Changing Times in the Military

Ending Gay Ban Poses Risks

Health and Discipline Would Be Jeopardized

BY WILLIAM J. GREGOR

In providing for the security of the nation, military policy must be guided by military necessity; there is no right to either enlistment or appointment in the armed forces on the basis of ability. The forces thus raised are designed to meet the military needs, not the ambitions of individuals. In peace, as in war, manpower policies should promote military efficiency, not personal fulfillment.

The Constitution grants Congress the sole power to raise and regulate land and naval forces, and it exercises that power without limitation. Congress has defined broad standards for military enlistments and appointments: age, mental ability, physical condition, and moral character. But more than mere capacity to perform a job always has been demanded from application of these standards. Rather, the goal is to select persons who have no extraordinary medical or psychological needs; persons who can readily adapt to the loss of their individuality and liberty; and persons whose personal behavior pose no risk to themselves, their comrades, or to military order.

Consequently, it is no surprise that most individuals turned away from recruiting offices are rejected on grounds other than ability, and that at least one-third of America's youth are ineligible for military service, according to the U.S. Army Recruiting Command. The question is not whether gays and lesbians can perform the jobs assigned to them, but whether, as a population, homosexuals display characteristics that raise significant health concerns and insurmountable problems for military discipline and order.

Under current medical standards the military may not induct anyone with a known "psychosexual condition," which is defined as including homosexuality. While that condition affects the personal and social behavior of individuals in different ways, what is known is that, for many youths, it poses tremendous difficulties. Thus, the Department of Health and Human Services' 1989 Report of the Secretary's Task Force on Youth Suicide noted that homosexual youths are six times more prone to commit suicide than heterosexuals. Although they make up less than 4 percent of the population, homosexuals commit 30 percent of all youth suicides. Additionally, 10 to 20 suicide attempts occur for each suicide reported. Consequently, homosexuality is identified as a significant risk factor associated with suicide.

Since the military assumes responsibility for the well-being of all service members, this fact alone would suggest that proper entrance medical screening would require a recruit to reveal his homosexuality and to submit to a thorough psychological evaluation. This is precisely what the report on youth suicide recommended. Noting that troubled youths did not normally give warning or seek help, the report urged everyone involved with youths to identify young people at high risk. The military command would fail in its duty to preserve the well-being of the force if it chose to ignore this significant health risk.

The report on youth suicide dealt with another major problem faced by homosexual youths: sexually transmitted diseases. According to the report, more than half of all adult male homosexuals will contract hepatitis B. More than two-thirds of all AIDS victims are male homosexuals. Additionally, 30 percent of gays and lesbians have problems with alcoholism and an equally high risk of drug abuse. Consequently, the enlisting homosexuals can be expected to place a disproportionately high demand on military medical and mental-hygiene facilities.

More important, in the military, health concerns are not merely personal problems. The threat of sexually transmitted diseases, especially HIV and hepatitis B, presents a serious public-health problem. Given this realistic threat, the armed forces must either identify homosexual males and limit their service or adopt what civilians call universal precautions.

Universal precautions seek to protect a civilian's right of privacy by treating all blood as tainted. Americans have seen National Collegiate Athletic Association basketball teams coping with these rules, for example—referees stop the game to clean up drops of blood and order players to the sidelines to change their shirts. But what would be the effect in the military of using universal precautions? If the referee stopped the fight every time a cadet in the West Point boxing ring started to bleed, would the cadets learn fear or courage?

After recruits learn the habit of universal precautions, what would be the effect on the battlefield? When a soldier is so injured that swift and instinctive action is needed to save his life, would his comrades hesitate? Given the possible dire consequences, military commanders would prefer to identify those soldiers who pose a risk to the force, rather than protect someone's privacy and adopt universal precautions.

Both the personal and public health threats associated with homosexuality, then, argue for identifying gay and lesbian recruits. Yet President Bill Clinton's proposal, now in force, prohibits this. This policy abrogates the military command's duty to protect the well-being of the soldiers and places the risk of military service upon the individual soldier and his comrades, all in the name of privacy.

But the truth is that there is no privacy in the military. People who join the armed forces cede much of their individuality and

SEE GREGOR, PAGE 30

Fears, Not Facts, Fuel Opposition

Gay, Lesbian Soldiers Have Served With Valor

BY PATRICIA SCHROEDER

What was good enough for George Washington is good enough for me. In 1777, as commander of the ragtag Continental Army, Washington ordered Friedrich Wilhelm von Steuben, the "drill master of the Revolution," to turn the beleaguered Colonials at Valley Forge into a disciplined fighting force. Military historian T. Harry Williams wrote that "thanks to [von Steuben], the American army took the field in 1778 prepared to fight." Von Steuben differed from his commanding officer in two respects: He was Prussian-born, and he was gay.

Fast-forward two centuries. On Jan. 29, 1993, President Bill Clinton instructed Secretary of Defense Les Aspin to draft an executive order by July 15 ending discrimination in the military based on sexual orientation. In addition, he terminated the questioning of recruits as to their sexual orientation and ordered that gay personnel not be discharged in the six months between now and July, but, instead, transferred to standby reserve.

Whatever the merits of Clinton's six-month compromise for lifting the ban or of current congressional maneuvering to restore it, the fact remains that the ban must go. Where would we be if such a ban had existed at Valley Forge? Von Steuben and thousands of gay men and lesbians since him have served with distinction and valor in our nation's military.

Even Gen. Dwight Eisenhower, with some discomfort, had to recognize the indisputability of this fact in 1946, when he called his trusted personal aide, Pvt. Johnnie Phelps, into his office. As Phelps later recalled, Eisenhower ordered, "It's been reported to me that there are lesbians in the WAC [Women's Army Corps] battalion. I want you to find them and give me a list. We've got to get rid of them."

Phelps responded, "Sir, if the General pleases, I'll be happy to check into this and make you a list. But you've got to know, when you get the list back, my name's going to be first." Eisenhower recalled that the WAC battalion had received meritorious commendations on a regular, six-month basis. He conceded, "Forget that order. Forget about it."

Eisenhower undoubtedly knew that thousands of gay soldiers and sailors were on the front lines in every theater of World War II, fighting and dying for their country. Stateside, however, military

SEE SCHROEDER, PAGE 33

Military Needs Argue Against End of Ban

GREGOR FROM PAGE 27

personal liberty and place themselves in the care of the command. Everyone who enters is asked private questions about personal and medical history. We ask recruits whether they have ever used illegal drugs; whether they have been treated for syphilis or gonorrhea; whether they have ever been pregnant or are unmarried with a dependent child. The answers to these questions often are grounds for exclusion.

Imposition of a civilian notion of privacy also has implications for military discipline, which depends largely upon the willingness of soldiers to comply with their orders. Harsh, swift punishments are no substitute for an environment in which the soldier accepts his orders easily. You could order men and women to shower together, but many would balk. Even if no incident occurred, both men and women would find it uncomfortable, and they would soon avoid the unit shower. Nor is it likely that such an order could be enforced by administrative or judicial punishment.

Troubled Water

Consider a common military requirement: an unannounced urinalysis. Routinely the company commander picks a trusted non-commissioned officer to watch each soldier as they give their specimen. What would be effect of selecting a homosexual to supervise? Does anyone really believe an entire infantry company would gladly expose themselves? Would the military really be expected to compel compliance under pain of court martial? Yet if you do not compel compliance, you inadvertently establish a rule that soldiers may object to orders based upon private feelings. If you compel obedience and humiliate the soldiers the commander will certainly not gain the respect of his command. If you avoid creating the situation by deliberately not assigning the duty to the homosexual non-commissioned officer, you have established the rule that homosexuals must be treated differently.

Whatever the choice, the command compromises the uniformity required in military discipline. When great punishments are needed to gain compliance with simple orders, soldiers will not develop an easy habit of obedience. Discipline and morale fail.

Avoiding disorder is an essential aspect of military discipline. The armed forces is an armed camp, filled with adolescent men and women selected and trained to use deadly force. Maintaining order in such a potentially explosive environment requires constant command attention and the active participation of individual soldiers. Military commanders must take steps to prevent incidents, not simply punish infractions when they occur.

Modern armed forces succeed through the action of well-trained, disciplined, cohesive groups—not by the genius of individuals. That is why liberal society finds military organizations so hostile. The public and the president are misguided, however, if they believe soldiers can maintain privacy and personal autonomy. A citizen who wants to enjoy privacy ought to avoid military service.

No New Manpower Needs

Finally, there is no operational reason to open the military to new groups. Historically, the United States has expanded recruitment to population groups that previously were excluded only when faced with pressing manpower needs and battlefield requirements. Even then, the government carefully considered the cost of including those groups and evaluated the impact on medical facilities and future claims for veteran care and disability. Now, however, the United States is reducing the armed forces and paring the military budget, so there is no need to seek new sources of manpower.

Civil society may choose to ignore homosexual behavior; the armed forces cannot. A soldier's personal conduct is often a threat to the success of the mission or the survival of his comrades. Absent pressing manpower needs, the difficulties of including homosexuals far outweigh any imagined benefit. The current policy is necessary and proper.

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It's Time for Jay Stephens to Go

LOCAL ANGLE FROM PAGE 26

President Clinton has said that he wants his Cabinet to look like America. He should follow the same stricture in picking the U.S. attorney for Washington. The District has never had an African-American U.S. attorney. Even President Jimmy Carter failed to break this shameful tradition. And it would not be tokenism to choose an African-American; it would just be the right thing to do.

It is also important to state the kind of person who should not be picked. Someone who has never had any involvement with this city or its people is not the proper selection, even if that person is African-American and has his or her mail delivered to a D.C. address. Nor should this selection be used as a consolation prize for someone who wanted something else; that would denigrate the post and the citizens of Washington.

This appointment should be a stellar one. The recruitment of a highly talented individual with an established reputation in the public or private realm is essential. The selection of someone who has risen to the highest levels in the estimation of his or her legal peers would lend real credibility to the claim that this president and this administration view the District in a new way.

Bill Clinton should be evaluated on what he does, not what he says. For far too long, the District has not been included as part of America. By nominating the District's U.S. attorney first and by announcing the criteria used in choosing that person, President Clinton will let the rest of the nation know the importance that he gives to the place where he now lives.

Symbolism does have its role. There could be no more powerful living symbol of the new attitude at the White House than a qualified individual who is representative of the community being selected as the new U.S. attorney for the District of Columbia.

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Sex, Lies, and the Code of Military Justice

BY BRUCE FEIN

President Bill Clinton's provisional policy regarding homosexuals in the military seems either empty or constitutionally dubious. The same can be said of his plan to make the policy permanent after July 15. Indeed, if he prohibits military discharges for homosexual sodomy, the president would seem vulnerable to impeachment—for failing to execute the laws faithfully.

On Jan. 30, President Clinton declared his intent to issue an executive order on July 15 that would prohibit "exclusion from military service solely on the basis of sexual orientation." He added, however, that the order "would establish rigorous standards regarding sexual conduct to be applied to all military personnel." Until July 15, at Clinton's direction, the Defense Department has ceased asking recruits about their sexual orientation. The Pentagon has also placed in abeyance formal dismissals of homosexuals from the armed forces.

On its face, President Clinton's policy provides only scant protection to homosexuals. It prevents discharges or other sanctions only against homosexuals who abstain from homosexual conduct during their military service. The president's Jan. 30 statement seems to confirm that conclusion: It repeatedly stresses the difference between sexual conduct and sexual orientation and underscores the president's agreement with the Joint Chiefs of Staff that homosexuals should be dismissed from service if they violate "the [military] code of conduct."

Article 125 of the Uniform Code of Military Justice prohibits homosexual or heterosexual sodomy on pain of dismissal from service. The prohibition was enacted by Congress pursuant to its constitutional authority "to make rules for the government of the land and naval forces," and the military has enforced the ban against homosexuals and heterosexuals.

The constitutionality of the prohibition seems unarguable. In *Bowers v. Hardwick* (1986), the Supreme Court held that homosexual sodomy could be criminalized based on no more than "majority sentiments about the morality of homosexuality." If homosexual conduct can be punished as a crime, a fortiori, it may serve as a justification for the lesser sanction of military discharge under Article 125.

President Clinton's policy provides only scant protection to homosexuals in the military.

Even apart from moral issues, Article 125 seems constitutionally irreproachable. Many military officers believe the policy is important to ensure combat effectiveness, unit cohesion, and esprit de corps. Others heatedly disagree that homosexuals undermine the military mission, and point to empirical studies commissioned by the Department of Defense to fortify their view.

But the Supreme Court, upholding a ban on the wearing of a yarmulke by an Air Force psychologist, explained in *Goldman v. Weinberger* (1986) that professional military judgment regarding matters of discipline or esprit de corps is constitutionally conclusive, even if based on "mere *ipse dixit* with no support from actual experience or a scientific study in the record, and contradicted by expert testimony."

U.S. District Judge Terry Hatter Jr. recently ignored the *Goldman* teaching in *Meinhold v. U.S. Department of Defense* (C.D. Calif., Jan. 29, 1993). Judge Hatter held the discharge of an acknowledged homosexual to be unconstitutional in the absence of empirical proof that homosexuality either interfered with job performance or undermined the military mission.

Article 125 Untarnished

In any event, Judge Hatter did not hold Article 125 unconstitutional and seemed to confine his ruling to homosexuals who practice abstinence during their service. He characterized the "key issue" in the case as "whether the United States Department of Defense may ban, from the armed forces of the United States, gays and lesbians who do not engage in prohibited conduct."

Article 125 applies to sodomy committed by any member of the armed forces, even if the sexual encounter is voluntary and discreet. The Supreme Court held in *Solorio v. United States* (1987) in overruling *O'Callahan v. Parker* (1969) that the Uniform Code of Military Justice applies to all conduct occurring during military service, even absent proof of "service connection."

In the investigation of Article 125 violations, military personnel may be compelled to disclose their transgressions without violating the Fifth Amendment privilege against self-incrimination. The Supreme Court declared in *Gardner v. Broderick* (1968) and in *Murphy v. Waterfront Commission* (1964) that public employees who receive a grant of immunity from state and federal criminal prosecution may be required to reveal adverse information that might justify discharge.

Requiring such disclosures from homosexuals would not threaten federal criminal punishment because the sanction for a confession is merely the loss of a military job. And, as the Court indicated in *Murphy*, the discharged service member would enjoy a Fifth Amendment right to prevent a state sodomy prosecution based on either the evidence disclosed to the military or its fruits.

In summary, if President Clinton sticks to his stated position, he will have secured rights of military service only for abstinent homosexuals, which seems to fall far short of popular understanding.

Confronted with the discrepancy, he might liberalize the policy to prohibit discharges based on homosexual conduct absent substantial evidence that combat effectiveness would otherwise be impaired.

But such a unilateral gambit may well be unconstitutional. Under Article II, Section 3 of the Constitution, the president is obliged to "take care that the laws be faithfully executed." In 1974, the House Judiciary Committee voted three articles of impeachment against President Richard Nixon for neglecting that obligation.

Article 125 is every bit as obligatory on the president as are the federal obscenity, racketeering, or antitrust laws. To be sure, a president enjoys wide prosecutorial discretion in determing how vigorously to enforce particular laws. But that discretion does not include wholesale abandonment of enforcement efforts; otherwise, the president could de facto nullify laws passed by Congress, even those enacted over a veto.

President Clinton, however, might constitutionally limit the force of Article 125 by routinely granting pardons to all offenders. Alternatively, he might eliminate discharge as an Article 125 sanction pursuant to Article 56 of the military code, which authorizes the president to set the maximum punishment for violations of the code. Whether the president opts for these latter approaches to protect homosexuals in the military may turn on the political backlash he believes they might provoke.

Amidst the fury surrounding homosexuals in the military, care should be taken to avoid establishing any dangerous legal principle that is politically fetching—for the moment. As Justice Robert Jackson warned in his dissent in *Korematsu v. United States* (1944), such principles may lie about "like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

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LETTERS

Classic Theory and Free Trade

To the editor:

In the article—drifting into polemic—on foreign investment by Jonathan A. Knee in your Jan. 18, 1993, issue ["Mapping Out a New Policy on Foreign Investment in the United States," Page 22], Mr. Knee asserted that a basic tenet of international trade theory is that every country gains in a world of perfectly free trade, but that one country gains if it is the only one with protectionist policies. Were that true, we would face that type of logical conundrum known as the "prisoner's dilemma." Unless I am grossly in error, it is not true. Classic international trade theory is derived from the ideas of the 18th-century English economist David Ricardo, who said that a country will benefit if it unilaterally adopts free trade, even if no other country should do so.

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President Can Rescind Ban

SCHROEDER FROM PAGE 27

psychiatrists were launching their own campaign to exclude homosexuals because they were thought to exhibit "psychopathological behavior."

What a stark irony—stateside psychiatrists were moving to ban gays while the gays themselves were overseas fighting for their country's future. What is little understood about the evolution of the ban is that although the policy was initiated in the 1940s, it was only recently that the military sought to ferret out gay individuals based on their status, rather than their conduct. In 1982 and 1986, President Ronald Reagan's secretary of defense, Caspar Weinberger, issued Department of Defense Directives 1332.14 and 1332.30, which targeted individuals rather than their conduct. For the first time in U.S. history, the focus shifted from homosexual acts to status.

President Clinton's executive order would simply rescind Weinberger's directives, shifting the focus back to conduct. Homosexual and heterosexual acts that are defined as sexual misconduct would still be subject to discipline.

The president has the authority under Article II, Section 2 of the Constitution to use the stroke of his pen to eliminate Weinberger's edict, but congressional supporters of the ban cite Article I, Section 8 of the Constitution as an invitation to their own political maneuvers. I, for one, welcome the sudden congressional interest in an important military personnel issue that has been all but ignored by the Congress. Maybe they will learn something.

The range of interest among my colleagues varies from sincere inquiry to hypocritical posturing. House Minority Whip Newt Gingrich of Georgia, who told reporters and constituents only a year ago that he did not "see any reason to expel somebody from the military for purely private behavior that's sexual," now rallies his party faithful to make the ban statutory through amendments to defense appropriations and authorization bills.

Why the change of heart? Gays in the military, according to Gingrich, make a fine political "gift" to help what was once the party of Lincoln reclaim the House and Senate.

I, too, will move to legislate the ban—out of existence—by reintroducing the Military Freedom Act, H.R. 5208, which will eliminate the ban without changing sexual misconduct guidelines. I sponsored the same bill in the last Congress, and it garnered 79 co-sponsors.

Three Specious Arguments

Opponents of gays and lesbians in the military have coalesced around three arguments. First, they argue that the ban cannot be rescinded without congressional repeal of Article 125 of the Uniform Code of Military Justice, which prohibits sodomy. False. The Reagan-era directives ban sexual orientation, not sexual conduct. The directives can easily be repealed without touching the military code. Moreover, maybe the Congress ought to take a look at Article 125 because it prohibits a variety of sexual activities routinely indulged in by men and women, married and single, regardless of sexual orientation. In my view, Article 125 ought to be repealed. The federal government should stay out of American bedrooms, military or civilian. If Congress wants to debate the issue, be my guest.

Second, supporters of the ban argue that we—the president, Congress, and the courts—should somehow defer to the military experts on the issue of gays in the military. Why should we? We are duty-bound to study the issue (which would include, I hope, reading the Constitution) and arrive at our own conclusions.

The federal courts are beginning to take up their duty and have found the experts lacking. The U.S. Court of Appeals for the 9th Circuit ruled last year in *Pruitt v. Cheney* that the military must prove that its policy has a rational basis and is not simply based on the "prejudice of others against homosexuals themselves." On Jan. 28, 1993, in *Meinhold v. Cheney*, the U.S. District Court for the Central District of California permanently enjoined the Defense Department from "discharging or denying enlistment to any person based on sexual orientation in the absence of sexual misconduct which interferes with the military mission." Citing the Defense Department's own reports, U.S. District Judge Terry Hatter Jr. ruled, "Gays and lesbians have served and continue to serve, the United States military with honor, pride, dignity, and loyalty. The Department of Defense's justifications for its policy banning gays and lesbians from myths and false stereotypes."

The factual record that the Defense Department presented to the court in defense of the ban was, in Hatter's characterization, "sparse." In fact, three Defense Department studies directly contradicted the "military judgment" that the ban's rationale is "not capable of being determined authoritatively by scientific means or proven studies."

Finally, supporters of the ban claim that gays and lesbians should be excluded for health reasons—gay men, because they might become HIV-positive at some point down the road, and lesbians, because we don't like them on general principles. Nonsense. Under current law, anyone can be denied enlistment based on a wide range of medical conditions, everything from HIV to arthritis, from fallen arches to gonorrhea. That's a policy that makes sense. But people should not be denied enlistment because they *might* develop a medical condition down the road. Should smokers be excluded? How about drinkers? How about ethnic groups more susceptible to certain hereditary diseases? It seems to me that any healthy, qualified the military.

The question, then, is one that the president and the Congress will also have to face squarely and fairly, without reference to radio-talk-show williwaws or first-Tuesday-in-November jitters: Can we continue to bar patriotic Americans from serving in the military based entirely on *who* they are?

Members of Congress whooped and hollered over our military's remarkable success in Operation Desert Storm. Among the 200,000 soldiers who served and fought were many gays and lesbians. Some reserve units even directed that all actions against gays and lesbians be suspended while Desert Storm was under way. Which leaves us with another question to face, squarely and fairly: What kind of policy is it that permits gays and lesbians in the military during war, but cashiers them in times of peace? Another question for my colleagues in the Congress to ponder.

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