

United States Senate

WASHINGTON, D.C. 20510

March 22, 1993

Mr. Robert Bush
Post Office Box 8432
Savannah, Georgia 31412

Dear Robert:

Thank you for contacting me regarding the military's policy excluding homosexuals from serving in the armed forces.

In general, I believe we should encourage every American to serve their country in some capacity, and I applaud the patriotism of all persons, including homosexuals, who desire to serve our nation in the military. I have no doubt that homosexuals have served and are today serving in the armed forces, but most of them are not openly disclosing their sexual orientation. However, I also believe that we should give very careful consideration to the advice of our military commanders on this subject. Although we have a volunteer force, there are still important and clear differences between civilian life and military service.

Our national security requires that the armed forces maintain a high level of good order and discipline. In order to maintain military effectiveness, members of the armed forces give up many of the constitutional rights that their civilian counterparts take for granted. The need for discipline, including adherence to the chain of command, means that military members' first amendment rights of speech and association are limited. Service members are also subject to searches and command inspections in living quarters that would not meet the privacy standards and warrant requirements of the fourth amendment that we take for granted in civilian society. Military personnel face involuntary assignments that require living and working in close proximity with others under conditions that afford little or no privacy. Particularly when military units deploy, living conditions --from foxholes to cramped quarters on ships --are frequently spartan and primitive.

We have made important improvements in the quality of life in the military and in the rights afforded to service members, but the basic nature of military service --preparation for, and participation in combat --means that service members must continue to live in a closely regulated, highly regimented environment. General Colin Powell, Chairman of the Joint Chiefs of Staff, has stated that, in view of the unique conditions of

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military service, active and open homosexuality by members of the armed forces would have a negative effect on military morale and discipline.

I agree with General Powell. I support the current policy of the Defense Department excluding homosexuals from serving in the armed forces. I also believe, however, that we have to listen to other points of view on this matter. That is exactly what will happen in the coming months under the compromise on this issue announced by President Clinton and endorsed by the Congress.

The compromise provides a six-month review period for both the President and the Congress to review the Defense Department's current policy. During the review period, anyone who engages in homosexual conduct will be completely discharged from the military. Anyone who admits to being homosexual, but whose case does not involve homosexual acts, will be separated from active duty and placed in a non-pay status with the Standby Reserve. Military commanders may reassign individuals involved in homosexual cases for the benefit of the individual or the unit concerned.

New recruits will no longer be asked about their sexual orientation as part of the enlistment process. Instead, the military services will put specific and appropriate emphasis on informing all military members of the laws and regulations on sexual conduct which apply to them.

In my view, this agreement permits the review to go forward without compromising longstanding Department of Defense policies.

This spring the Armed Services Committee will begin thorough, fair and comprehensive hearings on this subject. We will hear from senior military and civilian leaders of the Defense Department. I also want to hear directly from the people who would be most affected by changing the current policy: the men and women serving in the ranks of all of the military services. We will make every effort to hear from those who want to change the current policy as well as those who want to keep the current policy. Enclosed is a floor speech I gave which outlines a number of questions that will be addressed during the course of these hearings.

This is a difficult and emotional issue. Every man and woman in this country has a right to be respected. Our Constitution enshrines individual rights and liberties. Our Constitution also underscores the essential role of government in

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providing for the common defense. When the interests of some individuals bear upon the cohesion and effectiveness of an institution on which our national security depends, we must move very cautiously. This caution is prudence, not prejudice.

I appreciate your taking the time to share your views with me on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam", written in a cursive style.

Sam Nunn

SN/cch
Enclosure



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Senate

HEARINGS ON THE DEPARTMENT OF DEFENSE POLICY EXCLUDING HOMOSEXUALS FROM SERVICE IN THE ARMED FORCES

Mr. NUNN. Mr. President, there has been a crescendo of interest building in recent weeks on the issue of homosexuals serving in the Armed Forces. Current Department of Defense policy prohibits homosexuals from serving in the Armed Forces of the United States.

During the Presidential campaign, President Clinton made it very clear that he intended to change the current policy. So I do not think anyone should be surprised that his administration is currently developing a plan to change this policy.

Contrary to some media reports, I have had the opportunity to discuss this and other important national security issues on several occasions with President Clinton. I have also had the opportunity to discuss these issues with Secretary of Defense Aspin.

I have advised both President Clinton and Secretary Aspin to seek the advice and views, first and foremost, of a broad range of military personnel—the people who would be most directly affected by any change in the current policy on service by homosexuals—before making any final changes.

This is certainly an appropriate issue for the President as Commander in Chief, and Executive orders are well within his constitutional powers. The Constitution, however, also makes it very clear that Congress has the responsibility to deal with matters of this nature affecting the Armed Forces of the United States.

Under article I, section 8 of the Constitution, the Congress has the responsibility to “raise and support armies * * * to provide and maintain a Navy * * * [and] to make rules for the government and regulation of the land and naval forces.” It is the responsibility of Congress to ensure that policies of the Defense Department enhance good order and discipline, while providing for fair and equitable personnel policies.

So the question of whether homosexuals should serve in the military is an issue on which Congress and the President share constitutional responsibility. Secretary Aspin has emphasized the need for the Congress and the executive branch to work together on this issue, and I think he is absolutely right in that respect. It is in everyone's interest to see if we can resolve this issue through consensus rather than confrontation. There is time for confrontation later if it cannot be solved by consensus, but perhaps it can.

In recent days, I have heard a number of commentators suggest that the policy of excluding homosexuals from the military dates back to 1982. One of the issues that we will explore in our

hearings is the historical development of the current policy. At this time, however, I would like to provide a brief summary of the historical development because the suggestion that the policy only dates from 1982 is inaccurate and misleading.

Until the post-World War II period, military regulations on administrative separation were drafted in a manner that gave commanders broad discretion to separate service members. During World War II, for example, Army commanders were authorized to separate individuals for “inaptness or undesirable habits or traits of character.” This regulation, which formed the basis for the discharge of homosexuals during World War II, did not list any specific traits.

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, included consensual sodomy as a criminal offense.

In 1960 the Army adopted a mandatory 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 a soldier 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, DOD-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 policy.

In the 1970's, there was increasing litigation concerning the procedures and basis for the DOD policies on the separation of homosexuals. The extent to which the authority to retain was

exercised is unclear. In several court cases, the Department was asked to provide detailed reasons for not exercising the discretion to retain. This was one of the factors leading to a detailed review of the DOD policy in the late 1970's during President Carter's administration.

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 policy was liberalized by eliminating homosexual tendencies as a reason for separation. Second, the mandatory separation policy, which had been used in the 1950's, was reinstated. This policy incorporated without substantive change in DOD Directive 1332.14, which governs enlisted administrative separations, in 1982.

In short, the authority to separate homosexuals has been in effect over a lengthy period of time, although the manner in which this policy has been implemented has varied over the years. The current policy dates from President Carter's administration. There has not been a thorough review of this policy in recent years by either the executive or the legislative branch.

During the Senate's debate last year on the National Defense Authorization Act, I engaged in a colloquy with my friend and colleague Senator METZENBAUM in which I pledged to him that the Armed Services Committee would hold hearings on the military policy in this overall area this year, and this pledge was made long before this current controversy of the last several weeks.

Our hearings on this issue will begin in March, as I announced earlier this week. We will receive testimony from the senior civilian and military leadership of the Department of Defense.

I also believe that we should hear directly from the people who will be most directly affected by any change in the current policy: the men and women serving in the ranks of all the military services. These people have every right, under our system, to be heard in this respect before final action is taken by Congress and, I hope, by the executive branch. We will make every effort to hear from those who support a change in the current policy as well as those who favor retention of the current policy.

These will not be one-sided hearings. We will hear from both sides and both points of view, with particular emphasis on those who now serve in our Armed Forces.

Mr. President, I start from the premise that we should encourage every American to serve his or her country in some capacity. I am a

strong supporter, as many of my colleagues know, of national service, and I am delighted that President Clinton is making national service a top priority of his administration. I look forward to seeing and reviewing the administration's proposals on national service in the weeks to come.

Mr. President, I applaud the patriotism of all persons, including homosexuals, who desire to serve our Nation in the military. I have no doubt that homosexuals have served and are today serving in our Armed Forces with distinction, and many times with courage and valor. But I also add that most of them serving today are not openly disclosing that sexual orientation. And I think everyone ought to bear in mind that that is enormously important as we go through this series of hearings and debates.

I also believe that we should give very careful consideration to the advice of our military commanders on this subject. Although we do have a volunteer force, there are still important and clear differences between civilian life and military life. And I also hope that everyone will keep that in mind. We are not talking about civilian life; we are talking about military life and there are fundamental differences that our military people know well but too many times those of us in civilian life do not keep in mind.

Our national security requires that the Armed Forces maintain a high level of good order and discipline. In order to maintain military effectiveness, members of the Armed Forces give up many of the constitutional rights that their civilian counterparts take for granted. The number of constitutional rights military people give up is considerable, and I do not think we stop and think about that very often.

Military personnel are subject to involuntary assignments any place in the world, often on short notice, often to places of grave danger. The requirements of discipline, including adherence to the chain of command, means that their first amendment rights of speech and of association are limited. Young officers do not walk in and tell the colonel what they think every morning; if they bring up their first amendment rights, they usually are not in the military very long.

Military trials and administrative procedures have procedural safeguards, but they are not the same as the rights that apply in a civilian setting. Service members are subject to searches and command inspections in living quarters that would not meet the privacy standards and warrant requirements of the fourth amendment that we take for granted in civilian society.

I would like to know the last time someone in the barracks raised with the first sergeant their rights under the fourth amendment when they come in for an inspection.

Members of the Armed Forces are subject to the involuntary assignment to units, duties, and living quarters that require living and working in close proximity with others under conditions that afford little and often—very often—no privacy whatsoever. Particularly when military units deploy, living conditions are frequently spartan and primitive, from foxholes to cramped quarters on ships.

In recent years we have made important improvements in the quality of life in the military, and I hope we can continue that trend. We have also made improvements in the rights afforded to service members. But the basic nature of military service, which is preparation for the participation in combat to defend the interests of the United States, means that service members must continue to live in a closely regulated, highly regimented environment, which, as everyone who serves in the military can tell you, does not accord them every constitutional protection that we have as individuals in civil society.

Gen. Colin Powell, Chairman of the Joint Chiefs, has stated that, in view of the unique conditions of military serv-

ice, active and open homosexuality by members of the Armed Forces would have a very negative effect on military morale and discipline.

Mr. President, I agree with General Powell's assessment. I also believe, however, that the country is changing, the world is changing, and that we all have to be willing to listen to other views, and those views ought to be heard. The Armed Services Committee will be hearing from all points of view. My final judgment on this matter will be affected by the testimony we receive from a wide range of witnesses.

Mr. President, our hearings—and I hope to begin those at some point in March; I cannot pin down a date now because we are going to have to prepare for them and we are going to have to make sure we get knowledgeable people to testify and also have a fairness that is evident to all in our hearings—will explore a large number of issues, including some of the following questions, which I believe people should begin to think about.

I do not pretend to have the answers to these questions, but there are too many people talking on this subject now who have not even thought of the questions, let alone the answers.

First, should the Armed Forces retain the policy of excluding homosexuals from military service?

What is the historical basis for this policy?

What is the basis for the policy in light of contemporary trends in American society? As society changes in this regard, should our military services reflect those changes in society?

What has been the experience of our NATO allies and other nations around the world, not just in terms of the letter of their laws and rules but in the actual practice in their military services on recruiting, retention, promotion, and leadership of military members?

Most importantly, what would be the impact of changing the current policy on recruiting, retention, morale, discipline as well as military effectiveness?

If the current exclusionary policy is retained, should there be an exception for persons whose record of service would otherwise warrant retention on military duty?

If so, is it possible to draft legally defensible criteria for determining whether the exception should be applied in specific cases?

If such individuals are retained, what restrictions, if any, should be placed on their sexual conduct on base as well as off base?

If the general exclusionary policy is retained, should the armed services eliminate preenlistment questions about homosexuality?

If these questions are eliminated, should the exclusionary policy be limited to those who actually engage in homosexual conduct after entering the service?

If such a policy is adopted, what policy should apply to those who openly declare their homosexuality entering military services? Even if they are not asked any questions, if they volunteer that declaration, what then would their status be?

Before determining whether the policy should be changed, should there first be an effort to determine whether it is possible to draft a practical and legally defensible code of conduct regulating homosexuals in the military setting?

This is something that Secretary Aspin has been talking about in recent days.

Should the military have a single code of conduct that applies to conduct between members of the same sex, as well as members of the opposite sex, or are we going to have separate codes of conduct for each of those groups?

Should there be a limitation on whether a service member may engage in homosexual acts at any location, on or off post, where a heterosexual act would otherwise be appropriate; or only off post?

Should there be restriction on homo-

sexual acts with other military personnel or only with nonmilitary personnel? What restrictions, if any, should be placed on conduct between members of the same sex? Should such restrictions apply in circumstances in which conduct would not be prohibited if engaged in between members of the opposite sex—that is, where such conduct would not constitute any offense under the current procedures and practices and Uniform Code of Military Justice?

Let us say that the conduct does not have any connotations of sexual harassment or fraternization or prohibited displays of affection in uniform, all of which are prohibited.

Take a request to engage in sexual activity, for example: "Let's spend the night together in a motel." What would we do with that? Is that a violation or not?

What about displays of affection between members of the same sex while they are out of uniform? What about displays of affection that are otherwise permissible while in uniform, such as dancing at a formal event?

These are the questions the military has to answer. Too many times we in the political world send down edicts and do not think about the implications of the things that have to follow. These are questions that have to be thought about and every military commander will tell you that they have to go through each one of these things, probably, plus a lot more.

If the current exclusionary policy is changed, should there be a code of conduct regulating behavior toward homosexuals in the military? What rules, if any, should be adopted to prohibit harassment on the basis of sexual orientation?

What rules, if any, should be adopted to prohibit discrimination on the basis of sexual orientation?

If discrimination is prohibited, how would a nondiscriminatory policy affect pay, benefits, and entitlements?

Should homosexual couples receive the same benefits as legally married couples? For example, nonmilitary spouses now are entitled to housing, medical care, exchange and commissary privileges, and similar benefits. Military spouses also benefit from policies that accommodate marriages, such as joint assignment programs.

If homosexual couples are given such benefits, will they also have to be granted to unmarried heterosexual couples?

If discrimination is prohibited, will this require express guidance in personnel actions—such as in instructions to promotion boards?

If discrimination is prohibited, will there be a related requirement for affirmative action in recruiting, retention, and promotion to compensate for past discrimination?

If discrimination is prohibited, will there be a need for extensive sensitivity training for members of the Armed Forces? Who will carry out this sensitivity training?

Another question, Mr. President, the military currently endeavors to respect sexual privacy by establishing, to the maximum extent practicable, separate living and bathroom arrangements for men and women. If the policy is changed, should separate arrangements also be made for those who are declared homosexuals?

If the policy is changed, what accommodation, if any, should be made to a heterosexual who objects to rooming or sharing bathroom facilities with a homosexual?

These are not frivolous questions, Mr. President. These questions are going to have to be answered at the platoon level, and the company level, and the squad level, and the barracks level, by every military commander, man and woman, in our military forces today who has any command authority.

If the current exclusionary policy is changed, what are the implications of tolerating homosexual acts among military members in light of the statutory prohibition against homosexual

acts under the Uniform Code of Military Justice?

Is it all right to stand up and say, in effect, I have committed a crime under the Code of Military Justice and then have that policy basically say—well, we will not discriminate against you because of that?

What are the legal implications in this case? If the exclusionary policy is changed, do we not also need to go back and examine the laws that relate to the Uniform Code of Military Justice?

If the exclusionary policy is changed but the statutory prohibition remains—in other words if we do not change the law but we just change the policy by Executive order—can the President in the Manual for Courts-Martial specifically exempt from prosecution actions that would not be prohibited under a revised DOD directive?

If so, is there also a need to address heterosexual, consensual sodomy? Does that, too, need to be reviewed?

Regardless of whether the policy is changed, should the President, who has the authority under the Uniform Code of Military Justice to establish maximum punishments, revise the current 5-year maximum punishment for consensual sodomy?

If the current exclusionary policy is changed, what will be the effect on pending court-martial and administrative discharge cases?

If the current exclusionary policy is changed, what will be the effect on the tens of thousands of past cases, particularly in terms of claims for back pay, reinstatement, promotions, and similar forms of relief?

Mr. President, there are other questions that others will think of. These are the ones that have come to my mind just in the last few days. These are difficult and emotional issues but they must be addressed. Every man and woman in this country has a right to be respected. That is the foundation and the heart of our Constitution which enshrines individual rights and liberties. We cherish those rights and liberties. Our Constitution also underscores the essential role of Government in providing for our common defense. When the interests of some individuals bear upon the cohesion and effectiveness of an institution on which our national security depends, we must move very cautiously. This caution, in my view, is prudence, not prejudice.

A thorough airing of these matters is essential before any final action is taken by the Department of Defense or the Congress. It is my intent that the Armed Services Committee's hearings will provide a comprehensive discussion of these issues by persons knowledgeable in military affairs, personnel management, and human relations.

Mr. President, I know there are a lot of people who would like to propose a law on the floor. And I know there is a real effort underway to have the President sign an Executive order.

I urge that those who want to legislate on this subject one way or the other think through some of these questions before they propose a specific piece of legislation. And I would also urge that the White House, the President, and all of his advisers including my good friend the Secretary of Defense, think through these questions very carefully before they take any kind of action that can be final or could be perceived as final.

This is not an easy issue. It is an issue that all of us need to think through very carefully because it is not simply the rights of homosexuals at stake—although that is a very important consideration. It is also the rights of all of those men and women who serve in the military.

