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GAYS AND LESBIANS IN THE ARMED FORCES

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Mr. NUNN. Mr. President, the media is filled with accounts as to what may or may not be happening in the White House and Pentagon and the executive branch with respect to the issue of the restrictions on the service of gay men and lesbians in the Armed Forces.

As my colleagues will recall, the President issued an interim policy on January 29, 1993, which basically retained the longstanding restrictions on the service of gays and lesbians while eliminating questions on sexual orientation from the enlistment application. Part of that interim policy was a very important provision, which the President put in his interim order and which I felt strongly needed to be in that order, which said that even though the questions were not being asked, every new recruit would have explained to him or her the expectations of the Uniform Code of Military Justice relating not only to homosexual conduct but also to the other standards relating to sexual conduct, including the problems of sexual harassment.

So every new recruit, under the interim policy, is being acquainted with the expectations of conduct in general and also in terms of sexual conduct.

Mr. President, the President directed the Secretary of Defense to prepare a draft policy on this issue by July 15, 1993. It is my understanding that in recent days the Secretary of Defense, after detailed review and consultation with the civilian and military leadership of the Department of Defense, has presented a proposal to the President and that that proposal is now under review at the White House.

On February 4, 1993, the Senate agreed to an amendment which directed the Armed Services Committee to conduct hearings on this issue. In addition, the Senate agreed to an order which precluded amendments on this issue until July 15, 1993.

I believe that moratorium on legislation through July 15, 1993, was very helpful in providing the opportunity for our Armed Services Committee to have a fair, objective, and thorough set of hearings without the disruption of constant amendments on the floor that would have had really no legislative history in terms of committee deliberation.

Mr. President, it is my hope that any order issued by President Clinton on this subject will have a delayed effective date of sufficient length to permit congressional review and action if the Congress decides that legislative action is necessary.

Therefore, I urge my colleagues on both sides of the aisle to withhold any amendments on this issue until the Armed Services Committee has completed our action on what I think is a very important issue in the military services.

Whatever one's perspective may be, I believe that all interests will be best served if we deal with this issue through the normal established committee process with legislation that contains detailed findings and carefully considered procedures. Without these detailed findings and without a predicate for legislative action, I think the courts will have a much more difficult time dealing with this issue and the chances of any policy, however intended, holding up in Federal

courts could be diminished if we do not deal with it in a careful, prudent, and detailed way.

Mr. President, next week the Armed Services Committee will begin our markup on the National Defense Authorization Act for fiscal year 1994. I am hopeful that the Clinton administration will issue a policy on this subject of gays and lesbians in the military I can support, and I am also hopeful that a majority of our committee will be able to support the proposal by the President. I am also hopeful we can adopt that proposal if it is supportable by a majority of our committee in the markup which, as I have said, begins next week.

Regardless of what action is taken by the Clinton administration in the executive branch, however, we will have to consider and act on this issue because our bill is expected to be considered by the Senate prior to the August recess. So next week is the time we are going to have to act legislatively, notwithstanding any delay that may take place in the executive branch. We have to get this in our bill if we are going to have the kind of findings that I believe are necessary as we move from the legislative area to the executive branch in terms of implementation, and we need to give policy guidelines. And I am certain there will be legal challenges. So what we do in committee will also be important to the judicial branch of Government when this matter is brought before them in the proper forum.

Mr. President, I believe it is essential that the Congress codify the policies regarding homosexuality in the Armed Forces by adopting legislative findings and by providing clear legislative direction to the executive branch and to the leadership and the men and women in the Armed Forces.

Based upon the hearings held in our committee, it is my view that any policy issued by the executive branch as well as any legislation enacted by the Congress must at a minimum be consistent with the following principles. These are broad principles, and they are not meant to be exclusive because the issue is much too complex to be summarized.

But I do think these principles have clearly emerged in our hearings as supportable by the overwhelming evidence we have received.

The first principle I would articulate today is that military service is a unique calling which has no counterpart in civilian society. The primary purpose of our Armed Forces is to prepare for and to prevail in combat should the need arise. The conduct of military operations requires members of the Armed Forces to make extraordinary sacrifices including, if need be, the ultimate sacrifice to provide for the defense of our Nation.

No. 2, the foundation of combat capability is unit cohesion. Unlike our civilian society, in the military the mission is the No. 1 priority. The unit is the second priority, and the individual is the third priority.

Mr. President, in society the individual comes first. In the military, the mission comes first. If in a quest for full societal constitutional rights in the military, which have never existed in the military, if in that quest we end up placing consideration of the individual before consideration of the mission, we are going to have an awful lot of people killed in combat, and we are going to have an awful lot of people wounded in combat. And we are going to have questionable military performance by many of our units if we replace the standing principles for years and years that have been part of our military history-that the mission comes first, not the individual.

That is what so many people do not understand about the military. But it is a cardinal principle, and it is a distinction between the military and our civilian society.

Mr. President, the third principle is that military personnel policies must facilitate the assignment and the worldwide deployment of service members who frequently must live and must work under close conditions affording minimal privacy. There is an awful lot that can be

said on this subject. But another fundamental distinction between the military and civilian society is that people in civilian society, by and large, go home at night and they have the privacy of their homes. In many tens of thousands of military assignments, the home is the ship or the home is the tent or the home is the barracks. That is a fundamental distinction.

The fourth principle is that because of the factors that I have already enumerated, the presence in military units of persons who, by their acts or by their statements demonstrate a propensity to engage in homosexual acts, would cause an unacceptable risk to the high standards of morale, good order, and discipline, and unit cohesion that are absolutely essential to effective combat capability. There should be no change in the current grounds for discharge- homosexual acts, statements, or marriages.

The fifth principle is that while DOD policies on investigations may be subject to commonsense limitations because of the need to allocate scarce resources and to establish investigative priorities, these policies should not preclude investigations based upon any information relevant to an administrative or disciplinary proceeding.

Mr. President, despite recent media stories attributing certain statements to the Justice Department-and I have no idea whether they are accurate or not, whether someone in the Justice Department really made these statements or whether this is invented out of whole cloth; but despite these media stories and despite the statements that have been attributed to certain Justice Department people who are unnamed, about the constitutionality of various proposals in this arena, I am convinced that the principles I have enunciated are constitutionally sound and will be upheld by the Supreme Court of the United States.

No one can say what some Federal court may do in one case or the other. What we have to be guided by in terms of our deliberations is what we believe the Supreme Court will uphold on appeal.

The U.S. Supreme Court has repeatedly held that the application of constitutional rights to members of the Armed Forces is necessarily different from the rights of persons in civilian society.

Mr. President, there are many lawyers who speak on this subject and are quoted in the newspapers that I do not believe have read a number of these Supreme Court cases. It is the fundamental principle of the Supreme Court decisions on the military that there is a distinction, a significant distinction, between the individual rights in society and the individual rights when they wear a military uniform. The Federal courts on many different levels have ruled on numerous occasions that restrictions on the service of gay men and lesbians, including restrictions on acts and statements, do not violate the constitutional rights of military personnel.

Mr. President, I have come to these conclusions based upon the committee's extensive review of this matter over the last 6 months. During the Armed Services Committee markup next week of the National Defense Authorization Act for fiscal year 1994, I will be proposing, along with others, legislation that embodies these general principles.

Mr. President, I yield the floor.

Mr. DOMENICI addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from New Mexico [Mr. DOMENICI].

Mr. DOMENICI. Mr. President, is there a time arrangement that is part of a consent agreement?

The PRESIDING OFFICER. Under the previous order, each Senator is allowed to speak for up to 5 minutes.

Mr. DOMENICI. Mr. President, I do not believe I can do this in 5 minutes. I ask unanimous consent that I be allowed to speak for 10 minutes as if in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.