

Madam President, Mr. John Walters, who is president of the New Citizenship Project and former Acting Director and Deputy Director for Supply Reduction Office at the Office of National Drug Control Policy, says that:

Between 1977 and 1992, illegal drug use went from fashionable and liberating to unfashionable and stupid. Overall casual drug use by Americans dropped by more than half between 1985 and 1992.

A period for which there was intense education about the damage of drugs.

Monthly cocaine use declined by 78 percent.

That has turned around, Madam President, and now it is skyrocketing.

Last December, the University of Michigan announced that drug use, particularly marijuana use, by 8th, 10th, and 12th graders rose sharply in 1994, as it did in 1993 after a decade of steady decline.

These are terribly alarming statistics, affecting the personal general safety and welfare of our own citizens.

Madam President, let me share with you just for a moment the cost that this represents to our fellow citizens in this country. Each year, the drug cartels ship hundreds of tons of cocaine in the United States, killing and maiming more Americans each year than died in all the years of engagement in Vietnam. And 2.5 percent of the live births in the United States are now cocaine crack exposed babies—100,000 per year. We have had a lot of talk about children in this Chamber over the last few hours and days. And yet, we seem to accept that 100,000 new babies are born as crack babies in the United States. Each year, the cartel drains \$70 to \$140 billion in revenues out of the United States. That is \$70 to \$140 billion, Madam President. If this trend continues, 820,000 children will try cocaine in their lifetime; 58,000 of them will become regular users.

Well, Madam President, we can get caught up in the statistics, but the point I am trying to make here this morning is that the United States, Mexico, Colombia, Bolivia, and Peru are all at grave risk and are being challenged openly and directly by a powerful, brutal force that on a daily basis is costing the lives of our fellow citizens and are putting at jeopardy the very fabric of this democratic hemisphere.

Madam President, when we get into these discussions, there is a lot of fingerpointing. And there is certainly plenty of room to do that.

I do want to point out, as we address this issue, that in each of these countries, there have been citizens who have fought valiantly—in the United States, in Mexico, Colombia, Brazil, Peru, Bolivia—who have fought these problems, who have died fighting these problems. And my remarks in that sense are not incriminating. I applaud the efforts that have been expended in our country and these others to address the problem.

But the fact remains that we have not solved this issue and there are circumstances in each of the countries

that must be addressed. I would suggest that a new focus needs to be brought to this crisis.

I would suggest the forming of a new alliance of these five countries; that we must come to the table; that we must sit across the table from one another and we must approach the new century by lifting the bar, by lifting the standard of what we are going to achieve; that we must set our sights, these countries directly affected, these countries in the hemisphere must bring this era of abuse and attack on the citizens of the hemisphere to an end.

I would suggest that we have the technology to remove the product, the coca leaf, and we ought to do so as quickly as possible.

By the end of this century, the coca leaf should not be able to be grown in the hemisphere.

I read from the International Narcotics Control Strategy Report issued in March of this year:

The United States, which has pinpointed the major growing areas, has spray aircraft and a safe herbicide that can destroy illegal cultivation in a matter of months. Since the coca bush does not fully come on line until it is 18 months or 2 years old, these simple measures could deprive the cocaine trade of its basic material, crippling it, if not destroying it entirely. We need the necessary cooperation of the two largest coca growing countries to carry out this simple but effective crop-control measure.

Madam President, we simply must set as a goal among these five countries that we are going to eliminate this source of evil. We have the technology to do it. We have the knowledge of where the product is. It must be removed.

The chief kingpins behind these cartels are known and their locations are known and they must be arrested. Under the constitutional law of each of these countries, there are adequate provisions to arrest, detain, and punish these individuals doing so much damage in our country and throughout the hemisphere.

We must seek special rights of extradition so that these criminals can be brought to bay in the United States when they attack our citizens, as they are doing.

This is a stealth issue. This is an issue that is pervasive. If any other country was pouring chemicals into the United States causing the death or maiming of hundreds of thousands of citizens on an annual basis, it would not be tolerated. The whole Nation would rise up in defense. And yet we are quietly proceeding reducing the resources to attack this problem.

I am going to close, but I will just say that it is time for a new focus. I think these five major countries should come to the table. We need to mutually agree on the end game that the product will be eliminated, that the kingpins will be arrested and will understand that they will be on the run for the rest of their lives, and that other appropriate measures of cooperation, extradition and other laws for interdiction,

and the like, will be put in place, and that once those standards are mutually agreed upon and that this hemisphere will not accept degradation of democracy and an attack on the citizens, we will set the bar. People will either participate or we will know permanently they are not cooperating.

I yield the floor.

Mrs. BOXER addressed the Chair.

The PRESIDING OFFICER. Under the previous order, the Senator from Georgia has 10 minutes to speak. Does the Senator from Georgia wish to yield?

Mr. NUNN. Madam President, I need to go ahead and make my remarks. I have been waiting for some time, but I will certainly yield.

Mrs. BOXER. I would like to make an inquiry if it is possible, that concluding the remarks of the Senator from Georgia, I be permitted to speak as in morning business not to exceed 10 minutes.

The PRESIDING OFFICER. Under the previous order, the Senator from Indiana [Mr. COATS] is scheduled for 10 minutes. Does the Senator from California wish to ask unanimous consent for 10 minutes following the Senator from Indiana?

Mrs. BOXER. Yes, that would be perfectly acceptable. I make that request.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered. The Senator from California will have 10 minutes following the Senator from Georgia and the Senator from Indiana.

Mrs. BOXER. I thank my colleagues.

Mr. NUNN. Madam President, I ask unanimous consent that the time we used for that dialog not come out of my time.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### POLICY ON HOMOSEXUALITY IN THE ARMED FORCES

Mr. NUNN. Madam President, in view of the recent attention to the policy on homosexuality in the Armed Forces, Senator COATS and I would like this morning to update the Senate on the status of the legislation which was enacted in 1993 as section 571 of the National Defense Authorization Act for fiscal year 1994. Both Senator COATS and I will be speaking to this subject this morning. I think that our joint statements certainly reflect the continuing bipartisan consensus in support of the basic legislation that was enacted in 1993.

This discussion is precipitated by the recent district court decision in *Able* versus the United States and the reaction to it. In my view, the *Able* decision was not correctly decided. I believe it will be reversed on appeal, particularly in view of the unusual approach taken by the district judge in which he, in effect, drafted his own statute, manufactured his own legislative purposes, and reviewed the policy

without regard to the standards articulated over a long period of years by the Supreme Court of the United States. And I will speak further to each of those matters.

I believe that our legislative record is solid and the case will be reversed on appeal, and I do not see any need for further legislative action at this time.

#### BACKGROUND

At the outset, I would like to summarize briefly the events which led to the enactment of this legislation. A more detailed discussion of these events is in the committee's report on the legislation, Senate Report 103-112.

The prohibition on homosexual acts has been a longstanding element of military law. The prohibition on service by gay men and lesbians has been covered in military regulations.

In September 1992, during the Senate's debate on the National Defense Authorization Act for fiscal year 1993, Senator Howard Metzenbaum offered an amendment that would have established a "prohibition on discrimination in the military on the basis of sexual orientation." I observed that "this subject deserves the greatest care and sensitivity" and stated:

We will have hearings on the subject next year. We will hear from all viewpoints, and we will take into consideration the viewpoints of our military commanders, the viewpoints of those in the homosexual community, the viewpoints of those who are in uniform who may be homosexual, gay, and we will also consider the men and women in uniform who are not in that category and the effect it would have on military morale.

Based upon the assurance that hearings would be held in 1993, Senator Metzenbaum withdrew his amendment.

During the 1992 election campaign, Presidential candidate Bill Clinton said that, if elected, he would take action to change the current policy restricting the service of gay men and lesbians serving in the Armed Forces. He also spoke of the need to consult carefully with the military leadership on this issue. After the election, he reiterated his views on changing the policy and the need to consult with the military leadership.

Secretary of Defense Aspin, during his confirmation proceedings in January 1993, indicated that there would be extensive consultations with Congress on this subject.

Shortly after the Inauguration, a series of media reports suggested that a significant change in the Department's policy was imminent. A number of Senators indicated that they would offer an amendment early in the congressional session that would prohibit any change in policy. I expressed the view that neither the executive branch nor Congress should institute a significant change in the current policy, by Presidential order or by congressional action, prior to undertaking a comprehensive review, including hearings, on this subject.

In late January, I participated in a series of meetings with the President on the subject of homosexuality in the

Armed Forces. Other participants included then-Senate majority leader George Mitchell and Democratic members of the Senate Armed Services Committee. In addition, I consulted extensively with members of the Joint Chiefs of Staff.

As a result of these meetings and further discussions with the President, an interim policy was announced by the President on January 29, 1993, to remain into effect until July 15, 1993. This interim policy retained then-existing rules restricting the service of gay men and lesbians in the Armed Forces. The policy also set forth two modifications that would apply during the interim period. First, reflecting a recommendation made by the Joint Chiefs of Staff, new recruits would not be questioned about homosexuality during the enlistment process. Second, gay and lesbian cases that did not involve homosexual acts would be processed through separation from active duty, and the individual would be placed in a nonpay status in the Standby Reserve during this interim period.

In addition, the President directed the Secretary of Defense to conduct a review of the current policy and to provide him with a draft Executive order by July 15, 1993.

On February 4, 1993, during Senate consideration of the Family and Medical Leave Act, the Senate debated two amendments related to the service of gay men and lesbians in the Armed Forces.

The first amendment would have frozen in law "all Executive Orders, Department of Defense Directives, and regulations of the military departments concerning the appointment, enlistment, and induction, and the retention, of homosexuals in the Armed Forces, as in effect on January 1, 1993." The amendment was tabled by a vote of 62-37.

The Senate then unanimously adopted an amendment expressing the Sense of Congress that the Secretary of Defense should conduct "a comprehensive review of the current Department of Defense policy with respect to the service of homosexuals in the Armed Forces." The amendment further expressed the sense of Congress that the results of the review should be reported to the President and Congress not later than July 15, 1993. In addition, the amendment expressed the sense of Congress that the Senate Committee on Armed Services should conduct comprehensive hearings on the current military policy and should conduct oversight hearings on the Secretary's recommendations as such are reported.

The amendment, as adopted, was enacted as section 601 of the Family and Medical Leave Act of 1993, Public Law 103-3. The Senate also agreed to an order that effectively precluded consideration of any further amendments in the Senate relating to the service of gay men and lesbians in the Armed Forces until July 15, 1993. This procedure permitted the Department of De-

fense and the Committee on Armed Services to conduct their reviews prior to legislative action on specific amendments.

#### THE LEGISLATION

Madam President, the legislation passed in Congress in 1993 contains 15 findings, which address the constitutional role of Congress in establishing military manpower policy, the unique nature of military service, and the fact that the presence in the military of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to military capability.

The legislation codifies specific grounds for discharge—homosexual acts, statements, and marriages—reflecting DOD's longstanding policy on homosexuality in the Armed Forces. The legislation also provides the Secretary of Defense with discretion to reinstate accession questioning if the Secretary determines it to be necessary to effectuate the restrictions on homosexuality in the Armed Forces.

On February 28, 1994, the Department of Defense issued final regulations implementing the legislation.

#### THE LITIGATION

In the 13 months since the regulations were issued, there have been a number of judicial decisions addressing homosexuality in the Armed Forces, but most have dealt with the old administrative rules rather than the new legislation. The authority of the Armed Forces to discharge members based upon homosexual acts has been routinely sustained by the courts, including those courts such as the ninth circuit, that have questioned separation based on statements.

Two leading cases illustrate the differing approaches that the courts have taken on the impact of statements. In *Meinhold v. Department of Defense*, 34 F.3d 1469 (9th Cir. 1994), a case arising under the old policy, the ninth circuit held that a servicemember could not be discharged solely because he or she said "I am gay" but could be discharged for making a statement which "manifests a concrete expressed desire or intent to engage in homosexual acts." The court reached this conclusion based on its construction of the regulations, which make it unnecessary to decide any constitutional issue.

In *Steffan v. Perry*, 41 F. 3d 677 (D.C. Cir. 1994), the D.C. Circuit ruled that the statement "I am gay" constituted sufficient evidence under the regulations of a propensity or intent to engage in homosexual acts to justify a discharge. The court rejected any constitutional challenge to a discharge based upon such a statement.

Last week, in a case arising under the new legislation, a judge in the U.S. District Court for the Eastern District of New York took a different approach. In *Able versus United States*, Judge Nickerson held that the act and the implementing directives violate the first amendment as a restriction on

speech and the fifth amendment as a denial of equal protection. The judge's decision applies only to the six plaintiffs in the case, and has no wider direct application. As a result, the legislative policy remains in effect.

Madam President, to put this matter in perspective, there are over 600 district court judges in the United States, and it was predictable some district judge somewhere in the country would rule the statute unconstitutional. That does not mean though that the upper courts will uphold this. I made this point at the time the legislation was enacted. I also said that I believed the legislation would be sustained on appeal.

I am pleased that the Clinton administration has made it clear that it will appeal the Able decision, and I continue to believe that the legislative policy will be sustained on appeal.

My confidence is even higher after reading the opinion. In my view, the opinion does not reflect sound judicial craftsmanship or scholarship. The district court's opinion ignores the plain word of the statute, misconstrues the legislative history, relies on speculation about the purposes of the legislation rather than the clear words of the statute, and fails to discuss circuit court opinions which take a contrary view.

There are many flaws in the Able decision, which will undoubtedly be raised on appeal. Today, I will highlight some of the more egregious errors from a congressional perspective.

First, the decision misstates the definition of homosexuality in the statute and then proceeds to analyze the statute in terms of the judge's erroneous definition.

The opinion states:

The first question for the court is whether the Government may under the first amendment prohibit a member of the Services from stating that he or she is a homosexual, that is, that he or she has "an innate feeling within"—

I am emphasizing those words—that indicates the status of a homosexual.

This completely ignores the specific conduct-based definition in the statute, which provides:

The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

The statute talks about conduct, what a person does or intends to do.

We do not mention what the judge put so much emphasis on, that is, in his words, "an innate feeling within that indicates the status of a homosexual". That is nowhere in the statute. Judge Nickerson, in effect, rewrote the statute to conform to his own views of his concept of "status."

Second, the decision disregards the Supreme Court standard of review in military cases. As the Supreme Court stated in *Rostker v. Goldberg*, 433 U.S. 57 (1981), "judicial deference to \* \* \* congressional exercise of authority is at

its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." The Supreme Court emphasized that a court may not "substitute [its] own evaluation of the evidence for a reasonable evaluation by the legislative branch."

The Able decision, however, is replete with the district court's evaluation of the testimony presented in congressional hearings, while ignoring virtually all of the analysis presented by authoritative sources such as the committee's report.

Third, although the Able decision assumes there is no rational basis for the presumption that a statement by an individual that he or she is gay indicates a likelihood that the service member engages in or will engage in homosexual acts, the court makes no attempt to address the opinions that are directly contrary in *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) and *ben Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied 110 S.Ct. 1296 (1990), which found the presumption to be valid.

It is a puzzle to me how a district court judge completely ignored—he can disagree if he chooses—but how he completely ignored two circuit court opinions on this subject.

Fourth, the Able decision bases its equal protection analysis on the unwarranted assumption that the legislation is based upon the irrational prejudice of service members against gays and lesbians. The decision totally ignores the lengthy discussion of the issue of prejudice and stereotypes in the committee's report on the legislation, in which the committee concluded that "our position on the service of gays and lesbians is not based upon stereotypes but on the impact in the military setting of the conduct that is an integral element of homosexuality."

Fifth, instead of relying on the legislation and the committee report, the Able decision manufactures its own view of the legislation. The decision states:

Although the act's findings are silent as to the response of heterosexuals to the presence of known homosexuals in the services, the court will analyze the act as if it said that a statement of homosexual status was in itself an evil because heterosexuals would not like to hear it and would react so as to damage unit cohesion.

Madam President, it is a very large leap from the Supreme Court's decision in the Rostker case, which requires deference to Congress in these matters, to the decision of the district court in Able, in which the judge disregards the analysis provided by the committee and substitutes his own version of what he thinks motivated the Congress.

In summary, Madam President, the judge in Able has drafted his own statute, manufactured his own legislative purposes, and reviewed the policy without regard to the standards articulated by the Supreme Court. That is not what the Founding Fathers had in

mind when they drafted a Constitution based upon the separation of powers.

Madam President, the media understandably have focused on the inflammatory language in the opinion, such as the suggestion that the policy is "Orwellian" and that it ignores what "Hitler taught the world," in the judge's view.

The opinion is long on rhetoric and short on analysis. Speaker GINGRICH, in reaction, has raised the issue of whether we should reopen the legislative debate and reinstate the policy that predated the legislation.

In my view, Madam President, we should not do so. The policy on homosexuality in the Armed Forces is on much stronger ground than it was prior to enactment of this legislation. It is more likely to be sustained in the Supreme Court based on the law and the findings of Congress than if we went back to the old standards which were based on regulatory policy alone.

We have a strong legislative record, reflecting the common agreement of the civilian and military leadership of the Department of Defense, and of the Congress, that there is a clear military need for the policy on homosexuality in the armed forces. We have a detailed set of legislative findings, which we did not have prior to enactment, setting forth the basis for the policy. We have clear procedures for separation proceedings based upon homosexual acts, statements, and marriages.

The legislative policy is clearly consistent with the preexisting administrative policy requiring separation on the basis of homosexual acts, statements, and marriages. The new policy, of course, makes a change in previous practice in that the legislation does not require the government to initiate questions to an individual about homosexuality, and the regulations do not currently permit such questions to be asked. As I noted earlier in my statement, the recommendation to drop such questioning from the enlistment form was made by the Joint Chiefs of Staff—our military leadership—based on their determination that the questioning was not necessary to effectuate the policy on homosexuality in the Armed Forces.

During our hearings, the military chiefs, when asked for their personal opinions about this policy—General Powell, General Sullivan, Admiral Kelso, General McPeak, General Mundy, and Admiral Jeremiah—each stated he supported the policy.

Each was also asked whether the policy could be implemented in a manner consistent with morale, good order, with discipline, with unit cohesion, and without a degradation in readiness. Each responded that the military could actually implement the policy without such adverse effects.

Mr. President, the policy in effect reflects the recommendations of the military leadership, which were endorsed by the civilian leadership and

enacted by the Congress. Members on both sides of the aisle worked closely to ensure that there was a solid legislative record based upon sound military requirements. The hearings were conducted with dignity and respect for all involved, and reflected a sober, careful analysis of a very difficult time.

In my judgment, Mr. President, there is no need at this time for any legislative action. The policy is in place. The policy is working. I do not believe that the opinion in the Able case will survive appellate judicial scrutiny, particularly in light of the clear legislative findings and sound congressional action reflected in the statute. There is no call on the part of our military leadership for change. On the contrary, they believe the policy is working well. Moreover, if they come to the conclusion in the future that it is necessary to reinstate questioning, the statute gives the Department of Defense the authority to do so without further legislative action. In the absence of evidence that a legislative change is needed, it is my recommendation that the Congress take no further legislative action at this time.

The PRESIDING OFFICER. According to the previous order, the Chair recognizes the Senator from Indiana.

Mr. COATS. Madam President, I thank my colleague from Georgia for his statement, and hopefully this will complement that statement. I will attempt not to repeat in areas that he has already addressed.

Section 654(b)(2) of title 10, United States Code, governing military matters states that a member of the Armed Forces shall be separated from the Armed Forces if it is appropriately determined:

(2) that the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

The law defines a "homosexual" as: a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian."

On Thursday of last week, in the case of Lieutenant Colonel Jane Able et al. versus United States of America, Judge Eugene H. Nickerson, a Federal district court judge sitting in Brooklyn, ruled that the portion of the current homosexual policy contained in title 10, United States Code, section 654(b)(2) and its implementing directives, which addresses statements by individuals, violates the first and fifth amendments of the Constitution.

This court decision is the first one involving the current policy on homosexuals in the military.

Judge Nickerson's ruling allows six self-proclaimed homosexuals to remain on active duty. These six individuals

originally filed the suit anonymously and only stated that they were gay.

The issue of whether an individual has a protected right to state they are a homosexual has already been decided by the courts. Declaration of one's homosexuality cannot be logically separated from homosexual acts under free speech. The Senate report on the National Defense Authorization Act for fiscal year 1994 which accompanied the new statute cited the case of Ben Shalom versus Marsh:

The admission is not a statement protected by the free speech guarantees of the First Amendment because it can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct.

That case goes on to say:

The Army does not have to take the risk that an admitted homosexual will not commit homosexual acts that will be detrimental to its assigned mission.

To be very basic, the courts have ruled that if you say you are a soprano, people can logically conclude that you sing. Judge Nickerson's decision clearly rejects longstanding court precedent. It is early in the judicial process, but I am confident that the constitutionality of the current policy will prevail.

In 1993, the Senate began its investigation of what effect homosexuals have on the military. It held hearings on March 29 and 31; April 29; May 7, 10, and 11 and July 20, 21, and 22. Testimony was gathered from soldiers, sailors, airmen, and marines. The Secretary of the Department of Defense and the Chairman of the Joint Chiefs of Staff also appeared before the Armed Services Committee and gave extensive testimony from their knowledge of the Armed Forces. There were panels of witnesses from the academic community, as well as from the Senate. The committee also heard from active and retired military officers and enlisted personnel, homosexuals who had been discharged from the services and members of the military and civilian legal community. Literally hundreds of hours of research were conducted. The chairman and ranking member of the Senate Armed Services Committee both dedicated themselves to the most comprehensive examination of this issue that has ever been conducted. Their efforts took them to military installations and onto ships and submarines. This issue was also debated by the committee with the House Armed Services Committee and discussed with members of the administration on several occasions.

All of the committee's efforts made one thing abundantly clear. It was best pointed out in General Powell's testimony before the committee.

I would like to take just a moment of the Senate's time to go over General Powell's statements because they were extremely valuable to the decision process of the committee of the Congress and the administration. Let me now quote from that testimony.

We have challenged our own assumptions. We have challenged the history of this issue. We have argued with each other. We have consulted with our commanders at every level, from lieutenant (and) ensign all the way up to the commander in chief(s) of the various theaters. We have talked to our enlisted troops. We talked to the family members who are part of the armed services team. We examined the arguments carefully of those who are on the other side of the issue from us.

After all this work by the Department of Defense, General Powell concludes as follows:

The presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces.

In short, trained, successful, intelligent, experienced military and civilian personnel are of the opinion that admitting homosexual individuals to the military will rob our forces of the most essential element of a fighting force; its cohesion, morale, and esprit. Is this an irrational conclusion? General Powell eloquently addressed this as well. He stated:

Unlike race or gender, sexuality is not a benign trait. It is manifested by behavior. While it would be decidedly biased to assume certain behaviors based on gender or membership in a particular racial group, the same is not true for sexuality.

On November 30, 1993, 10 months after this effort began, the President signed the National Defense Authorization Act for Fiscal Year 1994 which contained the new policy at section 571.

The act codified the military's longstanding ban on homosexuals serving in the military. It was not the result of a knee jerk reaction but the steady work of the U.S. Congress which took into full consideration the needs of the services and the rights of individuals. Judge Nickerson's ruling is the ruling of a single judge in a single district and is not the consensus of the judicial community as a whole. It is not unusual for a case to be lost at the district level. The circuit courts are full of cases being appealed from district courts. The White House, the Department of Justice, and the Department of Defense all agree that an appeal is in order and will take place this summer. Many appeals are met with decisions which reverse the lower courts. We recently witnessed just such a reversal in the case of Joseph E. Steffan.

The law of the land is quite clear. In addressing this matter, Congress exercised its Constitutional prerogative, section 8, U.S. Constitution to—

\*\*\* raise and support Armies, \*\*\* provide and maintain a Navy, \*\*\* and \*\*\* to make Rules for the Government and Regulation of the land and naval Forces.

In the process, Congress made a number of findings:

First, there is no constitutional right to serve in the Armed Forces.

Second, pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of Congress

to establish qualifications for and conditions of service in the Armed Forces.

Third, the primary purpose of the Armed Forces is to prepare for and to prevail in combat should the need arise.

Fourth, the conduct of military operations requires members of the Armed Forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

Fifth, success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

Sixth, one of the most critical elements in combat capability is unit cohesion; that is, the bonds of trust among individual service members that make the combat effectiveness of the individual unit members.

Seventh, military life is fundamentally different from civilian life in that—

The extraordinary responsibilities of the Armed Forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

The military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

Eighth, the standards of conduct for members of the Armed Forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the Armed Forces.

Ninth, those standards of conduct, including the Uniform Code of Military Justice, apply to a member has a military status, whether the member is on duty or off duty.

Tenth, the pervasive application of the standards of conduct is necessary because members of the Armed Forces must be ready at all times for worldwide deployment to a combat environment.

Eleventh, the worldwide deployment of U.S. military forces, the international responsibilities of the United States, and the potential for involvement of the Armed Forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

Twelfth, the prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

Thirteenth, the Armed Forces must maintain personnel policies that exclude persons whose presence in the Armed Forces would create an unacceptable risk to the Armed Forces' high standards of morale, good order

and discipline, and unit cohesion that are the essence of military capability.

Fourteenth, the presence in the Armed Forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

If there is any remaining confusion about the policy, the Department of Defense should ensure that all directives, implementing regulations, and teaching manuals are crystal clear. Homosexuality is incompatible with military service. Homosexuality has always been, and continues to be defined by conduct. Speech is conduct, for it is rational to conclude that members of the military who say they are homosexuals have a propensity to engage in conduct. The military should not be made to bear the risk.

I fully anticipate that the Supreme Court will carefully review the body of work Congress placed into law. I believe that the strong policy set forth in 10 United States Code section 654 will fully meet the constitutional test.

I agree with Senator NUNN that no additional legislation is needed at this time. The law is sufficient. I am confident the court will uphold that law.

Obviously we would tend to closely monitor these judicial proceedings, the implementation of department regulations, and the administration's defense of the current law. But the current law is sufficient, in my opinion. I would just assure my colleagues that we intend to pay very close attention to the implementation of that law—as was clearly expressed with solid majority support of this Congress, with the support of this administration.

I ask the Senator from Georgia if he has any additional comments?

The PRESIDENT pro tempore. The Senator from Georgia.

Mr. NUNN. Mr. President, I wanted to thank the Senator from Indiana for his statement this morning, which shows that we have a united view here. I know the Chair, the Senator from South Carolina, the chairman of the committee, also agrees with our view and has made that clear in his statement. So I think we have very strong consensus in our committee. I thank the Senator from Indiana for the tremendous amount of work he has done on this issue over the last years. He has been an extraordinary partner in dealing with a very difficult, sensitive issue, but one that is important to the U.S. military and our national security. So I thank him very much for his support.

Mr. COATS. I thank the Senator. Without his leadership I do not believe we could have been successful. It has truly been a bipartisan effort and the then-chairman of the Senate Armed Services Committee's leadership was invaluable to this process.

As I said it was the most extensive set of hearings and extensive investiga-

tion ever conducted on this subject or perhaps any other subject. That has been placed as a matter of record and is part of the law. I thank him for his support and leadership.

Mr. THURMOND. Mr. President, Judge Eugene H. Nickerson, a district judge for the Eastern District of New York, has rendered a decision in the *Able versus United States* case that declares a portion of the don't ask-don't tell policy in violation of the first and fifth amendments to the Constitution as it relates to six plaintiffs. While this is a narrow ruling, it is also, in my opinion, an incorrect ruling and must be appealed to the second circuit court. I have been assured by the Department of Defense and the Department of Justice that an appeal is being formulated and briefs will be filed in a timely manner. A decision from the second circuit could come as early as this fall.

The Senate Armed Services Committee and the Senate worked hard to craft a constitutional policy that protects individual rights and yet provides our fighting men and women with the right kind of environment in which to build the highest morale, discipline, and esprit in their units. I wish to remind all of you that we bear a tremendous responsibility to our men and women in uniform. They rely on us to make certain they are given every opportunity to survive in combat. It is our responsibility to provide them the best places to train and live, the best equipment possible and the very finest in care for their families. In addition, we must not do anything that could reduce the soldiers' most valuable asset—unit cohesion.

Today, Senator NUNN, Senator COATS, and I are addressing this recent court decision. We worked long hours producing the current policy and both of them agree with me that we need to let the judicial system complete its process. I am confident that the final decision will uphold the constitutionality of the new policy and that it will serve the military well.

#### MEASURE PLACED ON THE CALENDAR—H.R. 849

Mr. COATS. Mr. President, I understand there is a bill that is ready to be read a second time?

The PRESIDING OFFICER (Mr. ASHCROFT). The clerk will read the bill the second time.

The bill clerk read as follows:

A bill (H.R. 849) to amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption for certain bona fide hiring and retirement plans applicable to State and local firefighters and law enforcement officers; and for other purposes.

Mr. COATS. Mr. President, I object to further proceedings on the bill at this time.

The PRESIDING OFFICER. The bill will be placed on the calendar.

The distinguished Senator from California is recognized.