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NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1994

REPORT

[TO ACCOMPANY S. 1298]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 1994 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE, FOR MILITARY CONSTRUCTION, AND FOR DEFENSE ACTIVITIES OF THE DEPARTMENT OF ENERGY, TO PRESCRIBE PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR FOR THE ARMED FORCES, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

JULY 27 (legislative day, JUNE 30), 1993.—Ordered to be printed

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POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES

Current Department of Defense policy provides that "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." The armed forces discharge servicemembers when there is an approved finding that: (1) the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act; (2) the member has stated that he or she is a homosexual or a bisexual; or (3) the member has married or attempted to marry a person of the same biological sex.

On January 29, 1993, the President directed the Secretary of Defense to review the Department's policy and to provide him with recommendations by July 15, 1993. On February 4, 1993, the Senate adopted an amendment, which was enacted into law, calling for a comprehensive review of the policy, and directing the Committee on Armed Service to conduct hearings. On July 19, 1993, the Secretary of Defense submitted his recommendations, which were approved by the President, to the Congress.

The Committee on Armed Services, after detailed hearings and careful review of the recommendations of the Secretary of Defense, agreed that a specific legislative framework for the policy should be set forth in law. Part I of this Report summarizes the committee's findings and recommendations. Part II sets forth the background to the committee's action. Part III describes the basis for the committee's action. Part IV contains a sectional analysis of the committee's legislative proposal.

I. SUMMARY

Based upon the committee's review and deliberations, the committee recommends legislation that sets forth legislative findings and a framework to guide the Department of Defense in its implementation of the policy concerning homosexuality in the armed forces. The committee recommends the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that—

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

The committee recommends that the policy concerning homosexuality in the armed forces continue the current conduct-based standards for discharge, as reiterated by the Secretary of Defense on July 19, 1993, which require separation on the basis of homosexual acts, statements, and marriages. The committee also recommends that these standards be set forth in the enlistment contract and in similar documents used for the appointment of officers. In addition, the committee recommends that the decision as to whether questions about homosexuality should be asked during the accession policy should be left to the discretion of the Department of Defense.

The standards and procedures set forth in the committee's recommendations are consistent with the policy of the Department of Defense, as set forth in DoD Directive 1332.14 (Enlisted Administrative Separations) and the policy memorandum issued by the Secretary of Defense on July 19, 1993 ("Policy on Homosexual Conduct in the Armed Forces"), as clarified in hearings before the committee.

II. Background

RESTRICTIONS BASED UPON HOMOSEXUALITY ARE A LONGSTANDING FEATURE OF MILITARY PERSONNEL POLICY

Until the post-World War II period, military regulations on administrative separation were drafted in a manner that gave commanders broad discretion to discharge members of the armed forces. The Army, for example, authorized separation for reasons such as "inaptness or undesirable habits" (section VIII of Army Regulation 615–200). This regulation did not list any specific traits.

With respect to courts-martial, homosexual conduct traditionally was prosecuted in the armed forces under the general article (currently Article 134 of the UCMJ, 10 U.S.C. 934), which authorizes trial by court-martial for conduct that is service-discrediting or that is prejudicial to good order and discipline. The Articles of War of 1916 established a specific article proscribing assault with intent to commit sodomy. In the aftermath of World War I, Congress established the offense of sodomy, including consensual sodomy, as Article 93 of the Articles of War. See Manual for Courts-Martial, 1921, para. 443, sec. XI.

During World War II, the Army developed a medical approach to homosexuality, involving efforts at identification and treatment. An undetermined number of gay men and lesbians served during the war as a result of a combination of factors: concealment of homosexuality because of social taboos; the relative flexibility of personnel regulations; wartime personnel needs; and the inability of psychiatrists to determine who was homosexual. When there was an identification of an individual as a homosexual, however, an effort at treatment was made. Failure to respond to treatment provided a basis for a "section VIII" discharge. The massive manpower in-

flux of civilians into the armed forces during World War II, combined with the medical approach to homosexuality, led to the discharge during the war of a significant number of persons for reasons related to homosexuality.

In 1944, the Army in Circular No. 3 endeavored to distinguish between homosexuals who were discharged because they were "not deemed reclaimable" and those who were retained because their conduct was not aggravated by independent offenses. In 1945, a greater emphasis was placed on "reclamation" of homosexual soldiers. If a homosexual soldier was deemed "rehabilitated", the soldier was returned to service.

In 1947, the policy was revised to discharge individuals who had "homosexual tendencies" even if they had not committed homosexual acts. Those who committed homosexual acts were subject to court-martial or administrative discharge, with the character of discharge depending on the nature of the act.

The Uniform Code of Military Justice, enacted in 1950, contained a prohibition on sodomy, including consensual sodomy, in Article 125 reflecting the previously enacted prohibitions in the Articles of War and the Articles for the Government of the Navy.

In 1950 the Army adopted a mandatory administrative separation policy, which stated: "True, confirmed, or habitual homosexual personnel, irrespective of sex, will not be permitted to serve in the Army in any capacity and prompt separation of known homosexuals from the Army is mandatory." This policy was somewhat relaxed in 1955, permitting soldiers to be deemed "reclaimable" when they "inadvertently" participated in homosexual acts. This policy was reversed in 1958, when the mandatory separation policy was reinstated.

In 1970, a Department of Defense-wide policy was issued, authorizing separation on the basis of homosexual acts and "homosexual tendencies." There was no definition of the term "homosexual tendencies." Under the Directive, the final decision on separation of an individual soldier was a matter of command discretion rather than mandatory.

In the 1970s, there was increasing litigation concerning the procedures and basis for the DoD policies on the separation of homosexuals. In several court cases, the Department was asked to provide detailed reasons for not exercising the discretion to retain an individual when there was a finding of homosexual acts or tendencies. There is no data on the specific number of cases in which the discretion to retain an individual was exercised, but it does not appear to have been frequently used. The litigation, however, was considered during a detailed review of the DoD administrative discharge policy in the late 1970s during President Carter's administration. This review involved all aspects of administrative discharge proceedings and all reasons for administrative discharge, not just discharges for homosexuality.

As a result of that review, the Department of Defense made two significant changes in policy which were set forth in a memorandum issued by then-Deputy Secretary of Defense Graham Claytor on January 16, 1981. First, the Department of Defense issued a conduct-based policy, which authorized separation of persons who, by their acts or statements, demonstrate a propensity or intent to

engage in homosexual conduct, and eliminated "homosexual tendencies" as a reason for separation. Second, the mandatory separation policy, which had been used in the 1950s, was reinstated. This policy was incorporated without substantive change in the 1982 revision of DoD Directive 1332.14, which provides the current authority for enlisted administrative separations. Similar standards are set forth in DoD Directive 1332.30, which governs officer administrative separations. The policy memorandum issued by the Secretary of Defense on July 19, 1993 continues the conduct-based focus of Department of Defense policy.

In summary, the authority to administratively separate homosexuals has been in effect over a lengthy period of time, although the manner in which this policy has been implemented has varied. This authority has been consistently supported over the years by Congress and by every Administration, both Republican and Democratic.

EVENTS LEADING UP TO THE COMMITTEE'S HEARINGS

In September 1992, during the Senate's debate on the National Defense Authorization Act for Fiscal Year 1993, Senator Howard Metzenbaum offered an amendment that would have established a "prohibition on discrimination in the military on the basis of sexual orientation." Senator Sam Nunn, Chairman of the Senate Armed Services Committee observed that "this subject deserves the greatest care and sensitivity" and stated: "We will have hearings on the subject next year. We will hear from all viewpoints, and we will take into consideration the viewpoints of our military commanders, the viewpoints of those in the homosexual community, the viewpoints of those who are in uniform who may be homosexual, gay, and we will also consider the men and women in uniform who are not in that category and the effect it would have on military morale." Based upon the assurance that hearings would be held in 1993, Senator Metzenbaum withdrew his amendment.

During the 1992 election campaign, Presidential candidate Bill Clinton said that, if elected, he would take action to change the current policy restricting the service of gay men and lesbians serving in the armed forces. He also spoke of the need to consult carefully with the military leadership on this issue. After the election, he reiterated his views on changing the policy and the need to consult with the military leadership.

Secretary of Defense Aspin, during his confirmation proceedings in January 1993, indicated that there would be extensive consultations with Congress on this subject.

Shortly after the Inauguration, a series of media reports suggested that a significant change in the Department's policy was imminent. A number of Senators indicated that they would offer an amendment early in the Congressional session that would prohibit any change in policy. Senator Nunn, among others, expressed the view that neither the Executive Branch nor Congress should institute a significant change in the current policy, by Presidential order or by Congressional action, prior to undertaking a comprehensive review, including hearings, on this subject.

On January 29, 1993, the President directed issuance of an interim policy that would be in effect until July 15, 1993. This in-

terim policy retained all then-existing rules restricting the service of gay men and lesbians in the armed forces. The policy also set forth two modifications that would apply during the interim period. First, reflecting a recommendation made by the Joint Chiefs of Staff, new recruits would not be questioned about homosexuality during the enlistment process. Second, gay and lesbian cases that did not involve homosexual acts would be processed through separation from active duty, and the individual would be placed in a nonpay status in the Standby Reserve during this interim period.

In addition, the President directed the Secretary of Defense to conduct a review of the current policy and to provide him with a draft Executive Order by July 15, 1993.

On February 4, 1993, during Senate consideration of the Family and Medical Leave Act, the Senate debated two amendments related to the service of gay men and lesbians in the armed forces.

The first amendment would have frozen in law "all Executive Orders, Department of Defense Directives, and regulations of the military departments concerning the appointment, enlistment, and induction, and the retention, of homosexuals in the Armed Forces, as in effect on January 1, 1993." The amendment was tabled by a vote of 62–37.

The Senate then unanimously adopted an amendment expressing the Sense of Congress that the Secretary of Defense should conduct "a comprehensive review of the current Department of Defense policy with respect to the service of homosexuals in the Armed Forces." The amendment further expressed the Sense of Congress that the results of the review should be reported to the President and Congress not later than July 15, 1993. In addition, the amendment expressed the Sense of Congress that the Senate Committee on Armed Services should conduct "comprehensive hearings on the current military policy" and should conduct "oversight hearings on the Secretary's recommendations as such are reported."

The amendment, as adopted, was enacted as section 601 of the Family and Medical Leave Act of 1993, Public Law No. 103–3. The Senate also agreed to an order that effectively precluded consideration of any further amendments in the Senate relating to the service of gay men and lesbians in the armed forces until July 15, 1993. This procedure permitted the Department of Defense and the Committee on Armed Services to conduct their reviews prior to legislative action on specific amendments.

COMMITTEE PROCEEDINGS

The question of whether changes should be made in the restrictions on the service of gay men and lesbians in the armed forces has generated intense feelings in the Congress, in towns and communities across the country, and particularly throughout the ranks of the military services. Some individuals view the question as a moral issue, touching upon deeply held religious and philosophical beliefs. Others view it as a civil rights issue involving the fair and equitable treatment of individuals with a particular sexual orientation who want to serve their country in uniform.

While the committee has received testimony reflecting these broad, strongly held views, the Committee's primary focus and concern has been the implications of any change in the current policy

on the effectiveness of our armed forces to carry out their mission to defend our nation.

Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces. Pursuant to these powers, it lies within the discretion of Congress to establish the qualifications for military service, the terms and conditions of military service, and the standards necessary to ensure good order and discipline within the armed forces.

The committee began its hearings on March 29, 1993, with an overview of the historical and legal background of the current Defense Department policy. Dr. David Burrelli, a sociologist from the Foreign Affairs and National Defense Division of the Congressional Research Service, summarized the historical development of the Defense Department's current policy. Professor David A. Schlueter of St. Mary's Law School described how the military legal system addresses the issue of homosexuality, and outlined legal issues raised by the current policy and proposals for change. Professor Steven A. Saltzburg of George Washington University National Law Center described the state of litigation concerning the service of gay men and lesbians in the armed forces, and outlined legal issues raised by this litigation. Mr. Charles Dale, a legislative attorney from the American Law Division of the Congressional Research Service, summarized the general state of the law with respect to issues concerning gay men and lesbians in the United States.

On March 31, 1993, the committee conducted a hearing on the role of unit cohesion in developing combat effectiveness, receiving testimony from three experts on military personnel policy: Dr. William D. Henderson, former commander of the Army Research Institute; Dr. Lawrence Korb, former Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics; and Dr. David Marlowe, chief of the Department of Military Psychiatry at Walter Reed Army Institute of Research.

The committee held a hearing on April 29, 1993, on the experiences of foreign military services. Testimony was presented by Dr. Charles Moskos, Professor of Sociology at Northwestern University; Dr. David Segal, Professor of Sociology at the University of Maryland; Dr. Judith Stiehm, Pressor of Political Science at Florida International University; and Lt. Gen. Calvin Waller, U.S. Army (retired).

On May 7, 1993, the committee received testimony from Members of the Senate, including Senator Howard Metzenbaum, Senator Frank H. Murkowski, Senator John F. Kerry, Senator Barbara Boxer, Senator Conrad Burns, Senator Dianne Feinstein, Senator John H. Chafee, and Senator James M. Jeffords.

The committee conducted a field visit to the Norfolk Naval Complex on May 10, 1993. During the morning, members of the committee visited four classes of ships: the aircraft carrier John F. Kennedy; the amphibious assault ships Austin and Gunston Hall; the attack submarines Montpelier, Flying Fish, and Baton Rouge; and the submarine tender, Emory S. Lamb. During these visits, members of the committee conducted informal discussions with sailors and marines of all ranks, visiting with them in their work-

ing and living spaces, including a visit to a submarine tender with a mixed gender crew. During the afternoon, the committee conducted a formal hearing at which testimony was presented by seventeen members of the Navy and Marine Corps selected by the committee, including both enlisted personnel and officers.

On May 11, 1993, the committee received testimony in Washington, D.C., from current and former members of the armed forces, including: General H. Norman Schwarzkopf, U.S. Army (Ret.); Colonel Frederick C. Peck, U.S. Marine Corps; Major Kathleen Bergeron, U.S. Marine Corps; Command Master Chief David Borne, U.S. Navy; Dr. Margarethe Cammermeyer, former Colonel and Chief Nurse, Washington Army National Guard; Chief Petty Officer Stevens R. Amidon, U.S. Navy; Thomas Paniccia, former Staff Sergeant, U.S. Air Force; and Sergeant Justin Elzie, U.S. Marine Corps.

Secretary of Defense Les Aspin submitted the administration's recommendations to Congress on July 19, 1993. On July 20, 1993, the committee received testimony on the recommendations from Secretary Aspin and the Joint Chiefs of Staff: General Colin L. Powell, U.S. Army, Chairman of the Joint Chiefs of Staff; Admiral David E. Jeremiah, U.S. Navy, Vice Chairman; General Gordon R. Sullivan, Chief of Staff, U.S. Army; General Carl E. Mundy, Jr., Commandant of the Marine Corps; Admiral Frank B. Kelso, II, Chief of Naval Operations; and General Merrill A. McPeak, Chief of Staff, U.S. Air Force.

On July 21 and July 22, 1993, the committee heard from the Honorable Jamie S. Gorelick, General Counsel of the Department of Defense, and Major General John P. Otjen, U.S. Army, Senior Member of the Military Working Group established by Secretary Aspin to review this issue.

In addition, the committee received testimony for the record from numerous private citizens and organizations.

The testimony presented to the committee represented a wide range of experiences, including those of current and former servicemembers who have publicly identified themselves as gay or lesbian. The committee received a broad variety of views, ranging from recommendations to reinstate the policy in effect prior to the January 29, 1993 interim modifications to recommendations for elimination of restrictions on homosexual acts. The committee carefully considered all points of view in developing its recommendations.

III. Basis for Committee's Action

Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces. Pursuant to these powers, it lies within the discretion of the Congress to determine qualifications for and conditions of service in the armed forces

The Framers of the Constitution, in Article I, section 8, expressly vested the powers to raise and regulate military forces in the Congress. Detailed statutory mandates on the qualifications for and conditions of military service are found primarily in title 10 of the

United States Code. The President may supplement, but not supersede, the rules established by Congress for the government an regulation of the armed forces.

The role of the courts in reviewing military personnel matters is even more circumscribed. Although the constitutional guarantees of the Bill of Rights are generally available to servicemembers, the application of those guarantees in the military setting differs considerably from the manner in which they apply in civilian society.

The limited role of the judiciary in reviewing military personnel policies, the differing application of constitutional rights in the military, and the special role of the armed forces have been consistent themes in the Supreme Court's review of military matters:

> [J]udges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94 (1953).
>
> [I]t is the primary business of armies and navies to fight and to be ready to fight should the occasion arise. *Ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955).
>
> The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *United States* v. *O'Brien*, 391 U.S. 377 (1968).
>
> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause . . . but the tests and limitations to be applied may differ because of the military context. . . . [W]e must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch. *Rostker* v. *Goldberg*, 453 U.S. 67–68 (1981).
>
> [J]udicial deference to . . . congressional exercise of authority is at its apogee when legislative action [is] under the congressional authority to raise and support armies and make rules and regulations for their governance . . . *Id.* at 70.
>
> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).
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> [T]he military is, by necessity, a specialized society separate from civilian society. *Parker* v. *Levy*, 417 U.S. 733, 743 (1974).
>
> Congress is permitted to legislate both with greater breadth and with greater flexibility when regulating military personnel. *Id.* at 756.

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. *Id.* at 758.
>
> [T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life. *Schlesinger* v. *Councilman,* 420 U.S. 738, 757 (1975).
>
> [C]ourts are 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.' *Chappell* v. *Wallace,* 462 U.S. 296, 305 (quoting Chief Justice Earl Warren, "The Bill of Rights and the Military," 37 N.Y.U.L. Rev. 181, 187 (1962)).
>
> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. . . . *Goldman* v. *Weinberger,* 475 U.S. 503, 507 (1986).
>
> [T]o accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps. Id.
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> "The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" Id. (quoting *Orloff* v. *Willoughby,* 345 U.S. 83, 92 (1953)).
>
> "[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Id.

In summary, Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces. Pursuant to these powers, it lies within the discretion of the Congress to determine qualifications for and conditions of service in the armed forces.

Military service is a unique calling in which the rights of individuals are subordinated to the needs of national defense

The primary mission of the armed forces is to defend our national interests by preparing for and, when necessary, waging war, using coercive and lethal force. Responsibility for the awesome machinery of war requires a degree of training, discipline, and unit cohesion that has no parallel in civilian society.

The armed forces must develop traits of character, patterns of behavior, and standards of performance during peacetime in order to ensure the effective application and control of force in combat. Members of the armed forces are subject to disciplinary rules and military orders at all times, twenty-four hours a day, regardless of whether they are actually performing a military duty.

Military service is a unique calling. It is more than a job. Our nation asks the men and women of the armed forces to make extraordinary sacrifices to provide for the common defense. While civilians remain secure in their homes, with broad freedom to live

where and with whom they choose, members of the armed forces may be assigned, involuntarily, to any place in the world, often on short notice, often to places of grave danger, often in the most spartan and primitive conditions.

For the sailors in the Persian Gulf, their ship is home. For the soldiers on the DMZ in Korea, their barracks is home. For the Marines serving in Somalia in Operation Restore Hope, their tent is home. Military men and women do not have the right to choose with whom they will share this home. They do not have the right to choose with whom they will share these burdens. They do not have the right to choose whether they will be placed in harm's way or under what conditions. Most important, they do not have the right to choose when and where they may be asked to make the ultimate sacrifice for their country.

General Gordon Sullivan, Chief of Staff of the Army, eloquently summarized the differences between military and civilian life in testimony before the committee on July 20, 1993:

> What separates us from civilian society is ultimate sacrifice, the sacrifice of our lives for our country. We have to sublimate everything that we do to selfless service to our Nation. Duty, honor, country . . . [I]t is, in fact, that mission, the protection of the Nation, which must govern everything that we do.

Although the individual decision to join the armed forces, in the absence of actual draft calls, is a matter of voluntary choice, there is no constitutional right to serve in the military. See, e.g., *Nieszner* v. *Mark*, 684 F.2d 562 (8th Cir.), *cert. denied* 460 U.S. 1022 (1982), *West* v. *Brown*, 558 F.2d 757 (5th Cir.), *cert. denied* 435 U.S. 926 (1977). The armed forces routinely restrict the opportunities for service on the basis of circumstances such as physical condition, age, sex, parental status, educational background, medical history, and mental aptitude. These restrictions primarily reflect professional military judgment as to what categories of personnel contribute to overall combat effectiveness rather than narrow performance criteria related to the performance of a specific task. They are based on the fact that members of the armed forces are not recruited for a single job at a single location. They must be capable of serving not as an individual, but as a member of a team, in a variety of assignments and locations, often under dangerous and life-threatening conditions.

Once military status is acquired, military service is not voluntary. Once an individual has changed his or her status from civilian to military, that person's duties, assignments, living conditions, privacy, and grooming standards, are all governed by military necessity, not personal choice. In a nation that places great value on freedom of expression, freedom of association, freedom of travel, and freedom of employment, the armed forces stand as a stark exception. Military commanders have the authority, as they have throughout our nation's history, to tell servicemembers where to live, where to work, and even when they must put their lives at risk—and to use the criminal law, the Uniform Code of Military Justice, to punish those who disobey any such orders.

The unique conditions of military service have existed from the days of the Revolutionary War, through the formation of the Constitution, to the present. Throughout our history, members of the armed forces have been subjected to controls and regulations that would not have been tolerated in civilian society.

This does not mean that Congress expects military commanders to exercise their authority in an arbitrary and capricious manner. There are numerous laws and regulations governing military service which provide servicemembers with protections against abuse and which establish means of redress. These have been carefully crafted to maintain the delicate balance between the individual concerns and the needs of the armed forces. While the nature of military service has changed over time, the fundamental precept—that the rights of the individual servicemember must be subordinated to the needs of national defense—remains unchanged.

The committee is mindful of the admonition of the Supreme Court that Congress is not free to disregard the Constitution when dealing with military affairs. As the Court noted in *Rostker* v. *Goldberg*, the "Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." 453 U.S. at 64.

Congress has played a leading role in enhancing the rights of members of the armed forces, including enactment of the Uniform Code of Military Justice; establishment of an independent civilian tribunal, the U.S. Court of Military Appeals, to review court-martial cases; authorization to appeal military justice cases directly to the Supreme Court; enhanced procedural rights in the promotion process; expanded opportunity for wearing religious apparel while in uniform; and protections for military whistleblowers. Whenever the committee considers a military practice or proposal in which military personnel would not be provided with the same rights as their civilian counterparts, the committee carefully assesses the military necessity for any difference in treatment.

The committee has carefully considered the needs of the armed forces and the rights of all persons, including those who are gay or lesbian, in addressing the issue of restrictions on the service of gay men and lesbians in the armed forces.

The foundation of combat capability is unit cohesion

General H. Norman Schwarzkopf, U.S. Army (Ret.), who commanded U.S. forces in Operations Desert Shield and Desert Storm, testified that unit cohesion "is the single most important factor in a unit's ability to succeed on the battlefield." General Schwarzkopf, whose distinguished career included combat in Vietnam and senior military personnel management responsibilities, told the committee:

> What keeps soldiers in their foxholes rather than running away in the face of mass waves of attacking enemy, what keeps the marines attacking up the hill under withering machinegun fire, what keeps the pilots flying through heavy surface-to-air missile fire to deliver bombs on targets is the simple fact that they do not want to let down their buddies on the left or on the right.

> They do not want to betray their unit and their comrades with whom they have established a special bond through shared hardship and sacrifice not only in the war but also in the training and the preparation for the war.
>
> It is called unit cohesion, and in my 40 years of Army service in three different wars, I have become convinced that it is the single most important factor in a unit's ability to succeed on the battlefield.

General Gordon Sullivan, Chief of Staff of the Army, in testimony before the committee on July 20, 1993, emphasized the importance of the bonds of trust between soldiers. Quoting from a letter in which one soldier wrote to another, "I always knew if I were in trouble and you were still alive that you would come to my assistance," General Sullivan added:

> Every officer in the United States Army, . . . every soldier [and] noncommissioned officer, . . . everyone in the services must know that . . . I will give up my life for them; and they, in turn will give up their life for me. I have to have trust in them, and them in me.

General Colin Powell, Chairman of the Joint Chiefs of Staff, testified on July 20, 1993, that—

> To win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.

General Powell noted in response to a question from the committee that the armed forces give constant attention to the development and maintenance of unit cohesion:

> Bonding begins on the first day of boot camp. Bonding takes place everytime a GI joins a new unit. A unit must bond as a fighting force before it is sent to the battlefield. Unit members work together, train together, and deploy together sharing experiences that contribute to the development of cohesion. Mutual trust, common core values, self confidence, and realization of shared goals help to form the cohesive military team. Cohesion requires the sacrifice of personal needs for the needs of the unit, subjugating individual rights to the benefit of the team.
>
> While individual initiative is rewarded, the contribution of the team—the cohesive unit—is what guarantees military success.

In his testimony before the committee, Dr. William Darryl Henderson, a decorated combat veteran, former commander of the Army Research Institute, and author of the book, *Cohesion: The Human Element in Combat*, illustrated the role of unit cohesion in transforming a collection of disparate individuals into a motivated, combat capable group willing to endure and prevail amidst the horrors of war:

> [T]he nature of the relationship among soldiers in combat is a critical factor in combat motivation. . . .
>
> The real question is: why soldiers fight? What causes soldiers to repeatedly expose themselves to the most lethal environment known, instead of taking cover or leaving the area as quickly as possible.
>
> Combat motivation is not a mythical force that emerges on the battlefield. It must be developed and maintained well in advance of any war. . . .
>
> A central finding of cohesion research is that the nature of modern war dictates that small-unit cohesion is the only force capable of causing soldiers to expose themselves repeatedly to enemy fire in the pursuit of unit objectives.
>
> The confusion, danger, hardship, dispersion, and isolation of modern war requires that soldiers, sailors, and airmen in combat be controlled and led through an internalization of soldier values and personal operating rules that are congruent with the objective, goals, and values of the organization. . . .

To summarize the findings on the importance of unit cohesion, Dr. Henderson cited the distinguished military author, S.L.A. Marshall, who wrote: "I find it to be one of the simplest truths of war that the thing which enables an infantry soldier to keep going with his weapon is the near presence or presumed presence of a comrade."

Dr. David Marlowe, Chief of the Department of Military Psychiatry at the Walter Reed Army Institute of Research, emphasized that unit cohesion must be developed long before a unit is on the battlefield:

> Cohesion is not something magical. It does not suddenly happen the moment the bullets come. If it was not there to begin with, it is going to take a long time and some dead and mangled bodies before you get it.

Dr. Marlowe noted that while it is difficult to project current trend into the future, he anticipated that the unit cohesion would continue to be a paramount concern:

> [T]echnological advances, smaller forces, battlefield dispersal, and the shift to a force projection modality have made the continuing maintenance of highly cohesive units more important to the future than they have ever been in the past and the immediate present.
>
> In the past, in time of danger we have usually been . . . afforded the luxury of time in which to create highly cohesive units to counterpunch or strike the enemy. When we have not had that luxury, the results, as in the initial results of the Korean conflict, were disastrous for our soldiers.
>
> The speed with which events and their consequences now overtake us make it imperative that our forces be able to make an immediate transition from peace to war. High continuing levels of cohesion are critical to making that transition with maximum unit effectiveness and minimal

short- or long-term negative effects on the mental health, physical health, and performance of the soldier.

The committee notes that the end of the Cold War has not diminished the need for military forces composed of readily available, highly cohesive units. Events in Somalia and the former Yugoslavia, as well as continuing tensions in areas ranging from the Korean border to the Persian Gulf, have demonstrated that units-in-being must be prepared to deploy to hostile, inhospitable conditions, with little advance warning or preparation.

Military personnel policy must facilitate the assignment and world-wide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy

One of the defining characteristics of military life is deployment to the field or on board vessels, for training or operations. Although many servicemembers, in garrison, have the opportunity to live off-post or in on-post quarters providing substantial privacy, the armed forces do not train or deploy in a garrison environment. General Colin Powell, Chairman of the Joint Chiefs of Staff, advised the Committee that—

> While some military specialties may gravitate to office type settings no Servicemember is guaranteed a particular assignment in a particular location. We are provided assignments anywhere in the world, often at very short notice, based on the needs of the Army, Navy, Air Force, or Marine Corps. Every military man and woman must be prepared to serve wherever and in whatever capacity the Armed Forces require their skills. Even forward deployed units need cooks and typists.

Military personnel policy must reflect the conditions under which servicemembers live while deployed for training or operations. General Powell noted that—

> [T]he majority of our young men and women are required to live in communal settings that force intimacy and provide little privacy. It may be hard to contemplate spending 60 continuous days in the close confines of a submarine; sleeping in a foxhole with half a dozen other people; 125 people all living and sleeping in the same 40 by 50 foot, open berthing area, but this is exactly what we ask our young people to do.

During training and deployment, a servicemember's home frequently is a cramped tent, a crowded berth on a vessel, or an open-bay barracks. The little privacy that a servicemember can find in such circumstances is highly valued.

During field training exercises and deployments, every effort is made to ensure that men and women are provided with separate living arrangements. One of the factors in dictating the pace of increasing the opportunities for women in the armed forces has been the need to accommodate sexual privacy with respect to living, rest room, and bathing facilities for deployed troops.

The separation of men and women is based upon the military necessity to minimize conditions that would disrupt unit cohesion,

such as the potential for increased sexual tension that could result from mixed living quarters. General Powell stated that—

> Cohesion is strengthened or weakened in the intimate living arrangements we force upon our people. Youngsters from different backgrounds must get along together despite their individual preferences. Behavior too far away from the norm undercuts the cohesion of the group. In our society gender differences are not considered conducive to bonding and cohesion within barracks living spaces.

It is reasonable for the armed forces to take these factors into consideration in establishing gender-based assignment policies and it is reasonable for the armed forces to take this into consideration when addressing issues concerning persons who engage in or have the propensity or intent to engage in sexual activity with persons of the same sex.

The presence in military units of persons who, by their acts or statements, demonstrate a propensity to engage in homosexual acts, would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are essential to effective combat capability

Military life is fundamentally different from civilian life. The extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion require that the military community, while subject to civilian control, exist as a specialized society. The military society is characterized by laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable in civilian society.

The standards of conduct for members of the armed forces completely regulate a service member's life, twenty-four hours a day, from the day a person acquires military status until the day that person is discharged. Military personnel must be available, at all times, for worldwide deployment to a combat environment. Their conduct is subject to the Uniform Code of Military Justice at all times—on base and off base, on duty and off duty.

The world-wide deployment of U.S. military forces, the international responsibilities of the United States, and the potential for involvement in actual combat frequently require the involuntary assignment of military personnel in circumstances in which their living conditions are spartan and primitive, characterized by forced intimacy and little or no privacy.

In view of the unique conditions that characterize military life, there is broad agreement that lifting the restrictions on the service of gay men and lesbians would be detrimental to the best interests of the armed forces.

General Colin Powell, Chairman of the Joint Chiefs of Staff, testified before the committee on July 20, 1993 that—

> [T]he presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces.

When asked about his position in light of the fact that military personnel can be asked to work with DoD civilians who may be gay or lesbian, General Powell responded by describing the unique nature of military service:

> Active military service is not an everyday job in an ordinary workplace. It requires a unique blend of skills, ethics, culture, and bonding to ensure an effective warfighting force. There is often no escape from the military environment for days, weeks, and often months on end. We place unique demands and constraints upon our young men and women not the least of which are bathing and sleeping in close quarters. The fact that as military members we serve 24-hours a day under often severely constrained conditions is more than rhetoric, it is a way of life.

General Powell emphasized that the views of the Joint Chiefs were based upon careful, thorough, and open-minded review of the issue:

> The Joint Chiefs and I have spent an enormous amount of time considering this issue. We had the President's guidance from January and we owed him and the Secretary of Defense our . . . very best advice on this issue. We challenged our own assumptions. We have challenged the history of this issue. We have argued with each other.
>
> We have consulted with our commanders at every level, from lieutenant [and] ensign all the way up to the commander in chief[s] of the various theaters. We have talked to our enlisted troops. We have talked to the family members who are part of the armed services team. We examined the arguments carefully of those who are on the other side of the issue from us.

He also made it clear that the recommendations of the chiefs were based solely upon considerations of military effectiveness:

> Our concern has not been about homosexuals seducing heterosexuals or heterosexuals attacking homosexuals. The first of these so-called problems is manageable and the second so-called problem is punishable. For us, the issue is also not what is acceptable in civilian life, and it is not our place as the uniformed leaders of the armed forces to use our official position to make moral or religious judgments on this issue.
>
> Our perspective is a unique one, and it is the unique perspective of the military and what is best for military effectiveness. The military exists to fight the Nation's wars, to accomplish our war-fighting mission. Hopefully, we are always strong enough to deter wars, but always ready to fight and win . . . if necessary.

General H. Norman Schwarzkopf, U.S. Army (Ret.), who commanded U.S. and Coalition forces in Operations Desert Shield and Desert Storm, testified before the Committee on May 11, 1993:

> I am opposed to . . . lifting the ban on homosexuals in the military service, and my opposition grows out of honest

> concern for the impact that such a measure would have on the men and women of the armed forces and the resultant reduction in our Nation's ability to protect our vital interests.
>
> [I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war . . .
>
> [I]n every case I am familiar with, and there are many, whenever it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered.

Lieutenant General Calvin Waller, U.S. Army (Ret.), who served as the Deputy Commander in Operations Desert Shield and Desert Storm, testified before the Committee on April 29, 1993:

> Cohesion and discipline are the soul of a military organization, [and] it is my opinion that [allowing] homosexuals . . . total openness in our Armed forces would cause less ready units or units that would not nearly be as effective as the units we currently have. . . .
>
> There is a big difference between the normal workplace of 8 hour days and a military unit, where units are routinely required to live in close and cramped quarters under the most adverse conditions. Having a casual encounter with an individual who is openly homosexual is one thing. . . . [O]n the other hand, having to be exposed to the same individual on a 24 hour basis, day in and day out, is "a horse of another color."

Command Master Chief David Borne, U.S. Navy, testified on May 11, 1993, that—

> One the most compelling arguments against allowing openly gay men and women to serve in the military is privacy. However, there are others. Life aboard ship is not an eight-hour-a-day job. It is 24 hours a day, seven days a week, for as long as six months at a time. And that is if you are lucky. Some of us have done more. We sleep in extremely close quarters together. We use the same head or bathroom facilities, and you have nowhere you can go to just get away from your coworkers. In other words, you live together.

The committee carefully considered the testimony of other witnesses, including current and former members of the armed forces and former Assistant Secretary of Defense Lawrence Korb, who testified on March 31, 1993 that these problems could be overcome through training and education.

The committee is well-aware of the large and effective training establishment maintained by the armed forces. The Committee also notes that training troops to change social attitudes is a formidable task.

The issue, however, is not whether military personnel can be trained to accept gays and lesbians as co-workers. As the committee has noted elsewhere in this report, military personnel may be required to work with gays and lesbians who are DoD civilian employees or contractor employees. No servicemember has the right to refuse to work with a gay or lesbian or to abuse or harass such a person. This is not the same, however, as requiring military personnel to share their personal living spaces with individuals who, by their acts or statements, demonstrate a propensity or intent to engage in sexual conduct with persons of the same sex.

General Colin Powell, Chairman of the Joint Chiefs of Staff, emphasized the differences in the armed forces between the issue of homosexuality and the issues of race and gender:

> Unlike race or gender, sexuality is not a benign trait. It is manifested by behavior. While it would be decidedly biased to assume certain behaviors based on gender or membership in a particular racial group, the same is not true for sexuality. We have successfully mixed rich and poor, black and white, male and female, but open homosexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force. It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.

Major Kathleen Bergeron, U.S. Marine Corps, offered the following observations at the May 11, 1993, hearing:

> I do not believe that any amount of sensitivity training or reeducating will change the way Marines think or feel about homosexual behavior because there is nothing more basic to an individual than his or her sexuality. Homosexuals are tolerated in the civilian community because individuals can separate their jobs from the other aspects of their lives. Civilians go home at night and distance themselves from the workplace. If homosexuals were allowed to serve in the military, the rules would have to change. Marines would have to be afforded the same considerations their civilian counterparts now have.

It is one thing to use military training and education to ensure that military personnel treat all persons, including DoD civilians and contractors who happened to be gay or lesbian, with dignity and respect. It would be something very different, however, to direct that military training and education be used to require military personnel to accept shared living arrangements with persons who, by their acts or statements, demonstrate a propensity or intent to engage in sexual conduct with persons of the same sex.

Sexual behavior is one of the most intimate and powerful forces in society. In civilian life people are not compelled to live with individuals who are sexually attracted to persons of the same sex, and the committee finds no military necessity to compel persons to do so in the military.

The reason it would be inappropriate to permit persons who engage in or have a propensity or intent to engage in homosexual acts to serve in the unique conditions that characterize military service was underscored by the General Counsel of the Department of Defense on July 21, 1993. In response to the question of why the armed forces would discharge an individual for stating: "I have a propensity to homosexuality, but I have resisted that propensity and have not engaged in any homosexual acts," she said:

> The definition of homosexual conduct, which is the basis for discharge, includes a statement by a servicemember that demonstrates a propensity. Now, if you say that you have a propensity, I would say that demonstrates that you have a propensity, and that is all that is required. The military is not required to take the risk that you will not engage in the act.

The committee agrees that the armed forces should not be required to take that risk in the unique conditions of forced intimacy and minimal privacy that characterize military life.

There are important differences between the issue of racial integration and the issues related to the service of gays and lesbians in the armed forces

One of the arguments advanced in favor of lifting the restrictions against the service of gays and lesbians in the armed forces is that the current ban is simply the product of prejudice, similar to the prejudice involved in opposition to racial integration of the armed forces after World War II.

This issue was eloquently addressed by General Colin Powell, Chairman of the Joint Chiefs of Staff, in a letter dated May 8, 1992 to Representative Patricia Schroeder:

> I am well aware of the attempts to draw parallels [to] the positions used years ago to deny opportunities to African-Americans. . . . I need no reminders concerning the history of African-Americans in the defense of their Nation and the tribulations they faced. I am a part of that history.
>
> Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human characteristics. Comparison of the two is a convenient but invalid argument. I believe the privacy rights of all Americans in uniform have to be considered, especially since those rights are often infringed upon by the conditions of military service.

The committee notes that opposition to racial integration in the post-World War II period included stereotypes attributing behavior deficiencies to African-Americans. The committee also notes that there is prejudice based upon stereotypes against gays and lesbians in American society. The committee emphasizes, however, that its position on the service of gays and lesbians is not based upon stereotypes, but upon the the impact in the military setting of the conduct that is an integral element of homosexuality.

Homosexuality is not merely an abstract sense of identity. It is intimately connected with conduct. The Random House Dictionary

defines "homosexuality" to mean "sexual desire or behavior directed towards a person or persons of one's own sex." This is consistent with Department of Defense policy, as set forth in DoD Directive 1332.14, the July 19, 1993 policy memorandum of the Secretary of Defense, and the committee's proposed legislation, which are based on conduct. The proposed legislation, for example, defines "homosexual" to mean "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."

While some individuals may view themselves as homosexual, gay, or lesbian based upon thoughts that never ripen into a propensity or intent to engage in homosexual acts, advocates of gay rights have expressly linked sexual orientation to conduct. For example, in a brief challenging the the constitutionality of sodomy laws, which were ultimately sustained by the Supreme Court, *Bowers* v. *Hardwick,* 478 U.S. 186, the Lambda Legal Defense and Education fund took the position that—

> For gay people, sexuality and their sexual orientation play an especially central role in the definition of self. . . . [Sodomy laws] impose an added burden on gay people, blocking their sense of self as well as their sexual fulfillment. . . .
>
> [S]tate regulation of same sex behavior constitutes the total prohibition of an entire way of life. . . .

It is reasonable for the armed forces to take into account the potential behavior of persons who define themselves as homosexual, gay, or lesbian. As General Powell noted in testimony before the House Budget Committee in 1992:

> [I]t is very difficult in a military setting, where you don't get a choice of association, where you don't get a choice of where you live, to introduce a group of individuals who are proud, brave, loyal, good Americans, but who favor a homosexual life style, and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive, put them in close proximity, [and] ask them to share the most private facilities together, the bedroom, the barracks, latrines, and showers.
>
> I think that is a very difficult problem to give the military. I think it would be prejudicial to good order and discipline to try to integrate that in the current military structure.

General Powell's comments do not reflect an irrational prejudice against gays and lesbians. His comments, which the Committee endorses, represent a prudent evaluation of the impact of such behavior on the armed forces, and underscore the fact that the policy is based upon prudence, not prejudice.

The restrictions on the service of gays and lesbians are based upon reasonable military personnel policy considerations

As noted in the preceding sections of this report, the restrictions on the service of gays and lesbians in the armed forces are based

upon reasonable considerations related to military morale, discipline, and unit cohesion.

Some have suggested that the policy is based upon irrational stereotypes, such as the view that homosexuals are predators or that all homosexuals inevitably are attracted to all persons of the same sex.

The committee, in recommending codification of restrictions related to homosexuality, does not rely upon such stereotypical views. The committee notes that some individuals may view themselves as "homosexual", "gay," or "lesbian" based upon intentions that are never acted upon, just as there are persons who view themselves as heterosexual who remain celibate. Likewise, the committee notes that not every gay or lesbian person will find every person of the same sex to be sexually attractive, just as not every heterosexual person finds every person of the opposite sex to be sexually attractive.

It would be irrational, however, to develop military personnel policies on the basis that all gays and lesbians will remain celibate or that they will not be sexually attracted to others. When dealing with issues involving persons of different genders, for example, the armed forces do not presume that servicemembers will remain celibate or that they will not be attracted to members of the opposite sex. On the contrary, the military specifically provides men and women with separate quarters in order to ensure privacy because experience demonstrates that few remain celibate and many are attracted to members of the opposite sex.

Similar considerations apply to the development of policies with respect to homosexuality. The committee agrees with the view of the Department of Defense that it is appropriate to take into consideration that when a person indicates that he or she has a propensity or intent to engage in homosexual act, the armed forces are not required to wait until the person engages in that act before taking personnel action. As noted elsewhere in this report, the courts have sustained the Department's position and the committee agrees.

The committee notes that the under current DoD Directives and the July 19, 1993 Memorandum of the Secretary of Defense, separation is required when there is a finding that the individual has the propensity or intent. The government is not required to prove in each individual case that a service member will not remain celibate or to otherwise prove adverse impact on a specific unit. The committee agrees with this approach. No service member is guaranteed that he or she will remain in any particular unit, and the armed forces must be able to manage their personnel by establishing qualification standards that facilitate worldwide assignment and timely deployment.

Restrictions on the service of gay men and lesbians do not violate the constitutional rights of military personnel

As noted above, the responsibility for establishing the regulations for the government of the land and naval forces is vested in the Congress. The rights of military personnel are established by the Congress and by the Executive Branch, acting under authority granted by the Congress. The Supreme Court repeatedly has em-

phasized that the application of constitutional rights to members of the armed forces may take into account the unique requirements of military service and may differ in substantial degree from the application of such rights in civilian life. The committee has carefully considered the constitutional rights of military personnel and prospective members of the armed forces, including those who are gay and lesbian, in drafting its recommendations.

Under current DoD policy, a servicemember's admission that he or she is homosexual provides a basis for discharge because the admission establishes a rebuttable presumption that the individual is a person who engages in, desires to engage in, or intends to engage in homosexual acts. The admission is not a statement protected by the free speech guarantees of the First Amendment because it "can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct." *ben Shalom* v. *Marsh,* 881 F.2d 454, 464 (7th Cir. 1989), cert. denied 110 S. Ct. 1296 (1990). See also *Pruitt* v. *Cheney,* 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992); *Rich* v. *Secretary of the Army,* 735 F.2d 1220 (10th Cir. 1984). As the court noted in ben Shalom, "the Army does not have to take the risk that an admitted homosexual will not commit homosexual acts that will be detrimental to its assigned mission." 881 F.2d at 460–61. The committee agrees with these views and has incorporated these concepts into its recommendations.

The discharge policy, as set forth in current DoD policy and as recommended by the committee, does not violate the due process or equal protection requirements of the Constitution. In response to a question about the differing treatment of homosexual and heterosexual behavior in the armed forces, the General Counsel of the Department of Defense testified on July 21, 1993 that—

> The courts have specifically addressed the issue of the distinction that is made within the Uniform Code, within the Manual for Courts-Martial, and within our regulations between homosexual conduct and heterosexual conduct, and have repeatedly deferred to the military judgment that such distinctions are appropriate. [I]t is my view that if those precedents hold, that the courts in the future will reach the same result with respect to [Secretary Aspin's] July 19th policy.

Military personnel do not have a constitutionally protected property interest in continued military service, and there is no protected liberty interest arising from a discharge based on homosexuality. Homosexual conduct is not a fundamental right and a classification based upon the choice of one's sexual partners is not a suspect classification. Moreover, there is no constitutionally protected privacy right to engage in homosexual conduct. *See Woodward* v. *United States,* 871 F.2d 1068 (Fed. Cir. 1989); *Dronenberg* v. *Zech,* 741 F.2d 1388 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army,* 735 F.2d 1220 (10th Cir. 1984). *Beller* v. *Middendorf,* 7632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). *Cf. Bowers* v. *Hardwick,* 478 U.S. 186 (1986).

The committee has taken note of a district court opinion, *Meinhold* v. *Department of Defense,* 808 F. Supp. 1455 (C.D.Cal.

1993) (holding that there is no rational basis for DoD's restrictions on the recruitment and retention of gays and lesbians). This opinion, which is not consistent with the decisions of other federal courts that have considered the DoD policy, was issued prior to the President's January 29, 1993 announcement of an interim policy, this committee's hearings, and the President's announcement of a revised policy on July 19, 1993. The review undertaken by the Executive Branch and this committee's hearings have established that the presence in the armed forces of persons who, by their acts or statements, have demonstrated a desire or propensity to engage in homosexual acts, would be contrary to the vital interest in ensuring morale, good order, discipline, and unit cohesion in the armed forces.

Legal issues in civilian society

The committee has taken note of legal issues involving gay men and lesbians in civilian society.

The Supreme Court, in *Bowers* v. *Hardwick,* has ruled that there is no constitutional right to engage in private homosexual acts, and that such acts may be proscribed by the criminal law. Sodomy is a crime in at least 24 states. Although proposals for decriminalization were adopted in two dozen states beginning in 1961, no state has decriminalized sodomy since 1983. Since 1973, a countertrend has resulted in the enactment of criminal laws prohibiting same-sex sodomy in eight states.

Federal law does not prohibit discrimination on the basis of homosexuality. The anti-discrimination provisions of Title VII of the 1964 Civil Rights Act and related statutes do not apply to discrimination based upon sexual orientation. There is no express statutory prohibition against discrimination in the federal civil service on the basis of sexual orientation. The Civil Service Reform Act of 1978, which does not expressly mention sexual orientation, prohibits "discrimination for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." 5 U.S.C. 2302(b)(10). As a result, federal agencies may not establish a blanket exclusion of gays and lesbians, but there are circumstances in which an agency may consider homosexuality to be a factor in an employment decision for a specific position. *See, e.g., Padula* v. *Webster,* 822 F.2d 98 (D.C. Cir. 1987).

Testimony before the committee indicated that a minority of the states provide protections on the basis of sexual orientation with respect to one or more of the following: public employment, private employment, public accommodations, education, housing, credit, banking, and insurance. Eight states have enacted statutes, fourteen have provided such protections through executive orders, and several state constitutions have been interpreted to provide protections to gay and lesbian employees. Various municipalities have adopted protections for municipal employees, and approximately 25 municipalities have adopted "domestic partnership" laws. Registration under these laws is largely symbolic, but in some jurisdictions the partnership law extends certain employment benefits to the partners of municipal employees. Various employers in the public

and private sectors, including police and fire departments, have eliminated restrictions based on sexual orientation.

The committee does not find these developments to be persuasive with respect to proposed elimination of the restrictions on homosexuality in the armed forces, due to the unique conditions of service in the United States military; the combat mission of the armed forces; world-wide deployments; the potential for extreme lack of privacy over extended periods of time while deployed on military operations or on field training exercises; the potential for involuntary assignments; the extraordinary physical, mental, and emotional demands of military combat; and the critical role of unit cohesion in achieving success during military combat.

The committee notes that while some jurisdictions and employers have reduced or eliminated certain restrictions based on sexual orientation, they have done so as a matter of local choice, not as a result of federal statutory or constitutional legal requirements. The courts have sustained a variety of state actions which were challenged as discriminating against gays and lesbians, including—

Police department dismissal of gays and lesbians. *E.g., Childers* v. *Dallas Police Department*, 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd* 669 F.2d 732 (5th Cir. 1982) *Endsley* v. *Naes*, 673 F. Supp. 1032 (D. Kan 1987), *Todd* v. *Navarro*, 698 F. Supp. 81 (S.D. Fla. 1988), *Dawson* v. *State Law Enforcement Division*, (D.S.C. 1992). *See also Walls* v. *Petersburg*, 895 F.2d 188 (4th Cir. 1990) (sustaining a law enforcement agency's inquiry into an officer's off-duty same-sex relationship.)

Dismissal or sanctions against teachers based upon matters related to sexual orientation. *E.g., Ross* v. *Springfield School Dist. No. 19*, 56 Or. App. 197, 641 P.2d 600 (1982); *Rowland* v. *Mad River Local School Dist.*, 730 F.2d 444 (6th Cir.), *cert. denied*, 470 U.S. 1009 (1984); *Gaylord* v. *Tacoma School District.*

Presumptions against gays and lesbians prevailing in a child custody dispute. *E.g., G.A.* v. *D.A.*, 745 S.W.2d 726 (Mo. Ct. App. 1987).

Limiting marital status to unions of persons of the opposite sex. *E.g., Baker* v. *Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971).

While the committee takes note of the fact that there is no constitutional protection for homosexual acts, and there are no federal statutes which prohibit discrimination on the basis of homosexual orientation in civilian society, the committee emphasizes that these considerations are not essential to its recommendations. The committee makes no judgment as to whether the protection of the civil rights laws should be extended to sexual orientation. The committee's review and its recommendations have focused on the impact of homosexual conduct in the unique setting of military service. Therefore, if the Supreme Court should reverse its ruling in *Bowers* and hold that private consensual homosexual acts between adults may not be prosecuted in civilian society, this would not alter the committee's judgment as to the effect of homosexual conduct in the armed forces. The committee finds that there are no significant developments in civilian society that would require a change in military policy.

The experience of foreign nations

The committee considered testimony on the experience of foreign nations with respect to the service of gay men and lesbians in the armed forces. The committee found that although some nations permit gays and lesbians to serve in their armed forces, such service frequently is accompanied by discrimination which has the result of disadvantaging gays and lesbians with respect to assignments, tenure, or promotions. Even the Scandinavian nations and the Netherlands, which have the most liberal policies, apply a conscription policy that results in dissimilar treatment of homosexuals and heterosexuals. A declared homosexual in those countries has the option of avoiding military service, an option which is not available to heterosexuals.

There is little actual experience in foreign nations with open homosexuality in military service. As Dr. David Segal testified on April 29, 1963:

> Even where policy and law allow them to serve, very few soldiers openly declare themselves to be homosexual, perhaps because there is a risk of gay bashing and of career costs to going public. Thus, the number of military personnel in Western nations who publicly identify themselves as homosexual appears to be very small. Even in those countries with non-exclusionary policies, open homosexuals may find themselves referred for psychiatric counseling, and excluded from certain units and certain assignments.

No other nation in the world requires the members of its armed forces to serve under the conditions that face the armed forces of the United States. There is no other nation which has the international responsibilities, overseas deployments, degree of field exercises, daily operating tempo, and frequency of circumstances in which servicemembers must live in conditions of little or no privacy. The committee concludes that while the foreign experience is worth monitoring, it does not provide a relevant basis for permitting gays and lesbians to serve openly in the armed forces of the United States.

The restrictions on the service of gays and lesbians do not provide a basis for harassment or mistreatment of persons who are gay or lesbian

Department of Defense civilian personnel policies do not, as a general rule, preclude the service of gays and lesbians as civilian employees of the Department of Defense. Similarly, civilian contractors who provide equipment and services to the armed forces may employ gays and lesbians. As a result, military personnel who are assigned to work with DoD civilian or contractor employees may be required to work with persons who are gay or lesbian. They are obligated to conduct themselves in such circumstances as military professionals without regard to the sexual orientation of their civilian co-workers.

Similarly, military personnel must conduct themselves off-duty and off-post in a manner that reflects credit on the armed forces. Harassment of civilians based upon their sexuality is inappropriate.

The same considerations apply when a member of the armed forces is subject to administrative or disciplinary processing based on allegations related to homosexuality. The proper means of addressing such allegations is through administrative discharge boards or courts-martial, not through harassment or mistreatment of individual servicemembers. Every member of the armed forces, regardless of alleged misconduct, is entitled to be treated with dignity and respect during the course of any military proceedings.

As General Colin Powell said in testimony before the committee on July 20, 1993: "No soldier, sailor, airman or Marine should be subjected to harassment or violence. . . ." The committee agrees that members of the armed forces who harass or mistreat their colleagues bring discredit upon themselves and their military service.

The committee notes that there have been instances of abuse of gay and lesbian servicemembers, including a recent court-martial which resulted in a conviction for murder of a servicemember who was facing discharge for homosexuality. The committee condemns any harassment or mistreatment of gay men and lesbians by members of the armed forces. The Uniform Code of Military Justice provides ample authority to discipline individuals who harass or mistreat civilian employees, members of the civilian community, or fellow servicemembers based upon sexual orientation. The committee expects the Secretary of Defense to monitor this issue and, if necessary, to issue appropriate regulatory guidance.

The July 19, 1993 Secretary of Defense Policy Memorandum

On July 19, 1993, Secretary Aspin submitted to Congress a memorandum which he had issued to the Secretaries of the Military Departments and the Chairman of the Joint Chiefs of Staff entitled "Policy on Homosexual Conduct in the Armed Forces" (hereafter referred to as the "July 19 Memorandum"). Under the July 19 Memorandum, current policies remain in effect until October 1, 1993. The committee reviewed the memorandum during three hearings on July 20, 21, and 22, receiving testimony from the Secretary of Defense, the Joint Chiefs of Staff, the General Counsel of the Department of Defense, and the Military Working Group. The committee carefully considered the July 19 Memorandum and the related hearings in the development of its legislative recommendations.

Based upon the testimony received at the hearing, the committee finds that the Department of Defense has retained the central features of its policy concerning homosexuality in the armed forces. The July 19 Memorandum carries forward longstanding Department of Defense policy, as reflected in the current version of DoD Directive 1332.14, which focuses on conduct that is incompatible with military service—homosexual acts, marriages, and statements that demonstrate a propensity to engage in homosexual acts. The July 19 Memorandum makes it clear that the mandatory discharge policy is necessary because such matters interfere "with the factors critical to combat effectiveness, including unit morale, unit cohesion, and individual privacy."

In the July 19 Memorandum, the description of the basic reasons for separation on the basis of homosexual acts, statements, and marriages remains unchanged, except for minor drafting clarifica-

tions. The July 19 Memorandum, for example, refers to statements which indicate a "propensity or intent" rather than "desire or intent" as under the current version of DoD Directive 1332.14. The committee views this as a useful clarification that will not affect the practical effect of the policy. The General Counsel confirmed that acts and statements that in the past provided a basis for discharge continue to provide a basis for discharge under the July 19 Memorandum.

The basic procedures for processing such cases also remain the same. The government must prove by a preponderance of the evidence that an individual engaged in the proscribed conduct or made the requisite statement. If the case involves a homosexual act, the burden then shifts to the individual to show that he or she meets the traditional criteria for retention in a homosexual acts case (including a showing that the conduct is a departure from the member's usual and customary behavior and the member does not have a propensity or intent to engage in homosexual acts). If the case involves a statement, the individual carries the burden throughout the proceeding of demonstrating that he or she is not a person who engages in or has a propensity or intent to engage in homosexual acts.

The July 19 Memorandum would make two changes in the way that the underlying policy is administered. First, it would continue the interim policy, established on January 29, 1993, that questions concerning homosexuality would not be asked as part of accession processing. Second, it would provide guidance on the conduct of investigations, including criminal investigations, administrative investigations, and commander's inquiries.

The July 19 Memorandum expressly states: "Any changes to existing policies shall be prospective only." The General Counsel confirmed in testimony on July 22 that there is nothing in the July 19 Memorandum which would cast doubt on the legal sufficiency of either the pre-January 29, 1993 policy or the January 29, 1993 interim policy; nor was there anything in the July 19 Memorandum that would provide a basis for a person to challenge successfully the validity of an administrative or court-martial action taken under either the pre-January 29, 1993 policy or under the January 29, 1993 interim policy.

The committee reviewed the investigative guidance during its hearings on July 20–22. The committee notes that military commanders and investigative agencies have broad powers to initiate inquiries, inspections, and investigations. These powers—which are essential to the commander's authority to maintain morale, good order and discipline, and unit cohesion—are subject to the limitations provided in the Uniform Code of Military Justice and the Manual for Courts-Martial. In addition, the Department of Defense and its components issue a variety of directives and guidelines that pertain to investigations.

The committee agrees that guidelines can provide a useful means of ensuring the proper allocation of scarce Department of Defense investigative resources and the establishment of reasonable investigative priorities. The committee is concerned, however, about the number of issues concerning the application of the guidelines that were raised in the committee's hearings. It is important that the

guidelines not be misinterpreted to establish new grounds for challenging administrative or disciplinary proceedings. The committee considered whether it should recommend legislation to clarify the guidance on investigations, but decided not to do so for the following reasons.

First, the July 19 Memorandum expressly states that it "creates no substantive or procedural rights". The significance of this provision was explained by the General Counsel on July 22:

> Chairman NUNN. Does the July 19th policy give an individual the right to invalidate an administrative or judicial proceeding or to exclude the use of any evidence in such a proceeding by alleging that an investigation was conducted in a manner contrary to the policy?
>
> Ms. GORELICK. No.
>
> Chairman NUNN. Tell us why.
>
> Ms. GORELICK. These are guidelines for commanders and investigators to try to improve internally our administration of this process. And it is not intended to create any substantive or procedural rights to encumber the necessary flexibility that the military must have in approaching the management of such a large group of personnel.

The General Counsel concurred with Senator Nunn's observation that the guidance does not "set up a whole set of legal obstacles that have to be adjudicated by a judge every time a commander makes a decision. This is * * * commonsense guidance and not a legal standard * * *." This means that the guidance can be reviewed, revised, and clarified on the basis of experience without disrupting past or pending cases.

Second, she confirmed that the references to "credible information" and "reasonable belief" as grounds for initiating investigations and inquiries constituted guidance for commanders to use in making commonsense judgments about the allocation of resources, and did not involve a legal standard, such as probable cause.

Third, the General Counsel assured the committee that the guidance will not be implemented in a manner that establishes unusual restrictions on the authority of commanders to initiate investigations. She noted that while the guidelines provided "additional guidance" for investigating homosexual cases, the guidance was "consistent with the way in which we approach other underlying offenses or problems." The discretion of commanders to initiate investigations was stressed by Secretary Aspin in his testimony before the committee on July 20, 1993:

> [I]n the last analysis, this policy leaves it up to the unit commanders. Now, there is going to be from each of [the military] departments and the Department of Defense generally some kind of guidelines for them, but we are essentially going to leave it up to the unit commanders to institute this policy and to make it work.

Secretary Aspin also noted: "It is up to the individual commander to determine when he has credible information."

Fourth, the General Counsel made it clear that a single statement, if the commander determined it to be credible, would provide

the basis for an investigation: "If service member A says to servicemember B 'I am homosexual' and * * * service member B then goes to the commander and says 'service member A said he was homosexual,' if the commander believes service member B, then that is absolutely grounds for initiating a discharge."

Fifth, the General Counsel clarified the guidance which provided that an activity such as "association with known homosexuals at a gay bar, possessing or reading homosexual publications, or marching in a gay rights rally" did not, by itself, provide a basis for initiating an investigation:

> In assessing what is credible information to initiate an inquiry, a commander may consider whether such actions as frequenting gay bars, reading gay literature, or marching in a gay rights parade are non-verbal statements which show a propensity to engage in homosexual acts. What the policy recognizes is that heterosexuals, as well as homosexuals, might march in gay rights parades, frequent a gay bar, [and] read gay literature. * * * [C]ommanders should be sensitive to the legitimate interests of service members in what they read and who their friends are and what they believe in.

The General Counsel also made it clear that the guidance regarding presence at gay bars did not restrict the authority of commanders to consider any conduct or statements occurring at such establishments, nor did it restrict the discretion of commanders to declare establishments off-limits or to consider information about conduct or statements occurring at such an establishment.

In summary, the committee finds that the July 19 Memorandum, as explained in the Department's authoritative testimony before the committee, is consistent with past DoD separation policy. The committee also received assurances from the Department of Defense that the investigative guidance would be implemented in a manner that would provide commanders with the discretion they need to maintain good order and discipline. In developing the committee's legislative recommendations, the committee specifically took into account the Department's position that the Memorandum does not affect past cases and does not establish substantive or procedural rights with respect to future cases. The committee will carefully monitor the implementation process to ensure that the policy is implemented in a manner consistent with the Department's testimony and the statutory framework recommended by the committee.

IV. Sectional Analysis

Section 546 would establish an express statutory policy concerning homosexuality in the armed forces.

Codification (sec. 546(a))

The statutory policy would be set forth in section 654 of title 10, United States Code.

Findings (10 U.S.C. 654(a))

This provision would set forth the findings that describe the basis for the policy recommended by the committee. The findings reflect long standing Department of Defense policy, as set forth in DoD Directive 1332.14, that "[h]omosexuality is incompatible with military service * * * [because 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."

Policy (10 U.S.C. 654(b))

This provision would codify the standards and procedures for separation on the basis of homosexuality. Separation is authorized for persons who engage in homosexual acts, statements and marriages.

A servicemember would be discharged if there is an approved finding that the individual has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts. A homosexual act, as defined in 10 U.S.C. 654(f), means "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." It also includes any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in such an act. This reflects the definitions in DoD Directive 1332.14 and the July 19, 1993 Memorandum issued by the Secretary of Defense.

The servicemember who may be retained in such circumstances only if there is a further finding that the member has demonstrated that: the conduct is a departure from the servicemember's usual and customary behavior; it is unlikely to recur; it was not accomplished by use of force, coercion or intimidation; the member's continued presence is consistent with the interests of the service in proper discipline, good order, and morale; and the member does not have a propensity or intent to engage in homosexual acts. These standards reflect current Department of Defense policy in DoD Directive 1332.14 and the July 19, 1993 Memorandum issued by the Secretary of Defense.

A servicemember would be discharged if there is an approved finding that the member has made a statement that he or she is a homosexual. The committee intends that this provision be interpreted in accordance with the testimony of the General Counsel of the Department of Defense on July 21 and 22, 1993 that the term "statement" includes a nonverbal statement, and that an act may constitute a non-verbal statement. The servicemember has the opportunity to submit evidence in rebuttal, but the servicemember may be retained only if there is a further finding that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

The restriction concerning statements demonstrating a propensity or intent to engage in homosexual acts reflects current Department of Defense policy, as continued in the Secretary of Defense's July 19, 1993 Memorandum. It is based on the presumption that when a member of the armed forces makes a verbal or nonverbal

statement that "I am homosexual," or any other words to the same effect, the member is stating that he or she is a person who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in" homosexual conduct.

The committee agrees that it is reasonable for the armed forces to presume that when a person uses the term "I am homosexual," the individual engages in, attempts to engage in, has a propensity to engage in, or intends to engage in impermissible conduct. It is appropriate for the armed forces to separate the individual from military service without waiting until the individual's propensity or intent to violate the UCMJ ripens into specific conduct prejudicial to good order and discipline. *See ben Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied* 110 S. Ct. 1296 (1990).

The committee intends that this provision be interpreted in accordance with the following points, which are consistent with the interpretations made by the General Counsel of the Department of Defense during her testimony before the committee on July 21 and 22.

First, once the government introduces evidence that the member has stated that he or she is a homosexual, the burden shifts to the member and remains with the member throughout the proceeding to demonstrate that he or she is not a homosexual as defined in the statute (i.e., a person who engages in, attempts to engage in or has the propensity or intent to engage in homosexual acts).

Second, a member cannot rebut the presumption simply through a promise to adhere to military standards of conduct in the future; nor can the member rebut the presumption by a statement to the effect that he or she has a propensity towards homosexuality but has not acted on it.

Third, if the member in rebuttal offers evidence to the effect that he or she does not engage in homosexual acts or has a propensity or intent to do so, that does not shift the burden to the government. Because the burden remains on the member throughout the proceeding, the member bears the burden of persuading the fact-finder by a preponderance of the evidence that the rebuttal is more credible than the original statement (e.g., by proving that the original statement was made in jest). If the fact-finder determines that the evidence in rebuttal does not overcome the presumption, the evidence is legally sufficient to sustain a discharge.

Fourth, the presumption applies when the individual makes a verbal or nonverbal statement that he or she is homosexual, or other words a reasonable person would take as such a statement, *e.g.*, "I am gay," "I am lesbian," "I have a homosexual orientation," "I am sexually attracted to person of the same sex", or nonverbal statements to the same effect. As noted by the General Counsel, the implementing regulations would make it clear that the final assessment as to what the words were intended to convey would be made by commanders.

The policy setting forth the grounds for discharge is conduct-based. There are no on-post/off-post, on-duty/off-duty, or public/private distinctions. The armed forces have a legitimate interest in the behavior of military personnel at all times and places, off-post as well as on-post. The Supreme Court has expressly rejected any requirement that military offenses be "service-connected." *Solorio*

v. *United States*, 483 U.S. 435 (1987). Accordingly, the prohibitions apply at all times and in all places. This is consistent with the July 19, 1993 Policy Memorandum and the testimony of the Department of Defense General Counsel.

The committee agrees with Department of Defense policy that acts and statements which form a basis for administrative discharge may include such conduct even when the act or statement occurs at a time when the conduct would not necessarily be subject to criminal prosecution under the Uniform Code of Military Justice (e.g., while the individual is acting in a civilian capacity, such as before joining the armed forces or when a reservist is in his or her civilian capacity). This is consistent with general military personnel policy, under which a person's qualifications for service may be affected by the circumstances of his or her civilian life, even if the act in question occurs at a time when the individual is not subject to military criminal jurisdiction under the Uniform Code of Military Justice. The committee's proposal continues current policy. The committee recognizes the authority of the Secretary of Defense, in developing implementing rules consistent with the statutory standards for discharge, to provide guidance on the treatment of information that involves isolated matters that are remote in time.

The committee notes that nothing in this provision precludes commanders from taking action to separate a member under another provision of law or to refer cases to trial by court-martial.

Entry standards and documents (10 U.S.C. 654(c))

This provision would require the Secretary of Defense to ensure that the standards for enlistment and appointment of members of the armed forces reflect the restrictions based on homosexual acts, statements, and marriages. This reflects current DoD policy and the July 19, 1993 Memorandum issued by the Secretary of Defense.

The committee also recommended a provision that the codified restrictions in 10 U.S.C. 654(b) be set forth in the enlistment contract and in similar documents used in connection with the appointment of officers. The purpose of this provision is to provide potential members of the armed forces with an opportunity to consider the implications of the policy prior to making a commitment to join the armed forces. This document is not a prerequisite to separation action under this provision, and the government need not prove that the individual read or signed an accession document that contained a copy of subsection (b) in order to take administrative or disciplinary action.

Required briefings (10 U.S.C. 654(d))

The committee recommends codifying the requirement, established in the January 29, 1993 interim policy and continued in the July 19, 1993 Memorandum by the Secretary of Defense, that the military justice briefings which military personnel receive upon entry into military service and periodically thereafter include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including sexual harassment as well as the restrictions based upon homosexual acts, statements, and marriages. This briefing is not a prerequisite to separation action under this provision, and the government need

not prove that the individual received such a briefing in order to take administrative or disciplinary action.

Rule of construction concerning avoidance of military service (10 U.S.C. 654(e))

This provision would make it clear that nothing in this section could be construed to require separation processing when an individual has engaged in conduct or made a statement simply for the purpose of obtaining a discharge (e.g., to avoid combat duty or a deployment).

Definitions (10 U.S.C. 654(f))

The provision recommended by the committee would define the terms "homosexual," "bisexual," and "homosexual act." These definitions reflect DoD Directive 1332.14 and the July 19, 1993 memorandum issued by the Secretary of Defense.

Regulations (sec. 546(b))

Under the provision recommended by the committee, the Secretary of Defense would be required to revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement the policy that would be set forth in 10 U.S.C. 654.

Savings provision (sec. 546(c))

It is the committee's view that the policy in effect prior to January 29, 1993, the January 29, 1993 interim policy, the July 19, 1993 policy, and this provision are all consistent with applicable constitutional requirements. Section 546(c) would make it clear that nothing in this provision may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense.

Sense of Congress concerning accession questions (sec. 546(d)(1)

This provision expresses the sense of Congress that the suspension of questioning concerning homosexuality as part of accession processing under the January 29, 1993 interim policy should be continued, but the Secretary of Defense may reinstate such questions, or such revised questions as he deems appropriate, if necessary to effectuate the congressional policies concerning homosexuality in the armed forces.

Although the law has prohibited homosexual conduct expressly since the enactment of the Articles of War of 1920, the systemic questioning of recruits about sexual orientation was not initiated until World War II. Department of Defense records indicate that specific questions on enlistment documents were not introduced until 1956. Accession questioning was suspended as part of the January 29, 1993, based upon a recommendation of the Joint Chiefs of Staff. The Chiefs have recommended, and the President has agreed, that the policy of not asking questions about homosexuality during accession processing should be continued.

The committee notes that the current enlistment form does not ask about every possible indication of indiscipline as part of the ac-

cession processing. The committee, however, does not believe that the suspension of the question should be made permanent as a matter of statutory law. It may well be that experience under the suspension could lead the Department of Defense to conclude that the question should be reinstated. Therefore, the committee's recommendation makes it clear that the Secretary of Defense retains discretion to reinstate accession question if the Secretary determines that it is necessary to effectuate the restrictions on homosexuality.

Sense of Congress concerning self-incrimination (sec. 546(d)(2))

Article 31 of the Uniform Code of Military Justice provides members of the armed forces with a privilege against self-incrimination, including a rights-warning requirement, when they are accused or suspected of committing a criminal offense. This privilege does not apply, however, with respect to acts or statements which provide a basis for administrative action, including separation, when such acts or statements do not constitute technical criminal offenses.

The practical impact of the investigative guidance which the Secretary of Defense has drafted will not be clear until there has been some experience over a period of time. Should that experience demonstrate that there are a significant number of occasions involving questions related to homosexuality in which the rights warning requirement of Article 31 is not applicable, then it may be desirable to consider whether such questions should trigger protections similar to the privilege against self-incrimination. Accordingly, this provision expresses the Sense of Congress that the Secretary of Defense should consider issuing guidance governing the circumstances under which servicemembers questioned about homosexuality should be afforded warnings similar to the Article 31 warnings concerning the privilege against self-incrimination.