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Gays in the Military - Executive Response and Background: Notes

Stack:

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Position:

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DOD REAUTHORIZATION/HIV ISSUE

I. STATUS REPORTS

A. LEGAL

- o OLC views on legal challenge
- o Possible litigation strategies

B. LEGISLATIVE

- o Senate report: discussions with Kennedy, Nunn
- o House report: bill introduced

C. ADMINISTRATIVE -- MAKING BENEFITS AVAILABLE

- o Steps to be taken by VA and DOD

D. POLITICAL -- reaction from various communities

II. RECOMMENDED PRE-SIGNING STEPS

1. Call to Sen. Nunn -- POTUS or Sec. Perry or Gen Shalikashvili
2. Call to Advisory Council on HIV/AIDS -- Panetta or Ickes
3. DOJ meeting with outside lawyers
4. Briefings for key groups pre-signing
5. Prepare Presidential Directive
6. Develop complete Q and A's

III. ISSUES/RECOMMENDATIONS

A. TIMING of signing

- Recommend Tuesday or Wednesday
- Recommend a.m. briefings for press, community
- Recommend p.m. signing

B. TONE of signing statement

- Strong opposition
- Direct agencies to take all possible action to assist those affected
- No specifics in statement - specifics through briefings

C. CEREMONY

- Recommend only WH photo, not open press

Exec Response
Issues

7-4107
6280

2/6/96 M.B. w/ Advocacy lawyers

~~not the expected~~

- ① bill
- ② courts
- ③ not defending
- ③ lawsuit -

addendum

Eg. prot strict scrutiny
rational

SG. refuses to defend
Lovett - (Coles)
(pre-es. prot^{mod})

- combat-readiness? - other disabilities not deployable.
(1/5 - non-deployable)

- existing DoD policy -

W.Den - Rostker v. Goldberg

existing DoD policy - judgment

Argument: harder for govt. to defend -> ^{DoD} made judgment.

a) Denier's comments

b) irr. distinction

Den - Rostker - Cong. thought abt. - hearing

disab-related discrim ADA, Rehab. Act
DOJ, EEOC

→ Case agst constitutionality (Dell)

Timing of lawsuit

so patently unconstitutional

4 → 2 inconsistent positions?? (Dell)

ADA - [military diff.]

[Comply v. defense]

→ [We'll look at case]

suggestion asked DOJ review
1 week.

-
- Practical cases:
- 1) called by commanders - med discharge
 - 2) prevent release - confid info
Dorian calling treatment centers
 - 3) retaliatory measures.
 - 4) need point person - OSD

1/31/98

① signing statement - next week

② legislation - Kennedy - attached to Ryan White

Nunn - own bill S.1 co-sponsor

Kennedy - public forum

classified session

~~③ law~~

"This provision does not serve any valid military purpose"

③ law

a) refusal to defend

decline to enforce - std.

So patently unconstitutional

high std.

defer to Congress - not

~~ch.~~

b) stays - resisted in gay context

(not committed)

④ Action

FAIRNESS

A) EO - authority?

B) D.O.D. - 1) rules

2) cost

Options 2 + 3. (retirement benefits)

C) Vets - regulatory

a) retirement

b) job training - non-approp funds

VA - vocat. rehab. benefits?

100% med

diminished learning capacity - stigma
persons

① Coast Guard

analogy w/ lupus.

disab. retirement

Screening ev. 4 years

92-Vets.

before VA estab. code -

② VA

HIV schedule rating change.

medical management

pros: timely

(empirical stigma - abstracts)

budgetary implications

1500 - eligible for SGM.

VA Comp - 517 B

49/90 days allowed for review

③ Dad

→ Option 2-

Option 3 - VA schedule change

1074

legal authority

substantial expansion

a) primary source - military facilities

b) MOU's - VA hospitals subst. change

c)

letter - Air Force

specific conditions

specific period of time

[chil. - cut off at 21]

evidence - lack in durability

Does it include CHAMPUS

retirement pay

Space available

HIV testing - 2 triggers

a) special test

- deployment

- new assignment

- STD clinic

- also / drug abuse

b) routine - ev. 2 yrs

sometimes more frequently

Tri-care coverage

Continued health benefits coverage
1078a)

- can buy continued coverage

\$3600/yr Family coverage
1 yr - lost \$
not specified -

Any member doesn't otherwise have eligibility
18 months only

Any benefit to build?

Anti-Deficiency Act problem.

DOD - not sure admin.

box 2

VA - rep.

Issue timing

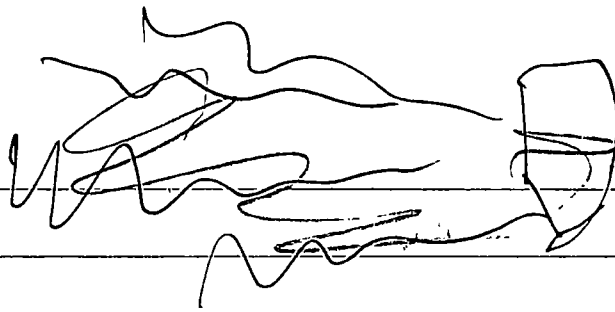
2) Pres. directs or agency process

Legislation 1) repeal
2) pens.

~~VA~~ VA touch w/COC.

budget - OMB.

DOD #s - Garden
reserve



Info

- ① Reservists - participate + get paid
- 2) inactive HIV - most

How many will lose?

② other infections -
non-deployables

→ 60+
→ employment

Bi 10:30

1074

①

②

Guard

VA - ways to obtain 30% - 1) defining persons separated by hostilities

2) persons w/ HIV

job training

DoD - 1074 authority - medical benefits

jobs-placement

Family health

DoD

① Family bens - 14 1/2 yrs.

under 14 1/2 yrs - ??

Options: ① Change VA req -

asymptomatic / less symptomatic

HIV $\Rightarrow$ retire

med bdl - separation or retirement?



more people into retirement

by changing VA scale

② Can't do disability 1201 - 30%

③ Limited practice - Secretary
Family hardship

1074 (c)

problem - Gulf War

nexus to military

Services-regulations

memos, refs

Limited -- only mil. facilities
statutory shakes

ex: Germany

VA

① any common practice that provides exceptions?

Coast Guard

exceptions: Walter Reed schedule?

[Tupus - treated as HIV (analogous)]
Coast Guard - DoT

CG-separated?

[Nancy McFadden]

non-stigmatizing discharge

Specialized rating schedule

1) regulatory - VA

2) administrative - all HIV persons / these / political

benefit/medical

family -

evidence - HIV social science??

VA
DOD

\$10,000 / annually

limited to care
no CHAMPUS

~~job training~~

job training - 0% get

Gulf War syndrome, not near 30% reservists?

DOD: ① short of admin.

1074

Cost Guard

Secretarial designation
(Comparability)

VA



misleading
Factual

5:00 - 1201

① empirical evidence - EEOC
research

② Nancy McFadden

Conf. call

Marty
Mary Lou
Whit Peters
MUC

VA - Mary Lou Keener

if given 30% retirement benefit,
offset - from future VA compensation

option 3: if lump sum settlement

~~not if annual retirement pay.~~
DoD - Deputy will do disab discharge

→ retired, not separated

Secretarial designee status - strong opp

ex: Navy - 32

(300)

- Civil service status - Unlikely,

no stat. authority - to preference

only place ^{non} ~~is~~ approp. fund,

- reservists - 500

most - inactive

488 - HIV

- ^{other} infectious diseases

working

a) infectious

[84 - weekend

23 - retired

- allowed to work

b) deployable

Box 3 - job

privacy / confidentiality / stigma

- DoD will work

benefits -

a) ~~unconstitutional~~ const. it

legal - b) TRO's - not oppose

legislative - House - 41 cosponsors Sen - kenn 27

admin -

political -

Signing statement - base

admin. detail

base - no military necessity

timing

① Pres. directive - DoD, VA.

6 months

DoD - defense

② DOJ - will they punt?

a) repeal

b) will they say

lawyers' meeting

DOJ - serves no valid military purpose

→ (gays in mil)

- irrational

DOD-

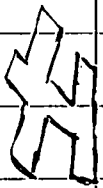
(703) 697-7248

What's going on?

medical board

Exec. solution

① asking that they not be separated.
DOJ



→ SG-stay
POTUS asking SG to ask for stay

②

DO

① ask for change in law

② E.O.-Comp. lens

DOD, VA

Pres. Directive

③ DOJ-POTUS

Counsel's Office -

Down

asking DOJ to consider
ask fully litigate

Σ Egg Roll - lawyers' mtg

1) ~~R. Jerome 514-8696~~

2) E. Pugh - SS docs

Sheri Swisher

1:30- Conf call

2/5/96 Conf Call

M. Yager

P. Fleming

H. Gracey / M. L. Keener

J. Miller / W. Peters / S. Harris

VA

Gracey

a) make regulatory change

disab.

CHAMPUS

DoD

Families → VA

- 1) admin.
- 2) → prod. rep.
- 3) new rep.

PVA -

DOJ issues

a) stay

rationale - gays v. HIV

b) constitutionality

c) others

d) signing statement

DoD - static - once rated disab. separated

VA - change

disab. comp.

Families out

V. Miller: VA commitment - 6 mos.

VA Option:

- 1) Hill pressure
- 2) VA groups
- 3) POTUS-

have asked Cabinet officers
to take care

AIDS Policy

- 1) ^{community} expect outrage
- 2) expect benefit plan

(1 month - 6 wks.)

VA - later, id get benefits

~~POU~~ [POTUS 1) w/o valid purpose
2) from belief]

sign-
enforce

→ [DoD - enforcement]

[Pres asked me to review claims that
might be unconstitutional]

Agenda - HIV

Welcome - Jack

Walter.

Parameters - veto.

signing statement - deplorable policy.

Legal issue,

⇒ ~~Std~~ ~~patent~~ ~~unco-~~ ~~stake~~ ~~and~~ ~~constitutional~~

intermediate level
of summary

b) litigation

- stay

briefing schedule

legislation

6 months

[act-challenged soon]

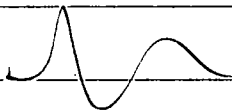
1) purpose -

mission to the Dept. of Defense

2) stays

lawsuit

DOJ - lawsuit early - litigation before
stays.



Rehab Act / Title VII

Military Exception to it:

Marsh (D.D.C.) 1990

HIV

Gonzales (9th Cir) 1983

Roper (2d Cir) 1987

Stinson (11th Cir) 1987

Garrett (11th Cir) 1990 HIV

Exception to Military Exception

Koop (DC Cir) for PHS Commissioned Officers

Military Exception Questioned + Rejected

Hill (E.D.N.Y.) → criticized in Roper
1986

Turns on how "military dept." is interpreted
in § 2000e-16 of Title VII

Const

Marsh (D.D.C. 1990) HIV

EP claim rejected b/c P did not show differential treatment on acct of HIV positive status. was ^{not} rationally related to legit. govt. interest (cleverage)

RICE (D. Puerto Rico 1992) HIV

Unique role of military → heavy reliance on readiness guides HIV policy. Question of fitness.

Holdiness (5th Cir 1987)

No Const. protected right to reventist

Didn't allege sufficient facts to state claim.

(said arbitrarily low evals + dislike of father)

- Constit. law
- Rehab. Act of 1973

5th, 14th

N.A. Min

P. Fleming

M. Scott

DOJ

still considering constit. issues

treatment -

- (A) same benefits pkg as anyone who invol. leaves -
- (B) continued entitlement to pers. medical care (other invol. separated don't get)
 - passed w/o for Promotion
 - P. I. Fid.
- (C) invol. separates don't get family care (medical retirement - treated as if retired)
 - DoD - still entitled to medical discharge
 - 30% disability - Vets. Admin Scale for -
 - other infections -
 - medical discharge -
- (D) eff. screening for disab. on entry or at discharge