

March 29, 1993

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(1) Perhaps the main issue in the current debate is whether such individuals should serve "in the closet" or [text unreadable]. In other words, should individuals who acknowledge their homosexuality be allowed to serve without fear of discharge? 6

(2) Proponents of maintaining the military policy on homosexuals are concerned with the extent to which acknowledged homosexuality would prove disruptive to enlistment, unit cohesion, morale, and discipline. 9

(3) Military leaders' concerns over potentially disruptive effects of homosexuality relate, in large measure to its presumed effects on the development of these interpersonal relationships. Although it is true that many homosexuals have served ("in the closet")... 17

Report for Congress, Homosexuals and U.S. Military  
Personnel Policy, David F. Burrelli, January 14, 1993

(4) While many homosexuals have served in the military, such service has been performed in most instances without acknowledgment of their homosexuality. The question confronting policy makers remains: "To what extent, if any, would open homosexuality be disruptive to morale, unit cohesion, and readiness in the ranks, and to what extent does any such disruption justify discrimination?" 28

(5) Issues of privacy for heterosexuals, whether real or perceived remain contentious. 28

(6) Proponents of maintaining the current policy state that "allowing declared and open homosexuals to join and remain in the military... would be quite a different kind of social chemistry than the present situation, where homosexuals who do serve in the military are discreet about it." (quoting Charles C. Moskos, Jr. ABC Nightline May 19, 1992.) [and in footnote] General Colin L. Powell...: " ... I am of the view... that it will be prejudicial to good order and discipline because (it will) introduce this added very complex social dimension into [this] institution..." Powell: 'Gays in the Military Far More Complicated Issue,' Air Force Times, December, 14, 1992: 12. 40

(7) Formally recognizing homosexuals would allow many "to come out of the closet" so long as they did not engage in homosexual behavior. Rescinding the policy on

the basis of orientation alone would allow homosexuals legitimacy... 40

(8) critics argue that in the interest of protecting homosexuals, the privacy and morality of heterosexuals, as well as readiness, would be sacrificed by this language. 43

Statement of David A. Schlueter, Professor of Law, St. Mary's University

(9) To admit homosexuals into the military arguably advances their personal private interests, but it raises concerns about the ability of heterosexual service members to be free from unwanted advances or unnatural attention from those who find them sexually attractive. 99

(10) There may still be a feeling of discontent among service members, either homosexuals or heterosexuals, which in itself can have an adverse effect on discipline. 100

(11) the law is grounded on deeply-rooted and firmly-held moral and religious values. The issue of homosexuality implicates potential moral challenges and dilemmas to those holding such values. A key question before Congress is whether the military... should be required to accept or accommodate a status@ conduct which some service members, civilians, and potential service members would find unacceptable on moral or religious grounds. 102

(12) most courts have held that a servicemember does not have a First Amendment right to declare that he or she is a homosexual. The rationale is that while a servicemember may have a right to advocate a particular viewpoint, it is entirely a different matter to admit being homosexual... That is, as long as it is illegal to be a homosexual on active duty, a service member's statement that he or she is a gay man or lesbian, will be considered an admission of wrongdoing, not protected by the First Amendment. [citing BenShalom] 111

Statement of Stephen A. Saltzburg, National Law Center, George Washington University

(13) To what extent is it the responsibility of government, including the military, to put aside stereotypes and to teach that men and women from different backgrounds with different interests and orientations can work together for the common good? A related question is: To what extent is it important to test empirically whether the military could put aside

stereotypes and could teach men and women from different backgrounds with different interests and orientations can work together in the public interest without compromising to an unacceptable degree the effectiveness of the fighting forces? 129-30

(14) the most difficult issue might well be how to deal with the heterosexuals' concern about having to room, shower, share cramped quarters -- for example, a tank or submarine -- or otherwise be in close contact with a homosexual. 134

(15) Stereotypes can be unfair and can be overcome. But, stereotypes can also generate feelings, whether or not these feelings are entirely rational or even explicable, and feelings can interfere with productivity. 141

(16) That homosexual men and women have served effectively in the military services is beyond dispute. But it is equally beyond dispute that, for most such men and women, their sexual preference was a secret. Thus, their successful service does not necessarily establish that, were the ban to be removed and homosexual preference to be explicitly deemed irrelevant, there would be no adverse effect on the mission of the services. 145

(17) Experienced military people have told me that it is one thing to share quarters, however, and be in close contact with others of the same sex without knowing for sure whether some might be homosexual, and another to think about the same activities with others of the same sex who are clearly defined as homosexual... the concern is that, once it is clear that certain men and women are homosexual, military service will be disrupted and privacy interests will be compromised. It must be, then, that showering with another person of the same sex who is homosexual is an invasion of privacy only if the other person is previously identified as homosexual. Perhaps, the concern is that a homosexual who identifies himself or herself is, through identification, communicating a heightened sexual interest that is worrisome to heterosexuals and that is absent prior to announcement of sexual preference... another problem with open identification of homosexuality is that it is a declaration that "I am different" from many other soldiers. Like Goldman's yarmulke, the declaration tends to be divisive... Goldman... involved... the possible risk that a yarmulke could be divisive because it might remind other Air Force personnel of their religious differences rather than of the overall group mission... Anything that serves as a reminder of fundamental differences among military personnel is therefore problematic in the eyes

of many. This includes open identification as a homosexual. 147-48.

### QUESTIONS

**(18) Dr. Burrelli:** Other areas that can be looked at are the effects of what would happen if there were a change in the policy and what effect such a change may have on youth attitudes towards enlistment... Would any change in policy affect the propensity of youth to join the service? If so, which youth would be affected? The best? The brightest? Or the marginal youth? What would be the added cost, if any, caused by these changes in terms of recruiting and retention? 161

**(19) Senator Warner:** Do we have an obligation, both to non-gays and gays, with respect to their contract?... If they were non-gay, they had a certain assurance that presumably, they were not going to be serving with gays who had the legal right to openly express their preference. 172

**Mr. Schlueter:** the policy could make provision for individuals on grounds of religious objection or string moral objections in much the same way we currently deal with conscientious objectors... 172

**(20) Mr. Saltzburg:** What if one sexual orientation is open and announced and is put out there in a different way than it has been in the past? And the response that many of the people in the military I admire say is that it causes them concern because they are not used to it, and it therefore is divisive. So that, in a way their response would be that the job-relatedness is uniformity; the job-relatedness is that we are the same; the job-relatedness is that we do not think at about differences. And anything that cause us to think about differences, they would say, is at the core of their concern. 174

**(21) Mr. Saltzburg:** there is sexual behavior itself, sexual contact between people and then there is the conduct that is not actually sexual activity -- it is talking about it. It is the extent to which we allow people to inject differences into the workplace. 188

**(22) Mr. Schlueter:** Under the current situation, it gives the homosexual the opportunity to decide whether to come out of the closet or not. And I understand there would be a number of them who would welcome the opportunity to serve and... to do so patriotically, highly motivated.. and yet remaining celibate or being very discreet so that no one would find out.

If a service member is any way flaunting his or her sexual status, then, obviously, they run the of losing the usefulness or utility of the policy as it stands now, which gives them the benefit of -- show us that you can do

the job, show us that you are worthy of remaining in the Armed Services regardless of your sexual status. 192-93

**(23) Senator Levin:** And something in between flaunting and celibacy would be simply your First Amendment rights; is that not correct? 193

Mr. Schlueter: I assume it probably would be. 193

**(24) Senator Shelby:** A combat unit must be a cohesive force. Servicemen must be able to work together and support each other. A homosexual in a military unit could therefore be a most disruptive influence. Even though his behavior might be exemplary he could still become an outcast or lose the trust of his comrades. Without this trust, the effectiveness of the entire unit would be compromised. 199

**(25) Senator Kempthorne:** I believe that allowing admitted and outspoken homosexuals into the military will hinder our military's recruitment, retention and readiness. 203

**(26) Senator Kempthorne:** Would it be lawful to order a heterosexual to live in a room with one or more declared homosexuals? What about other situations such as flying together as an aircraft crew? 203

Mr. Schlueter: Yes, that would be a lawful order. 203

**(27) Senator Faircloth:** What if--and how would you feel if--your 17 or 18- year old son--and that is a pretty young boy--became under the influence of an aggressive 40-year old homosexual who was his drill sergeant, or 35, pick an age. 214

**(28) Senator Smith:** the accession of avowed homosexuals into the Armed Forces will have a dramatic negative effect on morale and combat effectiveness... unit cohesion, discipline, and morale are indispensable components of readiness. Anything that erodes these elements undermines the capability and effectiveness of the force. 215

**(29) Mr. Saltzburg:** Would we have a hard time, or a harder time, recruiting the kind of men and women that we want if this ban were lifted? I think that is a relevant consideration because it is a big difference, the fact that it is voluntary now. 223-24.

**(30) Senator Warner:** I have had an opportunity here in the past few weeks to talk to a number of young people, and there are firm views on both sides. But, generally, I see that they have a frame of mind which is somewhat more open, and, therefore, we might not have the adverse impact on recruiting if we were to lift the ban. 227

**(31) Senator Cohen:** Then he has the third situation in which a heterosexual male or female says, "I do not want to live in the same quarters with those who are sexually oriented or attracted to me." And he asks the question as to whether or not that third case is closer to the objection of serving or living with blacks or closer to the female objecting to living with males. He suggests it is close to male-female than black or white. (Justice Powell) 232

**(32) Senator Coats:** The unit commander has to struggle with the details of a heterosexual coming to him or her saying, "I fell like my rights of privacy are being violated." 237

**(33) Senator Levin:** Now, let us look at the question of antipathy of some towards the group adversely affected. We have a recent case, Pruitt v. Cheney, which is referred to in the CRS study, which apparently states that the civilian rule in civilian cases that denial of equal protection is not justified by the antipathy of others towards the group adversely affected may be now a rule under military law. Is that accurate? 240

**Mr. Schlueter:** I believe so. 240

**(34) Senator Levin:** Do you know of any situations in the military where the antipathy of a unit towards an individual because of that individual's beliefs or status is grounds for restricting, prohibiting, limiting the individual's rights in the military? 240

**(35) Mr. Schlueter:** It would depend on the circumstances. If you are suggesting that a service member who does really nothing wrong, just upsets people because of who he is or who she is, then, no. But if the individual has done or said something to stir up controversy and is a problem in that sense, the commander, for example, might direct that the individual have no further contact with a particular person. Perhaps the service member--and there are cases on this where the service member is making eyes at another service member's girlfriend. Tension is building. And so you have a counseling session where the commander says, "Look. We are going to have a problem here. Get your act together." 240

**(36) Mr. Schlueter:** mixing heterosexuals and homosexuals presents real questions about infringement of privacy rights of heterosexuals. 244

[extracts continued]

## March 29, 1993 Hearing

Senator MCCAIN. My time is up, but I think your point is well made. The devil is in the details, as you pointed out in your statement. At this point, public behavior such as kissing, embracing and dancing between heterosexual service members is not prohibited except in narrowly-defined circumstances. What would be the reaction if that was in the enlisted club amongst people who are same-sex oriented? That is when we get into some issues that could be controversial and affect morale. Do you disagree?

Mr. SALTZBURG. I agree.

Mr. SCHLUETER. I agree.

Senator MCCAIN. Thank you, Mr. Chairman.

Chairman NUNN. Thank you, Senator McCain. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman, and thanks to all of our panel members for a very objective and fair presentation of a lot of issues here.

First, Professor Saltzburg, you, in response to Senator Cohen, went back into some of the history of the racial integration of the Armed Forces and went through some of the stereotypes which existed, which, if I am correct, were going to, in the eyes of many, create problems of unit cohesion. Is that right? There was a fear that because of these feelings and stereotypes, that unit cohesion could be weakened?

Mr. SALTZBURG. I believe that is correct, Senator.

Senator LEVIN. And was the decision made by civilians that, regardless of any such impact in the short term on unit cohesion, that integration was going to take place in any event?

Mr. SALTZBURG. My history is not perfect on this, but it is my recollection that it was made by the President, President Truman, who declared that that was exactly the way it was going to be.

Senator LEVIN. And that the declaration would be made regardless of any interim impact on unit cohesion?

Mr. SALTZBURG. I think that is right.

Senator LEVIN. Relative to the question that now comes up with respect to homosexuals, I want to refer you to the case of *Pruitt v. Cheney* and I would like to talk to you folks about that case.

According to our CRS document, Pruitt was an officer in the Army Reserve with an outstanding record in both active and reserved duty, and there had been no evidence of homosexual acts on her part. But then the Ninth Circuit said the following. "The Army did not discharge Pruitt because she spoke candidly about her sexuality to a newspaper, nor did it discharge her for publicly expressing her views on a timely and controversial subject, or for demonstrating compassion for and association with homosexuals. The Army discharged Pruitt because she admitted to being a homosexual."

My first question has to do with this. Is it a violation of the regulations to express one's views supporting homosexuality in the Army, now? Could one do that? Could one say "I support the rights of homosexuals to be in the Army." Would that be a violation of current Army regs?

Dr. BURRELLI. Under certain rulings including, I think it was the Ben-Shalom case, the judge said that people are free to speak about the policy, to speak against the policy, to talk with others and to read literature concerning the policy.

Senator LEVIN. Would you agree with that, Professor Schlueter?

Mr. SCHLUETER. Yes, I would. And in my statement I raised the question of whether, in the future, once homosexuals—assuming they were lawfully on active duty—whether they could continue to advocate that particular position. And if, indeed, they were lawfully in the Armed Forces, I think there would be a much tougher argument to show that could be restricted in any way, once it is considered lawful.

Senator LEVIN. Professor Saltzburg?

Mr. SALTZBURG. I would like to answer that question the way they did, but if it was an officer expressing views in a strongly-held way, it seems to me that it is not so clear that that might not be considered conduct detrimental—

Senator LEVIN. How about an enlisted person?

Mr. SALTZBURG. That probably would be more likely to be protected. But in the case of an officer, I think, who is regarded under cases like Levy as having some influence, to the extent it was free speech it has been limited in Levy drastically.

Senator LEVIN. Let us assume that it is an enlisted person so I can get to my point. Mr. Dale, do you agree with that conclusion?

Mr. DALE. Yes, sir.

Senator LEVIN. Let us assume we have an enlisted person who speaks strongly in favor of the rights of homosexuals, who associ-

ates with homosexuals, who reads homosexual literature, goes to homosexual bars. Can I assume that would be protected under current law on the part of an enlisted person? Is that a fair conclusion of what you are saying or not?

Dr. BURRELLI. There are certain limitations, sir,-

Senator LEVIN. Even on what I just said?

Dr. BURRELLI. If an establishment is deemed to be off limits, it is off limits, and the services can limit-

Senator LEVIN. Okay. Forget the bar. Other than the bar. I want to get to a point where there is an enlisted person engaging in what you all would say is, you believe, protected First Amendment speech.

Mr. SCHLUETER. So this is a heterosexual who is doing the advocating?

Senator LEVI. No, no. This is an enlisted person.

Mr. SCHLUETER. If they were an enlisted homosexual, the minute they said anything about it they would be out.

Senator LEVIN. They are not stating what their own status is. There is no evidence of their own status.

Dr. BURRELLI. If I may, sir, there is a case of a similar situation in California. The individual was president of the San Diego Veterans Association, a group that is known to be made up of homosexuals. This enlisted member never stated that he was homosexual, was never implicated in a homosexual act, and has never tried to marry anyone of the same sex. Because he has not been found to have done any of those three things, the individual cannot be subject for discharge under the administrative policies.