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HOUSE BILL NO. 2474

Offered January 21, 2011

A BILL to amend and reenact § 44-2 of the Code of Virginia, relating to eligibility for service in the Virginia National Guard.

Patron—Marshall, R.G.

Referred to Committee on Rules

Be it enacted by the General Assembly of Virginia:

Legislative Findings

1. The Virginia National Guard is one of the organized Militias of the several states. State organized Militias were not created by the United States Constitution or the United States Congress, but pre-existed the ratification of the United States Constitution.

2. State organized militias are mentioned in the United States Constitution in Article I, Section 8, Clauses 15 and 16: granting to Congress the limited authority "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;" and "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." All other powers over state Militias belong to the states.

3. The Militia provisions of the United States Constitution reflect both the importance of state Militias, and the founders' concern of the dangers of a large standing army in times of peace.

4. Whereas the Armed Forces of the United States reports to the President of the United States, unless the Virginia National Guard has been called into "actual service," it reports to the Governor of the Commonwealth of Virginia.

5. Unlike the provisions authorizing Congress to "raise and support" armies and "provide for a navy," the Militia provisions of the United States Constitution did not grant to the federal government the power to "constitute" the Militia, but only to organize, arm and discipline "the Militia" Thus, the Constitution left it to the several states to determine eligibility for service in the Militia, that is, to decide who will actually comprise the Militia.

6. Former U.S. Supreme Court Justice Joseph Story noted in his Commentaries on the Constitution: "The power over the militia ... was limited, and concurrent with that of the States. The right of governing them was confined to the single case of their being in the actual service of the United States.... It was then, and only then, that they could be subjected by the general government to martial law. The power to discipline and train the militia, except when in the actual service of the United States, was also vested exclusively in the States; and under such circumstances was secure against any serious abuses."

7. Thus, although Congress may determine who is eligible to serve in the Army, Navy and Air Force, if a person is not within the pool of persons determined by the state to constitute the Militia, Congress has no power to override state law to expand the pool of persons which the state must permit to serve in its state Militia. No person enlisting in the U.S. Army, Air Force or Navy automatically becomes a member of the National Guard of any state.

8. The federal Militia Act of 1903 recognized that the state National Guard is the "organized militia" of the several states. Between 1881 and 1892, state legislatures revised their military codes to provide for an organized Militia force. Most states changed the name of their organized Militias to the National Guard, following the example of New York.

9. The Supreme Court has explained the interrelation of the state National Guard and the federal government. "Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate State Guard unit. Under the 1933 Act, they could be ordered into active service whenever Congress declared a national emergency and authorized the use of troops in excess of those in the Regular Army." Perpich vs. Department of Defense 496 U.S. 334 (1990).

10. Any person who enlists in a State's National Guard is a member of a separate and distinct "State Guard unit" unless and that until is called into "actual service." Congress's constitutional authority over State National Guard applies only to such Guard Units as called up in the "actual service" of the United States, and does not extend to defining and determining who constitutes "the Militia." At the end of

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such "actual service," the National Guard member reverts to his or her status as a member of his State Guard.

11. A state may have different eligibility standards for membership in a State's National Guard than for membership in the Armed Forces of the United States (e.g., education, driving record, drug use, criminal record, age, and other criteria). Such eligibility standards are not within the power of the U.S. Congress because they are not matters of "discipline." "training," "arming" or "organizing" the Militia, or National Guard. At present, the Virginia National Guard and the U. S. Army have different eligibility admission criteria than the Armed Forces of the United States, and the Commonwealth of Virginia has authority to determine whether or not an active, open and practicing homosexual should serve in the Virginia National Guard. There is no constitutional right to serve in the National Guard.

12. The primary purpose of the Virginia National Guard, as with all military organizations, is to prepare for and to prevail in combat to defend the Commonwealth and the Nation should the need arise.

13. The conduct of military operations requires members of the National Guard to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

14. Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion. 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 a military unit greater than the sum of the combat effectiveness of the individual unit members.

A. In 1993, at a U.S. Senate Armed Services Committee hearing, Dr. William Henderson, former commander of the Army Research Institute, and author of Cohesion: The Human Element in Combat, testified that unit cohesion is the condition which makes soldiers "willing to risk death to achieve a common objective." Dr. Henderson testified that introducing service members who acknowledge that they engage in same sex behavior into units with soldiers opposed to homosexuality would seriously impair cohesion.

B. Dr. David Marlow, then chief of military psychiatry, Walter Reed Army Institute Research, testified that, "The impact on cohesion depended on two things: whether or not [there was] knowledge that people were homosexual, [and] whether or not they brought overt homosexual behaviors into the group."

C. A Military Working Group, appointed in 1993 by Defense Secretary Les Aspin found it would be very difficult for an open homosexual to exercise authority or serve effectively as a leader since the values and lifestyle might be perceived as contrary to those in the unit. "That ineffectiveness would be further undermined by perceptions of unfairness or [same sex] fraternization."

D. The report concludes that once an individual's homosexuality is known, the Military Working Group concluded that allowing open homosexuals in an environment of forced association and limited privacy will constitute "a major and unacceptable invasion of what little privacy remains."

15. Military life is fundamentally different from civilian life in that -

(i) 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

(ii) 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.

16. A November, 2010 Pentagon Study reported:

A. That 48.9 percent of Army and 59.7 percent of Marine combat troops believed repeal of DADT would negatively affect trust; 47.5 percent of Army and 57.5 percent of Marine combat troops said repeal would negatively affect their ability to get the job done.

B. Religious and moral objections predominated among objections to repeal of DADT. Chaplains, who supported integration of the services after WW II, are adamant in their opposition to the repeal of DADT. It is unrealistic to assume that moral/religious troops opposed to DADT repeal will not result in early troop departures from the military.

C. Fully 32 percent of ground combat Marines said they would leave the service sooner than planned. An additional 16.2 percent would consider leaving early. The report noted that 21.4 percent of Army combat arms personnel would leave sooner than planned, and 14.6 percent would think about leaving, a potential loss of 36 percent of our ground troops.

In view of this 2010 Pentagon Study, the Commonwealth of Virginia, which has a public interest in maintaining the highest standards of conduct to attract and keep recruits for our National Guard, cannot afford the loss of qualified personnel which would follow the acceptance of practicing homosexuals in the Virginia National Guard.

17. Despite the anticipated loss of qualified personnel, the Pentagon Working Group seeking to support Congressional repeal of 10 USC 654, has recommended the Uniform Code of Military Justice decriminalize sodomy which is a major vector for disease producing life-shortening medical conditions.

18. The Virginia National Guard has been and can be anticipated in the future to engage in actual combat which routinely makes it necessary for members to live in work in conditions that t are spartan,

primitive, and characterized by forced intimacy with little or no privacy.

19. The prohibition against active and or open homosexual conduct is a longstanding element of American military law is of long standing.

A. On March 11, 1778, Gen. George Washington drummed out of service Lt. Gotthold F. Enslin, the first soldier to be dismissed from the U.S. military for homosexuality.

B. After 1900, military personnel were punished for committing homosexual acts, usually categorized as sodomy. Prior to World War II, Homosexual behavior was prosecuted as "conduct unbecoming an officer" or, for enlisted members as "conduct to the prejudice of good order and military discipline."

C. The Articles of War in 1916 under President Woodrow Wilson established an article prohibiting the offense of sodomy. In the Manual for Courts-Martial, Congress included consensual sodomy as Article 93 of the Articles of War. Also, unit commanders could discharge soldiers for "inaptness or for undesirable habits" (Section VIII of Army Regulation 615-200).

D. During World War II under President Roosevelt, the Army developed a medical approach to discharge for homosexuality. In 1947 under President Truman, the Army's policy was revised to discharge soldiers identified as having "homosexual tendencies."14

E. In 1950, the Army's policy under President Truman stated, "True, confirmed, or habitual homosexual personnel, irrespective of sex, will not be permitted to serve in the army in any capacity and prompt separation of known homosexuals from the army is mandatory."

F. In 1978 under President Carter, the DOD issued the "Report of the Joint Service Administrative Discharge Study Group" which recommended that the military reaffirm the longstanding ban on homosexuals, "Homosexuality is incompatible with military service." It called for the statement, "Processing (for separation) is mandatory unless ... the allegations are groundless,"

E. On January 28, 1982, also under President Carter, the Pentagon published a conduct-based policy, "which authorized separation of persons who by their acts or statements, demonstrate a propensity or intent to engage in homosexual conduct, and eliminated `homosexual tendencies' as a reason for separation."

20. Consistent with the wisdom of the Armed Forces over all of its existence up to recently, The Virginia National Guard must maintain personnel policies that not admit persons whose presence in the military would create an unacceptable risk to high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

§ 44-2 of the Code of Virginia is amended to add a new subsection C, and then reenacted as follows:

§ 44-2. Composition of National Guard.

A. The National Guard shall consist of the regularly enlisted militia and of commissioned and warrant officers, who shall be residents of the Commonwealth of Virginia and shall fall within the age limits and qualifications as prescribed in existing or subsequently amended National Guard regulations (army and air), organized, armed and equipped as hereinafter provided. Upon original enlistment members of the National Guard shall not be less than seventeen nor more than fifty-five years of age, or, in subsequent enlistments not more than sixty-four years of age. All enlistments in the National Guard of persons under the age of eighteen years made prior to June 27, 1958, shall be held, and the same are hereby declared valid and effective in all respects, if otherwise valid and effective according to the law then in force.

B. Notwithstanding the above, persons otherwise qualified but residing outside the Commonwealth of Virginia may enlist or serve as commissioned or warrant officers in the National Guard.

C. No person ineligible to serve in the Armed Forces of the United States under 10 U.S.C. § 654 and accompanying Department of Defense Regulations implementing and enforcing this provision as in effect on January 1, 2009, shall be eligible to serve in the National Guard.