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Folder Title:
Gays in the Military [2]

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	To: Marcia Scott; From: Danny R. Lott, Jr, Lance Corporal, USMC; Re: Status [partial] (2 pages)	01/31/1996	b(6)
002. letter	To: Congressman Barney Frank; From: Normand Lezy, Major General USAF; Re: Court-martial of Captain Warren Dinges, USAF [partial] (2 pages)	01/29/1996	b(6)
003. letter	To: Sheila Widnal; From: Servicemembers Legal Defense Network; Re: Air Force Captain Warren Dinges [partial] (2 pages)	11/30/1995	b(6)
004a. letter	To: Marsha Scorr; From: Servicemembers Legal Defense Network; Re: Air Force captain Warren Dinges [partial] (1 page)	11/30/1995	b(6)
004b. letter	Copy of 003 [partial] (2 pages)	11/30/1995	b(6)
005. letter	Copy of 003 [partial] (2 pages)	11/30/1995	b(6)
006. letter	To: Edward Dorn, Undersecretary of Defense; From: Teresa Barnes; Re: RMSN Amy L. Barnes [partial] (1 page)	12/13/1995	b(6)
007. letter	Copy of 006 [partial] (1 page)	12/13/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Krislov, Marvin (Neuwirth, Steve)
OA/Box Number: 8191

FOLDER TITLE:

Gays in the Military [2]

2015-0017-F
sb1239

RESTRICTION CODES

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- P1 National Security Classified Information [(a)(1) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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TO: Maria

ROOM: _____ DATE: 12/1/95

☒ Per Your Request

☐ FYI

Message:

Richenberg v. Army

From: Arka Cabelli

*Copies of
all to
Kathy
Wallman
per our
discussion
12/1/95
AKC*

Here is ²⁻⁶⁻⁹⁶ ANOTHER DOD
CASE THAT CAME TO THE
ATTENTION OF MARSHA
SCOTT.

PAUL

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Dear Marcia Scott,

January 31, 1996

I am writing in regards to my status in the United States Marine Corps. I am a homosexual Marine serving in the pay grade of E-3 at Camp Lejeune, North Carolina.

I understand that you are the gay liason in the Whitehouse. My partner, (b)(6) contacted your office on my behalf. We are both hoping that we have found someone in the position to assist us.

My problem is not very simple.

Approximately one year and nine months ago I absented myself from my duty command (1st Battalion, 10th Marines, 2d Marine Division) without the proper authority.

I have since returned myself, of my own free will, with the intentions of resolving my actions and continuing my life.

What happened is this. I told my Battalion chaplain that I was gay. He wanted to know what I wanted to do about the situation, in regards to the Marine Corps. I was not sure at the time and asked that I have time to tell my family over the upcoming Thanksgiving holiday when I went home on leave. My family did not know that I was gay. My chaplain said that he would not say anything to my command until I had decided what I wanted to do.

After telling my family (who have disowned me-I have not seen them since that Thanksgiving holiday in 1993), I decided that I did want to seek discharge from the military.

My Company Commander, Captain Matthews, was informed, who in turn told my Battalion Executive Officer, Major Christie and my Battalion Commanding Officer, Lieutenant Colonel Morris.

I was told that I would be processed out of the Marine Corps on an administrative separation and also that my unit would not know that I was gay.

Having been in a previous unit where a gay Marine had been discharged and having been aware of the harassment that Sergeant Justin Elzie faced when his unit became aware of his homosexuality, my safety was my main concern.

My command assured me that my safety was their main concern and that the only people who would be aware of my reason for discharge would be the officers directly responsible for my paperwork.

On the 27th of December 1993, my package was complete and ready to be signed by the base Commanding General. My entire command, from Company level to the Regimental level was recommending an honorable discharge. Having served as an excellent Marine for nearly two years no punitive action was going to be taken. At this time my command suggested that I take leave (I had 10 days leave on my book) and that my paperwork would be ready when I returned. Up to this point everything was fine and only my command knew I was gay.

During this time from November (Thanksgiving) to the 27th of December I was absent from my regular duties in my work section. Naturally my supervisors and section leaders were wondering why I wasn't there.

I returned from leave approximately the 10th of January expecting my discharge package to be completed. I was told it had to be redone.

During this period of redoing my package several more marines were brought into the circle. These were junior enlisted marines.

By this time I was getting worried because everyone in my unit now knew I was being discharged. However, I don't believe everyone knew for what specifically.

I was personally receiving questions about why I was being discharged and noticed gay jokes and rude sexual comments around me that I was not aware of before. My roommate asked me straight out if I was gay and I denied.

Captain Mathews also received a phone call from a marine in my unit saying that they had overheard others talking about hazing or beating me up. He called a formation and ordered that there be no aggression towards anyone in our company. He suggested that I then stay off base overnight.

The reason for the reworking of my package, as I was told, was that Headquarters in Washington was not clear on the policy for discharging gay military personnel.

About 2-3 weeks passed while I was waiting for my new package to be approved. I was still going to my work section daily. However, they knew that I was gay. Everyone. I guess that someone who was told not to tell did. Towards the end of January 1994 I was called into the barracks for a phone call. Upon answering the phone a male voice on the line said "We know, die faggot" and hung up. I immediately told Capt. Mathews and was moved to a different barracks and work section. But, this is what upsets me. The new unit and work section was in the same area. The same immediate area. I was moved from one section to another section in the same company. Nothing was solved and I still felt threatened. I told my new commanding officer and he suggested that I stay in the Brig for my own safety. No thank you, I did not feel that was an option. You do not willingly go into a military brig when you are gay. Nor did I feel that I deserved to go into the brig. I was the one being wronged. I didn't do anything wrong.

I was still seeing the Battalion Executive Officer and the Chaplain and was told or rather mentioned that a person could go UA for a period of 29 days before it became serious. I took the hint.

Mid-January I left. I kept in touch with my Executive Officer, Major Christie, who told me that I was not being run as UA in the unit diary because it would stop my paperwork. I contacted him by phone, at his home, weekly inquiring about my package. I let him know I would return on the 30th day or before if my paperwork was ready. He gave me a direct order to return to base and told me that my paperwork was not yet ready. He is also the one who told me that I was not run as UA.

After 29 days I returned and my package was still not signed. Also my command gave me office hours for going UA. The result of this was a restriction to the barracks. Now, after being told to stay off base for my own safety I was restricted to the barracks for a period of six weeks and a delay of my paperwork.

I was to be accounted for 24 hours a day. The barracks I was restricted to was directly beside my original barracks and I still seen the same people daily. As a matter of fact, there were overflow marines in this new barracks. Also, living in close quarters you get to know the other people in adjacent barracks as well; so these marines also knew I was gay.

Nightly, as I was on restriction I had several different people pounding on my door and windows saying things like "faggot and queer" and wanting me to come outside.

I told my command this and I was asked if I wanted to be moved to the brig which would result in a delay on the days spent of my restriction. Again I denied.

After 2-3 weeks of this harassment I gave up. I left knowing the consequences of my action but feeling as if I had no choice. I was being threatened and felt that my command was not giving me the protection I deserved. I left my rifle cards, meal card, ID card, and room key with a letter addressed to the Commanding General explaining why I left. This was approximately the end of January or the beginning of February.

Realizing that I needed a civilian attorney to fairly represent me I spent a good part of a year before I found one who was willing to work for me "pro bono". Being deserted I was unable to work so financially I was in a bind. I retained an attorney by the name of Dwight Wells in Tampa, Florida. (813-254-0030) He worked on my case for me nearly five months. However, I suspected he was not doing such a good job as he never informed me of what was going on or returned my phone calls when I called asking questions. When I dismissed him and picked up my file (which was nothing more than the copies of my paperwork that I had given him) he attempted to bill me for his work. I would not sign and after laborious argument I just left with my file.

About 2-3 months after this I connected with the Military Law Associates (910-393-6403) in Swansboro, N.C. who were at least willing to make financial arrangements for the payments.

We arranged to turn myself in on November 30, 1995. This was done and I am now with Headquarters and Support Battalion, Bravo Company, Marine Corps Base at Camp Lejeune.

I have been here for over 2 months and once again the same things are happening. I have not as yet recieved any direct threats but the people in my section are aware of my homosexuality.

My Company Commander, Capt. Freeman and Company First Sergeant, 1stSgt Strickland (910-451-5297, 2969, 3344) along with my Battalion Commander Colonel Marsh (910-451-5403) are all recommending an honorable discharge. Since I returned myself and my service record book shows no previous history of any problems, along with the fact that I was searching for an attorney for several months prior to returning, I feel that this is fair.

My Company Commander, Captain Freeman, has told me that they cannot convince the Chief of Staff to also recommend this type of discharge.

After this long narrative what I am asking for is help. I basically feel that I am going to be treated less than fairly and that I am potentially in danger right now. If this was to escalate again I would be faced with the same problems.

I do have two congressmen by the name of Mr. Barney Frank and Mr. Gary Studds who have agreed to help however they can. I feel that the more influential people involved which I can persuade to help, the better.

My command has already let me know that they are behind one hundred percent in my efforts to receive an honorable discharge. They also realize the need to expedite this as quickly as possible to ensure my personal safety.

If you could forward a copy of this to the head of the Department of Defense, the two congressmen as well as the President of the United States I will also give a copy to my commander, Captain Freeman. Any help or instruction that your office could give would be greatly appreciated by me. If you feel that I have left someone out that should be aware of this, by all means, feel free to inform whoever you feel needs to know.

If you have any questions or if I can assist you in any way feel free to contact me at my company office at 910-451-5297, 2969 or 3344 during working hours. After hours you can reach me at 910-451-5297, have them page room 117 for Lance Corporal Lott, I am once again staying in the barracks. Our fax number at the company office is 910-451-3726.

Once again, thank you for taking the time to read this, I know it is quite lengthy. And thank you for your interest in my situation.

Sincerely,

Dannv R. Lott, Jr.

(b)(6) 001
Lance Corporal, USMC



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600



TELECOPIER MEMORANDUM

DATE: 29 Jan 96

To: MARVIN KRISLOV FAX: 202-456-1647

FROM: WILLIAM Sheehan (ODGC)(LC))

We are submitting 4 pages, including this Telecopier Memorandum.

If you do not receive all pages, please call _____
at (703) 695-6710 or (703) 697-2714.

REMARKS:

Fax to Richard Soar.de,
219-2464
mms cover sheet

for Eyes only -
Please discuss.

[Handwritten signature]
11/30
Kv



C. Dixon Osburn, Esquire
Servicemembers' Legal Defense Network
P.O. 53013
Washington, DC 20009

Dear Mr. Osburn:

In December 1995, you wrote to Secretary of Defense William Perry and to Secretary of the Air Force Sheila Widnall expressing your concern about the court-martial of Captain Warren Dinges. Your concern regarding this matter was also conveyed to the Air Force by Congressmen Barney Frank and Gerry Studds.

We have responded to Congressmen Frank and Studds; a copy of that response is attached. As you can see, it is our belief that the court-martial convening authority acted within his authority and is not in violation of law, DoD directive or Air Force Instruction.

As you know, I met with your colleague, Ms Benecke, to better understand your concerns about the Air Force's implementation of DoD Directive 1332.30. I'm sorry that you were unable to join us at that time. If you believe further discussion would be helpful, please call.

We hope the attached information is helpful to you.

Sincerely,

Florence W. Madden
Deputy General Counsel
(Military Affairs)

Atch
a/s

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concerning wells [(b)(9) of the FOIA]

The Honorable Barney Frank
House of Representatives
Washington, DC 20515

Dear Congressman Frank:

This is in response to your letter of November 30, 1995, concerning the court-martial of Captain Warren Dinges at Tinker AFB, OK. We have also discussed this matter with your staff, and at their request, with the Directors of the Servicemembers Legal Defense Network.

Captain Dinges, an Air Force graduate student at the University of Oklahoma, served as a volunteer Assistant Scoutmaster in Norman, Oklahoma. In 1994, he entered into a sexual relationship with (b)(6) 002 a 16 year old scout in the troop in which Capt Dinges served as Assistant Scoutmaster. Capt Dinges was removed from his position with the boy scout troop after that relationship became known to scouting officials. In 1995, Oklahoma scouting officials brought this matter to the attention of Air Force officials at Tinker AFB, and an investigation was initiated.

(b)(6) 002 was interviewed by two agents of the Air Force Office of Special Investigations on June 26, 1995 for approximately one hour, at a commercial location in Norman, OK. He described a sexual relationship with Capt Dinges, initiated in 1994 by Capt Dinges and consisting of 40-50 acts of sodomy. He agreed to provide a written statement at a later time. When no statement was received by July 13, OSI prepared one from the notes taken at the June 26 interview and met with (b)(6) 002 at the same location on July 19, 1995. The meeting lasted about twenty minutes and (b)(6) 002 pointed out two errors in the prepared statement. These were corrected and on July 20, (b)(6) 002 swore to the truth of the statement and signed it. The combined time for all three meetings was approximately 95 minutes; they took place at times and at a place agreed to by (b)(6) 002. Counsel or a family member could have accompanied Mr. (b)(6) 002 to these meetings had he desired. Throughout these meetings and in a later telephone conversation with trial counsel, (b)(6) 002 was friendly and cooperative. No suggestion of coercion was raised until two days before trial in November 1995, at which time (b)(6) 002 attorney advised that the witness was recanting and withdrawing his statement.

Trial counsel sought and received immunity from prosecution for (b)(6) 002. Though there was no indication that he was being considered for prosecution by Oklahoma authorities, the grant of immunity effectively removed (b)(6) 002 asserted objection to testifying at Capt Dinges' trial. After that grant of immunity was received, Capt Dinges entered a plea of guilty and stipulated to the truth of the allegations: that he had initiated a sexual relationship with (b)(6) 002 a 16-year old scout in the troop in which Capt Dinges served as Assistant Scoutmaster, and that he had participated in oral and anal intercourse with (b)(6) 002 on 40-50 occasions. In addition to this stipulation of fact, three letters written by Capt Dinges to (b)(6) 002 discussing their sexual relationship and Capt Dinges' desire to resume their friendship, were introduced into evidence. (b)(6) 002 did not testify, nor was his statement of July 20, 1995 introduced into evidence.

Our review of this matter indicates that the action of the commander in preferring court-martial charges against Capt Dinges was within his authority and within the guidelines established by the Department of Defense. Those guidelines do not prohibit trial by court martial or other disciplinary action. DOD Directive 1332.30 provides that "... administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate." Capt Dinges' conduct in this matter violated Article 125 of the Uniform Code of Military Justice and was aggravated by his abuse of a position of trust as an Assistant Scoutmaster. Prosecution under similar circumstances for heterosexual sodomy would not be inappropriate and has, in fact, occurred. Examples of such prosecution can be found at U.S. v. Gates, 40 M.J. 354 (1994) and U.S. v. Fagg, 34 M.J. 179 (1992), and U.S. v. Henderson, 34 M.J. 174 (1992).

I hope this information addresses your concerns in this matter. A similar letter is being provided to Congressman Studds.

NORMAND G. LEZY
Major General, USAF
Director, Legislative Liaison

COPY

THE WHITE HOUSE
WASHINGTON

January 26, 1996

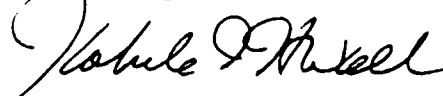
William F. Sheehan, Esq.
Deputy Counsel
Office of Legal Counsel
Department of Defense
Defense Pentagon-1600
Washington, DC 20301-1600

Dear Mr. Sheehan:

As previously discussed, we are forwarding a copy of a complaint made by the Secretary of the Air Force by the Servicemembers Legal Defense Network concerning the status of Air Force Captain Warren Dinges. This matter is being forwarded to you for any appropriate action and handling.

Thank you for your assistance in this matter.

Sincerely,



Kathleen M. Wallman
Deputy Counsel



Marvin Krislov
Associate Counsel

Enclosure

sent as directed (your copy)

kg

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Servicemembers Legal Defense Network

November 30, 1995

The Honorable Sheila E. Widnall
Secretary of the Air Force
1670 Air Force Pentagon
Washington, DC 20330-1670

Dear Ms. Widnall:

I write to you regarding the case of Air Force Captain Warren Dinges, SSN (b)(6) 003. Captain Dinges graduated 35th in his class at the United States Air Force Academy, is twelve hours from completing his PhD in chemistry at the University of Oklahoma, and has received numerous commendations for service in the Air Force.

On November 15, 1995 Captain Dinges was convicted and sentenced by general court-martial to five months imprisonment for consensual, private sex with an adult civilian male.

Captain Dinges' conviction was fueled in part by one of the most hurtful and pernicious stereotypes of gay people: pedophilia. Captain Dinges was in his mid-twenties and his lover was seventeen. The age of consent in the military and the state of Oklahoma is sixteen. A civilian female insinuated false allegations about Captain Dinges which Air Force personnel at Tinker Air Force Base pursued without any critical review of the evidence or regulations governing how they should have handled the case.

Indeed, the OSI investigative report concluded that the only possible evidence was that Captain Dinges might have engaged in consensual, sexual conduct with an adult, civilian male, absent aggravating circumstances. The transcript of the trial at court-martial will also show that the only evidence is Captain Dinges' stipulation of fact of consensual sodomy, a stimulation he made only after the government threatened to hold Captain Dinges' lover, (b)(6) 003, in contempt of court and held in jail for six months for refusing to testify.

Captain Dinges' prosecution and conviction represent an overzealous, biased and improper application of current regulations governing consensual, private, adult sexual activities.

Department of Defense Directive 1332.30, Attachment 8-1 (D), "Guidelines for Fact-Finding Inquiries Into Homosexual Conduct," states: "Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct."

Further, Department of Defense Instruction 5505.8 (A), states: "as a matter of investigative priorities and resource limitations, Defense Criminal Investigative Organizations (DCIOs) and other DoD law enforcement organizations will normally refer allegations involving only adult private consensual sexual misconduct to the Servicemember's commander for appropriate disposition."

P.O. Box 53013 • Washington, D.C. 20009 • Voice: 202.328.3244 • Facsimile: 202.797.1635

The Honorable Sheila E. Widnall
November 30, 1995
Page Two of Three

Read together, these two provisions were clearly intended to prevent incarceration of servicemembers for consensual, private, adult sexual conduct. At the very least, the military's historical practice has been not to pursue criminal charges when the only cause of action is consensual, private, adult sexual conduct. Indeed, the Department of Defense does not prosecute heterosexual servicemembers for similar allegations. And the Department of Defense should not prosecute homosexual servicemembers for similar allegations given the mandate of Department of Defense Instruction 5505 that requires even-handed enforcement of regulations governing consensual, private, adult sexual conduct.

Once OSI determined that the only substantive allegations were of consensual, private, adult sexual conduct, however, the matter should have been handled administratively. Despite a request from Captain Dinges' civilian counsel for an administrative hearing, Colonel Pratt with the Staff Judge Advocate's office, refused to consider an administrative board despite regulatory guidance to the contrary.

Both the actions of the OSI special agent and the Air Force prosecutor in this case raise serious concerns. The OSI special agent in charge of the investigation attempted on numerous occasions to coerce (b)(6) 003 into making a statement against Captain Dinges. The OSI special agent failed to read (b)(6) 003 his legal rights and failed, in violation of Oklahoma law, to interrogate him in the presence of a parent or an attorney. On two occasions, the special agent attempted to coerce (b)(6) 003 into signing a prepared written statement against Captain Dinges that was filled with factual inaccuracies. Under duress, (b)(6) 003 agreed to sign the second statement to end the harassment he faced, but he later submitted a written affidavit repudiating the statement he had been forced to sign.

At the general court-martial, the Air Force prosecutor, Captain Bernstein, subpoenaed Mr. (b)(6) 003 to again attempt to force his testimony. (b)(6) 003 invoked his right against self-incrimination. In order to induce his testimony, Captain Bernstein then secured a waiver of immunity from John C. Kinney and Mary Lee Warren of the Department of Justice Criminal Division to assure the civilian that he would not be prosecuted in civilian courts. The civilian refused to testify, at which point Captain Bernstein threatened to have a court hold the civilian in contempt and imprison him for six months. Only at this point, to avoid further embarrassment to his former lover, did Captain Dinges agree to stipulate to the fact that they had engaged in adult, private consensual sexual acts.

(b)(6) 003 is understandably shocked that the military would harass American civilians about their private, sexual conduct and threaten them with imprisonment in civilian courts.

The Honorable Sheila E. Widnall
November 30, 1995
Page Three of Three

Captain Dinges is currently serving five months in jail at Ft. Leavenworth. I understand that his civilian attorney, E.V. Spadafora will seek injunctive relief in federal court before Christmas to suspend the sentence while the case is on appeal. I ask that you intercede immediately to secure Captain Dinges' release from Ft. Leavenworth. If we wait for the normal channels to resolve the situation, Captain Dinges will have served his five months in prison. This is obviously an unacceptable situation. No one should be in prison for consensual, private, adult, sexual conduct.

Further, I ask that you instruct all appropriate military personnel regarding the evenhanded enforcement of the regulations regarding consensual, private, adult, sexual conduct cited above.

Sincerely,

C. Dixon Osburn

C. Dixon Osburn, Esq.
Co-Executive Director

cc:

Secretary of Defense William Perry
Attorney General Janet Reno
Amnesty International

Kathy - Marsha Scott says this matter is
by far her highest priority ~~letter~~
she doesn't want us to send the
others right now). IF ok
w/you, I will put in final &
then send (+ call Bill S. to
give heads up). Thanks
[Signature]

THE WHITE HOUSE
WASHINGTON

DATE: 1/25/96

TO: Kathleen Wallman

FROM: White House Counsel
Room 130, OEOB, x6-7903

To:
[Signature]
Marvin

☒ FYI *[Draft for your review]*

☒ Appropriate Action *[and approval]*

☐ Let's Discuss Thanks

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

*looks great.
Thank you.
KW*

Don, 2-5-96

DRAFT

January 25, 1996

DRAFT LETTER

William F. Sheehan, Esq.
Deputy Counsel
Office of Legal Counsel
Department of Defense
Defense Pentagon-1600
Washington, DC 20301-1600

Dear Mr. Sheehan:

As previously discussed, we are forwarding a copy of a complaint made by the Secretary of the Air Force by the Servicemembers Legal Defense Network concerning the status of Air Force Captain Warren Dinges. This matter is being forwarded to you for any appropriate action and handling.

Thank you for your assistance in this matter.

Sincerely,

Kathleen M. Wallman
Deputy Counsel

Marvin Krislov
Associate Counsel

Enclosure

W F Sheehan KG
1-25

TOP PRIORITY

William Sheehan
Deputy Counsel
Department of Defense

Washington, D.C.

Dear Mr. Sheehan

As previously discussed, we are forwarding
a copy of a complaint made by the Servicemember
Legal Defense Network concerning the status of
Air Force Captain Warren Dinger. This matter
is being forwarded to you for any appropriate
action and handling.

→ to the Secretary of
the Air Force

Thank you for your assistance in this
matter.

Sincerely yours,

Kathleen Wallman
Deputy Counsel

Marvin Krislov
Associate Counsel

THE WHITE HOUSE

WASHINGTON

MEMORANDUM TO MARVIN KRISLOV

FROM:  MARSHA SCOTT
DATE: DECEMBER 4, 1995

SUBJECT: AF Captain Warren Dinges

I'm enclosing the recent letter from Dixon Osborne and the Servicemembers Legal Defense Network informing me of this case. If any of this is true it is shocking. This guy is in jail now. What can we do? Please let me know ASAP. Thanks

Servicemembers Legal Defense Network
★ ★ ★ ★ ★

FAX COVER SHEET

TO: Paul Yandura
FAX: 202/456-5558
FROM: C. Dixon Osburn
DATE: November 30, 1995

Number of Pages To Follow: 1

COMMENTS:

I know your swamped, but I thought you would be concerned to know that an Air Force officer was recently convicted and sentenced to five months in prison for consensual sex with another man. Any advice you or Marsha could provide would be most helpful.

★ Dixon asked if you would call:
Secretary of Air Force, or Perry
Just let them know you
are aware of the case and
are following it.

— Should be send copies to Counsel.

*Civilian was
threatened to
testify (if not
testify would
be put in
jail)
in cooperation
with DOJ*

WARNING:

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return this original message to us at the above address. Thank you.

P.O. Box 53013 ★ Washington, DC 20009 ★ 202.328-3244 ★ 202.797.1635

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004a. letter	To: Marsha Scorr; From: Servicemembers Legal Defense Network; Re: Air Force captain Warren Dinges [partial] (1 page)	11/30/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Krislov, Marvin (Neuwirth, Steve)
OA/Box Number: 8191

FOLDER TITLE:

Gays in the Military [2]

2015-0017-F
sb1239

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Servicemembers Legal Defense Network

★ ★ ★ ★ ★

November 30, 1995

Marsha Scott
Deputy Assistant to the President
149 Old Executive Office Building
Washington, D.C. 20500

Dear Ms. Scott:

I am forwarding to you a letter that I sent to Secretary of Air Force Sheila Widnall because it involves a matter that concerns your office as well.

The letter details the criminal prosecution of Air Force Captain, Warren Dinges, SSN (b)(6) for consensual, private sex with an adult civilian male. On November 15, 1995, Captain Dinges was convicted and sentenced to five months imprisonment at Ft. Leavenworth.

Captain Dinges' conviction was obtained in violation of the spirit, if not the letter, of Department of Defense regulations, and it was obtained with the help of the Department of Justice.

Having no concrete evidence that Captain Dinges had violated any military regulations, the Air Force prosecutor subpoenaed a civilian male to attempt to compel testimony. The witness invoked his right against self-incrimination.

In order to induce the testimony, the Air Force prosecutor obtained a waiver of immunity from John C. Kinney and Mary Lee Warren of the Department of Justice Criminal Division to assure the civilian that he would not be prosecuted in civilian courts. The civilian again refused to testify, at which point the Air Force prosecutor threatened to have a court hold the civilian in contempt and imprison him for six months. Only at this point, to avoid further embarrassment, did Captain Dinges agree to stipulate to the fact that he and the civilian had engaged in adult, private consensual sexual acts.

The civilian is understandably shocked that the Clinton Administration would harass American civilians about their private, sexual conduct and threaten them with imprisonment in civilian courts. The Department of Air Force's and Department of Justice's roles in this action are both of grave concern.

I understand that Captain Dinges' civilian attorney will seek injunctive relief in federal court before Christmas to suspend the sentence while the case is on appeal. If there is anything that your office can do, I ask that you intercede immediately to secure Captain Dinges' release from Ft. Leavenworth. No one should be in jail for consensual, private, adult, sexual conduct.

Sincerely,

C. Dixon Osburn

C. Dixon Osburn, Esq.
Co-Executive Director

P.O. Box 53013 • Washington, D.C. 20009 • Voice: 202.328.3244 • Facsimile: 202.797.1635

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004b. letter	Copy of 003 [partial] (2 pages)	11/30/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Krislov, Marvin (Neuwirth, Steve)
OA/Box Number: 8191

FOLDER TITLE:

Gays in the Military [2]

2015-0017-F
sb1239

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Servicemembers Legal Defense Network

★ ★ ★ ★ ★

November 30, 1995

The Honorable Sheila E. Widnall
Secretary of the Air Force
1670 Air Force Pentagon
Washington, DC 20330-1670

Dear Ms. Widnall:

I write to you regarding the case of Air Force Captain Warren Dinges, SSN [REDACTED] (b)(6) 0046. Captain Dinges graduated 35th in his class at the United States Air Force Academy, is twelve hours from completing his PhD in chemistry at the University of Oklahoma, and has received numerous commendations for service in the Air Force.

On November 15, 1995 Captain Dinges was convicted and sentenced by general court-martial to five months imprisonment for consensual, private sex with an adult civilian male.

Captain Dinges' conviction was fueled in part by one of the most hurtful and pernicious stereotypes of gay people: pedophilia. Captain Dinges was in his mid-twenties and his lover was seventeen. The age of consent in the military and the state of Oklahoma is sixteen. A civilian female insinuated false allegations about Captain Dinges which Air Force personnel at Tinker Air Force Base pursued without any critical review of the evidence or regulations governing how they should have handled the case.

Indeed, the OSI investigative report concluded that the only possible evidence was that Captain Dinges might have engaged in consensual, sexual conduct with an adult, civilian male, absent aggravating circumstances. The transcript of the trial at court-martial will also show that the only evidence is Captain Dinges' stipulation of fact of consensual sodomy, a stimulation he made only after the government threatened to hold Captain Dinges' lover [REDACTED] (b)(6) 0046 in contempt of court and held in jail for six months for refusing to testify.

Captain Dinges' prosecution and conviction represent an overzealous, biased and improper application of current regulations governing consensual, private, adult sexual activities.

Department of Defense Directive 1332.30, Attachment 8-1 (D), "Guidelines for Fact-Finding Inquiries Into Homosexual Conduct," states: "Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct."

Further, Department of Defense Instruction 5505.8 (A), states: "as a matter of investigative priorities and resource limitations, Defense Criminal Investigative Organizations (DCIOs) and other DoD law enforcement organizations will normally refer allegations involving only adult private consensual sexual misconduct to the Servicemember's commander for appropriate disposition."

P.O. Box 53013 • Washington, D.C. 20009 • Voice: 202.328.3244 • Facsimile: 202.797.1635

The Honorable Sheila E. Widnall
November 30, 1995
Page Two of Three

Read together, these two provisions were clearly intended to prevent incarceration of servicemembers for consensual, private, adult sexual conduct. At the very least, the military's historical practice has been not to pursue criminal charges when the only cause of action is consensual, private, adult sexual conduct. Indeed, the Department of Defense does not prosecute heterosexual servicemembers for similar allegations. And the Department of Defense should not prosecute homosexual servicemembers for similar allegations given the mandate of Department of Defense Instruction 5505 that requires even-handed enforcement of regulations governing consensual, private, adult sexual conduct.

Once OSI determined that the only substantive allegations were of consensual, private, adult sexual conduct, however, the matter should have handled administratively. Despite a request from Captain Dinges' civilian counsel for an administrative hearing, Colonel Pratt with the Staff Judge Advocate's office, refused to consider an administrative board despite regulatory guidance to the contrary.

Both the actions of the OSI special agent and the Air Force prosecutor in this case raise serious concerns. The OSI special agent in charge of the investigation attempted on numerous occasions to coerce (b)(6) 0045 to making a statement against Captain Dinges. The OSI special agent failed to read (b)(6) 0045 his legal rights and failed, in violation of Oklahoma law, to interrogate him in the presence of a parent or an attorney. On two occasions, the special agent attempted to coerce (b)(6) 0045 into signing a prepared written statement against Captain Dinges that was filled with factual inaccuracies. Under duress, (b)(6) 0045 agreed to sign the second statement to end the harassment he faced, but he later submitted a written affidavit repudiating the statement he had been forced to sign.

At the general court-martial, the Air Force prosecutor, Captain Bernstein, subpoenaed Mr. (b)(6) 0045 to again attempt to force his testimony. (b)(6) 0045 invoked his right against self-incrimination. In order to induce his testimony, Captain Bernstein then secured a waiver of immunity from John C. Kinney and Mary Lee Warren of the Department of Justice Criminal Division to assure the civilian that he would not be prosecuted in civilian courts. The civilian refused to testify, at which point Captain Bernstein threatened to have a court hold the civilian in contempt and imprison him for six months. Only at this point, to avoid further embarrassment to his former lover, did Captain Dinges agree to stipulate to the fact that they had engaged in adult, private consensual sexual acts.

(b)(6) 0045 is understandably shocked that the military would harass American civilians about their private, sexual conduct and threaten them with imprisonment in civilian courts.

The Honorable Sheila E. Widnall

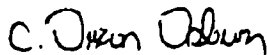
November 30, 1995

Page Three of Three

Captain Dinges is currently serving five months in jail at Ft. Leavenworth. I understand that his civilian attorney, E.V. Spadafora will seek injunctive relief in federal court before Christmas to suspend the sentence while the case is on appeal. I ask that you intercede immediately to secure Captain Dinges' release from Ft. Leavenworth. If we wait for the normal channels to resolve the situation, Captain Dinges will have served his five months in prison. This is obviously an unacceptable situation. No one should be in prison for consensual, private, adult, sexual conduct.

Further, I ask that you instruct all appropriate military personnel regarding the evenhanded enforcement of the regulations regarding consensual, private, adult, sexual conduct cited above.

Sincerely,



C. Dixon Osburn, Esq.
Co-Executive Director

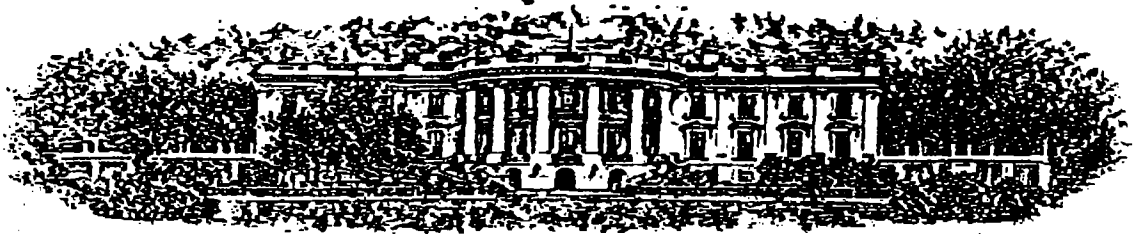
cc:

Secretary of Defense William Perry
Attorney General Janet Reno
Amnesty International

To Jack Quinn: fix

Marsha Scott is very concerned
about ~~that~~ ^{you} ~~work~~ ¹² which you
| ~~and~~ ^{you} ~~and~~ ¹² ~~James~~ ^{you} were ~~going~~ ^{to} to
| Speak with Jamie G. about
at (at Thursday's DOT
meeting.) Any news?
S'oss Shelly Thanks!
me

The White House



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: 12/12/95
TO: Jack Quinn (copy to James Costello please)
FACSIMILE NUMBER: 6-6279
TELEPHONE NUMBER: 6-6611
FROM: Marvin Krislov
TELEPHONE NUMBER: 6-7903
PAGES (WITH COVER): 5
COMMENTS: Marsha Scott is very concerned about this matter (which you or James were going to speak with Jamie G. about at last Thursday's DOJ meeting. Any news? Thanks much. Marvin

PLEASE DELIVER AS SOON AS POSSIBLE

The document(s) accompanying this facsimile transmittal sheet is intended only for the use of the individual or entity to whom it is addressed. This message contains information which may be privileged, confidential or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any disclosure, dissemination, copying or distribution, or the taking of any action in reliance on the contents of this communication is strictly prohibited. If you have received this information in error, please immediately notify the sender at their telephone number stated above.

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TOTAL 0:03'07" 5

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White House Liaison
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Tel: 202-219-7464
Fax: 202-219-7971

Date:

Dec 12, 1995

To:

Martin Kislom

Fax Number:

456-1647

From:

Richard Acunides

Number of Pages: 4
(including cover sheet)

☐ Action
☐ Approval
☐ Note and Return
☐ Comment
☐ Investigate
☐ For Clearance
☐ For Correction

☒ As Discussed
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☐ Signature
☐ Information

COMMENTS:

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. letter	Copy of 003 [partial] (2 pages)	11/30/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Krislov, Marvin (Neuwirth, Steve)
OA/Box Number: 8191

FOLDER TITLE:

Gays in the Military [2]

2015-0017-F
sb1239

RESTRICTION CODES

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RR. Document will be reviewed upon request.

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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Servicemembers Legal Defense Network

★ ★ ★ ★ ★

November 30, 1995

The Honorable Sheila E. Widnall
Secretary of the Air Force
1670 Air Force Pentagon
Washington, DC 20330-1670

Dear Ms. Widnall:

I write to you regarding the case of Air Force Captain Warren Dinges, SSN (b)(6) 005. Captain Dinges graduated 35th in his class at the United States Air Force Academy, is twelve hours from completing his PhD in chemistry at the University of Oklahoma, and has received numerous commendations for service in the Air Force.

On November 15, 1995 Captain Dinges was convicted and sentenced by general court-martial to five months imprisonment for consensual, private sex with an adult civilian male.

Captain Dinges' conviction was fueled in part by one of the most hurtful and pernicious stereotypes of gay people: pedophilia. Captain Dinges was in his mid-twenties and his lover was seventeen. The age of consent in the military and the state of Oklahoma is sixteen. A civilian female insinuated false allegations about Captain Dinges which Air Force personnel at Tinker Air Force Base pursued without any critical review of the evidence or regulations governing how they should have handled the case.

Indeed, the OSI investigative report concluded that the only possible evidence was that Captain Dinges might have engaged in consensual, sexual conduct with an adult, civilian male, absent aggravating circumstances. The transcript of the trial at court-martial will also show that the only evidence is Captain Dinges' stipulation of fact of consensual sodomy, a stimulation he made only after the government threatened to hold Captain Dinges' lover, (b)(6) 005, in contempt of court and held in jail for six months for refusing to testify.

Captain Dinges' prosecution and conviction represent an overzealous, biased and improper application of current regulations governing consensual, private, adult sexual activities.

Department of Defense Directive 1332.30, Attachment 8-1 (D), "Guidelines for Fact-Finding Inquiries Into Homosexual Conduct," states: "Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct."

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P.O. Box 53013 • Washington, D.C. 20009 • Voice: 202.328.3244 • Facsimile: 202.797.1635

The Honorable Sheila E. Widnall
November 30, 1995
Page Two of Three

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Both the actions of the OSI special agent and the Air Force prosecutor in this case raise serious concerns. The OSI special agent in charge of the investigation attempted on numerous occasions to coerce (b)(6) 005 to making a statement against Captain Dinges. The OSI special agent failed to read (b)(6) 005 his legal rights and failed, in violation of Oklahoma law, to interrogate him in the presence of a parent or an attorney. On two occasions, the special agent attempted to coerce (b)(6) 005 into signing a prepared written statement against Captain Dinges that was filled with factual inaccuracies. Under duress, (b)(6) 005 agreed to sign the second statement to end the harassment he faced, but he later submitted a written affidavit repudiating the statement he had been forced to sign.

At the general court-martial, the Air Force prosecutor, Captain Bernstein, subpoenaed Mr. (b)(6) 005 to again attempt to force his testimony. (b)(6) 005 invoked his right against self-incrimination. In order to induce his testimony, Captain Bernstein then secured a waiver of immunity from John C. Kinney and Mary Lee Warren of the Department of Justice Criminal Division to assure the civilian that he would not be prosecuted in civilian courts. The civilian refused to testify, at which point Captain Bernstein threatened to have a court hold the civilian in contempt and imprison him for six months. Only at this point, to avoid further embarrassment to his former lover, did Captain Dinges agree to stipulate to the fact that they had engaged in adult, private consensual sexual acts.

(b)(6) 005 is understandably shocked that the military would harass American civilians about their private, sexual conduct and threaten them with imprisonment in civilian courts.

The Honorable Sheila E. Widnall
November 30, 1995
Page Three of Three

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Further, I ask that you instruct all appropriate military personnel regarding the evenhanded enforcement of the regulations regarding consensual, private, adult, sexual conduct cited above.

Sincerely,

C. Dixon Osburn

C. Dixon Osburn, Esq.
Co-Executive Director

cc:

Secretary of Defense William Perry
Attorney General Janet Reno
Amnesty International

Socarides Richard



From: qnews
To: Channel Q News
Subject: POM Update 12/14
Date: Friday, December 15, 1995 8:35AM

PROJECT OPEN MIND UPDATE
Thursday, December 14, 1995

FOR EXTERNAL USE

The press release on Hogan and Hartson follows:

FOR IMMEDIATE RELEASE Contacts: Jeffrey Garrett
December 15, 1995 Rob Banaszak
(202) 638-4200

Hogan and Hartson Agrees to Represent PFLAG On First Amendment Issues
Raised by Christian Broadcasting Network's Attacks

Prominent Media Law Firm Will Handle Case Pro Bono

WASHINGTON, D.C. - PFLAG: Parents, Families and Friends of Lesbians and Gays announced today that the nationally recognized law firm of Hogan & Hartson L.L.P. has agreed to assist the organization on a pro bono basis concerning First Amendment issues raised by attacks from Pat Robertson's Christian Broadcasting Network (CBN). Hogan & Hartson is the largest and one of the most prominent law firms in the District of Columbia. Five of its attorneys are dedicated full-time to pro bono cases.

Robertson's CBN has mounted a series of attacks against the grass-roots organization since PFLAG's "Project Open Mind," a national media and grassroots outreach campaign designed to combat the spread of anti-gay hate speech and activities, was launched last month in Washington D.C., and in the three other target cities of Houston, Atlanta and Tulsa. The campaign began with television ads featuring anti-gay statements by Robertson, Jerry Falwell and Jesse Helms, juxtaposed against images of gay-bashing and gay-related teen suicide.

"We are thrilled that such a prominent firm as Hogan & Hartson has had the courage to stand up for our First Amendment rights," said Mitzi Henderson, president of PFLAG's board of directors. "With their help, we are committed to exercise our legal right to get our message on the air and compel CBN to stop its harassment and censorship attempts."

Soon after the ads began airing on a limited number of television stations in the target markets, Pat Robertson and CBN threatened lawsuits to prevent the ads from airing. Since CBN made these threats, no stations have agreed to run the ads.

"Our campaign is about saving lives by combating violence and hate speech. For CBN to block us from the air for political reasons is the height of callousness," Henderson continued.

Among the Hogan & Hartson legal team are four partners in the firm: Lee Bentley, a litigation specialist; Bob Corn-Revere, a former attorney for the FCC; Allen Snyder, a noted First Amendment expert and member of the firm's management committee; and Walter Smith, the director of the firm's pro bono department.

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Media Coverage

11/17 - This Week in Texas - statewide weekly g/l magazine - news story, picture from Houston press conference

12/1 - Houston Voice - weekly g/l paper - letters to editor - PFLAG members Peter Poit, Tirey Counts and Irv Smith

12/12 - Ground Zero News - national gay/lesbian publication - front page article

Action Items

* Expressions of sympathy and support for the families of Roxanne Ellis and Michelle Abdill can be made to:

Annette Abdill Real Estate School
843 E. Main
Medford, OR 97504

* Notification of media coverage - please include name and date of publication if faxing or mailing clips - thanks!

This concludes today's update - Jeffrey Garrett, Campaign Manager
(pflagpom@aol.com)

calls, and you hear comments: "You're a nigger." Or, "You're a faggot." They just use it like any other word in their vocabulary.

John: "Jew" is another hallway remark. If you call someone a Jew, it's like you're calling them an idiot or loser.

LYNN MINTON: That sounds like anti-semitism...

A John: "Jew" is not used as an ethnic term. It's just used as another insult. It's not referring to a person or group of persons.

LYNN MINTON: Wait a minute...

John: I'm just trying to speak from their point of view...

...Michelle: People use the word "faggot" in their everyday vocabulary. And it's just come to a point where some of us are sick of it. Me and my friend were sitting in the library and two guys were talking, and my friend said, "Will you please not use that word?" And they were like, "Why? Faggot, faggot, faggot. Why does that bother you?" Another person at our table wrote the word "fag" on a piece of paper and was flashing it in front of us and would not give up. And one guy said, "I don't understand why it offends you. You're not gay. And no one in this room is gay." He has no way of knowing that at all...L

LYNN MINTON: Maybe you interpret your "own kind" a little more broadly than some people.

Michelle: Yes. Definitely. Humankind.

BUSINESS WEEK

(bwreader@mgh.com)

December 25, 1995 issue

Department: Up Front: SHOW BIZ

101 DAMNATIONS AT DISNEY

WILL BOYCOTTING MICKEY Mouse work? The American Family Assn., which has mounted consumer boycotts in the past, wants people to stay away from Walt Disney products. The flash point for the conservative group, which is joined by the Florida Baptist Convention: Disney's giving health insurance benefits to gay employees' partners. Among other gripes are alleged subliminal sexual messages in The Lion King (which Disney denies). Disney says it's simply treating all workers equally for health care.

But previous boycotts along the same lines have made little, if any, measurable impact financially. AFA says its four-year boycott of Kmart--due to Playboy and similar mags being stocked by the chain's Waldenbooks and Borders bookstores--helped push the retailer into selling the book units recently. Kmart says that was done purely to focus on its ailing core business. Per-store sales rose 20% at Borders and 5% at Waldenbooks during the period.

The boycotters have been slightly more effective pressuring companies to watch where they advertise. AFA mounted a 1993 boycott of S.C. Johnson & Son for running ads on such shows as Law & Order, objecting to perceived sex and violence. They stopped after the home products company pledged to better screen what episodes it places ads on. Yet it hasn't dropped any of the shows.

AIR FORCE TIMES

NAVY TIMES

January 1, 1996

ALMANAC '96: FINAL CHAPTER LOOMS FOR 'DON'T ASK' POLICY / TWO COURT APPEALS COULD BRING DECISION BY SUPREME COURT

By Nick Adde

WASHINGTON -- It took more than nine months for the legal battle over gays in the military to cross the Brooklyn Bridge.

That may be slow, even by New York City's traffic standards. But later in 1996, there is a chance that challenges to "don't ask, don't tell, don't pursue," the government's policy on gays in the military, may be over.

Last March, Eugene Nickerson, a federal judge in Brooklyn, ruled that "don't ask, don't tell" is unconstitutional because it restricts the free speech of the six gay service members who filed the challenge.

On Dec. 16, a three-judge panel for the U.S. Court of Appeals for the 2nd Circuit in Manhattan heard the government's appeal of that case, Able vs.

United States. Countering the contention of gay-rights activists that Nickerson got it right, government lawyers argued that ``don't ask'' allows the military to discharge homosexuals but lets service members stay in if they keep their sex lives private.

Richenberg

A 13-judge panel at the U.S. Circuit Court of Appeals for the 4th Circuit in Richmond, Va., heard similar arguments Dec. 5 in the case of former Navy Lt. Paul Thomasson.

His case had a twist. In an unusual move, the 4th Circuit judges allowed a third party to argue that Congress enacted ``don't ask'' in 1994 as an exclusion policy, and that neither the gay-rights activists nor the government is correct in interpreting the policy.

Thomasson was kicked out of the Navy for revealing his sexual orientation to his commanders in March 1994. He appealed to the 4th Circuit after lower federal courts upheld his discharge.

Both the Able and Thomasson cases are on an inside track that leads directly to the U.S. Supreme Court. Lawyers do not like to predict the behavior of Supreme Court justices or federal judges.

But one lawyer for the Service Members Legal Defense Network, a gay-rights advocacy group, outlined a sequence of events that could lead to a decision by the end of 1996.

``The Supreme Court could hear a case as early as October,'' said Dixon Osborn of the advocacy group. ``It could happen if the 4th and 2nd circuits come down with opinions by the spring, and they conflict.''

Assuming Able wins in New York and Thomasson loses in Virginia (or vice versa), the high court would likely take quick action to resolve conflicting verdicts.

If the Supreme Court decides when it meets in October that settling the issue is of critical importance, the justices could hear the case shortly afterward and issue an opinion before the end of the year.

The decision could come more quickly if both circuits decide that ``don't ask'' does not violate the Constitution.

In that event, the Supreme Court could deny without comment the appeal that certainly would be raised by gay-rights activists. If both circuit courts rule that the gay ban is unconstitutional, people on both sides of the issue can forget about any quick settlement, Osborn said.

``There would be a backlash in Congress,'' he said. ``They would probably try to codify another policy to come up with the same rules.''

In the meantime, the 1995 discharge rate for gays will be about the same as in 1994, four-tenths of 1 percent, Osborn said. In 1994, 597 service members were discharged for being gay.

Besides the Able and Thomasson cases, seven others are pending in federal courts. Army Lt. Col. Jane Able (a pseudonym) and her five colleagues in the New York suit, Army Sgt. Steven Spencer, Army Capt. Kenneth Osborn, Navy Seaman Werner Zehr, Navy Reserve Lt. Cmdr. Richard von Wohld, and Coast Guard Petty Officer 2nd Class Robert Heigl, are still serving.

Also still in uniform pending the outcome of the legal battle are Navy Petty Officer 1st Class Keith Meinhold; Army Lt. Col. Margarethe Cammermeyer; California Army National Guard 1st Lt. Andrew Holmes; Navy Lts. Richard Watson, Tracy Thorne and Dirk Selland; and Marine Sgt. Justin Elzie.

The only Air Force case in federal court is that of Capt. Richard Richenberg, an RC135 electronic warfare officer at Offutt Air Force Base near Omaha, Neb., who in May 1993 told his commander he is gay. Richenberg went to court, delaying a pending discharge.

His case was heard Nov. 6 in U.S. District Court in Omaha. He argued that because he has not engaged in homosexual conduct, and will not as long as he is in uniform, the Pentagon policy allows him to remain in the Air Force.

Government lawyers countered that a statement of homosexual orientation is a de facto statement of intent to engage in homosexual activity, which is prohibited. A provision of the policy says acknowledged homosexuals have the ``propensity'' to engage in homosexual acts.

Judge Lyle Strom ruled against Richenberg on Dec. 11.

Socarides Richard

MARKVIEW

From: Channel Q
To: Channel Q News
Subject: Lesbian Attorney Wins Before U.S. Appeals Court
Date: Thursday, December 21, 1995 3:06PM

News from the ACLU National Headquarters

Federal Appeals Court in Georgia Renders
Landmark Ruling for Lesbian Attorney

Wedding Plans Became Basis for
Losing Job with State Attorney General

FOR IMMEDIATE RELEASE
Wednesday, December 20, 1995

ATLANTA -- In an important victory for lesbian and gay civil rights, a federal appeals court in Georgia today ruled that a lesbian's relationship with her partner is safeguarded by the Constitution and entitled to the highest level of judicial protection.

The ruling came in a case brought by Robin Shahar, who sued the Attorney General of Georgia, Michael Bowers, when he terminated her employment upon learning of Shahar's plans to enter into a Jewish marriage with another woman. The American Civil Liberties Union, which filed and litigated the case, applauded the decision.

"This careful, respectful ruling affirms the constitutional freedom of all government workers, including lesbian and gay employees, from being fired because of their intimate and personal relationships," said Ruth Harlow, associate director of the ACLU's Lesbian and Gay Rights Project, who argued the appeal. "It sets the highest possible legal hurdle for the government to clear if it seeks to fire someone on that basis."

A three-judge panel of the United States Court of Appeals for the Eleventh Circuit unanimously agreed that Shahar's relationship with her partner is protected under the "fundamental right of intimate association," a legal term describing an individual's right to enter into and maintain important personal relationships free of government intervention.

"Though the religious-based marriage in which Shahar participated was not marriage in a civil, legal sense it was intimate and highly personal in the sense of affection, commitment, and permanency," wrote Judge John C. Godbold.

A majority of judges then remanded the case to the district court for application of "strict scrutiny" to determine whether the Attorney General had a "narrowly tailored compelling governmental interest" that necessitated Shahar's firing. Although today's ruling did not reinstate Shahar to her position with the state, it clears the way for a likely return, given the difficult task of demonstrating a "compelling interest" before the lower court.

Bowers chance of success in the lower court are highly unlikely, according to legal observers. One of the appellate court judges even concluded that his justifications could not pass a more lenient, "balancing standard."

"I conclude that Shahar's constitutional interest in pursuing her

intimate association outweighs any threat in the efficient operation of the Georgia Department Law," wrote Judge Phyllis Kravitch in a separate opinion.

The ACLU filed the suit in October 1991, just after Shahar was to start work as an entry-level staff attorney for the Georgia Department of Law, which Bowers heads. In the early summer of 1991, Bowers rescinded the job after learning that Shahar and her lesbian partner were about to participate in a wedding ceremony.

In a letter explaining his decision, Bowers wrote, "This action has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As the chief legal officer of this state, inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper functioning of this office."

Shahar, who graduated 6th in her class at Emory Law School, had already worked for the Attorney General the summer following her second year of law school, and was offered the permanent position because of her good performance during that clerkship.

"I worked very hard to get that job at the state Attorney General's office," said Shahar. "I didn't deserve to get fired just because I underwent a commitment ceremony before my family and friends. I'm very pleased the court is finally placing the burden on the Attorney General to prove that he had some overriding need to take away my job."

"Perhaps most importantly, I'm thrilled with the respectful tone in which the judges viewed my loving relationship," added Shahar, who still lives in Atlanta with her partner of ten years, and currently works for the City of Atlanta Department of Law, where she was recently promoted.

"Each of the three appellate judges recognized the central importance of this lesbian relationship to the women involved," stressed the ACLU's Harlow. "The decision signals a new measure of respect for lesbian and gay couples."

In addition to Harlow, Shahar was represented on the appeal by William B. Rubenstein, former Director of the ACLU Lesbian and Gay Rights Project, and by Debra Schwartz, a partner at the Atlanta law firm of Stanford, Fagin, and Giolito.

-- 30 --

Contact: Denny Lee, (212) 944-9800 ext. 424

Media Relations Office 132 W 43rd Street, NYC 10036 (212) 944-9800 ext. 414

Socarides Richard

From: Channel Q
To: qnews
Subject: Articles - 1/6/96
Date: Saturday, January 06, 1996 9:29AM

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2. THE ECONOMIST Magazine: Excellent overview of gay marriage issue
3. SAN JOSE MERCURY NEWS: Soap opera "All My Children" gay story incident
4. SAN FRANCISCO EXAMINER: "Word is Out" and a way of being
5. FEEDBACK: Diana Ross and RuPaul film new music video tomorrow night in West Hollywood as gift to their gay and lesbian fans

THE ASSOCIATED PRESS

Saturday, January 6, 1996

TWO SELF-PROCLAIMED NEO-NAZIS ARRESTED IN SLAYING OF GAY MAN

Two Self-Proclaimed Neo-Nazis Arrested in Slaying of Gay Man

By MICHELLE KOIDIN

HOUSTON -- Two self-proclaimed neo-Nazis who allegedly had warned they were going to "get a fag" were arrested in the slaying of a homosexual stabbed 35 times in his van outside a gay bar.

"It's very obvious the victim was targeted because of the fact that he was homosexual," sheriff's Capt. Don McWilliams said. "They demonstrated no remorse at all over this."

Daniel Christopher Bean, 19, and his half-brother Ronald Henry Gauthier, 21, of Columbia Falls, Mont., were jailed on \$50,000 bail on murder charges.

The FBI joined the investigation Friday, looking into the possibility of civil rights charges.

The defendants told police they attacked Fred Mangione, 46, in the suburb of Katy early Thursday because he or his companion had made sexual advances. But witnesses said the two had talked about harming gays before they had even met the victim.

Three to five witnesses told detectives they heard the men say, "We're going to get a fag," police said.

After the slaying, a sheriff's deputy stopped the men as they ran from the scene with blood on their clothes, and they said something like, "We cut up this fag real bad," according to McWilliams.

Bean and Gauthier told detectives they belong to a group called the German Peace Corps, which authorities believe is based in California.

"These guys claim membership in an organization that by their own admission is a neo-Nazi organization that targets blacks and homosexuals for victimization," McWilliams said.

Sheriff's Deputy Tim Navarre said the defendants told him Mangione had prompted the attack because he or his longtime companion, Kenneth Stern had made advances toward them. "Where we come from, a man just doesn't do that," Navarre quoted one of the half-brothers as saying.

The half-brothers were visiting their mother, who lives a few blocks from the club, for the holidays.

Witnesses told investigators that Mangione and Stern met the defendants about an hour before the attack. The four left the bar for about 30 minutes in Mangione's van and returned.

Stern told deputies he went back inside. A few minutes later, he was attacked in the bar by one of the men. Several bar patrons helped fend off the attacker, who fled. Stern went outside and found the wounded Mangione.

THE ECONOMIST Magazine

January 6, 1996 issue

'I TAKE THEE TO BE MY LAWFULLY-WEDDED PARTNER...'

Excerpt distributed as a newspaper column by the New York Times Special

Features

Marriage may be for the ages - but it changes by the year. And never, perhaps, has it changed as quickly as since the 1960s.

In western law, wives are now equal rather than subordinate partners; interracial marriage is now widely accepted both in statute and in society; marital failure itself, rather than the fault of one partner, may be grounds for a split.

With change, alas, has come strain. In the 25 years from 1960, divorce rates soared throughout the west - more than sextupled in Britain, where divorce appears inevitable for the world's most celebrated marriage, that of Charles and Diana Windsor.

Struggling to keep law apace with reality, Britain's Tory government is even now advancing another marriage reform, seeking, on the whole sensibly, to make quick or impulsive divorce harder but no-fault divorce easier.

That, however, is not the kind of reform which some decidedly un-Tory people are seeking - and have begun to achieve.

Denmark, Norway and Sweden now allow homosexual partners to register with the state and to claim many (though not all) of the prerogatives of marriage. The Dutch are moving in the same direction.

In France and Belgium, cities and local governments have begun recognizing gay partnerships. And, in the American state of Hawaii, a court case may legalize homosexual marriage itself.

As of today, however, there is no country which gives homosexuals the full right of marriage. And that is what gay activists in more and more places are seeking. Marriage, one might think, is in turbulent enough waters already. Can gay marriage be a good idea - now?

To understand why the answer is yes, first set aside a view whose appealing simplicity is its undoing. "Governments are not elected to arrange nuptial liaisons, much less to untangle them," writes Joe Rogaly in the Financial Times. "It is a purely private matter."

On this libertarian view, the terms of a marriage contract should be the partners' business, not the state's. With the help of lawyers and sympathetic churchmen, homosexuals can create for themselves what is in all practical respects a marriage; if they lack a government license, so what?

The government-limiting impulse motivating this view is admirable. But, in truth, the state's involvement in marriage is both inevitable and indispensable.

Although many kinds of human pairings are possible, state-sanctioned marriage is, tautologically, the only one which binds couples together in the eyes of the law.

By doing so it confers upon partners unique rights to make life-or-death medical decisions, rights to inheritance, rights to share pensions and medical benefits; just as important, it confers upon each the legal responsibilities of guardianship and care of the other.

Far from being frills, these benefits and duties go to the very core of the marriage contract; no church or employer or "commitment ceremony" can bestow them at one blow. If marriage is to do all the things that society demands of it, then the state must set some rules.

Just so, say traditionalists: and those rules should exclude homosexuals. Gay marriage, goes the argument, is both frivolous and dangerous: frivolous because it blesses unions in which society has no particular interest; dangerous because anything which trivializes marriage undermines this most basic of institutions.

Traditionalists are right about the importance of marriage. But they are wrong to see gay marriage as trivial or frivolous.

It is true that the single most important reason society cares about marriage is for the sake of children. But society's stake in stable, long-term partnerships hardly ends there.

Marriage remains an economic bulwark. Single people (especially women) are economically vulnerable, and much more likely to fall into the arms of the welfare state.

Furthermore, they call sooner upon public support when they need care - and, indeed, are likelier to fall ill (married people, the numbers show, are not only happier but considerably healthier). Not least important, marriage

is a great social stabilizer of men.

Homosexuals need emotional and economic stability no less than heterosexuals - and society surely benefits when they have it.

"Then let them 'unchoose' homosexuality and marry someone of the opposite sex," was the old answer. Today that reply is untenable.

Homosexuals do not choose their condition; indeed, they often try desperately hard, sometimes to the point of suicide, to avoid it. However, they are less and less willing either to hide or to lead lives of celibacy.

For society, the real choice is between homosexual marriage and homosexual alienation. No social interest is served by choosing the latter.

To this principle of social policy, add a principle of government. Barring a compelling reason, governments should not discriminate between classes of citizens.

As recently as 1967, blacks and whites in some American states could not wed. No one but a crude racist would defend such a rule now.

Even granting that the case of homosexuals is more complex than the case of miscegenation, the state should presume against discriminating - especially when handing out something as important as a marriage license.

Thus the question becomes: is there a compelling reason to bar homosexuals from marriage?

One objection is simply that both would-be spouses are of the same sex. That is no answer; it merely repeats the question. Perhaps, then, once homosexuals can marry, marital anarchy will follow? That might be true if homosexual unions were arbitrary configurations, mere parodies of "real" marriage.

But the truth is that countless homosexual couples, especially lesbian ones, have shown that they are as capable of fidelity, responsibility and devotion as are heterosexual couples - and this despite having to keep their unions secret, at least until recently.

Would gay marriage weaken the standard variety? There is little reason to think so. Indeed, the opposite seems at least as likely: permitting gay marriage could reaffirm society's hope that people of all kinds settle down into stable unions.

The question of children in homosexual households - adoption, especially - is thorny. That question, however, is mainly separate from the matter of marriage as such.

In settling a child with guardians who are not the natural parents, the courts and adoption agencies will consider a variety of factors, just as they do now; a couple's homosexuality may be one such factor (though it need not, by itself, be decisive).

In the end, leaving aside (as secular governments should) objections that may be held by particular religions, the case against homosexual marriage is this: people are unaccustomed to it. It is strange and radical.

That is a sound argument for not pushing change along precipitously. Certainly it is an argument for legalizing homosexual marriage through consensual politics (as in Denmark), rather than by court order (as may happen in America).

But the direction of change is clear. If marriage is to fulfill its aspirations, it must be defined by the commitment of one to another for richer for poorer, in sickness and in health - not by the people it excludes.

SAN JOSE MERCURY NEWS

Saturday, January 6, 1996

SOAP OPERA UPDATE

ALL MY CHILDREN: Michael was upset someone wrote anti-gay terms on the blackboard of his Pine Valley High School room.

SAN FRANCISCO EXAMINER

Friday, January 5, 1996

'WORD IS OUT' AND A WAY OF BEING

By Fenton Johnson

ASK A gay man or lesbian over 35 what film most affected their lives as gay people; like as not they'll answer, " 'Word Is Out.' "

In the mid-1970s, the Mariposa Group, under the leadership of Peter

U.S. DEPARTMENT OF LABOR

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COMMENTS:

Socarides Richard

From: Channel Q
 To: qnews
 Subject: Articles - 1/2/96 (2)
 Date: Tuesday, January 02, 1996 5:07PM

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2. GRAND RAPIDS PRESS:
 - a. Tenure is gay teacher's best protection
 - b. School board's decision on gay teacher brings joy, anger, confusion
3. DETROIT SUNDAY JOURNAL: Fraternity embraces gay people
4. FEEDBACK: How to contact gay Michigan teacher

THE DETROIT NEWS

615 W. Lafayette, Detroit, MI 48226

(Send letters to the editor to the above address or Fax 313-222-6417 or

E-MAIL: Letters@detnews.com) (Print run 481,766)

(NOTE: The Detroit News welcomes letters to the editor from anyone in the country.)

Friday, December 29, 1995

DEB PRICE COLUMN

SUPREME COURT CAN THROW LIEUTENANT THE LIFE PRESERVER HIS NAVAL CAREER NEEDS

Without warning, Yeoman 3rd Class John Joseph Broughton Jr. was forced to grapple with a situation for which he wasn't trained: His new supervisor was an openly gay officer, Lt. Paul Thomasson.

"At first, I was shocked...I did not know whether or not I could work with a homosexual," the enlisted man recalls. "I decided to stick with (the new assignment)...I am glad I did."

Thomasson quickly taught him so much about computers that he wanted to make them the focus of his career. After the two had worked together just six months, Broughton publicly declared, "Lt. Thomasson, in my opinion, is the best lieutenant in the Navy."

Such enthusiasm had been voiced for years by Thomasson's bosses among the top brass. Throughout his star-studded career, "officer fitness" reports on him were decorated with superlative accolades: "A spectacularly good officer!," "destined for great things," "magnificent," "my No. 1 Navy lieutenant," "a true superstar," "a brilliant, brilliant future," "my strongest possible recommendation for immediate promotion," "if you are in your right mind, you will want Paul Thomasson working for you."

Admirals gushed that Thomasson had the potential to attain their rank.

And as chairman of the Joint Chiefs of Staff, Colin Powell awarded Thomasson a pair of medals for his "singularly distinctive" assistance in preparing Powell for high-level briefings.

But by the time Yeoman Broughton first met him late last year, Lt. Thomasson was in transition. The nearly perfect Navy officer was transforming himself into the nearly perfect person to challenge the ban on gay Americans serving openly in our armed forces.

On March 2, 1994 - the day after the navy issued regulations implementing the Clinton administration's "Don't ask, Don't tell" policy - Thomasson, 31, triggered discharge proceedings with a letter telling four admirals, "I can remain silent no longer. I am gay."

After coming out, Thomasson managed to serve another 15 months, until a federal judge allowed the Navy to throw his sterling career overboard. The rave reviews never stopped. Rear Adm. Albert Konetzni Jr., whose duties ironically then included carrying out the Navy's anti-gay policy, called the openly gay lieutenant "a superb young officer" who "commands the respect of his subordinates and seniors alike through honesty, integrity and forthright communication...He should be a first choice for lieutenant commander."

Now, rather than being on a military fast track, Thomasson is on a legal

fast track. His challenge may become the first "Don't ask, don't tell" case to reach the Supreme Court. The full 4th Circuit Court of Appeals heard the case December 5. It's ruling is likely by spring.

For decades, government attorneys have persuaded federal judges to defer to the Pentagon's fears. Military readiness and unit cohesion will suffer if heterosexuals know which of their co-workers are gay, those taxpayer-financed lawyers warn.

Expelling a stellar officer like Thomasson is "prudence," not prejudice, a Justice Department attorney told the 4th Circuit.

Yet sworn statements from Thomasson's immediate superiors, Cmdrs. Thomas Lisowski and Ann Stewart; his four subordinates, including Broughton; and 13 other colleagues put the lie to that claim. All stated the obvious: The Navy should keep Thomasson.

Cmdr. Stewart, who'd never before had such a talented officer work for her, wrote, "Lt. Thomasson's sexual orientation never had any impact on his or his unit's performance...Lt. Thomasson should continue to serve the Navy...as an openly gay officer." Likewise, Cmdr. Lisowski called Thomasson a "definite asset," someone he'd gladly serve with anywhere.

Our men and women in uniform are perfectly capable of combating fear and bias. Our Supreme Court must give every one of them that chance.

* [Deb Price, whose weekly gay-issues column is nationally syndicated, is the co-author of "And Say Hi to Joyce: America's First Gay Column Comes Out" (Doubleday, June 1995)]

* [Deb Price may be reached by e-mail at Deb.Price@glib.org]

* [NOTE: A personal thank you to Mike Krause - MJK429269 - for clipping Deb's column out of his copy of the Detroit News and mailing it to me every week so I can type it into e-mail form and send it out with these articles.

Thanks, Mikel]

GRAND RAPIDS PRESS

155 Michigan St. NW, Grand Rapids, MI, 49502
-(Fax 616-222-5269, print run 146,749)

December 17, 1995

EXPERTS: TENURE IS CRANE'S BEST DEFENSE (LEGAL ANALYSTS SAY THE BOARD CANNOT FIRE GERRY CRANE WITHOUT "JUST CAUSE.")

Now in his third year at Byron Center High School, Gerry Crane received tenure at the close of last year, Michigan Education Association officials said.

Legal experts say that is a pivotal factor in this case.

As a tenured teacher, Crane presumably cannot be fired without "just cause," placing a higher burden on the board than if Crane were a private employee.

But the school board still could act against Crane.

MEA officials say that under the state tenure act the board has the option to suspend Crane with pay while it litigates the case in a tenure hearing before an administrative law judge.

That judge would issue a written decision, which would then be forwarded to the state Tenure Commission. The matter could be appealed to the state Court of Appeals, the state Supreme Court and U.S. Supreme Court.

But because of his protection under the tenure act, some legal observers say that to fire Crane and have it hold up in court the board must establish that Crane's sexual orientation infringed on his classroom performance or conduct.

"Under the tenure act they are going to have to prove that his conduct in the classroom is violating some kind of rules, that he is somehow incompetent," Grand Rapids attorney Albert R. Dilley said.

Dilley said he is unaware of a case where a public school employee has been discharged solely on the basis of sexual orientation.

By contrast, private employees in several states have been fired because of their sexual orientation and had their discharges upheld in court of appeals.

Crane is in his 10th year of teaching, including the past three at Byron Center, two years at Wyoming Public Schools, and five in private schools, Young said.

U.S. DEPARTMENT OF LABOR

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☐ For Correction

☐ As Discussed
☐ As Requested
☐ Circulate
☐ Prepare Reply
☐ See Me
☐ Signature
☐ Information

COMMENTS:



HUMAN
RIGHTS
CAMPAIGN

TV -
MNHAA
MNHVW

December 20, 1995

The Honorable William J. Clinton
The President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

via facsimile

Dear Mr. President:

I write to thank you for your commitment to veto H.R. 1530, the FY 1996 National Defense Authorization Act. The Act contains a number of objectionable provisions. One such provision (Section 567) mandates the immediate discharge of service members infected with HIV, the virus that causes AIDS. Further, I ask that your veto message include a statement expressing opposition to this provision.

This provision would remove highly trained, experienced, and healthy men and women from the armed forces. Under current law, soldiers become non-worldwide deployable due to a number of medical reasons including HIV infection, diabetes, asthma, heart disease, cancer and pregnancy. These individuals provide valuable military service to their country until such time as the chronic illness or disability makes them unfit to perform their duties. Singling out the 1,150 service members who are HIV-positive for early separation is discriminatory and highly inappropriate.

The Department of Defense did not seek, and does not support this change in policy. This policy has been in place since the Reagan Administration and continues to receive the support of senior military officials. In fact, this change in policy would add an unnecessary administrative burden on commanders at all levels of the military without enhancing in any way the combat readiness of our armed forces. In addition, we object to a provision that restricts access of female service members and dependents to obtain privately-funded abortions in United States military facilities abroad.

WORKING FOR LESBIAN AND GAY EQUAL RIGHTS.

1101 14th Street NW, Suite 200 Washington, D.C. 20005
phone (202) 628 4160 fax (202) 347 5323 email hrc@hrc.org

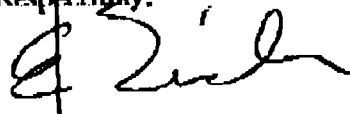


The Honorable William J. Clinton
December 20, 1995
Page Two

In opposing H.R. 1530, Senator Sam Nunn, the ranking member of the Senate Armed Services Committee, voiced strong objections to this provision. In a press release issued on Wednesday, December 13, Nunn raised "serious reservations" about provisions to discharge HIV-positive service members and restrictions on access of service women and dependents to abortions. A December 15 "Statement of Administration Policy" conveyed the Administration's serious concerns about both of these provisions and stated that the President would veto the bill if it were presented to him in its current form.

Two weeks ago, you gave hope to people living with HIV and demonstrated leadership by convening the historic White House Conference on HIV and AIDS. I was honored to participate in the Discrimination Workshop where we raised this issue with you and asked you to oppose such a provision. With your commitment in mind, I now ask that you veto this bill and include in your veto message your unqualified opposition to this provision.

Respectfully,



ELIZABETH BIRCH
Executive Director

THE WHITE HOUSE
WASHINGTON

1-3-96

Marvin -

MARSHA WANTED ME TO FORWARD
THIS CASE TO YOU.

I AM GOING TO WRITE A LETTER
TO RICHARD WASSON STATING THAT
WE RECEIVED HIS LETTERS AND HAVE
FORWARDED THEM TO WH COUNSEL.

LET ME KNOW IF THERE IS ANY PROBLEM
WITH DOING THAT.

~~PAUL YANDURA~~

~~6-26-94~~

THE WHITE HOUSE
WASHINGTON

Copy to Kathy Wallace
June Castillo

PUT
yet another on this
issue...

orig - M

1-3-96
K

WATSON, RICHARD

EXECUTIVE OFFICE OF THE PRESIDENT

29-Nov-1995 02:41am

TO: yandura_p
FROM: Charles V. Davidson
SUBJECT: situation

28 November 1995

Mr. Paul Yandura
Assistant to Marsha Scott
Gay and Lesbian Liaison to the President of the United States

Dear Paul,

I have decided to contact your office again and provide you with an update of my current situation. As you may recall we met at the SLDN fundraiser in October and I provided you with a few details of my case. Please feel free to contact me or my attorney (Mr. Chris Bakes) <spoken bake S> if you require additional information. My attorney can be reached at (415)393-0899.

I am a United States Naval Officer with over 14 years of service and in October of 1994 I provided a single page document to my commanding officer at Oregon State University (OSU) which stated that I had a homosexual orientation. Discharge proceedings were initiated against me due to my statement and in March of 1995 a Naval Board of Inquiry was convened in Bremerton Washington. The board voted to separate me with an honorable discharge. I requested a waiver for full separation pay but have not received any information on the status of that request, with the exception of a letter from the Chief of Naval Personnel that explained how they were sorry for losing my request and that it is being considered. This occurred over two months ago and I am still waiting for a decision. I provided Vice President Gore with a detailed press package outlining my case during his visit to Portland Oregon in June of 1995.

What is ironic about the separation Pay issue is that the current Secretary of the Navy instruction governing separation pay for involuntarily separated officers predates President Clinton's executive order and the law which implements "Don't Ask Don't Tell". This new policy was suppose to change the discriminatory procedures that were purely punitive. It has not. I would like to know the status of the DON's response to my separation pay request. Again, Chris Bakes can provide you with any and all copies of my requests.

A serious matter has arisen that could require your immediate attention (especially in the wake of Admiral Mack's insensitive comments regarding the rape in Japan). I feel the following event which comes on the heels of an already bad Navy publicity day could be devastating. My attorney's have learned, through reliable sources, that Major David K. Hough, USMC has made direct, public, disparaging, and discriminatory comment about my homosexuality and, by implication, my fitness as a naval officer. Major Hough (pronounced Hoke) is an NROTC instructor at OSU, my prior command.

According to witnesses, Major Hough, in the course of his official capacity as a university professor and military officer, in the course of directing a cardio pulmonary resuscitation (CPR) class consisting of NROTC midshipmen,

made the following comment as CPR was being demonstrated (paraphrased): "You're lucky that LT Watson is no longer here. He's a homosexual and one of you would have to be doing this with him." (At least one midshipman reported this incident immediately to his division officer, one LT James Thomas, USN. This witness has since been harassed by staff and fellow student alike. It is ironic that this WITCH-HUNT MENTALITY is allowed, (and fostered) at an institution of higher learning.

This shocking comment is a blatant violation of the United States District Court's order (Western District Washington State) of August 9, 1995, which "ENJOINS Defendants, pending resolution of this action, from...taking any adverse action against LT Watson on the basis of his statement that he has a homosexual orientation or on the basis of his homosexual status." Major Hough's comment, which has now been reported to the local NROTC chain of Command, violates the injunction and is in contempt of court.

Major Hough's comment is clearly a discriminatory slur and a hateful remark that has no place, especially coming from the mouth of an officer and a gentleman. It is clearly in violation of the Uniform Code of Military Justice, Article 133: Conduct unbecoming of an officer; Article 134: The general article; US Navy Regulations; and local state and institution laws.

Paul, it is a situation such as this that needs your expert assistance to ensure the US Navy does not sweep this investigation aside. Any assistance you can provide would be greatly appreciated. In addition, I am truly concerned for the brave students that came forward to voice their displeasure with the hateful remark. I would request that your office try to ensure their well being as well. They stood up for what they believe in.

Please contact me at home or via email at this alias address. This situation has gone public in the local media and I do not anticipate national coverage. Thank you for your help and understanding. Please acknowledge receipt of this message as soon as possible.

Yours in service,
Richard P. Watson

Mr. Richard P. Watson
804 James Street, Apt #C-101
Seattle, WA 98104
206.622.6821

9 December 1995

Ms. Marsha Scott
Gay and Lesbian Liaison Office
White House
Room 115 OEOB
Washington, DC 20500
Attn: Mr. Paul Yandura

This letter has been sent to confirm the receipt of my ^{email} ~~facsimile~~ sent to your office last week. I also wanted to provide your office with a hard copy of the facsimile and additional information. As I relay my concerns regarding my case to your office I also have detailed and specific resolutions in mind, that may be used to resolve this issue.

First and foremost is my concern for the safety and well-being of the courageous Oregon State University (OSU) NROTC midshipman. This brave individual stood up and denounced the bigoted and hateful remarks made by an active duty United States Marine Corps Officer (a cadre member of the OSU NROTC program) and is now facing harassment and pressure from the entire NROTC organization. The midshipman reported the discriminatory remarks and slurs to his class advisor and also advised me of the bigoted comments.

In a public institution, especially a facility of higher learning, this event is totally counter to the ideals of diversity and understanding. Let me provide you with an explanation of the entire event. It has been reported to me by the student who was present during the discriminatory remarks.

Major David Hough, USMC was presiding over a CPR class during the fall semester and made the following comment. "You are lucky that Lieutenant Watson is no longer here, he's a homosexual and you may have had to perform CPR with him!"

I can not begin to imagine the results of this Marine Corps Officer slanderous and inflammatory remarks. His remarks clearly violate the Uniform Code of Military Justice (UCMJ), articles 133 (Conduct Unbecoming of an Officer), Article 134 (General Article), and Article 138 (Redress). I am afraid the investigation being conducted by the Commanding Officer, Captain Marvin Rice will be cursory and incomplete. I fear that without your office pursuing the truth behind this event, the Officer may go unpunished. I have been in the United States navy for over fourteen years and I know how the good old boy

network operates. Without government intervention the military will not reprimand this officer. I would expect your office to conduct an independent investigation and make recommendations to the Secretary of the Navy.

In addition to informing my attorney, I have made two telephone calls to the United States Navy Inspector General's Office. Each have gone unanswered to. This typical response adds credence to my claims that no such action, based upon my request will occur. I would like your office to contact the Navy's Inspector General's Office, relay the information to them and request an independent investigation from their office. I have spoken to LCDR Wiley in the past and he may be able to provide you with some assistance.

Lastly, I am concerned about my own safety. I do not believe I am in any immediate threat since I am over 250 miles away from Major Hough. However, after working with the Major for more than a year I have witnessed a hateful and vengeful individual. I do not know what actions he would take against me if his career was threatened because of his illegal and insensitive comments.

I hope your office can assist me in this very important issue. In June of this year I personally asked Vice President Gore for his assistance, during a fund raising event in Portland Oregon. He acknowledged, and said he would look into the matter. I need his assistance now. Thank you for taking the time to investigate this issue. It is important that we keep hate and discrimination out of our public institutions. When a professor issues discriminatory comments in front of a class, it is a violation on several levels: ethics, professionalism, morality, and human kindness. It also taints or future by creeping into the impressionable minds of our students, the future leaders of America. I hope we can correct this before it envelops our future.

Yours in Service and Democracy,



Richard P. Watson

*Paul,
The comments
are also in violation
of the court order, the
preliminary injunction
issued by Judge Eilly,
which states in part, "...
enjoins the Navy from
taking any adverse
action against me on
the basis of my statement
or on the basis of
my homosexuality."*

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

18-Dec-1995 01:52pm

TO: yandura_p

FROM: Charles V. Davidson

SUBJECT: Update

Paul,

I just wanted to provide you with additional information that has been brought to my attention since we last spoke. First would you please confirm with an email or letter to me regarding your receipt of a letter I sent to you. You should have it by now. In addition, did you receive my email?

Second, I have been told by a very close friend of the student who provided me the information regarding the USMC Major, that the student is really being harassed in the form of verbal abuse, peer abuse, and mental or mind games. This young man is living in fear right now because of his valiant stand against discrimination. I would expect this treatment by military persons toward gay and lesbian servicemembers but not heterosexual members. This is why the policy is so flawed.

Please help protect this sailor before we read about him in the papers. I am not worried about my safety, I can take care of myself. But I cannot help this young man, only your office can ensure this harassment stops.

I have contacted the Navy's Inspector General's Office. I spoke with a LCDR Wiley. (202) 433-3277. He said he will file the complaint. I hope that means an investigation. Please use your office to force an investigation into this matter.

I have not corresponded with the commanding officer of the NROTC Unit, Capt marvin Rice, (541) 737-6289. I believe him to be a caring and compassionate man, but this is a tough issue. I would expect him to ask for outside assistance for his investigation, since he may be too close to the issue.

Finally, you are the last hope for this student. The affirmative action office has told him they cannot help him if the navy attempts any retribution against him because they are outside their sphere of influence. So we have a lone, brave student facing severe harassment without any support.

Thanks Paul for assisting in this very important case. If you need to reach me over the holiday please call (516) 968-4388, I will be there till 25 Dec 1995.

Sincerely, Rich Watson 804 James St, Apt #C-101, Seattle, WA 98104
(206) 622-6821

THE WHITE HOUSE
WASHINGTON

To: Marvin

From: Paul Yandura x62674

Marsha Scott's office

Marsha would like you to
look at this as soon as
possible. Please advise.

Thanks!

Servicemembers Legal Defense Network

Kirk Childress
*202/328 3244***FAX COVER SHEET****TO:** Marsha Scott (or Paul Yandura)
FAX: 202/456-5558**FROM:** Michelle M. Benecke, Esq.**DATE:** June 19, 1995
PHONE: (202) 328-3244**Number of Pages To Follow:** 3**COMMENTS:**

Enclosed are letters I have just received from Mrs. Teresa Barnes, the mother of a young sailor on Board the USS Simon Lake (Sardinia, Italy), who alleges that her daughter is the victim of a witch hunt started in retaliation for her report of physical battery and sexual harassment by a Navy man senior to her. Mrs. Barnes has not yet received a reply to her letters from either the White House or Undersecretary Dorn at DoD. This is of grave concern, since her daughter's discharge board is evidently scheduled for tomorrow, Friday, the 15th of December.

The allegations here are very serious and merit putting a hold on tomorrow's discharge board until they can be thoroughly investigated. (Note that the time in Italy is six hours ahead of the United States.) The Navy should be concerned, especially in light of the negative publicity surrounding its most recent sexual harassment scandal and the resulting stand down. Is there anything you can do?

WARNING:

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return this original message to us at the above address. Thank you.

12-13-1995 07:52PM

TAYLOR DRUG #062

812 282 8497

P.02

December 8, 1995

Dear Mr. President,

There is a terrible problem on a Navy vessel stationed in Italy, which I feel you should be aware of.

I really don't know where to begin. My daughter, RMSEN Amy L. Barnes became active duty in the Navy in April of 1993 and has never been a problem until this incident.

On or about November 17, 1995, my daughter and some other navy people were in a bar having a drink in Sardinia, Italy, when a Petty Officer Third Class who was very intoxicated, came up to her and asked her if she wanted to join him and his friends. She replied, "I am with my friends right now." He became very insistent. She then said, "Excuse me, I am with my friends." At that point, he threw his drink on her. She jumped up and said, "What the hell?" At that, he grabbed her and threw her across the bar. She hit her head on something and split her finger. In the meantime, her friends jumped the guy. Then they helped my daughter up and they all left the bar.

My daughter would not have reported anything except she couldn't get her finger to stop bleeding. So when they asked her what happened, she told them the whole story. The MA's came. They went and got the guy and questioned him. They're stories of course did not match. My daughter was told to wait outside in the cold while they questioned him, at which time she said, "This is bullshit!" They let the guy go and tell his wife that he was in trouble and then confined the two to the ship until further notice.

A few days after this incident, a rumor was started by the wife of a Petty Officer 3rd class, that my daughter and her friends, were gay. The next thing you know, they took one of my daughters' friends in a room and interrogated her for 13 hours. They told her she would either say that my daughter was gay or they would send her to Roda Spain for psychiatric evaluation then discharge her. Finally, she said ok, maybe she is gay. Then everybody they questioned added more names to the list until it turned into a witchhunt. After two weeks of questioning people, they called my daughter in and asked her if she is gay. I don't think they are allowed to ask that. But, she told them she has never slept with a man or woman. They said as long as two people say you are that is proof enough. They said she would be discharged for being gay. To my knowledge, she is not gay. But unless she has done some lived not, this should not be going on. They questioned people until the name of Chief ~~Barnes~~ came up. According to my daughter, it is a known fact, that she is gay. When Chief ~~Barnes~~' name came up the investigation was stopped. But there are about six people who are scheduled to be discharged for being gay because this girl and her friend say they are gay. I have read the White House briefings on this subject and without a lot of proof and not a witch hunt, this kind of thing can not happen.

Until yesterday, December 7, 1995, she has not been able to talk to anyone about this incident. Yesterday, they came and got her and she had to go in front of the Captain Eugene Wilson who asked if the incident was alcohol related, she replied, "yes sir." He asked if she offended the MA, she replied, "If my remark offended her, I guess I am guilty of that." He asked if she hit this Petty Officer Third Class, she replied, "No Sir, I did not". At that point, he pulled out a piece of paper

signed by someone she had never seen or met, who said she picked him up out of his seat, threw him on the ground and threatened to kill him. My daughter replied, "NO sir, I did not. This is the first time I have heard of this." At that, the Captain told her she was a liar and that she is no longer a RM and will be courtmarshalled!

They brought her witnesses in and questioned her. After her statement, the Captain told her she is no longer a RM. Something is very wrong here. There was no council present, no hearing, only 2 men. The man who pushed my daughter has been in two other alcohol-related incidences. My daughter has never been in trouble in her life. She is 5'9" and weighs 140 lbs. I can't see her being a bruiser in a bar.

Apparently, Captain Eugene Wilson, was aware of the other problem going on. That is why he was the way he was with my daughter.

My daughter is devastated. She went in the Navy for a future and has received promotions and is a good RM. This is not fair. Furthermore, it is illegal to do all of this without a hearing

I went to the navy recruit office in Clarksville, IN and spoke to Petty Officer 1st Class Tribbey, who said this was illegal and maybe the whole ship needs investigated. He said this is not the way the navy is.

I contacted Congressman Lee Hamilton's Office and was told this is illegal. They said for my daughter to write all of this down and he would start an investigation. In the meantime, my daughter and her witnesses are stripped of their titles and their top secret clearance and my daughter is still confined to the ship waiting to be courtmarshalled because she didn't want to talk to this man.

I need help! My daughter was ordered by the Captain not to talk to anyone about this or she would go to prison for disobeying a direct order. I have been told this is illegal. What is she supposed to do? Sit there and be discriminated against. I am an American Citizen and don't where to go except to my President. My daughter wants off that ship. She fears for her safety. An investigation by Mr. Hamilton would take time. She need help now. You are a parent yourself. If it could happen to my daughter, it could happen to anyone.

What is happening to our military. These kids risk their lives, for what? Sexual harassment! Sexual discrimination! This is wrong! But this is what is happening. Especially, on the USS Simon Lake. Please contact me when you read this and let me know what I can do as a parent to get my daughter off this ship. We are scared and desperate. My daughter wants out of the Navy. She says if this is what the Navy stands for, she wants no part of it. Without proof of anything or any prior problems, I don't feel it is right to give her a dishonorable discharge because of one man's bigotry. These are things that lawsuits are made of. These are things that ruin peoples' lives and lead possible to suicide. Please help my daughter and the other girls before it ends up worse.

Thank you,

Teresa Barnes 3104 Holman Lane, Jeffersonville, IN 47130, (812)282-3656

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. letter	To: Edward Dorn, Undersecretary of Defense; From: Teresa Barnes; Re: RMSN Amy L. Barnes [partial] (1 page)	12/13/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Krislov, Marvin (Neuwirth, Steve)
OA/Box Number: 8191

FOLDER TITLE:

Gays in the Military [2]

2015-0017-F
sb1239

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

December 13, 1995

Undersecretary of Defense for Personnel
4000 Defense Pentagon
Washington DC 20301

Dear Honorable Edward Dorn,

I am writing as a last resort. My daughter RMSN Amy L. Barnes (SSN [REDACTED] (b)(6) 0000) is currently on board the USS Simon Lake, based in Sardinia, Italy.

Amy is facing a discharge board this Friday, December 15, 1995; as a result of a reputory report that she is a lesbian which were made when she reported being sexually harassed by a superior officer and threatened by his repeated sexual advances, which ended with him assaulting her. I have had limited conversations with her this last month, since she has been confined to the ship and denied access to outside communication. As her mother, I am concerned for both her safety and her career.

In light of what happened in the navy following Tail Hook, I believed that my daughter would be safe from sexual harassment. Instead I am outraged to learn that the navy is punishing her for fending off and reporting her unwanted and threatening sexual assault rather than punishing a man who assaulted her. Because of this I feel that the navy's system does not work and will not fairly resolve this issue.

I ask you to explain why this is happening and to delay any administrative action to discharge my daughter before she is railroaded out of the navy on unjust charges.

Sincerely,

Linda Barnes

Linda Barnes
3104 Holmans Lane #6
Jeffersonville, IN 47130
(812)282-3636

Servicemembers Legal Defense Network

Kirk Childress
*202) 328 3244***FAX COVER SHEET****TO:** Marsha Scott (or Paul Yandura)
FAX: 202/456-5558**FROM:** Michelle M. Benecke, Esq.**DATE:** June 19, 1995
PHONE: (202) 328-3244**Number of Pages To Follow:** 3**COMMENTS:**

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I went to the navy recruit office in Clarksville, IN and spoke to Petty Officer 1st Class Tribbey, who said this was illegal and maybe the whole ship needs investigated. He said this is not the way the navy is.

I contacted Congressman Lee Hamilton's Office and was told this is illegal. They said for my daughter to write all of this down and he would start an investigation. In the meantime, my daughter and her witnesses are stripped of their titles and their top secret clearance and my daughter is still confined to the ship waiting to be courtmarshalled because she didn't want to talk to this man.

I need help! My daughter was ordered by the Captain not to talk to anyone about this or she would go to prison for disobeying a direct order. I have been told this is illegal. What is she supposed to do? Sit there and be discriminated against. I am an American Citizen and don't where to go except to my President. My daughter wants off that ship. She fears for her safety. An investigation by Mr. Hamilton would take time. She need help now. You are a parent yourself. If it could happen to my daughter, it could happen to anyone.

What is happening to our military. These kids risk their lives, for what? Sexual harassment! Sexual discrimination! This is wrong! But this is what is happening. Especially, on the USS Simon Lake. Please contact me when you read this and let me know what I can do as a parent to get my daughter off this ship. We are scared and desperate. My daughter wants out of the Navy. She says if this is what the Navy stands for, she wants no part of it. Without proof of anything or any prior problems, I don't feel it is right to give her a dishonorable discharge because of one man's bigotry. These are things that lawsuits are made of. These are things that ruin peoples' lives and lead possible to suicide. Please help my daughter and the other girls before it ends up worse.

Thank you,

Terresa Barnes 3104 Holman Lane, Jeffersonville, IN 47130, (812)282-3656

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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

December 13, 1995

Undersecretary of Defense for Personnel
4000 Defense Pentagon
Washington DC 20301

Dear Honorable Edward Dorn,

I am writing as a last resort. My daughter RMSN Amy L. Barnes (SSN [REDACTED] (b)(6) 807) is currently on board the USS Simon Lake, based in Sardinia, Italy.

Amy is facing a discharge board this Friday, December 15, 1995; as a result of a reputory report that she is a lesbian which were made when she reported being sexually harassed by a superior officer and threatened by his repeated sexual advances, which ended with him assaulting her. I have had limited conversations with her this last month, since she has been confined to the ship and denied access to outside communication. As her mother, I am concerned for both her safety and her career.

In light of what happened in the navy following Tail Hook, I believed that my daughter would be safe from sexual harassment. Instead I am outraged to learn that the navy is punishing her for fending off and reporting her unwanted and threatening sexual assault rather than punishing a man who assaulted her. Because of this I feel that the navy's system does not work and will not fairly resolve this issue.

I ask you to explain why this is happening and to delay any administrative action to discharge my daughter before she is railroaded out of the navy on unjust charges.

Sincerely,

Lurea Barnes

Lurea Barnes
3104 Holmans Lane #6
Jeffersonville, IN 47130
(812)282-3656

MK

Voici!

kg

NATIONLINE

Preacher, wife acquitted in child sex-abuse case

An East Wenatchee, Wash., preacher and his wife were acquitted Monday of all charges in a massive child sexual abuse case that critics say is a witch hunt.

Robert Roberson, 50, and Connie Roberson, 46, cried as the Waterville jury found them innocent of multiple child rape and molestation that prosecutors say occurred in ritualistic orgies at the East Wenatchee Pentacostal Church of God where Roberson is an unordained pastor.

The Robersons said they will seek to quickly regain their 5-year-old daughter, Rebekah, who was taken by authorities although she denies she was abused.

The prosecution stemmed from the controversial probe of two purported sex rings. The lead investigator was Wenatchee detective Robert Perez, whose foster daughter, 11, said she was sexually abused by dozens of relatives and neighbors.

The Robersons say they were charged because they criticized investigators' motives and methods in that larger probe. Critics say overzealous investigators coaxed children into making false accusations. At least four girls said to have been abused denied it during their testimony.

Of the 28 adults charged, five have been convicted, 14 pleaded guilty, five were dismissed — mostly because witnesses recanted or were unavailable to testify — three were acquitted and one case is pending.

The U.S. Justice Department, at the request of state officials, reviewed the handling of the cases but has not disclosed its findings.



Wenatchee World via AP
Roberson: Unordained pastor

TEXTILE MILL FIRE: A boiler exploded, igniting two of the four buildings at Malden Mills in Methuen, Mass., and causing what police said were multiple, serious injuries. It wasn't known if anyone died in the blaze. Police said they quickly evacuated the buildings, in which employees said up to 700 people would have been working the night shift.

BABY DEATHS: A 4-week premature baby died after a Caesarean section birth after her mother, Oraleita Goodloe of Denver, was shot to death. In Kalamazoo, Mich., 4-month premature baby Chase Lear-Carter died Sunday after eight days on a ventilator. He showed no signs of life for three hours, then gasped as his parents held him, they said.

DO-GOODER ARRESTED: When authorities in Pensacola, Fla., told Scott Plumley, 39, that they couldn't shut down neighborhood drug dealers because they lacked evidence, he went down the street, bought a \$4 bag of marijuana and called Escambia County sheriff's deputies. Instead, Plumley was arrested and faces up to a year in jail. "It is illegal to buy drugs for whatever reason," said Lt. Ron McNesby.

RIGHT TO DIE: Frances Brooke, 52, of Severna Park, Md., was charged with murder for giving her chronically ill mother an overdose of insulin. Lillis McRee, 81, died Nov. 23 at her Fripp Island, S.C., home. She had chronic pain from diabetes and spinal and nerve problems, a doctor said. South Carolina does not allow assisted suicide. A coroner's jury couldn't decide whether to rule the death a murder.

MODEL'S DEATH: Linda Sobek, a model and former Los Angeles Raiders cheerleader, was legally drunk and sexually assaulted before her death by asphyxiation, an autopsy showed. The Los Angeles County medical examiner's office ruled the death a homicide. Photographer Charles Rathbun, 38, is charged with killing Sobek, 27, of Hermosa Beach. She disappeared Nov. 16 during a modeling assignment. Rathbun told police he accidentally struck Sobek with a sport utility truck while showing her a stunt for a photo session, then panicked and buried her in a shallow grave.



AP
Sobek: Was sexually assaulted

TUESDAY, DECEMBER 12, 1995 • USA TODAY

SUPREME COURT: Seven religious charities must return nearly \$500,000 in donations from a convicted stock swindler, as a result of the Supreme Court deciding not to hear the case. The charities said they've mostly spent the money donated by Michael Douglas of Chicago, sentenced to prison for fraud. Lower courts had ruled the money must be returned for refund to investors who were defrauded.

ALSO MONDAY . . .

► **GAYS IN THE MILITARY:** An Omaha federal judge cleared the way for the Air Force to discharge Capt. Richard Richenberg Jr. under the military's "don't ask, don't tell" rule for homosexuals. Judge Lyle Strom said the policy is legal. Richenberg plans to appeal. The issue likely will be decided by the Supreme Court in another case.

► **BOEING STRIKE:** Negotiators for Machinists and Boeing Co. reached a tentative pact to end a 67-day strike, the union said. Terms include a 10% first-year bonus.

► **EXECUTION:** Texas executed Esequiel Banda, 31, by injection for the 1986 rape and strangulation of Merle Laird, 74, at her home in Hamilton. Banda told friends he sucked her blood because he sold his soul to the devil. It was the state's 18th execution this year, the most since 1938.

► **MONKEY BUSINESS:** Police said they have no leads in the \$15,000 robbery Sunday of Zoo Atlanta. Just after closing, three men handcuffed two guards and made off with \$15,000. "I'm thinking about leaving the tiger out at night and maybe assigning a couple of baboons as extra help," zoo director Terry Maple told WSB-AM.

San Francisco picks a mayor today

Voters today choose a mayor in the nation's 14th-largest city and, in special elections, fill a vacant U.S. House seat in California's Silicon Valley and one in the Chicago area.



By Ben Margot
Brown: Former Assembly speaker

San Francisco voters are choosing between incumbent Mayor Frank Jordan and former state Assembly speaker Willie Brown. Jordan, 60, is a former police officer elected to the four-year mayoral term in 1991. Brown, 61, was speaker for 14 years before leaving to run for mayor.

In California's 15th congressional district, Republican state Sen. Tom Campbell, 43, faces former San Jose city councilman Jerry Estruth, 52. The race is seen as a test of the Democratic strategy of linking GOP House candidates to House Speaker

Newt Gingrich, a favorite Democratic target. Incumbent Democrat Norman Mineta, 64, resigned for a private job.

In Illinois' 2nd district — Chicago's South Side and suburbs — Democrat Jesse Jackson Jr., 30, son of the civil rights leader, is the favorite over GOP lawyer Thomas Somer, 42. Democrat Mel Reynolds, 43, resigned the majority-black district seat after his conviction of having sex with a 16-year-old girl and trying to sabotage the investigation.

Written by Paul Leavitt. Contributing: Brian O'Connell, Patricia V. Rivera and M. David Goodwin

Handwritten note: J.K. Pls see if library can get call

2 automakers put electric cars in gear

By James R. Healey
USA TODAY

A/

Ford Motor and Chrysler today will announce a recharging system that could be a breakthrough in the effort to make electric cars convenient. They hope their backing for the SCI Systems recharger will make it the industry standard and end a dispute.

General Motors favors another system.

The recharger Ford and Chrysler picked resembles a miniature gasoline pump and hangs on the wall. It plugs into the car where gas usually goes. The system is to be unveiled at an electric-car conference in Atlanta. It can recharge a car in four to six hours vs. eight hours or more for some others.

Chrysler also plans to announce today that it has named its electric minivan Epic and will build it on the same line as conventional minivans.

"This is no conversion. These are real," says Chrysler manager Reg Modlin.

A California mandate requires automakers to start building some electrics in 1998. Officials are reconsidering the mandate, which seeks to cut air pollution, as unrealistic. Regardless, automakers say they'll have electrics by '98.

Ford's is a \$30,000 Ranger pickup. Its director of electric vehicle programs, John Wallace, pledges to "market it aggressively" but won't say how.

Similarly, Modlin won't discuss the price of Epic for fear of tipping competitors. "We don't intend to be second."

That's a new attitude. Automakers had dismissed battery cars as failures.

There could be a solid reason for the change. A study by the University of California at Davis found that the market for electrics could be five times as large as presumed.

Automakers expect electrics to sell initially to fleets. Even with new developments, electrics are too expensive and impractical for most consumers.

Killer cold cracks lows across USA

By Steve Marshall
USA TODAY

A/

The killer cold blanketing much of the USA, blamed in at least 46 deaths, has toppled several records.

Residents were digging out from under 3 feet of snow in Buffalo, N.Y., where a storm dumped the city's worst single-day snowfall on record.

The frigid air from Canada that's spawned the colder than normal temperatures will linger most of the week.

"There's some extremely cold air still lurking over the U.S.-Canadian border," said meteorologist Rich Wilson of Weather Services Corp.

Auto mechanic Mark Kreutzer waxed philosophical about those teeth-clenching temperatures — 19 below in parts of Wisconsin.

"When it gets down to zero, it doesn't really matter anymore," said Kreutzer of Wisconsin Rapids.

In Buffalo, residents took a day off Monday while crews with heavy equipment plowed.

"It's such a glorious morning," said Bo DeJenka as he skied down a Buffalo street. "Forget about your chores, forget about your job."

In Jackson, Ky., where the temperature was 14 degrees, the cold record was broken for the fourth consecutive day.

New Orleans' low of 26 set a record. The nation's lowest wind chill, a measure of the effect of temperature and wind, was -72 in Grand Marais, Minn.

Elsewhere in Minnesota, the wind chills statewide ranged from -40 to -60.

The picture was different in Fort Lauderdale, Fla., where the high was 75.

Waldholtz: 'I believe I was tricked'

By Mimi Hall
USA TODAY

A/

Rep. Enid Waldholtz, in an extraordinary five-hour news conference Monday, said her "teddy bear" husband tricked her and now "everything I thought I knew about Joe Waldholtz was a lie."

Waldholtz, a freshman Republican from Utah, said her husband stole nearly \$5 million from her family and his, forged documents, wrote mil-

lions in bad checks, embezzled campaign funds and made "questionable lifestyle choices" — all without her knowledge until a month ago.

Speaking for the first time since the FBI started investigating the couple's finances, she apologized to Utah voters, but said she would not resign.

"I believe I was tricked. I don't believe I was negligent. ... I was as stupid, as blind, as naive, as gullible, as trusting as anyone can be."

She said her husband, who served as her campaign treasurer, told staffers not to tell her about creditors because she was pregnant and shouldn't be upset.

With her lawyer and accountant at her side in Salt Lake City, she promised to file corrected campaign reports by Jan. 8.

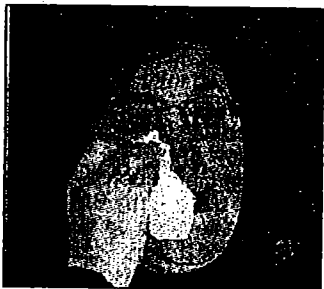
Her appearance lasted so long that three Salt Lake City TV stations cut away.

Thursday, Waldholtz will tes-

tify to a grand jury. Friday, Joe Waldholtz goes to court.

Citing her infant daughter's privacy, Waldholtz would not discuss her husband's "questionable lifestyle choices." She has filed for divorce and seeks sole custody.

"When you go home tonight, and you're with the person you love most," she said, "ask yourself if they're capable of what I've just told you."



By Carmen Troesser, Reuters

Enid Waldholtz: 'I completely let down my guard.'

► 'Reason for everything,' 3A

(Cite as: 1995 WL 736836 (D.Neb.))

Richard F. RICHENBERG, Jr., Plaintiff,
v.
William J. PERRY, Secretary of Defense,
in his official capacity; Sheila
Widnall Secretary of the Department of
the Air Force, in her official capacity,
Defendants.

No. 8:CV95-00393.

United States District Court,
D. Nebraska.

Dec. 11, 1995.

MEMORANDUM OPINION

STROM, Senior Judge.

*1 This matter is before the Court on the parties' cross motions for summary judgment (Filing Nos. 31 and 32). Plaintiff Richard F. Richenberg, Jr., is a Captain in the United States Air Force stationed at Offutt Air Force Base ("Offutt AFB") near Omaha, Nebraska. Defendant William J. Perry is the Secretary of the Defense and defendant Sheila Widnall is the Secretary of the Department of the Air Force. Plaintiff filed this action requesting permanent injunctive and declaratory relief prohibiting defendants from discharging him from the Air Force as a result of his statement that he is a homosexual. Plaintiff challenges the government's policy regarding homosexuals in the military primarily on the grounds that the policy on its face and as applied to him, violates his First Amendment freedom of speech and denies him equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments. Plaintiff also alleges that the Air Force discharge proceedings violated the Administrative Procedures Act. Finally, plaintiff alleges that the policy is unconstitutional as a Bill of Attainder. The Court heard oral arguments on this matter on November 6, 1995. After careful consideration of the motions, the briefs and the applicable law, the Court makes the following findings and conclusions.

THE POLICY

On January 29, 1993, President Clinton directed Les Aspin, Secretary of Defense at the time, to reevaluate the Department of Defense's ("DOD") policy regarding homosexuals in the military. Secretary Aspin commissioned two independent studies to evaluate the DOD's existing policy and to consider new policy options. Between March and July, 1993, the Senate and House Armed Services Committees held extensive public hearings on the matter. Pursuant to President Clinton's order, Secretary Aspin issued a new directive regarding homosexuals in the military on July 19, 1993. The Senate and House Armed Services Committees conducted further hearings and recommended that Congress enact the policy as contained in the July 19 directive. In November 1993, Congress enacted the policy as § 571 of the National Defense Authorization Act for Fiscal Year 1994, Pub.L. No. 103-160, 107 Stat. 1670-73 (codified at 10 U.S.C. § 654). President Clinton signed the policy into law on November 30, 1993.

In enacting the "Policy concerning homosexuality in the armed forces" Congress made extensive findings, including the finding that:

(8) Military life is fundamentally different from civilian life in that—

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

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

*2 10 U.S.C. § 654(a). Congress also found that:

(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.

Id. The policy provides that a service member

(Cite as: 1995 WL 736836, *2 (D.Neb.))

shall be separated from the armed forces if, pursuant to the regulations, one or more of the following is found:

- (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts.
- (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
- (3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. 654(b).

On December 21, 1993, the DOD issued Directive 1332.30, titled "Separation of Regular Commissioned Officers" to implement the policy. The Directive defines "homosexual conduct" to include "a homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." Directive 1332.30 at 1-1. The Directive further provides:

C. HOMOSEXUAL CONDUCT

A statement by a member that demonstrates 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. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in section C.1.

Id. at 2-1. Section C.1. reiterates the three grounds for separation outlined by 10 U.S.C. § 654. Regarding the "statement" grounds, however, the Directive elaborates that:

A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage

in, has a propensity to engage in, or intends to engage in homosexual acts. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

*3 Directive 1332.30 at 2-2. The Directive further provides that in determining whether an officer has successfully rebutted the presumption, the military may consider: (1) whether the officer has engaged in homosexual acts; (2) the officer's credibility; (3) testimony from others regarding the officer's past conduct, character and credibility; (4) the nature and circumstances of the officer's statement; and (5) any other evidence relevant to whether the officer is likely to engage in homosexual acts. Id. In conformity with Directive 1332.30, the Department of the Air Force amended its regulation AFR 36-2 regarding officer administrative discharge procedures. The pertinent portion of AFR 36-2 repeats much of the language contained in DOD Directive 1332.30, and together, shall be referred to as the "regulations." Section 654 and the regulations constitute the "policy" under which defendants seek to discharge plaintiff.

FACTS

Since entering the Air Force in April 1985, plaintiff has served with distinction as an Electronic Warfare Officer ("EWO"). After serving a three year tour of duty at Eielson Air Force Base in Alaska, plaintiff was transferred to Offutt Air Force Base in 1989. After serving in the Gulf War, plaintiff returned to Offutt AFB and was subsequently selected for the Foreign Military Sales ("FMS") program to train and support personnel in Saudi Arabia. Prior to going to Saudi Arabia, plaintiff was sent to Texas for FMS training. Towards the end of his

(Cite as: 1995 WL 736836, *3 (D.Neb.))

training in Texas in April, 1993, plaintiff requested that his assignment to Saudi Arabia be canceled and that he be separated from the Air Force. This request was denied. In May, 1993, plaintiff faxed a letter to Lieutenant Colonel David G. Bell, his commanding officer at Offutt AFB, informing Lt. Col. Bell that he is homosexual. Lt. Col. Bell showed the letter to Lt. Col. David Trask who was about to assume Lt. Col. Bell's duties. At about the same time, plaintiff told a few friends and fellow officers that he was homosexual. (Pl's Br. at 20). The Air Force canceled plaintiff's assignment to Saudi Arabia and reassigned him to Offutt AFB.

As a result of his letter and statements, the Air Force initiated proceedings to discharge plaintiff. A Board of Inquiry conducted a hearing on the matter, and on December 2, 1993, recommended that plaintiff be discharged. Before the Air Force took final action on that recommendation, however, the Secretary directed that the case be reconsidered under the recently enacted policy regarding homosexuals in the military. The Air Force reinitiated discharge proceedings in April, 1994, and a second Board of Inquiry conducted a hearing in June, 1994. At the hearing, plaintiff read a sworn statement and testified that he had not in the past and would not in the future engage in any prohibited conduct. On June 21, 1994, the Board of Inquiry recommended that plaintiff be discharged. Following the Board of Inquiry, the Air Force processed plaintiff's case through several procedural steps, including a Board of Review. At each stage, it was recommended that plaintiff be discharged. On August 28, 1995, the Secretary of the Air Force ordered that plaintiff be removed from active duty and issued an honorable discharge certificate.

*4 The Air Force scheduled plaintiff's discharge for September 8, 1995. On September 5, 1995, plaintiff filed with this Court an amended verified complaint and a motion for temporary restraining order (Filing Nos. 4 and 5). On September 7, 1995, the Court conducted a hearing on the temporary restraining order. On September 8, 1995, the

Court issued an order (Filing No. 14) and memorandum opinion (Filing No. 15) granting plaintiff's motion for TRO and setting an expedited schedule for cross motions for summary judgment which the Court now considers.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order for the moving party to prevail, it must demonstrate to the Court that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material only when its resolution affects the outcome of the case. *Anderson*, 477 U.S. at 248. A material issue is genuine if it has any real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). On a motion for summary judgment, the Court must view all evidence and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 250. However, the nonmoving party may not rest on the mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex*, 477 U.S. at 324. And if the plaintiff cannot support each essential element of his claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders other facts immaterial. *Id.* at 322-23. The Court reviews the parties' cross-motions for summary judgment in light of the foregoing standard.

DISCUSSION

(a) General Principles

(Cite as: 1995 WL 736836, *4 (D.Neb.))

Before addressing the merits of plaintiff's case, the Court must outline several principles which apply generally to plaintiff's constitutional claims. It is the sworn duty of federal courts to determine whether a statutory restriction unconstitutionally infringes on an individual's liberty. This duty is not discharged when the restriction arises in the context of military affairs. However, the "customary deference" which federal courts accord to congressional judgments is perhaps never more pronounced than when the "case arises in the context of Congress' authority over national defense and military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). This is because "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Furthermore, courts have recognized their relative "incompetence" in the area of military affairs:

*5 [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Court discussed at length the tension between its "constitutional responsibility" and the appropriate deference to accord Congress in the military arena. The Court in *Rostker* was called upon to decide whether the Military Selective Service Act violated the Fifth Amendment Due Process Clause by denying equal protection of the laws in requiring only men to register for the draft. The Court noted that although judicial deference is "at its apogee" when considering Congress' authority to raise and support armies, "deference does not mean abdication." *Id.* at 70. The Court stated that while this deference does not "refine" the applicable constitutional tests, it "cannot ignore Congress' broad authority conferred by the

Constitution to raise and support armies when we are urged to declare unconstitutional its studied choice of one alternative in preference to another for furthering that goal." *Id.* at 71-72. This especially true when "Congress specifically considered the question of the Act's constitutionality." *Id.* at 64.

As in *Rostker*, Congress enacted the policy in the present case pursuant to Article I Section 8 of the Constitution. 10 U.S.C. § 654(a)(1)-(3). In addition, the policy "received considerable national attention," "was the subject of wide-ranging public debate," and was "extensively considered by Congress in hearings, floor debate, and in committee." *Rostker*, 453 U.S. at 72. Accordingly, the Court will evaluate the policy in light of the principles articulated in *Rostker*.

(b) First Amendment

Plaintiff alleges that the policy infringes on his First Amendment rights by imposing a content/viewpoint-based restraint on his freedoms of speech and association (Count VI). [FN1] Specifically, plaintiff argues that the policy "silences a group of speakers not only because of what they say but because of who they are," thereby "implicat[ing] the First-Amendment value of promoting individual dignity and integrity." (Pl.'s Br. at 40, 54). Accordingly, plaintiff argues that the policy is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

The Supreme Court has long recognized, however, that First Amendment challenges of military regulations are subject to a different analysis than in a civilian context:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

*6 *Parker v. Levy*, 417 U.S. 733, 758 (1974).

(Cite as: 1995 WL 736836, *6 (D.Neb.))

Accordingly, "[t]he rights of military men must yield somewhat 'to meet certain overriding demands of discipline and duty.' " *Brown v. Glines*, 444 U.S. 348, 354 (1980) (citations omitted). Thus, " '[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.' " *Parker*, 417 U.S. at 759 (quoting *United States v. Priest*, 45 C.M.R. 338, 344 (1972)).

The Court applied these principles in *Goldman v. Weinberger*, 475 U.S. 503 (1986), when considering whether an Air Force regulation prohibiting an Orthodox Jewish member from wearing a yarmulke violated the First Amendment. Giving "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," the Court noted that personal identity in the military is subordinate to the "overall group mission." *Id.* at 507-08. In holding that the regulation did not violate the First Amendment, the Court stated:

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

...

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community."

Id. at 507 (citations omitted).

Applying these principles to the present case, the Court concludes that the policy does

not violate plaintiff's First Amendment rights. There is little doubt that the policy affects speech. But as the Seventh Circuit Court of Appeals recognized in addressing this very issue, "it does so only incidentally, in the course of pursuing other legitimate goals." *Ben-Shalom v. Marsh*, 881 F.2d 454, 462 (7th Cir.1989). The only restriction on plaintiff's speech is the ability to state that he is homosexual and the failure to rebut the presumption created by that statement. Although, this may result in a denial of self-identity, plaintiff's interests in autonomy and self-identity are subordinate to the military interests in good order and discipline, morale, unit cohesion and combat readiness. Thus while the presumption created by a statement of homosexuality may inhibit speech to a limited extent, the Court "cannot say that the infringement rises to the level of being unconstitutional." *Ben-Shalom*, 881 F.2d. at 461. This is true especially in light of the deferential review of First Amendment challenges of military regulations. Accordingly, plaintiff's First Amendment claim and equal protection claim based on the denial of a fundamental right must fail.

(c) Equal Protection

*7 Plaintiff alleges that the policy denies him equal protection of the laws by: (1) discharging him from the Air Force on the basis of his status as homosexual; (2) requiring him to rebut a presumption which does not apply to heterosexuals; and (3) discriminating against him on the basis of gender (Counts I, III and IV).

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." Equal protection applies to federal actions through the Fifth Amendment Due Process Clause. *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3 (1975). The equal protection analysis is identical under the Fifth and Fourteenth Amendments. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975).

(Cite as: 1995 WL 736836, *7 (D.Neb.))

A threshold issue in equal protection analysis is determining whether to apply strict scrutiny, intermediate scrutiny, or rational-basis review. Plaintiff argues that strict scrutiny applies because the policy excludes homosexuals on the basis of status rather than conduct and because homosexuals constitute a suspect class. Plaintiff concedes that neither the Supreme Court nor the Eighth Circuit Court of Appeals has ever held that homosexuals constitute a suspect-class. However, plaintiff urges the Court to reach this conclusion based on the suspect-class criteria identified by the Supreme Court in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), and *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973). In the alternative, plaintiff argues that the Court should apply heightened scrutiny because the policy unfairly discriminates on the basis of gender, a quasi-suspect classification.

Five federal courts of appeals have uniformly determined that rational-basis review is the proper analysis to apply to equal protection challenges of the military's policy regarding homosexuals. *Steffan v. Perry*, 41 F.3d 677, 684 (D.C.Cir.1994) (en banc); *Meinhold v. Department of Defense*, 34 F.3d 1469, 1478 (9th Cir.1994); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir.1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed.Cir.1989), cert. denied, 494 U.S. 1003 (1990); and *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir.1984). In light of this precedent and because "courts have been very reluctant, as they should be in our federal system" to create new suspect classes, the Court declines to extend suspect classification status to homosexuals. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985). In addition, plaintiff's attempt to obtain heightened scrutiny on the basis of gender discrimination must fail since the policy applies equally to male and female service members. Accordingly, the Court will apply rational-basis review to plaintiff's equal protection claims.

The standards for rational-basis review are familiar ones. A non-suspect classification is

"accorded a strong presumption of validity" and "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 113 S.Ct. 2637, 2642 (1993). The statute is presumed constitutional and the government has no obligation to produce evidence to sustain the rationality of the classification. *Id.* at 2643. Instead, the challenging party has the burden to "negative every conceivable basis which might support it." *Id.* (citations omitted). Classifications survive rational-basis review despite Congress' "generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* (citations omitted). In short, "[i]t is hard to imagine a more deferential standard than rational basis, but when judging the rationality of a regulation in the military context, we owe even more special deference to the 'considered professional judgment' of 'appropriate military officials.'" *Steffan v. Perry*, 41 F.3d 677, 685 (D.C.Cir.1994) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)).

*8 Under the rational-review analysis, the Court must first determine whether the policy is directed at the achievement of a legitimate governmental purpose. After months of public debate and extensive hearings, Congress expressed the purpose of the policy and the reasoned judgment of the Commander-in-Chief, the Secretary of Defense and the leaders of the military branches when it stated:

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

...

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

10 U.S.C. § 654(a). It is difficult to conceive of more legitimate governmental concerns than matters of national defense and the safety and security of American military personnel. A policy designed to protect these interests by

(Cite as: 1995 WL 736836, *8 (D.Neb.))

eliminating a potential threat to them is certainly aimed at a legitimate governmental purpose. This is especially true considering Congress' broad power to establish conditions and qualifications for service in the armed forces. Exercising this discretion, Congress has determined that due to the nature of military life, the presence of persons who demonstrate a propensity to engage in homosexual conduct presents an unacceptable risk to unit cohesion, morale, good order and discipline and military readiness. Thus, the policy of excluding from the military those who demonstrate a propensity to engage in homosexual conduct is directed at several and related legitimate governmental purposes.

Plaintiff argues that the policy is based on prejudice and that defendants' asserted justifications are invalid. The Court acknowledges, as did the court in *Ben-Shalom*, that there certainly is prejudice against homosexuals within the armed forces. However, the Court is called upon to determine the constitutionality of the policy—not its wisdom. That determination is for Congress to make as overseer of the military and the Court should not second-guess its authority in this area. As noted above, this principle applies with particular force when Congress has made a studied choice between alternatives and specifically considered the policy's constitutionality. As the Seventh Circuit reasoned in *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir.1989):

[T]he Army should not be required by this court to assume the risk, a risk it would be assuming for all our citizens, that accepting admitted homosexuals into the armed forces might imperil morale, discipline, and the effectiveness of our fighting forces.... We, as judges, although opponents of prejudice of any kind, should not undertake to order such a risky change with possible consequences we cannot safely evaluate.

Id. at 461. Accordingly, plaintiff's argument must fail.

The Court must next inquire whether the policy rationally furthers these purposes. Plaintiff argues that the presumption created by a statement of homosexuality is irrational

and impermissibly discriminates on the basis of homosexual orientation or status and not on the basis of conduct. [FN2]

*9 The Court concludes, as have other courts, that the military may rationally and reasonably infer from a statement of homosexuality that a member has a propensity to engage in homosexual conduct. For example, in *Ben-Shalom*, *supra*, the plaintiff was an Army reservist who was denied reenlistment due to her statement that she was a lesbian. The plaintiff challenged the Army regulation as creating a classification based on status and not conduct. Rejecting this argument, the court held that "the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future." 881 F.2d at 464. The court reasoned that the plaintiff's "forthright admission" of homosexuality "reasonably implies, at the very least, a 'desire' to commit homosexual acts." *Id.* at 460. The court added:

Plaintiff's lesbian acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct.

Id. at 464.

Similarly, in *Steffan v. Perry*, 41 F.3d 677, (D.C.Cir.1994) (en banc), the plaintiff was discharged from the Naval Academy solely on the basis of his statement that he is homosexual. The court noted that "[h]omosexuality, like all forms of sexual orientation, is tied closely to sexual conduct," and that to pretend otherwise " 'borders on the absurd.' " *Id.* at 689-90 (citations omitted). Thus, "the military may reasonably assume that when a member states that he is homosexual, that member means that he either engages in or is likely to engage in homosexual conduct." *Id.* at 686. And while it is conceivable that a person would describe himself as homosexual despite the absence of

(Cite as: 1995 WL 736836, *9 (D.Neb.))

any ongoing conduct or probability of such conduct, the fact that there may be exceptions is irrelevant "so long as the classification (the regulation) in the run of cases furthers its purpose, and we readily conclude that it does." *Id.* Accordingly, the court held that the policy of discharging members who admit to being homosexual rationally furthers the legitimate interest of banning persons who have a propensity to engage in homosexual conduct, especially considering that "the human sexual drive is enormously powerful and that an open declaration that one is homosexual is a rather reliable indication as to the direction of one's drive." *Id.* at 690. Thus, the plaintiff's claim "that the government cannot rationally infer that one who states he or she is a homosexual is a practicing homosexual, or is at least likely to engage in homosexual acts, is so strained a constitutional argument as to amount to a basic attack on the policy itself." *Id.* at 693.

*10 Thus, the Court concludes that the use of a rebuttable presumption is a rational means of furthering the military's legitimate purpose of prohibiting service members who demonstrate a propensity to engage in homosexual conduct from serving in the armed forces. It is of no constitutional consequence that the plaintiff may in fact have no propensity to engage in homosexual conduct. As stated above, under rational-basis review, the military need not create an exact fit between its policy and the goal sought to be achieved. Because the policy generally advances its purpose, the Court concludes that plaintiff's equal protection challenges must fail.

(d) Due Process

Plaintiff also alleges that the policy violates due process and procedural fairness (Count V). Specifically, plaintiff argues that the presumption is simply irrational and that it, in effect, creates an irrebuttable presumption. This claim is without merit. As discussed above, the military may constitutionally infer from a statement of homosexuality that a service member has a propensity to engage in homosexual conduct. In addition, seven service members thus far have successfully

rebutted the presumption. A service member is afforded a full hearing and opportunity to rebut the presumption. Whether the member successfully rebuts the presumption is determined on an individual basis. Finally, the Court agrees with defendants' assertion at oral argument that there is no guarantee to the service member that what he or she offers at the hearing will be accepted.

(e) Right of Privacy

Plaintiff alleges that the policy infringes on his constitutionally protected right of privacy (Count VII). Several courts have rejected this argument in challenges to the military's former policy regarding homosexuals. *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir.1991) cert. denied 503 U.S. 951 (1992); *Woodward v. United States*, 871 F.2d 1068, 1075 (Fed.Cir.1989), cert. denied, 494 U.S. 1003 (1990); *Dronenburg v. Zech*, 741 F.2d 1388, 1391-98 (D.C.Cir.1984); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1228 (10th Cir.1984). In addition, while not explicitly ruling on the issue of privacy, the court in *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir.1989), observed that:

The privacy expectations of a civilian, wherever their outer limit may be, cannot be compared to the substantially more limited privacy expectations accompanying military life. Plaintiff in the present case voluntarily sacrificed much personal privacy and liberty by deliberately seeking to be in the Army where privacy and liberty are necessarily at a premium.

Id. at 465. Finally, the Court agrees with the reasoning in *Rich*, supra, that even if the policy does implicate plaintiff's privacy interests, they are outweighed by the military's legitimate interests articulated above. 735 F.2d at 1228. Accordingly, plaintiff's claim that the policy denies him of his right to privacy must fail.

(f) Bill of Attainder

*11 Plaintiff asserts that the Act (10 U.S.C. § 654) constitutes a bill of attainder proscribed by Article I, § 9, Clause 3 of the United States Constitution (Count VIII). That section

(Cite as: 1995 WL 736836, *11 (D.Neb.))

provides that: "[n]o bill of attainder or ex post facto law shall be passed."

A bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977). Thus, there are three factors which determine whether a particular piece of legislation constitutes a bill of attainder: (a) whether the statute identifies an individual or individuals or easily ascertainable members of a group, (b) whether the statute inflicts punishment and (c) whether the punishment has been inflicted without a judicial trial. All three factors must be met. Because the Court finds that the policy as stated in 10 U.S.C. § 654 does not "inflict punishment" within the meaning of the bill of attainder clause, factors (a) and (c) will not be considered.

In *Selective Svc. Sys. v. Minn. Pub. Int. Res. Gp.*, 468 U.S. 841 (1984), the Supreme Court stated:

In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes" and (3) whether the legislative record "evinces a congressional intent to punish."

Nixon, supra, at 473, 475-476, 478, 53 L.Ed.2d 867, 97 S.Ct. 2777. *Id.* at 852. The military policy pertaining to homosexuality does not fall within the historical meaning of legislative punishment. As noted in *Selective Svc. Sys.*, bills of attainder at common law often imposed death penalty and lesser punishments including imprisonment, banishment, and the punitive confiscation of property. *Id.* The Court noted that "in our own country, the list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions." *Id.* at 852. However, in this case, homosexuals are not barred from the Air

Force simply because they are homosexuals. In this respect, this case is quite similar to the *Selective Service* case where the Court noted: "A statute that leaves open perpetually the possibility of qualifying for aid does not fall within the historical meaning of forbidden legislative punishment." *Id.* at 853. That case involved application for aid benefits under Title IV, which was tied to the applicants having properly registered with the *Selective Service System*. Here, the statute leaves open the possibility of qualifying for continued service in the Air Force when the person who has declared him or herself to be a homosexual overcomes the presumption that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts.

*12 Further, the policy is not concerned with somehow singling out homosexuals for punishment. The history behind the policy does not "evince an intent to punish" homosexuals. Indeed, maintaining the discipline and morale of the armed services is a compelling governmental interest justifying the adoption of the policy.

Finally, this is not a new restriction placed upon members of the Air Force. The policy of the Air Force has long barred participation by homosexuals. This statute, in fact, moderates the prior policy by prohibiting discharge simply on the basis of status, and permits the service member to rebut what formerly was an irrebuttable presumption of the Air Force.

For these reasons, the Court rejects plaintiff's contention that the statute is proscribed by the provisions of the Constitution prohibiting Congress from enacting bills of attainder.

(g) Administrative Procedures Act

Plaintiff contends that the decision to discharge Captain Richenberg violates the Administrative Procedures Act (Count IX). His first claim is that "the decision ... to discharge Captain Richenberg simply on the basis of his statement that he is gay violates the Administrative Procedures Act." His

(Cite as: 1995 WL 736836, *12 (D.Neb.))

second contention is that the decision of defendant Widnall is arbitrary and capricious, contrary to law and unsupported by substantial evidence.

Regarding his first contention, plaintiff contends that the Act and Regulations only authorize discharge proceedings for statements when a service member makes a statement that "demonstrates a propensity or intent to engage in homosexual acts," citing Directive 1332.30 at 1-1. That section defines homosexual conduct to include "a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts." However, the plaintiff ignores the operative provisions of 1332.30(C)(1)(b), quoted *supra*, at p. 5.

The Court has already addressed the validity of this presumption. While this may not be a wise policy, policy-making is not for the courts. Having found that the military may adopt such a policy effectively disposes of this contention.

The second contention is that the decision to discharge him based upon the Board of Inquiry hearing is arbitrary and capricious, contrary to law, and unsupported by substantial evidence. Plaintiff cites 5 U.S.C. § 706(2)(A-F) as the basis for these objections. That section of the United States Code deals with the scope of review of an agency action and states in part that the reviewing court shall hold unlawful and set aside any agency action found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; (E) unsupported by substantial evidence...." The Court has already disposed of Factor (B) and will not address it again.

This administrative discharge was initiated pursuant to AFR 36-2, adopted by the Department of the Air Force effective October 1, 1984, and a Board of Inquiry was convened by Special Order A-010 (Government Exhibit 1). The authority for the convening of a Board of Inquiry is premised on 10 U.S.C. § 1182. The Board of Inquiry convened on June 20-21,

1994. Plaintiff and the government both presented evidence, resulting in a decision in which the Board recommended that plaintiff be removed from active duty with an honorable discharge. This recommendation was reviewed by a Board of Review and subsequently by the Secretary of the Air Force, both of whom approved and adopted the recommendation of the Board of Inquiry. The Secretary directed that the plaintiff be given an honorable discharge from the United States Air Force. The standard of review of this agency action has been set forth by the United States Court of Appeals for the Eighth Circuit in *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 713 (1979), as follows:

*13 We turn now to the merits of the case. The scope of judicial review of agency action has been set forth by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136(1971). The reviewing court must first decide whether the agency acted within the scope of its statutory authority. *Id.* at 415, 91 S.Ct. 814. If it has, the court must then determine whether its actual choice was "arbitrary, capricious, an abuse of discretion, or otherwise no in accordance with law." *Id.* at 416, 91 S.Ct. at 823, quoting 5 U.S.C. § 706(2)(A). See *CPC International Inc. v. Train*, 515 F.2d 1032, 1043-1044 (8th Cir.1975), cert. denied, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977).

This inquiry necessarily involves a review of the decision of the Board of Inquiry which is the basis for the decision of the Board of Review and the Secretary. The Court believes that the appropriate standard of review of the action of the Board of Inquiry is governed by "the substantial evidence" test. See *Castillo v. Army & Air Force Exchange Service*, 849 F.2d 199 (5th Cir.1988). The "substantial evidence" test for review is a narrow one, and the reviewing court is not to substitute its conclusion for those of the agency. Furthermore, the possibility of drawing inconsistent conclusions from the evidence does not mean that the agency's findings are unsupported by substantial evidence. See *Erickson Transport Corp. v. ICC*, 728 F.2d

(Cite as: 1995 WL 736836, *13 (D.Neb.))

1057 (8th Cir.1984).

The Court has reviewed the entire transcript of the hearing before the Board of Inquiry. (Pl.'s Ex. C-1). The Court keeps in mind that in applying this standard of review, it is not to determine whether or not it would have decided the matter in the same manner as the Board of Inquiry but rather whether there is substantial evidence supporting the Board's finding. As the parties noted in their closing arguments, the issue boils down to a question of credibility. The Board of Inquiry had the opportunity to observe the witnesses and to review the evidence presented, and the Court finds that its decision is supported by "substantial evidence" as that term is used in the statute and in the cases applying that standard of review. Accordingly, the Court also finds that the decision of the Secretary is not arbitrary or capricious or an abuse of the Secretary's discretion.

CONCLUSION

The military's policy regarding homosexuals in the armed forces contained in 10 U.S.C. § 654 and the implementing regulations does not violate plaintiff's rights under the United States Constitution or under the Administrative Procedures Act. Accordingly, plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted. The Court will enter a separate order in accordance with this opinion.

FN1. Plaintiff also alleges that the policy violates his right to equal protection under the laws as guaranteed by the Fifth and Fourteenth Amendments by restricting his exercise of the fundamental right to freedom of speech (Count II). The Court will consider plaintiff's equal protection claim based on the alleged denial of a fundamental right together with his substantive First Amendment claim since the governing standard will be same. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990); *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). See also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 n. 4 (1986) ("respondents can fare no better under the Equal Protection Clause than under

the First Amendment itself"); and 3 *Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure*, 2nd § 18.40 (1992) ("if [a court] finds that a classification regarding speech or associational rights does not infringe first amendment freedoms, it is likely to find that the classification does not violate equal protection because it has determined that the law does not constitute the improper allocation of a fundamental right").

FN2. There is no doubt that the military may constitutionally prohibit homosexual conduct. *Meinhold v. Department of Defense*, 34 F.3d 1469, 1477 (9th Cir.1994); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C.Cir.1984); *Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir.1980), cert. denied, 452 U.S. 905 (1981).

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LEVEL 1 - 1 OF 4 STORIES

Copyright 1995 Omaha World-Herald Company
Omaha World Herald

December 13, 1995 Wednesday SUNRISE EDITION

SECTION: EDITORIAL; Pg. 28

LENGTH: 509 words

HEADLINE: Military Policy on Homosexuals Is Based on Solid Legal Ground

BODY:

Gays who are fighting to stay in the armed forces are often presented to the public as embattled heroes, struggling with an ignorant bureaucracy.

But there is another side to the story, less often told. The armed forces have made a major accommodation to homosexuals and lesbians by adopting the "don't ask, don't tell" policy. Members of the service who insist that the policy doesn't apply to them have little to sustain them, legally.

So it was when the case of Capt. Rich Richenberg came before U.S. District Judge Lyle Strom in Omaha. Some people might have expected Richenberg to win easily. But as Strom said in allowing the Air Force to discharge the captain, Congress has the right to do what it has done.

After Richenberg informed his commanding officer at Offutt Air Force Base that he was a homosexual, the Air Force tried to discharge him. He argued that it could not legally do so simply because he announced his homosexuality. The policy is designed to weed out those who act on their homosexuality, said Richenberg, not those who merely talk about it.

Strom ruled that the Air Force was within its rights. A number of courts have held that speech protected by the First Amendment in civilian life can be suppressed in the military to preserve discipline and cohesiveness. Preserving discipline and cohesiveness was the goal of Gen.

Colin Powell and other leaders who resisted the idea of totally removing the ban on gays in the military.

Furthermore, Strom said, Richenberg isn't being dismissed for being homosexual, but instead for a propensity to engage in homosexual acts.

Strom agreed with other courts that, given the strength of the human sex drive, a statement declaring homosexuality raises a presumption that the individual intends to act on it.

Richenberg had argued that such a presumption is unconstitutional because it is irrebuttable. Strom rejected that argument, saying that other service members have successfully rebutted the presumption.

Richenberg also argued that the government cannot bar a person from the military because of sexual preference for the same reason it cannot bar a person

Omaha World Herald, December 13, 1995 Wednesday

because of race. Strom noted that federal appeals courts have not found that homosexuals are a constitutionally protected class of citizens.

Strom added a compassionate note to his opinion. "There certainly is prejudice against homosexuals within the armed forces," Strom said.

"However, the court is called upon to determine the constitutionality of the policy - not its wisdom." Courts yield to the judgment of Congress in the area of military affairs and national defense, Strom observed. Congress, he said, has determined that "the presence of persons who demonstrate a propensity to engage in homosexual conduct presents an unacceptable risk to unit cohesion, morale, good order and discipline and military readiness." Such decisions should continue to be made by Congress, with the best military advice available, and not by the courts.

LOAD-DATE: December 18, 1995

LEVEL 1 - 4 OF 4 STORIES

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Omaha World Herald

December 12, 1995 Tuesday BULLDOG EDITION

SECTION: NEWS; Pg. 1

LENGTH: 960 words

HEADLINE: Gay Officer's Loss Follows Trend

BYLINE: JASON GERTZEN, WORLD-HERALD STAFF WRITER

BODY:

A federal court ruling Monday against a gay officer at Offutt Air Force Base added the case to a growing number of failed attempts to overturn the military's regulations on homosexuals.

"It's an uphill battle that lies ahead," said C. Dixon Osburn, co-director of the Servicemembers Legal Defense Network in Washington, D.C. Osburn's organization opposes the military regulations, known informally as "don't ask, don't tell." The regulations allow gay people to serve in the military so long as they keep their sexuality a secret and do not engage in homosexual acts.

U.S. District Court Judge Lyle Strom ruled that the regulations do not violate the constitutional rights of Capt. Rich Richenberg, a 10-year Air Force veteran who is an electronic warfare officer for an Offutt-based squadron.

Richenberg said he intends to appeal Strom's ruling in the lawsuit he filed.

Omaha World Herald, December 12, 1995 Tuesday

He said he hopes to get a court order allowing him to stay in the Air Force while he continues his legal fight.

"I am very disappointed," Richenberg said of Strom's ruling.

Offutt officials said Monday that they were waiting to hear from Air Force headquarters about when they should discharge Richenberg.

Richenberg's case joins four similar cases in federal courts across the country. With the ruling in Richenberg's case, only one of the five has been decided at the U.S. District Court level in favor of the gay members of the military.

In a 29-page opinion, Strom wrote that the military's policy on homosexuals served legitimate government purposes.

"Congress has determined that due to the nature of military life, the presence of persons who demonstrate a propensity to engage in homosexual conduct presents an unacceptable risk to unit cohesion, morale, good order and discipline and military readiness," Strom wrote.

Supporters of the policy on homosexuals said there are sound reasons to prohibit gay people from serving in the military.

"It is constitutional," said Elaine Donnelly, president for the Center for Military Readiness, a Michigan-based defense policy research organization. "The Congress has the right to set appropriate rules." Osburn said federal judges in four of the five cases have been too willing to accept at face value nearly anything the government has told them to justify the policy.

"To the extent that the federal courts continue to abdicate their role in reviewing these cases, it will be very hard for any service member to win," Osburn said. "The court should not treat the military as a separate branch of government that deserves untold deference when a constitutional right is at stake." Osburn said Richenberg and other gay members of the military who have served openly while waging legal campaigns prove that the policy against homosexuals is not needed.

"Captain Richenberg has been serving openly since 1993 and the Air Force has not come crumbling to its feet," Osburn said. "You have these individuals who are (Persian) Gulf War veterans who are exactly the type of people you want serving, yet they are getting booted out." Richenberg, 37, began trying to save his military career soon after telling his commander in May 1993 that he was gay.

Richenberg, who served in the Persian Gulf war, had been selected to work on a foreign military sales project to train and support personnel in Saudi Arabia.

Toward the end of his training in April 1993 for that project, Richenberg asked that his assignment to Saudi Arabia be canceled and that he be allowed to leave the Air Force.

His request was denied.

Soon after, he sent the letter to his commander telling him that he was gay.

Omaha World Herald, December 12, 1995 Tuesday

Richenberg has said he did not say he was gay to get out of the assignment.

He said he realized over time that he was homosexual. Richenberg said the Air Force had taught him to be honorable and to tell the truth, so he thought he could not keep his sexuality a secret.

Air Force officials canceled his Saudi Arabia assignment and sent him back to Offutt, but he was prohibited from continuing to fly with his electronic reconnaissance squadron. He was assigned to a desk job overseeing his unit's awards and decorations program.

After a hearing in December 1993, three Air Force colonels recommended that Richenberg be discharged.

In early 1994, after much wrangling between Congress and President Clinton, the Department of Defense implemented new regulations on homosexuals in the military.

In June 1994, under the revised regulations, the Air Force held another hearing on Richenberg's case. Again, three colonels recommended that Richenberg be discharged.

This past Aug. 28, Secretary of the Air Force Sheila Widnall finally ordered that Richenberg be discharged.

Offutt officials attempted to discharge Richenberg within hours of receiving Secretary Widnall's decision. In an effort to stop his discharge, Richenberg filed a federal court lawsuit against Secretary of Defense William Perry and Secretary Widnall.

Richenberg obtained a court order from Strom that blocked the discharge until Strom ruled on the lawsuit.

Richenberg said the policy on homosexuals violated his constitutional rights to freedom of speech and equal protection. His attorneys had argued that the policy unfairly discriminated against gay service members.

Strom wrote, "The court acknowledges . . . that there certainly is prejudice against homosexuals within the armed forces. However, the court is called upon to determine the constitutionality of the policy - not its wisdom. That determination is for Congress to make as overseer of the military, and the court should not second-guess its authority in this area."

GRAPHIC: Mug/1; Richenberg

LOAD-DATE: December 19, 1995



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



November 29, 1995

Mr. Marvin Krislov
Associate Counsel to the President
Old Executive Office Building
Room 130
Washington, D.C. 20500

Dear Marvin:

As you requested, enclosed please find copies of the following Department of Defense Directives:

- (1) DoD Directive 1304.26 (Qualification Standards for Enlistment, Appointment and Induction);
- (2) DoD Directive 1332.14 (Enlisted Administrative Separations); and
- (3) DoD Directive 1332.30 (Separation of Regular Commissioned Officers).

Also enclosed are copies of DoD Instruction 5505.8 (Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations) and the Training Guidance For DoD Policy On Homosexual Conduct in the Armed Forces. The implementing regulations of the individual Services addressing these matters follow the DoD Directives verbatim in all significant respects.

Please let me know if I can be of any further assistance.

Sincerely,

R. Hackney Wiegmann
Special Counsel
(Legal Counsel)





Department of Defense DIRECTIVE

December 21, 1993
NUMBER 1304.26

ASD(P&R)

SUBJECT: Qualification Standards for Enlistment, Appointment,
and Induction

- References:
- (a) Title 10, United States Code
 - (b) DoD Instruction 1205.1, "Implementation of the Universal Military Training and Service Act with Respect to Medical and Dental Registrants," September 27, 1960
 - (c) Title 32, United States Code
 - (d) Compact of Free Association between the United States and the Government of the Federated States of Micronesia and the Government of the Marshall Islands, 99 Stat. 1770 (1986) (reprinted as amended at 48 U.S.C.A. 1681 note)
 - (e) DoD Directive 1145.1, "Qualitative Distribution of Military Manpower," January 22, 1986
 - (f) DoD Directive 6130.3, "Physical Standards for Enlistment, Appointment, and Induction," March 31, 1986

A. PURPOSE

This Directive:

1. Establishes basic entrance qualification standards for enlistment, appointment, and induction into the Armed Forces in accordance with Section 113 of reference (a) and delegates the authority to specify certain of those standards to the Secretaries of the Military Departments.
2. Establishes the age, citizenship, education, aptitude, physical fitness, dependency status, moral character, and other disqualifying conditions that are causes for rejection for military service. Other standards may be prescribed in the event of mobilization or national emergency.
3. Sets standards designed to ensure that individuals under consideration for enlistment, appointment, or induction are able to perform military duties successfully, and to select those who are the most trainable and adaptable to Service life.

B. APPLICABILITY AND SCOPE

This Directive applies to:

1. The Office of the Secretary of Defense and the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard (by agreement with the Secretary of Transportation when it is not operating as a Military Service in the Navy) and their National Guard and Reserve components.

2. Applicants for initial enlistment into the Regular Armed Forces and the Reserve components.

3. Applicants for appointment as commissioned or warrant officers in the Active and Reserve components.

4. Applicants for reenlistment following release from active duty into subsequent Active or Reserve components (including the Army National Guard of the United States and the Air National Guard of the United States) after a period of more than 6 months has elapsed since discharge.

5. Applicants for the Scholarship or Advanced Course Reserve Officers Training Corps (ROTC), and all other Armed Forces special officer personnel procurement programs, including the Military Service Academies.

6. All individuals being inducted into the Armed Forces.

C. DEFINITION

Reserve Components. Includes the Army National Guard of the United States, the Army Reserve, the Naval Reserve, the Marine Corps Reserve, the Air National Guard of the United States, the Air Force Reserve, and the Coast Guard Reserve.

D. POLICY

It is DoD policy to:

1. Encourage to the maximum extent practical the use of common entrance qualification standards.

2. Avoid inconsistencies and inequities based on gender, race, religion, or ethnicity in the application of these standards by the Military Services.

3. Judge the suitability of persons to serve in the Armed Forces on the basis of their adaptability, potential to perform, and conduct.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness shall:

a. Review, coordinate, approve, and issue modifications to the standards in enclosure 1.

b. Ensure that the U.S. Military Entrance Processing Command assists the Services in implementing these standards.

2. The Assistant Secretary of Defense for Health Affairs shall act as an advisor to the Assistant Secretary of Defense for Personnel and Readiness (ASD(P&R)) on the physical and medical aspects of these standards.

3. The Assistant Secretary of Defense (Reserve Affairs) shall act as an advisor to the ASD(P&R) on the Reserve enlistment and appointment standards.

4. The Secretaries of the Military Departments:

a. Shall ensure conformance with this Directive.

b. Shall recommend to the ASD(P&R) suggested changes to this Directive.

c. Shall review all standards on an annual basis.

d. Shall establish procedures to grant waivers to the standards in individual cases for appropriate reasons.

e. Shall establish other standards as necessary to implement this Directive.

f. May issue generalized exceptions to these standards as permitted by law, with approval from the ASD(P&R).

F. PROCEDURES

The standards in enclosure 1 shall be used to determine the entrance qualifications for all individuals being enlisted, appointed, or inducted into any component of the Military Services.

G. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective February 5, 1994. Forward one copy of the implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.

A handwritten signature in black ink, appearing to read "J. A. Spivey". The signature is stylized with a large, looped initial "J" and a long, sweeping underline.

Enclosure - 1

1. Qualification Standards for Enlistment, Appointment, and Induction

QUALIFICATION STANDARDS FOR ENLISTMENT
APPOINTMENT, AND INDUCTION

A. GENERAL ELIGIBILITY CRITERIA

1. Entrance Considerations. Accession of qualified individuals shall be a priority when processing applicants for the Military Services.

2. Eligibility. Eligibility shall be determined by the applicant's ability to meet all requirements of this Directive, to include obtaining waivers. Applicants shall not be enlisted, appointed, or inducted unless fully qualified.

B. BASIC ELIGIBILITY CRITERIA

1. Age

a. For service in the Active and Reserve components, the minimum age for enlistment is 17 years and the maximum age is 35 years. (See 10 U.S.C., 510 reference (a).) The maximum age for a prior service enlistee is determined by adding the individual's years of prior service to 35. The Secretaries of the Military Departments concerned shall establish age standards for enlistment in the Reserve components (10 U.S.C., 510, reference (a)).

b. Age limitations for appointment as a commissioned or warrant officer normally depend on the Service concerned. In prescribing the age qualification for appointment as a Reserve officer, the Secretary of the Military Department concerned may not prescribe a maximum standard of less than 47 years for the initial appointment of a person who will serve as a medical, dental, or nurse officer in a specialty designated by the Secretary concerned as critically needed in wartime. (See DoD Instruction 1205.1 (reference (b)).)

c. By law (10 U.S.C. 532, reference (a)), persons appointed as commissioned officers must be able to complete 20 years of active commissioned service before their 55th birthday to receive a Regular commission. The Secretary of the Military Department concerned may defer the retirement for certain health profession officers on a case-by-case basis (10 U.S.C. 1251, reference (a)).

2. Citizenship

a. To be eligible for enlistment in the Regular Army or

Air Force, an individual must be an American citizen, or lawfully admitted to the United States for permanent residence (10 U.S.C. 3253 and 8253, reference (a)). There is no equivalent statute limiting enlistment in the Regular Navy and Marine Corps, but they usually apply the same citizenship requirements as those required for the Army and Air Force.

b. To be eligible for enlistment in the Reserve components, an individual must be a citizen of the United States or lawfully admitted to the United States for permanent residence (10 U.S.C. 510, reference (a)).

c. To be eligible for appointment as a commissioned or warrant officer, U.S. citizenship is required except for Reserve appointment where an individual must be lawfully admitted to the United States for permanent residence (Sections 532 and 591 of reference (a)). For regular appointment, when tendered, U.S. citizenship is required. Law requires National Guard officers to be U.S. citizens (32 U.S.C. 313, reference (c)).

d. Citizens of the Federated States of Micronesia or the Republic of the Marshall Islands also are eligible for enlistment in the Active and Reserve components. (See the Compact of Free Association (reference (d)).)

3. Education

a. Possession of a high school diploma is desirable, although not mandatory, for enlistment in any component of the Military Services. Section 520 of reference (a) states, "A person who is not a high school graduate may not be accepted for enlistment in the armed forces unless the score of that person on the Armed Forces Qualification Test is at or above the thirty-first percentile; however, a person may not be denied enlistment in the Armed Forces solely because of his not having a high school diploma if his enlistment is needed to meet established strength requirements." Alternative credential holders (i.e., General Education Development certificates and certificates of attendance and completion) and nongraduates may be assigned lower enlistment priority based on their first-term attrition rates.

b. Educational requirements for appointment as a commissioned or warrant officer are determined by each Military Service. Generally, a bachelors degree is a required prerequisite for a commission or appointment. In addition, special occupations (e.g., physician, chaplain) may require additional vocational credentials, which are determined by the Secretary of the Military Department concerned.

4. Aptitude

a. Overall aptitude requirements for enlistment and induction are based on applicant scores on the Armed Forces Qualification Test (AFQT) derived from the Armed Services Vocational Aptitude Battery. Applicant scores are grouped into percentile categories. Persons who score in AFQT Category V (percentiles 1-9) are, by law (10 U.S.C. 520 and DoD Directive 1145.1 (references (a) and (e))), ineligible to enlist. By law (10 U.S.C. 520, reference (a)), the number of persons who enlist during any fiscal year who score in AFQT Category IV (percentiles 10 to 30) may not exceed 20 percent of the total number of persons enlisted. The Secretary of Defense delegates to the Secretaries of the Military Departments the authority to specify more restrictive aptitude standards for enlistment.

b. Generally, for officers and warrant officers, no single test or instrument is used as an aptitude requirement for appointment.

5. Physical Fitness

a. DoD Directive 6130.3 (reference (f)) establishes the standards for entrance under the authority of 10 U.S.C. (reference (a)).

b. The pre-accession screening process should be structured to identify individuals with any medical condition that disqualifies an applicant for military service. Specifically, each applicant shall be independently evaluated by an authorized physician or a physician at a Military Entrance Processing Station to ensure the applicant is:

(1) Free of contagious or infectious diseases;

(2) Free of medical conditions or physical defects that would require excessive time lost from duty or would likely result in separation from the Service for medical unfitness;

(3) Medically capable of satisfactorily completing required training;

(4) Medically adaptable to the military environment;

(5) Medically capable of performing duties without aggravation of existing physical defects or medical conditions.

6. Dependency Status

a. Title 10 U.S.C. (reference (a)) does not specifically address eligibility requirements for single parents.

b. The Military Services may not enlist married individuals with more than two dependents under the age of 18 or unmarried individuals with custody of any dependents under the age of 18. However, the Secretary of the Military Department concerned may grant a waiver for particularly promising entrants.

c. The Military Services shall specify the circumstances under which individuals who have dependents may become commissioned officers or warrant officers; variations in policy are affected by the commissioning source (e.g., Service Academy vs. ROTC or Officer Candidate School; ROTC scholarship status, etc.).

7. Moral Character. Persons entering the Armed Forces should be of good moral character. The underlying purpose of moral character enlistment standards is to minimize entrance of persons who are likely to become disciplinary cases or security risks or who disrupt good order, morale, and discipline. The Military Services also have a responsibility to parents who expect that their sons and daughters will not be placed into close association with persons who have committed serious offenses or whose records show ingrained delinquency behavior patterns. The Military Services are responsible for the defense of the nation and should not be viewed as a source of rehabilitation for those who have not subscribed to the legal and moral standards of society at large. Moral standards of acceptability for service are designed to disqualify the following kinds of persons:

a. Individuals under any form of judicial restraint (bond, probation, imprisonment, or parole).

b. Those with significant criminal records. Section 504 of reference (a) states that, "no person...who has been convicted of a felony, may be enlisted in an Armed Force. However, the Secretary concerned may authorize exceptions in meritorious cases, for the enlistment of...persons convicted of felonies."

(1) Persons convicted of felonies may request a waiver to permit their enlistment. The waiver procedure is not automatic, and approval is based on each individual case. One of the considerations in determining whether a waiver will be granted is the individual's ability to adjust successfully to civilian life for a period of time following his or her release from judicial control.

(2) In processing waiver requests, the Military Services shall require information about the "who, what, when, where, and why" of the offense in question; and a number of letters of recommendation attesting to the applicant's character or suitability for enlistment. Such letters must be from responsible community leaders such as school officials, ministers, and law enforcement officials.

c. Those who have been previously separated from the Military Services under conditions other than honorable or for the good of the Service.

d. Those who have exhibited antisocial behavior or other traits of character that would render them unfit to associate with military personnel.

8. Provisions Related to Homosexual Conduct

* a. A person's 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 *
* in the manner described in paragraph B.8.b., below. Applicants *
* for enlistment, appointment, or induction shall not be asked or *
* required to reveal whether they are heterosexual, homosexual or *
* bisexual. Applicants also will not be asked or required to *
* reveal whether they have engaged in homosexual conduct, unless *
* independent evidence is received indicating that an applicant *
* engaged in such conduct or unless the applicant volunteers a *
* statement that he or she is a homosexual or bisexual, or words to *
* that effect.

* b. Homosexual conduct is grounds for barring entry into *
* the Armed Forces, except as otherwise provided in this section. *
* Homosexual conduct is a homosexual act, a statement by the *
* applicant that demonstrates a propensity or intent to engage in *
* homosexual acts, or a homosexual marriage or attempted marriage. *
* Propensity to engage in homosexual acts means more than an *
* abstract preference or desire to engage in homosexual acts; it *
* indicates a likelihood that a person engages in or will engage in *
* homosexual acts.

(1) An applicant shall be rejected for entry into the Armed Forces if, in the course of the accession process, evidence is received demonstrating that the applicant engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there is a further determination that:

(a) Such acts are a departure from the applicant's usual and customary behavior;

(b) Such acts, under all the circumstances, are unlikely to recur;

(c) Such acts were not accomplished by use of force, coercion, or intimidation, and;

(d) The applicant does not have a propensity or intent to engage in homosexual acts.

Such a determination will be made in the course of the normal accession process. A homosexual act means (1) Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and (2) Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph B.8.b.(1)(d)1, above.

(2) An applicant shall be rejected for entry if he or she makes a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further determination that the applicant 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. Such a determination will be made in the course of the normal accession process.

(3) An applicant shall be rejected for entry if, in the course of the accession process, evidence is received demonstrating that an applicant has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved).

* c. Applicants will be informed of separation policy *
* (Section 654 of 10 U.S.C. (reference (a))). Failure to receive *
* such information shall not constitute a defense in any *
* administrative or disciplinary proceeding. *

* d. Nothing in these procedures requires rejection for *
entry into the Armed Forces when the relevant Military Service
Command authority determines:

(1) That an applicant or inductee made a statement, engaged in acts, or married or attempted to marry a person of the same sex for the purpose of avoiding military service, and

(2) Rejection of the applicant or inductee would not be in the best interest of the Armed Forces.