

NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 1994

R E P O R T

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ON

H.R. 2401

together with

ADDITIONAL AND DISSENTING VIEWS

[Including cost estimate of the Congressional Budget Office]



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the Secretary of Defense to issue new regulations implementing the policies no later than 90 days after enactment of this act.

The committee believes that military service is a unique calling that has no counterpart in civilian society, and the primary purpose of the armed forces is to prepare for and prevail in combat when necessary. Moreover, the committee firmly believes that the maintenance of military unit cohesion—which is the key to combat capability—and the promotion of morale, welfare, and discipline must remain paramount over the desires of a single individual or group. The committee further concludes that combat capability is unalterably tied to the ability of the armed forces to foster mutual trust and confidence among service members; to ensure integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the military services; to maintain the public acceptability of military service; and to prevent breaches of security.

Guided by those views, and based on an extensive hearing record, as well as a full consideration of the extended public debate on this issue, the committee carried forward the fundamental tenets upon which the DOD policy regarding homosexuals has long been based. In short, the committee concludes that homosexuality is incompatible with military service. This principle, which has served as the basis of previous DOD policy, would be carried forward by this section, as would be the requirement for separation of a service member for homosexual conduct.

Specifically, this section would require commanders to initiate separation proceedings if one or more of the following criteria were met: (1) the service member has engaged in, solicited another to engage in, or attempted to engage in a homosexual act or acts; (2) the member has married or attempted to marry a person of the same sex; or (3) the service member has made either a verbal or non-verbal statement that the member is homosexual or bisexual. Such a statement is compelling evidence that the service member has in the past and is likely to again engage in homosexual conduct and, furthermore, is rational, reasonable and reliable evidence of a desire and propensity to engage in homosexual acts.

The committee interpretation that statements as a basis for separation include non-verbal statements reflects extended testimony that certain conduct, behavior, or other manifestations, not involving speech, by a service member could communicate to a reasonable person that the service member was a homosexual, as defined by this section. Whether or not a non-verbal statement, in fact, is grounds for separation, or serves just as a basis for beginning an inquiry, is dependent upon the totality of the circumstances. One non-verbal statement in and of itself could be grounds for separation. Similarly, it might require several non-verbal statements—indicating a pattern of behavior—to communicate to a reasonable person that the service member was a homosexual. The committee believes that commanders, NCOs and others in authority are the persons best able to judge the impact such non-verbal statements would have on unit cohesion, morale, and good order and discipline;

and they should retain the discretion to take whatever action is appropriate under the circumstances.

This section would provide that the service member facing separation for homosexual conduct would be afforded an opportunity to establish certain facts to avoid separation. The facts to be established vary, depending on whether the separation is for acts, marriage, or statements. However, in all cases separation is required unless the service member establishes the facts by a preponderance of the evidence.

The committee recognizes that some individuals may make statements or engage in certain conduct in an effort to avoid their legitimate service obligations. This section would allow retention of such members if the member engaged in the conduct or made the statement for the purpose of avoiding or terminating service and separation would not be in the best interest of the armed forces. Furthermore, nothing in this section would preclude commanders from taking action in appropriate cases to separate a member under another provision of law or to refer the case to trial by court-martial.

This section would also require the Secretary of Defense to establish standards for enlistment and appointment of members of the armed forces consistent with the policy that homosexual conduct is proscribed in the military, and to ensure that enlistment and appointment documents notify prospective service members of the policies and penalties regarding homosexual conduct. The committee believes that such notice will discourage those who engage in, intend to engage in, or have a propensity to engage in homosexual conduct from entering the military and will also provide potential service members fair warning of proscribed conduct.

Furthermore, this section would require the Secretary of Defense to ensure that members of the armed forces are briefed upon entry into service, and periodically thereafter, regarding the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies regarding homosexual conduct.

This section would also express the sense of Congress that the Secretary of Defense has the discretion to continue the practice, established by the interim DOD policy of January 29, 1993, of not asking prospective service members about homosexual conduct. In addition, the section would express the sense of Congress that the Secretary of Defense should consider issuing guidance governing the circumstances under which service members being questioned about homosexuality for administrative purposes would be advised about the prohibition on compulsory self-incrimination.

Throughout the public discussion and debate on this issue, there have been numerous recommendations to create an environment in the military that would allow a homosexual to serve discreetly, and to prevent or limit military authorities from intruding into that area of discretion. Such recommendations usually took one of the following forms:

- (1) Prescribing places and circumstances, so-called "zones of privacy," where homosexual activity by service members would be acceptable. For example, on-post activity would be prohibited, but off-post conduct would be permissible.

(2) Restricting in one manner or another the authority of the commander, the NCO, or the military criminal investigator to inquire into or investigate the sexual conduct of service members. For example, one recommendation was that military officials could not, at any time or under any circumstances, ask about a service member's sexual orientation.

(3) Attempting to define the parameters for military authorities as to what constituted credible evidence or indications of homosexual activity or conduct. For example, in one formulation, seeing a service member visiting a gay bar or marching in a gay rights parade would not individually constitute homosexual activity by that soldier; however, seeing a service member visit a gay bar and engage in some other overt homosexual act would constitute homosexual activity.

With regard to such recommendations, 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. For these reasons, the committee would neither restrict the authority of commanders, NCOs or other military authorities regarding homosexuals, nor create any special prerogatives for homosexuals. The committee expects the Secretary of Defense to follow the committee lead in developing directives and regulations implementing this section.

The committee also heard assertions that military personnel had abused their authority by conducting so-called "witch-hunts" to ferret out homosexuals. Although the committee believes that all abuses of authority by commanders and others should be punished under existing laws and regulations, the committee also believes that commanders, NCOs and others in the military chain of command charged with maintaining the military capability, unit cohesion and morale, welfare and discipline of their organizations should have great discretion as to what constitutes sufficient information to begin an inquiry or questioning of a subordinate about behavior or actions that could have an impact on unit cohesion, morale, welfare and discipline.

Similarly, the committee found no reason to impose guidelines as to when or on what basis a military criminal investigative organization should become involved in inquiring into homosexual conduct. The committee notes that most discharges for homosexuality historically have been the result of an administrative process, and that criminal investigative forces are limited. As a result, the committee believes that the most efficient use of limited resources would be to focus them on clearly criminal activity and not to divert them unnecessarily to cases that initially appear to be headed for administrative proceedings. If, however, at any time a commander has reason to believe that criminal activity has occurred, nothing in this section would prevent the use of criminal investigative elements. Similarly, if a criminal investigation turns up evidence or information that could be used in an administrative separation proceeding, nothing in this policy would preclude the use of

the evidence or information in the administrative separation proceeding.

The committee also heard a recommendation that the department should, as a matter of policy, enforce the Uniform Code of Military Justice equally on heterosexuals and homosexuals. The committee believes that all rules and regulations should be administered in a fair and impartial manner. The purpose of military law is to provide for both discipline and justice. As the testimony received by the committee from a panel of legal experts indicated, an "equal application" enforcement requirement 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. The committee believes that such an eventuality is neither conducive to justice nor discipline. Violations of the Uniform Code of Military Justice ought to be prosecuted on their individual merits, without an effort to compel the department to equalize prosecutions among groups of people, offenses, or artificially comparative categories.

The committee believes that the department should, as a matter of policy, investigate and prosecute violations of the Uniform Code of Military Justice in a fair and impartial manner, regardless of whether a homosexual or heterosexual is involved. The committee also believes that violations of the Uniform Code of Military Justice should be investigated and prosecuted on their individual merits, with no requirement to compel the department to equalize investigations or prosecutions among groups of people, offenses, or artificially comparative categories.

SECTION 576—FOREIGN LANGUAGE PROFICIENCY PAY

This section would require the Secretary of Defense to develop and carry out a test program for improving foreign language proficiency in the Department of Defense. The test program would focus on evaluating changes in the management of the foreign language proficiency program recommended in a June, 1993 report by the Department of Defense Inspector General and the Sixth Quadrennial Review of Military Compensation. The test program would include an evaluation of adjustments in compensation, including foreign language proficiency pay for active and reserve component personnel, larger enlistment and reenlistment bonuses, and special duty assignment pay.

There is general agreement in the Department of Defense and among members of the Committee on Armed Services and the House Permanent Select Committee on Intelligence concerning the need to increase foreign language proficiency in the department. The test program would be intended to demonstrate the best ways to achieve the objective.

ITEM OF SPECIAL INTEREST

CREATION OF AN ENVIRONMENTAL OFFICER POSITION FOR THE NAVY

The Navy is aggressively pursuing an environmental program to ensure that they are in compliance with all applicable laws and regulations regarding the environment. Their objectives are to re-