message that homosexuality is a hazard to life and that there is good evidence that it can be overcome, not that it is immutable. •

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Military Policy for Gays Likely to Pass Muster

By Bruce Fein

The American Civil Liberties Union Foundation and the Lambda Legal Defense and Education Fund recently filed suit (*Doe vs. Aspin*) in the U.S. District Court for the District of Columbia challenging the constitutionality of President Clinton's policy guidelines for treatment of homosexuals in the military. Although verging on a frolic, the lawsuit may make astute politics by seeking to highlight the asserted unfairness of the policy through testimony of named homosexual plaintiffs with irreproachable military service.

Article 125 of the Uniform Code of Military Justice prohibits homosexual and heterosexual sodomy and has been enforced against both types of conduct. Article 134 prohibits any conduct that prejudices "good order and discipline in the armed forces," such as that tending toward the destruction of good morale. Clinton's policy guidelines parallel these statutory injunctions by excluding from the military those who engage in homosexual conduct; sexual orientation, as such, does not trigger exclusion.

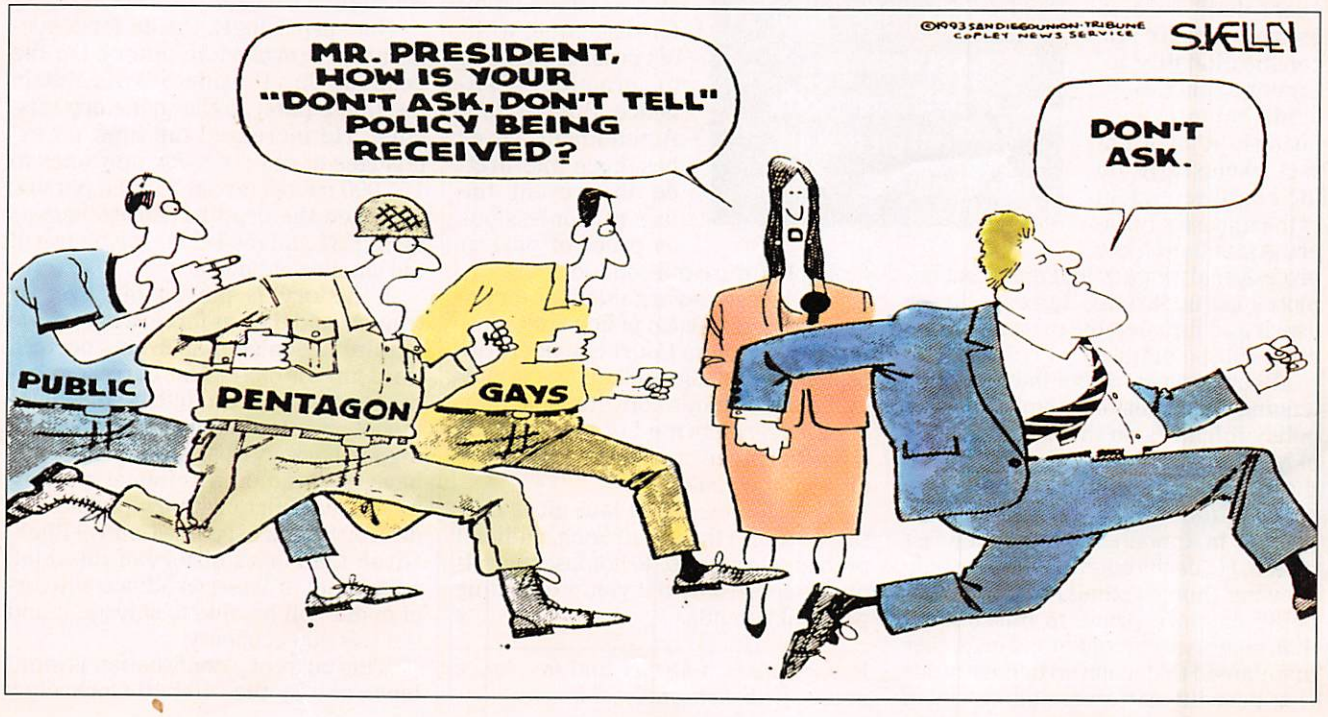
The guidelines define homosexual conduct as "a homosexual act, a statement that the member is homosexual or bisexual, or a marriage or attempted marriage to someone of the same gender." A confession of homosexuality, however, does not trigger automatic discharge. It creates only a "rebuttable prescription" of intent to engage in prohibited conduct, which can be "overcome by a demonstration of an intent to abstain from any homosexual act."

Under twin Supreme Court precedents, Clinton's policy guidelines seem constitutionally irreproachable. In *Bowers vs. Hardwick* (1986), the court upheld a criminal prohibition on homosexual sodomy. Writing for a 5-4 majority, Justice Byron White denied that a fundamental constitutional right of privacy protects homosexual conduct. He labeled the claim, at best, "facetious." White further reasoned that the majority's moral sentiment by itself is sufficient to sustain the prohibition under the due process clause.

If homosexual conduct can be criminalized under *Bowers*, then the lesser sanction of exclusion from the armed forces clearly passes constitutional muster.

Although the author of *Bowers* will be replaced by Judge Ruth Bader Ginsburg, the precedent seems in no danger of being overruled. Chief Justice William Rehnquist and Associate Justices Sandra Day O'Connor, Antonin Scalia and Clarence Thomas would inarguably vote against overruling it. Indeed, Rehnquist and O'Connor voted with White in the Bowers case. Justice Anthony Kennedy, as a federal judge, voted to deny a constitutional claim of a homosexual. So did Ginsburg in *Dronesburg vs. Zech* (1984).

In response to a question from Sen. Edward Kennedy, a Massachusetts Democrat, during her confirmation hearing, Ginsburg deplored "rank discrimination against anyone," including bias based on sexual orientation. She later retreated in responding to an inquiry by Sen. William Cohen, a Maine Republican, regarding the constitutionality of excluding individuals from government benefits because of sexu-



al orientation. She was adamant against offering any "hints, forecasts, or previews" of her opinion on constitutional protections for gays and lesbians. But the adverse congressional and military response to Clinton's initial promise to end discrimination against homosexuals in the armed forces suggests that Ginsburg is an unlikely candidate to assail the *Bowers* decision.

During her hearings, Ginsburg echoed the view of the late Justice Benjamin Cardozo that, while constitutional or statutory interpretation should not be informed by the weather of the day, drawing guidance from the climate of an era is proper. In other words, changes in societal practices and public opinion may alter the original meaning of the Constitution or statutes, but not too much or too fast. Ginsburg's elaboration of her judicial philosophy indicates that she believes jurisprudence should generally follow and ratify, but not be the architect for, alteration in social or political customs or values.

Justice David Souter's view of *Bowers* cannot be stated with confidence. Thus, Justices Harry Blackmun and John Paul Stevens are its only certain foes on the high court.

The *Bowers* precedent does not necessarily ensure the constitutionality of Clinton's policy to exclude homosexuals, because it may not rest exclusively on the moral sentiment of the majority. Rather, its foundation is a professional military judgment that homosexuals undermine unit cohesion or esprit and threaten the privacy of heterosexual soldiers.

A centerpiece of the lawsuit challenging the exclusion policy is that the policy infringes on the asserted right of homosexuals to be judged solely on the basis of "ability and fitness to serve." Clinton gave weight to the argument in announcing the policy last month. He declared, "There is no study showing [homosexuals] to be less capable or more prone to misconduct than heterosexual soldiers." He further maintained that a ban on homosexuals "has been lifted in other nations and in police and fire departments in our country with no discernible negative impact on unit cohesion or capacity to do the job." These statements suggest that Clinton hoped legally to sabotage his exclusion policy by discrediting its rationale.

But the Supreme Court made clear in *Goldman vs. Weinberger* (1986) that military regulations intended to safeguard discipline and unit morale need no empirical verification to survive constitutional scrutiny. Professional military judgment is sufficient, and such a judgment underwrites Clinton's exclusion policy.

The argument that the policy denies the right of homosexuals to be appraised on the basis of ability and fitness like heterosexuals seems unpersuasive. The military engages in collective exercises, not solo performances such as Achilles's slaying of Hector during the Trojan War. And the professional judgment of the military is that homosexuals, in contrast to heterosexuals, impair the fighting strength of units by undermining cohesion and esprit.

The ACLU inventively argues in its complaint that Clinton's policy violates the free speech right of homosexuals by using their confessions of homosexuality as a foundation for discharge, without proof of an intent to practice abstinence. But the First Amendment never has been interpreted to prevent the use of confessions as proof of past or probable future misconduct.

Doe vs. Aspin filed by the ACLU and Lambda Legal Defense and Education Fund is destined to further entrench judicial precedents adverse to homosexuals.

The investigative guidelines for enforcing the exclusion policy are vague. But the Supreme Court has never accepted the audacious claim that would-be violators enjoy a constitutional right to be fairly informed of the methods the government may use to detect or prevent the violations.

The *Doe vs. Aspin* lawsuit is destined to further entrench judicial precedents adverse to homosexuals. It makes sense only if it yields offsetting political benefits. •

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Russia Needs to Give Up Central Bank

By Steve Hanke and Kurt Schuler

Russia's Central Bank dropped a bombshell on the Russian public July 24. It decreed that as of midnight two days later, all ruble notes printed before 1993 — about 12 percent of the ruble notes in circulation — would be invalid. Russians were to spend the old rubles before then or exchange them for new notes up to a limit of 35,000 (about $35) a person by Aug. 7. Any excess notes would have to go into special bank accounts that would be frozen for six months at interest rates much below the current inflation rate.

In response to the Central Bank's decree, many stores stopped accepting old rubles immediately. Checks and credit cards are virtually unknown in Russia, and most Russians hold relatively large amounts of cash to pay for goods. Accordingly, the currency confiscation will rob many Russians of substantial savings.

Not surprisingly, the de facto confiscation provoked an outcry. On the deadline day, President Boris Yeltsin became a party to the monetary mischief. He increased the limit on exchanges of old notes for new ones to 100,000 rubles (about $100) a person, extended the deadline for exchanges to Aug. 31 and made legal again use of the smaller old notes.

If history is played out first as tragedy and then as farce, what are we to think when similar events occur a third time or more? This currency confiscation is only the latest episode of monetary mischief in a series stretching far back in Russian history. They have in common a reliance on gimmicks that hurt ordinary people and destroy their trust in the Central Bank. Given the bank's history of mischief, no amount of Western advice and foreign aid will be able to salvage it and the Russian economy.

This currency confiscation is similar to one by the Mikhail Gorbachev