

# MEMORANDUM

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This memo presents research on the legislative histories of two issues pertaining to the new military policy on homosexuality: (1) the intent to discriminatorily censor speech; and (2) the intent to accommodate troop prejudice. The materials were rather extensive, exceeding 3000 pages of text: and before we discuss some of the substantive issues, we should first lay out my modus operandi of the research process, and discuss how one should use the appendices. The appendices contain a comprehensive record of the research, and are the most valuable sections of this memo.

## I. THE FORM

We consulted the following materials for this research: Senate and House hearings from both the spring and summer of 1993, the committee report accompanying the passage of the National Defense Authorization Act for Fiscal Year 1994 (which codified the new policy), House and Senate debates on the passage of the National Defense Authorization Act for Fiscal Year 1994, a Senate debate on the passage of the Family and Medical Leave Act of 1993 (in some sense inaugurating the debates on the military policy), and two other proceedings. We also looked at other congressional debates pertaining to the subject, but the

above proceedings were the primary events at which the policy was debated. We did not examine the statements made by President Clinton, even though they are also a part of the legislative history of the policy. Below is a list of the appendices:

Appendix A: *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Comm. on Armed Services, United States Senate, 103d Cong., 2d. Sess. (1993).* (March 29, March 31; April 29; May 7, May 10, May 11; July 20, July 21, July 22; 1993 hearings)

Appendix B: *National Defense Authorization Act for Fiscal Year 1994, Comm. on Armed Services, S. Rep. 103-112, 103d Cong., 1st Sess. (1993).*

Appendix C: *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services, 103d Cong., 1st Sess. (1993)* (May 4 and 5, 1993 hearings)

Appendix D: *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services, 103d Cong., 1st Sess. (1993)* (July 21, 22, and 23, 1993 hearings)

Appendix E: *Family and Medical Leave Act of 1993, 139 Cong. Rec. S1262* (February 4, 1993)

Appendix F: *National Defense Authorization Act for Fiscal Year 1994, 139 Cong. Rec. S11157* (Sept. 9, 1993)

Appendix G: *National Defense Authorization Act for Fiscal Year 1994, 139 Cong. Rec. H7065* (Sept. 28, 1993)

Appendix H: *Hearing of the Republican Research Committees Task Force on Military Personnel, February 4, 1993; Homosexuals in the Military, 139 Cong. Rec. S7603* (June 22, 1993)

Essentially, we read through all of the transcripts of the hearings, debates, and committee report, and recorded all statements that relate to either the speech issue or the accommodation of prejudice issue, including statements that tangentially relate to these issues. If the passage was too long to record manually, we made a photocopy of the passage and included it in the appendices, along with the manually recorded passages.

The appendices consist of the recorded and photocopied passages, in the order that they were presented in the proceedings, except the photocopied passages are attached at the back of each appendix. Each statement is designated by a number, and numbering starts at " 1" for each appendix; for example, C10 denotes the tenth statement in Appendix C. Photocopied passages are denoted by letters, again lettering starting with A for each appendix; for example, DF denotes the sixth photocopied passage in Appendix D.

Appendices that contain multiple hearings have headings which denote the particular hearing date. We have tried to present full information about each speaker (i.e. name, title, organization); but in case we left out such information, each appendix contains a listing of the committee members and a table of contents which lists all the speakers at the hearings.

After compiling and synthesizing these materials, we developed eleven subject matter categories that seem to touch on the speech and prejudice issues. We then placed each statement in one or more of these categories, constructing a table that lists all the statements that relate to a particular subject matter category. In Part II of this memo, We discuss the subject matter of the categories and present the table.

We hope that the size of this memo is not daunting. We recommend, if you have the time, that you read through the appendices in their entirety since they include some really enlightening quotes (well, generally more inflammatory than enlightening). We do try to summarize the contents of the proceedings in Part II; but the rhetoric is so rich in places, and the materials so extensive, that we would feel more comfortable if you had the chance to read all of the relevant passages.

If a full reading is not possible, then the appendix designations in conjunction with the

table presented in Part II will facilitate selective reference to the materials. For example, assume that you are interested in any passages from the Senate committee report relating to the fear that lifting the ban would result in violence or neglect to homosexual soldiers, you would look for any entries beginning with "B" in the table presented in Part II under the violence category. Also, entries designated by two letters, such as "AD", denote photocopied passages; and thus, these selections are generally more extensive, and hence might supply a more lengthy statement concerning the desired category.

## II. THE SUBSTANCE

In this section, we do not supply a detailed analysis of "who said what when." Instead, first we discuss which proceedings seem to have been more influential in the final version of the newly adopted policy. Next, we emphasize the major justifications for the ban which were presented again and again during the hearings and the debates, also noting which justifications were curiously absent or emphatically denied in the proceedings. And finally, we present descriptions of the various categories in which we placed statements, and the table containing the categorizations. We would like to repeat that the valuable sections of this memo are the appendices, and the body of the memo is mainly a summary of the major points and a road map of how to maneuver through the appendices.

### ***A. The pedigree.***

It seems that the most influential proceedings were the hearings conducted by the Senate Committee on Armed Services. We say this because this committee wrote the legislation that was finally adopted in the *National Defense Authorization Act for Fiscal Year*

1994, and the House did not make any major changes to this legislation before adopting it. This is not to say that the House hearings are not important. To the contrary, they are valuable because (1) they are the record from which Representatives decided their vote; (2) these hearings repeat many of the justifications for the ban that were voiced in the Senate hearings; and (3) important figures such as General Norman Schwarzkopf, General Colin Powell, and Les Aspin testified at these hearings also.

The committee report accompanying the *National Defense Authorization Act for Fiscal Year 1994* is also an important piece of legislative history, with its “Policy concerning homosexuality in the armed forces” section. It is interesting to note that the report repeats several times that the policy adopted is not based on “troop prejudice.” But the text is not a complete whitewash, since it does present justifications implicating the specter of speech censorship and derivative effects of troop prejudice. Also Senator Kennedy presents material, “Additional View of Mr. Kennedy,” with a refreshing pro-gay position. This section is really good because it analyzes each of the “fifteen findings” of the Congress, and comments on how the hearings generating those findings are flawed in several ways. We are attaching this entire section to the back of Appendix B.

The congressional debates preceding the passage of the *National Defense Authorization Act for Fiscal Year 1994* are also valuable bits of legislative history, although they are not as extensive as the hearings. Statements from these debates pertaining to the speech and prejudice issues are indexed in the table also.

While the Senate debate preceding the passage of the *Family and Medical Leave Act* of 1993 is not direct legislative history since that legislation does not contain the new policy,

it is useful because it essentially inaugurated the congressional debate on the subject and supplied some of the first recorded justifications for the continuation of the ban. Similarly, the two remaining proceedings quoted in Appendix H are not central to a direct analysis of legislative history, they are useful for supplemental analyses of the intents and views of various Congresspersons.

### **B. *The arguments.***

From a *Palmore v. Sidoti* perspective (a perspective which would disallow the government from giving private prejudice effect), statements made in the hearing and debate proceedings seem to bode ill for the new military policy. It was repeated over and over that homosexual soldiers perform as well (or better) than heterosexual soldiers. It was stated on numerous occasions that problems with allowing homosexuals to serve would occur because of heterosexuals' responses--problems with soldiers' knowing that someone is homosexual.

The following were justifications for continuing the ban that were presented in the proceedings: the deleterious effect known homosexuals would have on unit cohesion; problems recruiting soldiers in the future, especially since the military primarily draws its recruits from the midwest, a place with moral and religious inhabitants; problems retaining military personnel (many speakers threatened they would resign if the ban were lifted); invading the privacy of heterosexual soldiers; forcing heterosexual soldiers to accept a "lifestyle" that they find immoral or against their religious upbringings; problems of violence directed at known homosexuals. All of these justifications have something in common--it is not that homosexual soldiers aren't capable of doing the job, but it is that the attitudes of the heterosexual troops create problems for unit cohesion, effective operations,

etc.

The major justification for the ban that dominates the proceedings is the argument that allowing homosexuals in the military would damage unit cohesion. Unit cohesion would suffer because there would not be appropriate bonding between soldiers. Heterosexual soldiers could not respect their homosexual colleagues. Speakers testified that unit cohesion requires shared cultural heritage, and any difference injected into the process would result in “cleavage” or reduced combat effectiveness.

There were other minor justifications such as increased AIDS transmissions and blood supply contamination, higher incidence of sexual harassment, homosexual soldiers’ lack of integrity; but these arguments were presented sporadically, and mostly were discredited, even by the ban supporters.

A big concern involved the concept of “open” or “known” homosexuality--this is where the origins of censoring speech began. Several speakers testified that only known homosexuality would disrupt unit cohesion or reduce combat effectiveness. If soldiers did not know someone was homosexual, there would not be a problem. So the issue of knowing, of attributing a homosexual orientation to someone, became a central issue. Thus, there was a lot of discussion on prohibiting open acknowledgments of homosexuality and the difference between prohibited “flaunting” and First Amendment protected statements. And this deteriorated into discussions about other forms of expression such as attending gay rights parades, reading gay literature, wearing activist T-shirts, etc. The baseline origins of the intent to censor speech was the concern over soldiers discovering that someone in their midst was homosexual. Knowing was the problem.

It is worth repeating that statements questioning the abilities of homosexual soldiers were largely absent from the proceedings. Instead, the dominant issues were ones involving unit cohesion, invasion of heterosexual privacy, moral degradation, impropriety of forcing religious personnel to work side by side with people they find immoral--essentially results of heterosexual soldier prejudice. And to avoid these effects, the issue of censoring speech arose, since public acknowledgment of homosexuality would trigger heterosexual responses. The decision to squelch speech was essentially a response to avoid heterosexual soldiers' crisis-producing knowledge of another soldier's homosexual orientation.

### ***C. The table.***

In examining statements made by various speakers, we found it useful to develop categories in which the statements could be placed. We came up with eleven themes which are linked to ideas of accommodating troop prejudice and censoring speech--themes that were emphasized in the various proceedings. These themes are by no means independent; rather, many of them relate to one another, with some being more specific subsets of others. Again, all eleven themes can be viewed as justifications for or manifestations of intents to accommodate troop prejudice or to censor speech.

After analyzing the statements and developing the categories, we then placed relevant statements into one or more categories. It is important to note that these groupings contain statements which denounce the theme as well as statements which support the theme--anti-ban and pro-ban statements are grouped together.

The eleven themes are the following: (1) Unit cohesion -- anything relating to cohesion in general, also including opinions concerning combat effectiveness; (2)

Recruitment and Retention -- the issue of whether removing the ban will result in problems for recruiting and retaining military personnel; (3) Heterosexual prejudice, forced association -- while this section is denoted "prejudice," the statements do not all contain the word "prejudice," rather any statements about not "growing up with homosexuals," not accepting homosexual lifestyles, etc. are included in this category; (4) Speech, open declarations -- this is actually a subset of "Open, known as, acknowledged," in that it is an explicit injection of knowledge into the unit, it is "flaunting," it is intentionally making soldiers aware of someone's homosexual orientation; (5) Open, known as, acknowledged -- whereas the previous category was concerned with admissions, statements, etc., this category consists of testimony relating to knowledge in general, open behavior vs. covert behavior, etc.; (6) Shared values and heritage, assimilation, negative effect of difference -- this is a narrow subset of "Unit cohesion" and consists of statements which assert that unit cohesion requires similarity, requires the absence of difference; (7) Violence or neglect to homosexual soldiers -- a subset of "Prejudice" and consists of statements which assert that lifting the ban would result in violence or in heterosexuals soldiers not looking after homosexual soldiers on the battlefield; (8) Polling the troops, troop opinion counts -- statements relating to polls taken concerning troop opinion and whether it should be given deference; (9) Homosexuality does not affect performance; (10) Heterosexual soldier privacy -- this could be subsumed under the "Prejudice" category, but it was distinctly and often expressed, especially in analogies to gender issues (i.e. women don't want to bunk with men); (11) Morality, religion -- this is a crucial category, and in some ways relates to the "Prejudice" category, a very common and heated justification for maintaining the ban.