

# DoD BETRAYING CONGRESS ON HOMOSEXUAL BAN

In announcing new Regulations on Homosexual Conduct in the Armed Forces, Defense Secretary Les Aspin began his December 22 news conference by stating that the Department of Defense (DoD) directives were designed to implement the policy as announced by President Clinton on July 19, 1993.

**But between July 19 and December 22 Congress passed a law — the most important terms of which have either been left out or contradicted by several sections of the December 22 directives.**

The new law codifies and restates (almost word for word) most elements of the long-standing policy excluding homosexuals from the military. Congress passed the law with the assurance of Pentagon officials that they would support and defend the law in court.

At the same time, Congress rejected certain controversial elements of the July 19 “don't ask, don't tell” policy, primarily because testimony from the Joint Chiefs and others convinced Congress that those elements would not be clear, enforceable, and defensible in court.

**Many of these discarded concepts have re-appeared, without legal authorization, in the directives announced on December 22. In effect, the Department of Defense is renegeing on its assurances to Congress, and attempting to subvert the law by simply redefining it.**

## Homosexuality as a Bar to Military Service

The most obvious and unacceptable difference between the DoD Directives and the law as passed by Congress is the assertion, which was presented on July 19 but left out of the law, that “*Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.*”

- This liberalized statement, which appears nowhere in the law, has been substituted for the unambiguous statement in law that “*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.*” (Senate Report 103-112, p. 265)
- The directives also substitute convoluted, inferior language for the clear and unambiguous congressional findings that support the exclusion policy; e.g., “*...military life is fundamentally different from civilian life....there is no constitutional right to serve in the armed forces....success in combat requires military units that are characterized by high morale....the prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service...etc.*” (Senate Report, pp. 263 -264)

DoD's assertion that homosexuality is “*not a bar to military service*” was omitted from the law because Congress recognized an inherent inconsistency that could be easily exploited by lawyers challenging the policy in court: If homosexual orientation is not a disqualifying characteristic at the time of entry, then how can merely revealing the presence of such a factor justify dismissal?

## Enlistment Policies

The only substantive difference between the statute and the long-standing exclusion policy is the elimination of questions regarding homosexuality at the point of enlistment. The law authorizes the Defense Secretary to reinstate those questions if necessary.

- It is not clear whether applicants will be required to affirm compliance with the exclusion policy by means of their signature, or whether they can be charged with fraudulent enlistment if they knowingly violate the exclusion policy.
- The DoD directives indicate that homosexual conduct "*may constitute grounds for barring entry into the Armed Forces.*" In light of legislative history and the terms of the exclusion law, use of the operative word "*shall*" would be more appropriate than "*may.*"

#### Commander's Inquiry and Investigative Policies

Instead of carrying out the intent of Congress that the law be clear, enforceable, and defensible in court, guidelines on the kinds of "credible information" that may be used by a commander to initiate criminal investigations or separation proceedings create a great deal of confusion.

- For example, the guidelines refer to "*associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.*"
- But this appears to contradict testimony by Defense Department General Counsel Jamie Gorelick, who assured members of the Senate Armed Services Committee that commanders would retain the discretion they need to maintain good order and discipline, including the option to consider associational activities such as those described above. (Senate Report 103-112. p. 292)
- The ambiguity may cause some commanders who fear being accused of "witch-hunting" to forego administrative actions against persons who do not verbally admit to being homosexual.
- As written, the directive raises questions that would advantage those who wish to defy or erode the premises of the exclusion policy. For example, if it is all right to participate in the listed associational activities, what would be wrong with selling or distributing homosexual literature on military bases, inviting a known homosexual partner to social events and dances, or organizing gay rallies on the premises?

Furthermore, the new regulations call for investigations to be conducted in an "*even-handed manner, without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct.*"

- Concepts of moral equivalency between homosexual and heterosexual conduct are fervently advocated by homosexual activists, but are contrary to prevailing American cultural values. There is no language in the statute that supports this directive.

Rules against heterosexual misconduct should be enforced on their own merits. According to the House Report accompanying the law rejected "equal application" enforcement requirements were rejected because they "*could cause the deferral of government prosecution of legitimate criminal cases by leaving the government subject to challenges based on a failure to meet artificial quotas and goals.*" (p. 290)

- If taken to its logical conclusion, the "even-handed enforcement" directive could lead to all sorts of troublesome questions; such as, if heterosexual couples may embrace or kiss in social situations, why should homosexual couples not be allowed to do the same?

#### Institutionalizing Dishonesty

DoD directives specify that "*an individual's efforts to follow DoD policy on homosexual conduct in the Armed Forces by not openly acknowledging his or her homosexual orientation do not constitute concealment.*"

- This directive, which has no support in the law, extends an open invitation for servicemembers to violate the rules by concealing their homosexuality.

- It is a form of situational ethics that institutionalizes dishonesty and deceit, contrary to the traditional honor codes of the service academies. It also conflicts with the mandate (stated in the same document) that “*Persons entering the Armed Forces should be of good moral character.*”

The directives also require that “*Information about homosexual orientation or conduct obtained during a security clearance investigation will not be used by the military departments in separation proceedings.*”

- This directive imposes a “don't tell” obligation on commanders, at the expense of their responsibility to care for the well-being of their troops.
- If the same “don't tell” obligation is applied to medical personnel who become aware of infection or high-risk behavior among certain patients, the well-being and health of military personnel could be put in serious jeopardy.

#### “Status” vs. “Conduct” — the “Rebuttable Presumption”

The DoD directives employ Orwellian double-think to draw imaginary distinctions between status and conduct. None of this is justified, since the long-standing exclusion policy and the new law that codifies it are both based on conduct, not status.

- As the statute recognizes, it is entirely reasonable to presume that persons who say they are homosexuals engage in the conduct that defines what it means to be a homosexual. By definition, a person who does not engage in that conduct does not have a homosexual “status” or “orientation.”
- Under the old policy as well as the new statute, this logical presumption is “*rebuttable*,” but only under extremely narrow circumstances; i.e., a service member says or does something entirely out of character while intoxicated, or to escape military service. (See Senate Report, p. 290) The “*rebuttable presumption*” provision does not constitute a significant revision of policy. (Homosexual groups are not demanding the right to remain celibate in the military.)
- The Senate Report accompanying the new legislation addresses the issue directly: “*It would be irrational...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 a person indicates that he or she has a propensity or intent to engage in homosexual acts, the armed forces are not required to wait until the person engages in that act before taking personnel action...*” (p. 284)
- The accompanying House Report is equally emphatic: “*...the committee concluded that any effort to create — as a matter of policy — a sanctuary in the military where homosexuals could serve discreetly and still be subject to separation for proscribed conduct would be a policy inimical to unit cohesion, morale, welfare, and discipline, unenforceable in the field, and open to legal challenge.*” (p. 289)
- Since most commanding officers are not lawyers, confusion caused by the DoD directives will create a “chilling” effect; i.e., a reluctance to initiate separation proceedings for fear of violating one section of the regulations while attempting to comply with another.

#### “Desire”, “Propensity” and “Intent”

The directives attempt to split hairs between “*desire*” and “*propensity*” to engage in homosexual acts, with the implication being that use of the phrase “*propensity or intent*” makes the policy less stringent.

- But according to both the Webster's Collegiate and the American Heritage College Dictionaries, the word means “*an innate inclination.*” Since homosexuals claim that their orientation is innate, use of the word “*propensity*” cannot be interpreted as a loophole or a weakening of the policy.
- The Senate Report refers to testimony by the DoD General Counsel in noting that use of the phrase “*propensity or intent*” (to engage in homosexual acts) “*will not affect the practical effect of the policy.*” (p. 290)

#### Military Training Scenarios

A number of hypothetical scenarios are described in the DoD Training Plan, with discussion points that provide guidance on what sort of investigatory procedures would be permissible under various circumstances. Most of the scenarios are consistent with

current, long-standing policy, but there are some which needlessly confuse the issue or conflict with congressional intent.

- For example, scenarios describing military personnel who say they are homosexual, but claim they don't engage in homosexual acts, transform the narrow "rebuttable presumption" exception described above into a wide-open loophole that could be easily exploited by homosexuals who refuse to admit that they are in violation of the exclusion policy.
- Details of the proposed training syllabus are not available as yet, but judging from recent experience with programs designed to promote acceptance of women in the military, it is reasonable to expect that "tolerance" of homosexual orientation, if not open conduct, will eventually be promoted in personnel training programs. Such a policy would put the military at odds not only with legislative intent, but with the cultural and religious values of most of its members.

#### Additional Comments re Defense Department Procedures

It was disingenuous and misleading for Secretary Aspin to suggest that the new policy enjoys strong support among uniformed people. Military tradition requires that uniformed personnel — from the Joint Chiefs on down — are not truly free to debate or dissent from formal directives once they are announced.

The newly-released DoD Training Plan also claims that a Military Working Group pursued "fairness and objectivity" in drawing up the directives.

- But the Military Working Group was not free to dissent from the President's intent to lift the ban; the only question before them was "how," not "if" the ban should be lifted.
- It is also important to note that during the course of their work, the Military Working Group granted early, closed-door access to organized homosexual and liberal groups who contributed heavily to President Clinton's campaign. Groups opposed to lifting the ban were only granted access after the Military Working Group's recommendations had already been written — a fact that was not disclosed at the time.

Even though some advocates complain because the directives don't go far enough, the truth is that their influence and recommendations are clearly reflected throughout the document.

**Advocates on both sides of the issue acknowledge that the directives constitute significant incremental change that can only lead to a complete lifting of the ban on homosexuals in the military. Every inconsistency, liberal nuance, or ambiguity will be exploited toward that end, and the needs of the military and its people will be sacrificed along the way.**

#### Conclusion

The House Report accompanying the recently-enacted legislation says that "*The Committee expects the Secretary of Defense in developing directives and regulations implementing this section to follow the committee's lead.*" (p. 289)

Unfortunately, the Department of Defense has not followed Congress' lead. Contradictory elements and gratuitous, liberalized directives that have no foundation in the law threaten to turn a solid piece of legislation into a legally unstable house of cards, designed to fall of its own weight.

If the Defense Department is allowed to transform what was supposed to be an exclusion policy into one of inclusion, the policy will then become what the courts and the homosexual activists say it is — not what the uniformed services and the Congress said it should be. Such a result would undermine sound military values — including those that are specifically referenced in the statute passed by Congress.

Congress must therefore exercise its authority and responsibility to set policy for the military, and do whatever is necessary to assure that the Department of Defense faithfully executes the law.

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