

**NEWS CONFERENCE SECRETARY OF DEFENSE  
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DEPARTMENT OF DEFENSE REGARDING THE REGULATIONS  
ON HOMOSEXUAL CONDUCT IN THE MILITARY**

(December 22, 1993)

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MR.: Good afternoon. I'm sorry we're running a little bit late. I apologize for that. In just a moment, Secretary Aspin will be in and have a statement on DOD's new homosexual conduct policy in the armed forces. He'll be followed by the DOD general counsel Jamie Gorelick, who will provide some additional information in response to questions and answers. And with that, Secretary Aspin.

SEC. ASPIN: Thank you. Let me just say that we're here today to release the new Department of Defense regulations on homosexual conduct in the armed forces. These regulations fully implement the Clinton administration's policy that was announced back in July. Secondly, they are consistent with the Defense Authorization bill that just recently passed the Congress. And third, they have been agreed to by the services after a thorough coordination process. So all three points are important: One, these regulations that are being issued today implement the policy that was announced July 19th. Secondly, they are consistent with the language in the Defense Authorization bill that passed the Congress in the conference form just before Thanksgiving. And third, they have been agreed to -- we've had extensive consultations with the services -- and they have been agreed to by the services after a thorough coordination process. General counsel Jamie Gorelick is going to make a presentation about how this is going to work and about the specifics of the regulations, but I'd like to before she does that take a moment and say a few words about how we got to this point that we're here today. When the Clinton administration came into office, we were immediately faced with the question of service by gays in the military. This was an enormously divisive and emotional issue. We determined very early on that attempting to solve this problem through a presidential stroke of the pen, as some had advocated at the time, we determined that that was not the best route to follow. Instead, we decided that the only successful way to resolve the issue was by working with the services and in particular working with the Joint Chiefs of Staff. On January 29th the President directed me -- signed a directive to the Secretary of Defense -- to begin formulating a new policy and he gave us a date of mid-July to complete that new policy. The strategy that we employed in coming up with a policy came from one central insight: namely, that the President and the Joint Chiefs of Staff must agree on the new policy. The Chiefs understood that the Commander-in-Chief wanted to change the existing policy to end discrimination based solely on status. The President understood that it was extremely important that any changes occur in a way that maintained the high level of morale and unit cohesion which is so important for military readiness and effectiveness. And everyone involved in the discussions understood that real-world considerations required a meeting of the minds on what practical limits the changes should encompass at this present time. Therefore, there was -- a period was necessary to formulate a policy that would accomplish these ends. That policy, which was announced in July -- July 19th to be exact -- was "Don't ask; Don't tell; Don't pursue." There are two important tests of the success of that policy. First is the reaction of the troops and second is the reaction of Congress. For the troops interestingly after the policy was announced it basically dropped off as an issue after being number one barracks topic. What happened was it was a constant topic of discussion throughout the barracks, throughout the military all last Spring. When the policy was announced it just disappeared. Obviously the indication of a successful formulation of the policy. In Congress the policy went through without any heavy lifting or major expenditure of political capital. Now, to be sure, there are still some lawsuits and to be sure not everybody is happy with the policy. I don't want to imply that we think we have unanimous consent here. But we have proceeded to capture the broad middle with this policy as has been announced in July, and is being implemented through this policy regulation, which we're making public -- making available today. I would wager that not an awful lot of people would have thought that we could pass the Defense Authorization bill this year without a big fight on gays in the military. If you thought back to the attitudes and the discussions of January and then made a bet that we could get through the authorization bill without a major fight, you could have won a lot of money, given where people thought we were going to end up in January. The success of the program, of the policy was shown by -- which doesn't mean that there weren't amendments. There was, in fact, an amendment in the House, in any case, there was an amendment on the left and there was an amendment on the right. But

the point was we were able to get that piece of legislation through without a big public fight which diverted a lot of attention and which required a lot of political capital from the White House. We were able to get it to happen in a way in which that we didn't have to divert resources away from other fights -- on NAFTA, on the economic programs and all the other things that we needed political capital on this year. So the important thing is that an acrimonious fight in Congress was avoided. The defense authorization bill was passed, and the White House was permitted to preserve its political capital for other fights. In sum, I would say that we have accomplished four things in the formulation phase of our strategy. One of them, I think, is to say that we have got the right solution: Don't ask, don't tell, don't pursue. Number two, we worked with the right strategy to get the right solution. The strategy of separating the formulation and the implementation stages of the process has allowed us to make the change in a rational and a deliberate manner without acrimony that surrounded the issue when it first surfaced in January. The process of saying, "Okay, we're going to take six months and come up with a policy, and Congress, don't you worry about that, don't think you have to vote on this on every issue, because we guarantee you'll get a vote on this before we're finished; but we're going to take six months, we're going to come up with a policy, we're going to announce our policy in July, and then you'll have ample chance to vote on these issues in the defense bills as they go through the system before they get implemented. We are not going to implement this till you've had a chance to vote on it." We made that pledge, and that pledge allowed us to deal with the issue in a rational way, without acrimony, which we would have had plenty of if we tried to implement a policy right away on January 20th. The third point here is that we worked the solution through the military and through the joint chiefs. Obviously, a change in policy of this magnitude would ultimately be impossible to accomplish without a meeting of the minds between the services and the civilian leadership. I hope there's nobody that doubts that. I occasionally read comments that say we could have done this thing right away at the outset with a stroke of the pen. I hope nobody's under any illusion about that. We did it in the only way that it was possible to do it, which was working with the joint chiefs, for two reasons. Number one, without the joint chiefs, there weren't the votes in Congress for the policy. And number two, without the joint chiefs, we would have had very much trouble implementing any policy. The implementation of the policy is successful when the joint chiefs of staff send the word down to their various services from the top down, "This is a policy, this is a good policy, we want it implemented." You need enthusiastic support in the services in order to implement any kind of complicated social change, and that's why it was important to have everybody on board, and that's why I think there's a very, very good chance that this policy will work out, because it has the support of the people in the military services, starting at the top. Everyone involved worked the problem in a way that was constructive and helpful until we arrived at the solution. We've reached a meeting of the minds, and that was true in the formulation of the policy in general terms and, in particular, in the regulations that we're issuing today, the particulars of the regulations that are going out to the services today. Fourth point: We've taken the issue off the table in a way that will not harm the readiness of our forces. As has been emphasized throughout this process, unit cohesion and morale are the bedrock or readiness. Formulation of the new policy has sharply reduced and almost eliminated the anxiety among the forces concerning this issue. We're confident that the new policy will maintain unit cohesion and will maintain the readiness of the forces. It is the best-equipped, best-trained military in the world today, and this will help and make sure that it doesn't degrade from those high standards. Now, what we're doing is moving from stage two -- to stage two, from stage one to stage two. We're moving from the formulation of the policy to the implementation of the policy. Today, we're announcing the new regulations. We fully expect the same cooperative spirit that guided our formulation of the new policy will also guide the implementation phase. At this point, I'd like to turn to Jamie Gorelick, who will explain the new regulations and answer any questions that you might have. Jamie, why don't do this.

Q Mr. Secretary, could we ask you a quick question?

SEC. ASPIN: On the general policy, yes ma'am.

Q You say one of the big tests is the reaction of the troops, and it seems that some military officials at bases are not allowing reporters on the bases to talk to the troops about this issue. Since you say that is an important factor, would you say now that it's possible for reporters to go out and talk to the troops.

SEC. ASPIN: We will make it available. The problem was we didn't know -- the troops did not know what the policy was gonna be in the specifics, and that's what we're doing today with the regulations. We are gonna

implement the regulations -- putting out the regulations today. As Jamie will explain, they have to then go to implementing regulation for each of the services. But we have no doubt that, as soon as this has been able to be internalized in the military services, you all have a chance to go out and talk to people about it.

Q Well, do we have to make a mystery here? I mean, really, why can't the people that are -- (inaudible) -- talk about it.

SEC. ASPIN: Because what they're talking about, is they don't -- because at the moment, you're talking to people who don't know what the policy is in its particulars. As soon as they understand what it is, how it's gonna affect their lives, we would like you to have a chance to talk to them. Yes ma'am. Yes, sir.

Q Do you foresee a time when you won't have to make the premise that homosexuality is incompatible with military service?

SEC. ASPIN: I -- let me just say that I do not know -- I would not say that the policy that we are implementing here today is the policy that will be forever. I think that we don't know that. I think that the policy has changed an awful lot in the last four or five years. Or that attitudes on this issue have changed a lot in the four or five years, presumably they -- that change has not stopped. And if changes occur, I would anticipate that further changes might occur in the military. But for the time being, or for the foreseeable future, this is now the policy. It's a long struggle to get there. We should not think willy-nilly of taking up the issue again next year or any time soon, but it's -- I would not say that this is gonna be it forever. Let me just turn it -- one last question. Yes, sir.

Q Why not wait to implement the policy until the courts have had a chance to decide the central question of whether homosexuals can be dismissed at all?

SEC. ASPIN: You're talking about the Stephan case. The Stephan case is a case that is brought up under the old policy not under the new policy. So the Stephan case is an appeal and raises the issues, questions the issues of the old policy.

Q Some of the positions have tended to imply that homosexuals cannot be dismissed at all from the armed forces.

SEC. ASPIN: I understand. But what we are doing is implementing a policy here which is a new policy, and I would argue is a greatly improved policy, because it's more consistent, it's more thought through, it has the support of the services in a way that the old policy was not clear. It has the support of Congress because we've had votes on it in Congress. It was not clear about the old policy how much the policy had the support of the Congress. We are going to be able, under this new policy, to argue in the courts that here is a policy that has been considered by the executive branch, has been considered by the military, has been considered by the Congress and all of the -- those entities have supported it. And we are implementing those regulations and we fully expect that there will be lawsuits on this. But we would like to fight them out on the new policy rather than on the old policy.

Q Does that mean you want to appeal the old policy --

SEC. ASPIN: That -- that -- no, I'm sorry, that one is still under discussion as to what to do about the question of appealing.

Q (Off mike.)

SEC. ASPIN: Well, no, I mean, this -- it is under discussion, and it has not been decided what is going to happen to the Stefan case. For the purposes -- for the purposes of this exercise today, these regulations apply to the new policy, not the old policy. Jamie's going to talk about the regulations. (Laughter.)

MS. GORELICK: Thank you, Mr. Secretary. I would like to discuss a little bit the process by which we came to the directives, and walk you through the substance. We will have available for you the full book of

directives. We've tried to make it easy for you by listing the changes that we've made and by providing a summary for you. The -- these directives are the faithful execution of the July 19th policy and the legislation, and it was our job to turn that brief bit of legislation and the very brief statement of policy into the kind of language that we in the Pentagon understand, which is about an inch- and-a-half of directive. The critical policy decisions were made in July, and you will not find very much difference between what we all testified to, and particularly what I testified to in July, and what you see in this book. The hours of testimony before the House and the Senate are amplified here, but again, we view this as an implementation, not a policymaking process. I think that the way in which we have written these and the training that we intend to pursue will make these directives enforceable and understandable in the field. We have cognizance, as you know, over millions of people, and trying to create a set of directives that millions of people can understand is a difficult exercise. Ed Dorn, the assistant secretary for personnel and readiness, will take responsibility for the implementation of the training, and for concerns that may arise as we go forward. The second point I'd like to emphasize is how collaborative the process of arriving at these directives was. We had many, many, many, many hours of consultations with dozens and dozens of people throughout the department, within the services, at the most senior level within the services and with the Department of Justice. The services will implement these guidelines, these directives, in 45 days, so that they will become final on February 5th. The services' implementation drafts are due to us in 30 days, and that means that we will then have 15 days to consider their consistency with what we have issued, and, of course, to consider any other comments that people may have. We are always open to suggestions as to how to do things better. We have a three-part policy, as Mr. Aspin said, and what I think I should just do for you now, and then I'll take your questions, is outline what's new. And when I say what's new, I'm talking about the difference between this policy and the current policy, not the interim -- that is, the pre-January policy. With respect to don't ask, we will not ask at orientation -- we will not ask at a session about orientation or past conduct. If independent evidence of acts or statements is brought to the attention of those in the accession process, those acts and statements will be evaluated according to the same kinds of standards we see in the separation criteria that I'll get to in a minute. Applicants will be informed both before they join the service and at accession about what our standards are, so people will know coming in what our standards are. The second part of the policy is don't tell. That's essentially the separation criteria. The criteria are set forth in both the July 19th policy and they are echoed and ratified in the legislation. Someone may be discharged for homosexual acts, for marriages and for statements under certain circumstances. Now, the statements which can be a basis for discharge are those which demonstrate a propensity or intent to engage in acts. Now, there are two changes here. One, we've eliminated the word "desire" to emphasize that the statement must be one that shows a likelihood to engage in acts. That is done in the statute as well as in our policy. We've also defined propensity as more than an abstract preference or a desire, and defined it in terms of a likelihood that the person would act. Again, it's a very conduct-based policy. Now, as you all know, a statement then creates a rebuttable presumption that the person will engage in acts, but the service member then has an opportunity to rebut, and we lay out the kinds of evidence that one might bring in, evidence of one's activities, the context in which the statement was made, the credibility of the person making the statement, the circumstances of the statement. The board then has discretion to assess the facts and determine whether there is that likelihood. There was a lot of attention paid to the fact-finding process that commanders would undertake in connection with a possible separation. Number one, no inquiry will be made about orientation, but a service member can be asked about conduct if there is credible information -- and credible information is information that supports a reasonable inference that there has indeed been homosexual conduct. The commander must assure himself that there is that credible information. Credible information is not rumor; it is not suspicion; it's not opinion. It's facts. Associational activities, like going to a gay parade or reading a magazine -- in and of themselves -- are not credible information, and only rise to that level if they are such that a reasonable person would believe that the conduct was intended to make a statement, intended to tell other people that the person is a homosexual. The inquiry is limited the facts involved in the allegation. Again, this was a very important part of our policy when we announced it in July -- and that is that, if someone investigates a particular set of facts, say, that two people were engaged in homosexual acts. The inquiry will be complete when the facts establishing that set of acts is determined. There will not then be a process whereby each service member is interrogated about his or her partners. There will be no -- that's our attempt to try to deal with the concern about witch hunts. That doesn't mean that investigators must blink at evidence that is staring them in the face, and we have some ability to explain that a little bit more in our directives and in the scenarios that we have set forth. The burden of proof remains on the member. The standard is preponderance of the evidence. Now, if no aggravating

circumstances exist and the person is found to be someone who should be separated, they will be separated under honorable condition -- that is, an honorable discharge or a general discharge; that is without aggravating factors. The next part is, don't pursue. And don't pursue has some ramifications for the fact finding process that I just described, but it also relates to criminal investigations. There will be no criminal investigations to determine orientation. Investigations of sexual misconduct will be undertaken in an even-handed manner without regard to whether the service member is heterosexual or homosexual. That doesn't mean the results are always the same, but it means the process by which we investigate is the same. So, for example, allegations of consensual adult sexual conduct, heterosexual or homosexual, will normally be referred to commanders for administrative action and will not be pursued criminally. A commander who has credible information about a UCMJ violation may request a criminal investigation, and the commander must assure himself that there is credible information before launching that investigation. The criminal investigators themselves must assure themselves that there is credible information. Personnel security is the last issue. There will be no investigations here either to determine orientation. Information obtained in the personnel security process will not be provided for use in separation proceedings or criminal proceedings. Now that is current policy, but it has not uniformly been followed. And it is clearly part of our policy that that line be honored. And inquiries into sexual conduct must be relevant to security concerns like promiscuous sexual behavior or concealment of sexual conduct. So there must be a nexus between the question about orientation and the security concerns. And finally, one's efforts to conform one's behavior to DOD policy by not openly acknowledging homosexuality is not in and of itself -- that is not concealment, so that you don't get penalized as a servicemember for abiding by the policy. Now ultimately these changes, which are incremental changes, need to be understood by commanders, by Judge Advocates General, by our troops, and Ed and his people will be responsible for training. We have put in the materials -- you will see some scenarios -- they are not meant to be prescriptive, they are meant to be a cookbook of answers for commanders, but they are meant to give an idea to the people doing the training and the people perceiving the training of what we, who have been involved in the process of developing these directives, thought they meant and thought that they might result in. Now, I'd be happy to take your questions.

Q I have a two-part question. Part one is -- granted the Stefan case was decided under the pre-January rules and regulations, but in your professional legal opinion, wouldn't the reasoning of the circuit court in Stefan throw out this policy as well? That's part one. And part two is somewhat related in that the -- it seems to me the key to this policy and the purported change is in your assumption that a declaration of homosexual orientation establishes a rebuttable presumption of future homosexual conduct, and that presumption can be rebutted by the evidence you've described. Now, I was at a Senate Armed Services Committee hearing where that issue went back and forth and the secretary ended up saying, "That is not a change in existing policy. That is precisely what existing policy had held." So, given the fact that it's not a major change, isn't this entire policy really the old policy -- perhaps more humanely applied in certain circumstances, but basically the old policy in a new suit?

MS. GORELICK: The old policy did not have either the don't ask or don't pursue parts, which I think are very significant and important in allowing someone with a homosexual orientation to -- as the secretary put it -- stay off the radar screen, and I think that those should not be overlooked. With respect to the "don't tell" part, the criteria for separation are the same with some minor changes that I explained -- that is, having to do with the elimination of the word desire, a clearer definition of the word propensity, to make it absolutely clear that what we're talking about is the likelihood of acts. But the rebuttal presumption, which existed before, was A) hard to find, and B) hard to understand. And we have tried to make it more apparent and we've tried to give some examples of how it might work, and -- if you will -- to make it more robust. And I think that that is a difference that a court could acknowledge, as well as the careful balancing that went into this policy. So, in addition to the reasons that the secretary stated, having to do with both houses of Congress and both policy making branches of government agreeing on this policy, I think that there are some reasons why a court might view this policy differently than the old policy. I'm not going to address the Stefan case. That issue is under discussion, and, I'm sorry, I'm just not going to address it. Yes?

Q Aside from conduct or declarations or statements when one is already in the military, you mentioned something about evidence being brought up at accession.

MS. GORELICK: Yes.

Q What is accession, and how much would that evidence be pursued relating to past conduct, not as a test of the conduct of the member when he's in the armed forces?

MS. GORELICK: Well, accession is the process by which one joins the service, and -- as you know -- the policy say, "We're not going to ask. We're not going to ask about your orientation, at that point. We're not going to ask about acts.

Q (Inaudible)? The only question is -- well, the only question is if someone comes in and says, "Well, here's my history of acts," or "I am a homosexual," or, in the very odd case, I suppose you might have some third party evidence submitted -- and we did try to address that. And all I'm saying about that is that you will look at those matters in the same way that you would if someone were in the service, you would look at whether the conduct -- is the conduct an issue -- reflects a likelihood that while you are in the service you will act similarly.

Q Can I follow that up?

MS. GORELICK: Certainly.

Q Then you would take an allegation by a third party as a reason to pursue an inquiry at a session at the point of joining the armed services?

MS. GORELICK: Well, there has to be information. Even when you're in the service, a mere allegation that someone is gay doesn't amount to credible information. Yes?

Q All right, I've got a question on "Don't tell," what you might call the Klinger Provision.

MS. GORELICK: Speak up.

Q About the Klinger Provision. You don't tell, but if you tell only to get out of the military, it doesn't count. So then you can wind up being openly gay in the military because you only told to get out?

MS. GORELICK: Well, that is the current rule, as you know, and that's been carried forward. We've had, thankfully, very few instances in which it has been necessary to use it. Martha?

Q But one of the things they talk about is the blur between homosexual status and conduct, legal authority and gays in the military. Define -- and I know you do so in this -- sexual orientation.

MS. GORELICK: Sexual orientation is an attraction to a person of a particular gender.

Q And that's okay as long as you have no desire or likelihood to act on that?

MS. GORELICK: What we're simply saying is we have never acted on the basis of someone's orientation. It has never made any difference in the way the military treats a servicemember. We act on the basis of conduct. So this policy is conduct based. And if you engage in acts or are likely to do so, then we can and will separate you. Beyond that essentially we're not going to ask.

Q So basically a homosexual can serve as long as they're celibate?

MS. GORELICK: Again, as I say, it's conduct based, and we are not looking at anything other than conduct or likelihood to engage in conduct. Yes?

Q Concerning the types of discharges given, I noticed that the new policy, similar to the existing one, states that if the person is determined to have engaged in homosexual conduct, did so in private under consenting circumstances, they almost always in the past got an honorable or a general under honorable circumstances discharge, and that seems to be the same situation now, if I understand the new directives.

MS. GORELICK: Yes.

Q But you also indicated that commanders might be able to use their discretion to invoke the Uniform Code of Military Justice, which might make homosexual conduct a criminal offense. Could you clarify exactly how they can draw that line? Are they supposed to give them honorable discharges under most cases, but some not?

MS. GORELICK: We have not taken away any of the commanders' discretion. On the other hand, there is a clear statement that our criminal investigative resources should not in ordinary circumstances be used for adult private consensual activity. And it is therefore the most likely case, and I would say the norm, that such a case would be handled, A, administratively; and B, if there were not aggravating factors, would result in a discharge under honorable conditions.

Q The reason I raised that is that there has been some indication in the press and people I've spoken to that some commanders in recent weeks have, in fact, become, in the words of some of the activists, vindictive and have invoked sodomy prosecutions or threatened to do so. And there's a feeling that they seem to be lashing out on us.

MS. GORELICK: Let me address quite squarely the allegations that have been made in the press in that regard. I want to make two very clear statements. Number one: The suggestion that the criminal process could be invoked against someone who makes a statement is preposterous. There has never been a basis in the Uniform Code of Military Justice for that, nor is there now. Number two: The notion that the current policy that we are about to issue broadens the basis on which someone could be investigated rather than narrowing it is equally preposterous. Now, with respect to the other allegations that surfaced in the press over the weekend that there has been vindictive conduct, we will look at any such allegation. You know, in order to discharge somebody, that person goes before a board, that board decision is reviewed. There is ample opportunity for us, consistent with concepts of military justice, to try to ensure fairness in the system, and that's one of the things that my good friend Ed will have the privilege and honor of trying to do. And it is our intention to make sure that people understand what we are trying to do here. Yes, sir?

Q Is it still true under this policy that homosexuality is incompatible with military service?

MS. GORELICK: There is no statement to that effect in the directives.

Q Is that your view or would you say that it's been altered to say homosexual conduct is incompatible with military service?

MS. GORELICK: That is the statement that is in the directive. The basis provision of the directive is basically a quote from the July 19th policy. We understand that to be consistent with the legislation. It does not adopt in the language of the policy all of the findings of the legislation nor in my view does it need to do so. Yes, sir?

Q Jamie, you said homosexual conduct is incompatible with this, but when it becomes clear that the person on active duty is homosexual, then they must separate from the service, even though they have done nothing? Somehow you find out, but once it becomes clear, they have to leave, is that correct? Even though they haven't conducted themselves in a manner that would violate any of your rules? If it comes to your knowledge?

MS. GORELICK: If they -- if becomes clear that they are a homosexual, if they state their homosexuality, they have an opportunity to show that they do not engage in acts, and there would be a fact-finding hereafter. So the question is do they engage in acts or are they likely to do so?

Q The Secretary emphasized that you want to fight the new battle, the legal battles in the new policy. What are the ramifications of the new policy with respect to the two major themes of the constitutional question, that is the Fifth and Fourteenth, Equal protection, and the First Amendment, free speech?

MS. GORELICK: I think I was trying to answer that question essentially when I answered Bob Zelnick's question. The new policy addresses the attack on the old policy having to do with speech by trying to make very clear that this is conduct-based and that when a determination is made to separate someone based upon a statement, it is because of what the statement tells you about the likelihood of acts, and that's why there is this more robust, more apparent rebuttable presumption proceeding. The person has an opportunity to produce evidence on that issue, and I think that that addresses the First Amendment concern.

Q Can you state with confidence, or to what degree of confidence will you state that the number of discharges for homosexuality will decline under this new policy? Do you in fact expect that to happen? And do you have any idea by how much?

MS. GORELICK: I have no idea. I really don't. They have declined, as you know, from two years ago to last year, but I really don't know. I don't know because –

Q Isn't that the real test though.

MS. GORELICK: Pardon me.

Q Isn't that the real test.

MS. GORELICK: Well, it depends on how many homosexuals there are in the military, in part, which we don't know because we're not asking.

Q If the statement, as you said, tells you something, about the strong likelihood to act in a way that might be incompatible with this, how does that protect the notion that a mere statement is not enough to get somebody out?

MS. GORELICK: Because you then look, if the person says, "I said that, but I don't engage in conduct," that's what the board looks at. The board looks at evidence relating to the likelihood of engaging in conduct.

Q In future conduct.

MS. GORELICK: In future conduct.

Q How does that protect the First Amendment?

MS. GORELICK: Well, it protects the First Amendment because we are not – we are not taking action based upon someone's statement of belief or the statement itself, but rather from what the statement tells you about future action. That was the rationale of the 7th Circuit opinion upholding the old regulations on that basis. I don't want to get too far down in the weeds on legal doctrine here.

Q When the new policy's fully implemented Feb. 5, what happens to existing discharge proceedings, in particular cases like the Meinhold case, the Justin Elview? Are new administrative proceeding started for them, or what do you do with those existing cases?

MS. GORELICK: Well, let me answer the broader question and the narrow question. The broader question is what happens to pending cases on Feb. 5. From Feb. 5 forward, those will be -- these will be the rules that apply to cases that arise after that date. Now there is a provision whereby the service can make these procedures available to then-pending cases and one of the things that we will do is look at all pending cases to see whether they should be treated differently than the course they are currently on.

Q Just to follow on that –

MS. GORELICK: Yes.

Q But it seems to me if you feel this new policy is more defensible in court, wouldn't it follow that you would

want to open new cases in all -- for all existing pending cases?

MS. GORELICK: There -- yes, but there are other competing factors having to do with how stale the evidence is and other issues that come into the mix. It's not such a simple issue.

Q If I could just ask you to clarify about the misconduct when it is private consensual. Two parts -- my first question is are you now going to direct investigative sources that way because if heterosexuals are engaged in something that is a violation of the UCMJ, you know, it's not normally investigated there. Is that the rationale? And also, how does this sort of fit together with the fact that you still say that homosexual conduct is incompatible with military service? I'm just a little unclear, and I'm expecting that people who hear the report might ask the same questions.

MS. GORELICK: Well, I think -- to answer your first question, the reason that we are saying that we will not normally use criminal investigative resources for private, adult, consensual sexual conduct is that we just don't think it's a good use of our resources. We haven't been using our resources -- criminal resources that way for heterosexuals, and they are scarce resources, and we don't think we should use them that way for homosexual conduct. The two -- the issue of whether you use your criminal justice resources in that way and whether you maintain someone in the military service once they've been found to have acted that way are two different issues. Yes, in the back?

Q (Off mike) -- personnel security. A gay Marine goes into a position and he has to have a security clearance. Now, on the form he can't put, "I am a homosexual," right?

MS. GORELICK: He will not be asked.

Q Okay. In the course of the investigation they find out he is a homosexual.

MS. GORELICK: Yes?

Q None of that can be used against him?

MS. GORELICK: Not for separation or criminal justice proceedings. It can be used if it is -- it can be used in making the personnel security determination if there is some nexus to a security concern. For example, if he engages in promiscuous conduct or if there is an issue of concealment, those are traditional concerns. But his sexual orientation itself, sexual activity in and of itself does not disqualify him from receiving a personnel security clearance.

Q All right, if he's denied that security clearance, then he's just shifted to another job with no prejudice against him?

MS. GORELICK: I don't know the answer to that question. I think that depends on what his skills are. I think there are probably some circumstances where if someone is denied a clearance, it will have an impact on their -- on their career. I -- that's not something that I have actually addressed.

STAFF: Only a couple more questions?

Q Can I just follow up on this. The retroactivity -- if someone like a Justin Elsie or Stefan, if you don't appeal those cases, for instance, and they continue to serve, can past statements be held against them -- if they never again say, "I am gay"?

MS. GORELICK: That's one of the issues that is -- that one has to deal with in resolving this issue of retroactivity, and we just have not -- we just have not resolved what to do with pending cases. And we may reach different decisions in different individual cases.

Q Back to this question of the admission of desire, does that mean that a service person can say that he or she is gay or lesbian and it will not be (a presumption ?) case? Or will that be, at that point, a rebuttable presumption, or what?

MS. GORELICK: Yes, the latter.

Q The latter.

STAFF: Thank you.

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