

**ASSESSMENT OF THE PLAN TO LIFT THE
BAN ON HOMOSEXUALS IN THE MILITARY**

HEARINGS

BEFORE THE

MILITARY FORCES AND PERSONNEL SUBCOMMITTEE

OF THE

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Opening Statement of Hon. Ike Skelton, A Representative from Missouri, Chairman, Military Forces and Personnel Subcommittee

(1) The policy seems to describe homosexuality as incompatible with military service, but it just does not say it clearly. With this policy, the President appears to have accepted the principle that attitudes among the people of a unit do make a difference and must be considered. 1

(2) I want to support the President, but my family background is deeply rooted in religious values, and most of my constituents have said they believe the President is off track. 2

(3) Mr. Kyl: It may matter little to a commander if an individual had a consensual liaison off duty and off base, if no one else ever knew of it and the individual never manifested his homosexuality on duty or in public. But it may matter a great deal that an individual publicly manifests his or her homosexual orientation on duty to others in the unit. 4

Statement of Gen. Colin Powell, Chairman, Joint Chiefs of Staff

(4) We should not let anything happen that disrupts this feeling of cohesion, this process of bonding. 32

(5) It involves matters of privacy and human sexuality that, in our judgment, if allowed to openly exist within the force, will create serious issues having to do with cohesion and having to do with the well-being of the force. It asks us to deal with fundamental issues that our society as a whole has not yet dealt, [sic] with and has not yet given us sufficient guidance so that we can deal with it within the unique setting of the military service. 32

QUESTIONS

(6) General McPeak: ...the new policy defines homosexual statement as a type of homosexual conduct. The airman who comes to the orderly room and tells me he is homosexual is headed for the door. He is leaving the Air Force. "Don't tell" means "don't tell". 40

(7) Mr. Kyl: So it is not just the homosexual conduct, but also the manifestation of homosexual orientation; is that correct? 45

(8) Mr. Dellums: If it is the issue of behavior, lift the ban, because you are already dealing with the question of behavior. And if the question is one of unit cohesion, then what you really are saying, unfortunately, is that people have a problem with homosexuals. 50

(9) Secretary Aspin: The crux of the matter that we are talking about and that you are talking about here, is the question about the difference between public acknowledgment of homosexuality and private acknowledgment of homosexuality.

The policy defines conduct as statements. When you look at it in that light, if a person keeps it private that he is homosexual and does not talk about it, doesn't say anything, doesn't reveal it in any way, keeps his or her private life private, the judgment of the people here is that that does not affect unit cohesion.

But once you make it public, even though you are not doing anything other than making it public, that does affect unit cohesion. 50

(10) Aspin: We have defined conduct to include statements. 51

(11) Mr. Dellums: I understand. I am simply saying that once you do that, you are acquiescing to the fears and the ignorance that people have regarding homosexuals. 51

(12) Mr. Montgomery: Now, if we implement this new law, is that going to hurt recruiting quality? 55

(13) General McPeak: The point is that open homosexuality is what causes a problem. I have known homosexual airman who didn't tell, and it did not work out to be a problem at unit level.

So the whole impact of the new policy is to allow homosexuals to serve, as long as they don't tell. That is the whole point. And I have some experience in watching that in action. It works fine. 62

(14) Mr. Hunter: ...service leaders have a duty to protect the values of your troops--if you consider them to be legitimate values. And I think the polls and the surveys that have been taken... show that a majority of the troops today, the young people serving in uniform, did not want to see the ban lifted.

And you have not once used the term "value." You have not once accorded legitimacy to the feelings of people who serve in the armed forces who feel that because of their values, because of their faith, because of their traditions, homosexuality is repugnant and they do not want to serve in intimate quarters with homosexuals. 63

(15) General Mundy: ...if you wear a T-shirt that says, you know, "I am gay and proud of it," or "I am queer, I am here," something like that, yes, that is a statement. 68

(16) Secretary Aspin: A statement is a positive affirmation of conduct and that is why it causes different things to happen. 78

(17) Mr. Bartlett: ...if I read the guidelines here it simply says that the only way you can be a homosexual is for nobody to know it, because as soon as you tell somebody, you are out. Explain to me how we can tell homosexuals that is not just a sham? 83

**Statement of Gen. Jack Merritt, U.S. Army, Retired,
President, Association of the U.S. Army**

Statement of Charles Johnson, Former Marine Corps Major

(18) ...the perspective I bring is an overarching imperative to avoid the adverse effect of bonding degradation and the killing of unneeded soldiers on future battlefields, you could not get away from that....
...The point is not that middle America will not accept this, but that really a superior power, God, will not accept this. 98-99.

QUESTIONS

(19) Mr. Stupak: Do any of you gentlemen get the sense that if this policy were adopted, there would be resignations from the armed services of its members because they would feel personally offended by this policy? 112

(20) General Merritt: I think there will be, Mr. Chairman. 112

(21) General Merritt: The issue is avowed homosexuals, public--either evidencing homosexual behavior or being simply avowed homosexuals and what that does to unit cohesion. 113

(22) General Merritt: ...the dynamic of the Marine and a squad leader, the soldier and his lieutenant, is one of trust. The first time the lieutenant helps a suspected homosexual, he is in trouble. 115

(23) Mr. Buyer: Real life scenario here amongst the troops and in the command is when this literature is found, doesn't it in fact have an effect upon unit cohesion, when they find out that Joe over here has a Playgirl Magazine, or in fact leaves his wallet and in that wallet there is a naked picture of a boyfriend and somebody finds it? 121

(24) Mr. Dornan: In terms of future recruitment of high quality, highly motivated personnel, what will be the effect of lifting the ban? 129

(25) General Sullivan: Forced association and the expressed reluctance of soldiers to "live" with homosexuals would lead me to believe that allowing homosexuals to serve would have a negative impact on recruitment. 147

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QUESTIONS

(26) Mr. Kyl: It is quite possible that a consensual homosexual act which no one ever finds out about has very little impact on military discipline and cohesion. 176

(27) Ms. Gorelick: we have tried to reflect what is already in the case law; that our investigative policy will not infringe on speech and associational interests. 192

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

Statement of Cass Sunstein, University of Chicago Law School, Chicago, Illinois

(28) The strongest argument to the contrary would be that in the end, the interests supporting the new policy amount to unreasoned fear or prejudice. It might be urged that the relevant military interests fall in this category. See *Cleburne*, supra, striking down discrimination against the mentally retarded on precisely this ground. This is certainly a reasonable argument, but I think that the best prediction is that the current Court would reject it in the military context. If military preparedness is at stake, the Court is unlikely to say that the relevant interest is illegitimate, at least in the absence of a firm social consensus that homosexuals should be treated in the same way as heterosexuals. Cf. *Heller v. Doe*, 81 USLW 4728 (1993). 259

(29) Perhaps it would be possible to respond...that the new policy raises distinctive free speech concerns because it allows people to be discharged for what they say (not just for what they do). Perhaps the new policy is attacking speech as speech, because of its effects on listeners--because of its fear that a mere statement of homosexuality (unaccompanied by acts) will itself endanger military morale....

This argument has some force; but I do not think that it is persuasive, at least in the context of a facial challenge to the policy. 260

(30) ...the government might be able to say that the prejudice itself justifies the policy--that the prejudice is so deep and severe that military security requires a prohibition on homosexual conduct. On this view, military morale requires the prohibition, since heterosexuals would feel uncomfortable working with known homosexuals, especially in close quarters.

Most of the justifications for the discrimination in the policy do seem connected with prejudice....

The announcement of the new policy points to concerns about "unit morale, unit cohesion, and individual privacy." These interests appear to be based on the disruption that might occur if heterosexuals were aware that homosexuals were in the military service....

We are largely left, then, with an argument that dislike and fear of people who engage in homosexual conduct would endanger military morale and preparedness.
263

QUESTIONS

(31) Mr. Schlueter: I have no doubt that the military can constitutionally forbid statements. And you need to distinguish between those statements which advocate a homosexual lifestyle and those statements which amount to an admission which...under prior decisions are not protected by the first amendment. 317

(32) Mr. Schlueter: I don't know that someone could flaunt their orientation without risking an investigation....If someone is clearly flaunting being very actively involved in homosexual marches, is posting posters everywhere, I think eventually a commander...would be justified in initiating an investigation into whether that individual had committed acts.

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QUESTIONS

(33) Master Chief Hagan: The third question about attending parades or wearing T-shirts would have a tremendously detrimental effect on cohesion and morale; would be an in-your-face sort of thing and should be easily understood as conduct, and seriously negative, sir. 358

(34) Chief Master Sergeant Pfingston: ...if homosexuality is flaunted and it is an in-your-face issue, then it will affect unit cohesion, without doubt... 359

(35) Sergeant Major Kidd: ...no one would know that they are homosexual. And, therefore, no, it would not have an affect on the unit because what has an effect on the unit is

knowing that there is a homosexual in there... 364

(36) Mr. Dornan: And you gentlemen all know that the best of your troops can never respect and thereby follow orders totally from someone who likes taking it up the bum, no matter how secret he keeps it. Once it leaks out, they think this person is abnormal, perverted, and a deviant from the norm. 378

Mr. HUNTER. Thank you, Mr. chairman. And thank you for the courtesy of allowing me as a nonmember of the subcommittee to participate, and thank you so much for being with us today and for going through this exercise and discussion which has been kind of extended and necessarily so. Let me ask you a question.

If the court asks for a rational basis for the treatment we are accorded those who are homosexual by activity and the treatment that is accorded those who are homosexual by orientation, what is the rational basis for excluding from the military or separating from the military a homosexual on the grounds that he acted out his orientation in the privacy of his own home, which information was relayed by his companion to his commander?

Ms. GORELICK. The rational basis would be, first, that homosexual conduct undermines, and has been held to undermine, the good order and discipline of the military, undermines unit cohesion, et cetera. That is a premise that has been accepted by the courts today.

Mr. HUNTER. But I am asking you for a rational basis when the sexual activity was never communicated to his platoon. But it was communicated by his companion to his company commander.

Ms. GORELICK. Well, then the company commander knows. By definition, somebody knows at that point. And I don't know that it makes sense to distinguish between the platoon and the commander.

Number one, if the company commander knows, there is knowledge within the military. Number two, if he committed that act, it is a violation of the UCMJ. It is a crime under concepts of military justice. And number three, we have this rule for general application. And the rule is that homosexual conduct undermines key factors necessary to sustaining combat readiness and sustaining our military force.

Mr. HUNTER. Okay. All three of your attempts at a rational basis, I think, would be beaten into fine mustard by a Court. Good order and discipline hasn't demonstrably been damaged, assuming that he has a good record with respect to his activities. This was done in an entirely private setting outside of his platoon. Only the commander knows.

Mr. SKELTON. May I interrupt? You are assuming that the commander will keep silent on this issue, which is highly unlikely.

Mr. HUNTER. Well, I would say that commanders are expected in many, many cases to take what is told to them by their troops and hold that in confidence.

Ms. GORELICK. Not in this instance. Let me say-

Mr. KYL. Will the gentleman yield? Instead of the commander, say it is the investigating officer. The commander doesn't know, just somebody in the investigating aspects of this.

Mr. HUNTER. Let's use Mr. Kyl's hypothetical that it is an investigating officer. Secondly, the Secretary of Defense yesterday said what we are telling people is keep it private. Ostensibly this person has, quote, kept it private and kept it private in such a way that the rational reasons that have been held in the past with respect to unit cohesion and discipline are not affected. That is the argument in court.

I think the inability to show a rational basis to the court for excluding a person who fits in this category is exactly the Mack truck-sized hole that litigants are going to utilize to tear this policy absolutely to shreds. And if you could comment on that.

Ms. GORELICK. I would be happy to. For the last decade, courts consistently have upheld discharges in precisely those circumstances. That is where someone has been found to have engaged in private homosexual conduct. And the courts have held that that is sustainable, that the discharge on that basis is sustainable and has applied the rational basis test. The military doesn't have to take the risk upon finding that out that it will happen again.

Mr. HUNTER. And here is the kicker. At least the cases I have seen and the legal analysis I have seen, the rational basis that in the past has been sought by the court has been found in the statement of incompatibility. They have found that the statement, "the finding of the military that homosexuality is incompatible with military service" has been utilized in itself as a rational basis for upholding the policy. Now, if you take the statement of incompatibility out, I think you have a real stretch in trying to apply the scenario that I have just laid out to a given case and succeed in winning.

Ms. GORELICK. Well, I beg to differ with you. While the language that you cite has been found in briefs and opinions, what it means is, if you look at what a homosexual is in the directive that you are quoting from, a homosexual is a person who engaged in, desires to engage in, or intends to engage in homosexual acts. It is that definition of a person who is a homosexual that has been found to be incompatible and we are not changing that. Moreover, the statement that you quote, that homosexuality is incompatible, needs to be read together with the next sentence—the presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.

That is discharge policy under the July 19th policy. So, I really quite fail to see the difference that you are pointing to. And I think that your elevation of that one statement to a position of importance in the analysis and the defense of the policy is a matter of law and legal analysis.

Mr. HUNTER. So you think that there is a rational basis for excluding, from the military, a person who acts out his orientation in the privacy of his own home and is reported by his commander to a service investigative agency or to a commander. You think there is a rational basis?

Ms. GORELICK. Yes, I have so testified and it is the same rational basis that is found under the prior case law.

Mr. HUNTER. Thank you.

Mr. SKELTON. Thank you. Ms. Gorelick.

Ms. GORELICK. Yes, sir.

Mr. SKELTON. The phrase, "homosexuality is incompatible with military service" is in the old policy, the old language; is that correct?

Ms. GORELICK. Yes, sir, yes it is.