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Gates 'Don't Ask' Memo Limits Discharge Policy

By ELISABETH BUMILLER

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WASHINGTON — In the growing legal confusion at the Pentagon over the “don't ask, don't tell” law, Defense Secretary Robert M. Gates issued a directive on Thursday that appeared to be a near moratorium on discharges of openly gay service members.

In a memorandum dated Oct. 21, Mr. Gates said that “until further notice,” only five senior Defense Department officials, all civilians, would have the authority to expel openly gay service members. As the memo explained it, the relevant service secretary — either the Secretary of the Army, Navy or Air Force — has to consult with the Pentagon’s legal counsel, Jeh C. Johnson, and the undersecretary for personnel, Clifford L. Stanley, before the three can make a group decision on whether a gay service member should be forced out of the military.

Until Thursday the decision was in the hands of a far larger number of less senior military and civilian officials. The 17-year-old “don't ask, don't tell” law bans openly gay, lesbian and bisexual members of the United States armed forces.

A senior defense official declined to say under repeated questioning at a briefing for reporters if Mr. Gates’s memorandum was in effect an end to discharges under the law, given the number and seniority of officials who must approve a discharge. One other Pentagon official said it might slow down the process but it was not a moratorium.

The senior defense official who briefed reporters was granted anonymity under Pentagon-imposed ground rules, although under pressure from reporters, Geoff Morrell, the Pentagon press secretary, said that the official could be somewhat further

identified as “also a lawyer.” Asked why the Pentagon did not want the official who is also a lawyer identified, Mr. Morrell replied, “That’s the way we’re choosing to do it.”

The Pentagon has spent the last week and a half whipsawed by the courts while trying to navigate the complex legal and political environment of “don’t ask, don’t tell.” President Obama, Mr. Gates, the chairman of the Joint Chiefs of Staff and the House of Representatives have said for months — years in the case of Mr. Obama — that the law should be overturned. But the Senate has not yet voted to repeal. Until, and if, that happens, the Pentagon and the Justice Department are following the traditional rule of upholding the law.

The courts in the meantime have stepped in. On Sept. 9, a Federal District Court judge in California ruled that the ban was unconstitutional. On Oct. 12, the same judge, Virginia A. Phillips, denied the Obama administration’s request to keep the ban in place and issued an injunction ordering the military to stop enforcing the law. Three days later, the Pentagon for the first time told military recruiters that they could accept openly gay applicants. Five days after that, in response to an emergency request from the government, a federal appeals court told the Pentagon it could continue to at least temporarily enforce the law.

Thursday’s memorandum by Mr. Gates reflected that most recent legal decision, although there is at least one more coming: A decision by the appeals court, perhaps as early as next week, on whether the Pentagon can continue to enforce the law for a longer period.

Gay rights groups reacted tepidly to Mr. Gates’s memorandum. R. Clarke Cooper, the executive director of Log Cabin Republicans, the group that brought the lawsuit against the government to overturn the law, called it “a step in the right direction” but not a solution.

Richard Socarides, who served as an adviser to President Bill Clinton on gay issues, offered qualified praise. “The practical impact of this new procedure will hopefully be a de facto moratorium,” he said.

John Schwartz contributed reporting from New York.