

December 26, 2012

The President
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Mr. President:

As organizations that work to end discrimination, we write to you today about Section 533 of the FY 2013 National Defense Authorization Act (NDAA). We understand that you have not yet made a decision about whether you will sign or veto the NDAA. If you decide to veto the bill, we strongly urge you to include Section 533 in your veto message as a provision that Congress can and should correct before sending it back to you for your signature. However, if you sign the bill, we strongly urge you to provide guidance to the Department of Defense on the intent and proper implementation of Section 533.

It appears that Section 533(a), which was added to the NDAA during conference, was intended to reflect current policy regarding the accommodation of religious practices in the military. We believe that Section 533(a) as written, however, differs from current policy in potentially significant ways.

We understand that the current policy, like most laws and regulations on accommodating religious practices, calls for an assessment of the accommodation and the effect it would have on both important military objectives and on fellow service members. The hastily drafted NDAA provision, however, does not seem to provide for such an assessment. Rather it seems to compel the military to accommodate the conscience, moral principles, or religious beliefs of all members of the armed forces without accounting for the effect an accommodation would have.¹

As a result, we fear this provision could lead to claims of a right to discriminate against not just lesbian, gay, and bisexual service members, but also women, religious minorities, and in the provision of health care. Requests for accommodation could, for instance, undermine longstanding prohibitions against harassment, give rise to claims of a right to proselytize other service members and civilians in occupied areas, and lead to claims affecting health care services or anti-harassment training.

The second clause of Section 533(a)(1) prohibits the use of belief in personnel actions if “practicable.” Unfortunately, this language suggests that beliefs held by service members may be taken into account if not “practicable,” even when an individual’s beliefs have never been expressed or never acted on. Yet, Representative Adam Smith explained the goal of the

¹ The right to exercise one’s religion is not without limits. *See, e.g., Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985). It has long been understood that religious exercise should not interfere with, for instance, others’ rights, safety, and an ordered society. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Watson v. Jones*, 80 U.S. 679, 728 (1872).

provision was to ensure that service members “cannot be punished solely for [their] beliefs.”² Upon joining the Armed Forces, service members are not obliged to give up any religious beliefs or beliefs reflecting conscience or moral principles. To be subject to any adverse personnel actions based solely on those beliefs is improper and discriminatory.

Going forward, we urge you to ensure that no accommodation of religious belief or conscience can result in discrimination or harm to others. The Armed Forces must be permitted to consider these important objectives. We also urge that you ensure that adverse personnel actions based solely on service members’ beliefs is prohibited. This can be accomplished either with a veto message calling for Section 533 to be corrected or a signing statement providing guidance on the intent of the provision and how it should be implemented.

We support the right of service members to hold their own religious and moral beliefs. We also support accommodating beliefs—so long as doing so does not result in discrimination or harm to others. We agree with Representative Smith who said he does not think the provision belongs in the bill³ and Representative Steny Hoyer who called the provision unnecessary.⁴ We urge that your veto message or your signing statement clarify your administration’s intent on this provision, to help avoid the “endless issues” that Eugene Fidell, a legal expert on military justice,⁵ predicts it may cause.

Respectfully yours,

American Civil Liberties Union
Americans United for Separation of Church and State
Anti-Defamation League
Gay & Lesbian Advocates & Defenders
Interfaith Alliance
Lambda Legal
National Center for Lesbian Rights

² Chris Johnson, “Defense Budget Includes ‘Conscience’ Provision,” *Wash. Blade*, Dec. 18, 2012, <http://www.washingtonblade.com/2012/12/18/defense-budget-bill-includes-conscience-provision/>.

³ Johnson, “Defense Budget Includes ‘Conscience’ Provision.”

⁴ Rep. Hoyer, Floor Statement in Support of the National Defense Authorization Act Conference Report, Dec. 20, 2012, <http://www.democraticwhip.gov/content/hoyer-statement-support-national-defense-authorization-act-conference-report-0>.

⁵ Adam Serwer, “Defense Bill Includes Broadened Version of Todd Akin’s Anti-Gay Provision,” *Mother Jones*, Dec. 20, 2012, <http://www.motherjones.com/politics/2012/12/defense-bill-todd-akin-anti-gay-provision>.