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Gays in the Military - Executive Response and Background: Drafts - Talking Points

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Draft---Close Hold

Talking Points on President's Position on Excluding Service Members with HIV

--The President today will sign the defense authorization bill, but will reiterate his strong opposition to the provision requiring the involuntary separation of those service members living with the HIV condition. (Currently, service members living with HIV retain their positions unless they are medically unable to perform their duties.)

--The President strongly supports the bipartisan effort in Congress to repeal this blatantly discriminatory provision, and will do everything he can to ensure its passage.

--In a statement released today, the Chairman of the Joint Chiefs of Staff and the Secretary of Defense reiterate their longstanding opposition to this provision.

--In their statement, the Chairman of the Joint Chiefs of Staff and the Secretary of Defense state that this provision is unwise, unwarranted, arbitrary and unnecessary as a matter of military policy. They also conclude that this provision would be disruptive and wasteful, and would undermine the existing fair policy.

--The President agrees with this conclusion. Based on this advice, he has concluded that this provision serves no valid military purpose.

--For this reason, and after consulting with the DOJ about its legal effect, the President has concluded that this provision is unconstitutional.

--Specifically, the President has concluded that this provision violates equal protection by requiring the separation of physically able service members living with a disability, without furthering any legitimate military purpose.

--For these reasons, and at the direction of the President, the Attorney General will decline to defend this provision in any court challenge to its constitutionality.

--The House and Senate may defend this provision in court, if they wish to support their argument that this provision is constitutional.

--No service members will be discharged at this time. The Secretary of Defense does not plan to discharge any service members under this provision until the last possible moment provided by the law, and then only if there has been no Congressional repeal or judicial invalidation.

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TALKING POINTS

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--In the absence of Congressional repeal or judicial invalidation, the Secretary of Defense will enforce the provision by providing notice to those potentially affected by this provision.

--The President, the Secretary of Defense and the Attorney General will consult before taking any further actions regarding this provision.

--The President also is directing the Secretaries of Defense and Veterans' Affairs to take all possible steps to ensure that, in the absence of Congressional repeal or judicial invalidation, any service members and families affected by this provision will receive the full benefits to which they would have been entitled had they been medically retired.

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Questions and Answers on HIV-Exclusion Provision

Q: You originally refused to sign the bill because it included the provision discharging service members with HIV. Why are you signing it today?

A: I believe that a defense authorization bill is necessary at this time to ensure military preparedness and support our armed forces. I continue to believe that it is wrong and blatantly discriminatory to discharge service members who are ably serving their country simply because they are living with a disability, the HIV virus, when they are medically able to perform their duties. I strongly support the bipartisan effort to repeal this provision, and will do everything to ensure the repeal's passage.

Q: On what basis have you concluded that this provision is unconstitutional?

A: The Secretary of Defense and the Department of Defense have repeatedly opposed this provision as unnecessary as a matter of military policy. In the statement today by the Chairman of the Joint Chiefs of Staff, they conclude that this provision is unwarranted, arbitrary, and unwise, and would be disruptive and wasteful, as well as breaking faith with service members who have served their country.

I agree with them. This discriminatory provision violates equal protection because it requires the discharge of service members living with HIV without furthering any legitimate government purpose. After consulting with the Department of Justice, I have concluded that this provision is unconstitutional.

Q: Will the United States enforce the provision even though it is unconstitutional?

A: The Secretary of Defense will provide notice to potentially affected service members to allow for judicial review of the statute. The Secretary of Defense does not plan to discharge any service members under this provision until the last possible moment provided by the law, and then only if there has been no Congressional repeal or judicial invalidation.

In accordance with my determination that this law is unconstitutional, I have directed the Attorney General to decline

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to defend the provision in any court challenge. Instead, the House and Senate will need to defend the provision if they wish to make their argument that it is constitutional.

Q: Is this action unprecedented?

A: No. The courts, including the Supreme Court, and substantial practice by numerous Presidents, have recognized the President's constitutional obligation not to defend statutes he believes are unconstitutional. Even if the President signs a statute, he still has the obligation as the Nation's top constitutional officer to determine whether laws are constitutional. For example, the Supreme Court has approved President Franklin Delano Roosevelt's refusal to defend an provision of an appropriations bill that he determined violated individual rights, even though he felt compelled to sign the bill for budgetary reasons.

Q: What will this mean for those service members who have HIV?

A: No service member will be immediately discharged. The Secretary of Defense will provide notice to those service members potentially affected by this provision so that they can initiate any litigation. The Secretary of Defense, the Attorney General and I will assess the need for any further actions regarding this provision.

In the meantime, I am directing the Secretaries of Defense and Veterans' Affairs to take all possible steps to provide full benefits to those service members and their families affected by this provision.

ONLY IF ASKED

Q: Will service members be allowed to stay in the service while they are challenging their discharge?

A: That decision rests with the courts. The courts typically weigh the burden on those challenging a discharge before making any decision whether or not to grant a preliminary injunction. We hope the courts give full consideration to the heavy burden and unfairness of discharge on those affected by the provision.

Follow-up
① significant -
VA plus.
②
③

This directive
protects
families
of these discharged
or
10/19
\$1000 - other med. non deployable
medical disability - war
wounds

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DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: ADB DATE: 8/3/16
2015-0017-F

TALKING POINTS

1. As you know, the President is deeply concerned about the HIV exclusion provision of the DOD authorization bill. The President understands that the Department of Defense has long opposed this provision. The President also is opposed to it and believes the provision is unconstitutional.

2. There is no question that the provision discriminates and therefore would violate the Equal Protection Clause unless it could be concluded that the discriminatory classification furthers a legitimate governmental purpose.

3. The Congressional sponsors have sought to justify this provision, largely on the grounds of combat-readiness. We understand that the Department of Defense has consistently opposed this provision as:

a) breaking our commitment to these service people, which undercuts the morale of the force;

b) depriving the United States of qualified military personnel with needed expertise when separation is not necessary;

c) not justified by any considerations of world-wide deployability, since there are more than sufficient military personnel who can be deployed;

d) discriminatorily singling out this group of service people since over 5,000 other service members are medically non-deployable and are nevertheless allowed to remain in the service.

[NB: Defense Department has over 5,000 service members who are medically permanently non-deployable because of conditions including cancer, heart, other diseases, yet these service members are not being involuntarily separated. Defense Department estimates there are over 1,000 service members currently serving who are living with HIV, but are not medically disabled.]

4. Since you have opposed this provision in the past and have supported the retention of otherwise qualified military personnel who are living with HIV but not medically disabled, we assume that you share the President's view that this provision would harm the mission of the Defense Department.

5. Accordingly, the President wants to know whether you are able to affirm that the Department of Defense believes that implementation of this provision would be detrimental to the military mission of national defense.

6. I want to make clear that the President is not seeking a legal judgment from Defense Department attorneys as to whether this provision violates the Equal Protection Clause. The President will make that determination in consultation with the Attorney General based on your military judgment. The President is seeking your confirmation on the military question I have just presented.

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E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

01-Feb-1996 09:35am

TO: (See Below)

FROM: Todd Stern
 Office of the Staff Secretary

SUBJECT: RE: HIV/DOD TALKING PTS.

FYI -- the DOD Authorization bill is S. 1124, not H.R. 1530. H.R. 1530 is the prior DOD Authorization bill, which the President vetoed on December 28.

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