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Department of Defense DIRECTIVE

December 21, 1993 #
NUMBER 1332.14

SUBJECT: Enlisted Administrative Separations

- References:
- (a) DoD Directive 1332.14, subject as above, January 28, 1982 (hereby canceled)
 - (b) Section 977 of title 10, United States Code (Denial of Certain Benefits to Persons Who Fail to Complete at Least Two Years of an Original Enlistment)
 - (c) Pub. L. No. 97-66, "The Veterans' Disability Compensation, Housing, and Memorial Benefits Amendments Act of 1981", October 17, 1981, (95 Stat. 1035)
 - (d) Sections 801-940 of title 10, United States Code (Uniform Code of Military Justice, Articles 1-140)
 - (e) through (z), see enclosure 1

A. REISSUANCE AND PURPOSE

This Directive reissues reference (a) and updates policy, responsibilities, and procedures governing the administrative separation of enlisted members from the Military Services.

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense and the Military Departments (including their Reserve components). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force and the Marine Corps.

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 2.

D. POLICY

1. It is DoD policy to promote the readiness of the Military Services by maintaining high standards of conduct and performance. Separation policy promotes the readiness of the Military Services by providing an orderly means to:

a. Judge the suitability of persons to serve in the Armed Forces on the basis of their conduct and their ability to meet required standards of duty performance and discipline;

b. Maintain standards of performance and conduct through characterization of service in a system that emphasizes the importance of honorable service;

* c. Achieve authorized force levels and grade distributions; and *

* d. Provide for the orderly administrative separation of enlisted personnel in a variety of circumstances. *

2. DoD separation policy is designed to strengthen the concept that military service is a calling different from any civilian occupation.

a. The acquisition of military status, whether through enlistment or induction, involves a commitment to the United States, the Service, and one's fellow citizens and Service members to complete successfully a period of obligated service. Early separation for failure to meet required standards of performance or discipline represents a failure to fulfill that commitment.

b. Millions of Americans from diverse backgrounds and with a wide variety of aptitudes and attitudes upon entering military service have served successfully in the Armed Forces. It is DoD policy to provide Service members with the training, motivation, and professional leadership that inspires the dedicated enlisted member to emulate his or her predecessors and peers in meeting required standards of performance and discipline.

c. The Military Services make a substantial investment in training, time, equipment, and related expenses when persons are enlisted or inducted into military service. Separation prior to completion of an obligated period of service is wasteful because it results in loss of this investment and generates a requirement for increased accessions. Consequently, attrition is an issue of significant concern at all levels of responsibility within the Armed Forces. Reasonable efforts should be made to identify enlisted members who exhibit a likelihood for early separation, and to improve their chances for retention through counseling, retraining, and rehabilitation before initiation of separation proceedings. Enlisted members who do not demonstrate potential for further military service should be separated to avoid the high costs in terms of pay, administrative efforts, degradation of morale, and substandard mission performance that are associated with retention of enlisted members who do not conform to required standards of discipline and performance despite efforts at counseling, retraining, or rehabilitation.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness may supplement the enclosures to this Directive, and may delegate the authority to establish reporting requirements for the reasons for separation (Part 1, enclosure 3) to a Deputy Assistant Secretary.

2. The Secretaries of the Military Departments shall prescribe implementing documents to ensure that the policies, standards, and procedures in this Directive are administered in a manner that provides consistency in separation policy to the extent practicable in a system that is based on command discretion. The implementing documents also shall address the following matters:

* a. Commander Responsibilities. The Secretary concerned, acting *
* through his or her military commanders, shall ensure that the policies, *
* standards and procedures of this directive are applied consistently, that *
* fact-finding inquiries are conducted properly, that no abuse of authority *
* occurs, and that failure to follow the provisions of this directive results *
* in appropriate corrective action.

* b. Processing Goals. The Secretary concerned shall establish processing time goals for the types of administrative separations authorized by this Directive. Such goals shall be designed to further the efficient administration of the Armed Forces and shall be measured from the date of notification to the date of separation. Normally such goals should not exceed 15 working days for the notification procedure (Part 3, section B., enclosure 3) and 50 working days for the administrative board procedure (Part 3, section C., enclosure 3). Goals for shorter processing times are encouraged, particularly for cases in which expeditious action is likely. Variations may be established for complex cases or cases in which the separation authority is not located on the same facility as the respondent. The goals, and a program for monitoring effectiveness, shall be in the implementing document of the Military Department. Failure to process an administrative separation within the prescribed goal for processing times shall not create a bar to separation or characterization.

* c. Periodic Explanations. The Secretary concerned shall prescribe appropriate internal procedures for periodic explanation to enlisted members of the types of separations, the basis for their issuance, the possible effects of various actions upon reenlistment, civilian employment, veterans' benefits, and related matters, and the effects of 10 U.S.C. 977 (reference (b)) and Pub. L. No. 97-66 (1981) (reference (c)) concerning denial of certain benefits to members who fail to complete at least 2 years of an original enlistment. Such explanation may be provided in the form of a written fact sheet or similar document. The periodic explanation shall take place at least each time the provisions of the Uniform Code of Military Justice (UCMJ) are explained under Article 137 of the UCMJ (reference (d)). The requirement that the effects of the various types of separations be explained to enlisted members is a command responsibility, not a procedural entitlement. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization.

* d. Provision of Information During Separation Processing. The Secretary concerned shall ensure that information concerning the purpose and authority of the Discharge Review Board and the Board for Correction of Military/Naval Records, established under 10 U.S.C. 1552 and 1553 (reference (e)) and DoD Directive 1332.28 (reference (f)) is provided during the separation processing of all members, except when the separation is for an immediate reenlistment. Specific counseling is required under 38 U.S.C. 3103(a) (reference (g)) which states that a discharge under other than honorable conditions, resulting from a period of continuous, unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Veterans Administration, notwithstanding any action by a Discharge Review Board. The information required by this paragraph should be provided in the form of a written fact sheet or similar document. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization.

F. PROCEDURES

Procedures and standards for implementing the policy in section D., above, are in enclosure 3.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective February 5, 1994.
2. This Directive applies only to administrative separation proceedings initiated on or after February 5, 1994 unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.
3. Forward two copies of proposed implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.



Enclosures - 4

1. References
2. Definitions
3. Standards and Procedures
4. Guidelines for Fact-Finding Inquiries into Homosexual Conduct

REFERENCES, continued

- (e) Section 1552 of title 10, United States Code (Correction of Military Records) and Section 1553 (Review of Discharge or Dismissal)
- (f) DoD Directive 1332.28, "Discharge Review Board (DRB) Procedures and Standards," August 11, 1982
- (g) Section 3103 of title 38, United States Code (Certain Bars to Benefits (Veterans Administration))
- (h) DoD Directive 1205.5, "Transfer of Members Between Reserve Components of the Military Services," May 16, 1980
- (i) DoD Instruction 1332.15, "Early Release of Military Enlisted Personnel for College or Vocational/Technical School Enrollment," June 1, 1976
- (j) DoD Directive 1344.10, "Political Activities by Members of the Armed Forces on Active Duty," June 15, 1990
- (k) DoD Directive 1300.6, "Conscientious Objectors," August 20, 1971
- * (l) DoD Directive 1315.15, "Special Separation Policies for Survivorship," *
September 26, 1988 *
- (m) Section on Mental Disorders, International Classification of Diseases and Injuries - 8, Diagnostic and Statistical Manual (DSM-III) of Mental Disorders, 3rd Edition, Committee on Nomenclature & Statistics, American Psychiatric Association, Washington, D.C., 1978
- (n) Chapter 61 of title 10, United States Code (Retirement or Separation for Physical Disability)
- (o) Section 1170 of title 10, United States Code (Regular Enlisted Members: Minority Discharge)
- (p) DoD Directive 1215.13, "Unsatisfactory Performance of Ready Reserve Obligation," June 30, 1979
- (q) Manual for Courts-Martial, 1969 (Revised Edition), as amended
- (r) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992
- (s) DoD Instruction 1336.1, "Certificate of Release or Discharge from Active Duty," January 6, 1989
- (t) DoD Directive 1010.1, "Drug Abuse Testing Program," December 28, 1984
- (u) Section 1163 of title 10, United States Code (Reserve Components: Members; Limitations on Separations)
- (v) Section 504 of title 10, United States Code (Persons Not Qualified for Enlistment)
- (w) Section 505 of title 10, United States Code (Regular Components: Qualifications, Terms, Grade)
- (x) Section 266 of title 10, United States Code (Boards for Appointment, Promotion, and Certain Other Purposes)
- (y) Section 654 of title 10, United States Code (Policy concerning homosexuality in the Armed Forces)
- * (z) DoD Instruction 5505.8, "Investigations of Sexual Misconduct by the *
Defense Criminal Investigative Organizations and Other DoD Law *
Enforcement Organizations," February 28, 1994 *

DEFINITIONS

A. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

B. Convening Authority. (1) The Separation Authority or (2) a commanding officer who has been authorized by the Secretary concerned to process the case except for final action and who otherwise has the qualifications to act as a Separation Authority.

C. Discharge. Complete severance from all military status gained by the enlistment or induction concerned.

D. Entry-Level Status. Upon enlistment, a member qualifies for entry-level status during (1) the first 180 days of continuous active military service or (2) the first 180 days of continuous active service after a service break of more than 92 days of active service. A member of a Reserve component who is not on active duty or who is serving under a call or order to active duty for 180 days or less begins entry level status upon enlistment in a Reserve component. Entry level status for such a member of a Reserve component terminates as follows: (a) 180 days after beginning training if the member is ordered to active duty for training for one continuous period of 180 days or more; or (b) 90 days after the beginning of the second period of active duty training if the member is ordered to active duty for training under a program that splits the training into two or more separate periods of active duty. For the purposes of characterization of service or description of separation, the member's status is determined by the date of notification as to the initiation of separation proceedings.

E. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

F. Homosexual Act

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 subsection F.1., above.

G. Homosexual Conduct. 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.

H. Member. An enlisted member of a Military Service.

I. Military Record. An individual's overall performance while a member of a Military Service, including personal conduct and performance of duty.

J. Propensity. 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.

K. Release from Active Duty. Termination of active duty status and transfer or revision to a Reserve component not on active duty, including transfer to the Individual Ready Reserve (IRR).

L. Respondent. A member of a Military Service who has been notified that action has been initiated to separate the member.

M. Separation. A general term that includes discharge, release from active duty, release from custody and control of the Armed Forces, transfer to the IRR, and similar changes in Active or Reserve status.

N. Separation Authority. An official authorized by the Secretary concerned to take final action with respect to a specified type of separation.

* O. Sexual Orientation. An abstract sexual preference for persons of a *
* particular sex, as distinct from a propensity or intent to engage in *
* sexual acts. *

* P. Statement that a Member Is a Homosexual or Bisexual or Words to That *
* Effect. Language or behavior that a reasonable person would believe was *
* intended to convey the statement that a person engages in, attempts to *
* engage in, or has a propensity or intent to engage in homosexual acts. *

STANDARDS AND PROCEDURES

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PART 1

REASONS FOR SEPARATION

A. Expiration of Service Obligation

1. Basis. A member may be separated upon expiration of enlistment or fulfillment of service obligation. This includes separation authorized by the Secretary concerned when the member is within 30 days of the date of expiration of term of service under the following circumstances:

a. The member is serving outside the continental United States (CONUS); or

b. The member is a resident of a State, territory, or possession outside CONUS and is serving outside the member's State, territory, or possession of residence.

2. Characterization or Description. Honorable, unless:

a. An Entry-Level Separation is required under subsection C.3. of Part 2;

b. Characterization of service as General (under honorable conditions) is warranted under section C. of Part 2 on the basis of numerical scores accumulated in a formal, Service-wide rating system that evaluates conduct and performance on a regular basis; or

c. Another characterization is warranted upon discharge from the IRR under section E. of Part 3.

B. Selected Changes in Service Obligations

1. Basis. A member may be separated for the following reasons:

a. General demobilization or reduction in authorized strength.

b. Early separation of personnel under a program established by the Secretary concerned. A copy of the document authorizing such program shall be forwarded to the Assistant Secretary of Defense for Personnel and Readiness (ASD(P&R)) on or before the date of implementation.

c. Acceptance of an active duty commission or appointment, or acceptance into a program leading to such commission or appointment in any branch of the Military Services.

d. Immediate enlistment or reenlistment

e. Interservice transfer of inactive reserves in accordance with DoD Directive 1205.5 (reference (h)).

2. Characterization or description. Honorable, unless:

a. An Entry Level Separation is required under section C. of Part 2;

b. Characterization of service as General (under honorable conditions) is warranted under section C. of Part 2 on the basis of numerical scores accumulated in a formal, service-wide rating system that evaluates conduct and performance on a regular basis; or

c. Another characterization is warranted upon discharge from the IRR under section E. of Part 3.

C. Convenience of the Government

1. Basis. A member may be separated for convenience of the government for the reasons set forth in subsection C.4., below.

2. Characterization or description. Honorable, unless:

a. An Entry Level Separation is required under section C. of Part 2; or

b. Characterization of service as General (under honorable conditions) is warranted under section C. of Part 2.

3. Procedures. Procedural requirements may be established by the Secretary concerned, subject to procedures established in subsection C.4., below. Prior to characterization of service as General (under honorable conditions), the member shall be notified of the specific factors in the service record that warrant such a characterization, and the Notification Procedure (section B. of Part 3) shall be used. Such notice and procedure is not required, however, when characterization of service as General (under honorable conditions) is based upon numerical scores accumulated in a formal, service-wide rating system that evaluates conduct and performance on a regular basis.

4. Reasons

a. Early release to further education. A member may be separated under DoD Directive 1332.15 (reference (i)) to attend a college, university, vocational school, or technical school.

b. Early release to accept public office. A member may be separated to accept public office only under circumstances authorized by the Military Department concerned and consistent with DoD Directive 1344.10 (reference (j)).

c. Dependency or hardship.

(1) Upon request of the member and concurrence of the government, separation may be directed when genuine dependency or undue hardship exists under the following circumstances:

(a) The hardship or dependency is not temporary;

(b) Conditions have arisen or have been aggravated to an excessive degree since entry into the Service, and the member has made every reasonable effort to remedy the situation;

(c) The administrative separation will eliminate or materially alleviate the condition; and

(d) There are no other means of alleviation reasonably available.

(2) Undue hardship does not necessarily exist solely because of altered present or expected income, family separation, or other inconveniences normally incident to Military Service.

d. Pregnancy or childbirth. A female member may be separated on the basis of pregnancy or childbirth upon her request, unless retention is determined to be in the best interests of the service under section A. of Part 2 and guidance established by the Military Department concerned.

e. Parenthood. A member may be separated by reason of parenthood if as a result thereof it is determined under the guidance set forth in section A. of Part 2 that the member is unable satisfactorily to perform his or her duties or is unavailable for worldwide assignment or deployment. Prior to involuntary separation under this provision, the Notification Procedure (section B. of Part 3) shall be used. Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

f. Conscientious objection. A member may be separated if authorized under DoD Directive 1300.6 (reference (k)).

g. Surviving family member. A member may be separated if * authorized under DoD Directive 1315.15 (reference (l)). *

h. Other designated physical or mental conditions.

(1) The Secretary concerned may authorize separation on the basis of other designated physical or mental conditions, not amounting to Disability (section D., below), that potentially interfere with assignment to or performance of duty under the guidance set forth in section A. of Part 2. Such conditions may include but are not limited to chronic seasickness or airsickness,

enuresis, and personality disorder.¹

(2) Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

(3) Separation on the basis of personality disorder is authorized only if a diagnosis by a psychiatrist or psychologist, completed in accordance with procedures established by the Military Department concerned, concludes that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired.

(4) Separation for personality disorder is not appropriate when separation is warranted under sections A. through N. or section P. of this Part. For example, if separation is warranted on the basis of unsatisfactory performance (section G.) or misconduct (section K.), the member should not be separated under this section regardless of the existence of a personality disorder.

(5) Nothing in this provision precludes separation of a member who has such a condition under any other basis set forth under this section (Convenience of the Government) or for any other reason authorized by this Directive.

(6) Prior to involuntary separation under this provision, the Notification Procedure (section B. of Part 3) shall be used.

(7) The reasons designated by the Secretary concerned shall be separately reported.

i. Additional grounds. The Secretary concerned may provide additional grounds for separation for the convenience of the government. A copy of the document authorizing such grounds shall be forwarded to the ASD(P&R) on or before the date of implementation.

D. Disability.

1. Basis. A member may be separated for disability under the provisions of 10 U.S.C., chapter 61 (reference (n)).

¹Personality disorders are described in the Diagnostic and Statistical Manual (DSM-III) of Mental Disorders (reference (m)).

2. Characterization or description. Honorable, unless:

a. An Entry Level Separation is required under section C. of Part 2; or

b. Characterization of service as General (under honorable conditions) is warranted under section C. of Part 2.

3. Procedures. Procedural requirements for separation may be established by the Military Departments consistent with chapter 61 (reference (n)). If separation is recommended, the following requirements apply prior to characterization of service as General (under honorable conditions): the member shall be notified of the specific factors in the service record that warrant such a characterization, and the Notification Procedure (section B. of Part 3) shall be used. Such notice and procedure is not required, however, when characterization of service as General (under honorable conditions) is based upon numerical scores accumulated in a formal, service-wide rating system that evaluates conduct and performance on a regular basis.

E. Defective Enlistments and Inductions

1. Minority

a. Basis

(1) Under age 17. If a member is under the age of 17, the enlistment of the member is void, and the member shall be separated.

(2) Age 17. A member shall be separated under 10 U.S.C. §1170 (reference (o)) in the following circumstances except when the member is retained for the purpose of trial by court-martial:

(a) There is evidence satisfactory to the Secretary concerned that the member is under 18 years of age;

(b) The member enlisted without the written consent of the member's parent or guardian; and

(c) An application for the member's separation is submitted to the Secretary concerned by the parent or guardian within 90 days of the member's enlistment.

b. Description of separation. A member separated under subparagraph E.1.a.(1), above, shall receive an order of release from the custody and control of the armed forces (by reason of void enlistment or induction). The separation of a member under subparagraph E.1.a.(2), above, shall be described as an Entry Level Separation.

c. Procedure. The Notification Procedure (section B. of Part 3) shall be used.

2. Erroneous

a. Basis. A member may be separated on the basis of an erroneous enlistment, induction, or extension of enlistment under the guidance set forth in section A. of Part 2. An enlistment, induction, or extension of enlistment is erroneous in the following circumstances, if:

(1) It would not have occurred had the relevant facts been known by the government or had appropriate directives been followed;

(2) It was not the result of fraudulent conduct on the part of the member; and

(3) The defect is unchanged in material respects.

b. Characterization or description. Honorable, unless an Entry Level Separation or an order of release from the custody and control of the Military Services (by reason of void enlistment or induction) is required under section C. of Part 2.

c. Procedure

(1) If the command recommends that the individual be retained in military service, the initiation of separation processing is not required in the following circumstances:

(a) The defect is no longer present; or

(b) The defect is waivable and a waiver is obtained from appropriate authority.

(2) If separation processing is initiated, the Notification Procedure (section B. of Part 3) shall be used.

3. Defective enlistment agreements

a. Basis. A defective enlistment agreement exists in the following circumstances:

(1) As a result of a material misrepresentation by recruiting personnel, upon which the member reasonably relied, the member was induced to enlist with a commitment for which the member was not qualified;

(2) The member received a written enlistment commitment from recruiting personnel for which the member was qualified, but which cannot be fulfilled by the Military Service; or

(3) The enlistment was involuntary. See 10 U.S.C. 802 (reference (d)).

b. Characterization or Description. Honorable, unless an Entry Level Separation or an order of release from the custody and control of the Military Services (by reason of void enlistment) is required under section C. of Part 2.

c. Procedures. This provision does not bar appropriate disciplinary action or other administrative separation proceedings regardless of when the defect is raised. Separation is appropriate under this provision only in the following circumstances:

(1) The member did not knowingly participate in creation of the defective enlistment;

(2) The member brings the defect to the attention of appropriate authorities within 30 days after the defect is discovered or reasonably should have been discovered by the member;

(3) The member requests separation instead of other authorized corrective action; and

(4) The requests otherwise meets such criteria as may be established by the Secretary concerned.

4. Fraudulent Entry Into the Military Service

a. Basis. A member may be separated under guidance in section A. of Part 2 on the basis of procurement of a fraudulent enlistment, induction, or period of military service through any deliberate material misrepresentation, omission, or concealment that, if known at the time of enlistment, induction, or entry onto a period of military service might have resulted in rejection.

b. Characterization of Description. Characterization of service or description of separation shall be in accordance with section C. of Part 2. If the fraud involves concealment of a prior separation in which service was not characterized as Honorable, characterization normally shall be Under Other Than Honorable Conditions.

c. Procedures. The Notification Procedure (section B. of Part 3) shall be used except as follows:

(1) Characterization of service Under Other Than Honorable Conditions may not be issued unless the Administrative Board Procedure (section C. of Part 3) is used.

(2) When the sole reason for separation is fraudulent entry, suspension of separation (section B. of Part 2) is not authorized. When there are approved reasons for separation in addition to fraudulent entry, suspension of separation is authorized only in the following circumstances:

(a) A waiver of the fraudulent entry is approved; and

(b) The suspension pertains to reasons for separation other than the fraudulent entry.

(3) If the command recommends that the member be retained in military service, the initiation of separation processing is unnecessary in the following circumstances:

(a) The defect is no longer present; or

(b) The defect is waivable and a waiver is obtained from appropriate authority.

(4) If the material misrepresentation includes preservice or prior service homosexual conduct (subsection H.1. of this enclosure, below), the standards of paragraph H.1.b. and procedures of subsection H.3. below, shall be applied in processing a separation under this section. In such a case, the characterization or description of the separation shall be determined under paragraph E.4.b., above.

5. Separation from the Delayed Entry Program

a. Basis. A person who is in the Delayed Entry Program may be separated because of ineligibility for enlistment under standards prescribed by the Secretary concerned or upon his or her request when authorized by the Secretary concerned.

b. Description of Separation. Entry level separation.

c. Procedure. The person shall be notified of the proposed separation and the reasons therefor. The member shall be given the opportunity to submit to the separation authority a statement in rebuttal by a specified date (not less than 30 days from the date of delivery). The notice shall be delivered personally or sent by registered or certified mail, return receipt requested (or by an equivalent form of notice if such service is not available by the U.S. mail at an address outside the United States). If the person fails to acknowledge receipt of notice, the individual who mails the notification shall prepare a Sworn Affidavit of Service by Mail (see DoD Directive 1215.13, reference (p)) that shall be inserted in the file along with postal Service Form 3800.

F. Entry Level Performance and Conduct

1. Basis

a. A member may be separated while in entry level status (section I. of enclosure 2) when it is determined under the guidance in section A. of Part 2 that the member is unqualified for further military service by reason of unsatisfactory performance or conduct (or both), as evidenced by inability, lack of reasonable effort, failure to adapt to the military environment, or minor disciplinary infractions.

b. When separation of a member in entry-level status is warranted by unsatisfactory performance or minor disciplinary infractions (or both), the member normally should be separated under this section. Nothing in this provision precludes separation under another provision of this Directive when such separation is authorized and warranted by the circumstances of the case.

2. Counseling and Rehabilitation. Separation processing may not be initiated until the member has been counseled formally concerning those deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation requirements are important with respect to this reason for separation. Because military service is a calling different from any civilian occupation, a member should not be separated when this is the sole reason unless there have been efforts at rehabilitation under standards prescribed by the Secretary concerned.

3. Description of Separation. Entry-Level Separation.

4. Procedures. The Notification Procedure (section B. of Part 3) shall be used.

G. Unsatisfactory Performance

Dec 21, 93#

1332.14 (Encl 3, Att.1)

1. Basis. A member may be separated when it is determined under the guidance in section A. of Part 2 that the member is unqualified for further military service by reason of unsatisfactory performance. This reason shall not be used if the member is in entry-level status (section I. of enclosure 2).

2. Counseling and Rehabilitation. Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation requirements are of particular importance with respect to this reason for separation. Because military service is a calling different from any civilian occupation, a member should not be separated when unsatisfactory performance is the sole reason unless there have been efforts at rehabilitation under standards prescribed by the Secretary concerned.

3. Characterization or Description. The service shall be characterized as Honorable or General (under honorable conditions) in accordance with section C. of Part 2.

4. Procedures. The Notification Procedure (section B. of Part 3) shall be used.

H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph H.1.b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. 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 paragraph H.1.b..

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that:

(a) Such acts are a departure from the member'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;

(d) Under the particular circumstances of the case, the member's continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and morale; and

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

(2) The member has made a statement that he or she is a homosexual or bisexual, and that effort to engage in homosexual acts is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in paragraph H.1.b..

approved finding 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. A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member 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. In determining whether a member has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

- (a) Whether the member has engaged in homosexual acts;
- (b) The member's credibility;
- (c) Testimony from others about the member's past conduct, character, and credibility;
- (d) The nature and circumstances of the member's statement;
- (e) Any other evidence relevant to whether the member is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

(3) The member 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).

2. Burden of Proof. See paragraphs H.4.e. and f., below, for guidance as to the burden of proof and when a finding regarding retention is required.

3. Characterization or Description. Characterization of service or description of separation shall be in accordance with the guidance in section C. of Part 2. When the sole basis for separation is homosexual conduct, a characterization Under Other Than Honorable Conditions may be issued only if such a characterization is warranted under section C. of Part 2 and there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in the following circumstances:

- a. By using force, coercion, or intimidation;
- b. With a person under 16 years of age;
- c. With a subordinate in circumstances that violate customary military superior-subordinate relationships;
- d. Openly in public view;
- e. For compensation;
- f. Aboard a military vessel or aircraft; or

g. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

4. Procedures. The Administrative Board Procedure (section C. of Part 3) shall be used, subject to the following guidance:

a. Separation processing shall be initiated if there is probable cause to believe separation is warranted under paragraph H.1.b., above. Fact-finding procedures for inquiries into homosexual conduct are in enclosure 4.

b. The Administrative Board shall follow the procedures set forth in subsection C.5. of Part 3, except with respect to the following matters:

(1) If the Board finds that one or more of the circumstances authorizing separation under paragraph H.1.b., above, is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described in that paragraph.

(2) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph H.1.b. has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

c. In any case in which characterization of service Under Other Than Honorable Conditions is not authorized, the Separation Authority may be exercised by an officer designated under paragraph B.4.a. of Part 3.

d. The Separation Authority shall dispose of the case according to the following provisions:

(1) If the Board recommends retention, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary concerned with a recommendation that the Secretary separate the member under the Secretary's authority (section C. of this Part).

(2) If the Board recommends separation, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis of the following considerations:

1 There is insufficient evidence to support the finding; or

2 Retention is warranted under the limited circumstances described in paragraph H.1.b., above.

(3) If there has been a waiver of Board proceedings, the Separation Authority shall dispose of the case in accordance with the following provisions:

(a) If the Separation Authority determines that there is not sufficient evidence to support separation under paragraph H.1.b., above, the

Separation Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Separation Authority determines that one or more of the circumstances authorizing separation under paragraph H.1.b. has occurred, the member shall be separated unless retention is warranted under the limited circumstances described in that paragraph.

* e. The member shall bear the burden of proving throughout the *
* proceeding, by a preponderance of the evidence, that retention is warranted *
* under the limited circumstances described in subparagraphs H.1.b.(1) and *
* H.1.b.(2). *

f. Findings regarding whether or not retention is warranted under the limited circumstances of paragraph H.1.b. are required if the member clearly and specifically raises such limited circumstances.

g. Nothing in these procedures:

(1) Limits the authority of the Secretary concerned to take appropriate action in a case to ensure that there has been compliance with this Directive;

(2) Requires that a member be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

(a) The member engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding or terminating military service; and

(b) Separation of the member would not be in the best interest of the Armed Forces.

(3) Precludes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned;

(4) Authorizes a member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;

(5) Precludes separation in appropriate circumstances for another reason in this Directive; or

(6) Precludes trial by court-martial in appropriate cases.

I. Drug Abuse Rehabilitation Failure

1. Basis

a. A member who has been referred to a program of rehabilitation for personal drug and alcohol abuse may be separated for failure through inability or refusal to participate in, corporate in, or successfully complete such a program in the following circumstances:

(1) There is a lack of potential for continued military service;

or

(2) Long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

b. Nothing in this provision precludes separation of a member who has been referred to such a program under any other provision of this Directive in appropriate cases.

c. Drug abuse rehabilitation failures shall be reported separately from alcohol abuse rehabilitation failures. If separation is based on both, the primary basis shall be used for reporting requirements.

2. Characterization or Description. When a member is separated under this provision, characterization of service as Honorable or General (under honorable conditions) is authorized except when an Entry-Level Separation is required under section C. of Part 2. The relationship between voluntary submission for treatment and the evidence that may be considered on the issue of characterization is set forth in subparagraph C.2.c. (6) of Part 2. The relationship between mandatory urinalysis and the evidence that may be considered on the issue of characterization is in paragraph C.2.c. (7) of Part 2.

3. Procedures. The Notification Procedure (section B. of Part 3) shall be used.

J. Alcohol Abuse Rehabilitation Failure

1. Basis

a. A member who has been referred to a program of rehabilitation for drug and alcohol abuse may be separated for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program in the following circumstances:

(1) There is a lack of potential for continued military service;
or

(2) Long term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

b. Nothing in this provision precludes separation of a member who has been referred to such a program under any other provision of this Directive in appropriate cases.

c. Alcohol abuse rehabilitation failures shall be reported separately from drug abuse rehabilitation failures. If separation is based on both, the primary basis shall be used for reporting purposes.

2. Characterization or Description. When a member is separated under this provision, characterization of service as Honorable or General (under honorable conditions) is authorized except when an Entry-Level Separation is required under section C. of Part 2.

3. Procedures. The Notification Procedures (section B. of Part 3) shall be used.

K. Misconduct

1. Basis

a. Reasons. A member may be separated for misconduct when it is determined under the guidance set forth in section A. of Part 2 that the member is unqualified for further military service by reason of one or more of the following circumstances:

(1) Minor Disciplinary Infractions. A pattern of misconduct consisting solely of minor disciplinary infractions. If separation of a member in entry-level status is warranted solely by reason of minor

disciplinary infractions, the action should be processed under Entry-Level Performance and Conduct (section F. of this enclosure, above).

(2) A pattern of Misconduct. A pattern of misconduct consisting of (a) discreditable involvement with civil or military authorities or (b) conduct prejudicial to good order and discipline.

(3) Commission of a Serious Offense. Commission of a serious military or civilian offense if in the following circumstances:

(a) The specific circumstances of the offense warrant separation; and

(b) A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial (reference (q)).

(4) Civilian Conviction

(a) Conviction by civilian authorities or action taken that is tantamount to a finding of guilty, including similar adjudications in juvenile proceedings, when the specific circumstances of the offense warrant separation, and the following conditions are present:

1 A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial (reference (q)); or

2 The sentence by civilian authorities includes confinement for 6 months or more without regard to suspension or probation.

(b) Separation processing may be initiated whether or not a member has filed an appeal of a civilian conviction or has stated an intention to do so. Execution of an approved separation should be withheld pending outcome of the appeal or until the time for appeal has passed, but the member may be separated before final action on the appeal upon request of the member or upon direction of the Secretary concerned.

b. Reporting. The Deputy Assistant Secretary of Defense (Military Manpower & Personnel Policy), Office of the ASD(P&R), shall require separate reports under each subparagraph in paragraph K.1.a. for misconduct by reason of drug abuse, unauthorized absence, and such other categories as may be appropriate.

c. Related Separations. Homosexual conduct shall be processed under section H. Misconduct involving a fraudulent enlistment is considered under subsection E.4., above.

2. Counseling and Rehabilitation. Separation processing for a pattern of misconduct (subparagraph K.1.a. (1) and (2) of this enclosure, above) may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. If the sole basis of separation is a single offense (subparagraph K.1.a. (3)) or a civilian conviction or a similar juvenile adjudication (subparagraph K.1.a. (4)), the counseling and rehabilitation requirements are not applicable.

3. Characterization or Description. Characterization of service normally shall be Under Other Than Honorable Conditions, but characterization as General (under honorable conditions) may be warranted under the guidelines in section C. of Part 2. For respondents who have completed entry-level status, characterization of service as Honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate. In such cases, separations for

misconduct with an Honorable characterization shall be approved by a commander exercising general court-martial jurisdiction or higher authority as specified by the Secretary concerned. (As an exception, the Secretary concerned may authorize general court-martial convening authorities to delegate authority to the special court-martial convening authorities to approve separations with service characterized as Honorable when the sole evidence of misconduct is command-directed urinalysis results, which cannot be used for characterization of service, or when an administrative discharge board has recommended separation with an Honorable discharge.) When characterization of service Under Other than Honorable Conditions is not warranted for a member in entry-level status under section C. of Part 2, the separation shall be described as an Entry-Level Separation.

4. Procedures. The Administrative Board Procedure (section C. of Part 3) shall be used; however, use of the Notification Procedure (section B. of Part 3) is authorized if characterization of service Under Other Than Honorable Conditions is not warranted under section C. of Part 2.

L. Separation in Lieu of Trial by Court-Martial

1. Basis. A member may be separated upon request of trial by court-martial if charges have been preferred with respect to an offense for which a punitive discharge is authorized and it is determined that the member is unqualified for further military service under the guidance set forth in section A. of Part 2. This provision may not be used when section B. of paragraph 127c of the Manual for Courts-Martial (reference (q)) provides the sole basis for a punitive discharge unless the charges have been referred to a court-martial empowered to adjudge a punitive discharge.

2. Characterization or Description. Characterization of service normally shall be Under Other Than Honorable Conditions, but characterization as General (under honorable conditions) may be warranted under the guidelines in section C. of Part 2. For respondents who have completed entry-level status, characterization of service as Honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate. When characterization of service Under Other Than Honorable Conditions is not warranted for a member in entry level status under section C. of Part 2, the separation shall be described as an Entry Level Separation.

3. Procedures

a. The request for discharge must be submitted in writing and signed by the member.

b. The member shall be afforded opportunity to consult with counsel qualified under Article 27(b)(1) of the UCMJ (reference (d)). If the member refuses to do so, counsel shall prepare a statement to this effect, which shall be attached to the file, and the member shall state that he or she has waived the right to consult with counsel.

c. Except when the member has waived the right to counsel, the request shall be signed by counsel.

d. In the written request, the member shall state that he or she understands the following:

(1) The elements of the offense or offenses charged;

(2) That characterization of service Under Other Than Honorable Conditions is authorized; and

(3) The adverse nature of such a characterization and possible consequences thereof.

e. The Secretary concerned shall also require that one or both of the following matters be included in the request:

(1) An acknowledgment of guilt of one or more of the offenses or any lesser included offenses for which a punitive discharge is authorized; or

(2) A summary of the evidence or list of documents (or copies thereof) provided to the member pertaining to the offenses for which a punitive discharge is authorized.

f. The Separation Authority shall be a commander exercising general court-martial jurisdiction or higher authority as specified by the Secretary concerned. (As an exception, the Secretary concerned may authorize general court-martial convening authorities to delegate authority to the special court-martial convening authorities to approve requests for discharge in the case of enlisted members who have been absent without leave for more than 30 days, have been dropped from the rolls of their units as absent in desertion, have been returned to military control, are assigned to a regional personnel control/separation processing facility, and are charged only with being absent without leave for more than 30 days.)

g. Statements by the member or the member's counsel submitted in connection with a request under this subsection are not admissible against the member in a court-martial except as authorized under Military Rule of Evidence 410, Manual for Courts-Martial (reference (q)).

M. Security

1. Basis. When retention is clearly inconsistent with the interest of national security, a member may be separated by reason of security and under conditions and procedures established by the Secretary of Defense in DoD 5200.2-R (reference (r)).

2. Characterization or Description. Characterization of service or description of a separation shall be in accordance with section C. of Part 2.

N. Unsatisfactory Participation in the Ready Reserve

1. Basis. A member may be separated for unsatisfactory participation in the Ready Reserve under criteria established by the Secretary concerned under DoD Directive 1215.13 (reference (p)).

2. Characterization or Description. Characterization of service or description of a separation shall be in accordance with section C. of Part 2 and DoD Directive 1215.13 (reference (p)).

3. Procedures. The Administrative Board Procedure (section C. of Part 3) shall be used, except that the Notification Procedure (section B. of Part 3) may be used if characterization of service Under Other Than Honorable Conditions is not warranted under section C. of Part 2.

O. Secretarial Plenary Authority

1. Basis. Notwithstanding any limitation on separations provided in this Directive, the Secretary concerned may direct the separation of any member prior to expiration of term of service after determining it to be in the best interests of the Service.

2. Characterization or Description. Honorable or General (under honorable conditions) as warranted under section C. of Part 2 unless an Entry Level Separation is required under section C. of Part 2.

3. Procedures. Prior to involuntary separation, the Notification Procedure (section B. of Part 3) shall be used, except the procedure for requesting an Administrative Board (paragraph B.I.g. of Part 3) is not applicable.

P. Reasons Established by the Military Departments

1. Basis. The Military Departments may establish additional reasons for separation for circumstances not otherwise provided for in this Directive to meet their specific requirements, subject to approval by the ASD(P&R).

2. Counseling and Rehabilitation. Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records except when the Military Department concerned provides in its implementing document that counseling and rehabilitation requirements are not applicable for the specific reason for separation.

3. Characterization or Description. Characterization of service or description of a separation shall be in accordance with section C. of Part 2.

4. Procedures. The procedures established by the Military Departments shall be consistent with the procedures contained in this Directive insofar as practicable.

Q. Weight Control Failure

1. Basis. A member may be separated for failure to meet the weight control standards established under DoD Directive 1308.1, when it is determined that the member is unqualified for further military service and meets both of the following conditions:

a. The member is not medically diagnosed with a medical condition that precludes or interferes with weight control. Members with a medically diagnosed condition that precludes or interferes with weight control may be separated either through medical channels, if appropriate, or under the guidance in paragraph C.4.h. of this enclosure, above.

b. The member fails to meet weight control standards, and the sole reason for separation is failure to meet the weight control standard.

2. Counseling and Rehabilitation. Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

3. Characterization or Description. Honorable, unless characterization of service as General (under honorable conditions) is warranted under section C. of Part 2 on the basis of numerical scores accumulated in a formal, service-wide rating system that evaluated conduct and performance on a regular basis, or when an entry level separation is required under section C. of Part 2.

4. Procedures. The Notification Procedure (section B. of Part 3) shall be used.

PART 2

GUIDELINES ON SEPARATION AND CHARACTERIZATION

A. Separation

1. Scope

This general guidance applies when referenced in Part 1. Further guidance is set forth under the specific reasons for separation in Part 1.

2. Guidance

a. There is a substantial investment in the training of persons enlisted or inducted into the Military Services. As a general matter, reasonable efforts at rehabilitation should be made prior to initiation of separation proceedings.

b. Unless separation is mandatory, the potential for rehabilitation and further useful military service shall be considered by the Separation Authority and, where applicable, the Administrative Board. If separation is warranted despite the potential for rehabilitation, consideration should be given to suspension of the separation, if authorized.

c. Counseling and rehabilitation efforts are a prerequisite to initiation of separation proceedings only insofar as expressly set forth under specific requirements for separation in Part 1. An alleged or established inadequacy in previous rehabilitative efforts does not provide a legal bar to separation.

d. The following factors may be considered on the issue of retention or separation, depending on the circumstances of the case:

(1) The seriousness of the circumstances forming the basis for initiation of separation proceedings, and the effect of the member's continued retention on military discipline, good order, and morale.

(2) The likelihood of continuation or recurrence of the circumstances forming the basis for initiation of separation proceedings.

(3) The likelihood that the member will be a disruptive or undesirable influence in present or future duty assignments.

(4) The ability of the member to perform duties effectively in the present and in the future, including potential for advancement or leadership.

(5) The member's rehabilitative potential.

(6) The member's entire military record.

(a) This may include:

1 Past contributions to the Service, assignments, awards and decorations, evaluation ratings, and letters of commendation;

2 Letters of reprimand or admonition, counseling records, records of nonjudicial punishment, records of conviction by court-martial and records of involvement with civilian authorities; and

3 Any other matter deemed relevant by the Board, if any, or the Separation Authority, based upon the specialized training, duties, and experience of persons entrusted by this Directive with recommendations and decisions on the issue of separation or retention.

(b) The following guidance applies to consideration of matter under subparagraph A.2.d.(6)(a):

1 Adverse matter from a prior enlistment or period of military service, such as records of nonjudicial punishment and convictions by courts-martial, may be considered only when such records would have a direct and strong probative value in determining whether separation is appropriate. The use of such records ordinarily shall be limited to those cases involving patterns of conduct manifested over an extended period of time.

2 Isolated incidents and events that are remote in time normally have little probative value in determining whether administrative separation should be effected.

3. Limitations on separation actions. A member may not be separated on the basis of the following:

a. Conduct that has been the subject of judicial proceedings resulting in the acquittal or action having the effect thereof except in the following circumstances:

(1) When such action is based upon a judicial determination not going to the guilt or innocence of the respondent; or

(2) When the judicial proceeding was conducted in a State or foreign court and the separation is approved by the Secretary concerned; or

(3) When the acquittal from the judicial proceedings was based on a finding of not guilty only by reason of lack of mental responsibility. Members in this category normally shall be separated under Secretarial plenary authority (Enclosure 3, Part 1, Section O) unless separation for disability (Enclosure 3, Part 1, Section D) is appropriate.

b. Conduct that has been the subject of a prior Administrative Board in which the Board entered an approved finding that the evidence did not sustain the factual allegations concerning the conduct except when the conduct is the subject of a rehearing ordered on the basis of fraud or collusion; or

c. Conduct that has been the subject of an administrative separation proceeding resulting in a final determination by a Separation Authority that the member should be retained, except in the following circumstances:

(1) When there is subsequent conduct or performance forming the basis, in whole or in part, for a new proceeding;

(2) When there is new or newly discovered evidence that was not reasonably available at the time of the prior proceeding; or

(3) When the conduct is the subject of a rehearing ordered on the basis of fraud or collusion.

B. Suspension of Separation

1. Suspension

a. Unless prohibited by this Directive, a separation may be suspended for a specified period of not more than 12 months by the Separation Authority or higher authority if the circumstances of the case indicate a reasonable likelihood of rehabilitation.

b. During the period of suspension, the member shall be afforded an opportunity to meet appropriate standards of conduct and duty performance.

c. Unless sooner vacated or remitted, execution of the approved separation shall be remitted upon completion of the probationary period, upon termination of the member's enlistment or period of obligated service, or upon decision of the Separation Authority that the goal of rehabilitation has been achieved.

2. Action during the period of suspension

a. During the period of suspension, if there are further grounds for separation under Part 1, one or more of the following actions may be taken:

(1) Disciplinary action;

(2) New administrative action; or

(3) Vacation of the suspension accompanied by execution of the separation if the member engages in conduct similar to that for which separation was approved (but suspended) or otherwise fails to meet appropriate standards of conduct and duty performance.

b. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and shall be afforded the opportunity to consult with counsel (as provided in paragraph B.1.f. of Part 3) and to submit a statement in writing to the Separation Authority. The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. If the respondent identifies specific legal issues for consideration by the Separation Authority, the matter shall be reviewed by a judge advocate or civilian lawyer employed by the government prior to final action by the Separation Authority.

C. Characterization of Service or Description of Separation

1. Types of characterization or description

a. At separation, the following types of characterization of service or description of separation are authorized under this Directive:

(1) Separation with characterization of service as Honorable, General (under honorable conditions), or Under Other Than Honorable Conditions.

(2) Entry Level Separation.

(3) Order of release from the custody and control of the Military Services by reason of void enlistment or induction.

(4) Separation by being dropped from the rolls of the Service.

b. Any of the types of separation listed in this section may be used in appropriate circumstances unless a limitation is set forth in this section or in Part 1 (Reasons for Separation).

2. Characterization of service

a. General considerations

(1) Characterization at separation shall be based upon the quality of the member's service, including the reason for separation and guidance in paragraph C.2.b., below, subject to the limitations set forth under various reasons for separation in Part 1. The quality of service

will be determined in accordance with standards of acceptable personal conduct and performance of duty for military personnel. These standards are found in the UCMJ (reference (d)), directives and regulations issued by the Department of Defense and the Military Departments, and the time-honored customs and traditions of military service.

(2) The quality of service of a member on active duty or active duty for training is affected adversely by conduct that is of a nature to bring discredit on the Military Services or is prejudicial to good order and discipline, regardless of whether the conduct is subject to UCMJ jurisdiction. Characterization may be based on conduct in the civilian community, and the burden is on the respondent to demonstrate that such conduct did not adversely affect the respondent's service.

(3) The reasons for separation, including the specific circumstances that form the basis for the separation, shall be considered on the issue of characterization. As a general matter, characterization will be based upon a pattern of behavior rather than an isolated incident. There are circumstances, however, in which the conduct or performance of duty reflected by a single incident provides the basis for characterization.

(4) Due consideration shall be given to the member's age, length of service, grade, aptitude, physical and mental condition, and the standards of acceptable conduct and performance of duty.

b. Types of characterization

(1) Honorable. The Honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate. In the case of an Honorable Discharge, an Honorable Discharge Certificate (DD Form 256) will be awarded and a notation will be made on the appropriate copies of the DD Form 214/5 in accordance with DoD Directive 1336.1 (reference (s)).

(2) General (under honorable conditions). If a member's service has been honest and faithful, it is appropriate to characterize that service under honorable conditions. Characterization of service as General (under honorable conditions) is warranted when significant negative aspects of the member's

conduct or performance of duty outweigh positive aspects of the member's military record.

(3) Under Other Than Honorable Conditions.

(a) This characterization may be issued in the following circumstances:

1 When the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of members of the Military Services.

2 When the reason for separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected of members of the Military Services. Examples of factors that may be considered include the use of force or violence to produce serious bodily injury or death, abuse of a special position of trust, disregard by a superior of customary superior-subordinate relationships, acts or omissions that endanger the security of the United States or the health and welfare of other members of the Military Services, and deliberate acts or omissions that seriously endanger the health and safety of other persons.

(b) This characterization is authorized only if the member has been afforded the opportunity to request an Administrative Board, except as provided in section L. of Part 1 (Separation in Lieu of Trial by Courts-Martial).

c. Limitations on characterization. Except as otherwise provided in this paragraph, characterization will be determined solely by the member's military record during the current enlistment or period of service to which the separation pertains, plus any extensions thereof prescribed by law or regulation or effected with the consent of the member.

(1) Prior service activities, including records of conviction by courts-martial, records of absence without leave, or commission of other offenses for which punishment was not imposed shall not be considered on the issue of characterization. To the extent that such matters are considered on the issue of retention or separation (subsection A.2. of this Part), the record of proceedings may reflect express direction that such information shall not be considered on the issue of characterization.

(2) Preservice activities may not be considered on the issue of characterization except as follows: in a proceeding concerning fraudulent entry into military service

(subsection E.4. of Part 1), evidence of preservice misrepresentations about matters that would have precluded, postponed, or otherwise affected the member's eligibility for enlistment or induction may be considered on the issue of characterization.

(3) The limitations in subsection A.3. of this Part, above, as to matters that may be considered on the issue of separation are applicable to matters that may be considered on the issue of characterization.

(4) When the sole basis for separation is a serious offense that resulted in a conviction by a court-martial that did not impose a punitive discharge, the member's service may not be characterized Under Other Than Honorable Conditions unless such characterization is approved by the Secretary concerned.

(5) Conduct in the civilian community of a member of a Reserve component who is not on active duty or active duty for training may form the basis for characterization Under Other Than Honorable Conditions only if such conduct affects directly the performance of military duties. Such conduct may form the basis of characterization as General (under honorable conditions) only if such conduct has an adverse impact on the overall effectiveness of the service, including military morale and efficiency.

(6) A member's voluntary submission to a DoD treatment and rehabilitation program and voluntarily disclosed evidence of prior personal drug use by the member as part of a course of treatment in such a program may not be used against the member on the issue of characterization. This limitation does not apply to:

(a) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been introduced first by the member.

(b) Taking action based on independently derived evidence, including evidence of continued drug abuse after initial entry into the a treatment and rehabilitation program.

(7) The results of mandatory urinalysis may be used on the issue of characterization except as provided in DoD Directive 1010.1 (reference (t)).

3. Uncharacterized Separation

a. Entry-Level Separation

(1) A separation shall be described as an Entry-Level Separation if separation processing is initiated while a member is in entry-level status, except in the following circumstances:

(a) When characterization Under Other than Honorable Conditions is authorized under the reason for separation (Part 1) and is warranted by the circumstances of the case; or

(b) The Secretary concerned, on a case-by-case basis, determines that characterization of service as Honorable is clearly warranted by the presence of unusual military duty. The characterization is authorized when the member is separated under Part 1 by reason of selected changes in service obligation (section B.), Convenience of the Government (section C.), Disability (section D.), Secretarial Plenary Authority (section O.), or an approved reason established by the Military Department (section P.).

(2) In time of mobilization or in other appropriate circumstances, the ASD(P&R) may authorize the Secretary concerned to delegate the authority in subparagraph C.3.a.(1) (b), above, (concerning the Honorable Characterization) to a general court-martial convening authority with respect to members serving in operational units.

(3) With respect to administrative matters outside this Directive that require a characterization as Honorable or General, an Entry-Level Separation shall be treated as the required characterization. This provision does not apply to administrative matters that expressly require different treatment of an Entry-level Separation except as provided in subparagraph C.3.a.(4), below.

(4) In accordance with 10 U.S.C. 1163 (reference (u)), an Entry-Level Separation for a member of a Reserve component separated from the Delayed Entry Program is "under honorable conditions."

b. Void Enlistments or Inductions. A member shall not receive a discharge, characterization of service at separation, or an Entry-Level Separation of the enlistment or induction is void except when a constructive enlistment arises and such action is required under subparagraph C.3.b.(3), below. If characterization or an Entry-Level Separation is not required, the separation shall be described as an order of release from custody or control of the Military Services.

(1) An enlistment is void in the following circumstances:

(a) If it was effected without the voluntary consent of a person who has the capacity to understand the significance of enlisting in the Military Services, including enlistment of a person who is intoxicated or insane at the time of enlistment. 10 U.S.C. §504 (reference (v)); Article 2(b), UCMJ (reference (d)).

(b) If the person is under 17 years of age. 10 U.S.C. §505 (reference (w)).

(c) If the person is a deserter from another Military Service. 10 U.S.C. §504 (reference (v)).

(2) Although an enlistment may be void at its inception, a constructive enlistment shall arise in the case of a person serving with a Military Service who:

(a) Submitted voluntarily to military authority;

(b) Met the mental competency and minimum 10 U.S.C. age qualifications of Sections 504 and 505 of (references (v) and (w)), at the time of voluntary submission to military authority;

(c) Received military pay or allowances; and

(d) Performed military duties.

(3) If an enlistment that is void at its inception is followed by a constructive enlistment within the same term of service, characterization of service or description of separation shall be in accordance with subsection C.2. or paragraph C.3.a. of this Part, as appropriate; however, if the enlistment was void by reason of desertion from another Military Service, the member shall be separated by an order of release from the custody and control of the Service regardless of any subsequent constructive enlistment. The occurrence of such a constructive enlistment does not preclude the Military Departments, in appropriate cases, from either retaining the member or separating the member under section E. of Part 1 on the basis of the circumstances that occasioned the original void enlistment or upon any other basis for separation provided in this Directive.

c. Dropping from the rolls. A member may be dropped from the rolls of the Service when such action is authorized by the Military Department concerned and a characterization of service or other description of separation is not authorized or warranted.

PART 3

PROCEDURES FOR SEPARATION

A. Scope

1. The supplementary procedures in this Part are applicable only when required under a specific reason for separation (Part 1). These procedures are subject to the requirements set forth in Part 1 with respect to specific reasons for separation.

2. When a member is processed on the basis of multiple reasons for separation, the following guidelines apply to procedural requirements (including procedural limitations on characterization of service or description of separation):

a. The requirements for each reason will be applied to the extent practicable.

b. If a reason for separation set forth in the notice of proposed action requires processing under the Administrative Board Procedure (section C., below), the entire matter shall be processed under section C.

c. If more than one reason for separation is approved, the guidance on characterization that provides the greatest latitude may be applied.

d. When there is any other clear conflict between a specific requirement applicable to one reason and a general requirement applicable to another reason, the specific requirement shall be applied.

e. If a conflict in procedures cannot be resolved on the basis of the foregoing principles, the procedure most favorable to the respondent shall be used.

B. Notification Procedure

1. Notice: If the Notification Procedure is initiated under Part 1, the respondent shall be notified in writing of the matter set forth in this section.

a. The basis of the proposed separation, including the circumstances upon which the action is based and a reference to the applicable provisions of the Military Department's implementing regulation.

b. Whether the proposed separation could result in discharge, release from active duty to a reserve component, transfer from the Selected Reserve to the IRR, release from custody or control of the Military Services, or other form of separation.

c. The least favorable characterization of service or description of separation authorized for the proposed separation.

d. The right to obtain copies of documents that will be forwarded to the Separation Authority supporting the basis of the proposed separation. Classified documents may be summarized.

e. The respondent's right to submit statements.

f. The respondent's right to consult with counsel qualified under Article 27(b)(1) of the UCMJ (reference (d)). Nonlawyer counsel may be appointed when the respondent is deployed aboard a vessel or in similar circumstances of separation from sufficient judge advocate resources as determined under standards and procedures specified by the Secretary concerned. The respondent also may consult with civilian counsel retained at the member's own expense.

g. If the respondent has 6 or more years of total active and reserve military service, the right to request an Administrative Board (section C.).

h. The right to waive paragraphs d., e., f. or g., above, after being afforded a reasonable opportunity to consult with counsel, and that failure to respond shall constitute a waiver of the right.

2. Additional notice requirements

a. If separation processing is initiated on the basis of more than one reason under Part 1, the requirements of paragraph B.1.a. apply to all proposed reasons for separation.

b. If the respondent is in civil confinement, absent without leave, or in a reserve component not on active duty or upon transfer to the IRR, the relevant notification procedures in sections D., E., or F. of this Part apply.

c. Additional notification requirements are set forth in Part 1, sections C. and D., when characterization of service as General (under honorable conditions) is authorized and the member is processed for separation by reason of Convenience of the Government or Disability.

3. **Response.** The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. An extension may be granted upon a timely showing of good cause by the respondent. The decision of the respondent on each of the rights set forth in paragraphs B.1.d. through g., above, and applicable provisions referenced in subsection 2. shall be recorded and signed by the respondent and counsel, subject to the following limitations:

a. If notice by mail is authorized under sections D., E., or F. of this Part and the respondent fails to acknowledge receipt or submit a timely reply, that fact shall constitute a waiver of rights and an appropriate notation shall be recorded on a retained copy of the appropriate form.

b. If the respondent declines to respond as to the selection of rights, such declination shall constitute a waiver of rights and an appropriate notation will be made on the form provided for respondent's reply. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made.

4. Separation Authority

a. The Separation Authority for actions initiated under the Notification Procedure shall be a special court-martial convening authority or higher authority. Also, subject to approval by the ASD(P&R), the Secretary concerned also may authorize a commanding officer in grade 0-5 or above, or a commanding officer in the grade of 0-4 who is on an approved recommended list for promotion to 0-5 and who is assigned to command a unit authorized a commanding officer in the grade of 0-5 or above, with a judge advocate or legal advisor available to the command, to act as a Separation Authority for a specified reason for separation. If the case was initiated under the Administrative Board Procedure and the member waived the right to a hearing under subsection C.4., below, the Separation Authority shall be an official designated under subsection C.6., below.

b. The action of the Separation Authority shall be recorded..

c. The Separation Authority shall determine whether there is sufficient evidence to verify the allegations set forth in the notification of the basis for separation. If an allegation is not supported by a preponderance of the evidence, it may not be used as a basis for separation.

d. If there is a sufficient factual basis for separation, the Separation Authority shall determine whether separation is warranted under the guidance in sections A. and B. of Part 2. On the basis of that guidance, the Separation Authority shall direct one of the following actions:

(1) Retention;

(2) Separation for a specific reason under Part 1;

(3) Suspended separation in accordance with the guidance in section B. of Part 2.

e. If the Separation Authority directs separation or suspended separation on the basis of more than one reason under Part 1, the Separation Authority shall designate the most appropriate basis as the primary reason for reporting purposes.

f. If separation or a suspended separation is directed, the Separation Authority shall assign a characterization or description in accordance with section C. of Part 2.

g. Except when characterization Under Other Than Honorable Conditions is directed or the member is separated on the basis of homosexual conduct or a void enlistment or induction, the Secretary concerned may authorize the Separation Authority or higher authority to make a recommendation or determination as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total military obligation. This option applies in cases involving separation from active duty or from the Selected Reserve. Section E. of this Part is applicable if such action is approved.

C. Administrative Board Procedure

1. **Notice.** If an Administrative Board is required, the respondent shall be notified in writing of the matters in this section.

a. The basis of the proposed separation, including the circumstances upon which the action is based and reference to the application provisions of the Military Department's implementing regulation.

b. Whether the proposed separation could result in discharge, release from active duty to a Reserve component, transfer from the Selected Reserve to the IRR, release from the custody or control of the Military Services, or other form of separation.

c. The least favorable characterization of service or description of separation authorized for the proposed separation.

d. The respondent's right to consult with counsel as prescribed in paragraph B.1.f. of this Part. However, nonlawyer counsel may not represent a respondent before an Administrative Board unless (1) the respondent expressly declines appointment of counsel qualified under Article 27(b)(1) of the UCMJ (reference (d)) and requests a specific nonlawyer counsel; or (2) the Separation Authority assigns nonlawyer counsel as assistant counsel.

e. The right to obtain copies of documents that will be forwarded to the Separation Authority supporting the basis of the proposed separation. Classified documents may be summarized.

f. The respondent's right to request a hearing before an Administrative Board.

g. The respondent's right to present written statements instead of board proceedings.

h. The respondent's right to representation at the Administrative Board either by military counsel appointed by the Convening Authority or by military counsel of the respondent's own choice (if counsel of choice is determined to be reasonably available under regulations of the Secretary concerned) but not both.

i. The right to representation at the Administrative Board by civilian counsel at the respondent's own expense.

j. The right to waive the rights in paragraphs d. through i., above.

k. That failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of the rights in paragraphs d. through i., above.

l. Failure to appear without good cause at a hearing constitutes waiver of the right to be present at the hearing.

2. Additional notice requirements

a. If separation processing is initiated on the basis of more than one reason under Part 1, the requirements of paragraph C.1.a. apply to all proposed reasons for separation.

b. If the respondent is in civil confinement, absent without leave, or in a reserve component not on active duty or upon transfer to the IRR, the relevant notification procedures in sections D., E., or F. of this Part apply.

c. Additional notification requirements are set forth in sections C. and D., Part 1, when characterization of service as General (under honorable conditions) is authorized and the member is processed for separation by reason of Convenience of the Government or Disability.

3. Response. The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. An extension may be granted upon a timely showing of good cause by the respondent. The decision of the respondent on each of the rights set forth in paragraphs 1.d. through 1.i., above, and applicable provisions referenced in subsection 2., above, shall be recorded and signed by the respondent and counsel, subject to the following limitations:

a. If notice by mail is authorized under sections D., E., or F. of this Part and the respondent fails to acknowledge receipt or submit a timely reply, that fact shall constitute a waiver of rights and an appropriate notation shall be recorded on a retained copy of the appropriate form.

b. If the respondent declines to respond as to the selection of rights, such declination shall constitute a waiver of rights and an appropriate notation will be made on the form provided for respondent's reply. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made.

4. Waiver.

a. If the right to a hearing before an Administrative Board is waived, the case will be processed under subsection B.4. of this Part (Notification Procedure), but the Separation Authority in such cases shall be an official designated under subsection C.6.

b. When authorized by the Secretary concerned, a respondent entitled to an Administrative Board may exercise a conditional waiver after a reasonable opportunity to consult with counsel under paragraph C.1.d. A conditional waiver is a statement initiated by a respondent waiving the right to a board proceeding contingent upon receiving a characterization of service or description of separation higher than the least favorable characterization or description authorized for the basis of separation set forth in the notice to the respondent.

5. Hearing procedure. If a respondent requests a hearing before an Administrative Board, the following procedures are applicable:

a. Composition

(1) The Convening Authority shall appoint to the Administrative Board at least three experienced commissioned, warrant, or noncommissioned officers. Enlisted personnel appointed to the Board shall be in grade E-7 or above, and shall be senior to the respondent. At least one member of the Board shall be serving in the grade of O-4 or higher, and a majority shall be commissioned or warrant officers. The senior member shall be the president of the board. The Convening Authority also may appoint to the Board a nonvoting recorder. A nonvoting legal advisor may be appointed to assist the Board if authorized by the Secretary concerned.

(2) If the respondent is an enlisted member of a Reserve component or holds an appointment as a Reserve commissioned or warrant officer, the Board shall include at least one Reserve officer as a voting member. Additionally, all Board members will be commissioned officers if an Under Other Than Honorable Characterization (UOTHC) from the Reserve component is authorized to be issued. (See 10 U.S.C., Section 1163 (reference (u))). Voting members shall be senior to the respondent's reserve grade (See 10 U.S.C. Section 266 (reference (x))).

(3) The Convening Authority shall insure that the opportunity to serve on Administrative Boards is given to women and minorities. The mere appointment or failure to appoint a member of such a group to the Board, however, does not provide a basis for challenging the proceeding.

(4) The respondent may challenge a voting member of the Board or the legal advisor, if any, for cause only.

b. Presiding Officer. The president shall preside and rule finally on all matters of procedure and evidence, but the rulings of the president may be overruled by a majority of the Board. If appointed, the legal advisor shall rule finally on all matters of evidence and challenges except challenges to him or herself.

c. Witnesses

(1) The respondent may request the attendance of witnesses in accordance with the implementing instructions of the Military Department concerned.

(2) In accordance with such instructions, the respondent may submit a written request for temporary duty (TDY) or invitational travel orders for witnesses. Such a request shall obtain the following matter:

(a) A synopsis of the testimony that the witness is expected to give.

(b) An explanation of the relevance of such testimony to the issues of separation or characterization.

(c) An explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination.

(3) The Convening Authority may authorize expenditure of funds for production of witnesses only if the presiding officer (after consultation with a judge advocate) or the legal advisor (if appointed) determines that:

(a) The testimony of a witness is not cumulative;

(b) The personal appearance of the witness is essential to a fair determination on the issues of separation or characterization;

(c) Written or recorded testimony will not accomplish adequately the same objective;

(d) The need for live testimony is substantial, material, and necessary for a proper disposition of the case; and

(e) The significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness, the timing of the request for production of the witness, the potential delay in the proceeding that may be caused by producing the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(4) If the Convening Authority determines that the personal testimony of a witness is required, the hearing will be postponed or continued if necessary to permit the attendance of the witness.

(5) The hearing shall be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness if a witness requested by the respondent is unavailable in the following circumstances:

(a) When the presiding officer determines that the personal testimony of the witness is not required;

(b) When the commanding officer of a military witness determines that military necessity precluded the witness' attendance at the hearing; or

(c) When a civilian witness declines to attend the hearing.

(6) Subparagraph C.5.c., above, does not authorize a Federal employee to decline to appear as a witness if directed to do so in accordance with applicable procedures of the employing agency.

d. Record of Proceedings. In cases where the Board recommends separation, the record of the proceedings shall be kept in summarized form unless a verbatim record is required by the Secretary concerned. In cases where the Board recommends retention, a record of the proceedings is optional unless required by the Secretary concerned. However, a summarized or verbatim record shall be prepared in any case where the board recommends retention and the Separation Authority elects to forward the matter to the Secretary concerned under subparagraph C.6.d.(2)(b), below. The Board reporter shall retain all materials necessary to prepare a transcript should the Separation Authority elect to forward the case to the Secretary. In all cases, the findings and recommendations of the Board shall be in verbatim form.

e. Presentation of Evidence. The rules of evidence for courts-martial and other judicial proceedings are not applicable before an Administrative Board. Reasonable restriction shall be observed, however, concerning relevancy and competency of evidence.

f. Rights of the Respondent

(1) The respondent may testify in his or her own behalf, subject to the provisions of Article 31(a), UMCJ (reference (d)).

(2) At any time during the proceedings, the respondent or counsel may submit written or recorded matter for consideration by the Board.

(3) The respondent or counsel may call witnesses in his or her behalf.

(4) The respondent or counsel may question any witness who appears before the Board.

(5) The respondent or counsel may present argument prior to when the Board closes the case for deliberation on findings and recommendations.

g. Findings and Recommendations

(1) The Board shall determine its findings and recommendations in closed sessions. Only voting members of the board shall be present.

(2) The Board shall determine whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence.

(3) The Board shall then determine under the guidance in section A. of Part 2 whether the findings warrant separation with respect to the reason for separation set forth in the Notice. If more than one reason was contained in the Notice, there shall be a separate determination for each reason.

(4) The Board shall make recommendations on the following:

(a) Retention or Separation. The Board shall recommend retention or separation.

(b) Suspension of Separation. If the Board recommends separation, it may recommend that the separation be suspended in accordance with section B. of Part 2, but the recommendation of the Board as to suspension is not binding on the Separation Authority.

(c) Characterization of Service or Description of Separation. If separation or suspended separation is recommended, the Board shall recommend a characterization of service or description of separation as authorized in Part 1 (Reasons for Separation) in accordance with the guidance in section C. of Part 2.

(d) Transfer to the Ready Reserve. Except when the Board has recommended separation on the basis of homosexual conduct or has recommended characterization of service Under Other Than Honorable Conditions, the Secretary concerned may authorize the Board to make a recommendation as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total military obligation. This option applies to cases involving separation from active duty or from the Selected Reserve. Section E. of this Part is applicable if the action is approved.

6. Separation Authority

a. The Separation Authority for actions initiated under the Administrative Board Procedure shall be a general court-martial convening authority or higher authority. The Secretary concerned also may authorize a commanding officer in grade O-7 or above with a judge advocate or legal advisor available to his command to act as a separation authority in specified circumstances. When an Administrative Board recommends characterization of service as Honorable or General

(under honorable conditions), the Separation Authority may be exercised by an officer designated under subsection B.4. When the case has been initiated under the Notification Procedure and the hearing is a result of a request under paragraph B.1.g., the Separation Authority shall be as designated in subsection B.4.

b. In every case in which characterization of service Under Other Than Honorable Conditions is recommended, the record of the Board's proceedings will be reviewed by a judge advocate or civilian attorney employed by the Military Department prior to action by the Separation Authority. Such review is not required when another characterization is recommended unless the respondent identifies specific legal issues for consideration by the Separation Authority.

c. The respondent will be provided with a copy of the Board's statement of facts and recommendations.

d. The Separation Authority shall take action in accordance with this subparagraph, the requirements of Part 1 with respect to the reason for separation, and the guidance in Part 2 on separation and characterization.

(1) If the Separation Authority approves the recommendations of the Board on the issue of separation or characterization (or both) this constitutes approval of the Board's findings and recommendations under paragraph C.5.g. unless the Separation Authority expressly modifies such findings or recommendations.

(2) If the Board recommends retention, the Separation Authority may take one the following actions:

(a) Approve the recommendation.

(b) Forward the matter to the Secretary concerned with a recommendation for separation based upon the circumstances of the case. In such a case, the Secretary may direct retention or separation. If the Secretary approves separation, the characterization of service or description of separation will be Honorable, General (under honorable conditions) or an Entry Level Separation under the guidance in section C. of Part 2.

(3) If the Board recommends separation, the Separation Authority may:

(a) Approve the Board's recommendation;

(b) Approve the Board's recommendations, but modify the recommendations by one or more of the following actions when appropriate:

1 Approve the separation but suspend execution as provided in section B. of Part 2.

2 Change the character of service or description of separation to a more favorable characterization or description.

3 Change the Board's recommendation, if any, concerning transfer to the IRR.

(c) Disapprove the Board's recommendation and retain the respondent.

(4) If the Separation Authority approves the Board's findings and recommendations in whole or in part with respect to more than one reason under Part 1, the Separation Authority shall designate the most appropriate basis as the primary reason for reporting purposes.

(5) If the Separation Authority finds legal prejudice to a substantial right of the respondent or determines that the findings of the Board have been obtained by fraud or collusion, the case may be referred to a new board. No member of the new board shall have served on a prior board that considered the case. The Separation Authority may not approve findings and recommendations less favorable to the respondent than those rendered by the previous board unless the Separation Authority finds that fraud or collusion in the previous board is attributable to the respondent or an individual acting on the respondent's behalf.

D. Additional Provisions Concerning Members Confined by Civil Authorities

1. If proceedings under this Part have been initiated against a respondent confined by civil authorities, the case may be processed in the absence of the respondent. Paragraph C.5.e. of this Part is not applicable except insofar as such rights can be exercised by counsel on behalf of the respondent.

2. The following requirements apply:

a. The notice shall contain the matter set forth in subsection B.1. of this Part or subsection C.1. (Notice in the Administrative Board Procedure), as appropriate. The notice shall be delivered personally to the respondent or sent by registered mail or certified mail, return receipt requested (or by an equivalent form of notice if such service is not available for delivery by U.S. mail at an address outside the United States. If the member refuses to acknowledge receipt of notice, the individual who mails the notification

shall prepare a Sworn Affidavit of Service by Mail (see DoD Directive 1215.13, (reference (r)) which will be inserted in the member's personnel file together with PS Form 3800.

b. If delivered personally, receipt shall be acknowledged in writing by the respondent. If the respondent does not acknowledge receipt, the notice shall be sent by mail as provided in paragraph 2.a., above.

c. The notice shall state that the action has been suspended until a specific date (not less than 30 days from the date of delivery) in order to give the respondent the opportunity to exercise the rights set forth in the notice. If respondent does not reply by such date, the separation authority shall take appropriate action under subsection B.4. of this Part.

d. The name and address of the military counsel for appointed consultation shall be specified in the notice.

e. If the case involves entitlement to an Administrative Board, the respondent shall be notified that the board will proceed in the respondent's absence and that the case may be presented on respondent's behalf by counsel for the respondent.

E. Additional Requirements for Certain Members of Reserve Components

1. Members of reserve components not on active duty

a. If proceedings under this Chapter have been initiated against a member of a reserve component not on active duty, the case may be processed in the absence of the member in the following circumstances:

(1) At the request of the member;

(2) If the member does not respond to the notice of proceedings on or before the suspense date provided therein;
or

(3) If the member fails to appear at a hearing as provided in paragraph C.1.1..

b. The notice shall contain the matter set forth in subsections B.1. or C.1. of this Part, as appropriate.

c. If the action involves a transfer to the IRR under circumstances in which the procedures in this enclosure are applicable, the member will be notified that the character of service upon transfer to the IRR also will constitute the

character of service upon discharge at the completion of the military service obligation unless specified conditions established by the Secretary concerned are met.

2. Transfer to the IRR. Upon transfer to the IRR, the member will be notified of the following:

a. The character of service upon transfer from active duty or the Selected Reserve to the IRR, and that the character of service upon completion of the military service obligation will be the same unless specified conditions established by the Secretary concerned are met.

b. The date upon which the military service obligation will expire.

c. The date by which the member must submit evidence of satisfactory completion of the specified conditions.

3. If the member submits evidence of completion of the specified conditions but the Military Department proposes to issue a discharge other than an Honorable Discharge, the Notification Procedure shall be used. An Administrative Board is not required at this point notwithstanding the member's years of service.

4. If the member does not submit such information on or before the date specified in the notice, no further proceedings are required. The character of discharge at the completion of the military service obligation shall be the same as the character of service upon transfer from the Selected Reserve to the IRR.

5. The following requirements apply to the notices required by subsections E.1. and 2. of this Part.

a. Reasonable effort should be made to furnish copies of the notice to the member through personal contact by a representative of the command. In such a case, a written acknowledgment of the notice shall be obtained.

b. If the member cannot be contacted or refuses to acknowledge receipt of the notice, the notice shall be sent by registered or certified mail, return receipt requested (or by an equivalent form of notice if such service by U.S. Mail is not available for delivery at an address outside the United States) to the most recent address furnished by the member as an address for receipt or forwarding of official mail. The individual who mails the notification shall prepare a Sworn Affidavit of Service by Mail (see DoD Directive 1215.13 (reference (r))), which will be inserted in the member's personnel file together with PS Form 3800.

F. Additional Requirements for Members Beyond Military Control by Reason of Unauthorized Absence

1. Determination of applicability. If the general court-martial convening authority or higher authority determines that separation is otherwise appropriate under this Directive, a member may be separated without return to military control in one or more of the the following circumstances:

a. Absence without authority after receiving notice of initiation of separation processing.

b. When prosecution of a member who is absent without authority appears to be barred by the statute of limitations, Article 43, UCMJ (reference (d)).

c. When a member who is an alien is absent without leave and appears to have gone to a foreign country where the United States has no authority to apprehend the member under a treaty or other agreement.

2. Notice. Prior to execution of the separation under paragraphs 1.b. or 1.c., the member will be notified of the imminent action by registered mail or certified mail, return receipt requested (or by an equivalent form of Notice if such service by U.S. Mail is not available for delivery at an address outside the United States) to the member's last known address or to the next of kin under regulations prescribed by the Military Department concerned. The notice shall contain the matter set forth in subsections B.1. or C.1., as appropriate, and shall specify that the action has been suspended until a specific date (not less than 30 days from the date of mailing) in order to give the respondent the opportunity to return to military control. If the respondent does not return to military control by such date, the separation authority shall take appropriate action under subsection B.4. of this Part.

3. Members of reserve components. See 10 U.S.C. §1163 (reference (x)) with respect to limitations on separation of members of reserve components.

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned (reference (y)).

* 5. The guidelines in this enclosure do not apply to activities of
* Defense Criminal Investigative Organizations and other DoD law enforcement
* organizations, which are governed by DoD Instruction 5505.8 (reference (z)). *

B. DEFINITIONS

1. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. Commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

* 3. Homosexual. A person, regardless of sex, who engages in, attempts to
* engage in, has a propensity to engage in, or intends to engage in homosexual
acts.

* 4. Homosexual Conduct. "Homosexual conduct" is a homosexual act, a
* statement by the member that demonstrates a propensity or intent to engage in
homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person
* would believe (3) was intended to convey the statement (4) that a person
* engages in, attempts to engage in, or has a propensity or intent to engage in
* homosexual acts. This may include statements such as "I am a homosexual," "I
am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

d. "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.

* 5. Sexual Orientation. An abstract sexual preference for persons of
* a particular sex, as distinct from a propensity or intent to engage in
* sexual acts. *

* C. BASES FOR CONDUCTING INQUIRIES *

* 1. A commander will initiate an inquiry only if he or she has credible
* information that there is a basis for discharge. Credible information exists
* when the information, considering its source and the surrounding circum-
* stances, supports a reasonable belief that there is a basis for discharge.
* It requires a determination based on articulable facts, not just a belief or
* suspicion. *

* 2. A basis for discharge exists if: *

* a. The member has engaged in a homosexual act. *

* b. The member has said that he or she is a homosexual or bisexual,
* or made some other statement that indicates a propensity or intent to engage
* in homosexual acts; or *

* c. The member has married or attempted to marry a person of the same
* sex. *

* 3. Credible information does not exist, for example, when: *

* a. The individual is suspected of engaging in homosexual conduct,
* but there is no credible information, as described, to support that suspicion;
* or *

* b. The only information is the opinions of others that a member is
* homosexual; or *

* c. The inquiry would be based on rumor, suspicion, or capricious
* claims concerning a member's sexual orientation; or *

* d. The only information known is an associational activity such as
* going to a gay bar, possessing or reading homosexual publications, associating
* with known homosexuals, or marching in a gay rights rally in civilian clothes.
* Such activity, in and of itself, does not provide evidence of homosexual
* conduct. *

* 4. Credible information exists, for example, when: *

* a. A reliable person states that he or she observed or heard
* a Service member engaging in homosexual acts, or saying that he or she is a
* homosexual or bisexual or is married to a member of the same sex; or *

* b. A reliable person states that he or she heard, observed, or
* discovered a member make a spoken or written statement that a reasonable
* person would believe was intended to convey the fact that he or she engages
* in, attempts to engage in, or has a propensity or intent to engage in
* homosexual acts; or *

* c. A reliable person states that he or she observed behavior that
* amounts to a non-verbal statement by a member that he or she is a homosexual
* or bisexual; i.e., behavior that a reasonable person would believe was
* intended to convey the statement that the member engages in, attempts to
* engage in, or has a propensity or intent to engage in homosexual acts. *

D. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual. However, upon receipt of credible information of homosexual conduct (as described in section C., above) commanders or appointed inquiry officials may ask members if they engaged in such conduct. But the member should first be advised of the DoD policy on homosexual conduct (and rights under Article 31, UCMJ, if applicable). Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding, nor does it provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or have a propensity or intent to engage in homosexual acts.

6. The Service member bears the burden of proving, by a preponderance of the evidence, 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.

* E. LEGAL EFFECT

The procedures in this enclosure create no substantive or procedural rights.



Department of Defense DIRECTIVE

December 21, 1993 #
NUMBER 1332.30

SUBJECT: Separation of Regular Commissioned Officers

- References:
- (a) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," February 12, 1986 (hereby canceled)
 - (b) Chapter 60 and Sections 618, 630, 654, 827, and 831 of title 10, United States Code
 - (c) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980
 - (d) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992
 - (e) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"
 - (f) DoD Instruction 5505.8, "Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations," February 28, 1994

A. REISSUANCE AND PURPOSE

This Directive:

1. Reissues reference (a)
2. Implements Chapter 60 and Section 630 of reference (b) to update policy, responsibilities, and procedures governing the administrative separation of commissioned officers for substandard performance of duty, for an act or acts of misconduct or moral or professional dereliction, or in the interest of national security.
3. Implements Chapter 60 and Section 630 of reference (b) on the discharge of regular commissioned officers with less than 5 years active commissioned service in certain circumstances.

B. APPLICABILITY AND SCOPE

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD) and to the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.
2. Applies to regular commissioned officers of the Military Services.
3. Does not apply to commissioned warrant officers and retired commissioned officers of the Military Services.

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

D. POLICY

1. It is DoD policy to:

a. Promote the readiness of the Military Services by maintaining high standards of conduct and performance. An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the nation have placed in his or her patriotism, valor, fidelity, and competence. Commissioned officers are expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times.

b. Judge the suitability of persons to serve in the Armed Forces
* on the basis of their conduct and their ability to meet required standards *
* of duty performance and discipline. *

c. Separate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to:

(1) Ensure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline.

(2) Maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

2. Notwithstanding any other provision of this Directive, the Secretaries of the Military Departments concerned may discharge regular commissioned officers with less than 5 years active commissioned service from a Military Service when there is a need to reduce the number of officers in
* that Service to meet budgetary or force size requirements. The provisions of *
* Enclosure 6 do not apply to the discharge of probationary officers under this *
authority.

3. The Assistant Secretary of Defense for Personnel and Readiness (ASD(P&R)), in coordination with the Secretaries of the Military Departments, shall ensure that officers separated under this Directive are fully informed of assistance available from the Department of Defense to assist them in the transition to civilian life.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness shall supplement this Directive, as needed.

2. The Secretaries of the Military Departments shall:

a. Prescribe regulations consistent with the policy and procedures contained in this Directive.

"b. Ensure, through their military commanders, that the policies, standards and procedures of this Directive are applied consistently, that fact-finding inquiries are conducted properly, that no abuse of authority occurs, and that failure to follow the provisions of this Directive results in appropriate corrective action."

C. ~~X~~. Address any recommendations for policy changes in this Directive to the ASD(P&R).

F. PROCEDURES

Procedures and standards for implementation of the policy in section D., above, are in enclosures 2 through 8.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective February ²⁵~~8~~, 1994.

2. This Directive applies only to administrative separation proceedings initiated on or after February ²⁵~~8~~, 1994, unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.

3. Forward two copies of proposed implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.



Enclosures - 8

1. Definitions
2. Reasons for Separation
3. Procedures for Nonprobationary Commissioned Officers
4. Composition of Boards
5. Board of Inquiry Procedures
6. Procedures for Certain Probationary Commissioned Officers
7. Character of Discharge
8. Guidelines for Fact-Finding Inquiries into Homosexual Conduct

DEFINITIONS

1. Active Commissioned Service. Service on active duty as a commissioned officer in a grade above warrant officer, W-4.
2. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.
3. Commissioned Officer. An officer in any of the Military Services who holds a grade and office under a commission signed by the President, other than a commissioned warrant officer or retired commissioned officer.
4. Convening Authority. The Secretary of the Military Department concerned who may delegate this responsibility as appropriate.
5. Counsel. A lawyer qualified under 10 U.S.C. 827 (b)(1) (reference (b)) or a civilian lawyer retained at the commissioned officer's expense.
6. Drug Abuse. As defined in DoD Directive 1010.4 (reference (c)).
7. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
8. Homosexual Act
 - a. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and
 - b. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in paragraph 8.a., above.
9. Homosexual Conduct. 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.
10. Legal Advisor. A judge advocate qualified under 10 U.S.C. 827 (b)(1) (reference (b)) and appointed to assist a Board of Inquiry.
11. Nonprobationary Commissioned Officer. A commissioned officer other than a probationary commissioned officer.
12. Probationary Commissioned Officer. A Commissioned officer with less than 5 years of active commissioned service; however, a regular commissioned officer serving on active duty on September 14, 1981, shall be a probationary commissioned officer for a period of 3 years from the date of his or her appointment as a regular commissioned officer.
13. Propensity. 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.
14. Respondent. A commissioned officer required to show cause for retention on active duty.
15. Separation. Discharge, retirement, or resignation.

* 16. Sexual Orientation. An abstract sexual preference for persons of *
* a particular sex, as distinct from a propensity or intent to engage in *
* sexual acts. *

17. Show-Cause Authority. Any of the following as determined by the
Secretary of the Military Department concerned:

a. Commanders exercising General Court Martial authority and all
general or flag rank officers in command who have a judge advocate or
legal advisor available.

b. The Secretary of the Military Department concerned or officers
(not below the grade of major general or rear admiral) designated by the
Secretaries of the Military Departments to determine, based on a record
review, that an officer shall be required to show cause for retention on
active duty.

* 18. Statement that a Member Is a Homosexual or Bisexual or Words to *
* That Effect. Language or behavior that a reasonable person would *
* believe was intended to convey the statement that a person engages in, *
* attempts to engage in, or has a propensity or intent to engage in. *
* homosexual acts. *

REASONS FOR SEPARATION

A. SUBSTANDARD PERFORMANCE OF DUTY

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when, as compared to other commissioned officers of his or her grade and experience, he or she is found to be substandard in any of the following respects:

1. Performance of duty.
2. Efficiency.
3. Leadership.
4. Lack of response to training, in that performance of duties in the officer's assigned speciality is precluded or impaired to the degree of being unsatisfactory.
5. Attitude or character.

B. ACTS OF MISCONDUCT OR MORAL OR PROFESSIONAL DERELICTION

A commissioned officer may be separated from the Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when he or she is found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to):

1. Serious or recurring wrongdoing, punishable by military or civilian authorities.
2. Intentional or discreditable mismanagement of personal affairs, including financial affairs.
3. Drug abuse.
4. Intentional neglect of, or failure to perform, assigned duties or complete required training.
5. Conduct resulting in the loss of professional status to such an extent as to impair performance of assigned military duties.
6. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

C. HOMOSEXUAL CONDUCT

- * Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph C.1.b., below. Homosexual conduct *
includes homosexual acts, a statement by a member that demonstrates a
propensity or intent to engage in homosexual acts, or a homosexual marriage or
attempted marriage. 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. *

1. A commissioned officer shall be separated under this provision if one or more of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated that:

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

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

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

(4) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order, and morale of the Service; and,

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

b. The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer 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. 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. In determining whether an officer has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(1) Whether the officer has engaged in homosexual acts;

(2) The officer's credibility;

(3) Testimony from others about the officer's past conduct, character, and credibility;

(4) The nature and circumstances of the officer's statement;

(5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

c. The officer has married or attempted to marry a person known to be of the same sex (as evidenced by the external anatomy of the persons involved).

2. The commissioned officer shall bear the burden of proving
* throughout the proceedings, by a preponderance of the evidence, that *
* retention is warranted under the limited circumstances described in *
* paragraphs C.1.a. and C.1.b. of this enclosure, above. *

3. Nothing in this Directive or the Service implementing regulations requires that an officer be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

a. The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service; and

b. Separation of the officer would not be in the best interest of the Armed Forces.

D. RETENTION IS NOT CONSISTENT WITH THE INTERESTS OF NATIONAL SECURITY

Under DoD 5200.2-R (reference (d)), a commissioned officer may be separated from a Military Service when it is determined that the commissioned officer's retention is clearly inconsistent with the interest of national security.

E. MULTIPLE REASONS

A commissioned officer may be considered for separation under all the reasons in sections A., B., C., and D. of this enclosure above; however, separate findings under each applicable section shall be required as to the reasons for separation.

PROCEDURES FOR NONPROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The Secretary of each Military Department shall prescribe procedures for the initiation of separation recommendations.

B. SHOW-CAUSE AUTHORITY

1. The show-cause authority will determine whether an officer shall be required to show cause for retention on active duty for one or more of the reasons listed in enclosure 2, and as further defined by the Secretary of the Military Department concerned.

2. The show-cause authority shall:

a. Evaluate all information presented concerning the case under consideration.

b. Determine whether the record is sufficient to require the officer to show cause for retention on active duty.

c. Under regulations prescribed by the Secretary concerned, close the case if the authority determines that the officer should not be required to show cause for retention on active duty.

d. Report the matter for referral to a Board of Inquiry if the authority determines that the officer should be required to show cause for retention on active duty. The reasons for making such a determination shall be provided to the officer in writing.

e. Refer the case to a Board of Inquiry if the record supports a finding of homosexual conduct under enclosure 2.

f. Consider the initiation of separation action if the record supports a finding of drug abuse under enclosure 2.

3. As provided in 10 U.S.C. 618(b)(2) (reference (b)), the Secretary concerned may require an officer to show cause for retention on active duty based upon the recommendation of a promotion selection board.

C. BOARD OF INQUIRY

1. Composition. See enclosure 4.

2. Convening. A Board of Inquiry shall be convened under such regulations as may be prescribed by the Secretary of the Military Department concerned.

3. Function. A Board of Inquiry shall give a fair and impartial hearing to a respondent. The Board of Inquiry is an administrative board that shall consider all relevant and material evidence pertaining to the case and shall

function under rules and procedures established by the Secretary of the Military Department concerned. The Board of Inquiry shall make findings of fact and a recommendation as to whether a respondent should be retained on active duty. The board also shall recommend the character of discharge in accordance with regulations prescribed by the Secretary of the Military Department concerned, if it recommends discharge. Its findings must be supported by a preponderance of the evidence. The proceedings and hearing before a Board of Inquiry are intended to give the officer an opportunity to respond to, and rebut, the basis for the contemplated change of status, after having been informed of the contemplated change and the reasons therefor. The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken.

4. Determinations

a. If a Board of Inquiry determines that the respondent's retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Inquiry determines that the respondent's retention on active duty is not warranted, it shall report the matter to a Board of Review, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

D. BOARD OF REVIEW

1. Composition. See enclosure 4.

2. Convening. A Board of Review shall be convened under such regulations prescribed by the Secretary of the Military Department concerned.

3. Function. After a Board of Inquiry has determined a respondent has failed to establish that retention on active duty is warranted, the Board of Review shall review the record for the purpose of examining the grounds for such determination.

4. Determinations

a. If a Board of Review determines that the respondent has established that retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Review determines that the respondent has failed to establish that retention on active duty is warranted, the Board of Review shall recommend to the Secretary of the Military Department concerned that the respondent should be separated, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

E. ACTION BY THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED UPON
RECOMMENDATION OF THE BOARD OF REVIEW

If the Board of Review recommends that the respondent not be retained on active duty, the Secretary of the Military Department concerned may direct:

1. Separation.
2. Retention.

The action of the Secretary is final.

F. RETIREMENT OR DISCHARGE

1. Retirement. A commissioned officer separated from active duty in accordance with this Directive, if eligible for voluntary retirement under any provisions of law on the date of such separation, shall be retired in the grade and with the retired pay for which eligible if retired under such provision.

2. Discharge. A commissioned officer separated from active duty in accordance with this Directive, if ineligible for retirement under any provision of law on the date of such separation, shall be:

a. Honorably discharged in the grade then held if separated only for substandard performance of duty; or

b. Discharged in the grade then held if separated for misconduct, for moral or professional dereliction, homosexual conduct, or in the interest of national security. The character of discharge shall be determined by the Secretary of the Military Department concerned but in no case shall it be more severe than that recommended by the Board of Inquiry.

G. APPLICATION FOR RETIREMENT OR DISCHARGE

At any time before final action in the case, the Secretary of the Military Department concerned may grant a request by the commissioned officer concerned for:

1. Voluntary retirement.
2. Discharge.

The action of the Secretary is final.

H. LIMITATIONS

1. A commissioned officer required to show cause for retention on active duty because of substandard performance of duty and who is retained on active duty by a Board of Inquiry or a Board of Review may not again be required to show cause for retention for the same reasons within the one-year period beginning on the date of the determination to retain.

2. Subject to paragraph H.3., below, a commissioned officer required to show cause for retention on active duty because of misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security, and who is retained on active duty by a Board of Inquiry or a Board of Review may again be required to show cause for retention at any time.

3. A commissioned officer may not again be required to show cause for retention on active duty solely because of conduct that was the subject of the previous proceedings, unless the findings and recommendations of the

Board of Inquiry or Board of Review that considered the case are determined to have been the result of fraud or collusion.

COMPOSITION OF BOARDS

A. COMPOSITION

Each board convened in accordance with this Directive shall be composed of at least three commissioned officers having the qualifications prescribed by section B. of this enclosure. The senior member shall be the President of the Board. A nonvoting legal advisor may also be appointed to assist the Board of Inquiry.

B. OFFICERS ELIGIBLE TO SERVE ON BOARDS

1. Each commissioned officer who serves on a board must be an officer on the active duty list of the same Military Service as the respondent.

2. A commissioned officer may not serve on a board unless he or she is serving on active duty in a grade above lieutenant colonel or commander, and is senior in grade and rank to any respondent being considered by the board.

3. If qualified commissioned officers from the active duty list are not available in sufficient numbers to comprise a board, the Secretary of the Military Department concerned shall complete the membership of the board by appointing retired regular commissioned officers of the same Military Service. The retired grade of such officers must be above lieutenant colonel or commander and must be senior to the grade held by any respondent being considered by the board.

4. No person shall be a member of more than one board convened under this Directive to consider the same respondent.

BOARD OF INQUIRY PROCEDURES

A. CHALLENGES

Under regulations prescribed by the Secretary of the Military Department concerned, board members are subject to challenge for cause only. In the event the membership of the board is reduced to less than three officers, the convening authority shall appoint additional members.

B. LEGAL ADVISOR

The legal advisor, if appointed, shall perform such functions as the Secretary of the Military Department concerned may prescribe except that the legal advisor has no authority to dismiss any allegation against the respondent or to terminate the proceedings.

C. RECORDER

The Government may be represented before the board by a recorder whose duties shall be prescribed by the Secretary of the Military Department concerned.

D. RIGHTS OF A RESPONDENT REQUIRED TO SHOW CAUSE FOR RETENTION BEFORE A BOARD OF INQUIRY

1. When the case is referred to a Board of Inquiry, the respondent shall be notified in writing, at least 30 days before the hearing, of the reasons for which he or she shall be required to show cause for retention on active duty and of the least favorable characterization of discharge for which the officer may be recommended.

2. The respondent shall be allowed a reasonable period of time, as determined by the Board of Inquiry, to prepare his or her showing of cause for retention on active duty.

3. The respondent may appear in person at all proceedings of the Board of Inquiry.

4. The respondent may be represented either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice (if the counsel of choice is determined to be reasonably available under regulations prescribed by the Secretary of the Military Department concerned), but not by both. The respondent may employ civilian counsel, at no expense to the Government, in which case no military counsel shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall withhold any records that the Secretary of the Military Department concerned determines should be withheld in the interest of national security. When any records are withheld, the respondent shall be furnished, to the extent practicable, a summary of the records so withheld.

6. The respondent may request the appearance before the board of any witness whose testimony is considered to be pertinent to his or her case. A determination on the availability of the witness or whether the witness shall

be required to appear, and the materiality of the witness, shall be made pursuant to regulations of the Secretary of the Military Department concerned. Witnesses not on active duty must appear voluntarily and at no expense to the Government, except as otherwise authorized by the Secretary of the Military Department concerned.

7. Subject to regulations prescribed by the Secretary of the Military Department concerned, the respondent may submit, at any time before the board convenes or during the proceedings, documents from his or her record of service, letters, answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. These documents may include depositions of witnesses not deemed to be reasonably available or of witnesses unwilling to appear voluntarily.

8. The respondent may testify in his or her behalf subject to the provisions of 10 U.S.C. 831 (Article 31 of the Uniform Code of Military Justice) (reference (b)).

9. The respondent and his or her counsel may question any witness who appears before the board.

10. The respondent or counsel for the respondent may present oral or written argument, or both, on the matter to the board.

11. The respondent may, under regulations prescribed by the Secretary of the Military Department concerned, request a continuance, when necessary, for the preparation of his or her case before the board.

E. BOARD DETERMINATION

The Board of Inquiry shall decide the case on the evidence received or developed during open hearings. Voting shall be conducted in closed session with only voting members of the board in attendance. All findings and recommendations shall be determined by a majority vote.

F. REPORT OF PROCEEDINGS

The record of proceedings shall be kept in summarized form unless a verbatim record is required by the Show Cause Authority (SCA) or the Secretary of the Military Department concerned. In all cases, the findings and recommendations of the Board of Inquiry shall be stated in clear and concise language and shall be signed by all members concurring. Those members not concurring in the findings or recommendations, or both, may file a statement of nonconcurrence, and the reasons therefor, for inclusion in the record. The respondent shall be provided a copy of the report of the proceedings and the findings and recommendation of the board and shall be provided an opportunity to submit written comments for consideration by the Board of Review. When the Board of Inquiry determines that retention on active duty is warranted, and the case is closed, a summarized report of the proceedings may be prepared pursuant to regulations prescribed by the Secretary of the Military Department concerned.

PROCEDURES FOR CERTAIN PROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The SCA may initiate action for any of the reasons stated in enclosure 2 of this Directive, or for such other reasons as the Secretary of the Military Department concerned may prescribe by regulation. Prior to forwarding the record to the Secretary of the Military Department concerned, the commissioned officer shall be advised in writing of the following:

1. The reason action was initiated and the character of discharge recommended.
2. That he or she may tender a resignation.
3. That he or she may submit a rebuttal or declination statement instead of a resignation.
4. That he or she may confer with appointed or retained counsel.

The officer shall be permitted a reasonable period of time to prepare his or her response.

B. PROCESSING

1. If submitted, the resignation, with the record, shall be forwarded to the authority designated to take final action.

2. If the officer does not tender a voluntary resignation, or if voluntary resignation is not accepted by the Departmental Secretary, the case shall be returned to the SCA for action. If, under regulations of the Secretary concerned, the SCA determines the officer shall be separated with a general discharge, the SCA may refer the case to a Board of Officers or a Board of Inquiry, as determined appropriate, or submit the case to the Secretary concerned who will take a final action. If the SCA determines the officer should be separated with an Other Than Honorable Discharge, the SCA shall refer the case directly to a Board of Inquiry in accordance with Sections C, D, and E of enclosure 3.

3. If the commissioned officer does not tender a resignation statement, and an "Honorable" discharge is recommended by a Board of Inquiry, the record and any rebuttal shall be submitted to the Secretary of the Military Department concerned for final decision.

4. The Secretary of the Military Department concerned may direct referral of the record to a Board of Inquiry whenever the Secretary considers such action appropriate, and the case shall be processed in accordance with sections C., D., and E. of enclosure 3.

C. FINAL DETERMINATION

The Secretary of the Military Department concerned may direct:

1. Retention.
2. Discharge.

The action of the Secretary is final.

CHARACTER OF DISCHARGE

A. DISCHARGE FOR SUBSTANDARD PERFORMANCE OF DUTY

A discharge shall be characterized as "honorable" when substandard performance of duty is the sole basis for the discharge.

B. DISCHARGE FOR MISCONDUCT, OR FOR MORAL OR PROFESSIONAL DERELICTION, OR HOMOSEXUAL CONDUCT, OR IN THE INTERESTS OF NATIONAL SECURITY

A discharge shall be characterized as "Honorable," "General (Under Honorable Conditions)", or "Under Other Than Honorable Conditions."

1. Consideration. The character of a discharge shall be predicated on the commissioned officer's behavior and performance of duty while a member of a Military Service. Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident. There are circumstances, however, in which conduct reflected by a single incident may provide the basis for characterization.

2. Exceptions

a. A discharge shall be characterized as "Honorable" when the grounds for discharge are based solely on pre-Service activities, other than intentional misrepresentation, or omission of facts, in obtaining an appointment or in official statements or records.

b. A discharge shall be characterized as "Honorable" or "Under Honorable Conditions" when the sole basis for separation is homosexual conduct unless aggravated acts are included in the findings. A separation "Under Other Than Honorable Conditions" may be issued if there is a finding that the officer attempted, solicited, or committed a homosexual act:

- (1) By using force, coercion, or intimidation.
- (2) With a person under 16 years of age.
- (3) With a subordinate in circumstances that violate the customary military superior-subordinate relationship.
- (4) Openly in public view.
- (5) For compensation.
- (6) Aboard a military vessel or aircraft.
- (7) In another location subject to military control under aggravating circumstances, noted in the finding, that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.

* 5. The guidelines in this enclosure do not apply to activities of *
* Defense Criminal Investigative Organizations and other DoD law enforcement *
* organizations, which are governed by DoD Instruction 5505.8 (reference (f)). *

B. DEFINITIONS

1. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. Commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

* 3. Homosexual. A person, regardless of sex, who engages in, attempts to *
engage in, has a propensity to engage in, or intends to engage in homosexual *
acts.

* 4. Homosexual Conduct. "Homosexual conduct" is a homosexual act, a *
statement by the member that demonstrates a propensity or intent to engage in *
homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person *
* would believe (3) was intended to convey the statement (4) that a person *
* engages in, attempts to engage in, or has a propensity or intent to engage in *
* homosexual acts. This may include statements such as "I am a homosexual," "I *
am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

d. "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.

* 5. Sexual Orientation. An abstract sexual preference for persons of
* a particular sex, as distinct from a propensity or intent to engage in
* sexual acts.

* C. BASES FOR CONDUCTING INQUIRIES

* 1. A commander will initiate an inquiry only if he or she has credible
* information that there is a basis for discharge. Credible information exists
* when the information, considering its source and the surrounding circum-
* stances, supports a reasonable belief that there is a basis for discharge.
* It requires a determination based on articulable facts, not just a belief or
* suspicion.

* 2. A basis for discharge exists if:

* a. The member has engaged in a homosexual act.

* b. The member has said that he or she is a homosexual or bisexual,
* or made some other statement that indicates a propensity or intent to engage
* in homosexual acts; or

* c. The member has married or attempted to marry a person of the same
* sex.

* 3. Credible information does not exist, for example, when:

* a. The individual is suspected of engaging in homosexual conduct,
* but there is no credible information, as described, to support that suspicion;
* or

* b. The only information is the opinions of others that a member is
* homosexual; or

* c. The inquiry would be based on rumor, suspicion, or capricious
* claims concerning a member's sexual orientation; or

* d. The only information known is an associational activity such as
* going to a gay bar, possessing or reading homosexual publications, associating
* with known homosexuals, or marching in a gay rights rally in civilian clothes.
* Such activity, in and of itself, does not provide evidence of homosexual
* conduct.

* 4. Credible information exists, for example, when:

* a. A reliable person states that he or she observed or heard
* a Service member engaging in homosexual acts, or saying that he or she is a
* homosexual or bisexual or is married to a member of the same sex; or

* b. A reliable person states that he or she heard, observed, or
* discovered a member make a spoken or written statement that a reasonable
* person would believe was intended to convey the fact that he or she engages
* in, attempts to engage in, or has a propensity or intent to engage in
* homosexual acts; or

* c. A reliable person states that he or she observed behavior that
* amounts to a non-verbal statement by a member that he or she is a homosexual
* or bisexual; i.e., behavior that a reasonable person would believe was
* intended to convey the statement that the member engages in, attempts to
* engage in, or has a propensity or intent to engage in homosexual acts.

D. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual. However, upon receipt of credible information of homosexual conduct (as described in section C., above) commanders or appointed inquiry officials may ask members if they engaged in such conduct. But the member should first be advised of the DoD policy on homosexual conduct (and rights under Article 31, UCMJ, if applicable). Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding, nor does it provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or have a propensity or intent to engage in homosexual acts.

6. The Service member bears the burden of proving, by a preponderance of the evidence, 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.

* E. LEGAL EFFECT

The procedures in this enclosure create no substantive or procedural rights.



Department of Defense INSTRUCTION

February 28, 1994
NUMBER 5505.8

IG, DoD

SUBJECT: Investigations of Sexual Misconduct by the Defense
Criminal Investigative Organizations and Other DoD Law
Enforcement Organizations

- References:
- (a) DoD Instruction 5505.8, subject as above, December 22, 1993 (hereby canceled)
 - (b) DoD Directive 5106.1, "Inspector General of the Department of Defense," March 14, 1983
 - (c) Title 10, United States Code, Chapter 47, Uniform Code of Military Justice," Sections 801-940
 - (d) DoD Instruction 5505.3, "Initiation of Investigations by Military Criminal Investigative Organizations," July 11, 1986

A. REISSUANCE AND PURPOSE

This Instruction reissues reference (a) under the authority of reference (b) and updates DoD policy regarding the initiation of criminal investigations into certain types of sexual misconduct, as defined in this Instruction. It provides that, 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 Service member's commander for appropriate disposition. To ensure their independence, objectivity, and effectiveness, however, DCIOs are authorized to initiate investigations into adult private consensual sexual misconduct without obtaining a referral from the member's commander; they may do so, however, only if the Director or Commander, or Principal Deputy, of the DCIO determines that there is credible information that an offense has been committed and that the expenditure of investigative resources is appropriate.

B. APPLICABILITY

This Instruction applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Unified Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components").

C. DEFINITION

Sexual Misconduct. A sexual act or acts in violation of Chapter 47 of title 10 U.S.C. (reference (c)) that occur between consenting adults, in private, whether on or off a military installation. It does not include any sexual act or acts that involve allegations of force, coercion, or intimidation; abuse of position or rank; fraternization; persons under the age of 16; or conduct that relates directly to applicable security standards for access to classified information. Other terms used in this Instruction are defined in enclosure 1.

D. POLICY

1. No DCIO or other DoD law enforcement organization shall conduct an investigation solely to determine whether a Service member is a heterosexual, a homosexual, or a bisexual.
2. Except pursuant to subsections F.2. and F. 3., below, a DCIO or other DoD law enforcement organization shall not initiate a criminal investigation into adult private consensual sexual misconduct where such misconduct is the only offense involved.
3. Investigations by DCIOs and other DoD law enforcement organizations shall be conducted in an even-handed manner, without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct.
4. The provisions of this Instruction do not provide a basis for challenging the validity of any administrative or criminal proceeding or for excluding the use of any evidence in such proceeding.

E. RESPONSIBILITIES

The Secretaries of the Military Departments and the Heads of the DoD Components shall issue regulations implementing this Instruction.

F. PROCEDURES

1. Allegations of adult private consensual sexual misconduct received by a DCIO or other DoD law enforcement organization normally shall be referred to the commander(s) of the Service member(s) concerned, unless the Commander, Director, or Principal Deputy of a DCIO initiates an investigation under F.3. below.
2. Upon the receipt of any allegation of adult private consensual sexual misconduct, the commander shall review the allegation. If the commander determines that there is credible information of adult private consensual sexual misconduct, the

DEFINITIONS

1. Commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command," or a civilian supervisor in a comparable position who is outside a Defense Criminal Investigative Organization and is authorized to request an investigation or act on the results of an investigation by a Defense Criminal Investigative Organization.
2. Credible Information. Information, considered in light of its source and the surrounding circumstances, that supports a reasonable belief that a Service member has engaged in adult private consensual sexual misconduct. Credible information consists of articulable facts, not just a belief or suspicion.
3. Defense Criminal Investigative Organizations. The Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations.
4. Other DoD Law Enforcement Organizations. Those elements of the DoD Components, other than the Defense Criminal Investigative Organizations, that are authorized to investigate violations of the Uniform Code Military Justice or the United States Code.
5. Sexual Orientation. An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

commander may request a criminal investigation by the DCIO or other DoD law enforcement organization, as appropriate.

a. If a commander requests that a DCIO initiate a criminal investigation into adult private consensual sexual misconduct, the Commander or Director of the DCIO, and those managers or supervisors approved by them to do so, shall independently evaluate and make a determination whether the request is based on credible information of adult private consensual sexual misconduct prior to initiating a criminal investigation.

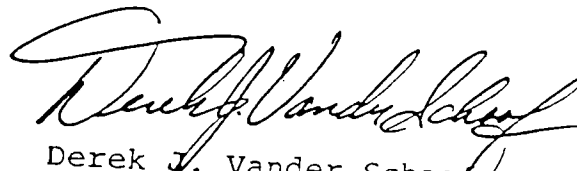
b. If a DCIO determines that a request from a commander lacks credible information of adult private consensual sexual misconduct, or is not in keeping with established policy, the matter will be returned to the commander, without action, for appropriate disposition.

3. DoD Instruction 5505.3 (reference (d)) shall apply with respect to investigations of adult private consensual sexual misconduct, except that an investigation into adult private consensual sexual misconduct may be initiated by a DCIO without a request from the Service member's commander only upon the determination of the Commander or Director of the DCIO or Principal Deputy that there is credible information of adult private consensual sexual misconduct and that such an investigation is an appropriate use of investigative resources.

4. Investigations shall be limited to the factual circumstances directly relevant to the specific allegations.

G. EFFECTIVE DATE AND IMPLEMENTATION

This Instruction is effective February 28, 1994. Forward two copies of implementing documents to the Inspector General, Department of Defense, within 30 days.


Derek J. Vander Schaaf
Deputy Inspector General

Enclosure
Definitions



Department of Defense INSTRUCTION

December 22, 1993
NUMBER 5505.8

IG, DoD

SUBJECT: Investigations of Sexual Misconduct by the Defense
Criminal Investigative Organizations and Other DoD Law
Enforcement Organizations

- References:
- (a) DoD Directive 5106.1 "Inspector General of the Department of Defense, " March 14, 1983
 - (b) Secretary of Defense Memorandum, "Policy on Homosexual Conduct in the Armed Forces," July 19, 1993
 - (c) Title 10, United States Code, Chapter 47, Uniform Code of Military Justice," Sections 801-940
 - (d) DoD Instruction 5505.3, "Initiation of Investigations by Military Criminal Investigative Organizations," July 11, 1986

A. PURPOSE

This Instruction, issued under the authority of reference (a), implements reference (b) regarding the initiation of criminal investigations into certain types of sexual misconduct, as defined in this Instruction. It provides that, 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 Service member's commander for appropriate disposition. To ensure their independence, objectivity, and effectiveness, however, DCIOs are authorized to initiate investigations into sexual misconduct without obtaining a referral from the member's commander; they may do so, however, only if the Director or Commander, or Principal Deputy, of the DCIO determines that there is credible information that an offense has been committed and that the expenditure of investigative resources is appropriate.

B. APPLICABILITY

This Instruction applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Unified Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components").

C. DEFINITION

Sexual Misconduct. A sexual act or acts in violation of reference (c) that occur between consenting adults, in private, whether on or off a military installation. It does not include any sexual act or acts that involve allegations of force, coercion, or intimidation; abuse of position or rank; persons under the age of 16; or conduct that relates directly to applicable security standards for access to classified information. Other terms used in this Instruction are defined in enclosure 1.

D. POLICY

1. No DCIO or other DoD law enforcement organization shall conduct an investigation solely to determine a Service member's sexual orientation.

2. Except pursuant to subsections F.2. and F. 3., below, a DCIO or other DoD law enforcement organization shall not initiate a criminal investigation into sexual misconduct where such misconduct is the only offense involved.

3. Investigations by DCIOs and other DoD law enforcement organizations shall be conducted in an even-handed manner, without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct.

E. RESPONSIBILITIES

The Secretaries of the Military Departments and the Heads of the DoD Components shall issue regulations implementing this Instruction.

F. PROCEDURES

1. Allegations of sexual misconduct received by a DCIO or other DoD law enforcement organization normally shall be referred to the commander(s) of the Service member(s) concerned, unless the Commander, Director, or Principal Deputy of a DCIO initiates an investigation under F.3. below.

2. Upon the receipt of any allegation of sexual misconduct, the commander shall review the allegation. If the commander determines that there is credible information of sexual misconduct, the commander may request a criminal investigation by the DCIO or other DoD law enforcement organization, as appropriate.

a. If a commander requests that a DCIO initiate a criminal investigation into sexual misconduct, the Commander or Director of the DCIO, and those managers or supervisors approved by them to do so, shall independently evaluate and make a determination whether the request is based on credible

information of sexual misconduct prior to initiating a criminal investigation.

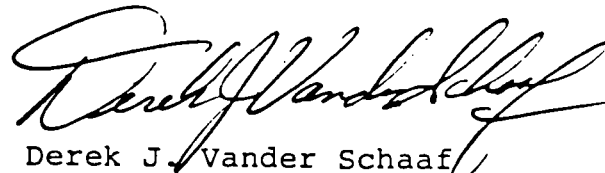
b. If a DCIO determines that a request from a commander lacks credible information of sexual misconduct, or is not in keeping with established policy, the matter will be returned to the commander, without action, for appropriate disposition.

3. DoD Instruction 5505.3 (reference (d)) shall apply with respect to investigations of sexual misconduct, except that an investigation into sexual misconduct may be initiated by a DCIO without a request from the Service member's commander only upon the determination of the Commander or Director of the DCIO or Principal Deputy, that there is credible information of sexual misconduct and that such an investigation is an appropriate use of investigative resources.

4. Investigations shall be limited to the factual circumstances directly relevant to the specific allegations.

G. EFFECTIVE DATE AND IMPLEMENTATION

This Instruction is effective February 5, 1994. Forward two copies of implementing documents to the Inspector General, Department of Defense, within 30 days.



Derek J. Vander Schaaf
Deputy Inspector General

Enclosure
Definitions

DEFINITIONS

1. Commander. Any commanding officer, installation commander, or other appropriate command authority, or civilian supervisor in a comparable position who is outside a Defense Criminal Investigative Organization and is authorized to request an investigation or act on the results of an investigation by a Defense Criminal Investigative Organization.
2. Credible Information. Information, considered in light of its source and all attendant circumstances, that supports a reasonable belief that a Service member has engaged in sexual misconduct. Credible information consists of articulable facts, not just a belief or suspicion.
3. Defense Criminal Investigative Organizations. The Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations.
4. Other DoD Law Enforcement Organizations. Those elements of the DoD Components, other than the Defense Criminal Investigative Organizations, that are authorized to investigate violations of the Uniform Code Military Justice or the United States Code.
- 5 Sexual Orientation. A sexual attraction to individuals of a particular sex.



PERSONNEL AND
READINESS

ASSISTANT SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON DC 20301-4000

DEC 21 1993



MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY (MANPOWER
RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE NAVY (MANPOWER
AND RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE AIR FORCE (MANPOWER,
RESERVE AFFAIRS, INSTALLATIONS, & ENVIRONMENT)

SUBJECT: Training Guidance For DoD Policy On Homosexual Conduct in the Armed Forces

On 19 July 1993, the Secretary of Defense issued a memorandum concerning homosexual conduct in the Armed Forces. The memorandum directs the Secretaries of the Military Departments to ensure that all members of the Armed Forces are aware of their specific responsibilities in carrying out this new policy. Of particular concern are personnel involved in recruiting, accession processing, commander's inquiries, criminal investigations, and administrative separations.

To assist you in meeting this requirement, the attached training plan is offered as an approach to the education of your personnel on the new policy. It is intended to provide a starting point. Each Service will ensure that those responsible for policy implementation and administration are aware of their responsibilities under the new policy.

Although this briefing is designed for personnel involved in policy implementation and personnel administration, it is evident that information regarding the policy will continue to be of interest to all members of the Armed Forces. The policy must be explained clearly and precisely to ensure that the policy is fully and consistently effectuated.

Edwin Dorn

Attachment:
as stated

cc:
Assistant Secretary of Defense (Reserve Affairs)
Director, Joint Staff
Chief, Office of Personnel and Training
Department of Transportation

DoD

POLICY ON HOMOSEXUAL CONDUCT

TRAINING PLAN

BACKGROUND

On 29 January 1993, the President directed the Secretary of Defense to develop a policy "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States." The President further directed that the policy be implemented in a manner that is "practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain."

On 5 April 1993, the Secretary of Defense directed that a Military Working Group (MWG) be formed to develop and assess alternative policy options to meet the President's requirements. Fairness and objectivity were major aims of the MWG's process. In pursuit of those aims, the MWG met with individuals and groups holding a broad spectrum of views on the subject. This included meetings with uniformed and civilian experts from inside and outside the Department of Defense (DoD), including the Service members who would be most affected by the policy. To broaden understanding of the issue, the MWG also compared experiences of the militaries of other countries, researched available literature, and performed statistical analyses of military separation data obtained from the Services.

Also in April 1993, the Secretary of Defense commissioned RAND's National Defense Research Institute to provide information and analysis that would be useful in helping formulate the draft policy. A multidisciplinary team of researchers was drawn from a number of departments at RAND. Their research and analysis was provided to the Secretary of Defense prior to the decision announced by the Secretary and the President on July 19, 1993.

After comprehensive study and with the concurrence of the Joint Chiefs of Staff, the Secretary of Defense has established a policy determined to be in the best interest of the United States Armed Forces. The provisions of the National Defense Authorization Act for Fiscal Year 1994 related to this issue are fully consistent with this new policy.

Although this briefing is designed for personnel involved in policy implementation and personnel administration, it is evident that information regarding the policy will continue to be of interest to all members of the Armed Forces. The policy must be explained clearly and precisely to ensure that the policy is fully and consistently effectuated.

This training plan is offered to assist all Services in accomplishing that goal.

THE POLICY

It is the policy of the Department of Defense to judge the suitability of persons to serve in the Armed Forces on the basis of their conduct and their ability to meet required standards of duty performance and discipline. 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 below.

This policy must be well understood by all personnel with specific responsibilities for its implementation and administration. Of particular concern are those personnel involved in recruiting, accession processing, commanders' inquiries, criminal investigations, and administrative separations. Terminology is particularly important to the dialogue.

A. Key Policy Features:

1. A person's sexual orientation is considered a personal and private matter. Officials of the Armed Forces will not ask and Service members will not be required to reveal whether they are heterosexual, homosexual, or bisexual.

2. A member's sexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described below.

3. When a member engages in homosexual conduct, he or she is subject to administrative separation. Homosexual conduct includes a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

4. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts -- such as a statement by the member that he or she is a homosexual -- 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.

5. Neither commanders' inquiries (for administrative reasons or for minor offenses) nor military criminal law enforcement investigations (for criminal violations) will be conducted absent credible information of homosexual conduct.

6. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge. It requires a determination based on articulable facts, not just a belief or suspicion.

7. Service members may be discharged if they are found to have engaged in homosexual conduct.

B. Accessions Policy:

Applicants for service in the Armed Forces will not be required to reveal whether they are heterosexual, homosexual or bisexual or answer questions about their sexual orientation. They will be briefed on departmental policies governing separation policy for members of the Armed Forces.

C. Commander's Inquiry and Investigative Policy:

Commanders may initiate inquiries or investigations into homosexual conduct as defined by DoD policy. However, no inquiries or investigations will be conducted solely to establish an individual's sexual orientation, nor will Service members be asked or required to answer questions concerning their sexual orientation. The informal fact-finding inquiry is the preferred method of addressing homosexual conduct. If there is credible information of possible criminal conduct, commanders should consider seeking the assistance of law enforcement or the appropriate Defense Criminal Investigative Organization. A statement by a member that he or she is a homosexual continues to be a basis for initiating an informal fact-finding inquiry. No inquiries or investigations will be conducted absent credible information of conduct that would be the basis for discharge or for a court-martial. Inquiries and investigations will not go beyond establishing the elements of the offense or basis for discharge. Inquiries and investigations shall be limited to the factual circumstances directly relevant to the specific allegations.

D. Separation Policy:

Service members may be discharged if they engage in homosexual conduct. Homosexual conduct is any act involving bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of sexual gratification, or any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts, and attempts or solicitations to engage in such acts; a statement by the member that he or she is a homosexual or bisexual or that otherwise demonstrates a propensity or intent to engage in homosexual acts; or a homosexual marriage or attempted homosexual marriage. Normally, administrative separations involving homosexual conduct will be under honorable conditions, unless there are aggravating circumstances, such as force, coercion or acts with a minor.

BRIEFING PLAN

Title of Briefing: DoD Policy on Homosexual Conduct

Briefer: Commander, commanding officer or officer-in-charge

Instructional Materials: Background Fact Sheet
 Policy Fact Sheet
 Hypothetical Teaching Scenarios
 Service Regulations

Briefing Goals:

- (1) To inform personnel responsible for policy implementation and personnel administration about the DoD Policy. Of particular concern are personnel involved in recruiting, accession processing, commander's inquiries, criminal investigations, and administrative separations.
- (2) To clarify the policy and its implementation, and answer questions related to associated definitions and hypothetical scenarios.

Teaching Approach:

- (1) Tailor the briefing to your audience. Do not change the message while tailoring it. The requirement is that each audience member knows and understands the policy.
- (2) Introduce the topic and define the briefing goals.
- (3) Hand out the Policy Fact Sheet.
- (4) Conduct the briefing, and guide a discussion informing the audience of their specific area of responsibility in implementing this policy.
- (5) Discuss selected policy-related scenarios.
- (6) Conduct a Q & A session.
- (7) Conclude briefing by summarizing your expectations related to each member's role in properly implementing this policy.

BRIEFER'S GUIDANCE SHEET

Conduct a briefing to train personnel involved in policy implementation and personnel administration within your organization about this policy.

- You may consult with the legal office, the chaplain, the Inspector General, and military criminal investigation agencies prior to giving the briefing.
- Encourage a legal office representative to attend and respond to questions.

Realize that effective implementation and compliance with this policy is directly related to the professionalism of your presentation.

- The briefing IS informational, IS a clarification of policy, and IS factual.
- The briefing IS NOT sensitivity training, IS NOT a forum to debate the policy, IS NOT a "gripe" session, and IS NOT intended to discuss personal values or beliefs.

Divide your audience into appropriate groups where practical.

Learn the key policy features and refer back to them in any discussion.

HYPOTHETICAL TEACHING SCENARIOS FOR COMMANDERS AND PERSONNEL INVOLVED IN RECRUITING, ACCESSION PROCESSING, CRIMINAL INVESTIGATIONS, AND ADMINISTRATIVE SEPARATIONS

The following hypothetical scenarios are for training purposes only. They are not meant to prescribe "correct" outcomes, but to illustrate how relevant personnel should approach issues that may arise under the DoD policy on homosexual conduct in the Armed Forces. The scenarios do not establish any evidentiary standards or create any substantive or procedural rights.

1. Situation: During a commander's "open-door" period, a young Service member comes into the commander's office and states that he believes he may be homosexual. The commander advises the Service member of the military's policy on homosexual conduct, and the Service member replies, "Maybe I shouldn't say anything else." The commander advises him he might wish to discuss the matter with the chaplain.

Issues: The commander wonders whether he should initiate separation action on the basis of the Service member's statement that he believes he may be a homosexual. Should he refer the case to a Military Criminal Investigative Organization (MCIO) for an investigation to determine if the Service member has committed any homosexual acts since entering the service? Should he initiate a commander's inquiry to determine if grounds for administrative separation exist?

Discussion: The Service member's commander may initiate an inquiry based on the member's statement only if he determined that there was credible information that a basis for discharge exists. If the commander believed that the statement merely indicated a young person's confusion over some aspect of his sexual identity and did not constitute a statement by the member that he is a homosexual, the commander would not initiate any inquiry. If the commander believed, in light of his knowledge of the member and the circumstances of the statement, that the member was stating that he is a homosexual, he would initiate an inquiry.

Since the Service member has not indicated that he has committed any criminal act, this case should not be referred to any military law enforcement agency. Had the Service member stated he had engaged in a homosexual act or acts in violation of the UCMJ, the commander would also advise the Service member of his rights under Article 31b of the UCMJ.

2. Situation: An officer observes two male junior enlisted Service members walking and holding hands while off-duty and on liberty. The Service members are wearing civilian clothes and are in an isolated wooded public park and, except for the officer, they are alone. He reports the incident to the commanding officer (CO) and adds that he is surprised to find out they appear to be homosexuals. He asks the CO what he proposes to do about the incident. The CO decides he will call the two Service members into his office, separately, and ask them about the officer's observations.

Issue: Was the CO's action appropriate? If not, what action should he have taken?

Discussion: The officer's observation of the two enlisted Service members walking and holding hands in the park constitutes credible information of homosexual conduct if the officer is someone the CO otherwise trusts and believes. The two Service members' hand-holding in these circumstances indicates a homosexual act and therefore the commanding officer may follow-up and inquire further. Probably, the extent of the inquiry will be two confidential one-on-one conferences between the CO and the two Service members to inquire into the incident.

Before the Service members are asked to discuss or explain the incident, the CO should advise them of the military's policy on homosexual conduct. Should they decline to discuss the matter, the questioning should stop. At that point, the CO may consider other relevant information and decide whether to initiate administrative separation actions based on the information he possesses.

3. Situation: A Service member has been observed entering, leaving, and generally "hanging around" a downtown gay bar. The commander is notified of the observations but isn't sure what action, if any, she should take.

Issues: What should the commander do? Can the commander administratively discharge the Service member for going to a gay bar? Should she conduct a commander's inquiry?

Discussion: Given the absence of any information, credible or otherwise, of the occurrence of either a crime or otherwise proscribed conduct, the commander should not begin an inquiry into this matter. Going to a gay bar is not a crime, nor does it, in itself, constitute a "nonverbal statement" by the Service member that he is a homosexual. A commander may begin an inquiry, however, if a member engages in behavior that a reasonable person would believe is intended to convey the statement that the member is a homosexual or bisexual. The commander in this case may wish to point out to her subordinate that his favorite club is known to be an establishment catering to homosexuals.

4. Situation: A Service member tells his commanding officer (CO) that he is a homosexual. Based on the Service member's statement of his homosexuality, his CO begins immediately to process the Service member for separation from the service. Three days later, the Service member complains that he has been receiving both written and spoken threats from unidentified Service members who are apparently aware of his homosexuality, and who have stated they are going to beat him up.

Issue: What actions should the Service member's CO take?

Discussion: The CO should ask for investigative assistance from the Military Criminal Investigative Organization with respect to the threat and take all reasonable means to protect the safety of the Service member, as he would any other Service member under his command. The CO should initiate a criminal investigation into the threats received by the Service member.

The Service member's statement that he is a homosexual should not be investigated by the MCIO because a statement that a member is a homosexual does not, by itself, constitute credible information of a crime. The CO is appropriately initiating action under the Service's administrative separation procedures.

The CO may consider transferring the Service member to another location. His final decision on this matter would depend on the nature of the threats and the investigative findings.

5. Situation: A metropolitan area publication, oriented to the activities and interests of the area's homosexual community, prints a story under the headline, "Gays in Government," purporting to list government workers believed to be homosexuals. The story contains the names of two enlisted Service members stationed at a nearby military installation. The Service members' commander receives an anonymous letter containing a copy of the article "Gays in Government" and after reading it wonders whether he should conduct an inquiry into the matter or begin administrative separation action on the two Service members for homosexuality. He has never before seen a copy of the publication that printed the article and the story gives no supporting documentation for why any of the individuals listed were believed to be homosexual.

Issue: What action should the commander take in regard to the purported "outing" of the two enlisted Service members?

Discussion: The commander should not initiate any inquiry based on the article. The article purports to identify the two Service members as homosexuals, but does not allege any criminal or otherwise proscribed homosexual conduct. A commander should begin an inquiry only if he has credible information indicating proscribed homosexual conduct. -- i.e., a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

The commander might call the two Service members into his office separately, advise them of the article, and remind them of the DoD policy regarding homosexual conduct. He should advise them that he is conducting no further inquiry into the matter at this time and will consider the matter closed, unless he receives credible information of proscribed homosexual conduct.

6. Situation: A noncommissioned officer (NCO) is watching the local TV news coverage of the gay rights parade when he notices a female Service member assigned to his unit marching in the parade in civilian clothes, carrying a handmade placard. As the television camera zooms in on the Service member's sign, the NCO can clearly read the handwritten words "Lesbians in the military say, 'Lift the Ban!'" The next morning, the NCO reports the incident to his commander.

Issue: Should the commander inquire into what meaning his Service member had intended to convey by carrying that particular sign in the gay rights parade?

Discussion: A Service member's carrying of a banner or sign in a gay rights activity would not in and of itself constitute credible information indicating proscribed homosexual conduct. In this case, however, the Service member chose to carry a sign that could reasonably be interpreted as making a statement that she is a homosexual. It would be reasonable for her commander to inquire whether the Service member's actions were intended to inform the public that she was a "lesbian Service member."

A Service member's statement that he or she is a homosexual, or words to that effect, is evidence that the Service member engages in homosexual acts or has an intent or propensity to do so. Therefore, the commander may inquire into the incident further. Before questioning his subordinate about the incident, the commander should advise her of the military's policy on homosexual conduct. Should the Service member choose not to discuss the matter further, the discussion should end. The commander would then decide whether to initiate administrative discharge procedures based on the information provided by the NCO.

Recommended for Investigators and Commanders

7. Situation: The commander of a military installation calls up his Military Criminal Investigative Organization commander and requests that he stop by to discuss a "problem." In the nearby civilian community, a new social club has recently opened and is known to be frequented almost exclusively by homosexuals. Thursday nights are advertised as "military night," with Service members being offered free admission and reduced price on alcoholic beverages. The commander wants his military law enforcement agents to coordinate with the local police to conduct surveillance of the gay bar on "military night" and compile a list of all Service members frequenting the club. He proposes that military law enforcement agents trace license numbers of all vehicles parking in the club's parking lot that display DoD identification stickers.

Issue: Is this type of "stake-out" permitted under the new policy?

Discussion: No. The installation commander does not have credible information that a specific crime has been committed. Even if the commander had received reports that numerous military members had been observed entering and exiting the purported gay bar, absent evidence of a crime, there would be no basis to conduct a surveillance operation as requested by the installation commander.

The MCIO commander reminds the installation commander that military law enforcement agents currently receive copies of all arrest documents relating to lewd and lascivious behavior or other criminal conduct occurring in the local community, which is punishable under the UCMJ.

Note: This exemplifies a key change to the DoD policy on investigations. Even though the military authorities have information of an off-post gay bar frequented by Service members, they may not conduct an investigation absent a specific allegation of a criminal act. Frequenting a gay bar is not a criminal act.

There is no legal impediment to either local civilian or military law enforcement activities investigating alleged criminal activity at public locations. In this case, however, where no specific criminal activity is alleged, surveillance would have had the singular purpose of actively seeking out possible homosexuals. This is contrary to the DoD Policy on Investigations of Sexual Misconduct, which specifically precludes any investigation solely to establish an individual's sexual orientation. In addition, a fact-finding inquiry by the commander for purposes of administrative separation would not be appropriate, as going to a gay bar does not constitute credible information of proscribed homosexual conduct.

Recommended for Investigators and Commanders

8. Situation: A Service member walks into his barracks room and observes two other enlisted men engaging in an act of sodomy. He notifies his supervisor and the military law enforcement agents. The military law enforcement agents respond to the barracks where the two suspects are placed under apprehension and advised of their rights. During the course of the apprehension, the military law enforcement agents find, in plain view, photographs of one of the suspects engaging in anal sodomy with other Service members, some of whom are known to the supervisor. They also find a personal letter from the same suspect, addressed to another man and signed "All my love, Sugar." These items are taken as evidence. The enlisted men's commander calls the Military Criminal Investigative Organization and advises that the two enlisted men have admitted, under rights advisement, to committing an act of sodomy.

The commander wants the MCIO to continue the investigation by scouring every photograph and the letter to attempt to compile a list of other possible homosexual Service members. Once the list is compiled, the commander wants the MCIO to question both suspects in detail concerning whether they know if anyone on the list is a homosexual or has committed homosexual acts. The commander says he wants the MCIO to hunt out any and all homosexuals within his unit.

Issues: Should the MCIO continue the investigation after the suspects have admitted to the offense of sodomy? If yes, how should the investigation proceed? Should the MCIO comply with the commander's direction to ferret out any homosexuals in the unit?

Discussion: The MCIO would not normally initiate an investigation of consensual adult private sexual conduct. However, in this case the act of sodomy occurred not in private but in a shared barracks room, and therefore may be investigated. Even so, under the new policy, the MCIO should continue its investigation into alleged homosexual conduct only so long as necessary to develop the relevant facts and circumstances surrounding the offense. In cases of consensual sodomy in which the Service members involved in the sexual act admit to the crime, the case will usually be closed and further investigation halted. The Service members would not be asked about other partners with whom they may have had sex, absent evidence of other criminal activity.

In this case, in the routine course of investigating the act of sodomy, the MCIO has discovered credible information of additional alleged criminal acts -- the photographs. The MCIO should investigate the facts surrounding the acts depicted in the photos. This would include questioning the suspect depicted in the photos concerning his sexual partners shown in the photographs engaging in criminal activity. Other Service members in the pictures who are identified by the suspect may be questioned regarding the activities at issue.

(Situation 8 continued)

As to the letter, the fact that it is written to another man and signed, "All my love, Sugar" may indicate another homosexual relationship involving one of two Service members found committing sodomy. Furthermore, if the MCIO were to follow the commander's instructions and proceed to "hunt" for any and all homosexuals, they would probably scrutinize the letter closely to compile a list of other names referenced therein. This way they could question each and every possible homosexual and, in turn, compile additional lists of other homosexuals. Such an approach to investigating possible incidents of homosexuality is expressly prohibited. At any given point in a criminal investigation involving homosexuality, the investigating agents must be able clearly and specifically to explain which criminal acts they are investigating and how the investigation relates to those criminal acts. No criminal investigations should be made into whether a person is homosexual, but only to investigate criminally proscribed acts. In this case, unless the letter has evidentiary value relating to one of the suspects, the MCIO should give the letter to the commander and not use it to launch investigations of any other persons. The commander may evaluate it for credible information and possible grounds for administrative discharge.

Recommended for Investigators and Commanders

9. Situation: While investigating a fraud case involving "E-Mail" transmissions between two officers, the Military Criminal Investigative Organization obtains the commander's authorization to search one of the suspect's computer files stored on his personal computer at home. During the search of the computer, the MCIO agent notices that the suspect subscribes to a computer information service apparently catering to a homosexual and bisexual clientele. The agent scrolls through the directory and notes that the computer service has a directory entitled "Gay Military Service Members" and lists the names, ranks and addresses of approximately 400 persons. The agent contacts his supervisor and asks whether, based on this list which purports to identify approximately 400 homosexuals in the military, the MCIO should investigate any or all of the names listed for sodomy or other crimes involving homosexual acts.

Issues: Should the MCIO investigate anybody on the list for crimes involving homosexual acts? What should the MCIO do with the list?

Discussion: The MCIO should not initiate an investigation of any of the names listed on the computer file. There is no alleged crime to investigate. Names on a list are not credible information of any crimes. Not only do the files disclose nothing more than the names of purported homosexuals, as opposed to information of alleged homosexual acts, but the information is not "credible information" because nothing is known about how the information came to be stored in the computer file or the reliability of the information. The information is also not a basis for administrative separation and should not be referred to the individual's commander. The MCIO should leave the file alone and not take further action.

Recommended for Investigators and Commanders

10. Situation: A Military Criminal Investigative Organization office has received several complaints from both military and civilian personnel concerning homosexual acts occurring in a restroom at one of the gymnasiums on a military installation. Several different witnesses have provided names of Service members and civilians who have been seen numerous times in the restroom performing primarily oral sodomy, but in several incidents anal intercourse. In addition to naming individuals, Service members working out at the gym have provided specific times during the day that appear to be the "busy times" for homosexual activity. The agent in charge of the MCIO office decides to send a covert MCIO agent into the restroom to investigate and develop further information concerning the allegations.

Issue: Can the MCIO investigate alleged acts of sodomy using undercover techniques?

Discussion: Yes. The eyewitness accounts of frequent incidents of criminal activity on the military installation warrants an investigation. Once they have credible information to establish that criminal acts are being committed, MCIOs may utilize any reasonable investigative technique to prove the elements of the crime.

In this case, the MCIO has knowledge of repeated and frequent acts of sodomy occurring at specific times at one of the installation gymnasiums. Use of an undercover agent would be appropriate in this instance. Care must be taken in authorizing the use of surveillance techniques, such as hidden audio and video surveillance, but in the circumstances recited here, such techniques would be permitted.

11. Situation: An enlisted member sees an officer known to him walk into a well-known homosexual bar. A couple of days later, the enlisted member sees the officer walking closely with another man late at night in a park. The enlisted member tells the officer that he knows he is a homosexual and that if the officer does not pay him \$10,000, he will report him to the Military Criminal Investigative Organization. The officer does not say anything, and immediately goes to the MCIO to report that the enlisted member is trying to blackmail him. The MCIO does not ask if the officer is a homosexual because, under these circumstances, it would be improper for the MCIO to question him about his sexual orientation. However, the MCIO begins an investigation of the enlisted member's alleged extortion of the officer.

Issues: Was the MCIO's action proper? Should they have investigated the officer for being a homosexual?

Discussion: The officer provided credible information of alleged extortion by the enlisted member. There is no credible information that the officer has committed any homosexual act, let alone any criminal act. Therefore, the MCIO's approach to the investigation -- investigating alleged criminal activity of the enlisted member, but not inquiring further into the sexual orientation of the officer -- is proper.

Scenarios 12 and 13 are recommended for personnel that deal with administrative separations. These scenarios illustrate the operation of the "rebuttable presumption" that arises when a Service member states that he or she is a homosexual. The scenarios are examples of administrative discharge proceedings in which a Service member attempts to rebut the presumption; they do not establish any evidentiary standards or create any substantive or procedural rights.

12. Situation: An enlisted Service member states to his commanding officer that he is a homosexual. He also tells this to several other enlisted members. An Administrative Discharge Board is convened. At the Board hearing, the member does not dispute that he stated on several occasions that he is a homosexual. He promises, however, that he will not engage in any homosexual acts during the remainder of his term of enlistment. The member presents no other evidence. When asked by the Board whether he engages in or has engaged in homosexual acts, the member refuses to answer.

Issue: How should the Board consider whether the Service member has successfully rebutted the presumption?

Discussion: A statement by a Service member that he or she is a homosexual creates a rebuttable presumption that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts. This means that the statement itself is evidence that the member engages in or is likely to engage in homosexual acts. If the member fails to demonstrate that he or she in fact does not engage in homosexual acts and is not likely to do so, he or she may be discharged.

In determining whether a Service member has successfully rebutted the presumption, a Board may consider, among other things: whether the member has engaged in homosexual acts; the member's credibility; testimony from others about the member's past conduct, character, and credibility; the nature and circumstances of the statement; and any other evidence relevant to whether the member is likely to engage in homosexual acts. The Board also may inquire whether the member engages in or has engaged in homosexual acts.

In this case, the only evidence that the member presented was his promise that he would not engage in any homosexual acts during the remainder of his term of enlistment. The issue for the Board is whether that promise, in light of the Board's assessment of the member's credibility and the nature and circumstances of his statements that he was a homosexual, was sufficient to demonstrate that he does not engage in homosexual acts and is not likely to do so. In making its determination, the Board may consider that the Service member did not present any evidence showing that he does not engage in, and has not engaged in, homosexual acts, and that he refused to answer when asked by the Board about homosexual acts.

13. Situation. An officer tells his best friend, another officer, that he has recently come to terms with his sexuality and has decided that he is a homosexual. He says, however, that he has not engaged in any homosexual acts during his six years of military service, and that he will continue to refrain from such acts. Although the officer asks his friend not to tell anyone else about their conversation, the friend tells the commanding officer (CO). Having determined that the friend's account of the officer's statement constitutes credible evidence of homosexual conduct, the CO then asks the officer whether he told his friend that he is a homosexual. The officer answers, "Yes."

At a Board of Inquiry hearing, the Service presents the testimony of the officer's friend and the CO about the officer's statements to them. There is no evidence that the officer engaged in any homosexual acts.

The officer presents testimony from several fellow officers and subordinate enlisted persons, all males. Those individuals testify that the officer has never stated or suggested to them that he is a homosexual and has never made any sexual advances or engaged in sexual innuendo toward them or anyone they know. They also state that the officer is an outstanding leader, that he is always truthful and conscientious, and that they believe he is fully capable of abiding by all Service regulations, including its restrictions on homosexual conduct. Finally, the officer himself testifies that, although he considers himself a homosexual, he has not engaged in any homosexual acts during his six years of service and that he intends to continue to refrain from such acts during the remainder of his term of service.

Issue: How should the Board consider whether the officer has successfully rebutted the presumption?

Discussion: The officer's statement to his friend that he is a homosexual created a rebuttable presumption that the officer engages in or has the propensity or intent to engage in homosexual acts. The question for the Board is whether the officer's evidence succeeded in rebutting that presumption by demonstrating that the officer in fact does not engage in homosexual acts and is unlikely to do so. In making that determination, the Board could consider, among other things: the evidence that the officer had not engaged in any homosexual acts; the officer's credibility; the testimony from other Service members about the officer's past conduct, character, and credibility; and the nature and circumstances of the officer's statements to his friend and commanding officer. The Board is also free to ask the officer questions about past conduct.

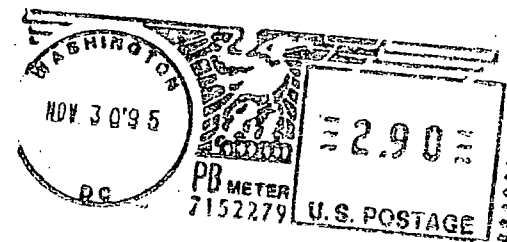
Scenario 14 is recommended for personnel involved in the accession process.

14. Situation: An applicant comes into a recruiting station and says that he would like to enlist. Although, in accordance with DoD policy, the recruiter does not ask any questions about the applicant's sexual orientation or sexual conduct, the applicant states, of his own accord: "I am a homosexual."

Issue: What should the recruiter do after hearing the applicant's statement?

Discussion: Applicants will not be asked or required to reveal whether they are heterosexual, homosexual or bisexual during the accession process. In addition, applicants will not be asked whether they have engaged in homosexual conduct unless independent evidence is received indicating that an applicant has engaged in such conduct or unless the applicant volunteers a statement that he is a homosexual or bisexual, or words to that effect.

If an applicant nevertheless comes into a recruiting office and volunteers a statement that he is a homosexual, that applicant will be rejected, unless he can demonstrate that he does not engage in homosexual acts and does not have an intent or propensity to do so. In this scenario, once the applicant said "I am a homosexual," the recruiter could tell him that the Service assumes that the applicant's statement means that he engages in homosexual acts or has a propensity or intent to do so. The recruiter could then ask the applicant if this is what he meant. If the applicant answers "Yes," the applicant could be rejected.



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December 6, 1995

MEMORANDUM FOR MARVIN KRISLOV

FROM: JOHN STANLEY

RE: Thomasson v. Perry Oral Argument

This memo sets out a few general observations regarding the oral argument in the Thomasson case on December 5, and discussions I had with Justice Department attorneys after the arguments.

Summary. The informal consensus among several Justice Department and JAG corps attorneys present at the arguments was that the 4th Circuit will issue a divided opinion, but that it will probably decide in favor of the government. It appeared to me that Thomasson's attorney (Moore) was pressed harder and by more judges than Kneedler was. Several judges (e.g. Ervin, CJ) were conspicuously silent during questioning and therefore tough to read. Most of us predicted that the decision will not likely be a speedy one, because the case was heard en banc and will probably foster dissent(s). Ed Kneedler said he believed that there was no chance that the case could reach the Supreme Court this session -- unless the 4th Circuit finds the statute or directive unconstitutional.

Appellant's argument. Moore relied heavily on Judge Nickerson's opinion in the Able case, currently on appeal to the 2nd Circuit. He argued, as held in Able, that Congress never truly intended to create a rebuttable presumption (never intended to allow a person to announce he or she is gay, but rebut this statement by convincing the administrative panel that he or she would not engage in homosexual acts in the future). He quoted the Abel opinion, calling the instances in which servicemen have been found to carry the burden of rebutting the presumption "dysfunctional aberrations." (NB: there are now 7 individuals who have successfully rebutted the presumption). This was one of the keys underlying his First Amendment argument: that the mere statement "I am gay" that has effectively been made actionable by the directive.

Moore asserted that, by offering evidence and testimonials reflecting exemplary military service, Thomasson had offered evidence to the administrative board to rebut the presumption that he was likely to engage in homosexual acts. Judge Murnaghan became noticeably frustrated with this assertion, repeatedly asking Moore how this evidence was directed at rebutting the presumption. Murnaghan's questioning may evidence a belief that the presumption is not a sham and, therefore, is rebuttable -- undercutting Moore's First Amendment argument.

Appellee's argument. Kneedler was pressed most vigorously by Judge Motz (a Clinton appointee). He was questioned hard on whether a member of the armed forces may admit that he or she is gay, but rebut the presumption simply by stating that he or she has refrained, and will refrain, from committing homosexual acts (i.e. a "simple assertion" of celibacy). Kneedler would not agree to give a categorical answer; instead, he reminded the judges that the administrative panels are free to consider whatever facts are presented and determine whether such facts are sufficient to rebut. Thus, a simple assertion of celibacy would be weighed as the panel sees fit.¹

The directive provides that, in order to rebut the presumption, a service member must disprove that there is a "likelihood" that he or she engages in or will engage in homosexual acts. Judge Luttig pressed Kneedler on the definition of the term "likelihood." He asked whether "a likelihood" means a possibility (e.g. a 10% chance), a probability (e.g. more than a 50% chance), or some other number. Kneedler did not give a definitive answer.

Family Research Council's argument. Professor Woodford appeared for the Family Research Council. He did not seem to generate an enthusiastic reception from the judges -- except possibly for Judge Luttig. Judge Motz, Williams and one other judge all pressed him hard. Motz challenged him to point to the words in the statute which were inconsistent with the DoD directive, and he could not. Instead, his argument that the directive goes beyond the bounds set up by the statute relies on the practice under the *old* policy, which he contends was essentially codified by Congress. There was some question whether the court could strike down the directive -- could they reach the issue if the appellant hadn't directly raised this issue?

Judge Luttig's position is difficult to anticipate: while he may support overturning the directive, it is difficult to envision him supporting a decision which would reinstate Thomasson.

¹ According to a Justice Department attorney after the argument, Kneedler probably did not want to be pinned down on this question because he was aware that Jamie Gorelick had testified to Congress that a simple promise of celibacy would *not* suffice to rebut the presumption.

December 4, 1995

COPY

CLOSE HOLD -- PRIVILEGED AND CONFIDENTIAL

MEMORANDUM FOR JACK QUINN
JAMES CASTELLO

FROM: MARVIN KRISLOV

RE: Thomasson v. Perry Appeal

On Tuesday, Dec. 5, the U.S. Court of Appeals for the Fourth Circuit, en banc, hears oral arguments in the appeal of Thomasson v. Perry, which challenges the "Don't Ask, Don't Tell" policy.¹ The court will allow the Family Research Council to argue orally against Thomasson's claims. This memorandum provides a short history of the case and sets out the three arguments. A law clerk, John Stanley, will attend the arguments in Richmond and will provide any additional updates.

I. Case Facts

On Mar. 2, 1994, Lt. Paul Thomasson, USN, announced in a letter to the Navy that he was a homosexual. A Navy Board of Review recommended Thomasson's discharge for failing to rebut the presumption that he engaged in, or was likely to engage in, homosexual acts. Thomasson sued to prevent his discharge. He challenged the constitutionality of Section 571 of the National Defense Authorization Act of 1994, 10 U.S.C. §654 ("Policy concerning homosexuality in the armed forces") and DoD Directive No. 1332.30 ("Separation of Regular Commissioned Officers"), which together comprise the current policy concerning homosexuality in the armed forces. On June 8, 1995, the U.S. District Court for the Eastern District of Virginia held that the statute and regulations were valid and did not violate

¹ Four other cases have challenged the policy at the district court level: (1) Able v. U.S., 880 F.Supp. 968 (E.D.N.Y., 1995) (both the act and directives allowing discharge of service member who states he or she is homosexual violates First Amendment and equal protection rights); (2) Elzie v. Aspin, 897 F.Supp. 1 (D.D.C., 1995) (discharge of service member and denial of retirement benefits for stating that he was homosexual under old policy remanded to be considered under new policy); (3) Philips v. Perry, 883 F.Supp. 539 (W.D. Wash., 1995) (discharge of service member for stating that he was homosexual did not violate First Amendment or equal protection rights); (4) Selland v. Perry, 1995 WL 643998 (D.Md.) (discharge of service member for stating he was homosexual and was in relationship did not violate First Amendment or equal protection rights).

Thomasson's freedom of speech, equal protection rights, freedom of association, due process rights, or the Administrative Procedure Act.² Thomasson appealed.

II. Statute and Directive

The statute in question represents the compromise struck between the Clinton Administration and Congressional opponents of relaxing the ban on homosexuals in the military. Legislative history reflects that Congress intended to implement this compromise as articulated in the final version of the Clinton Administration policy. The Clinton Administration Executive Order on "Don't ask, Don't tell" was issued in the summer of 1993; the legislation passed in the winter of 1993. DoD issued its directive shortly thereafter, and the current version was issued in February, 1994.

Section 571 of the National Defense Authorization Act of 1994 requires discharge for a service member who: (1) engages in homosexual conduct,³ (2) attempts same-sex marriage,⁴ or, as is relevant in the Thomasson case, (3) has stated that he is a homosexual.⁵ A service member who has stated that he is a homosexual may be retained, however, if he can demonstrate that he does not engage in, intend to engage in, or have the propensity to engage in, homosexual conduct.⁶ Therefore, a statement that one is a homosexual creates a rebuttable presumption that one engages in or is likely to engage in homosexual conduct. If the service member does not rebut this presumption, his statement is used as evidence against him.

² 895 F.Supp. 820 (E.D.Va., 1995).

³ 10 U.S.C. §654(b)1.

⁴ 10 U.S.C. §654(b)3.

⁵ 10 U.S.C. §654(b)2.

⁶ Id. Under both the statute and Directive 1332.30, which implements the statute, a declaration that one is a homosexual raises a presumption that one engages in or is likely to engage in homosexual conduct. The declaration is grounds for discharge not because it reflects sexual orientation, which the directive provides is not a bar to continued service, but because it indicates a likelihood that one will engage in homosexual acts.

While the statute does not define "propensity," the directive defines it as "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." DoD Directive 1332.30, para. B.5.d.

Rebutting the presumption, while difficult, has not proved impossible. In 1994, several armed forces members who had admitted to being homosexuals successfully demonstrated that they had no propensity or intent to commit homosexual acts.⁷

III. Arguments

A. Thomasson

Lt. Thomasson argues both that the statute and the DoD directive (1) violate his equal protection rights because he was discharged, not for proscribed conduct, but as a result of his sexual orientation and his mere speech regarding his sexual orientation; and (2) violate his free speech rights because he was discharged solely as a result of publicly acknowledging his sexual orientation.⁸

B. Government

The Government argues that its "Don't Ask, Don't Tell" policy does not violate equal protection rights. It argues that the discharge of service members who publicly acknowledge their homosexuality but fail to demonstrate the unlikelihood that they will engage in homosexual acts meets the rational-basis test because the Government has a legitimate interest in prohibiting homosexual conduct in the military to protect military effectiveness.

The Government also argues that its policy does not violate a service member's freedom of speech. The policy treats a member's statement of homosexuality as a basis from which to presume, if there is no rebuttal, that the member engages in or is likely to engage in homosexual acts. The First Amendment does not prohibit such evidentiary use of a member's statements.⁹ Therefore, one's statement regarding sexual orientation may be used as evidence of homosexual conduct. The ability to rebut the

⁷ Dept. Of the Army Pamphlet 27-50-268; 1995-Mar Army Law. 39.

⁸ Thomasson, additionally, claims that the policy violates freedom of association, due process rights, and the Administrative Procedure Act. Neither party devotes much discussion to these issues, and they should not be the major issue on appeal.

⁹ This reasoning is based on several Supreme Court decisions, particularly Wayte v. United States, 470 U.S. 598 (1985) (Citizen's letter announcing refusal to register for selective service can be used as evidence without violating free speech rights).

presumption, the Government argues, demonstrates that the policy is not directed at speech per se.

C. Family Research Council (FRC)

The FRC argues that the court should not reach Thomasson's constitutional claims because the statute does not distinguish between homosexual conduct and homosexual orientation. As such, the FRC claims that a service member's public acknowledgment of his or her homosexuality in and of itself requires discharge. The FRC argues that Thomasson bases his claim solely on a provision in the directive that says that "sexual orientation is not a bar to service." FRC suggests that this provision cannot overcome what it calls the "clear legislative history" that "homosexuality is incompatible with military service" and that Congress did not distinguish between conduct and orientation.¹⁰ Since the court must interpret the statute before the regulation, the FRC argues that Thomasson's free speech and equal protection claims are moot.¹¹

¹⁰ The Government responds that the fact that the presumption of homosexual conduct can be rebutted proves a distinction in the statute between conduct and orientation. Additionally, the Government argues that the legislative history supports its assertion.

¹¹ The FRC claims that the "Don't Ask, Don't Tell" policy is substantively identical to its predecessor, which deemed homosexuals unqualified to serve in the armed forces. Therefore, it argues that this court may decide Thomasson's free speech and equal protection claims in the same manner as previous courts interpreting the homosexual exclusion policy in effect prior to the National Defense Authorization Act of 1994.

DSG

CSG DISCUSSION DRAFT - June 6, 1995
No. 94-1039

11:10 a.m.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ROY ROMER, ET AL., PETITIONERS

v.

RICHARD G. EVANS, ET AL.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

DREW S. DAYS, III
Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

departments, including the Department of Justice, have adopted administrative policies barring discrimination on the basis of sexual orientation in their internal operations. In addition, Congress and the President have adopted rules that require separation from military service on the basis of homosexual conduct, but make clear that separation is not required on the basis of sexual orientation alone. The United States has a strong interest in the proper development and application of equal protection principles and a particular interest in those principles as they relate to governmental classifications based on homosexual conduct or orientation.

STATEMENT

1. In 1992, Colorado voters approved the following amendment to the state constitution by a vote of approximately 53% to 47%:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Pet. App. B2. The measure, known as Amendment 2, had been submitted to the State's voters at the November, 1992, election. Ibid.; see generally Colorado Const. Art. V, § 1.

In an analysis prepared for the voters in the 1992 election, see Pet. Br. 6 n.3, the Legislative Council of the Colorado

General Assembly noted that the proposal of Amendment 2 arose "in the context of three decades of increased governmental activity in the area[] of civil rights," and explained that the Amendment would "identif[y] one area * * * in which civil rights laws and policies could not be enacted or enforced by the state government or by local governments in Colorado." Pet. App. F3.¹

The Council's analysis identified "a patchwork of federal, state, and local laws, regulations, and policies * * * [that] monitor, offer limited protection against, or prohibit discrimination based on sexual orientation." Pet. App. F3. The analysis specifically described ordinances in effect in three Colorado cities -- Aspen, Boulder, and Denver -- that had "determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations." *Id.* at F4; see J.A. _____ (relevant ordinances). The Council pointed out that, at the state level, an executive order prohibited "discrimination based on sexual orientation in the hiring, promotion, and firing of classified and exempt state employees"; a state statute "prohibit[ed] health insurance companies from determining insurability based on an individual's

¹ Petitioners indicate (Br. 6 n.3) that over 200,000 copies of the Legislative Council's analysis were distributed to voters. More than 1.5 million people voted on Amendment 2 (Pet. App. B2), and the campaigns for and against it presented the voters with a variety of arguments and views. See generally, *e.g.*, *id.* at E10; Pet. Br. 7. Both the Colorado Supreme Court (see *id.* at D24-D25 & n.26) and petitioners (Br. 6. n.3, 41; see also Pet. App. B11) have cited the Council's analysis as relevant in interpreting Amendment 2.

sexual orientation"; and the Colorado Civil Rights Commission had voted to recommend that the State's general civil rights law be amended to prohibit discrimination based on sexual orientation. Pet. App. F5; see J.A. _____ (executive order); Colo. Rev. Stat. § 10-3-1104(1)(f)(VI)-(VIII) (West Supp. 1992). The Council's analysis also noted the existence of policies barring discrimination based on sexual orientation applicable to the student organizations of one state college and to both the students and employees of Colorado State University and the Denver Public Schools. Pet. App. F5.

In its analysis, the Legislative Council explained that Amendment 2 would invalidate the Aspen, Boulder, and Denver ordinances insofar as they protected homosexual, lesbian, and bisexual persons against discrimination on the basis of sexual orientation; that it would, in addition, "nullify existing anti-discrimination policies based on sexual orientation" adopted by any state entity; and that it would also prevent the future "adoption of any state statute, local ordinance, or policy for public entities which prohibits discrimination based on sexual orientation." Pet. App. F6. The Council pointed out (*ibid.*) that the Amendment would not affect non-discrimination policies adopted by private employers. Its analysis also noted (*ibid.*) that the Amendment "does not address the rights of heterosexual individuals to bring claims of discrimination," and that its effect on any such rights under existing or future ordinances was unknown.

2. Respondents filed this action in state court seeking to enjoin enforcement of Amendment 2 on a variety of grounds, including its violation of the individual respondents' federal constitutional right to equal protection of the laws. See, e.g., Pet. App. D3-D4 & n.2. After hearing evidence and arguments (see id. at E2, E7-E11), the trial court entered a preliminary injunction in favor of respondents. In holding that respondents had demonstrated a reasonable probability of success on the merits (see id. at E11-E13), the court concluded (id. at E17) that Amendment 2 burdened the "fundamental right" of an "identifiable class" "not to have the State endorse and give effect to private biases." The court indicated that it would apply strict scrutiny in reviewing the Amendment. Id. at E18.

The Supreme Court of Colorado affirmed the entry of the preliminary injunction. Pet. App. D1-D28. The court undertook its own analysis of the relevant constitutional principles. Relying on this Court's decisions in the area of voting rights (see id. at D9-D14), and in particular on a line of cases beginning with Hunter v. Erickson, 393 U.S. 385 (1969), it concluded (Pet. App. D21) that the federal Equal Protection Clause "protects the fundamental right to participate equally in the political process, and that any legislation * * * which infringes on [that] right by 'fencing out' an independently identifiable class of persons must be subject to strict scrutiny." The court rejected (id. at D21-D23) petitioners' argument that the cases on which the court relied could support

an equal protection challenge only to legislation that placed unusual political burdens on groups defined by racial or other constitutionally suspect characteristics.

In reaching this decision, the Colorado Supreme Court construed Amendment 2 "at a minimum, to repeal existing [anti-discrimination] statutes, regulations, ordinances, and policies of state and local entities" of the sort identified in the Legislative Council's analysis of the measure (see pages 3-4, supra), and also "to prohibit any governmental entity from adopting similar, or more protective[,] statutes, regulations, ordinances, or policies in the future" without a new constitutional amendment. Pet. App. D24-D25 (footnote omitted). Noting that the parties "sharply disagree[d]" on the proper interpretation of the Amendment, the court found it unnecessary to determine its full scope, because the unambiguous prohibition of "the enactment of antidiscrimination laws by state or local entities * * * alone provide[d] a sufficient basis for [the court's] conclusion." Id. at D24 n.25. The court held that "alter[ing] the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent * * * a [new] constitutional amendment" (id. at D25) raises serious equal protection concerns. Since "no other identifiable * * * group's ability to participate in the political process is restricted and encumbered in a like manner," Amendment 2 "expressly fenc[ed] out an independently identifiable group" (ibid.) from "seeking

government action favorable to it and thus, from participating equally in the political process" (*id.* at D26). The court held that Amendment 2 must therefore be subjected to "strict judicial scrutiny," and it affirmed the trial court's preliminary injunction. *Id.* at D27-D28.²

On remand, the trial court considered evidence and argument concerning whether Amendment 2 was "supported by a compelling state interest and narrowly drawn to achieve that purpose in the least restrictive manner possible." Pet. App. C4 (quoting *id.* at D8). The court considered six interests asserted by the State (*id.* at C4):

1) deterring factionalism; 2) preserving the integrity of the state's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing the government from interfering with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of [Colorado] children.

It rejected most of the State's asserted interests as either not constitutionally "compelling" or as unsupported by the record. *Id.* at C4-C14. The court recognized the promotion of "religious freedom" and "family privacy" as potentially compelling state interests, but held that Amendment 2 was not narrowly tailored to advance those interests. *Id.* at C14; see *id.* at C10-C13. The

² Justice Erickson dissented. Pet. App. D29-D57. He would have vacated the preliminary injunction and remanded for trial under a rational basis standard. *Id.* at D57.

court held Amendment 2 unconstitutional, and permanently enjoined its enforcement. *Id.* at C20.³

The Colorado Supreme Court affirmed. Pet. App. B1-B24. The court noted at the outset that respondents had not appealed the trial court's ruling on suspect or "quasi-suspect" status, and it declined to address that issue. *Id.* at B6 n.3. The court also declined to reconsider its previous conclusion that Amendment 2 was subject to strict scrutiny, and therefore refused to consider the measure's validity under a "rational basis" test. *Id.* at B6-B7 & nn.3-4. Applying strict scrutiny, the court held that Amendment 2 was neither necessary nor narrowly tailored to advance the State's compelling interest in ensuring religious freedom (*id.* at B8-B11) or its interests in preserving personal and familial privacy (*id.* at B11-B14). The court rejected each of the remaining interests asserted by the State as not constitutionally "compelling." *Id.* at B14-B21.

The court also rejected (Pet. App. B22-B23) petitioners' argument that those portions of Amendment 2 relating to "conduct, practices, and relationships" should be severed from those relating only to sexual "orientation." In the context of Amendment 2, the court held that the "four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class

³ The court rejected respondents' argument that legislative classifications based on homosexuality or bisexuality are constitutionally "suspect" or "quasi-suspect" (*id.* at C14-C19), and declined to consider the validity of Amendment 2 under a "rational basis" standard of review (*id.* at C19).

of persons" (id. at B23). Finally, the court rejected the State's argument that the Tenth Amendment to the U.S. Constitution could insulate Amendment 2 from review under the federal Equal Protection Clause. Id. at B23-B24. The court affirmed the entry of the permanent injunction barring the State from enforcing Amendment 2. Id. at B24.⁴

SUMMARY OF ARGUMENT

ARGUMENT

INTRODUCTION

The Equal Protection Clause prohibits a State from denying the equal protection of the laws to persons within its jurisdiction. The Clause permits a State to draw legitimately-based reasonable distinctions between groups or classes of individuals. A State may not, however, simply choose to exclude a particular group of its citizens or residents from seeking the protection of the State against harm or the threat of harm.

Amendment 2 contravenes this fundamental principle by identifying a particular group of state citizens and residents-- and only that group--as completely ineligible for state protection from any form of public or private discrimination against them, regardless of the pervasiveness, harmfulness,

⁴ Justice Scott joined the court's opinion and judgment, but filed a separate opinion (Pet. App. B25-B35) "to suggest that Amendment 2 impermissibly burdens the right 'peaceably to assemble and petition the government for redress of grievances,' * * * [and that the] permanent injunction should be upheld under the Privileges and Immunities Clause of the Fourteenth Amendment." Id. at B25. Justice Erickson dissented (id. at B36-B54), arguing that Amendment 2 should be evaluated and upheld under a "rational basis" standard of review. See id. at B53.

source or lack of justification for that discrimination. In so doing, Amendment 2 is virtually without parallel in United States history except in the racially discriminatory legal regimes that the Equal Protection Clause was originally adopted to remedy and prohibit. Like those regimes, Amendment 2 violates the Clause's guarantee that the State's protection from unfair and oppressive discrimination will not categorically be denied to any group.

In this case the State has announced, as part of its fundamental law, that neither it, nor its subdivisions, instrumentalities or agencies, will ever protect individuals who are of homosexual, lesbian or bisexual orientation from discrimination against them based on that personal characteristic. It requires no extension of present law to conclude that, in thus amending its constitution, Colorado has violated the Equal Protection Clause. Resolution of this case accordingly does not require the Court to expand the category of classifications that are constitutionally "suspect" and subject to heightened scrutiny under the Equal Protection Clause. The Court need only decide, in accordance with the language and clear purpose of the Clause, that a State cannot make and enact a categorical decision that it will never protect a group of persons within its borders from discrimination against them based on a personal characteristic that they share.

ARGUMENT

**AMENDMENT 2 DENIES THE EQUAL PROTECTION OF COLORADO
LAW TO INDIVIDUALS WITH HOMOSEXUAL, LESBIAN OR
BISexual ORIENTATION**

A. Amendment 2 Denies Homosexuals, Lesbians And
Bisexuals Equal Status Under The Law

1. Individuals Who, Alone Among All Groups
In Society, Are Forbidden From Securing
Governmental Protection Against
Discrimination, Do Not Have Equal Status
Under The Law.

The Equal Protection Clause provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. The Clause's application to most legal distinctions a State may draw is familiar: the State ordinarily may make distinctions and create classifications having a rational relationship to a legitimate governmental purpose; it may not, however, enact laws that draw invidious, arbitrary or irrational distinctions, nor may it enforce facially neutral laws in an invidious, arbitrary or irrational manner. See, e.g., Clements v. Fashing, 457 U.S. 957, 967 (1982) ("Classification is of the essence of legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause"). At the core of the Clause is a requirement that States not adopt or enforce policies that would deny the protection of their laws to persons or groups within their jurisdiction because they possess a personal characteristic not shared by others. States, that is, may not use such characteristics as a basis for relegating groups of adult citizens or residents to an inferior status under the law, pursuant to which they are disabled from seeking the State's protection against discriminatory harm visited upon them by others. [citation needed]

States concededly should and do have broad authority to arrange their governmental structures and to allocate power among those structures--including the power to hear complaints about, and to determine whether to provide protection from and remedies for, discrimination. In making such decisions, moreover, states ordinarily have no affirmative constitutional obligation to enact laws forbidding some or all discrimination against particular groups of state residents, nor are they ordinarily forbidden from repealing such laws that they may have adopted. See Crawford v. Board of Education, 458 U.S. 527, 538-539 (1982). [But see Reitman v. Mulkey]. The Equal Protection Clause is not ordinarily implicated by such governmental actions or inactions because they do not purport to preclude any person or group from seeking the protection of state government against harm. Cf. Missouri v. Lewis, 101 U.S. 22, 30 (1880) (Equal Protection Clause "is not violated by any diversity in the jurisdiction of the several courts . . . if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress").

A state decision enshrined in the state's constitution that under no circumstances can any organ of state or local government respond to any kind of injurious public or private discrimination against a particular group (and only against that group) is not, however, a simple structuring or allocation of power; it is, rather, an obvious and fundamental impairment of that group's

legal status by removing its ability "to claim the protection of the laws." As such it is contrary to the letter and purpose of the Equal Protection Clause. The Fourteenth Amendment's mandate of equal protection must mean, we believe, that state government that is generally open to, and able to consider the complaints of, individuals who claim that they are being unjustly victimized on the basis of a personal characteristic, must be equally open to such claims by all citizens. A group of citizens who share a personal characteristic that may cause unjustified discrimination against them cannot be said to enjoy the equal protection of the laws when they do not have an ability equal to others even to seek the protection of the laws against harmful discriminatory treatment.⁵

The correctness of this reading of the Equal Protection Clause is confirmed both by its history and its judicial interpretation. The Fourteenth Amendment's historical roots lay in the national effort to protect African Americans from state involvement in hostile discrimination toward them. See, e.g., Mitchum v. Foster, 407 U.S. 225, 238-39 (1972); Richmond v. J.A. Croson Co., 488 U.S. 469, 522 (1988) (Scalia, J., concurring in the judgment) ("The struggle for racial justice has historically been a struggle by the national society against oppression in the individual states."). From the beginning, this Court has

⁵(Clause "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.") See also Missouri v. Lewis, 101 U.S. at 31.

recognized that the framers of the Amendment were concerned, not only with state laws that affirmatively discriminated on the basis of race, but also with state laws or policies that deliberately and explicitly failed to extend to African Americans the protection of the laws available to others. See e.g., Slaughterhouse Cases, 83 U.S. 36, 70 (1873) (tracing origin of Fourteenth Amendment to concern about public discrimination against African Americans and to the perception that "laws for their protection were insufficient or were not enforced"). The evils against which the Amendment was specifically directed included, not only the formal enactment of unequal laws, but also the refusal of many Southern state governments to respond to unjust discrimination by private persons or public officers.

[citation]

The Fourteenth Amendment addressed these concerns by placing primary responsibility on the States for guaranteeing the equal protection of the laws to all persons. While an early version of the Amendment introduced in Congress would simply have empowered Congress to protect equal rights, the Amendment as proposed and ratified imposed the obligations of Section 1 directly on the states and provided congressional enforcement power under Section 5 as a secondary source of protection. See William E. Nelson, The Fourteenth Amendment--(198_). Subsequent congressional debates over federal enforcement legislation included repeated references to the States' affirmative obligation to afford equal protection. See, e.g., Cong. Globe,

42d Cong., 1st Sess., App. 153 (April 4, 1871) (Rep. Garfield) ("the provision that the States shall not 'deny the equal protection of the laws' implies that they shall afford equal protection"); [other cites].

This Court's early decisions interpreting the Equal Protection Clause also consistently recognized both the primary role of the States in providing residents with the protection of the laws and the related proposition that the Clause would be violated by a deliberate state refusal to provide such protection to specific "persons and classes of persons." Missouri v. Lewis, 101 U.S. 22, 30, 31 (1879). See Barbier v. Connolly, 113 U.S. 27, 31 (1884) (Amendment requires that "equal protection and security should be given to all under like circumstances"); Civil Rights Cases, 109 U.S. 3, 24 (1883) (Amendment "extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class or to any individual, the equal protection of the laws"). In particular, the Court assumed that to be consistent with the Equal Protection Clause, state law had to avoid "singl[ing] out and expressly den[ying]" a group the protections accorded others, Strauder v. West Virginia, 100 U.S. 303, 308 (1880), and that state law had to be responsive to claims of unjust and injurious discrimination. See Civil Rights Cases, 109 U.S. at 24-25.

The language, purpose and history of the Equal Protection Clause thus clearly reject the possibility that a State might be entitled completely to deny access to legal protection to a

specified class of persons. Whatever the outer limits of this principle, it clearly prohibits a deliberate, absolute and permanent refusal by a State to permit any branch of government within the State to consider any claims of injurious discrimination against the members of a group who share a personal characteristic that may provoke such discrimination.

2. Amendment 2 Comprehensively Prohibits
Homosexuals, Lesbians and Bisexuals
From Securing Governmental Protection
Against Discrimination.

In construing Amendment 2 for the purpose of deciding this facial constitutional challenge to its validity, the Court must give the measure the interpretation that has been accorded to it by the Supreme Court of Colorado. [citation] That court's decision in this case concededly does not define the ultimate outer reach of Amendment 2. [Citation of Colorado Supreme Court] The Colorado Supreme Court did, however, determine the consequences that would flow from the Amendment at a minimum. [citation; quote "minimum"?] It is that minimum construction that we use in addressing the constitutionality of Amendment 2 in this case.

Amendment 2 disables state government, as a matter of state constitutional law, from adopting or enforcing any law or policy under which homosexual, lesbian or bisexual orientation can be the basis of a claim of discrimination. Several aspects of this remarkable measure deserve brief separate attention:

First, although the Amendment accomplishes a repeal of existing laws or policies within the State insofar as such laws

or policies may protect homosexuals, lesbians or bisexuals from discrimination based on their sexual orientation, its effect goes much further than that of a mere repeal of existing law.

Amendment 2 purports, in addition to accomplishing a repeal, to disable the State for the indefinite future from enacting or adopting any law or policy that would provide a basis for a claim of discrimination against persons of homosexual or bisexual orientation.

Second, for the same reason, adoption of Amendment 2 constitutes a significantly more powerful measure against the targeted groups than would a simple refusal by the State, or one of its agencies or subdivisions, to adopt a law or policy prohibiting discrimination on the basis of homosexual or bisexual orientation. Amendment 2 effectively incorporates into state law an injunction that no organs of state government may even consider such a law or policy:

Third, Amendment 2 does not apply to only one or some of the organs of state government. It is completely comprehensive in its scope. It applies to the State as a whole and also to all branches, departments and agencies of the State. It applies, not only to state legislation, but to state executive, administrative and (as far as one can tell) judicially-developed policy as well. It also applies at the local as well as the statewide level of government, extending its prohibitions to all governmental units or political subdivisions of the state, including municipalities

and school districts. Amendment 2 permits absolutely no local governmental or community choice in the subject it covers.

Fourth, although the prohibitions of Amendment 2 might have been contained in a state statute, Amendment 2 is instead intended for incorporation as fundamental law into the state's constitution. [fn: Interestingly, as part of the state Bill of Rights] As part of the state constitution, Amendment 2 represents the state's effort to make Amendment 2 as permanent and fundamental a part of the law and policy of Colorado as possible. Amendment 2 cannot be modified or repealed by the normal political processes to which most governmental choices are always subject. An amendment to the state constitution would be necessary before any organ of state or local government could even consider adoption of a law or policy permitting a claim of discrimination by the targeted group.

Fifth, Amendment 2 applies to discrimination in any area of public or private life--it is not limited to a prohibition or recognition of claim of discrimination in any particular subject matter area. It prohibits recognition of claims of discrimination in public and private employment, housing, public and private education, commercial contracts, purchasing of insurance protection, membership or participation in social and political organizations, obtaining health care, etc. It applies, moreover, no matter how harmful, invidious or without justification that discrimination might be, and wholly without

regard to the factual circumstances in which the discrimination might occur.

Sixth, Amendment 2 prohibits recognition of claims based on private and state discrimination. In addition to relationships among citizens and residents, it also applies to relationships of individuals with their government and with governmental officials. It thus prohibits recognition of claims of discrimination in provision of state and local governmental benefits and services, in police protection, in access to public facilities, to public education, public health care, etc. Seventh, Amendment 2 does not deal exclusively or primarily with discrimination based on the conduct of the victims of the discrimination. It prohibits recognition of discrimination claims when discrimination is based, not on conduct, but on a personal characteristic of sexual orientation. [fn to Colo. Sup. Ct. refused to distinguish between conduct orientation].

Eighth, Amendment 2 is not a broadly neutral prohibition on the legal recognition of any discrimination claims by Colorado residents. It applies to prevent recognition only to discrimination based on sexual orientation. So far as the Amendment and the remainder of the Colorado Constitution are concerned, the State may continue to recognize--or choose in the future to recognize--any other claims of discrimination on any other basis.

Ninth, even within the area of sexual orientation discrimination, Amendment 2 is discriminatorily selective. It

applies only to discrimination claims by the minority of people who are homosexual, lesbian or bisexual. Discrimination claims are still permitted under state law, even if based on sexual orientation, so long as the discrimination is against members of the heterosexual majority.

In its focus on a group defined by a personal characteristic, as well as in the breadth and categorical quality of its complete denial of claims by members of that group to a right to nondiscriminatory treatment, Amendment 2 has, we believe, no parallel in United States history except in the treatment of the black minority by state legal systems whose manifest injustice was the primary motivation for the adoption of the Fourteenth Amendment. Amendment 2 is nothing short of a formal and binding statement by the State of Colorado that, as a matter of fundamental state policy, no organ of state government will take steps to prevent or remedy official or private discrimination against one, and only one, defined group of the state's residents. While others in the State who are victimized by public or private discrimination based on personal characteristics may, at all times, seek new state laws or policies--or the enforcement of existing laws or policies--to protect them against that discrimination, members of the one specified group may not. Under Amendment 2, discrimination against homosexuals and bisexuals is, as a matter of permanent state policy, behavior that is not, and will never be, of any state concern.

It is true that Amendment 2 permits members of the group it targets to continue to avail themselves of general state laws insofar as they can do so without invoking a claim of discrimination. Despite Amendment 2, someone of homosexual or bisexual orientation can presumably sue for breach of contract, trespass to property or tortious assault. But in any of the many relationships in public and private life that are not governed by strict legal affirmative duties or prohibitions, Amendment 2 is a pronouncement of state policy that discrimination against this group--and only this group--is, and always will be, permissible. Under Amendment 2, for example, neither the State, nor any state agency or municipality within Colorado, can consider giving specific relief to homosexuals or bisexuals who might find themselves comprehensively excluded from one or many areas of private employment solely on the basis of dislike of their sexual orientation. The same would be true if most or all banks or other lenders were to decide, entirely for reasons of bias, to refuse to finance home purchases or business investments by the targeted group, or if lessors of residential or commercial property were, for similar reasons, to refuse to rent to members of the group. Similarly, homosexuals or bisexuals could not seek relief from sexual orientation discrimination if physicians, hospitals or ambulance services should refuse to treat them because of their sexual orientation, if restaurants or hotels refused to serve or accomodate them, if public utilities declined

to provide important services, or if food, clothing stores or other businesses refused to admit or sell to them.

These are not fanciful hypotheticals. As an actual example of the type of governmental action that Amendment 2 would prohibit, the Colorado Legislative Council identified a 1992 state statute prohibiting health insurance companies from determining insurability based on an individual's sexual orientation. See J.A.----. [fn. giving prohibitory language of statute?] This statute was presumably enacted because individuals were unable, solely because of their sexual orientation, to obtain private health insurance coverage affording access to medical care that might often be necessary to preserve health or life, and because the state legislature believed that no sufficient justification existed for such potentially devastating exclusions. Amendment 2, however, would not only repeal that statute, but it would prevent any future state legislature--or any other official body in the State--from making the same or a similar judgment where homosexuals or bisexuals are the targets of unjustified discrimination, while leaving the State and its localities open to prohibiting any other sort of biased or discriminatory behavior.

The constitutional guarantee that states will not deny the equal protection of the laws to anyone within their jurisdictions is, we believe, directly violated by this creation of a single group of state residents who, because of a shared personal characteristic, are uniquely ineligible for state protection

against discriminatory treatment. This is not to say that a State must provide such protection to all groups or to any particular group in some or all circumstances. What the Constitution requires is not that the State act whenever a group seeks protection, but that, at a minimum, it not completely foreclose itself from acting to cure discrimination against one group, while remaining entirely open to the antidiscrimination claims of others. Such a foreclosure inevitably fixes a separate and inferior legal status on the targeted group--its members, and its members alone, cannot appeal to government for protection against discrimination. That inferior status must, in turn, create precisely the danger that it was the central purpose of the Equal Protection Clause to prevent--the danger that a group might be deprived of the right to "exemption from legal discrimination, implying inferiority in civil society, lessening the security of their employment of the rights which others enjoy, and discriminations which are steps towards reducing them to the conclusion of a subject race."

B. AMENDMENT 2 VIOLATES THE DOCTRINE OF HUNTER V. BRICKSON

'Amendment 2's violation of the Equal Protection Clause is not cured by the fact that the people of Colorado remain free to modify or repeal it by constitutional amendment. That is true with respect to any provision of state constitutional or statutory law, and was equally true of the racially discriminatory legal regimes against which the Equal Protection Clause was originally directed. The Clause mandates that the State extend the protection of its laws in the present tense and through its ordinary political and governmental processes, a command that is surely violated when a state places a limitation of the scope of a group's legal protections in its basic charter, the document that literally "constitutes" the state.

A. Hunter v. Erickson Requires Heightened Constitutional Scrutiny Of Measures That Bar A Minority Group From Seeking Protection Against Discrimination Through The Normal Legislative Process

The Colorado Supreme Court based its decision in this case on a "political participation" theory derived from this Court's decision in Hunter v. Erickson, 393 U.S. 385 (1969). [Transition from our argument in I.] We agree with respondents that Amendment 2 also violates the Hunter doctrine.

The Equal Protection Clause requires that all citizens, regardless of the "groups" or "classes" to which they may otherwise belong, be given a right to participate on essentially equal terms in the democratic process. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Reynolds v. Sims, 377 U.S. 533 (1964); see also Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982). Hunter v. Erickson holds, in accord with this principle, that limitations on the forums in which groups within society may seek legal protection against discrimination impose constitutionally significant burdens. Hunter struck down a citizen-initiated city charter amendment that suspended existing city ordinances prohibiting housing discrimination on the basis of "race, color, religion, national origin or ancestry," and that prohibited the enforcement of any such ordinance in the future unless it was first approved by a citizen referendum. Acknowledging that, in general, "a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects" (393 U.S. at

392), the Court nevertheless concluded that the city charter provision at issue in Hunter "discriminate[d] against minorities, and constitute[d] a real, substantial, and invidious denial of the equal protection of the laws." Id. at 393. The measure "obviously made it substantially more difficult to secure enactment of ordinances subject to" its terms, and therefore "disadvantaged those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." 393 U.S. at 390-391.

Hunter involved protection against discrimination based on race, religion, or national origin. The decision's fundamental constitutional holding, however, does not appear to depend on the nature of the group or groups whose claims to protection from discrimination are excluded from the ordinary political process. The Hunter principle is one of equal access to that process; the principle cannot sensibly be limited to exclusions based upon "suspect" classifications, but should apply whenever members of a group are precluded from using the ordinary political process to seek governmental protection against a realistic threat of class-based discrimination.'

'As petitioners acknowledge (Br. 24), Hunter cannot be limited to racial minorities alone: The measure struck down in Hunter itself was broader, encompassing not only discrimination on the basis of race or color, but also discrimination on the basis of "religion, national origin or ancestry." 393 U.S. at 387; see also Gordon, 403 U.S. at 5. Moreover, this Court has never relied on any explicit "suspect classification" analysis in either propounding or limiting the Hunter doctrine.

Hunter's reasoning, therefore, should extend to a version of Amendment 2 that specifically targeted women, even though this Court has never held that distinctions based on gender to be "suspect" under the Equal Protection Clause. See, e.g., Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 373 n.* (1993) (Ginsburg, J., concurring). Similarly, we assume that Hunter would be applicable to a measure prohibiting state or local anti-discrimination legislation to protect the aged, the mentally or physically disabled, or children whose parents were not married at the time of their birth, even though none of those classifications may call for strict (or even heightened) constitutional scrutiny. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313-314 (1975); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442-447 (1985); Matthews v. Lucas, 427 U.S. 495, 506 (1976).

The Court has accordingly refused to apply Hunter to referendum or super-majority provisions that did not single out an identifiable group as ineligible for antidiscrimination protection. See James v. Valtierra, 402 U.S. 137, 141-142 (1971), Gordon v. Lance, 403 U.S. 1, 7 (1971) ("discriminate against or authorize discrimination against any identifiable class"); see also Crawford v. Los Angeles Board of Education, 458 U.S. 527, 537 & n.14, 540-541 543-544 (1982). In Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982), however, the Court invoked Hunter in striking down a measure that "remove[d] the authority to address a racial problem--and only a racial

problem--from the existing decisionmaking body, in such a way as to burden minority interests" (*id.* at 474) and "burden[ed] all future attempts to integrate [the State's] schools * * * by lodging decisionmaking authority over the question at a new and remote level of government" (*id.* at 483). See also Crawford, 458 U.S. at 545-547 (Blackmun, J., concurring) (distinguishing Seattle School District); Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd mem.*, 402 U.S. 935 (1971) (applying Hunter to school desegregation question). Nothing in the Court's subsequent cases suggests a retreat from Hunter's central promise of searching constitutional review of any measure that erects obstacles that make it substantially more difficult for a targeted and identified group to seek governmental protection against a threat of discrimination.

B. The Hunter Doctrine Applies To Amendment 2

Amendment 2 violates the Hunter principle. Under the Amendment, citizens of Colorado may seek redress through the ordinary legislative process for discrimination against them based on personal characteristics such as race, age, gender, or sexual orientation. Homosexual or bisexual people, however, are entirely prohibited by the Amendment from using that process, at either the State or local level, to obtain explicit protection against discrimination based on their sexual orientation, and they are also prohibited from seeking the establishment of executive branch or administrative policies barring such discrimination. As in Hunter, their attempts to achieve legal

protection against discrimination through the political process can only succeed if they are first able to secure the repeal of a structural constitutional or charter provision that prevents that issue from being considered through that process. [Add response to petitioners' argument that process is equal because everyone can participate at a constitutional level].

The purpose, form and effect of Amendment 2 are strikingly similar to those of the charter provision struck down in Hunter.

As was true of the charter amendment in Hunter, Amendment 2 was designed to restrict any decision about providing legal protection against discrimination to a particular group to the most remote level possible (enactment of a new state constitutional amendment); and, as in Hunter, Amendment 2's practical effect would "obviously" be to make such protection against discrimination "substantially more difficult to secure." Hunter, 393 U.S. at 390.

The violation of the Hunter principle is, indeed, even clearer here than in that case. In Hunter, the city charter provision that the Court struck down prohibited the enactment or enforcement of one city's ordinances barring housing discrimination on grounds of race, color, religion, national origin or ancestry. Members of minority groups whose use of the ordinary political process was barred by the ordinance could still, however, seek anti-discrimination protection from the government in other subject matter areas--such as employment, education and access to public services. Amendment 2, on the

other hand, prohibits access to government protection against discrimination in all areas of public and private life. Amendment 2 is also not limited, as was the provision in Hunter, to barring enactment or enforcement of ordinances by a single city government, thus leaving open the possibility of obtaining equivalent protection from the state legislature or state executive or administrative officials. Amendment 2 entirely precludes access to any governmental process throughout the State of Colorado, as a means of seeking protection against discrimination.

Because Amendment 2 applies only to protection against discrimination on the basis of a particular personal characteristic, the amendment's practical burden falls exclusively on people with those characteristics. There is no dispute that those people constitute a minority of the population.⁶ Nor is there doubt, in light of the record in this case, about the reality of the threat of unjustifiable discrimination against homosexuals and bisexuals in Colorado. See, e.g., Pet. App. C17-C18 (finding history of discrimination).

The measure at issue in this case targets people identifiable by their "homosexual, lesbian or bisexual

⁶ We do not understand petitioners to dispute that the group defined by Amendment 2 is a small minority of the general population (and will remain so, whether or not the State adopts any legal protections against discrimination). See generally, e.g., R. Posner, Sex and Reason 294-295, 297-298 (1992).

orientation, conduct, practices or relationships." There is reason to pause any time a challenged measure itself defines a group of persons for the specific purpose of visiting on its members some unusual political disability. That feature, for example, distinguishes this case from cases in which facially neutral measures have been called into question on the theory that their effect was to burden one group or another. Compare Hunter, 393 U.S. at 391; Gordon, 403 U.S. at 5; James, 402 U.S. at 141; Crawford, 458 U.S. at 540-541 & n.26. No previous case of which we are aware has involved a measure that has so baldly singled out a disfavored class of citizens for purposefully unequal treatment.¹⁰

⁹ This case involves no question of a distinction between "status" and "conduct." The Colorado Supreme Court declined petitioners' invitation to sever the provisions of Amendment 2 relating to "orientation" from those relating to "conduct," on the ground that in the context of Amendment 2 each term "provides nothing more than a different way of identifying the same class of persons." Pet. App. B22-B23. That interpretation of the intent and scope of Amendment 2 is conclusive as a matter of state law. Cf. Reitman v. Mulkey, 387 U.S. at 376-379.

Reliance on a status-based classification distinguishes this case from the federal government's policy on service by homosexuals in the Nation's armed forces. The military's policy prohibits only homosexual conduct, and allows service by persons with a homosexual or bisexual orientation so long as they either refrain from disclosing that orientation or, having disclosed it, satisfy military authorities that they have no related propensity to engage in prohibited conduct.

¹⁰The myriad enactments that petitioners suggest (Br. 36-37) would be vulnerable to challenge under the decision below are readily distinguishable from Amendment 2: They do not relate to the government's ability to protect--or even consider protecting--a particular class of citizens from the threat of public or private discrimination. And it is hard to imagine a clearer demonstration that the threat of such discrimination is a
(continued...)

C. Amendment 2 Does Not Survive Strict Scrutiny

We therefore conclude that Amendment 2 satisfies the unusual criteria previously identified by the Court for application of heightened constitutional scrutiny of burdens on the right to political participation. We also agree with the Colorado Supreme Court (Pet. App. B8-B22) that petitioners have failed to identify any state interest served by Amendment 2 that is sufficiently important to justify, under a heightened standard, the Amendment's broad and permanent preclusion of all possible governmental responses to identified problems of discrimination against gay men, lesbians, or bisexuals.

[Add brief argument applying strict scrutiny to Amendment 2].

¹⁰(...continued)
real one than the identification of the targeted class in the challenged legislation itself.

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CONCLUSION

The judgment of the Supreme Court of Colorado should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JUNE 1995

**PHOTOCOPY
PRESERVATION**

Send red dot
asap to
James Castell.
- Looks good
to me.
Mamm

Send red dot
11/8/95
Kj

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20508

November 8, 1995

MEMORANDUM FOR JAMES CASTELLO

FROM: JAMES BAKER 

SUBJECT: Responding to Letters on E.O. 12968

You asked NSC/Legal to review the attached letter drafted by Presidential Correspondence. We have done so with NSC/Intelligence Programs, which was the action office for the order in question.

NSC staff recommend the following language as an appropriate response to persons who write in regarding E.O. 12968's provisions that relate to sexual orientation and access to classified information. A separate response should be drafted for those who write to comment on the order's other provisions, such as those pertaining to financial disclosure. Alternatively, this response could be expanded to address the order more generally.

If you, or Presidential Correspondence, have questions regarding the text suggested below please telephone me at (6-9111), or Ed Appel, NSC/Intelligence Programs, (6-9341). Thank you.

"Thank you for taking the time to share your views with me regarding Executive Order 12968. This order ensures fair treatment for all Americans in the granting of access to classified information. Among other things, the Order states that the United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation granting access to classified information. Further, the Order provides that no inference concerning the standards for access to classified information may be raised solely on the basis of the sexual orientation of the employee.

I am dedicated to ending discrimination in our society in whatever form it takes. By working together, we can make our national community a better place for all Americans."

cc: Ed Appel

Attachment

Tab A Draft Response from Presidential Correspondence

COPY

EXECUTIVE OFFICE OF THE PRESIDENT

03-Nov-1995 03:18pm

TO: James Castello
FROM: Stephen R. Neuwirth
Office of the Counsel
CC: Marvin Krislov
SUBJECT: should you or Marvin handle the attached?

TOP PRIORITY

Please read dot
to Alan Kreczko ✓
Jamie Baker ✓
for handling
per James Castello

(no need to copy me)
MK

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

03-Nov-1995 02:07pm

TO: Stephen R. Neuwirth

FROM: Kyle M. Baker
 Presidential Correspondence

SUBJECT: Language clearance

Steve-

Please review the following language re: Executive Order 12968. Marsha Scott has cleared, but I need a Counsel's office approval as well since it involves legal issues. Thanks.

Thank you for taking the time to share your views with me regarding Executive Order 12968, which opens the door for qualified gays and lesbians to receive top security clearances. As you know, this Executive Order states in clear and unmistakable language that the government does not and shall not discriminate on the basis of sexual orientation in the granting of access to classified information. I firmly believe that there is no reason why gays and lesbians who are qualified should not receive the same clearances as other employees.

I am dedicated to ending discrimination and to protecting the civil rights of every citizen in our society. By working together, we can make our national community a better place for all Americans.

THE WHITE HOUSE

WASHINGTON

DATE: 11/6

TO:

JAMIE
Rosen

FROM:

White House Counsel
Room 128, OEOB, x7900

MARUT

Krislow

☒ EPI

☒ Appropriate Action

☐ Let's Discuss

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

The fraudulent conveyance statutes in the State of Oregon are state laws of general applicability and do not relate to any employee benefit plan. The claims of the Trusts for fraudulent conveyance are not preempted by ERISA.

CONCLUSION

The motions to dismiss of All State (# 16) and Action Cleaning (# 19) for failure to state a claim under the Federal Rules of Civil Procedure 12(b)(6) are denied.



Margarethe CAMMERMEYER, Plaintiff,

v.

Les ASPIN, Secretary of Defense,¹
et al., Defendants.

No. C92-942Z.

United States District Court,
W.D. Washington,
Northern Division.

June 1, 1994.

National Guard officer brought declaratory judgment action against the government claiming that her discharge from military service based solely on her admission that she is a lesbian violated her constitutional rights. On cross-motions for summary judgment, the District Court, Zilly, J., held that: (1) officer's discharge violated her equal protection rights; (2) officer's discharge violated her substantive due process rights; but (3) officer's discharge did not violate her right to freedom of speech and association.

Motions granted in part and denied in part.

1. Although William J. Perry is now the Secretary of Defense, he has not yet been formally substi-

1. Constitutional Law §224(2) Militia §10

National Guard officer's discharge pursuant to regulation banning homosexuals who merely acknowledge their orientation violated officer's equal protection rights under Fifth Amendment; officer successfully met her burden of negating government's proffered justifications for its policy of excluding homosexuals from service by offering controverted evidence that individual justifications either had no basis in fact or were based solely on prejudice. U.S.C.A. Const. Amend. 5.

2. Constitutional Law §215

Legislative classifications based on race, alienage, or national origin require strict scrutiny, and classification will be upheld only if it is suitably tailored to serve compelling state interest; strict scrutiny is also required when laws impinge upon constitutionally protected fundamental rights. U.S.C.A. Const. Amends. 5, 14.

3. Constitutional Law §224(1)

Legislative classifications based on gender call for heightened standard of review; classification survives only if it is substantially related to sufficiently important governmental interest. U.S.C.A. Const. Amends. 5, 14.

4. Constitutional Law §213.1(1)

Certain restrictions beyond person's control, such as illegitimacy, are subject to heightened review; these restrictions will survive equal protection scrutiny to extent they are substantially related to legitimate state interest. U.S.C.A. Const. Amends. 5, 14.

5. Constitutional Law §213.1(2)

Equal protection challenges that do involve suspect classifications or fundamental rights are subject to rational basis review; under this standard, discriminatory classification is presumed valid and will be sustained if there is rational relationship between disparity of treatment and some legiti-

tuted as a named defendant.

mate governmental purpose. U.S.C.A. Const.Amends. 5, 14.

6. Constitutional Law ⇨224(1)

Homosexuals are not suspect or quasi-suspect class for equal protection purposes, and classifications based on homosexuality are entitled only to rational basis review. U.S.C.A. Const.Amends. 5, 14.

7. Constitutional Law ⇨213.1(2)

In applying rational basis test to equal protection challenge, initially, court must determine whether challenged classification serves legitimate governmental purpose; if court answers this question in affirmative, court must then determine whether discriminatory classification is rationally related to achievement of that legitimate purpose. U.S.C.A. Const.Amends. 5, 14.

8. Constitutional Law ⇨213.1(2)

If governmental policy is shown to be based solely on prejudice, it cannot survive rational basis review. U.S.C.A. Const.Amends. 5, 14.

9. Federal Civil Procedure ⇨2484.5

Proper standard to be applied in evaluating parties' cross motions for summary judgment on equal protection claim brought by plaintiff discharged from military under homosexual exclusion policy is, if evidence, construed in light most favorable to defendants, shows that there is no reasonably conceivable rational basis policy, and court cannot conceive of rational basis, then plaintiff is entitled to summary judgment; alternatively, if evidence, construed in light most favorable to plaintiff, shows that there is any reasonably conceivable rational basis for policy, then defendants are entitled to summary judgment; finally, if evidence creates disputed issue of material fact as to policy's rationality, then neither party is entitled to summary judgment.

10. Militia ⇨10

National Guard officer's acknowledgment of her lesbian orientation itself was not reliable evidence of her desire or propensity to engage in homosexual conduct and, therefore, there was no rational basis for government's underlying contention, in support of

homosexual exclusion policy, that homosexual orientation equals desire or propensity to engage in homosexual conduct.

11. Constitutional Law ⇨211(1)

Cardinal principle of equal protection law is that federal government cannot discriminate against class in order to give effect to prejudice of others. U.S.C.A. Const. Amend. 5.

12. Constitutional Law ⇨278.6(1)

Militia ⇨10

National Guard officer's Fifth Amendment substantive due process rights were violated by her discharge pursuant to homosexual exclusion policy; discharge of officer based solely on her admission of homosexual orientation was not rationally related to government's legitimate interest in maintaining readiness and combat effectiveness of its military forces. U.S.C.A. Const.Amend. 5.

13. Constitutional Law ⇨213.1(1, 2)

When classification penalizes exercise of fundamental constitutional right, heightened scrutiny is required; on other hand, where regulation impairs lesser interest, their need only be rational relationship between challenged regulation and legitimate governmental purpose.

14. Constitutional Law ⇨90.1(1), 91

Militia ⇨10

Policy banning homosexuals from military service did not violate discharged officer's right to freedom of speech and association; service members' challenges to military regulations requiring discharge of homosexuals based on individual's statement that he or she is a homosexual do not implicate First Amendment concerns, since service member is not being discharged for his or her speech, but rather for his or her status as a homosexual. U.S.C.A. Const.Amend. 1.

Jeffrey I. Tilden, Michael H. Himes, Perkins Coie, Seattle WA, Mary Newcombe, Hedges & Caldwell, Los Angeles, CA, for plaintiff.

David M. Glass, U.S. Dept. of Justice, Civil Div., Federal Programs Branch, Washington, DC, for defendants.

ORDER

ZILLY, District Judge.

Margarethe Cammermeyer brings this declaratory judgment action against the Government claiming that her discharge from military service under Army Regulation 135-175, based solely on her admission that she is a lesbian, violated her rights to equal protection of the laws guaranteed under the Fifth Amendment to the United States Constitution. She also claims her discharge violated her right to privacy under the First, Fourth, Fifth and Ninth Amendments to the Constitution, her substantive due process rights under the Fifth Amendment and her right to freedom of speech under the First Amendment. Cammermeyer further claims that Army Regulation 135-175 is an invalid exercise of executive power violative of the constitutional separation of powers, and that the regulation violates principles of federalism.

The parties have now filed cross-motions for summary judgment. Plaintiff moves for summary judgment on her equal protection claim (docket no. 50). Defendants move for judgment on the pleadings or, in the alternative, summary judgment on all of plaintiff's claims (docket no. 59). The Court heard oral argument on these cross-motions on April 20, 1994, and took the matter under advisement. The Court has reviewed all of the materials submitted by the parties and now GRANTS plaintiff's motion for summary judgment as to her equal protection and substantive due process claims under the Fifth Amendment, and GRANTS defendants' motion for summary judgment as to the remainder of plaintiff's claims.

2. Cammermeyer was married from 1966 until 1980 and she and her husband had four sons. She was forced to resign upon her first pregnancy in 1968 following more than seven years of active duty as a result of then-applicable Army regulations. Due to a change in Army regula-

I. BACKGROUND

Margarethe Cammermeyer is a former Colonel of the Washington State National Guard. She entered the Army Student Nurse Corps in 1961, and with the exception of a four year period when she was ineligible for service,² Cammermeyer served in the Army until 1986. In that year, Cammermeyer transferred to the Washington State National Guard where she continued to serve until she was discharged on June 11, 1992.

Cammermeyer's expertise as an Army Nurse is remarkable. She has earned bachelor's, master's and doctorate degrees in Nursing. She was a member of the Clinical Faculty of the University of San Francisco School of Nursing where she co-authored four research articles published in the *Journal of Military Medicine*. Cammermeyer Decl. at ¶¶ 3, 8, 12, 19. In addition, she received numerous awards and distinctions, including the Bronze Star for distinguished service in Vietnam.³ *Id.* at ¶ 6. She volunteered and served in Vietnam for fifteen months with distinction. *Id.* at ¶¶ 5-6. Cammermeyer has served in numerous other capacities in the Army and Washington State National Guard, including medical-surgical supervisor and Assistant Chief Nurse of the 50th General Hospital in Fort Lawton, Washington, Chief Nurse of the 352nd Evacuation Hospital in Oakland, California, and State Chief Nurse and consultant to the State Chief Surgeon at Camp Murray, Washington. *Id.* at ¶¶ 8, 11, 15.

In April, 1989, Cammermeyer applied for admission to the Army War College to receive training she considered essential to goal of becoming Chief Nurse of the National Guard Bureau ("NGB"). *Id.* at ¶ 16. During a top secret security check required for admission to the Army War College, Cammermeyer was asked about her sexual orienta-

tions, she was able to reenlist in the Army Reserve in 1972.

3. The recommendation for her Bronze Star provided, in part, that "[h]er professional and personal conduct merit the highest praise and reflect great credit upon herself and the United

son and answered that she is a lesbian.⁴ Notwithstanding this admission, Cammermeyer was told by the Washington State National Guard that she could continue to serve as Chief Nurse, and that the Guard would not pursue her discharge "unless forced to do so" by the Department of the Army. *Id.* at ¶ 18. Alternatively, she was told she could resign. Cammermeyer chose to continue to serve. Six months later, pursuant to service-wide federal regulations barring homosexuals from the military, the United States Army commenced proceedings to withdraw Cammermeyer's "federal recognition" and thus render her ineligible to serve in the Washington State National Guard or any other branch of the military.⁵

Cammermeyer continued to serve in her position as Chief Nurse for more than three years after she admitted that she is a lesbian. During this period, a military retention board was convened to review whether Cammermeyer's federal recognition should be withdrawn because of her lesbian status. On July 14, 1991, after a two-day hearing, the Board recommended withdrawal of Cammermeyer's federal recognition. In presiding over the Board, former Chief Nurse, NGB, Colonel Patsy Thompson openly regretted her "sad duty" of reading the Board's adverse recommendation to "one of the great Americans." Tr. of Hearing before Federal Recognition Board, Vol. 2, at 131-33. Colonel Thompson stated that Cammermeyer "has consistently provided superb leadership and has many outstanding accomplishments to her credit." *Id.* at 132.

On June 11, 1992, Cammermeyer was discharged based upon the Board's recommen-

dation and received an honorable discharge.⁶ Cammermeyer's final evaluation, dated July 31, 1992, describing her contributions to the Army and noting her discharge, concluded that "[t]his officer has the potential to serve as Chief Nurse, NGB; and to represent her profession in major research projects in military medicine anywhere in the world." Cammermeyer Decl., Exhibit D, Officer Evaluation Report (OER) dated July 31, 1992. Prior to her discharge, Washington Governor Booth Gardner, Commander-in-Chief of the Washington State National Guard, wrote a letter to then Secretary of Defense Richard Cheney requesting that Cammermeyer be retained. Cammermeyer Decl. Exhibit H. That letter states, in part, that "if Colonel Cammermeyer's discharge becomes final, this would be both a significant loss to the State of Washington and a senseless end to the career of a distinguished, long-time member of the armed services." *Id.*

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if the record shows "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." *Williams v. I.B. Fischer Nev.*, 999 F.2d 445, 447 (9th Cir.1993) (quoting Fed. R.Civ.P. 56(c)). In determining whether there are any genuine issues of material fact for trial, the court must view all of the evidence in the light most favorable to the nonmoving party. *Abuan v. General Electric Co.*, 3 F.3d 329, 332 (9th Cir.1993), cert. denied, — U.S. —, 114 S.Ct. 1064, 127

become an officer in the NGUS until he or she has been promoted to the same grade in the state National Guard and been "federally recognized." 10 U.S.C. § 591(a). A board of officers may be convened at any time to investigate an officer's "capacity and general fitness" to retain his or her Federal recognition. 32 U.S.C. § 323(b). On the board's recommendation, an officer's Federal recognition may be withdrawn, requiring mandatory discharge from the State National Guard. 32 U.S.C. §§ 323(b), 324(a)(2).

6. Cammermeyer is believed to be the highest ranking officer in any service of the U.S. Armed Forces to have been discharged because of homosexual status.

States Army Medical Service...." Complaint (docket no. 1) at ¶ 4.6.

4. Her formal statement, written by the DIS Investigator based upon their conversation but edited and initialed by Col. Cammermeyer, states: "I am a Lesbian. Lesbianism is an orientation I have, emotional in nature, towards women. It does not imply sexual activity...." Cammermeyer Decl., Ex. G.

5. The Army National Guard is comprised of two separate but overlapping organizations, the National Guards of the various states and the National Guard of the United States ("NGUS"). Under the dual system, a servicemember may not

L.Ed.2d 383 (1994). This is true even when the court is presented with cross-motions for summary judgment. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir.1990). "Summary judgment must be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Abuan*, 3 F.3d at 331 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R.Civ.P. 56(e). If there is any need to weigh the evidence at issue, summary judgment is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

B. Equal Protection Challenge

[1] Both parties move for summary judgment on plaintiff's claim that her discharge from the Washington State National Guard violated her equal protection rights under the Fifth Amendment to the United States Constitution.

1. Equal Protection Standard

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)). While the Fifth Amendment does not contain an equal protection clause, the due process clause of the Fifth Amendment has an equal protection component that applies to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[2-5] There are three standards of review applicable to equal protection challenges

to governmental regulations: strict scrutiny, heightened scrutiny, and rational basis review. *High Tech Gays*, 895 F.2d at 571 (citing *Cleburne*, 473 U.S. at 440-41, 105 S.Ct. at 3254-55, 87 L.Ed.2d at 320-21). Legislative classifications based on race, alienage, or national origin require strict scrutiny. The classification will be upheld only if it is "suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254, 87 L.Ed.2d at 320. Strict scrutiny is also required when laws impinge upon constitutionally protected "fundamental" rights. *Id.* Legislative classifications based on gender call for a heightened standard of review; the classification survives only if it is "substantially related to a sufficiently important governmental interest." *Id.* at 441, 105 S.Ct. at 3255, 87 L.Ed.2d at 321. Certain restrictions beyond a person's control, such as illegitimacy, are also subject to heightened review. These restrictions "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Mills v. Habluetzel*, 456 U.S. 91, 99, 102 S.Ct. 1549, 1554, 71 L.Ed.2d 770, 777-78 (1982). Finally, equal protection challenges that do not involve suspect classifications or fundamental rights are subject to "rational basis" review. *Heller v. Doe*, 509 U.S. —, —, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257, 270 (1993). Under this standard, a discriminatory classification is presumed valid and will be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.*

[6] The Ninth Circuit has previously held that homosexuals are not a suspect or quasi-suspect class for equal protection purposes and that classifications based on homosexuality are entitled only to rational basis review. *High Tech Gays*, 895 F.2d at 571. In this case, the parties agree that the rational basis standard of review applies to plaintiff's equal protection challenge.

2. Rational Basis Review

[7] Rational basis review is a two-step process. *Jackson Water Works, Inc. v. Public Utilities Comm'n*, 793 F.2d 1090, 1094

9th Cir.1986), *cert. denied*, 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 184 (1987). Initially, the court must determine whether the challenged classification serves a legitimate governmental purpose. If the court answers this question in the affirmative, the court must then determine whether the discriminatory classification is rationally related to the achievement of that legitimate purpose. A discriminatory classification that is based on prejudice or bias is not rational as a matter of law. See *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421, 426 (1984) (mother could not be denied custody of her child based on social disapproval of her interracial marriage); *Cleburne*, 473 U.S. at 448, 105 S.Ct. at 3259, 87 L.Ed.2d at 326 (city could not require a special use permit for group home for the mentally retarded where the requirement was based on prejudice).

The defendants contend that Army Regulation 135-175 serves the government's legitimate interest in maintaining the readiness and combat effectiveness of its military forces. Plaintiff does not dispute that this is a legitimate governmental purpose. Thus, the Court can proceed to the second step of its rational basis analysis and determine whether the government's exclusion of homosexuals from military service is rationally related to this legitimate governmental purpose.

Before proceeding with this analysis, however, the Court must resolve three preliminary issues: (a) the appropriate level of deference to accord to military decisions; (b) the viability of the standard of review applied in *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992), following *Heller v. Doe*, 509 U.S. —, —, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257, 270 (1993); and (c) whether, for purposes of equal protection analysis, there is a meaningful distinction between homosexual orientation and homosexual conduct.

a. Deference to the Military

The Constitution confers broad powers on the President and Congress to raise and support armies, provide and maintain a naval force, and promulgate rules governing and regulating both land and naval forces. Tra-

ditionally, courts have recognized the Constitution's mandate by according significant deference to the "considered professional judgment" of military officials regarding the composition of the armed forces. *Goldman v. Weinberger*, 475 U.S. 503, 508, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986). "While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces." *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir.1980). As the Supreme Court has reflected:

"[It] 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."

Rostker v. Goldberg, 453 U.S. 57, 65-66, 101 S.Ct. 2646, 2652, 69 L.Ed.2d 478, 487 (1981) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973)). Furthermore, "[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." *Beller*, 632 F.2d at 811.

In view of this standard, the Court must be particularly careful not to substitute its own judgment as to what is "desirable" or its own evaluation of what the executive branch may have intended by a given policy. The Court is also mindful, however, that there is not and must never be a "military exception" to the Constitution. Indeed, courts have been willing to defer to the military only within the confines of ordinary constitutional analysis. See *Rostker*, 453 U.S. at 67, 101 S.Ct. at 2653, 69 L.Ed.2d at 488 (deference to the judgment of other branches in the area of military affairs does not require abdication of "ultimate responsibility to decide constitutional question"). This principle applies with even greater force to equal protection claims since it has traditionally been the domain of the federal courts to scrutinize classifications challenged on equal protection grounds.

This Circuit, in *Pruitt*, 963 F.2d at 1166-67, recognized that deference to the military does not preclude judicial review of military decisions. In *Pruitt*, the plaintiff, a former Army Reserve officer who was discharged because she acknowledged her homosexual orientation, sued to be reinstated. The trial court dismissed the claim, holding that the Army's determination that homosexuality is incompatible with the military mission was entitled to substantial deference. The Ninth Circuit reversed and remanded, holding that the plaintiff had stated an equal protection claim. The court rejected the Army's contention that the court should defer to military judgment and uphold its regulation "without a record to support its rational basis." *Id.* at 1167. The court reasoned that:

We readily acknowledge, as we must, that military decisions by the Army are not lightly to be overruled by the judiciary. That admonition, however, is best applied in the process of judging whether the reasons put forth on the record for the Army's discrimination against *Pruitt* are rationally related to any of the Army's permissible goals.

Id. at 1166 (citations omitted). The *Pruitt* court further stated that if it were to defer to military judgment by affirming the district court's dismissal of *Pruitt*'s complaint, without any supporting factual record, it would "come close to denying reviewability at all." *Id.* at 1167. Thus, simply labeling the government's decision as "military" does not prevent a meaningful review of the decision to discharge the plaintiff because she is a homosexual.

Although this Court must give appropriate deference to the military decisionmaking process, the Court must also review the reasons provided by the defendants to determine whether the classification is "rationally related to any of the Army's permissible goals." *Id.* at 1166.

7. The Kentucky statute allowed close relatives and guardians to participate as parties in proceedings to commit the mentally retarded but not the mentally ill. The Court noted that mental retardation has its onset during a person's devel-

b. Scope of Rational Basis Review

The parties in this case dispute the proper standard for review of government policy under the rational basis test. Plaintiff relies on *Pruitt*, and asserts that the defendants have the burden to demonstrate with facts on the record that the challenged policy is rational and legitimate. The *Pruitt* Court, in rejecting the Army's argument that it could discharge *Pruitt* "without any justification in the record" for the policy, stated that "[a]ssuming that *Pruitt* supports her allegations with evidence, we will not spare the Army the task, . . . of offering a rational basis for its regulation, nor will we deprive *Pruitt* of the opportunity to contest that basis." *Id.* The court then remanded the case for development of a factual record and a determination of whether the Army's discriminatory regulation was "rationally related to a permissible governmental purpose." *Id.* at 1167.

The defendants argue that "the continuing validity of *Pruitt* is undercut" by *Heller*. Defendants' Memorandum of Points and Authorities (docket no. 59) at 13. At oral argument, the Government further contended that *Pruitt* was "superseded" and "rendered moot" by *Heller*. Tr. April 20, 1994 Hearing (docket no. 93) at 25. Defendants contend that under *Heller*, they have no burden to submit evidence justifying the challenged policy and this Court may reject plaintiff's equal protection claim as a matter of law, without considering any such evidence.

In *Heller*, 509 U.S. —, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993), plaintiffs challenged a Kentucky statute that mandated a higher burden of proof in involuntary commitment proceedings for mentally ill persons than for mentally retarded persons. Plaintiffs claimed that this distinction lacked a rational basis.⁷ The Supreme Court rejected plaintiffs' argument that the statutory distinctions were irrational, finding that the State had "rationally advance[d] a reasonable and identifiable governmental objective." *Id.*, 509 U.S. at —, 113 S.Ct. at 2648, 125 L.Ed.2d at 277. The Court further found that the

opment, in contrast to mental illness, which may arise or manifest itself after minority when family members have far less knowledge of the medical condition. *Heller*, 509 U.S. at —, 113 S.Ct. at 2644, 125 L.Ed.2d at 272.

State's proffered rationales provided a rational basis for the statutory classification. *Id.*, 509 U.S. at —, 113 S.Ct. at 2647, 125 L.Ed.2d at 276. In so finding, the Court stated that a challenged discriminatory classification:

"must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, ... and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," ... whether or not the basis has a foundation in the record.

Id., 509 U.S. at —, 113 S.Ct. at 2642-43, 125 L.Ed.2d at 270-71 (citations omitted).

The defendants' contention that *Pruitt*'s vitality has been extinguished by *Heller* is without merit.⁸ While it is true that, under *Heller*, the government policymaker is not required to submit evidence to justify its policy, and may offer only "rational speculation" to explain the discriminating classification, the Court remains obligated to determine whether there is a rational basis for the policy. Otherwise, it would not have been necessary for the *Heller* court to examine the assumptions underlying the Kentucky statute. If the Government's position were correct, the *Heller* Court could have simply upheld the statute as a matter of law, without any inquiry into its rationality. In fact, the *Heller* Court closely examined the State's asserted bases for the differential treatment of the two classes and found that there were plausible rationales for each of the statutory distinctions challenged in the case. The Court concluded that, "even the standard of rationality as we so often have defined it must find some footing in the realities of the

subject addressed by the legislation." *Heller*, 509 U.S. at —, 113 S.Ct. at 2643, 125 L.Ed.2d at 271.

The continued vitality of *Pruitt*, following *Heller*, is further demonstrated by *Jackson v. Brigle*, 17 F.3d 280 (9th Cir.1994), a sovereign immunity case, where the Ninth Circuit stated in dicta at the end of its opinion:

The *Pruitt* and *High Tech Gays* cases, upon which the district court relied, do stand for the proposition that if the Government discriminates against an individual on the basis of homosexuality and does not demonstrate a rational basis for doing so, it will have violated that individual's constitutional rights.

Id. at 284.

[8] *Heller* did not address the proper scope of a court's rational basis review where, as here, the plaintiff alleges the governmental policy at issue is based solely on prejudice. If the policy is shown to be based solely on prejudice, it cannot survive rational basis review. *Cleburne*, 473 U.S. at 450, 105 S.Ct. at 3259, 87 L.Ed.2d at 327.

In a recent district court case in this circuit, *Dahl v. Secretary of the United States Navy*, 830 F.Supp. 1319 (E.D.Cal.1993),⁹ the court rejected the same arguments made by the government here. Dahl was discharged from the Navy because he admitted during an official interview that he was a homosexual. The *Dahl* court concluded that:

In sum, there is no support for defendants' argument that the court must accept without question defendants' proffered bases for the homosexual exclusion policy without analyzing the relevant evidence and determining whether the policy is motivated by prejudice against homosexuals.

Id. at 1327.

[9] In *Dahl*, as in this case, each party moved for summary judgment on the plaintiff's equal protection claim and both offered evidence in support of their respective motions. The *Dahl* court considered the par-

tion unsupported by empirical data or evidence." Tr. April 20, 1994 Hearing (docket no. 93) at 26.

9. *Dahl* is currently on appeal.

8. The Government contended at oral argument that under *Heller* no review of the rational basis for the Army regulation is necessary because "we are completely free to rely on rational specula-

ties' respective burdens of production under Rule 56 as to the policy's rationality or irrationality under the *Heller* standard, and concluded:

If the evidence, construed in the light most favorable to defendants, shows that there is *no* reasonably conceivable rational basis for the homosexual exclusion policy, and the court cannot conceive of a rational basis (i.e. because it is based solely on illegitimate prejudice), then plaintiff is entitled to summary judgment. Alternatively, if the evidence, construed in the light most favorable to plaintiff, shows that there is *any* reasonably conceivable rational basis for the policy, then defendants are entitled to summary judgment. Finally, if the evidence creates a disputed issue of material fact as to the policy's rationality, then neither party is entitled to summary judgment.

Dahl, 830 F.Supp. at 1327. This Court agrees that this is the proper standard to be applied in evaluating the parties' cross-motions for summary judgment on plaintiff's equal protection claim.

(c) *Orientation v. Conduct*

The undisputed evidence in the record establishes that Cammermeyer was discharged from military service *solely* because she admitted her homosexual orientation. The Government argues, nevertheless, that Cammermeyer's admission that she is a lesbian is reliable evidence of her propensity to engage in homosexual conduct. The Government's position, in sum, is that homosexual "orientation" is equivalent to homosexual "conduct." This is a critical issue for plaintiff because the parties acknowledge for purposes of this litigation that, under *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986),¹⁰ and *Pruitt*, 963 F.2d at 1165, the government may exclude individuals from military service on the basis of homosexual conduct.

10. *Hardwick* involved a due process challenge to a Georgia statute which criminalized sodomy. *Hardwick* challenged the statute after being discovered engaging in sodomy with another consenting adult while in the privacy of his own home. The Supreme Court held that the Consti-

The Government cites *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir.1989), *cert. denied*, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990), as support for its position that acknowledgment of homosexual orientation can "rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct." In *Ben-Shalom*, plaintiff Miriam Ben-Shalom, a sergeant in the Army Reserve, admitted that she was a lesbian. As a result of this admission, she was discharged from the Army Reserve pursuant to Army Regulation 135-178,¹¹ which provided for the discharge of any servicemember who "induced homosexual tendencies, desire or interest, but is without overt homosexual acts." The trial court found no reason to believe that the plaintiff's admission that she a lesbian meant the plaintiff was likely to commit homosexual acts, and ordered injunctive relief in plaintiff's favor. The Seventh Circuit reversed, holding that Ben-Shalom's "lesbian acknowledgement, if not an admission of its practice, at least can rationally reasonably be viewed as reliable evidence" of a desire or propensity to engage in homosexual conduct. *Id.* at 464. The *Ben-Shalom* court, relying on *Bowers*, denied relief, holding that the Army regulation promoted a legitimate governmental interest sufficient to survive rational basis scrutiny. The Government's reliance on *Ben-Shalom*, and other cases cited in the defendants' Opposition to Plaintiff's Motion for Summary Judgment (docket no. 75) at 5, is misplaced.

The Ninth Circuit has recognized a distinction between homosexual status or orientation and conduct. In *Pruitt*, the plaintiff was discharged from the Army because of her public acknowledgment in a newspaper interview that she is a homosexual. She subsequently brought an action to challenge the same Army regulation at issue in this case. The Government argued, citing several cases, that its right to discharge homosexual servicemembers was so firmly supported in the

tution confers no fundamental right upon homosexuals to engage in sodomy.

11. This is substantially the same Army regulation challenged by Cammermeyer.

law that any equal protection claim asserted by Pruitt was legally insufficient on its face. In rejecting this argument, the Ninth Circuit distinguished these prior cases, including *Bowers* and other cases relying on *Bowers*, as cases "relating to conduct, not orientation." *Pruitt*, 963 F.2d at 1165-66 n. 4 and 5.¹²

Supreme Court precedents have also recognized a status-conduct distinction in other contexts. In *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), the Court struck down a statute criminalizing "status" as a drug addict, absent evidence of drug use, as a violation of the Eighth Amendment prohibition against cruel and unusual punishment. Similarly, in *Powell v. Texas*, 392 U.S. 514, 532, 88 S.Ct. 2145, 2154, 20 L.Ed.2d 1254 (1968), the Court upheld a conviction for drinking in public but disapproved of arrests based solely on status as a chronic alcoholic. Furthermore, Supreme Court precedents prohibit presumptions of criminal conduct based on orientation. See *Jacobson v. United States*, 503 U.S. —, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992) (prior conduct does not demonstrate a propensity to engage in identical conduct later made illegal); *Aptheker v. Secretary of State*, 378 U.S. 500, 501-02, 84 S.Ct. 1659, 1661-62, 12 L.Ed.2d 992, 995 (1964) (government may not deny member of Communist Party right to travel based on statutory presumption the individual will compromise national security). These cases stand for the proposition that status and conduct are distinct, and that it is inherently unreasonable to presume that a certain class of persons will violate the law solely because of their orientation or status.

This status-conduct distinction is particularly relevant in the military context, where homosexual conduct by servicemembers is not just discouraged, but is grounds for discipline and, if the conduct is sodomy, criminal charges. The Court notes that the military does not make similar presumptions with regard to other groups.¹³

Plaintiff has also provided the Court with substantial uncontroverted evidence that a distinction between homosexual orientation and homosexual conduct is well grounded in fact. According to Dr. Herek,¹⁴ "no data exist to indicate that lesbians and gay men are less capable than heterosexuals of controlling their sexual or romantic urges, refraining from the abuse of power, or exercising good judgment in handling authority." Herek Decl., ¶14. Dr. Herek also states that a person's public identification of his or her sexual orientation does not necessarily imply sexual conduct, past or present, or a future desire for sexual behavior. *Id.* ¶8. The plaintiff also relies on the testimony of Dr. Laura S. Brown,¹⁵ who testified that "[t]here is almost no relationship between an individual's orientation and his or her sexual conduct." Brown Decl., ¶21. Brown also testified that homosexuals are more likely to control their sexual urges than heterosexuals because they have less opportunity to express their sexuality and have to exercise great discretion in choosing settings and persons who are likely to be receptive, and circumstances that are not likely to result in career problems. Brown Decl., ¶22.

Significantly, the very policy challenged by plaintiff in this case recognizes a distinction between orientation and conduct. Dr. Law-

12. In the present case, the Government also relies on *Dronenburg v. Zech*, 741 F.2d 1388 (D.C.Cir.1984), to support its argument that homosexual orientation equals homosexual conduct. However, whether any agency of the federal government can discriminate against individuals merely because of sexual orientation remains an open question in the D.C. Circuit. See *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C.Cir. 1986), *aff'd in part and rev'd in part sub. nom., Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988); *Steffan v. Aspin*, 8 F.3d 57, 62 (D.C.Cir.1993), *vacated for reh'g en banc*, (D.C.Cir. January 7, 1994). Moreover, the Ninth Circuit distinguished *Dronenburg* in *Pruitt*, 963 F.2d at 1165 n. 4.

13. The military does not discharge servicemembers who identify themselves as alcoholics or drug addicts. See OPNAVINST 5350.4B (titled "Alcohol and Drug Abuse Prevention and Control"), Himes Decl., Ex. 7. Rather, the military requires actual evidence of substance abuse or that the individual's status impairs his or her ability to function in the military. *Id.*

14. Dr. M. Herek is an Associate Research Psychologist at the University of California at Davis.

15. Dr. Laura S. Brown is a clinical professor of psychology at the University of Washington.

rence J. Korb, the former Assistant Secretary of Defense (Manpower, Reserve Affairs, Installation and Logistics) who was responsible for implementing the policy at issue in this case, testified by declaration that:

As the policy clearly states, the purpose was to authorize the military to discharge gay servicemembers who demonstrate a propensity to engage in homosexual conduct. The policy was never intended to authorize the military to discharge someone simply based on his or her status—absent any evidence of conduct. To the contrary, conduct was the real focus of the policy.

A servicemember's own admission of being gay—absent any indication of her propensity to engage in homosexual conduct—is simply not sufficient grounds for discharging her under the existing policy. Discharging someone based on his or her status is irrational and has no basis in furthering the military mission. The policy I authorized should not be construed as authorizing such an irrational outcome.

Korb. Decl., ¶ 5.

[10] The Court concludes that plaintiff's acknowledgment of her lesbian orientation itself is not reliable evidence of her desire or propensity to engage in homosexual conduct. The Court therefore concludes that there is no rational basis for the Government's underlying contention that homosexual orientation equals "desire or propensity to engage" in homosexual conduct.

3. Rational Review Analysis of the Equal Protection Claim

Plaintiff was discharged from service in the Washington State National Guard pursuant to Army Regulation 135-175 and Department of Defense ("DOD") Directives 1332.14 and 1332.30, 32 C.F.R. Part 41, Appendix A, 46 Fed.Reg. 9571 (Jan. 29, 1981). Army Regulation 135-175 defines homosexual as "a

16. Discharge is not required under these circumstances, however, if there are findings that: (i) such conduct is a departure from the member's usual and customary behavior; (ii) such conduct under all the circumstances is unlikely to recur; (iii) such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service; (iv) under

person, regardless of sex, who engages in or desires to engage in, or intends to engage in homosexual acts." 32 C.F.R. Part 41, Appendix A, 46 Fed.Reg. 9571, 9577 (January 29, 1981). The regulation requires the discharge of any member of the service who has: (1) "engaged in, attempted to engage in or solicited another to engage in a homosexual act;"¹⁶ or (2) "stated that he or she is homosexual or bisexual unless there is a further finding that the member is not homosexual or bisexual." *Id.*, 46 Fed.Reg. 9571, 9577-78. The plain language of the regulation makes clear that the policy targets not only individuals who engage in homosexual conduct but also individuals who merely acknowledge their homosexual orientation. This litigation does not challenge the classification of persons who engage in homosexual conduct, and the constitutionality of laws forbidding such conduct is not at issue here. Rather, this litigation concerns the exclusion of individuals from military service solely on the basis of homosexual status or orientation.

The Government contends that the rational basis for the Army's policy of excluding homosexuals is evident from the policy itself and from legislative findings made in connection with the military's new "don't ask, don't tell" policy, effective November 1993. Because the policy is rational on its face, the Government argues, no further judicial inquiry into the policy's rationality is necessary or appropriate.

The regulation, at 32 C.F.R. Part 41.13, provides that homosexuality is incompatible with military service. The regulation provides that the presence of homosexuals in the military environment: (1) seriously impairs the accomplishment of the military mission; (2) adversely affects the ability of the armed forces to maintain discipline, good order and morale; (3) seriously impairs the military's ability to foster mutual trust and confidence among servicemembers; (4) adversely affects

the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; (v) the member does not desire to engage in or intend to engage in homosexual acts. 46 Fed. Reg. 9571, 9578 (January 29, 1981).

the military's ability to insure the integrity of the system of rank and command; (5) impairs the military's ability to facilitate assignment and worldwide deployment of service-members who frequently must live and work under close conditions affording minimal privacy; (6) adversely affects the military's ability to recruit and retain members of the armed forces; (7) adversely affects the ability of the armed forces to maintain the public acceptability of military service; and (8) seriously impairs the military's ability to prevent breaches of security. 46 Fed.Reg. 9571, 9577 (January 29, 1981).

Recently, Congress made fifteen express findings in support of its new policy concerning homosexuals in the armed forces. See 10 U.S.C. § 654(a)(1)-(15). The Government argues that these findings also support the exclusion from military service of "persons who demonstrate a propensity or intent to engage in homosexual acts" under the policy at issue in this case.¹⁷ One such finding, cited by the Government, is that the presence of such persons in the military "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." 10 U.S.C. § 654(a)(15).

Notwithstanding the Government's arguments to the contrary, this Court is not required to accept the justifications in the regulation or the legislative findings at face value. Rather, the Court must determine if these justifications provide a rational basis for the challenged policy. Both parties have submitted substantial evidence concerning the rationality or irrationality of the military's policy. Under these circumstances, the Court should review the entire record to determine whether the proffered bases for the Government's policy are rational or moti-

vated solely by prejudice against homosexuals.

The Government relies heavily upon the professional military judgment of this country's military leaders that the presence of homosexuals in the military will adversely affect the morale, good order and discipline of the military. The Government cites the testimony of General Colin Powell in hearings before the Senate Armed Service Committee in July, 1993 that:

Open homosexuality in units is not just the acceptance of benign characteristics such as race or color or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist in the force would affect the cohesion and well-being of the force.

Hearing to Receive Testimony on DOD Policy on Service of Gay Men & Lesbians in the Armed Forces: Hearing Before the Senate Armed Services Comm., 103d Cong., 1st Sess. (July 20, 1993) (hereinafter "Senate Hearing"), Glass Decl., Ex. T, at 25. The Government also relies on the testimony of various military officials who testified before the Armed Services Committee, including Generals Mundy, Sullivan, and McPeak, Admiral Kelso, and former Secretary of Defense Les Aspin. See Glass Decl., Ex. T, at 29-37, 86, and 94. The Court concludes, however, that the testimony of these officials merely restates the justifications listed in the Army regulation.

Most notably, the defendants offer the Rule 30(b)(6) deposition testimony of Major General John P. Otjen and former Assistant Secretary of Defense Edwin Dorn. General Otjen was a member of the Military Working Group ("MWG") that studied the issue of homosexuals in the military and reported its findings to the Secretary of Defense in June, 1993.¹⁸ See Summary Report of Military

17. The Court may consider relevant factfinding by Congress as evidence in determining whether the Army's regulations possess a rational basis. See generally *EEOC v. Boeing Co.*, 843 F.2d 1213, 1217 (9th Cir.), cert. denied, 488 U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 212 (1988). Both parties rely on the Congressional findings in the new policy, and neither party has filed a formal objection to the other party's use of this factfinding as evidence.

18. The MWG Report made findings as to each of the rationales stated in the Army regulation, with the exception of the security risk rationale, for the purpose of recommending to the President a new policy on homosexuals in the military that would "comply with the President's direction to end discrimination while maintaining high standards of combat effectiveness and unit cohesion." See Memorandum for the Secretary of Defense, Attached to MWG Report, Otjen Dep., at Ex. 10.

Working Group (hereinafter "MWG Report"), at 5-7, Otjen Dep., Ex. 10. General Otjen testified that allowing homosexuals in the military would adversely affect unit cohesion¹⁹ and morale. Otjen Dep. 188:5-190:4, 192:19-201:1, 263:10-265:3. Assistant Secretary Dorn testified similarly. General Otjen testified, based on his experience, the experience of members of the MWG, and the experiences of servicemembers who spoke to the MWG, that when a unit is "confronted with a homosexual situation—for lack of a better description—that there is a casting out, if you will, of the individual." See Otjen Dep., 194:4-9. Otjen testified that this "casting out," which can destroy unit cohesion, occurs because the persons doing the casting out are afraid of or prejudiced against the homosexual person or feel "let down," "out of surprise." See Otjen Dep., 196:14-197:4.

The Government's evidence offers justifications for the policy of excluding homosexuals from military service. Under *Heller*, 125 L.Ed.2d at 271, the burden is on the plaintiff "to negative every conceivable basis which might support" the government's policy. To meet this burden, plaintiff offers evidence to the effect that the rationale, as stated in the Army Regulation and advanced by the Government, has no factual foundation, is contradicted by the government's own studies and evidence, and is based solely on prejudice against homosexuals.

(1) *Incompatibility with Military Service and Interference with Military Mission.* Plaintiff offers evidence that homosexuality is compatible with military service, and in fact, a large number of homosexuals have served and continue to serve in the military with distinction. Plaintiff cites the statements of President Clinton that, "there have been and are homosexuals in the military who serve with distinction," and "there is no study showing them to be less capable or more prone to misconduct." Himes Dec., Ex. 4. Plaintiff also offers the statement of Vice Admiral Joseph S. Donnell, the Commander of the Navy's surface Atlantic Fleet, describing his experience with lesbian servicemem-

bers as follows: "Experience has . . . shown that the stereotypical female homosexual in the Navy is hardworking, career-oriented, willing to put in long hours on the job and among the command's top professionals." Foote Decl., Ex. A.

Plaintiff also relies upon numerous military and government studies, such as the 1957 study popularly known as the "Crittenden Report," and a more recent study, commissioned by the military and performed by the Defense Personnel Security Research and Education Center (PERSEREC), known as the PERSEREC Report. These studies establish that gays and lesbians not only serve in the military, but also that the majority of them do so without incident and receive honorable discharges at the conclusion of their service. See *Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals in the Military*, Himes Decl., Ex. 5 (hereinafter "Crittenden Report"); and Sarbin & Karols, *Nonconforming Sexual Orientations and Military Suitability* (1988), Himes Decl., Ex. 6 (hereinafter PERSEREC Report).

Plaintiff also offers evidence concerning the experience of foreign countries, such as Canada, Australia, France, Israel, Sweden, the Netherlands, Denmark, Finland, Norway and Japan, all of which allow homosexuals to serve in their armed forces. It is undisputed that the United States Government has commissioned studies of these militaries, and those studies have concluded that "the presence of homosexuals in the military is not an issue and has not created problems in the functioning of military units." See *Homosexuals in the Military: Policies Practices of Foreign Countries* (1993), Himes Decl., Ex. 8, at 3 (hereinafter "GAO Report"). See also the "RAND Report," *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*, Himes Decl., Ex. 9 at 65-104 (hereinafter "RAND Report") (homosexuals pose no special problems in foreign militaries).

19. The Congressional findings define unit cohesion as "the bonds of trust among individual service members that make the combat effective-

ness of a military unit greater than the sum of the combat effectiveness of the individual unit members." 10 U.S.C. § 654(a)(7).

(2) *Effect on Discipline, Good Order, and Morale.* Plaintiff offers evidence demonstrating that this justification is based solely on prejudice. President Clinton has stated that "most military people [are] opposed to lifting the ban because of the feared impact on unit cohesion, rooted in disapproval of homosexual lifestyles," and "those who oppose lifting the ban are clearly focused not on the conduct of individual gay servicemembers, but on how nongay servicemembers feel about gays in general and, in particular, those in the military service." Himes Decl., Ex. 4. Plaintiff also notes that this rationale, as well as virtually every other justification used today to exclude homosexuals from military service, was also used to justify the military's discrimination against African-Americans in World War II. Herek Decl. at ¶¶ 19-22, Ex. I. There is no dispute that the exclusion of African-Americans from military service was based solely on prejudice.

(3) *Unit Cohesion.* Plaintiff relies on the comprehensive analysis of the impact of homosexual servicemembers on unit cohesion contained in the RAND Report. The RAND Report concludes:

At present, there is no scientific evidence regarding the effects of acknowledged homosexuals on a unit's cohesion and combat effectiveness. Thus, any attempt to predict the consequences of allowing them to serve in the U.S. military is necessarily speculative.

RAND Report, Himes Decl., Ex. 9, at 283.

(4) *Rank and Command.* Plaintiff argues that there is no evidence supporting the defendants' contention that the presence of homosexuals in the military will be detrimental to the military's rank and command structure. Plaintiff offers a statement by the Chief of Naval Personnel in a 1976 memorandum to the Judge Advocate General that, "no empirical proof exists at this time [to support the Navy's contention that] homosexuality has an adverse effect upon the completion of the [military] mission." See *Meinhold v. United States Dep't of Defense*, 808 F.Supp. 1455, 1457 (C.D.Cal.1993). Plaintiff also cites the Crittenden Report, which found that there is no "visible supporting data [to support the conclusion that gays and lesbians]

cannot acceptably serve in the military." Crittenden Report, Himes Decl., Ex. 5, at 5. Finally, plaintiff offers government-commissioned reports on foreign militaries. These reports have concluded, "in all cases where a decision has been made to include homosexuals in the [foreign military] force, the organization's leaders believe that the force's organizational performance is unaffected by that presence." RAND Report, Himes Decl., Ex. 9, at 15; Korb Decl. at 9-10; GAO Report, Himes Decl., Ex. 8, at 3.

(5) *Privacy.* Plaintiff has submitted substantial evidence refuting the privacy rationale. Plaintiff offers, for example, the PERSEREC Report which concludes that concerns regarding homosexuals invading the privacy of heterosexuals are unfounded because homosexuals, like heterosexuals, are "selective in their choice of intimate partners and in their expression of sexual behavior" and are selective "in observing rules of privacy, in considering appropriateness of time and place, in connecting sexuality with the tender sentiments, and so on." Himes Decl., Ex. 6, at 31.

(6) *Recruitment and Retention of Military Personnel.* According to plaintiff's expert, Dr. Lawrence Korb, the Assistant Secretary of Defense who was directly responsible for military personnel matters between 1981 and 1985, there is no evidence supporting the defendants' assertion that allowing homosexuals to serve in the military will adversely affect recruitment and retention of military personnel. Korb Decl. at 7. The RAND report similarly concludes that lifting the ban would likely have no effect on recruitment and only nominal effect on reenlistment. Himes Decl., Ex. 9, at 397-407.

(7) *Public Disapproval of Homosexuals in the Military.* Plaintiff submits the RAND Report, which found that depending upon how the question is phrased, approximately 40-79% of the public favors allowing homosexuals to serve in the military. Himes Decl., Ex. 9, at 201-02. Public polls have yielded similar results. Herek Decl. at ¶ 16; Korb Decl. at 6-7. In any event, to the extent public disapproval of homosexual service in the military is based on prejudice, such disapproval would not be a legitimate

basis for the government's policy. See *Cleburne*, 473 U.S. at 448, 105 S.Ct. at 3259, 87 L.Ed.2d at 326.

(8) *Security Risk*. Plaintiff argues that there is no factual support for the security risk rationale.²⁰ Former Defense Secretary Cheney has essentially admitted this by acknowledging that the military's argument that homosexuals are greater security risks than heterosexuals is a "bit of an old chestnut." Himes Decl., Ex. 14; *Meinhold*, 808 F.Supp. at 1457. See also the Crittenden Report, Himes Decl., Ex. 5, at 6; *PERSEREC* Report, Himes Decl., Ex. 6, Korb Decl., at 6; Brigadier General Evelyn Foote Decl., ¶ 34.

Plaintiff has successfully met her burden of negating the proffered justifications for the government's policy of excluding homosexuals from service by offering uncontroverted evidence that the individual justifications either have no basis in fact or are based solely on prejudice. The Government, for its part, has failed to offer any evidence showing that its justifications are based on anything but prejudice.

An examination of the record demonstrates that the sole motivation for the exclusion of acknowledged homosexuals from military service is prejudice. President Clinton has admitted that opposition to lifting the ban on homosexual service is "rooted in disapproval of homosexual lifestyles," and based on "the fear of invasion of privacy of heterosexual soldiers" and "how nongay servicemembers feel about gays in general and, in particular, those in the military service." Himes Decl., Ex. 4.²¹ General Colin Powell has also admitted in testimony before Congress that the policy was originally implemented more than ten years ago "[i]n simple language, to keep homosexuals out of the service." Glass Decl., Ex. T at 111. Dr. Lawrence Korb, the former Assistant Secretary of Defense who was responsible for im-

plementing the policy at issue in this case, testified that:

Based on my experience in the Pentagon, as a long-time student of national defense policy, and as a retired Navy Captain, I am of the opinion that there is no longer any justification for the armed services' current ban on homosexuals serving in the military. As detailed below, each of the justifications offered in support of this policy is without factual foundation. Moreover, there is substantial evidence that gays and lesbians have served and continue to serve their country as ably as heterosexuals. Sexual orientation simply does not provide a rational basis upon which to exclude a person from military service. On the other hand, to the extent that sexual misconduct threatens to undermine the discipline, good order, and morale that is critical to the accomplishment of the military mission, such misconduct can be and is adequately addressed through existing regulations which prohibit such misconduct whether committed by homosexuals or heterosexuals.

Korb Decl. ¶ 6. The uncontroverted evidence establishes that many homosexuals have served, and currently serve, in the military, and that the majority of them do so without incident and receive honorable discharges at the conclusion of their service. See Crittenden Report, Himes Decl., Ex. 5; *PERSEREC* Report, Himes Decl., Ex. 6; Remarks by President Clinton at National Defense University, Himes Decl., Ex. 4; Testimony of General Colin Powell, S. Hearing, Glass Decl., Ex. T, at 23.

The testimony of defendants' own witnesses further demonstrates that the policy is rooted solely in prejudice. Both General Otjen and former Assistant Secretary of Defense Dorn admitted in their depositions that the defendants have no facts supporting any of the stated rationales.²² See Otjen Dep., at 54, 68-79, 287-91, 307-14; Dorn Dep., at

views of the Department of Defense. Dorn Dep. at 31:1-9.

20. Defendants would appear to concede this, as the new "don't ask, don't tell" policy, as codified in 10 U.S.C. § 654(a), does not include this rationale.

21. Assistant Secretary of Defense Dorn testified that President Clinton's statements reflect the

22. Defining "facts" as statistics, scientific studies, and reports rather than opinions and anecdotes.

190-92 (as to new policy), 199-200 (as to old policy). In addition, and more compelling, both witnesses testified to the effect that the government's objection to homosexual service is based solely on the fears and prejudices of heterosexual servicemembers.

General Otjen was asked hypothetically whether, if everyone in the military had no fear or prejudice against homosexuals and did not morally disapprove of the homosexual lifestyle, there would be any problem with unit cohesion in the military as a result of permitting open homosexuals to serve. See Otjen Dep., at 226:2-10. While General Otjen had difficulty accepting this assumption, he agreed that if that assumption were true, there would be no problem with unit cohesion. See Otjen Dep. at 226:4-233:13; see also Otjen Dep. at 192:3-15, 234:8-237:14, 262, 263-264:14, 264:15-266:3 (testifying to the same effect regarding the rank and command, privacy, morale, and retention rationales). General Otjen also admitted during his deposition that he had no facts to support the finding in the MWG's Report that "the presence of open homosexuals would in general polarize and fragment the unit and destroy the bonding and singleness of purpose required for effective military operation." See Otjen Dep. at 192:19-193:5.

Former Assistant Secretary of Defense Dorn testified similarly. For example, Dorn admitted that he was accurately quoted as saying, "[a]s with the racial desegregation of the military, much of the resistance to gays is grounded in fear and in prejudice." See Dorn Dep. at 133:3-9, Ex. 7, at 3. Secretary Dorn also testified that the problems with unit cohesion and rank and command cited in the policy were based on anticipated negative reactions of heterosexual servicemembers to homosexuals and a "general spirit of ill ease within the unit." See Dorn Dep. at 197:1-4; 221:12-17; 225:3-12. Although Dorn emphasized that the policy excluding homosexuals from service was based on the personal experiences of military professionals with open homosexuals in their units, he admitted that the sum of these personal experiences was

that "many individual soldiers don't want to be around gays." Dorn Dep. at 194:14-18. Other problems with homosexual service cited by Dorn, such as lovers' quarrels, involve matters of homosexual conduct, rather than homosexual orientation or status. Dorn Dep. at 196:10-14. See also Dorn Dep. at 159:7-14; 186:12-21.

Defendants' argument that the Army regulation banning homosexuals from service is based on rational, nonprejudicial reasons is unpersuasive. Defendants' military experts have conceded that their justifications for the policy are based on heterosexual servicemembers' fear and dislike of homosexuals. Mere negative attitudes, or fear, are constitutionally impermissible bases for discriminatory governmental policies. *Cleburne*, 473 U.S. at 448, 105 S.Ct. at 3259, 87 L.Ed.2d at 326. Unsubstantiated presumptions concerning a particular group also constitute prejudice and cannot serve as the rational basis for a discriminatory governmental policy. Thus, to the extent the Government's policy is based on the unfounded presumption that servicemembers with a homosexual orientation will engage in proscribed homosexual conduct,²³ the policy is not rationally based. This Court cannot defer to military decisions based solely on prejudice against a particular group. *Id.* The defendants have not submitted any evidence that supports any other basis for the policy.

Certainly, the undisputed evidence in this case relating to Colonel Cammermeyer's service strongly supports the conclusion that acknowledged homosexuality is not incompatible with military service. Cammermeyer served in the Army and the Washington State National Guard with distinction. She was a highly trained, decorated and dedicated officer in the military. The events that gave rise to her discharge involved her quest to achieve the position of Chief Nurse of the National Guard Bureau. After she disclosed her lesbian status in April 1989, she continued to perform her military duties for over three years until her discharge. Her final evaluation, dated July 31, 1992, provides in

law or fact.

23. This Court has already concluded that the Government's presumption has no foundation in

part that, "[t]his officer is exemplary in her dedication," that she "has clearly demonstrated outstanding administrative and technical skills" and that "Colonel Cammermeyer's strong leadership has been a key element in improving WAARNG medical readiness." Cammermeyer Decl., Ex. D at 1-3. The rating officer described Cammermeyer in the professionalism section of her final evaluation as "the most knowledgeable military nurse with whom I have had the pleasure to work," and the senior rater described her as having continued to serve the Washington Army National Guard "with dedicated professionalism." It is ironic that after over three years as an acknowledged homosexual servicemember, Cammermeyer was evaluated as having "the potential to assume responsibility at NGB level as Chief Nurse," yet she was discharged because of the alleged incompatibility of her sexual orientation with military service. *Id.*

[11] In conclusion, viewing all the evidence in the light most favorable to the Government, the Court must conclude that the rationales offered by the Government to justify its exclusion of homosexual servicemembers are grounded solely in prejudice. Under *Palmore* and *Cleburne*, this is impermissible. A cardinal principle of equal protection law is that the federal government cannot discriminate against a class in order to give effect to the prejudice of others. The government has discriminated against Colonel Cammermeyer solely on the basis of her status as a homosexual and has failed to demonstrate a rational basis for doing so. The Court holds that plaintiff's discharge pursuant to the regulation banning homosexuals who merely acknowledge their orientation violates plaintiff's equal protection rights under the Fifth Amendment, and the Court grants summary judgment in favor of plaintiff and against defendants on this claim.

C. Substantive Due Process Claim

[12] Defendants also move for summary judgment on plaintiff's claim that Army Regulation 135-175 violates the due process clause of the Fifth Amendment. Plaintiff claims that the regulation "mandates discharge solely upon an admission of homosex-

uality, without any nexus between homosexual status and the ability to perform the work duties and responsibilities of the Armed Forces." Complaint at ¶6.3. Plaintiff did not move for summary judgment on this issue; however, the parties have briefed and argued the issue. The Court concludes that the issue has been fully and fairly addressed by the parties, and thus the Court may consider the issue as if cross motions for summary judgment were presented. *See Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir.1982).

1. Standard of Review

The due process clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. C amend V. The due process clause contains both substantive and procedural components. The procedural component requires the government to follow appropriate procedures whenever its agents decide to deprive any person of life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 665, 88 L.Ed.2d 662 (1986) (discussing due process clause of Fourteenth Amendment). The due process clause also "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.'" *Id.* at 337, 106 S.Ct. at 678, 88 L.Ed.2d at 672 (Stevens, J., concurring). The substantive due process clause "serves to prevent governmental power from being 'used for purposes of oppression.'" *Id.* at 331, 106 S.Ct. at 665, 88 L.Ed.2d at 668 (quoting *Murray's Lessee v. Hoboken L & Improvement Co.*, 18 How. 272, 277, 15 L.Ed. 372 (1856)). Plaintiff's challenge to Army Regulation 135-175 is based on the substantive component of the due process clause.

[13] Federal regulations that infringe upon personal rights may be challenged on either substantive due process or equal protection grounds. Although courts approach equal protection and due process analogously, there are similarities in the doctrines:

When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. At the other extreme, where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis.

Beller, 632 F.2d at 808 (citing *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 497, 85 S.Ct. 1678, 1688, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring); *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942)). Thus, when a classification penalizes the exercise of a fundamental constitutional right, heightened scrutiny is required. *Reno v. Flores*, 507 U.S. —, —, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1, 16 (1993); *High Tech Gays*, 895 F.2d at 572. On the other hand, where a regulation impairs a lesser interest, there need only be a rational relationship between the challenged regulation and a legitimate governmental purpose. *Flores*, 507 U.S. at —, 113 S.Ct. at 1448, 123 L.Ed.2d at 18.

2. Due Process Analysis

Plaintiff asks this Court to hold that the Constitution confers a fundamental right of privacy upon a person to be a homosexual.²⁴

24. This issue necessarily encompasses the basic question of whether individuals have a fundamental right under the Constitution to their sexual orientation, whether heterosexual, homosexual or bisexual.

25. Because no authority exists for plaintiff's proposition that homosexual orientation is a fundamental right, she analogizes to Supreme Court precedents that distinguish between "status" and

The United States Constitution does not explicitly mention any right of privacy. The Supreme Court has previously recognized, however, that one aspect of "liberty" protected by the due process clause is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." *Roe*, 410 U.S. at 152, 93 S.Ct. at 726. See also *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). The Court has recognized, for example, a right of privacy in personal decisions relating to marriage, contraception, procreation, family relationships and child rearing, education and abortion. *Carey*, 431 U.S. at 685, 97 S.Ct. at 2016, 52 L.Ed.2d at 684. The Supreme Court has refused, however, to find a fundamental right of privacy to engage in homosexual sodomy. *Bowers*, 478 U.S. at 192, 106 S.Ct. at 2844, 92 L.Ed.2d at 146-47.

In seeking to identify constitutional rights entitled to heightened judicial scrutiny, the Supreme Court has limited these rights to rights that are "deeply rooted in this Nation's history and traditions," *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977), or liberties that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Although plaintiff raises an important issue, it is not clear that either of these formulations would confer a fundamental right of privacy to be a homosexual. Moreover, plaintiff concedes that no court has ever found a fundamental right to be, and to identify oneself as, a homosexual.²⁵

The Court need not decide whether plaintiff has a fundamental right to be a homosexual in order to resolve her substantive due process claim. The Court has already held that the Army regulation challenged here is

"conduct" in the criminal context. See *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (striking down California statute criminalizing status of narcotics addiction as violative of Eighth Amendment), and *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (upholding conviction for public drunkenness, as distinguished from arrests based on status of being a chronic alcoholic).

based solely on prejudice. As such, it cannot withstand even rational basis review. Regulations based solely on prejudice are irrational as a matter of law and serve no legitimate governmental purpose.

The Government argues that plaintiff's substantive due process claim is foreclosed by *Woodward v. United States*, 871 F.2d 1068 (Fed.Cir.1989), *cert. denied*, 494 U.S. 1003, 110 S.Ct. 1295, 108 L.Ed.2d 473 (1990). The Government contends that *Woodward*, like the present case, is a homosexual status case, and thus the *Woodward* court's rejection of the plaintiff's substantive due process claim in that case applies here. In *Woodward*, a Naval Reserve officer contended that homosexuality was protected under the constitutional right of privacy, and thus the Navy could not, consistent with the Fifth Amendment, discharge him on the basis of his homosexuality. In analyzing plaintiff's privacy claim, the Court noted that although *Woodward* had not admitted to homosexual conduct, he had stated that "he was attracted sexually to, or desired sexual activity with, members of his own sex." *Id.* at 1074 n. 6. In view of these admissions, the *Woodward* court distinguished plaintiff's case from cases involving discharge solely on the basis of status.²⁶ Thus, *Woodward* is not solely a homosexual status case, and the case is distinguishable on those grounds.²⁷

The Court holds that plaintiff's Fifth Amendment substantive due process rights were violated by her discharge under Army Regulation 135-175. The Army's discharge of Cammermeyer based solely on her admission of homosexual orientation was not rationally related to the Government's legitimate interest in maintaining the readiness and combat effectiveness of its military forces. The defendants' motion for summary judgment on this claim is denied and the plaintiff is granted summary judgment on this claim.

26. The *Woodward* court stated: "While acts of sodomy have not been expressly admitted by *Woodward*, in view of [his statements, his known association with gays, and his failure to claim celibacy] we need not address the factual situation where there is action based solely on 'status

D. First Amendment Claim

[14] Defendants move for summary judgment on plaintiff's claim that the policy banning homosexuals from military service violates her right to freedom of speech and association. The Court concludes that this claim is foreclosed by controlling Ninth Circuit precedent. The Ninth Circuit held that servicemembers' challenges to military regulations requiring discharge of homosexuals based on the individual's statement that he or she is a homosexual do not implicate First Amendment concerns; the servicemember is not being discharged for his or her speech, but rather for his or her status as a homosexual. See *Pruitt*, 963 F.2d at 1163-64; *Schowengerdt v. United States*, 944 F.2d 483, 489 (9th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1514, 117 L.Ed.2d 650 (1992).

In *Pruitt*, an Army Reserve officer challenged on First Amendment grounds the Army Regulations mandating her involuntary discharge for admitting she was a lesbian. Plaintiff contended that her discharge was based on public statements to a newspaper reporter that she was a lesbian, which she argued was protected expression. *Pruitt*, 963 F.2d at 1163. The court rejected plaintiff's First Amendment arguments, holding that *Pruitt* was not discharged under Army regulations for her speech, but rather for her status as a homosexual. The court noted that "*Pruitt's* admission, like most admissions, was made in speech, but that does not mean that the first amendment precludes the use of the admission as evidence of the facts admitted." *Id.* at 1164.

Similarly, in *Schowengerdt*, a Naval Reserve officer who was also a civilian employee of the Navy, challenged on First Amendment grounds his discharge from the Navy. *Schowengerdt's* discharge was based on his admission of bisexuality, and certain written materials describing his bisexual activities discovered during a search of his office. *Schowengerdt*, 944 F.2d at 485. The court

as a person with a homosexual orientation." *Woodward*, 871 F.2d at 1074 n. 6.

27. The Court notes also that the Ninth Circuit, in *Pruitt*, 963 F.2d at 1165 n. 4, has questioned the *Woodward* court's analysis.

held that Schowengerdt's discharge did not violate the First Amendment because "he was not discharged for writing about bisexuality but rather for *being* a bisexual, of which his purely private correspondence was evidence." *Id.* at 489.

Plaintiff cites no precedent in support of her claim under the First Amendment. Further, every court that has addressed this issue has refused to grant relief on First Amendment grounds. *See, e.g., Ben-Shalom*, 881 F.2d at 462; *Dahl*, 830 F.Supp. at 1338. The Court therefore grants defendants' motion for summary judgment on this claim.

E. Other Claims

Plaintiff's complaint asserts two additional claims: first, that Army Regulation 135-175 is an invalid exercise of executive power, in violation of the doctrine of separation of powers; second, that Army Regulation 135-175 violates the principles of federalism because the United States Constitution reserves to the State of Washington the power to appoint officers in the Washington State National Guard. The Court construes plaintiff's failure to respond to defendants' motion for summary judgment on these claims as a concession that these claims are without merit and therefore grants defendants' motion as to these claims.

F. Conclusion

All who had the opportunity to serve with Margarethe Cammermeyer agree that she was an outstanding officer and Army Nurse. Her care and professionalism in performing her duties earned her numerous awards and distinctions, including the Bronze Star Medal for distinguished service in Vietnam. Undoubtedly, Colonel Cammermeyer would have continued to serve in the Washington State National Guard, earning the continued respect and admiration of her peers, had she not applied for a top secret clearance to gain admission to the Army War College, and admitted in response to a direct question during her clearance interview that she is a lesbian. That admission led to her discharge from military service.

Colonel Cammermeyer was discharged from the National Guard pursuant to a governmental policy that is based solely on prejudice. Prejudice, whether founded on unsubstantiated fears, cultural myths, stereotypes or erroneous assumptions, cannot be the basis for a discriminatory classification. *Cleburne*, 473 U.S. at 448, 105 S.Ct. at 3259. As the Supreme Court stated in *Palmore*, 466 U.S. at 433, 104 S.Ct. at 1882, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Plaintiff is therefore entitled to judgment as a matter of law on her equal protection and substantive due process claims under the Fifth Amendment. Plaintiff is entitled to summary judgment against defendants on her first and third claims and for judgment as follows:

- a. For an order requiring defendants to reinstate her to her former position in the Washington State National Guard and to restore to her all rights, honors and privileges of that status;
- b. For an order requiring defendants to expunge all record of plaintiff's sexual orientation and her statements, if any, regarding same from any and all records in defendants' possession;
- c. For an order enjoining defendants from taking any adverse action against plaintiff by reason of her homosexual status or on account of statements of her homosexual orientation;
- d. For an order enjoining defendant from taking any action against plaintiff based on the purported authority of directives or regulations mandating separation from military service by reason of homosexual status or on account of statements of homosexual orientation;
- e. For a declaration that defendants' action in separating plaintiff from military service based solely on her declaration of homosexual orientation was unconstitutional;
- f. For a declaration that defendants' regulation mandating separation from service by reason of homosexual status or on account of statements of homosexual orientation is unconstitutional; and
- g. Costs of suit.

Defendants are entitled to judgment dismissing plaintiff's second, fourth, fifth and sixth claims.

The Clerk of the Court is directed to enter judgment in accordance with this Order.

IT IS SO ORDERED.



**TRANSAMERICA PREMIER
INSURANCE COMPANY,
Plaintiff,**

v.

**K & S CONSTRUCTION, Kurt Shepard
and Sandra Shepard, Defendants.**

No. 93-K-2261.

United States District Court,
D. Colorado.

April 25, 1994.

Insurer which had provided bonds for construction company brought action to enforce indemnity agreement, and construction company counterclaimed for breach of contract and other counts. On insurer's motion to dismiss counterclaims, treated as motion for summary judgment, the District Court, Kane, Senior District Judge, held that: (1) construction company failed to show that it was not in default when insurer exercised assignment of accounts receivable under general indemnity agreement, and (2) insurer did not breach indemnity agreement with construction company by refusing to provide it with financial assistance.

Motion granted.

1. Indemnity ¶8(3)

Construction company, for which insurer had executed payment and performance bonds, failed to show that it was not in default when insurer exercised assignment of accounts receivable under general indemnity agreement, for purposes of breach of con-

tract claim; although construction company submitted evidence that four "unpaid bills" were not due because of bona fide dispute over amount owed, construction company failed to address printout listing accounts payable to other vendors.

2. Indemnity ¶8(3)

Insurer, which executed payment and performance bonds on behalf of construction company, did not breach indemnity agreement with construction company by refusing to provide it with financial assistance. Insurer was not required to provide assistance since construction company was in default when it requested assistance.

3. Indemnity ¶8(3)

Insurer was required to act in good faith in exercising its judgment, even though it was vested with sole discretion to provide financial assistance to construction company under general indemnity agreement.

4. Torts ¶10(1), 12

Essential element of tortious interference with prospective advantage and intentional interference with contractual relations is improper conduct that either prevents formation of contract between complainant and third party or induces breach of existing contract.

5. Damages ¶50.10

Claim for intentional infliction of emotional distress requires proof of outrageous conduct.

Edgar L. Neel, and Kelly K. Robinson, Weller Friedrich, LLC, Denver, CO, for plaintiff.

William L. Bruckner, Corona & Balistreri, San Diego, CA, James Hatter, Fossum, Hatter & Green, Cortez, CO, for defendants.

MEMORANDUM OPINION AND ORDER

KANE, Senior District Judge.

This case arises out of a General Indemnity Agreement (the "Indemnity Agreement") executed by Defendants Kurt Shepard and Sandra Shepard, doing business as Defen-

agreement. *Air Line Pilots Ass'n*, 869 F.2d at 1520. The trial court, however, has discretion to condition the grant of an injunction on a return to the *status quo* where an injunction is necessary to preserve the jurisdiction of the arbitrator. *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528, 533, 80 S.Ct. 1326, 1330, 4 L.Ed.2d 1379 (1960); *Air Line Pilots Ass'n*, 869 F.2d at 1520-21 n. 2. The Court finds that a conditional injunction is not necessary under the circumstances presented here. First, the Court disagrees with UTU's characterization of the *status quo*. The contested work has been assigned to maintenance-of-equipment employees since Taylor Yard opened in October 1992. Therefore, the *status quo* is not the assignment of work to the conductors, but rather the assignment of work to maintenance-of-equipment employees. Second, a conditional injunction is not necessary to preserve the jurisdiction of the arbitrator.

Accordingly, it hereby is

ORDERED, that plaintiff's request for a permanent injunction is granted. The defendant labor organization, and the individual defendants, individually, and as officers or members or representatives of the conductors and assistant conductors employed by Amtrak, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, and each of them, or by or through their order, and all others acting in concert or in participation with them, be and they are hereby permanently enjoined from calling, permitting, instigating, authorizing, encouraging, participating in, approving of, or continuing any disruption of normal rail operations, including but not limited to strikes, picketing, slowdowns, concerted refusals to work, interference with equipment, sick-outs or other work stoppages, and all other acts in furtherance or in support thereof, in derogation of the procedures provided by the Railway Labor Act for the resolution of grievances with respect to the Metrolink work jurisdiction dispute. It hereby further is

ORDERED, that defendants' motion for a conditional injunction is denied. It hereby further is

ORDERED, that plaintiff's motion for a preliminary injunction is denied as moot.

SO ORDERED.



LTJG Richard Dirk SELLAND, Plaintiff,

v.

Les ASPIN, et al., Defendants.

Civ. A. No. 93-1924-LFO.

United States District Court,
District of Columbia.

Sept. 28, 1993.

As Amended Sept. 29, 1993.

Naval officer moved for preliminary injunction to bar Secretaries of Defense and Navy from separating him from Navy based on homosexual orientation. The District Court, Oberdorfer, J., held that discharging officer from armed forces based solely on homosexual status was barred by injunction issued by another federal court.

Granted.

1. Injunction $\S$ 75

Burdens on plaintiff seeking injunction against military are heightened by deference properly owed to military judgment by judiciary.

2. Injunction $\S$ 138.21

It is appropriate to consider factors involved in determining whether to issue preliminary injunction in relation to one another, so that stronger showing of one factor will permit weaker showing on other factors.

3. Injunction $\Rightarrow$ 138.69

Because Department of Defense was under injunction from another federal court not to discharge any person in armed forces based solely on homosexual status, naval officer was entitled to preliminary injunction barring his separation from Navy on basis of his admitted homosexuality, where separation was based only on officer's homosexual status, as opposed to conduct, and Navy had made no finding that conduct interfered with military mission of armed forces of United States.

Antonia B. Ianniello, Hank Hockeimer, Steptoe & Johnson, Washington, DC, for plaintiff.

Vincent M. Garvey, Michael J. Haungs, Dept. of Justice, Civil Div., Washington, DC (Lt. Cdr. Mark D. Lawton, Dept. of the Navy, Office of the JAG, of counsel), for defendants.

MEMORANDUM

OBERDORFER, District Judge.

Plaintiff, Lieutenant (J.G.) Richard D. Selland, is before the Court on his motion for a preliminary injunction that would bar the Secretaries of Defense and Navy from separating him from the Navy on the basis of homosexual orientation.

I.

The essential undisputed facts are that the Chief of Naval Personnel has reported to the Secretary of the Navy that

[plaintiff] is a regular Supply Corps officer with two years commissioned service ... [who] has been recommended for administrative separation with an Honorable discharge.

Administrative Record (A.R.) at 4. Noting plaintiff's two objections to his separation, the Chief advised the Secretary that (1) plaintiff had appropriate notice that "he was being considered for administrative separation based on homosexuality as evidenced by his admission that he is a homosexual," and (2) "[n]either [Defense Department] guidelines nor policy concerning the retention of

homosexual [sic] contains any ... provision [that] the Navy must allege misconduct, in addition to status, in order to separate an officer based on his homosexuality." In conclusion the Chief recommended that the Secretary "separate [plaintiff] from the Naval Service with an Honorable Discharge.... The separation code will be GRB (homosexuality admission)." *Id.*

On May 21, 1993, an Acting Secretary of the Navy advised an Assistant Secretary of Defense that the Secretary of the Navy had approved an honorable discharge but had not yet directed separation and recommended that plaintiff's case be referred to the Attorney General for determination of whether or not the discharge should be suspended.

On July 2, 1993, the General Counsel of the Defense Department advised the Attorney General that plaintiff's case and one other

have been processed in accordance with Department of Defense policies and procedures governing administrative separation of military personnel for homosexuality. *They are based only on acknowledged homosexual 'status,' as opposed to homosexual conduct....* The Separation Authority has determined that separation is warranted under established policies and procedures.

A.R. at 2 (emphasis supplied). The General Counsel further reminded the Attorney General of her authority to direct that plaintiff's discharge be suspended. If she directed suspension, plaintiff would be "separated from active duty and placed in the standby reserve" with the option to return to active duty upon request should the current policy be changed. *Id.* Those individuals whose cases are not suspended would be discharged.

On August 9, 1993, the Associate Attorney General advised the General Counsel that the Attorney General had delegated to him her authority to

suspend final discharges in 'acknowledged homosexual status' cases given to the Attorney General by the President in his January 29, 1993 directive establishing an

interim policy regarding homosexuals in the military.

A.R. at 1. The Associate Attorney General reminded the General Counsel that, on July 19, 1993, the President "announced a new homosexual policy for the military and ... the Secretary of Defense directed that the interim policy and ... procedures remain in effect until October 1, 1993." *Id.* He concluded that "the discharge is hereby suspended until the President's policy on homosexuals in the military ... becomes effective." *Id.* (emphasis added). That date is October 1, 1993. Thus, for ought that appears, unless restrained the defendants will automatically discharge plaintiff on, or soon after, that date, without any further administrative consideration of his case.

Plaintiff appears to be in a situation resembling that of a sparrow caught in a badminton game. Despite taunts from shipmates about their belief that he was homosexual, he creditably performed his duties as the supply officer on a nuclear submarine. As the taunts escalated when homosexuals in the armed services surfaced as an issue in the 1992 presidential campaign, plaintiff confided in his Chaplain about the discomfort the taunts were causing him. On the day after President Clinton's inauguration, apparently relying on the President's public statements about homosexuals in the military, plaintiff and the Chaplain met privately with plaintiff's commanding officer, apparently to ask him to admonish the crew about taunting plaintiff. Instead, when the plaintiff admitted that "he was homosexual" (A.R. at 4), the commanding officer removed him from the ship forthwith.¹ Since then he has served creditably as a supply officer in a shore billet.

Separation from active duty would end plaintiff's pay, allowances, and related privileges. Moreover, one may reasonably infer from the cabinet-level correspondence in the

administrative record that nothing but a few hours stands in the way of his final discharge from the Navy, complete with the unhelpful and, to many, ignominious, notation on an otherwise honorable discharge: "GRB (homosexuality admission)." ² A.R. at 5.

All of the foregoing is occurring or imminent without any apparent consideration or finding contemplated by Naval Regulations as to whether there are (or are not) "particular circumstances" that justify plaintiff's retention at some billet in the Navy despite his admission of homosexuality. SECNAVINST 1920.6A at 1(b)3(a)(4) (Encl. 3); see *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 857 (D.C.Cir.1978).

Most important, the separation and, as of October 1, 1993, discharge remain imminent despite the following order of the United States District Court for the Central District of California:

[T]he Department of Defense is permanently enjoined from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States.

Meinhold v. United States Department of Defense, 808 F.Supp. 1455, 1458 (C.D.Cal. 1993), stay denied, No. CV-92-6044, 1993 WL 195368 (9th Cir. Mar. 5, 1993).

II.

[1-2] In order to obtain a preliminary injunction a movant must establish (1) a substantial likelihood of success on the merits, (2) irreparable injury, (3) relatively less injury to defendants, and (4) promotion of, or at least no detriment to, the public interest. These burdens on a plaintiff seeking an injunction against the military are heightened by the deference properly owed to military judgment by the judiciary. On the other hand, an injunction to maintain the status

1. Defendants could cite this incident to show the burden that would be placed on commanders if they were required to police this kind of tension between homosexuals and others. But, at the merits stage, this burden must be compared, in terms of fact and law, with that borne by commanders after the armed forces included blacks and, more recently, women, in their ranks.

2. Query whether the notation is intentionally unhelpful, whether it would serve any useful purpose, and whether it would comport with the spirit of the "don't ask, don't tell" policy.

q110 is more accessible than a mandatory injunction that would alter it. Moreover, it is appropriate to consider these four factors in relation to one another so that a stronger showing of one factor will permit a weaker showing on the other factors.³

[3] Here the probability of success is great. Defendants are under an injunction by a federal judge (which has survived appellate review on two stay motions) not to discharge any person from the armed forces solely because of his/her status as a homosexual. Cabinet-level documents make it clear that plaintiff is threatened with imminent discharge as of October 1. Our Court of Appeals has established in no uncertain terms the duty of a district court to enforce orders of the Court of Appeals.⁴ The same principle governs a complaint alleging a violation of a viable order of another federal district court that, on its face, applies nationwide to cabinet officers of the national government.

The likelihood of plaintiff's success is further enhanced by the Supreme Court decision that struck down a California statute that the court construed as making it a crime to be a drug addict—even absent any allegation that the addict sold or used illegal drugs. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Of course, *Robinson* was a criminal case, which this is not, and a different standard applies to the military in criminal as well as civil cases. Nevertheless, the Supreme Court may well invoke the *Robinson* precedent to condemn inferences of conduct from an unpopular condition (if homosexuality is proved to be a condition) as distinguished from proven illegal acts or attempts to commit them. This result is likely to follow whether the defendants' actions and threatened actions are subject to strict scrutiny⁵ or are tested for a rational basis.⁶

Defendants argue that it is reasonable to infer that a homosexual has committed or is likely to commit homosexual acts. This argument must fail for two reasons: (1) the General Counsel explicitly renounced conduct as a ground for separation; and (2) the *Meinhold* Court required not only a finding of homosexual conduct; it further ordered that a discharge can survive that injunction, at a minimum, if it is based on a finding that the conduct interferes with the military mission of the armed forces of the United States. That is presently, if only temporarily, the law of the land on this subject. Therefore, plaintiff is likely to prevail because defendants have made no finding in compliance with the *Meinhold* requirements.

In reaching these conclusions, I have carefully considered the relevant precedents in this circuit. The D.C. Circuit held in *Dronenburg v. Zech*, 741 F.2d 1388, 1397-98 (D.C.Cir.1984), a case involving sexual misconduct by a homosexual soldier, that the Constitution did not bar the Navy's policy of mandatory discharge for actual homosexual conduct. Here, however, the adverse action is "based only on acknowledged homosexual 'status,' as opposed to homosexual conduct." A.R. at 2. Moreover, our Court of Appeals has reserved judgment as to whether the Central Intelligence Agency may discharge an individual because of sexual orientation, as distinguished from conduct. *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C.Cir.1986), modified sub nom. *Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988).

At the district court level, my colleague Judge Gasch approved a Navy discharge based solely on sexual orientation. *Steffan v. Cheney*, 780 F.Supp. 1 (D.D.C.1991), appeal pending. However, he based his decision in part on health considerations, a ground not urged by the government here. In any event, despite my very great respect for Judge Gasch, I am not persuaded that the

3. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C.Cir. 1973).

4. *See International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C.Cir. 1984).

5. *See FCC v. Beach Communications, Inc.*, — U.S. —, —, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445, 105 S.Ct. 3249, 3257, 87 L.Ed.2d 313 (1985).

6. *See Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254.

other grounds for his ruling are likely to, or should, control in the unique circumstances at issue here.

The defendants contend nevertheless that plaintiff is not likely to succeed on the merits because their action is not final and plaintiff has not exhausted his administrative remedy. But the remedy they proffer would be before the Board for the Correction of Naval Records, which can consider whether plaintiff's discharge as a homosexual was correct after the discharge. In the circumstances here that is not an adequate remedy, exhaustion of which would be required before plaintiff's claim could be addressed on the merits.

The plaintiff's claim for irreparable injury if he were merely separated from active duty and placed in the standby reserve would be problematic were it not for the Certificate of Release or Discharge From Active Duty (DD Form 214). True, the separation primarily threatens pay and allowances, which can be compensated later, and emotional distress, which may not be compensable or actionable. However, the Certificate, complete with signatures of plaintiff and a Navy Personnel Officer, states: "(23) Type of Separation—Release from Active Duty" and "(28) Narrative Transfer to Inactive-Involuntary Transfer to Inactive Reserve (Homosexuality-admission)." The document states on its face: "This is an Important Record. Safeguard it." It is. And publication of it threatens irreparable injury. Moreover, the Associate Attorney General's letter makes it more likely than not likely that on October 1, 1993, or shortly thereafter, the other shoe will automatically drop, and plaintiff will not only lose his pay, allowances, and his well-performed job, but will be finally discharged with the modern counterpart of a "bar sinister" etched upon his record: "GRB (homosexuality admission)."

Defendants have demonstrated no equity against the maintenance of this single plain-

tiff in *status quo* pending a final judgment because of its possible deleterious effect upon the Navy's mission. Moreover, the equity of any claim of injury that defendants might have is trumped by the fact that they are perilously close to being in contempt of the *Meinhold* order.⁷ There is also an intangible, but meaningful, equity in the fact that plaintiff made the statement about his homosexuality, not for broadcasting on television, but in the company of his Chaplain to his Commanding Officer in his stateroom apparently to gain his intervention with respect to taunts he was receiving, in part because of public statements by the President of the United States. Indeed, he appears to have felt free to make his admission in reliance on those presidential statements. Response of LTJG Richard Selland to the Notice of Administrative Separation (A.R. at 9). Thus, the equities favoring plaintiff outweigh any demonstrated injury or threatened injury to the Navy.

The public interest in this matter is difficult to quantify. Obviously, the public interest in the Navy's mission is paramount, and could be (indeed in the proceedings on the merits may well be) decisive. But this is an application to maintain the *status quo* temporarily pending a final resolution of the matter. An accompanying Order will grant the motion, tailor the *Meinhold* order to the posture of this case, and schedule expedited administration of it on the merits.

ORDER

On the basis of the findings and for reasons stated in the accompanying Memorandum, it is this 27th day of September, 1993, hereby

ORDERED: that, pending a final judgment or other order of the Court, defendants, and all persons acting in concert with them, are ENJOINED from separating plaintiff from active duty, placing him on

order entered September 22, 1993, is unequivocal. It directs defendants to show cause why they should not be cited for contempt "for continuing to enforce the Department of Defense's policy regarding gays and lesbians despite this Court's determination that the policy violates the United States Constitution...."

7. Defendants would distinguish the *Meinhold* order because, in denying a stay of it, the Ninth Circuit emphasized that the plaintiff in that case was not being discharged, but only separated from active duty and placed on reserve. But that distinction does not reach this case where, for ought that appears, discharge can be days or hours away. In any event, a *Meinhold* court

CARLSON v. RICE

Cite as 832 F.Supp. 17 (D.Me. 1993)

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active reserve, or discharging plaintiff from the Navy based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the United States Navy; and it is further

ORDERED: that on or before October 8, 1993, the parties shall file a proposed schedule for the disposition, or trial, of this case on the merits.



Stacey Lee CARLSON, Plaintiff,

v.

Ronald Kermit RICE, and Leona Rice, Defendants.

Civ. No. 93-61-P-C.

United States District Court,
D. Maine.

Sept. 22, 1993.

Plaintiff sued parents for assault and battery and intentional and negligent infliction of emotional distress, based on allegations of childhood sexual abuse, and parents moved to dismiss on statute of limitations grounds. The District Court, Gene Carter, Chief Judge, held that allegations of emotional distress, repressed memory, and inability to engage in normal activities sufficiently supported claim for tolling of limitations period due to mental illness.

Denied.

1. Federal Civil Procedure $\S$ 1833

District court would decline, in its discretion, to consider affidavits submitted by plaintiff's counsel in conjunction with defendant's motion to dismiss complaint for failure to state claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Limitation of Actions $\S$ 2(1)

As choice-of-law matter, Maine courts apply Maine statute of limitations.

3. Federal Courts $\S$ 409

As federal court sitting in diversity, district court was bound to follow choice-of-law rule of Maine, where plaintiff was resident of Kansas, defendants resided in Maine, and action was based on incidents allegedly occurring in three other states.

4. Federal Civil Procedure $\S$ 1772, 1829

To resolve motion to dismiss for failure to state claim, district court must accept as true all factual allegations in complaint, construe them in favor of plaintiff, and decide whether, as matter of law, plaintiff could prove no set of facts which would entitle her to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

5. Limitation of Actions $\S$ 180(7)

Pursuant to Maine law, allegations that plaintiff had been sexually abused by father while she was child, that she suffered extreme emotional distress and had until recently repressed all memory of alleged abuse, and that her ability to engage in normal activities was impaired were sufficient to create issue of fact so as to state claim that statute of limitations was tolled by reason of mental illness. 14 M.R.S.A. $\S$ 853.

6. Limitation of Actions $\S$ 95(4.1)

Under Maine law, statute of limitations for plaintiff's assault and battery and intentional and negligent infliction of emotional distress claims against parents would begin to run as of date that plaintiff began to experience flashbacks relating to alleged childhood sexual abuse at hands of her father of which she had previously repressed all memory. 14 M.R.S.A. $\S\S$ 752, 752-C, 753; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Jack H. Simmons, Berman & Simmons,
P.A., Lewiston, ME, for plaintiff.

Bruce C. Gerrity, Preti, Flaherty, Beliveau
& Pachios, Augusta, ME, for defendants.

of irreparable injury for each of the following reasons, independently of one another:

1. The Navy, by failing to follow its own procedural regulations in Meinhold's discharge, violated the administrative procedures act. (5 U.S.C. Section 702 *et seq.*). Specifically,

a. The Navy failed to articulate the standard governing its decision to discharge Meinhold;

b. The Navy violated its own procedural regulations during his administrative discharge hearing by, among other things, introducing improper evidence, considering Meinhold's failure to testify on his own behalf, permitting the unauthorized presence of non-voting members during Board deliberations, and taking into account unauthorized findings.

2. The Navy's action in discharging Meinhold violated traditional principles of estoppel because, through its conduct, the Navy repeatedly assured Meinhold he would not be discharged despite his acknowledged gay status, provided he conformed his conduct to all military requirements.

3. The Navy's regulations, which mandate the discharge of all homosexual service members on the basis of their sexual status, is a bill of attainder in violation of Art. I, § 9 of the U.S. Constitution.

4. The Navy's regulation violates the equal protection guarantee of the Fifth Amendment because the Navy has shown no rational relationship between the regulation and its purported objective.

5. Due to Meinhold's constant need to hone his skills and keep abreast of technological advances, Meinhold will suffer irreparable injury if Meinhold remains separated from his job, in that he will be deprived of the ability to return to his position as an expert airborne sonar analyst and instructor.

6. The Navy will suffer no hardship through reinstatement of Meinhold since he is, by the Navy's own admission, one of their finest airborne sonar analysts. Therefore, no bond is necessary.

ORDER

The Court, having considered Defendants' *ex parte* application for reconsideration of the Court's issuance of a preliminary injunction or, in the alternative, for a stay pending appeal, together with the moving papers.

It is Ordered that Defendants' *ex parte* application be, and hereby is, Denied.

It is further Ordered that the Secretary of the Navy shall immediately reinstate Plaintiff to his position in the United States Navy as an Aviation Antisubmarine Warfare Operator First Class (AW1).

ORDER

It is Ordered that the United States Attorney shall personally notify the Secretary of the Defense and the Secretary of the Navy of the preliminary injunction, and all other orders in this action, and that they shall comply with all orders of this Court no later than 8:00 a.m. Pacific Standard Time on November 12, 1992.

It is further Ordered that failure to comply will result in sanctions, which will include, but shall not be limited to, a prohibition against filing any further papers in this action, and any papers filed by Plaintiff shall be deemed unopposed.



Volker Keith MEINHOLD, Plaintiff,

v.

UNITED STATES DEPARTMENT OF
DEFENSE, et al., Defendants.

No. CV 92-6044 TJH (JRx).

United States District Court,
C.D. California.

Jan. 29, 1993.

Following his discharge from the Navy because he was homosexual, serviceman

brought suit challenging Department of Defense policy. On cross motions for summary judgment, the District Court, Hatter, J., held that policy of banning gays and lesbians from military service based merely on status, and not conduct, violated equal protection clause of Fifth Amendment.

Plaintiff's motion granted.

1. Armed Services §3, 22

Requiring serviceman to exhaust his interest intraservice remedies for discharge based on his status as homosexual would be futile, where new hearing would have resulted in same decision.

2. Armed Services §22

Constitutional Law §224(3)

To survive serviceman's claim that Department of Defense's policy banning gays and lesbians based merely on status, and not conduct, violated equal protection clause, Department was required to establish, through factual record, that its policy was rationally related to its permissible goals; in determining whether policy was rationally related, court could not merely defer to "military judgment" as the rationale for the policy, but rather had to consider factual basis underlying the "military judgment." U.S.C.A. Const.Amend. 5.

3. Armed Services §4, 11, 22

Constitutional Law §224(3)

Policy of Department of Defense of banning gays and lesbians from military service based merely on status, and not conduct, violated equal protection clause of Fifth Amendment, absent proof that policy was rationally related to Department's permissible goals. U.S.C.A. Const.Amend. 5.

Harry G. Melkonian, Christopher L. Rudd, John I. McGuire, White & Case, Los Angeles, CA, for plaintiff.

Stuart M. Gerson, Asst. Atty. Gen., Terree A. Bowers, U.S. Atty., Vincent M. Garvey, David M. Glass, Attys., Dept. of Justice, Washington, DC, for defendants.

AMENDED OPINION

HATTER, District Judge.

BACKGROUND

In 1980, at the age of 17, Volker Keith Meinhold enlisted in the United States Navy. Over the last twelve years, Meinhold has established a reputation for being a dedicated and disciplined sailor. As such, he earned his position as a Naval airborne sonar analyst and instructor. He has consistently received outstanding evaluations and has never been the subject of disciplinary action.

In 1992, Meinhold was discharged from the Navy and deprived of his career after he announced on an ABC television news program that he was gay. Meinhold was discharged not because he engaged in prohibited conduct, but because he labeled himself as gay. Meinhold filed this action in response to his discharge. Previously, this Court issued a preliminary injunction ordering the Navy to reinstate Meinhold pending a final resolution of this case.

The Court, now, decides this case on the merits based on the cross motions for summary judgment. The parties are in agreement on the relevant facts, and the Court finds that there are no genuine issues of material fact to preclude the rendering of a decision based on the law of the land. Fed. R.Civ.P. 56(c). While Meinhold, also, attacks the administrative discharge procedures used by the Navy, the key issue presented to the Court is whether the United States Department of Defense may ban, from the armed forces of the United States, gays and lesbians who do not engage in prohibited conduct.

DISCUSSION

Exhaustion of Administrative Remedies

[1] While it is clear to this Court that there were numerous procedural errors committed by the board of Naval officers convened for Meinhold's administrative discharge hearing, it is also undisputed that a new hearing would result in the same decision. Namely, Meinhold would, again, be discharged based on his status as a homo-

sexual. Thus, requiring Meinhold to exhaust his intraservice remedies would be futile. See, *Watkins v. U.S. Army*, 875 F.2d 699, 705 (9th Cir.1989) (*en banc*), *cert. denied*, 498 U.S. 957, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990). Therefore, this Court will proceed to the merits of Meinhold's claims.

Equal Protection

[2] To survive Meinhold's claim that the Department of Defense's policy banning gays and lesbians based merely on status, and not conduct, violates the Equal Protection clause of the Fifth Amendment, the Department of Defense must establish, through a factual record, that its policy is rationally related to its permissible goals. *Pruitt v. Cheney*, 963 F.2d 1160, 1166-67 (9th Cir.1991), *cert. denied*, — U.S. —, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992). In determining whether the policy is rationally related, the Court cannot merely defer to the "military judgment" as the rationale for the policy—the Court must consider the factual basis underlying the "military judgment." *Pruitt*, 963 F.2d at 1166-67.

[3] The Navy contends that its ban against gays and lesbians is rationally related to its goals of maintaining discipline, good order and morale; fostering mutual trust and confidence among servicemembers; the need to recruit and retain servicemembers; and maintaining public acceptability of the Navy. Navy Military Personal Manual 3630400(1). Security concerns, once generally raised by supporters of the ban, however, are no longer a rationale, since gays and lesbians are not a security risk to the military, according to former Secretary of Defense Richard Cheney. *Meet the Press* (NBC television broadcast, Dec. 6, 1992).

The factual record placed before the Court by the Department of Defense is sparse. The Navy rests solely on a report produced by the United States General Accounting Office in June of 1992. General Accounting Office, *Defense Force Management: Statistics Related to DoD's Policy on Homosexuality* (1992). However, that report concludes nothing more than what

the Department of Justice has already told the Court—the rationale for the policy banning gays and lesbians from the military is "not capable of being determined authoritatively by scientific means or proven studies." *Defense Force Management*, p. 69. The GAO reached the conclusion that the policy is based on "military judgment [which is] inherently subjective in nature [and not susceptible to] scientific or sociological analysis." *Defense Force Management*, p. 56. However, the military has, indeed, obtained scientific and sociological analyses upon which to base its decisions regarding gays and lesbians in the military.

In 1957, the Secretary of the Navy commissioned a report regarding the revision of its policies, procedures and directives dealing with homosexuals. *Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuality* (Mar. 15, 1957) ["Crittenden Report"]. The Crittenden Report stated that there was no "visible supporting data [to support the conclusion that gays and lesbians] cannot acceptably serve in the military." *Crittenden Report*, p. 5. In 1976, the Chief of Naval Personnel stated that "no empirical proof exists at this time [to support the Navy's contention that] homosexuality has an adverse effect upon the completion of the [military] mission." Memorandum from Chief of Naval Personnel to Judge Advocate General (Aug. 2, 1976).

Moreover, in 1988, the Department of Defense commissioned a study of homosexual veterans which concluded that "having a same-gender or an opposite-gender orientation is unrelated to job performance in the same way as being left- or right-handed." Theodore R. Sarbin & Kenneth K. Eoyang, *Nonconforming Sexual Orientation and Military Suitability*, p. 33 (1988). In 1989, another Department of Defense-commissioned study investigated the suitability of gay men and lesbians for military service, and found that "homosexuals more closely resemble those who successfully adjust to military life than those who are

discharged for unsuitability ... [and that] homosexuals show pre-service suitability-related adjustment that is as good or better than the average heterosexual." Michael A. McDaniel, *Preservice Adjustment of Homosexual and Heterosexual Military Accessions*, p. 19 (1989).

Further, Vice Admiral Joseph S. Donnell, the Commander of the Surface Atlantic Fleet has stated that "[e]xperience has ... shown that the stereotypical female homosexual in the Navy is hardworking, career-orientated, willing to put in long hours on the job and among the command's top professionals." Administrative Message from Commander, Naval Surface Fleet, Atlantic, to the Naval Surface Fleet, Atlantic (July 2, 1990).

Additionally, of all the countries in the North Atlantic Treaty Organization ["NATO"], only the United States and Great Britain ban gays and lesbians from their armed forces. On October 27, 1992, Canada's military leaders rescinded Canada's policy of banning gays and lesbians from the Canadian Forces, albeit as a result of a court order. In explaining why the ban was rescinded, General A.J.G.D. de Chastelain, Canada's Chief of the Defense Staff, reported that the military leadership was "satisfied that the policy no longer serves the best interests of the CF and its members." *National Defense News Release* (Oct. 27, 1992). On November 23, 1992, Australia lifted its ban against gays and lesbians in the Australian Defence Force. Prime Minister P.J. Keating, *Australian Defence Force Policy on Homosexuals* (Nov. 23, 1992). In support of lifting the ban, Australia's Prime Minister stated that "the decision will not have the adverse effect on morale and cohesion predicted by some." *Id.*

Finally, Dr. Lawrence J. Korb, the former Assistant Secretary of Defense who was responsible for approving and implementing the present policy banning gays and lesbians, has declared "that there is no longer any justification for the armed ser-

vices' current ban on homosexuals serving in the military ... [that] each of the justifications offered in support of this policy is without factual foundation ... [and, therefore,] there is no longer any rational basis [for it]." Meinhold's Exhibit 12, p. 874, ¶¶ 4 & 7.

As the Ninth Circuit has held, so, too, does this Court hold that deference to "military judgment," in the absence of a factual basis for such judgment, would result in the denial of judicial review. *Pruitt*, 963 F.2d at 1166-67.

Gays and lesbians have served, and continue to serve, the United States military with honor, pride, dignity and loyalty. The Department of Defense's justifications for its policy banning gays and lesbians from military service are based on cultural myths and false stereotypes. These justifications are baseless and very similar to the reasons offered to keep the military racially segregated in the 1940's.*

Gays and lesbians should not be ban from serving our country in the absence of conduct which interferes with the military mission. Hopefully, our military leaders will come to realize that "[w]e are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies." *Michael H. v. Gerald D.*, 491 U.S. 110, 141, 109 S.Ct. 2333, 2351, 105 L.Ed.2d 91, 117 (1989) (Brennan, J., dissenting).

Therefore, Meinhold's motion for summary judgment is granted, and the Department of Defense's motion for summary judgment is denied. The Department of Defense is permanently enjoined from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States. Meinhold's

* For a particularly insightful and thorough analysis of the Department of Defense's ban against gays and lesbians, see Kurt D. Hermansen,

Comment, Analyzing the Military's Justification for its Exclusionary Policy: Fifty Years Without a Rational Basis, 26 Loy.L.A.L.Rev. 151 (1992).

discharge from the United States Navy is rescinded.

It is so Ordered.



Edward ROWELL; Randie Rowell, Plaintiffs,

v.

POWERSCREEN INTERNATIONAL, LIMITED, a United Kingdom Corporation; Powerscreen of Arizona, Inc., an Arizona Corporation, Defendants.

POWERSCREEN INTERNATIONAL, LIMITED, a United Kingdom Corporation; Powerscreen of Arizona, Inc., an Arizona Corporation, Third-Party Plaintiffs,

v.

CLING-SURFACE COMPANY, Third-Party Defendant.

No. CV-S-91-310-PMP (RJJ).

United States District Court, D. Nevada.

July 20, 1992.

Gravel pit worker who was injured while applying solid bar belt dressing to conveyor belt of powerscreen used to crush and sort minerals brought products liability action against powerscreen's manufacturer. On manufacturer's motion for summary judgment, the District Court, Pro, J., held that evidence raised genuine issues of material fact as to whether worker's use of dressing was foreseeable, and whether powerscreen was defective, precluding summary judgment.

Motion denied.

1. Federal Civil Procedure ¶2544

Party moving for summary judgment has initial burden of showing absence of

genuine issue of material fact. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Federal Civil Procedure ¶2544

On motion for summary judgment, once movant's burden of showing absence of genuine issue of material fact is met by presenting evidence which, if uncontroverted, would entitle movant to directed verdict at trial, burden then shifts to respondent to set forth specific facts demonstrating that there is genuine issue for trial. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

3. Federal Civil Procedure ¶2544

If, on motion for summary judgment, factual context makes respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is genuine issue for trial. Fed.Rules Civ. Proc.Rule 56, 28 U.S.C.A.

4. Federal Civil Procedure ¶2544

If party seeking summary judgment meets burden of showing absence of genuine issue of material fact, then summary judgment will be granted unless there is significant probative evidence tending to support opponent's legal theory. Fed. Rules Civ.Proc.Rule 56, 28 U.S.C.A.

5. Federal Civil Procedure ¶2539, 2544

Parties seeking to defeat summary judgment cannot stand on their pleadings once movant has submitted affidavits or other similar materials; affidavits that do not affirmatively demonstrate personal knowledge are insufficient. Fed.Rules Civ. Proc.Rule 56, 28 U.S.C.A.

6. Federal Civil Procedure ¶2470.1

"Material issue of fact" necessary to preclude summary judgment is one that affects outcome of litigation and requires trial to resolve differing versions of the truth. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

7. Federal Civil Procedure ¶2543

All facts and inferences drawn must be viewed in light most favorable to respond-