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THE WHITE HOUSE

WASHINGTON

March 1, 1995

MEMORANDUM FOR LEON PANETTA
GEORGE STEPHANOPOULOS
AB MIKVA
BILL GALSTON

FROM: JOEL KLEIN *JK*
CLIFF SLOAN *CS*

SUBJECT: Colorado gay rights case

I. OVERVIEW

The Supreme Court will review a major gay rights case from Colorado. The case concerns the constitutionality of a state constitutional amendment banning state or local legislation which protects gays and lesbians from discrimination on the basis of sexual orientation or grants preferences on that basis. The Colorado Supreme Court held that this state amendment violates the U.S. Constitution (specifically, the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

The U.S. government is not a party in the case, and has not participated in the case. U.S. government participation in the Supreme Court -- through filing an amicus curiae brief, and, if we choose to do so, participating in the oral argument as an amicus curiae -- is entirely discretionary. An amicus brief supporting the State and defending the permissibility of the amendment would have to be filed by April 7. An amicus brief opposing the State and agreeing with the Colorado Supreme Court about the unconstitutionality of the state amendment would have to be filed by May 8. The case will be argued in the fall and probably decided in the spring of 1996.

II. THE COLORADO CASE

In November 1992, Colorado voters adopted a state constitutional amendment on a 53.4% - 46.6% vote. The amendment provides that neither the State nor local government may adopt a statute or policy "whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." Denver, Aspen, and Boulder previously had adopted ordinances prohibiting discrimination on the basis of sexual orientation.

A group of individuals and local governments (including Denver, Aspen, and Boulder) challenged the state constitutional amendment as a violation of the U.S. Constitution. The trial court and the Colorado Supreme Court agreed that the state amendment is unconstitutional because (1) it denies an identifiable group (gay and lesbian men and women) "the fundamental right to participate equally in the political process" and (2) it is not narrowly tailored to serve a compelling government interest. Because the Colorado Supreme Court found that a "fundamental" right had been infringed, the Court applied rigorous "strict scrutiny," rather than deferential "rational basis" review. (In light of its "fundamental right" analysis, the Colorado Court did not decide what level of judicial scrutiny legislation affecting gays and lesbians ordinarily should receive).

Colorado argues that the Colorado courts impermissibly invented an extravagant new "fundamental" constitutional right and that Colorado permissibly may take this contentious issue out of the state and local sphere. Plaintiffs maintain that the Colorado Court's analysis is well-grounded and correct.

III. OTHER BALLOT INITIATIVES

Similar ballot initiatives have been on the ballot in numerous States. In February 1994, President Clinton sent a letter to the Gay and Lesbian Victory Fund expressing opposition to such ballot initiatives. (A copy of the President's letter is attached). In November 1994, at least some of the initiatives were defeated.

On the litigation front, a Cincinnati initiative has been struck down by a federal court in Ohio on grounds similar to the Colorado Supreme Court's; the case is currently pending in the U.S. Court of Appeals for the Sixth Circuit.

THE WHITE HOUSE
WASHINGTON

April 6, 1995

TO: JUDGE MIKVA

FROM: DOUGLAS LETTER

Here are items, which Cliff Sloan
left for me, that are relevant to
our meeting yesterday.



GEORGETOWN UNIVERSITY LAW CENTER

Chai R. Feldblum
Associate Professor of Law

TO: Joel Klein
FROM: Chai Feldblum CF
DATE: 3/1/95
RE: ENDA

The LCCR Steering Committee has been meeting recently to prepare for the reintroduction of the Employment Non-Discrimination Act of 1995 (ENDA). I would like to have the group **consider the possibility of dropping all the findings** from the Senate version of ENDA. (The House version never had findings to begin with.)

The **sole reason** I would suggest this change to the coalition is if doing so would ensure that the Administration could endorse the bill. The main concern you raised last time we talked was that the Administration could not, in good conscience, endorse a bill that included findings which imply heightened scrutiny while it was pursuing a vigorous defense of the military ban.

As you know, I don't think that's true as a legal matter, given that the findings are mostly hortatory, not legally binding. In addition, I think it is short-sighted to allow your understandable defense of the military ban to dictate an insistence on rational basis review for gay people. As I have said (often!), I believe DOJ could accept quasi-suspect status as the appropriate constitutional standard for gay people and still defend the military ban. (Just like Rostker v. Goldberg.) If you guys did that, it would take care of your Colorado problem (because you then could easily submit an amicus brief in the Supreme Court in good conscience), you would be more honest as constitutional lawyers (since an unbiased legal analysis should indicate that heightened scrutiny is appropriate), and you could still say honestly that you are defending the military ban.

But, if you continue to insist on rational basis review, the Administration should still be able to endorse ENDA upon reintroduction. And, if it takes dropping the findings that imply heightened scrutiny to get that endorsement from you, I would like to try to do that.

What we need, though, is to find out whether dropping the findings **will**, in fact, gain the Administration's endorsement. Obviously, the LCCR group will not agree to drop the findings unless they have some guarantee they will get something back in return from the Administration.

The next LCCR meeting, on which I expect we will vote on the final draft, is scheduled for Friday, March 10th at 10:00 a.m. So I think we would need to know by then whether the Administration would be willing to endorse the bill if the findings were dropped. Is it possible to get a decision by then?

Also, we've made a bunch of other changes that you folks should like. Attached is a short description of those changes and the actual bill, as revised.

Thanks for your attention to this, Joel.

cc. Ralph Neas, LCCR
Daniel Zingale, HRCF



GEORGETOWN UNIVERSITY LAW CENTER

Chai R. Paddham
Associate Professor of Law

CHANGES TO ENDA OF 1995

1. Religious Exemption: Section 7(b) has been changed to state that ENDA applies only to employees of religious organizations who perform solely for-profit activities. This change was made to accommodate the concerns of several religious organizations because the previous language implied that an employee who worked in both for-profit and not-for-profit activities would be covered by ENDA.
2. Coverage of Congress: The procedures and remedies available to congressional employees under section 9(b) now reflect those available under the Congressional Accountability Act of 1995.
3. Punitive Damages Against the Government: In accord with the Civil Rights Act of 1991, the United States no longer is liable for punitive damages under section 10(b).
4. Definition of Sexual Orientation: The definition of "sexual orientation" in section 19(12) is now simply "lesbian, gay, bisexual or heterosexual." The prohibition on discrimination based on either real or perceived sexual orientation has been preserved in section 3. The new definition tracks the approach of most state laws prohibiting discrimination on the basis of sexual orientation and removes the descriptive phrase "as manifested by identity, acts, statements, or associations." This phrase had given rise to bogus arguments that employers would be required to treat sexual misconduct by gay employees differently than sexual misconduct by heterosexual employees. The removal of the phrase does not change the coverage of the bill.

103D CONGRESS
2D SESSION

S. 2238

To prohibit employment discrimination on the basis of sexual orientation.

IN THE SENATE OF THE UNITED STATES

JUNE 23 (legislative day, JUNE 7), 1994

Mr. KENNEDY (for himself, Mr. CHAPPE, Mr. AKAKA, Mr. JEFFORDS, Mr. BINGAMAN, Mr. PACKWOOD, Mrs. BOKER, Mr. BRADLEY, Mr. DODD, Mr. FEINGOLD, Mrs. FEINSTEIN, Mr. GLENN, Mr. HARKIN, Mr. INOUYE, Mr. KERRY, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mr. LIBBERMAN, Mr. METZENBAUM, Mr. MIKULSKI, Ms. NOBLEY-BRAUN, Mr. MOYNIHAN, Mrs. MURRAY, Mr. PELL, Mr. RIEGLE, Mr. ROBB, Mr. SARBANES, Mr. SIMON, and Mr. WELLSTONE) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

A BILL

To prohibit employment discrimination on the basis of sexual orientation.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 SECTION 1. SHORT TITLE.
- 4 This Act may be cited as the "Employment Non-
- 5 Discrimination Act of 1994".
- 6 SEC. 2. FINDINGS AND PURPOSES.
- 7 (a) FINDINGS.—The Congress finds that—

*Changes as of
3/1/95*

*The deletion of
findings is contingent
on a positive
Administration response.
Otherwise, no change re findings.*

(1) an individual's sexual orientation bears no relationship to the individual's ability to contribute fully to the economic and civic life of society;

(2) historically, American society has tended to isolate, stigmatize, and persecute gay men, lesbians, and bisexuals;

(3) one of the main areas in which gay men, lesbians, and bisexuals face discrimination is employment;

(4) employment discrimination on the basis of sexual orientation violates fundamental American values of equality and fairness;

(5) the continuing existence of employment discrimination on the basis of sexual orientation denies gay men, lesbians, and bisexuals equal opportunity in the workplace and affects interstate commerce;

(6) individuals who have experienced employment discrimination on the basis of sexual orientation often lack recourse under Federal law; and

(7) gay men, lesbians, and bisexuals have historically been excluded from full participation in the political process, comprise a discrete and insular minority, and have historically been subjected to purposeful unequal treatment based on characteris-

tics not indicative of their ability to participate in or contribute to society.

~~(b) PURPOSES.~~ It is the purpose of this Act—

(1) to provide a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation;

(2) to provide meaningful and effective remedies for employment discrimination on the basis of sexual orientation; and

(3) to invoke congressional powers, including the powers to enforce the 14th amendment to the Constitution and to regulate commerce, in order to prohibit employment discrimination on the basis of sexual orientation.

SEC. 3. DISCRIMINATION PROHIBITED.

A covered entity, in connection with employment or employment opportunities, shall not—

(1) subject an individual to different standards or treatment on the basis of sexual orientation real or perceived

(2) discriminate against an individual based on real or perceived the sexual orientation of persons with whom such individual is believed to associate or to have associated; or

(3) otherwise discriminate against an individual on the basis of sexual orientation, *real or perceived*.

1 SEC. 4. BENEFITS.

2 This Act does not apply to the provision of employee
3 benefits to an individual for the benefit of his or her
4 partner.

5 SEC. 5. NO DISPARATE IMPACT.

6 The fact that an employment practice has a disparate
7 impact, as the term "disparate impact" is used in section
8 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-
9 2(k)), on the basis of sexual orientation does not establish
10 a prima facie violation of this Act.

11 SEC. 6. QUOTAS AND PREFERENTIAL TREATMENT PROHIBITED.

12 (a) QUOTAS.—A covered entity shall not adopt or im-
13 plement a quota on the basis of sexual orientation.

14 (b) PREFERENTIAL TREATMENT.—A covered entity
15 shall not give preferential treatment to an individual on
16 the basis of sexual orientation.

17 SEC. 7. RELIGIOUS EXEMPTION.

18 (a) IN GENERAL.—Except as provided in subsection
19 (b), this Act shall not apply to religious organizations.

20 (b) FOR-PROFIT ACTIVITIES.—This Act shall apply
21 to a religious organization's for-profit activities subject to
22 taxation under section 511(a) of the Internal Revenue
23 Code of 1986 as in effect on the date of the enactment
24 of this Act.

the relationship between a
religious organization and an
employee of that organization whose
job pertains solely to the for-profit activities
of the organization

1 SEC. 8. NONAPPLICATION TO MEMBERS OF THE ARMED
2 FORCES; VETERANS' PREFERENCES.

3 (a) ARMED FORCES.—

4 (1) For purposes of this Act, the term "employ-
5 ment or employment opportunities" does not apply
6 to the relationship between the United States and
7 members of the Armed Forces.

8 (2) As used in paragraph (1), the term "Armed
9 Forces" means the Army, Navy, Air Force, Marine
10 Corps, and Coast Guard.

11 (b) VETERANS' PREFERENCES.—This Act does not
12 repeal or modify any Federal, State, territorial, or local
13 law creating special rights or preferences for veterans.

14 SEC. 9. ENFORCEMENT.

15 (a) ENFORCEMENT POWERS.—With respect to the
16 administration and enforcement of this Act—

17 (1) the Commission and the Librarian of Con-
18 gress shall have the same powers, respectively, as
19 the Commission and the Librarian of Congress have
20 to administer and enforce title VII of the Civil
21 Rights Act of 1964 (42 U.S.C. 2000e et seq.);

22 (2) the Attorney General of the United States
23 shall have the same powers as the Attorney General
24 has to administer and enforce such title; and

25 (3) the district courts of the United States shall
26 have the same jurisdiction and powers as such

courts have to enforce such title and section 808 of the Civil Rights Act of 1991 (2 U.S.C. 1209).

(b) PROCEDURES AND REMEDIES.—The procedures and remedies applicable to a claim for a violation of this Act are as follows:

(1) For a violation alleged by an individual, other than an individual specified in paragraph (2) or (3), the procedures and remedies applicable to a claim brought by an individual for a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall apply.

(2) For a violation alleged by an employee of the House of Representatives or of an instrumentality of the Congress, the procedures and remedies applicable to a claim by such employee for a violation ~~section 201(a)(1) of the Congressional Accountability Act of 1995~~ ~~of section 117 of the Civil Rights Act of 1991 (2 U.S.C. 601) shall apply.~~

(3) For a violation alleged by an employee of the Senate, the procedures and remedies applicable to a claim by such employee for a violation of section 802 of the Civil Rights Act of 1991 (2 U.S.C. 1202) shall apply.

SEC. 10. STATE AND FEDERAL IMMUNITY.

(a) STATE IMMUNITY.—A State shall not be immune under the 11th amendment to the Constitution of the

United States from an action in a Federal court of competent jurisdiction for a violation of this Act. In an action against a State for a violation of this Act, remedies (including remedies at law and in equity) are available for the violation to the same extent as such remedies are available in an action against any public or private entity other than a State.

(b) LIABILITY OF THE UNITED STATES.—The United States shall be liable for all remedies under this Act, ~~except for punitive damages,~~ to the same extent as a private person and shall be liable to the same extent as a nonpublic party for interest to compensate for delay in payment.

SEC. 11. ATTORNEYS' FEES.

In any action or administrative proceeding commenced pursuant to this Act, the court or the Commission, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee, including expert fees and other litigation expenses, and costs. The United States shall be liable for the foregoing the same as a private person.

SEC. 12. RETALIATION AND COERCION PROHIBITED.

(a) RETALIATION.—A covered entity shall not discriminate against an individual because such individual opposed any act or practice prohibited by this Act or because such individual made a charge, assisted, testified,

1 or participated in any manner in an investigation, proceed-
2 ing, or hearing under this Act.

3 (b) COERCION.—A person shall not coerce, intimi-
4 date, threaten, or interfere with any individual in the exer-
5 cise or enjoyment of or on account of his or her having
6 exercised, enjoyed, assisted, or encouraged the exercise or
7 enjoyment of, any right protected by this Act.

8 SEC. 12. POSTING NOTICES.

9 A covered entity shall post notices for employees, ap-
10 plicants for employment, and members describing the ap-
11 plicable provisions of this Act, in the manner prescribed
12 by, and subject to the penalty provided under, section 711
13 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

14 SEC. 14. REGULATIONS.

15 The Commission shall have the authority to issue reg-
16 ulations to carry out this Act.

17 SEC. 16. RELATIONSHIP TO OTHER LAWS.

18 This Act shall not invalidate or limit the rights, rem-
19 edies, or procedures available to an individual claiming
20 discrimination prohibited under any other Federal law or
21 any law of a State or political subdivision of a State.

22 SEC. 18. SEVERABILITY.

23 If any provision of this Act, or the application of such
24 provision to any person or circumstance, is held to be in-
25 valid, the remainder of this Act and the application of such

1 provision to other persons or circumstances shall not be
2 affected thereby.

3 SEC. 17. EFFECTIVE DATE.

4 This Act shall take effect 60 days after the date of
5 the enactment of this Act, and shall not apply to conduct
6 occurring before such effective date.

7 SEC. 18. DEFINITIONS.

8 As used in this Act—

9 (1) the term "commerce" has the meaning
10 given such term in section 701(g) of the Civil Rights
11 Act of 1964 (42 U.S.C. 2000e(g));

12 (2) the term "Commission" means the Equal
13 Employment Opportunity Commission established by
14 section 705 of the Civil Rights Act of 1964 (42
15 U.S.C. 2000e-4);

16 (3) the term "covered entity" means an em-
17 ployer, employment agency, labor organization, joint
18 labor-management committee, an entity to which
19 section 717(a) of the Civil Rights Act of 1964 (42
20 U.S.C. 2000e(a)) applies, an employing authority of
21 the House of Representatives, an employing office of
22 the Senate, or an instrumentality of the Congress;

23 (4) the term "employee of the Senate" has the
24 meaning given such term in section 801(c) of the
25 Civil Rights Act of 1991 (2 U.S.C. 1201(e));

(5) the term "employer" has the meaning given such term in section 701(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(b));

(6) the term "employment agency" has the meaning given such term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c));

(7) the term "employment or employment opportunities" includes job application procedures, hiring, advancement, discharge, compensation, job training, or any other term, condition, or privilege of employment;

(8) the term "instrumentalities of the Congress" has the meaning given such term in section 117(b)(4) of the Civil Rights Act of 1991 (2 U.S.C. 60(b)(4));

(9) the term "labor organization" has the meaning given such term in section 701(d) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d));

(10) the term "person" has the meaning given such term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a));

(11) the term "religious organization" means—

(A) a religious corporation, association, or society; or

(B) a college, school, university, or other educational institution, not otherwise a religious organization, if—

(i) it is in whole or substantial part controlled, managed, owned, or supported by a religious corporation, association, or society; or

(ii) its curriculum is directed toward the propagation of a particular religion;

(12) the term "sexual orientation" means lesbian, gay, bisexual, or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations; and

(13) the term "State" has the meaning given such term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

○



Department of Justice

STATEMENT OF

DEVAL PATRICK

ASSISTANT ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

CONCERNING

THE EMPLOYMENT NON-DISCRIMINATION ACT

S. 2238

PRESENTED ON

JULY 29, 1994

Mr. Chairman and Members of the Committee, I am pleased to provide this testimony today on the problems addressed by S. 2238, the Employment Non-Discrimination Act of 1994.

On behalf of the President, I want to commend you, Mr. Chairman, your colleagues in the House, Mr. Frank and Mr. Studds, and your more than 130 cosponsors in both chambers, for introducing this bill. It is a serious and thoughtful approach to address the problem of discrimination against gay men and lesbians. Because the President strongly supports the principle of non-discrimination based on sexual orientation, he will sign into law legislation passed by Congress that prohibits discrimination in employment based on sexual orientation.

The President and his Administration have consistently supported the principle of non-discrimination in employment. All Americans should be able to find jobs, keep jobs and earn promotions based on their qualifications and the quality of their work, not on irrelevant characteristics. This has been a core value in this country for many years.

As you know, thirty years ago, Congress enacted the Civil Rights Act of 1964, including Title VII which prohibits discrimination in employment based on race, color, religion, sex

and national origin. In 1967, the Age Discrimination in Employment Act was enacted to protect older Americans. Most recently, in 1990, Congress enacted the Americans with Disabilities Act to extend full civil rights protections to persons with disabilities. All of these are legislative markers on the road to full and productive participation in our free society.

These laws reflect Congress' deepening understanding of the notion that characteristics such as race, religion, sex, age and disability have no relevance to the ability of an individual to perform required functions of a job. Quite often, unfortunately, prejudice and stereotypes held by some employers still limit a gay or lesbian person's ability to obtain and keep a job. But as the President said in Riga, Latvia, recently, "Freedom without tolerance is freedom unfulfilled." In that spirit, this Administration believes the principle of non-discrimination in employment should be extended to include sexual orientation. The Administration wants to work with Congress to enact such a bill to make this principle a reality.

Our Nation prides itself on embracing the principle that persons should be judged based on merit and ability, not on class, culture or other extraneous factors. Our civil rights laws reflect this principle. By allowing employment discrimination on the basis of sexual orientation, our society

cheats itself out of the contributions of very able and talented individuals throughout the Nation. As the international market place becomes increasingly competitive, America does not have the luxury of wasting talent.

The Administration supports using the framework of Title VII to provide protections against discrimination based on sexual orientation. These well known standards -- covering the same employers, using the same standards, and providing the same enforcement mechanisms -- provide employers and employees with solid guidance on the law. S. 2238 takes this sound approach, building on 30 years of Title VII jurisprudence.

S. 2238 makes a number of exceptions to the basic Title VII provisions. The first is for instances of disparate impact. Disparate impact was first recognized as a basis for establishing a violation of Title VII by the U.S. Supreme Court in *Griggs v. Duke Power*, 401 U.S. 424 (1971). In *Griggs*, the Court recognized that a facially neutral practice that appears fair in form but discriminatory in operation, and if not justified by business necessity, is prohibited by Title VII. The Civil Rights Act of 1991 amended Title VII to codify the disparate impact standard. S. 2238, however, explicitly excludes disparate impact as a method of proof in cases of discrimination on the basis of sexual orientation.

The President has always supported, and strongly respects, freedom of religion. The administration supports carefully crafted provisions to insure that civil rights laws do not unduly interfere with that freedom. Title VII excludes religious organizations from the prohibition from discrimination based upon religion. The Employment Non-Discrimination Act respects freedom of religion by providing a broad exemption for religious organizations, an exemption broader than in other employment discrimination laws.

The third distinction from Title VII pertains to benefits. Under Title VII, discrimination in the provision of employee benefits is prohibited. The Employment Non-Discrimination Act, by contrast, would not apply to the provision of employee benefits to an individual for the benefit of his or her partner.

The fourth exception is for members of the armed forces. Title VII does not apply to members of the armed forces. S. 2238 would not apply and would have absolutely no impact on uniformed military employment practices. The Administration agrees with this approach.

The President has consistently opposed the use of quotas in employment discrimination law and his position is no different here. In addition to the exceptions outlined above, S. 2238

explicitly prohibits the use of quotas. The Administration agrees that any bill addressing this issue should rule out the use of quotas.

The notion of providing antidiscrimination protection is not so novel as to be untested in the public and private sectors. Longstanding Federal employment policy prohibits discrimination based on non-job-related conduct, including discrimination based on sexual orientation. We know of nothing in that experience to suggest a loss or reduction in productive capacity or workplace goodwill. Eight states and over 80 local governments provide some form of protection. Indeed, 308 of your colleagues in the House and Senate have pledged not to discriminate in employment based on sexual orientation.

In the private sector, numerous companies such as General Motors, Miller Brewing Company, Citicorp, IBM, and AT&T have policies of non-discrimination based on sexual orientation. A number of these employers also provide the same degree of employee benefits to a person's partner, without regard to sexual orientation.

Until this year, Congress had not heard testimony on the issue of employment discrimination based on sexual orientation in nearly 15 years. I trust that over the course of these hearings you will hear from many witnesses who will document the problems

faced by lesbians and gay men in employment, and that their testimony will build a useful and solid record on the problem of employment discrimination based on sexual orientation. Hearing that testimony should lead you to the same conclusion we have reached: that Congress should pass a bill to embody the principle against discrimination in employment based on sexual orientation.

Mr. Chairman, thank you for the opportunity to testify today. We expect to have some technical comments on the bill, which we would like to supply for the hearing record. Beyond that, we look forward to working with you and the Committee to eliminate employment discrimination based upon sexual orientation.

THE PRESIDENT HAS SEEN

THE WHITE HOUSE
WASHINGTON

June 22, 1994

MR. PRESIDENT:

Attached is a decision memo from Counsel's office on a bill that Senator Kennedy plans to introduce tomorrow prohibiting employment discrimination on the basis of sexual orientation. Senator Kennedy is hoping for an Administration endorsement.

Counsel's office lists four options, recommending option 2 -- that you express support for the principle of combatting employment discrimination on the basis of sexual orientation, but refrain from explicitly endorsing the Kennedy bill so as to preserve some flexibility. Counsel's office informs us that George and Gergen also support this approach. (The other options are (1) endorse the bill; (3) state that we will review it, while expressing no further position; and (4) oppose the bill.)

In view of the shortness of time, I am forwarding the memo to you immediately. At the same time, I am circulating it to the Vice President and relevant staff.

Option 1 ___ Option 2 (Counsel's choice) ☒

Option 3 ___ Option 4 ___ Discuss ___

Todd Stern

Big P
How does
Relig Freedom Act
can we
discuss
discuss

THE WHITE HOUSE

WASHINGTON

June 22, 1994

94 JUN 22 P7:10

MEMORANDUM FOR THE PRESIDENT

FROM: LLOYD N. CUTLER *LNC*
SPECIAL COUNSEL TO THE PRESIDENT

JOEL I. KLEIN *JEK*
DEPUTY COUNSEL TO THE PRESIDENT

CLIFFORD M. SLOAN *CMS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Gay rights anti-discrimination bill

Senator Kennedy plans to introduce legislation tomorrow that would prohibit employment discrimination on the basis of sexual orientation ("the Employment Non-Discrimination Act"). According to the Leadership Conference on Civil Rights, the bill will be endorsed by a bipartisan group of legislators (Feinstein, Murray, Chafee, and Jeffords in the Senate; Frank, Studds, Edwards, Schroeder, Morella, Shays, and Huffington in the House) and by a range of civil rights leaders and groups (including Coretta Scott King, Justin Dart, the Leadership Conference On Civil Rights, and many other representatives of minority, women, disability, and labor groups). Senator Kennedy has requested that the Administration endorse the bill and that Assistant Attorney General Deval Patrick be present to express support for it.

In many respects, the bill is narrowly crafted. The Act prohibits employment discrimination on the basis of sexual orientation. (A copy of the bill is attached.) It precludes the use of quotas or discrimination claims based solely on statistics (so-called "disparate impact" claims). It does not apply to religious organizations, but it does apply to their "for-profit activities subject to taxation." The bill also does not apply to the armed forces.

At the same time, certain provisions of the bill may raise significant issues. The congressional findings seem to include a finding that would lead to "strict scrutiny" for sexual orientation claims in court. (The finding refers to exclusion of gay men, lesbians, and bisexuals from "full participation in the political process" and to their status as a "discrete and insular minority," p. 2, lines 17-20 -- traditional formulations for strict scrutiny). In the gays-in-the-military litigation, DOJ and DOD have been arguing against strict scrutiny in the military context.

In addition, the bill defines "sexual orientation" as "lesbian, gay, bisexual, or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations" (p. 11, lines 13-16) and prohibits employment discrimination on the basis of sexual orientation (p. 3, lines 21-22). Opponents may claim that the bill thus protects even on-the-job sexual acts and on-the-job sexual statements of any kind, regardless of propriety. It is, however, possible that clarifying language could promptly resolve this problem and make clear that the point of the legislation is merely that gay men, lesbians, and bisexuals should not be treated differently from similarly situated heterosexuals.

OPTIONS

Four options are possible:

- (1) ☐ Endorse the legislation.
- (2) ☐ State that we support the principle of combatting sexual orientation employment discrimination and that we will review the legislation with care.
- (3) ☐ State that we will review the legislation and express no further position at this time.
- (4) ☐ Oppose the legislation.

We recommend in favor of option 2. The principle of non-discrimination in employment is clearly laudable and appropriate, and is consistent with your public statements during the campaign and subsequently. At the same time, we may wish to preserve some flexibility to offer suggestions on the bill and to respond to criticisms of it.



U.S. Department of Justice

Office of the Associate Attorney General

Deputy Associate Attorney General

Washington, D.C. 20530

June 15, 1994

TO: Jamie Gorelick
Deputy Attorney General

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

FROM: Nancy McFadden
Deputy Associate Attorney General *Nancy*

Stuart Ishimaru *SI*
Counsel to the Assistant Attorney General
Civil Rights Division

Helaine Greenfeld *HG*
Special Assistant
Civil Rights Division

SUBJECT: Gay and Lesbian Equal Employment Opportunity Bill

BACKGROUND

As you know, Senator Edward Kennedy and Representatives Barney Frank and Gerry Studds plan to introduce bills in the Senate and House of Representatives, respectively, to prohibit employment discrimination based on sexual orientation. Current plans call for the bill's introduction and accompanying press conference on Tuesday, June 21, 1994.

On the Senate side, the Labor and Human Resources Committee (chaired by Senator Kennedy) plans to hold hearings in the near future, perhaps within weeks of the bill's introduction. They have indicated that they will be asking Assistant Attorney General Patrick to testify.

In the House, the Education and Labor Subcommittee on Select Education and Civil Rights (chaired by Rep. Major Owens) plans to conduct an oversight hearing June 20 on sexual orientation employment discrimination in New York City. While this hearing is not

specifically on the bill, it is likely the bill will be raised. Rep. Owens likely will hold further hearings on the bill once it is introduced. Rep. Edwards, who is quite supportive of the bill, may hold hearings later in the summer as well. The Civil and Constitutional Rights Subcommittee of the House Judiciary Committee, chaired by Rep. Edwards and including Rep. Frank, plans a hearing July 6, in Mississippi, on the situation in Ovett. It is possible that the bill would be raised at that time.

SUMMARY OF THE BILL:

The bill's sponsors plan to introduce similar, though not identical, versions in the House and Senate. The core of both bills will be the same: prohibiting employment discrimination based on sexual orientation.

The bill explicitly exempts employee benefits, non-profit religious activities, veterans preferences, or the armed forces. It excludes use of the disparate impact standard, and forbids the use of quotas and other "preferential treatment." The bill prohibits retaliation and coercion, and requires notices of the law's protections and remedies to be posted. The Senate bill includes a findings and purposes section.

The bill follows the form of the Americans with Disabilities Act, using Title VII as the framework for coverage, enforcement and remedies but not amending it directly to include sexual orientation. Amending the 1964 Act could open the door to challenges to other provisions of the Act by those hostile to the protections provided -- a debate the civil rights community (and the Administration) clearly would want to avoid.

Nearly every year for the last twenty, Members of Congress sympathetic to the cause of gay and lesbian civil rights have introduced an omnibus gay and lesbian civil rights bill. These bills typically would include prohibitions against discrimination based on sexual orientation in employment, public accommodations, fair housing, etc., simply adding gays and lesbians as a protected class into existing civil rights laws.

The substance of this new bill is purposely different. Instead of introducing an omnibus bill that would face certain defeat, the drafters (the Members and the civil rights coalition) have narrowed their focus to employment discrimination.

RECOMMENDATION

We recommend that the Administration support the bill. As a matter of both law and policy, support for the principle of prohibiting discrimination based on sexual orientation in employment is the right thing to do. The President and the Attorney General often have stated their intolerance for discrimination of any kind. Lawyers in the Civil Rights Division have reviewed a draft of the legislation and believe it to be legally viable. Of course, the question of its political viability is another consideration. The Department will need to analyze the bill provision by provision and may well have recommendations for revisions but

these would not undermine the core aim of the bill.

In evaluating the policy and political implications of support for the bill, we believe the following factors are relevant:

1. The legislation is supported by a broad mainstream civil rights coalition.
2. The gay and lesbian groups, indeed much of the mainstream civil rights coalition, have worked hard to prepare a bill that would be as conservative as possible given the political realities faced by Congress and the President.

The advocates have agreed to pursue an employment discrimination bill rather than an omnibus bill -- giving up provisions that other minority groups have not had to sacrifice.

In order to preempt the usual objections to gay and lesbian rights, the drafters have included significant exemptions for military and non-profit religious entities and have deliberately excluded quotas and preferential treatment (to avoid the affirmative action issue).

3. Lack of support of what the affected community views as a mild anti-discrimination measure may well cause a negative backlash among leaders of a variety of civil rights groups, particularly given the political dynamics surrounding the President's policy on gays in the military.
4. Support for this legislation obviously would open the Administration to attack by conservatives. For example, neither the House nor the Senate version of the bill contains exceptions for discriminating against teachers or others who work with children -- an issue ripe for family values and morality demagoguery.
5. Opponents of the bill could use this as an opportunity to point to a series of "pro-gay and lesbian" actions by the Administration: Ovett, Gay Games, Toboso (Cuban gay asylum case), the Departments' policies on discrimination against gays and lesbians, and the President's statement regarding anti gay and lesbian ballot initiatives.
6. We cannot judge adequately the impact of Administration support for the bill on the Administration's full legislative agenda.



U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

DATE: April 24, 1995

FACSIMILE TRANSMISSION SHEET

FROM: Walter Dellinger OFFICE (202) 514-2051
PHONE: _____

TO: Abner Mikva * OFFICE (202) 456-2622
PHONE: _____
James Castella

NUMBER OF PAGES: 5 PLUS COVER SHEET

FAX NUMBER: (202) 456-6279

REMARKS:

IF YOU HAVE ANY QUESTIONS REGARDING THIS FAX, PLEASE CONTACT KATHLEEN MURPHY OF KEVIN SMITH ON 514-2057

OFFICE OF LEGAL COUNSEL FAX NUMBER: (202) 514-2622
FIS NUMBER: (202) 368-0563



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

April 24, 1995

MEMORANDUM TO DREW S. DAYS

Re: Romer v. Evans

FROM: Walter Dellinger

Attached is the core of the argument that I earlier suggested we make in Romer. I realize that it takes a fundamentally different (and far simpler) view of the case than anyone has heretofore advanced. Nonetheless, I am now persuaded that it is correct. I have discussed it at length with Jeff Powell, Dawn Johnsen and Teresa Roseborough. Jeff drafted this version over the weekend, and we have now reviewed it.

I hope that we will give serious consideration to filing such a brief. I look forward to discussing it at your convenience.

cc: AG Reno
DAG Gorelick
AAG Schmidt

ROMER V. EVANS

OLC Draft Argument
April 24, 1995

INTRODUCTION

This case presents an important yet quite narrow issue: is the Equal Protection Clause of the Fourteenth Amendment violated when a state determines that no agency of state or local government may take any action to protect the rights of an identifiable group against any form of private or public discrimination directed against that group. The resolution of this case does not require the Court to consider whether to expand the set of classifications that this Court has determined to be "suspect" and subject to heightened scrutiny under the Equal Protection Clause. Nor does it require the Court to rule on the existence or scope of a general constitutional right of "equal participation" in the political process. This case concerns instead the literal meaning of the Fourteenth Amendment's express command that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

In defending the constitutionality of Amendment 2, the State of Colorado necessarily asserts the power of a state to decide, in as sweeping and unlimited a fashion as possible, that neither it nor any of its agencies will protect in the future an identifiable group against harmful discrimination regardless of the nature, source, form or justification of that discrimination. The language and history of the Equal Protection Clause as well as this Court's cases interpreting the Clause, we submit, demonstrate the untenability of the State's position. By disabling entirely the ordinary political processes and institutions of the State from protecting a particular, specified group against discrimination, Amendment 2 contradicts the Fourteenth Amendment's central prohibition on state decisions to exclude individuals or groups from the protections of the law.

ARGUMENT

- I. A state constitutional provision forbidding any state or local response to public or private discrimination against an identifiable group implicates the core requirement of the Equal Protection Clause that the state extend the protection of the laws to all persons within its jurisdiction.

This Court's equal protection decisions frequently have referred to the Fourteenth Amendment's historical roots in the national effort to protect African Americans against state involvement in hostile discrimination. [cites] As is well known, the framers of the Amendment were concerned not only with state laws that affirmatively discriminated on the basis of race, but also with state laws or policies that permitted private racial discrimination by deliberately failing to extend to African Americans the protection of the laws. See e.g., Slaughterhouse Cases, 83 U.S. 36, 70 (1873) (tracing origin of Fourteenth Amendment to concern about public discrimination against African Americans and to the perception that "laws for their protection

[that] were insufficient or were not enforced"); [cite to Hyman and Wiecek]. The Fourteenth Amendment addressed the concerns of its framers by placing on the states primary responsibility for guaranteeing to all persons the protection of the laws.¹

One theme in the early history of the interpretation of the Fourteenth Amendment is of special relevance for the present case.² From the beginning, the courts asserted that the negative wording of the Equal Protection Clause ("No State shall deny") imposed an affirmative obligation on the states, and that the Clause would be violated by a deliberate state refusal to provide equal protection to "persons and classes of persons." Missouri v. Lewis, 101 U.S. 22, 30, 31 (1879); Barbier v. Connolly, 113 U.S. 27, 31 (1884) (Amendment requires that "equal protection and security should be given to all under like circumstances"); Civil Rights Cases, [cite to discussion of failure of state common law to protect African Americans].

Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of laws for the protection of his fundamental rights, as well as the enactment of such laws.

United States v. Hall, 26 Fed.Cas. 79, 81 (C.C.S.D.Ala. 1871) (Woods, J.). Whatever the outer limits of this principle, it is clear that a deliberate state decision to deny or withdraw the protection of the laws from a specified person or class of persons is directly contrary to the Fourteenth Amendment's fundamental purpose of requiring the states to ensure that all persons receive the protection of the laws.

Amendment 2 directly infringes this principle. Its language is as sweeping as possible: under it, no agency or entity whatever of the State of Colorado or its subdivisions may "enact, adopt, or enforce any statute, regulation, ordinance or policy" addressing "any ... claim of discrimination" based on homosexual orientation or conduct.³ By adopting Amendment 2, the

¹ Section 5 of the Amendment, of course, empowered Congress to enact legislation to enforce the requirements of the other sections of the Amendment. In doing so, however, section 5 in no way lessened the states' obligation to obey those requirements.

² Although the Fourteenth Amendment was adopted in response to discrimination against African Americans, from its earliest cases applying the Fourteenth Amendment, this Court has recognized that guarantees of section 1 of the Fourteenth Amendment, including the Equal Protection Clause, are not limited to African Americans or to racial groups. See Barbier, 113 U.S. at 359; Slaughterhouse Cases, 83 U.S. at 72. The Court's modern equal protection decisions, of course, regularly apply the Equal Protection Clause to cases unrelated to race (or related issues such as ethnic origin). See [1985 insurance case; WVA taxation case]. In doing so, the Court has sought to implement the original and historical understanding that the Clause "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." Missouri v. Lewis, 101 U.S. at 31.

³ Amendment 2 is of course limited by United States Constitution and by applicable federal statutes. With that caveat, however, it is as absolute and as perpetual a prohibition as the State could adopt.

State has decided, in advance and in the abstract, that it will permit no public consideration to be given nor any public remedy provided to a claim that persons within its jurisdiction are being treated unfairly because of their perceived homosexual orientation or conduct. As such, we believe that it is almost literally unprecedented in American history.

Amendment 2 is not, as Colorado portrays it, a simple decision to withdraw a particular area of potential governmental action from the power of state or local legislators; it indeed forbids the extension of general civil rights protections to include discrimination against homosexual persons, but it goes far beyond a decision to limit the interference of public law with private choice. Under Amendment 2, "no statute, regulation, ordinance or policy" can be adopted or implemented in response to differential, harmful treatment accorded someone because of his or her homosexual orientation or conduct, no matter how arbitrary the discrimination or egregious the mistreatment.⁴

Amendment 2's implications are sweeping. Not even the most detailed and specific evidence that public officials, acting without authorization by law and out of private motives, are using their discretionary authority to harm homosexual persons or to deny them generally available privileges can authorize the adoption of a regulation or the issuance of a policy to rectify such actions. State and local officials are similarly powerless to adopt any policy in response to private, discriminatory denials of the common law privileges of the law-abiding citizen if the denials are based on the citizen's homosexual orientation. Under Amendment 2, state courts would be closed to arguments that public officials were intentionally and systematically administering the laws to the disadvantage of persons because of homosexual orientation or conduct, because to accept such an argument would be in effect to "enforce [a judicial] policy whereby homosexual ... orientation [or] conduct [would] be the basis of [a] claim of discrimination."⁵ Indeed, if upheld, Amendment 2 would prevent the enactment of a statute

⁴ We note in particular that Amendment 2 cannot be justified on the basis of other, valid state policies such as criminal law prohibitions on conduct. Under the Amendment, victims of discrimination based on homosexual orientation whose conduct is and is known to be entirely lawful cannot obtain protection against that discrimination in the form of a statute, ordinance, regulation, or policy. Whatever room Amendment 2 may leave for the ad hoc protection of an individual against, for example, a denial of the common law privileges of daily business, is, we believe, insufficient to change the conclusion that the Amendment withdraws the protection of the laws from an identifiable group to a constitutionally cognizable degree.

⁵ In this respect, Amendment 2 contravenes this Court's early and repeated insistence that the Equal Protection Clause guarantees that "all persons ... should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts." Yick Wo, 118 U.S. 356 at 367, quoting Barbier, 113 U.S. at 31. Accord, Lewis, 101 U.S. at 30 (no person may be denied "the equal right to resort to the appropriate courts for redress").

On its face, Amendment 2 would not prevent a state court from holding that a particular official action was arbitrary and capricious or otherwise unlawful under the relevant state laws governing the action. However, it seems implausible to argue that the Equal Protection Clause's demand that "no ... class of persons shall be denied the same protection of the laws which is enjoyed by ... other classes," Lewis, 101 U.S. at 31, can be met by the observation that an individual member of a class can perhaps be given a remedy for class-based discrimination as long as he or she does not describe her injury in class-based terms.

or ordinance, or the announcement of a rule of common law, forbidding discrimination as egregious as that ruled unconstitutional in this Court's seminal decision of Yick Wo v. Hopkins, 118 U.S. 356 (1886), as long as the arbitrary exercise of governmental power was directed against the victims because of their homosexual status.⁶

This case does not require the Court to decide what limitations, if any, the Equal Protection Clause places on state decisions regarding the organization of state government, the distribution of governmental power, or the particular processes necessary to enact laws dealing with a given subject. Colorado has announced in advance and as a general matter that no form of harmful discrimination against a specified group may be addressed by any organ of state or local government. The specified group is stripped of state law protection against of kinds of discrimination as yet unknown, and wholly without regard to whether such discriminations, whatever they may be, would have any legitimating purposes. By this action, the State of Colorado has flatly contradicted the Equal Protection Clause's essential mandate that the State exclude no one from the protection of its laws.

⁶ In Yick Wo, the Court held unconstitutional the racially discriminatory application of a city ordinance under which many Chinese laundrerers had been denied an exemption granted virtually all white applicants. The Court stated that

[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration ... with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment.

118 U.S. at 373.

REPORT FROM THE OFFICE OF THE WHITE HOUSE COUNSEL

In a decision entered on March 30, 1995, District Judge Eugene H. Nickerson declared one portion of the statute governing the service of gay men and lesbians in the Armed Forces unconstitutional, and permanently enjoined the Department of Defense from taking any action against the six named plaintiffs under that provision. Able v. United States, No. 94-CV-0974 (E.D.N.Y. March 30, 1995). The Court concluded that the section of the statute providing for the discharge of individuals who state that they are homosexual, (10 U.S.C. § 654(b)(2)), infringes upon the First Amendment rights of homosexual servicemembers, and impermissibly differentiates between homosexuals and heterosexuals in violation of the Equal Protection component of the Fifth Amendment.

In reaching its decision, the Court found the statutory presumption that an individual who states that he or she is homosexual will engage in or is likely to engage in homosexual acts is invalid. The Court further found unconvincing the argument that the policy is necessary to preserve unit cohesion and morale by protecting the personal privacy of the heterosexual service members, preventing the introduction of sexual tension or sexuality into an otherwise sexually neutral environment, and eliminating the potential polarization that could occur with military units. It found that these views are based solely on the irrational prejudices and biases of other servicemembers, which cannot justify the significant infringement on First Amendment freedoms.

The Court also relied solely on its First Amendment findings, rather than a determination of whether homosexuals constitute a quasi-suspect class, in holding that any differential treatment of speech by homosexuals must be "tailored to serve a substantial governmental interest." The anticipated negative reactions of others, the Court stated, cannot serve as the basis for an otherwise discriminatory policy.

The Department of Justice remains convinced that the policy is constitutionally defensible and that the decision will be reversed on appeal.

Doug = see me

EXECUTIVE OFFICE OF THE PRESIDENT

10-Apr-1995 05:21pm

TO: Abner J. Mikva
TO: James Castello

FROM: Douglas N. Letter
Office of the Counsel

CC: Cheri Sweitzer

SUBJECT: Employment Non-Discrimination Legislative Proposal

Ab and James: At our meeting last week about what to do in the Romer case in the Supreme Court, you had asked me to look at Senator Kennedy's proposed legislation on non-discrimination against gays in order to compare coverage with the Colorado provision. I provided you both with copies of the Kennedy bill; my understanding is that it has not been reintroduced in this session of Congress.

I see two primary differences between the coverage of the Kennedy bill and the Colorado legislation.

First, the Kennedy bill applies only to discrimination in employment. Thus, presumably, it leaves untouched the ability to discriminate in other areas on the grounds of sexual orientation, e.g., housing, food and other services, sale of health insurance coverage, college admission, etc. The Colorado provision is more broadly worded and prevents Colorado entities from adopting and enforcing any rule providing protected status or prohibiting discrimination because of sexual preference. This provision was directed at ordinances adopted by Denver, Boulder, and Aspen, which prohibited discrimination based on sexual orientation in jobs, housing, and public accommodations. (The Colorado General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on sexual orientation.) Thus, the Kennedy bill would not give as complete protection as the three ordinances that would have been overturned by the Colorado provision found invalid.

Second, the Kennedy bill appears to cover only employers covered by the Civil Rights Act of 1964. The latter statute appears to cover only employers engaged in interstate commerce with 15 or more employees (42 USC 2000e(b)). Thus, many small businesses would be left out of the Kennedy bill, while these employers would appear to be covered by the Colorado article.

Consequently, if the Administration stays out of the Colorado case, but supports the Kennedy bill -- if reintroduced -- that bill will provide noticeably less protection for gays than would a ruling by the Supreme Court striking down the Colorado provision.

Should I do anything further on this? Would you like me to

probe gently my sources at the staff level to see what
recommendations have been made to the Solicitor General?



U.S. Department of Justice

Office of the Associate Attorney General

Deputy Associate Attorney General

Washington, D.C. 20530

June 15, 1994

TO: Jamie Gorelick
Deputy Attorney General

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

FROM: Nancy McFadden
Deputy Associate Attorney General *Nancy*

Stuart Ishimaru *SI*
Counsel to the Assistant Attorney General
Civil Rights Division

Helaine Greenfeld *HG*
Special Assistant
Civil Rights Division

SUBJECT: Gay and Lesbian Equal Employment Opportunity Bill

BACKGROUND

As you know, Senator Edward Kennedy and Representatives Barney Frank and Gerry Studds plan to introduce bills in the Senate and House of Representatives, respectively, to prohibit employment discrimination based on sexual orientation. Current plans call for the bill's introduction and accompanying press conference on Tuesday, June 21, 1994.

On the Senate side, the Labor and Human Resources Committee (chaired by Senator Kennedy) plans to hold hearings in the near future, perhaps within weeks of the bill's introduction. They have indicated that they will be asking Assistant Attorney General Patrick to testify.

In the House, the Education and Labor Subcommittee on Select Education and Civil Rights (chaired by Rep. Major Owens) plans to conduct an oversight hearing June 20 on sexual orientation employment discrimination in New York City. While this hearing is not

specifically on the bill, it is likely the bill will be raised. Rep. Owens likely will hold further hearings on the bill once it is introduced. Rep. Edwards, who is quite supportive of the bill, may hold hearings later in the summer as well. The Civil and Constitutional Rights Subcommittee of the House Judiciary Committee, chaired by Rep. Edwards and including Rep. Frank, plans a hearing July 6, in Mississippi, on the situation in Overt. It is possible that the bill would be raised at that time.

SUMMARY OF THE BILL:

The bill's sponsors plan to introduce similar, though not identical, versions in the House and Senate. The core of both bills will be the same: prohibiting employment discrimination based on sexual orientation.

The bill explicitly exempts employee benefits, non-profit religious activities, veterans preferences, or the armed forces. It excludes use of the disparate impact standard, and forbids the use of quotas and other "preferential treatment." The bill prohibits retaliation and coercion, and requires notices of the law's protections and remedies to be posted. The Senate bill includes a findings and purposes section.

The bill follows the form of the Americans with Disabilities Act, using Title VII as the framework for coverage, enforcement and remedies but not amending it directly to include sexual orientation. Amending the 1964 Act could open the door to challenges to other provisions of the Act by those hostile to the protections provided -- a debate the civil rights community (and the Administration) clearly would want to avoid.

Nearly every year for the last twenty, Members of Congress sympathetic to the cause of gay and lesbian civil rights have introduced an omnibus gay and lesbian civil rights bill. These bills typically would include prohibitions against discrimination based on sexual orientation in employment, public accommodations, fair housing, etc., simply adding gays and lesbians as a protected class into existing civil rights laws.

The substance of this new bill is purposely different. Instead of introducing an omnibus bill that would face certain defeat, the drafters (the Members and the civil rights coalition) have narrowed their focus to employment discrimination.

RECOMMENDATION

We recommend that the Administration support the bill. As a matter of both law and policy, support for the principle of prohibiting discrimination based on sexual orientation in employment is the right thing to do. The President and the Attorney General often have stated their intolerance for discrimination of any kind. Lawyers in the Civil Rights Division have reviewed a draft of the legislation and believe it to be legally viable. Of course, the question of its political viability is another consideration. The Department will need to analyze the bill provision by provision and may well have recommendations for revisions but

these would not undermine the core aim of the bill.

In evaluating the policy and political implications of support for the bill, we believe the following factors are relevant:

1. The legislation is supported by a broad mainstream civil rights coalition.
2. The gay and lesbian groups, indeed much of the mainstream civil rights coalition, have worked hard to prepare a bill that would be as conservative as possible given the political realities faced by Congress and the President.

The advocates have agreed to pursue an employment discrimination bill rather than an omnibus bill -- giving up provisions that other minority groups have not had to sacrifice.

In order to preempt the usual objections to gay and lesbian rights, the drafters have included significant exemptions for military and non-profit religious entities and have deliberately excluded quotas and preferential treatment (to avoid the affirmative action issue).

3. Lack of support of what the affected community views as a mild anti-discrimination measure may well cause a negative backlash among leaders of a variety of civil rights groups, particularly given the political dynamics surrounding the President's policy on gays in the military.
4. Support for this legislation obviously would open the Administration to attack by conservatives. For example, neither the House nor the Senate version of the bill contains exceptions for discriminating against teachers or others who work with children -- an issue ripe for family values and morality demagoguery.
5. Opponents of the bill could use this as an opportunity to point to a series of "pro-gay and lesbian" actions by the Administration: Overt, Gay Games, Toboso (Cuban gay asylum case), the Departments' policies on discrimination against gays and lesbians, and the President's statement regarding anti gay and lesbian ballot initiatives.
6. We cannot judge adequately the impact of Administration support for the bill on the Administration's full legislative agenda.

THE PRESIDENT HAS SEEN

THE WHITE HOUSE

6.22.94

WASHINGTON

June 22, 1994

MR. PRESIDENT:

Attached is a decision memo from Counsel's office on a bill that **Senator Kennedy plans to introduce tomorrow** prohibiting employment discrimination on the basis of sexual orientation. Senator Kennedy is hoping for an Administration endorsement.

Counsel's office lists four options, recommending option 2 -- that you express support for the principle of combatting employment discrimination on the basis of sexual orientation, but refrain from explicitly endorsing the Kennedy bill so as to preserve some flexibility. Counsel's office informs us that George and Gergen also support this approach. (The other options are (1) endorse the bill; (3) state that we will review it, while expressing no further position; and (4) oppose the bill.)

In view of the shortness of time, I am forwarding the memo to you immediately. At the same time, I am circulating it to the Vice President and relevant staff.

Option 1___ Option 2 (Counsel's choice) ☒

Option 3___ Option 4___ Discuss___

Todd Stern

*Religious Freedom Act
can't be a
discrimination
Do it*

THE WHITE HOUSE

WASHINGTON

June 22, 1994

94 JUN 22 P7:10

MEMORANDUM FOR THE PRESIDENT

FROM: LLOYD N. CUTLER *LNC*
SPECIAL COUNSEL TO THE PRESIDENT

JOEL I. KLEIN *JEK*
DEPUTY COUNSEL TO THE PRESIDENT

CLIFFORD M. SLOAN *CMS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Gay rights anti-discrimination bill

Senator Kennedy plans to introduce legislation tomorrow that would prohibit employment discrimination on the basis of sexual orientation ("the Employment Non-Discrimination Act"). According to the Leadership Conference on Civil Rights, the bill will be endorsed by a bipartisan group of legislators (Feinstein, Murray, Chafee, and Jeffords in the Senate; Frank, Studds, Edwards, Schroeder, Morella, Shays, and Huffington in the House) and by a range of civil rights leaders and groups (including Coretta Scott King, Justin Dart, the Leadership Conference On Civil Rights, and many other representatives of minority, women, disability, and labor groups). Senator Kennedy has requested that the Administration endorse the bill and that Assistant Attorney General Deval Patrick be present to express support for it.

In many respects, the bill is narrowly crafted. The Act prohibits employment discrimination on the basis of sexual orientation. (A copy of the bill is attached.) It precludes the use of quotas or discrimination claims based solely on statistics (so-called "disparate impact" claims). It does not apply to religious organizations, but it does apply to their "for-profit activities subject to taxation." The bill also does not apply to the armed forces.

At the same time, certain provisions of the bill may raise significant issues. The congressional findings seem to include a finding that would lead to "strict scrutiny" for sexual orientation claims in court. (The finding refers to exclusion of gay men, lesbians, and bisexuals from "full participation in the political process" and to their status as a "discrete and insular minority," p. 2, lines 17-20 -- traditional formulations for strict scrutiny). In the gays-in-the-military litigation, DOJ and DOD have been arguing against strict scrutiny in the military context.

In addition, the bill defines "sexual orientation" as "lesbian, gay, bisexual, or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations" (p. 11, lines 13-16) and prohibits employment discrimination on the basis of sexual orientation (p. 3, lines 21-22). Opponents may claim that the bill thus protects even on-the-job sexual acts and on-the-job sexual statements of any kind, regardless of propriety. It is, however, possible that clarifying language could promptly resolve this problem and make clear that the point of the legislation is merely that gay men, lesbians, and bisexuals should not be treated differently from similarly situated heterosexuals.

OPTIONS

Four options are possible:

- (1) ___ Endorse the legislation.
- (2) ___ State that we support the principle of
 combatting sexual orientation employment
 discrimination and that we will review the
 legislation with care.
- (3) ___ State that we will review the legislation and
 express no further position at this time.
- (4) ___ Oppose the legislation.

We recommend in favor of option 2. The principle of non-discrimination in employment is clearly laudable and appropriate, and is consistent with your public statements during the campaign and subsequently. At the same time, we may wish to preserve some flexibility to offer suggestions on the bill and to respond to criticisms of it.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

LIEUTENANT COLONEL JANE ABLE,
PETTY OFFICER ROBERT HEIGL,
FIRST LIEUTENANT KENNETH OSBORN,
SERGEANT STEVEN SPENCER,
LIEUTENANT RICHARD von WOHL, and
SEAMAN WERNER ZEHR,

94 CV 0974

Plaintiffs,

MEMORANDUM
AND
ORDER

-against-

UNITED STATES OF AMERICA,
WILLIAM J. PERRY, SECRETARY OF
DEFENSE, in his official capacity,
and FEDERICO F. PEÑA, SECRETARY OF
TRANSPORTATION, in his official
capacity,

Defendants.

-----X

SULLIVAN & CROMWELL

(David H. Braff, Michael Lacovara, Penny Shane,
Ellen Bresler, Edward A. Harris, Ann T. Kenny, of
counsel)

125 Broad Street
New York, New York - 10004
for plaintiffs.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

(Ruth E. Harlow, Marc E. Elovitz, Matthew Coles,
of counsel)

132 West 43rd Street
New York, New York 10036
for plaintiffs.

LAMBDA LEGAL DEFENSE & EDUCATION FUND

(Beatrice Dohrn, Evan Wolfson, of counsel)

666 Broadway
New York, New York 10012
for plaintiffs.

DEPARTMENT OF JUSTICE

(Frank W. Hunger, Zachary W. Carter, John A. Rogovin, Charles S. Kleinberg, David J. Anderson, Vincent M. Garvey, Margaret H. Plank, Robert A. Van Kirk, Kevin W. Simpson, Mark T. Quinlivan, of counsel)
901 E Street, N.W., Room 1022
Washington, D.C. 20530
for defendants.

DEPARTMENT OF THE ARMY

(Major Douglas K. Mickle, Captain Tara O. Hawk,
Office of the Judge Advocate General, of counsel)
for defendants.

NICKERSON, District Judge:

Plaintiffs, six members of the United States Armed Services (the Services) who have stated that they are homosexual, brought this action for an order (1) declaring invalid under the First and Fifth Amendments Section 571 of the National Defense Authorization Act for the Fiscal Year 1994, 10 U.S.C. § 654 (the Act), concerning a new policy as to homosexuals, and the directives issued under the Act (the Directives), and (2) enjoining the government from enforcing the Act and the Directives.

This court has jurisdiction under 28 U.S.C. §§ 1331 and 1346. Venue lies here under 28 U.S.C. § 1391.

On April 4 and May 9, 1994, this court on plaintiffs' motions preliminarily enjoined defendants from enforcing the Act and the Directives against

plaintiffs based on their statements of sexual orientation. Able v. U.S., 847 F. Supp. 1038 (E.D.N.Y. 1994); Able v. U.S., No. 94 CV 0974 (E.D.N.Y. May 9, 1994).

On September 14, 1994, this court granted defendants' motion to dismiss the complaint as to plaintiffs' intimate association, vagueness and overbreadth claims, but denied defendants' motion to dismiss the first amendment and equal protection claims. Able v. U.S., 863 F. Supp. 112 (E.D.N.Y. 1994).

While the motion to dismiss was pending, defendants appealed the court's preliminary injunction orders pursuant to 28 U.S.C. § 1292(a)(1). On January 3, 1995, the Court of Appeals for the Second Circuit remanded the case, holding that this court had not applied the proper preliminary injunction standard and ordering consolidation of a preliminary injunction hearing with a trial on the merits of the permanent injunction. The Court of Appeals directed that "[t]he preliminary injunction orders shall remain in effect until March 31, 1995 upon which date they shall expire unless reentered by the district court following a

trial on the merits. . . ." Able v. U.S., 44 F.3d 128, 133 (2d Cir. 1995) (per curiam).

On March 6, 1995, this court held that under the pleadings plaintiffs lacked standing to claim that (1) the Act violates their right to expressive association, (2) subsection 654(b) (1) violates their rights to free expression and equal protection, and (3) subsection 654(b) (3) violates their right to equal protection. Able v. U.S., No. 94 CV 0974 (E.D.N.Y. Mar. 6, 1995).

From March 13 to March 16, 1995 the court tried the merits of plaintiffs' remaining claims.

THE GENESIS OF THE ACT

On January 29, 1993 President Clinton directed then Secretary of Defense Les Aspin to submit a draft executive order "ending discrimination on the basis of sexual orientation in determining who may serve" in the Services, in a manner "consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain." Memorandum from President Clinton to the Secretary of Defense (Jan. 29, 1993), Ex. PX-21.

On July 19, 1993, Secretary Aspin announced a new policy as to the service of gay men and lesbians in the

Services, stating that "sexual orientation is considered a personal and private matter . . . and is not a bar to service entry or continued service unless manifested by homosexual conduct." Memorandum from Secretary Aspin to the Secretaries of the Army, Navy and Air Force and the Chairman of the Joint Chiefs of Staff (Jul. 19, 1993), Ex. PX-180.

From March through late July 1993 the Armed Services Committees of the House and Senate held public hearings on the matter. Secretary Aspin presented the administration's new policy to the Senate Armed Services Committee on July 20, 1993.

Both Committees issued reports recommending legislation practically identical to what is now the Act, which became effective November 30, 1993. The Directives became effective February 28, 1994. On March 15, 1994, the United States Coast Guard announced its policy on homosexual conduct "in lock step" with that of the other military services. Memorandum from Secretary Of Transportation Federico Peña to the Commandant, United States Coast Guard (Mar. 15, 1993), Ex. JX-13 at p. B301327.

THE ACT AND THE DIRECTIVES

Section 654, entitled Policy Concerning Homosexuality in the Armed Forces, contains in subsection (a) "fifteen findings" that say, among other things:

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(13) 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.

(14) 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.

(15) 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.

Subsection (b), setting forth the Act's policy, states, in substance, that a member "shall be separated" from the Services if one or more of the following three findings is made:

(1) The member is found to have engaged, attempted to engage, or solicited another to engage, in homosexual acts, unless the member has demonstrated,

among other things, that "such conduct" departs from the member's usual behavior and he or she "does not have a propensity or intent to engage in homosexual acts."

(2) 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 in accordance with 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."

(3) The member has married or attempted to marry someone of the same sex.

Subsection (f) contains definitions. "Homosexual" includes "the terms 'gay' and 'lesbian'" and means a person who engages, attempts to engage, has a "propensity" to engage, or "intends" to engage, in homosexual acts. The term "homosexual act" means any bodily contact between members of the same sex to satisfy sexual desires or any such contact that a reasonable person would understand to "demonstrate a propensity" or "intent" to engage in such an act. The Act does not define the word "propensity."

On December 21, 1993 Secretary Aspin issued a memorandum and Directives concerning the implementation of the new policy. Memorandum from Secretary Aspin to the Secretaries of the Military Departments et al. (Dec. 21, 1993), Ex. JX-4. They provided that an applicant to become a member will not be asked about his or her sexual orientation, that "homosexual orientation is not a bar" to "service entry or continued service," but that "homosexual conduct" is. Such "conduct" includes not only homosexual "acts" but also a statement by a member or applicant that "demonstrates a propensity or intent to engage" in such acts. A statement that demonstrates the "propensity" will thus require separation unless the member rebuts a presumption that he or she engages or intends to engage in "homosexual acts" or has a "propensity" to do so. Directives 1332.14, 1332.30, & 1304.26, Exs. JX-6, JX-7, & JX-9.

As examples of statements giving rise to the presumption the Directives include "I am a homosexual," "I am gay," "I am a lesbian," and "I have a homosexual orientation." Id. The Directives purport to distinguish homosexual "orientation" from homosexual "propensity," defining homosexual "orientation" as "an

abstract sexual preference for persons of a particular sex," and homosexual "propensity" as evidencing "a likelihood that a person engages in or will engage in" homosexual acts. Id.

The Directives go on to say that "a statement . . . demonstrat[ing] a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." Id.

The Directives do not explain how an "orientation" means an "abstract preference" if not revealed but if admitted becomes evidence of a "likelihood" to commit acts, a likelihood that requires discharge.

THE ISSUE BEFORE THE COURT

The six plaintiffs have "stated" in their complaint that they are "homosexuals." That is the only thing that they have done that is now before the court. Under the state of the pleadings the court thus does not consider the case to draw into question the validity of any subsection of the Act other than (b) (2).

Subsection (b) (2) has two aspects pertinent to this case. It provides for the discharge of a member because he or she (1) has made a "statement" and (2) the statement is of his or her status, that is, his or her "propensity."

Plaintiffs urge that subsection (b) (2) is invalid both under the First Amendment and the equal protection component of the due process clause of the Fifth Amendment.

THE LEGISLATIVE PURPOSE

Before addressing the constitutional validity of subsection (b) (2) the court looks to the text of the entire Act to determine the end to which the Act is directed.

The Act says that its objective is to reach "homosexual conduct," that is, "homosexual acts" as they are defined in the Act. Thus finding (13) in subsection (a) says that the "prohibition against homosexual conduct" in the military is "necessary." Finding (15) indicates that the prohibition against such conduct is so necessary that even those who have a mere "propensity" to engage in that conduct must be discharged from the military because their status as

homosexuals makes it likely that they will commit homosexual acts.

The statement "I am a homosexual" or "I have a homosexual propensity" is thus prohibited by the terms of the Act not because the statement itself causes harm but because one can infer from it that the speaker will do harmful things, namely, commit "homosexual acts" injurious to "morale, good order and discipline, and unit cohesion."

THE FIRST AMENDMENT

The free speech clause of the First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech."

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 that indicates the status of a homosexual.

Plaintiffs' statements that they are homosexual constitute "speech," and important, not trivial, speech. The First Amendment recognizes the value of speech not only as an instrument, that is, a mechanism

by which ideas may be exchanged, but also as an expression of personal dignity and integrity. Speech is worthy of First Amendment protection not only when it contributes to the "marketplace of ideas" or assists in the search for "truth," but also when it articulates "the premise of individual dignity and choice upon which our political system rests." Cohen v.

California, 403 U.S. 15, 24, 91 S. Ct. 1780, 1788 (1971). "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means." Whitney v. California, 274 U.S. 357, 375, 47 S. Ct. 641, 648 (1927) (Brandeis, J., joined by Holmes, J., concurring).

Plaintiffs have done no more than acknowledge who they are, that is, their status. The speech at issue in this case implicates the First Amendment value of promoting individual dignity and integrity, and thus is protected by the First Amendment from efforts to prohibit it because of its content.

Regulation of the content of speech that involves First Amendment concerns is presumed invalid. See R.A.V. v. City of St. Paul, --- U.S. ---, ---, 112 S. Ct. 2538, 2542 (1992); Simon & Schuster, Inc. v. New

York Crime Victims Bd., 502 U.S. 105, 116, 112 S. Ct. 501, 508 (1991). The government may regulate its content only upon a showing that such regulation promotes a "compelling interest" and that the government has chosen "the least restrictive means" to further the interest. Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989).

The court recognizes that the judgments of Congress and the military with regard to military affairs are entitled to substantial deference, and that courts "lack the competence" to make policy decisions in the military context. See Goldman v. Weinberger, 475 U.S. 503, 507, 106 S. Ct. 1310, 1313 (1986), Rostker v. Goldberg, 453 U.S. 57, 65, 101 S. Ct. 2646, 2652 (1981). But that does not mean that courts are not competent or should abdicate their responsibility to review the constitutionality of military decisions. "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is [the courts'] 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated."

United States v. Robel, 389 U.S. 258, 264, 88 S. Ct. 419, 424 (1967) (citations omitted).

A court need not determine the wisdom of a particular military policy in order to determine whether that policy conflicts with the Constitution. Even in the military context, regulation of speech based on content survives constitutional scrutiny only if it is "no more than [what is] reasonably necessary to protect [a] substantial government interest." Brown v. Glines, 444 U.S. 348, 355, 100 S. Ct. 594, 600 (1980).

A

Defendants argue that subsection (b)(2) does not offend the First Amendment because the subsection is ultimately directed solely at the prohibition of acts and gives members who reveal their homosexual "orientation" an opportunity to rebut the presumption that a member with such an "orientation" will either commit undesirable acts or has a "propensity" to commit such acts.

In advancing this argument, defendants reject old myths previously offered to justify a ban on service by homosexuals.

From the early 1920's through the 1970's, homosexuals were deemed unfit for service because homosexuality was considered a "mental illness" or a "personality disorder." See Prepared Statement of Dr. David F. Burrelli, S. Hrg. 103-845, Ex. JX-1 at pp. 13-14. In 1982, the Department of Defense issued a policy mandating dismissal of homosexuals in part "to prevent breaches of security" that presumably would arise if a closeted homosexual were blackmailed. See id. at p. 15. Even as recently as 1993, some proponents of retaining the complete ban testified that such a policy was necessary because homosexuals are more likely, as a group, "to spread infectious diseases such as hepatitis and syphilis." See Statement of Col. John Ripley, H.A.S.C. Hrg. 103-18, Ex. JX-2 at pp. 89-90.

The legislative record shows that the Act and the Directives are not premised on these beliefs. Defendants do not contend that the new policy was enacted in response to a finding that gay men and lesbians have physical or psychological defects rendering them unfit to serve, pose security risks, or are more likely than heterosexuals to violate a code of conduct or other rules generally. See Defendants' Responses to Plaintiffs' Requests for Admission, Ex.

PX-13 at pp. 5-8. Indeed, defendants admit that Congress "clarified that the proscription on service has nothing to do with unjustified assumptions that homosexuals are not just as capable physically, mentally and psychologically to serve in the United States military as heterosexuals." Transcript of Defendants' Closing Statement at p. 256.

High-ranking administration officials and military officers certified the demonstrated ability of homosexuals to serve competently and conscientiously. Secretary Aspin, in presenting the administration's new policy, testified to the Department of Defense's recognition "that homosexuals have served with distinction in the Armed Forces." S. Hrg. 103-845, Ex. JX-1 at p. 702. General Norman Schwarzkopf noted that "homosexuals have served in the past and have done a great job serving their country." S. Hrg. 103-845, Ex. JX-1 at p. 612. Major Kathleen Bergeron affirmed that in her experience, homosexuals who eventually had been separated "had an honorable record and served with distinction." S. Hrg. 103-845, Ex. JX-1 at p. 612. General Colin Powell, discussing the arguments of those who believe that homosexuals should be allowed openly to serve, stated that "[t]hey note correctly that

homosexuals have privately served well in the past and are continuing to serve well today." S. Hrg. 103-845, Ex. JX-1 at p. 707.

Thus, the government, including Congress, believed that the admission of homosexuals into the Services did not pose an uncontrollable risk that they would commit acts inherently dangerous to morale, good order and discipline, and unit cohesion, and manifested that belief by allowing homosexuals to enter the Services.

The government's confidence was justified by the fact that over the years thousands of homosexuals have served in the Services ably and honorably before the Act became law. By the time the Act was passed, the old myths had finally been abandoned.

But despite its recognition that homosexuals do not by their nature pose a risk to the military mission or lack competence as soldiers, the government elected to allow them to join and remain in the Services only on the condition that they remain silent regarding their status. The government justified this condition by saying that it needed to use a statement of orientation as evidence of a likelihood to engage in prohibited acts in order to forestall the commission of such acts.

To presume from a person's status that he or she will commit undesirable acts is an extreme measure. Hitler taught the world what could happen when the government began to target people not for what they had done but because of their status.

Thirty three years ago the Supreme Court held it was cruel and unusual punishment prohibited by the Eighth Amendment to subject an admitted narcotics addict to a misdemeanor prosecution on the theory that his addiction justified an inference that he had possessed or in the future would possess drugs.

Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417 (1962). See also Powell v. Texas, 392 U.S. 514, 543, 88 S. Ct. 2145, 2159 (1968) (Black, J., concurring) ("Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it.")

Robinson's status as a narcotics addict was self-acquired. How much worse it is to infer the commission of acts from one's homosexual status, which may well be acquired at birth or in early childhood. See John C.

Gonsiorek and James D. Weinrich, eds., Homosexuality: Research Implications for Public Policy 2 (1991).

Defendants recognized that a policy mandating discharge of homosexuals merely because they have a homosexual orientation or status could not withstand judicial scrutiny. As Jamie Gorelick, Counsel to the Department of Defense, stated at the Senate hearing: "The reason we do not discharge people because we believe them to have a homosexual orientation is because in 1981 it was recognized that if we did have a status-based as opposed to a conduct-based rule, that it would be vulnerable to the courts." S. Hrg. 103-845, Ex. JX-1 at p. 777.

Defendants therefore designed a policy that purportedly directs discharge based on "conduct," and craftily sought to avoid the First Amendment by defining "conduct" to include statements revealing one's homosexual status. To say "I have a homosexual orientation," a mere acknowledgment of status, is thus transmogrified into an admission of misconduct, and misconduct that the speaker has the practically insurmountable burden of disproving.

As noted above, the Directives purport to distinguish between homosexual "orientation" and

homosexual "propensity," defining the former as the quality of having an "abstract sexual preference for members of the same sex" and the latter as the quality of having such a preference that presumably is sufficiently concrete to indicate a "likelihood" that the preference will be acted upon.

The court regards the definition and treatment of these terms to be nothing less than Orwellian. Although the Act and the Directives are written in such a manner as to give the impression that there is a principled distinction between the two characteristics, only a brief critique will demonstrate that in practice no such distinction exists.

Neither the Act nor the Directives explain how to differentiate an "orientation" from a "propensity," although the Act's avowed policy to insure that "homosexual orientation" not be treated as a "bar" to service would seem to make such differentiation crucial. Those who formulated the policy testified that any distinction between the two is merely "hypothetical," Testimony of Counsel Gorelick, S. Hrg. 103-845, Ex. JX-1 at p. 800, and the Directives, as decreed by Congress, equate a statement of "orientation" with an admission of at least a

"propensity." See Directives 1332.14 & 1332.30, Exs. JX-6 & JX-7, and S. Rep. 103-112, Ex. JX-15 at p. 294.

These facts seem to the court to be powerful evidence that despite their semantic gymnastics, defendants themselves did not perceive a difference between the two. Plainly they intended that the articulation of a mere "orientation" be sufficient to initiate a discharge proceeding. Thus, one who does no more than express an "orientation" is faced with the prospect of somehow showing that he or she does not have a "propensity" to engage in prohibited acts in order to avoid discharge.

The word "propensity" is generally understood and defined to mean a "natural inclination" or an "innate or inherent tendency." Webster's Third New International Dictionary 1817 (1986); see also Random House Dictionary of the English Language 1152 (1966). "Innate" means "existing in one from birth" or "inborn." Random House at 733; see also Webster's at 1165.

Defendants make much of the opportunity to rebut the presumption of propensity. But that opportunity is an ignis fatuus. Neither the Act nor the Directives suggest how one who is born with an innate tendency, an

"orientation" or a "propensity," to commit a homosexual act can prove that he or she does not have such an orientation or propensity. Furthermore, the testimony at the Senate hearing shows that a member who admits to a homosexual orientation has only a "hypothetical" chance to escape discharge.

As stated by Ms. Gorelick, the rebuttable presumption places a "very high burden" on the member, and in a situation where "someone made the statement [of homosexuality] knowingly and was not drunk or had not lost his or her mind," it would be "very unlikely" that the burden could be overcome by the member's assertion that he or she does not engage or have a propensity to engage in prohibited acts. S. Hrg. 103-845, Ex. JX-1 at p. 772. Indeed, Ms. Gorelick testified that even if the speaker completely disclaimed his or her acknowledgement of his or her sexual orientation, asserting that "I was misunderstood, I did not mean it, it was a joke," that disclaimer would only "hypothetically suffice" to rebut the presumption. Id.

Thus, the policy treats a statement of homosexual orientation as proof of the case. Once such a statement is made, the speaker is judged guilty until

proven innocent of committing misconduct the government considers so threatening to the military mission that a member may be discharged for it. This seems to the court a rather draconian consequence of merely admitting to an orientation that Congress has determined to be innocuous.

Defendants point to three isolated instances where Navy members have been able to escape discharge despite having stated that they were homosexual as evidence that the Act does not punish expressions of homosexual orientation but merely uses them as evidence in an effort to preclude the commission of prohibited acts. See Administrative Bd. Records Nos. 13, 15, & 16, Exs. DX-1, DX-2, & DX-3.

An examination of the records (such as they are) of these proceedings shows that the results were aberrations stemming from a dysfunctional application of the policy. In one, the member had said "she thought she might be gay." In another, the member had stated "I'm kind of confused about my sexual preference." And in the third the member had said he was homosexual only in what he thought was a confidential session with a Navy counselor who tried to

make him "comfortable" and "as free as possible" so as to get to the "root" of the member's problems.

In each of these cases, the member stated at the discharge hearing that he or she was gay, but was apparently able to escape discharge by stating that he or she had not engaged and did not intend to engage in "homosexual acts." But Congress' specific intent was that "a member cannot rebut the presumption simply through a promise to adhere to military standards of conduct in the future, nor can the member rebut the presumption by a statement to the effect that he or she has a propensity towards homosexuality but has not acted on it." S. Rep. 103-112, Ex. JX-15 at p. 294.

These three atypical results are obviously aberrations that cannot be taken to show that the Act holds out any realistic opportunity to rebut the presumption.

The plain fact is that subsection (b)(2) burdens speech based solely on its content by subjecting the member to a discharge process in which the member has only at best a hypothetical chance to escape separation. The Act works to discharge or subject to discharge proceedings members who possess no more than an "orientation" regardless of whether they have

engaged in or demonstrated a likelihood of engaging in prohibited acts, and thus reaches speech that does not indicate acts.

This court concludes that under the First Amendment a mere statement of homosexual orientation is not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings.

B

In this court defendants argued something not even mentioned in the fifteen findings of the Act. In substance, they contended that a majority of the heterosexuals in the Services would not, for a variety of reasons, like to know that there were homosexuals serving with them and that this would result in a serious detriment to "unit cohesion." Defendants now say that the Services are justified in deferring to this feeling of heterosexuals by imposing silence on homosexuals.

Defendants' advancement of this alternative theory to justify the Act indicates that, once Congress decided to try to get all known homosexuals out of the Services, the chief concern was to draft legislation to insure that the enactment would survive judicial review. See also Testimony of Counsel Gorelick and

Gen. John P. Otjen, S. Hrg. 103-845, Ex. JX-1 at pp. 775-78, 812-21, 829-30. The Committee hearings show that legal counsel thought the best way to do this was to pretend that the concern was over, not the mere presence of homosexuals in the Services, but their potential acts. According to counsel, if the Act provided forthrightly that open homosexuals shall be banned because heterosexuals will not stand for them, it would be vulnerable under the Constitution of the United States. See Testimony of Counsel Gorelick, S. Hrg. 103-845, Ex. JX-1 at p. 777.

So the lawyers evolved the Byzantine and complex provisions described above. The Act was designed to say nothing about heterosexual animosity towards homosexuals. The Act's fifteen findings avoid using a single word about heterosexuals, and fail to say what, if any, effect the reactions of heterosexuals may have on unit cohesion.

Those who opposed the removal of the total ban on homosexuals and testified at the hearings were more candid. They said that the concern was with the potential reaction of heterosexuals if they knew who were the homosexuals serving with them.

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. See Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16, 95 S. Ct. 1225, 1233 n.16 (1975) (courts need not "accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation").

There certainly was much testimony at the Committee hearings, particularly from generals and other high-ranking officers, opposing any lifting of the ban on homosexuals because of the expected reactions of heterosexuals. It is fair to say that the bulk of the anecdotal testimony described how heterosexuals would be prejudiced against homosexuals because their "lifestyles" or "values" differed from the "traditional" moral or religious "values" of heterosexuals. See, e.g., Testimony of Maj. Bergeron, S. Hrg. 103-845, Ex. JX-1 at pp. 630-31 (expressing concern that members' children "be exposed to that

lifestyle"), Testimony of Capt. Gordon Holder, S. Hrg. 103-845, Ex. JX-1 at p. 544 (questioning ability to lead subordinates "in an area . . . basically against [his] moral standards"); Testimony of Comm. James Pledger, S. Hrg. 103-845, Ex. JX-1 at pp. 541-42 (reporting that significant number of his crew "took exception" to lifting ban "based on moral convictions").

General John P. Otjen, a staunch opponent of any lifting of the ban and the chairman of the Military Working Group that recommended the policy that eventually became the Act, sounded a theme repeatedly stated by high-ranking officers that "when somebody identifies themselves as homosexual" "that is disruptive to unit cohesion. . . ." S. Hrg. 103-845, Ex. JX-1 at p. 780. See also id. at p. 821 ("[B]ased on my experience, [a] statement [of homosexual orientation] alone will cause disruption within the unit.").

General Schwartzkopf testified that "[t]he introduction of an open homosexual into a small unit immediately polarizes that unit." S. Hrg. 103-845, Ex. JX-1 at pp. 595-96. See also S. Rep. 103-112, Ex. JX-15 at pp. 279-80. General Powell said that

"[h]omosexuals over history who have been willing to keep their orientation private have been successful members. . . , " S. Hrg. 103-845, Ex. JX-1 at p. 708, but that "the presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale and esprit of the Armed Forces." Id. See also Sen. Rep. 103-112, Ex. JX-15 at p. 278. The Report of the Association of the United States Army stated: "Heterosexual animosity toward known homosexuals can cause latent or even overt hostility, resulting in degradation of team or unit esprit." H.A.S.C. Hrg. 103-18, Ex. JX-2 at p. 337.

This heterosexual animosity towards homosexuals is by its terms based on irrational prejudices. But the government advances two arguments to attempt to refute the fact that the policy of requiring secrecy was based on irrational stereotypes.

First, they say that the policy "seeks to accommodate the privacy interests of servicemembers."

This seems to the court the most incongruous of arguments. After passage of the Act the showers, the latrines and the barracks became no more private than they were before. As defendants say, "Privacy is extremely limited in the military."

To "accommodate" the privacy of heterosexuals presumably means, for example, to keep their naked bodies safe in the showers from the stares of homosexuals. But if indeed there are homosexuals who wish to peek at naked bodies, they might do so quite as readily when their orientation is a secret as when it is open. The only difference will be that heterosexuals will not know which of their servicemates are homosexuals, and heterosexuals will have reason to have a generalized suspicion of everyone in the showers, hardly a circumstance likely to increase "cohesion."

To suggest to heterosexuals that the secrecy policy will "accommodate" their privacy interests is to attempt to mislead them. They are not dunces or ostriches. They can hardly be unaware that because of the passage of the Act homosexuals are serving with them.

Second, defendants contend that the policy somehow addresses the concern about "sexual tension" in the unit. The argument is based on the proposition that homosexuals, following their "tendencies," will behave in improper ways that will give rise to such tension.

This was an argument advanced before the Senate Committee in support of the total ban on homosexuals. See, e.g., S. Hrg. 103-845, Ex. JX-1 at pp. 535-36 (testimony of Fleet Master Chief Ronald Carter), pp. 763-64 (statement of Gen. Gordon Sullivan), pp. 604-05 (testimony of Maj. Bergeron). It can hardly have force now when homosexuals are not banned and will be serving in units. There is no reason to believe that such improper behavior, if it occurs, would be more likely to occur because a homosexual had admitted his orientation rather than kept it a secret.

Moreover, inappropriate behavior by a homosexual, whether in the closet or not, is susceptible of control by the general regulations. The Uniform Code of Military Justice, 10 U.S.C. § 801 et seq., contains numerous provisions that target such misconduct, prohibiting rape, 10 U.S.C. § 920, sexual harassment, 10 U.S.C. § 893, and fraternization, 10 U.S.C. § 934.

There was, of course, evidence presented to Congress to the effect that the presence of individuals who acknowledged their homosexual orientation would cause no significant breakdown in cohesion. In a report commissioned by Secretary Aspin, an interdisciplinary team of researchers from the National

Defense Research Institute of the RAND Corporation (the RAND Group) concluded that "although some disruptions might result from having acknowledged homosexuals serving in the military," "the experience of analogous organizations . . . suggests that any increase is likely to be quite small." RAND National Defense Research Institute, Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment (1993) (the Rand Report), Ex. PX-1 at p. xxiv. The RAND Group noted that in Canada, Israel, the Netherlands, and Norway, "countries that have policies of complete nondiscrimination," "no serious problems were reported concerning the presence of homosexuals in the force." Rand Report, Ex. PX-1 at p. 14.

A report by the United States General Accounting Office (the GAO) in 1992 also recounted that analogous organizations that have "accepted homosexuals into their ranks . . . have generally not reported adverse impacts." GAO, Report to Congressional Requesters, Defense Force Management: DoD's Policy on Homosexuality (Jun. 1992), Ex. PX-5 at p. 43.

Furthermore, the RAND Group noted that although the military had expressed in the 1940's similar, indeed almost identical, fears about the reactions of

white members if there was racial integration of the Services, in fact integration "did not 'destroy' unit cohesion and military effectiveness." Rand Report, Ex. PX-1 at p. 189.

While the empirical evidence developed by neutral and objective organizations such as the RAND Group supports the conclusion that any disruption would probably be quite small, the court will assume arguendo that Congress could have made a finding in the Act that the reactions of heterosexuals would have a larger impact. But even if the Act had included such a finding, there are factors other than those mentioned in the hearings that cast doubt on any such conclusion.

What the court deems extraordinary is the almost total lack of concern evidenced in the Congressional hearings and the Committee reports as to the impact on unit cohesion of the attempt to enforce secrecy on homosexuals and to enlist them in the perpetration of a hoax on heterosexuals. Common sense suggests that a policy of secrecy, indeed what might be called a policy of deception or dishonesty, will call unit cohesion into question.

If there is one thing that is undisputed and seems self-evident, it is that cohesion depends on mutual

trust within the unit. The honor code for servicemembers provides that they will not lie or cheat, and for good reason. Honesty is a quality that attracts respect. Secrecy and deception invite suspicion, which in turn erodes trust, the rock on which cohesion is built.

The policy of the Act is not only inherently deceptive. It also offers powerful inducements to homosexuals to lie. An enlisted member may ask another enlisted member his or her sexual orientation. Testimony of Counsel Gorelick and Gen. Otjen, S. Hrg. 103-845, Ex. JX-1 at pp. 810-11. It is true that a homosexual may answer "no comment." But a homosexual who answers truthfully is subject to discharge proceedings. A heterosexual is not. The pressure to lie is obvious.

There are no findings, even in the Committee reports, assessing whether a policy of secrecy and deception is more or less deleterious to unit cohesion than would be a policy of openness and honesty. The court has no findings before it calculating the net effect of the policy on unit cohesion.

The task of this court is to determine the constitutionality of the policy adopted by Congress,

not its morality. But heterosexuals and homosexuals alike would be entitled to think it demeaning and unworthy of a great nation to base a policy on pretense rather than on truth. To invite someone with a homosexual orientation to join the Services, then to throw that person out solely because that orientation is revealed from something he or she said, and finally to pretend that the discharge was not because of the person's orientation, might appear to all members, heterosexual and homosexual, less than honorable, with incalculable effect on "high morale, good order and discipline, and unit cohesion."

Even if the First Amendment were to tolerate the prohibition of a truthful self-identification by a homosexual because it offends the sensibilities of some heterosexuals it surely would require a legislative finding that the consequences of disclosure would be infinitely more serious than anything revealed in the record before Congress. Even General Otjen conceded that the Services would fulfill their mission if homosexuals were permitted to reveal their orientation. See Deposition of General Otjen, Ex. PX-19 at p. 139 (confirming that subordinate members of the Services follow their orders whether or not they like them).

See also Testimony of Gen. Calvin Waller, S. Hrg. 103-845, Ex. JX-1 at p. 401 ("If the ultimate decision is to allow openly declared homosexuals to serve in the Armed Forces, I am confident that the military leadership, as well as the military personnel, will salute and make the best of that situation.")

In any event the Supreme Court has held that the First Amendment will not countenance the proscription of the expression of an idea because others find that idea repugnant.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 2545 (1989). See also Terminiello v. Chicago, 337 U.S. 1, 4, 69 S. Ct. 894, 896 (1949); Healy v. James, 408 U.S. 169, 187-88, 92 S. Ct. 2338, 2349 (1972); Simon & Schuster, supra, 502 U.S. at 118, 112 S. Ct. at 509.

This principle applies with particular force where, as here, heterosexuals find the mere idea of homosexual orientation disagreeable based largely on irrational stereotypes.

The court holds that subsection (b)(2) of the Act and its accompanying Directives are invalid under the First Amendment.

EQUAL PROTECTION

The due process clause of the Fifth Amendment makes binding upon the federal government the Fourteenth Amendment's command that no state shall "deny to any person within its jurisdiction the equal protection of the laws." See Bolling v. Sharpe, 347 U.S. 497, 498-99, 74 S. Ct. 693, 694 (1954).

The court analyzes Fifth Amendment equal protection challenges by the same standards as those applicable to claims of violation of the equal protection clause of the Fourteenth Amendment. See Weinberger, supra, 420 U.S. at 638 n.2, 95 S. Ct. at 1228 n.2.

Because the Act gives to persons of one status, heterosexual, the chance to exercise the fundamental right of free speech and prohibits it to those of another status, homosexual, defendants must at least show that the policy is "tailored to serve a substantial governmental interest." Police Department

of the City of Chicago v. Mosley, 408 U.S. 92, 99, 92 S. Ct. 2286, 2292 (1972).

For the reasons discussed above, whether the government intended that subsection (b) (2) prevent the commission of prohibited "acts" or appease heterosexual prejudices, defendants fail to make the required showing.

Even if defendants do believe that heterosexual servicemembers will be so upset by a coworker's mere statement of homosexuality as not to work cooperatively in the unit, such a belief does not justify a discriminatory policy.

"Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private [] prejudice that they assume to be both widely and deeply held." Palmore v. Sidoti, 466 U.S. 429, 433, 104 S. Ct. 1879, 1882 (1984), quoting Palmer v. Thompson, 403 U.S. 217, 260-61, 91 S. Ct. 1940, 1962-63 (1971) (White, J., dissenting). Congress may not enact discriminatory legislation because it desires to insulate heterosexual servicemembers from statements that might excite their prejudices.

The court holds that subsection (b)(2) of the Act and its accompanying Directives violate the equal protection component of the Fifth Amendment.

CONCLUSION

The court declares subsection (b)(2) of the Act, 10 U.S.C. § 654(b)(2), and the Directives implementing that subsection invalid under the First and Fifth Amendments and enjoins defendants from enforcing them against plaintiffs.

So ordered.

Dated: Brooklyn, New York
March 30, 1995

Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

**U.S. Department of Justice****Civil Division**

Washington, D.C. 20530

CIVIL DIVISION**FEDERAL PROGRAMS BRANCH****FAX TRANSMITTAL COVER SHEET**

DATE: March 31, 1995

TO: Doug Letter
White House Counsel's Office

FAX NUMBER: 456-1647

FROM: Bob Van Kirk
FAX NUMBER: (202) 616-8202
Telephone Number: (202) 514-9834

THERE ARE A TOTAL OF 3 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.

Doug,

Looks like it printed the unsaved final. There are just a couple of word changes in this one. John may have some quick suggestions that he will either call over or fax.

Bob Van Kirk

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In a decision entered on March 30, 1995, Judge Eugene H. Nickerson declared one portion of the statute governing the service of gay men and lesbians in the Armed Forces unconstitutional and permanently enjoined the Department of Defense ("DOD") from taking any action against the six named plaintiffs under that provision. Able v. United States, No. 94-CV-0974 (E.D.N.Y. March 30, 1995). The Court concluded that the section of the statute providing for the discharge of individuals who state that they are homosexual, 10 U.S.C. § 654(b)(2), infringes upon the First Amendment rights of homosexual servicemembers and impermissibly differentiates between homosexuals and heterosexuals in violation of the Equal Protection component of the Fifth Amendment.

In reaching its decision, the Court found that the statutory presumption that an individual who states that he or she is homosexual will engage in or is likely to engage in homosexual acts is invalid and restricts speech that does no more than convey a homosexual orientation. Slip op. at 24-25. The Court further held that the remaining arguments advanced by defendants, that the policy is necessary to preserve unit cohesion and morale by protecting the personal privacy of heterosexual servicemembers, preventing the introduction of sexual tension or sexuality into an otherwise sexually neutral environment, and eliminating potential polarization within military units, are based solely on the irrational prejudices and biases of other servicemembers. Id. at 25-31. The Court held that the negative reactions of others to communication of this kind fails to justify the significant infringement on First Amendment freedoms created by the statute.

In a two-page discussion of equal protection principles, the Court relied solely on its First Amendment findings, rather than a determination of whether homosexuals constitute a quasi-suspect class, in holding that any differential treatment of speech by homosexuals must be "tailored to serve a substantial governmental interest." Slip op. at 37-38 (citation omitted). The anticipated negative reactions of others, the Court stated, cannot serve as the basis for an otherwise discriminatory policy. Id. at 38 (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

The Department of Justice remains convinced that the policy is constitutionally defensible and that the decision will be reversed on appeal. No other court prior to this time has concluded that discharge from the Armed Forces based on a statement of homosexuality is violative of the First Amendment and numerous courts have expressly rejected this position. Moreover, the district court failed to apply the stringent test applicable to facial constitutional challenges, which requires that plaintiffs demonstrate that there are no circumstances under which this provision can be constitutionally applied. Instead, the Court addressed an as-applied challenge to the statute that plaintiffs had specifically waived prior to trial. Finally, it is significant that the Court relied on none of the evidence

presented at trial and instead approached the case as if it presented strictly legal issues -- a position which the defendants had consistently advocated from the outset of the litigation. A formal decision authorizing appeal is expected shortly.