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11/10/55

THE DEPUTY ATTORNEY GENERAL

Leah -

You had asked me about
DoD compliance with the policy on
gays in the military. From time to
time, I get information on that issue.
The enclosed is encouraging.

Julius



Office of the Deputy Attorney General
Washington, D.C. 20530

NOV 10 1995

MEMORANDUM FOR LEON E. PANETTA, THE WHITE HOUSE

CC: JACK QUINN, COUNSEL TO THE PRESIDENT

FROM: THE DEPUTY ATTORNEY GENERAL *JS*

SUBJECT: **Information** -- Defense Department Efforts to Enforce Directives Restricting Overzealous Investigation of Gay and Lesbian Service Members.

Summary: In August, 1995, the Defense Department released a Navy General Counsel report concluding that in the first months under the new policy, Marine investigators on Okinawa committed numerous violations of Defense and Navy Department regulations in connection with an investigation of homosexual conduct. The Navy and the Marines took specific steps to prevent repetition of such violations. The attorney representing several of the Marines who were the victims of the violations has recently written to praise the Defense Department and the Navy for their efforts.

Background: The Administration's policy on military service by homosexuals went into effect on February 28, 1994. The new policy includes provisions limiting the circumstances in which service members may be investigated for homosexual conduct and the way such investigations may be conducted. No investigation may be initiated without credible information of a violation of the policy prohibiting homosexual conduct; investigations must not extend to issues as to which, or persons as to whom, credible information is lacking; and criminal investigations of consensual, adult homosexual conduct are disfavored (the preferred course is administrative separation), and may be authorized only by the subject's commander.

The advocacy organization, Servicemembers Legal Defense Network (SLDN), has charged that the Defense Department has not taken adequate steps to ensure that these rules are followed or to investigate alleged violations.

The Okinawa Matter: Charges surfaced in the late Spring of 1994 that Marine Corps investigators were engaged in a "witch hunt," triggered by the case of Sgt. Robert Nadel, at Camp Hansen on Okinawa. Sgt. Nadel was eventually court-martialed and convicted of indecent assault on a young Marine lance corporal. His conviction is on appeal. Jonathan M. Bowie of the prominent New York law firm of Skadden, Arps, Slate, Meagher & Flom was retained, through SLDN, to defend Sgt. Nadel. Mr. Bowie soon

charged that a criminal investigation had been improperly initiated by officials other than Sgt. Nadel's commander, and that many Marines had been improperly questioned during that investigation without credible information. Mr. Bowie's allegations were reported in the press, and in early summer, Senator Wofford wrote to Secretary Perry asking him to look into the allegations.

Secretary Perry referred the matter to DoD's Acting General Counsel, Stephen W. Preston. Mr. Preston in turn tasked Navy General Counsel Steven S. Honigman to investigate and report back to him. Mr. Honigman assigned the project to Navy Assistant General Counsel Joseph T. Lynch, a senior career attorney.

Mr. Lynch's report concluded that the criminal investigation of Sgt. Nadel had been improperly initiated, because it had not been authorized by Sgt. Nadel's commander. The report also concluded that many Marines had been improperly questioned, including some who had been asked, without credible information, whether they were homosexuals. The report listed each improper question.

Mr. Honigman adopted Mr. Lynch's detailed report, and in his transmittal letter to DoD General Counsel Judith A. Miller announced a number of measures to prevent recurrence of such violations. These measures included informing Navy and Marine Corps judge advocates about the central legal conclusions of the report; directing a review of all outstanding Marine Corps criminal investigations into allegations of homosexual conduct to ensure those investigations are in compliance with the Administration's new policy on homosexual conduct; and directing a review of Marine Corps investigative policies to ensure they are consistent with the new policy.

This report was transmitted by Ms. Miller to Rep. Coyne of Pennsylvania, who has monitored the matter since Senator Wofford's defeat last Fall, and to Mr. Bowie.

Mr. Bowie has recently written to Ms. Miller, in part to express his appreciation for the Department's efforts in ensuring compliance with the new policy. In light of the criticism sometimes leveled at the Defense Department by advocates for gay service members, I thought Mr. Bowie's letter was worth calling to your attention. Although he asks a number of follow-up questions, and expresses mild disappointment about certain aspects of the report, Mr. Bowie writes:

"We believe that Mr. Lynch's report is a great step forward: it is honest, thoughtful, objective and effective. [W]e believe that the report shows a strong effort by the Department to examine and correct abuses in the policy on gays in the military where they occur. . . . We believe that Mr. Lynch's report is admirable, honest

and forthright: our desire is to ensure that the promise of progress that it represents does not go unfulfilled for lack of an advocate."

Mr. Bowie's letter is attached at Tab A.

It is troubling -- but perhaps not surprising -- that violations like those the Navy has documented could occur at a remote facility like Camp Hansen. I am sure the Defense Department would not contend that even now it has achieved complete compliance with the investigative rules established in the new policy. I am also certain that some violations will occur, and advocates will continue to criticize the services for failing to observe the limitations in the new rules. But it is very encouraging that in this Okinawa case, the Department has looked critically at its performance and taken steps that even a strong critic and advocate for gay interests has characterized as "a great step forward."

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October 18, 1995

Ms. Judith A. Miller
General Counsel
Department of Defense
1600 Defense
The Pentagon
Washington, D.C. 20301-1600

Re: Report of Violations of Regulations
in Okinawa in Spring of 1994

Dear Ms. Miller:

I am in glad receipt of your letter of August 29, 1995 from Congressman William J. Coyne, enclosing the memorandum from the General Counsel of the Navy, Steven S. Honigman, in turn enclosing a memorandum to the Staff Judge Advocate General of the Navy and a memorandum from the General Counsel of the Navy dated 17 May 1995 regarding a report by Mr. Joseph T. Lynch, Assistant General Counsel (Manpower and Reserve Affairs).

As you know, the report grew out of questions raised in cases in Okinawa in which my firm has been involved. We believe that Mr. Lynch's report is a great step forward: it is honest, thoughtful, objective and effective. While we might not agree with all of his conclusions, and might have wished him to examine certain of the issues which he chose not to, we believe that the report shows a strong effort by the Department to examine and correct abuses in the policy on gays in the military where they occur.

This letter is written to inquire about the results of the report, and specifically the follow-through that has occurred on the recommendations of the report and the orders of General Counsel Honigman. For

Ms. Judith A. Miller
October 18, 1995
Page 2

simplicity we are writing to you directly, but I believe you will receive an official request from the office of Congressman Coyne to respond similarly.

Specifically:

(1) General Counsel Honigman's memorandum to the Staff Judge Advocate requires that solicitation to engage in private adult consensual sexual misconduct be treated in the same manner as sexual misconduct defined in paragraph C of DoD Instruction 5505.8. Please advise whether this interpretation has been formalized and carried through, and how that interpretation has been documented.

(2) Similarly General Counsel Honigman's memorandum requires a redefinition of the term "fraternization", and we would inquire as to how that definition has been implemented.

(3) General Counsel Honigman's memorandum requires a review of Marine Corps CID investigative policies with respect to the scope of investigations into allegations of homosexual conduct, and requires the Staff Judge Advocate to bring to the attention of the appropriate officials of HQ Marine Corps such actions as may be necessary to assure compliance with DoD instruction 5505.8 and enclosure 4. We wish to know the results of that review, as does General Counsel Honigman.

(4) The report in General Counsel Honigman's memorandum requires that the Staff Judge Advocate advise him concerning the feasibility of requiring CID detachments to obtain the opinion of the responsible Staff Judge Advocate of whether proposed investigations comply with DoD instruction 5505.8. We would inquire as to the status of the Staff Judge Advocate's response.

(5) General Counsel Honigman's memorandum requires a review of all outstanding Marine Corps CID investigations involving homosexual conduct to insure that they comply with the provisions of DoD instruction 5505.8 and enclosure 4, concerning the permissible scope

Ms. Judith A. Miller
October 18, 1995
Page 3

of such investigations and to provide guidance if necessary to assure compliance. We would inquire, as does the memorandum, as to the results of that review, how it was conducted and what documentation exists to ensure the review of each case.

We note that we are aware of other cases in the Marine Corps in which no such review appears to have occurred.

(6) General Counsel Honigman's memoranda, and the report itself, are properly related directly to incidents in the Marine Corps, and resulting responses required by the Marine Corps. We are pleased to understand that the types of incidents described in the report are not widespread and systemic in the military: but it is still true that in individual cases in each of the services, abuses have been shown to occur. We believe that the recommendations of the report apply equally to each of the services, and certainly it would make little sense for the different services to have different standards apply on military-wide regulations. We request confirmation that each of the other services have been informed of the recommendations of the report, and instructed to respond appropriately.

(7) As you know, the incidents described in Mr. Lynch's report stem from an actual case, that of Sgt. Robert Nadel, in Okinawa, who we have and are continuing to defend. In a separate letter, I wish to raise with you the issues for the continued prosecution of Sgt. Nadel prompted by the report; but as this is not a policy matter, but one relating to a specific case, we address it separately.

* * *

I wish to emphasize to you that neither I nor my firm views ourselves as adversaries of the Department in its efforts to properly implement the new regulations (except in those specific circumstances where we represent clients in adverse situations with the military).

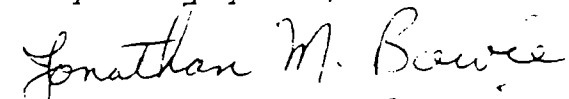
Ms. Judith A. Miller
October 18, 1995
Page 4

We have great respect both for the institution, and its efforts to carry out its mission and maintain an effective justice system for its members.

As David Ogden may have mentioned to you, for my own part I am largely retired at this point because of my health. I am too old and tired to want to make enemies and indeed, I believe that we have very much common interests in trying to ensure the proper implementation of the new policies. We are, in effect, asking both for your help and to help in this effort. We believe that Mr. Lynch's report is admirable, honest and forthright: our desire is to ensure that the promise of progress that it represents does not go unfulfilled for lack of an advocate.

Separately, we are addressing you on the issue that had been raised with White House Counsel Abner Mikva, concerning a policy of the denial of assistance of counsel to servicemembers. Though there is some overlap with the issues raised in the report, we believe that this issue is much more of a policy matter and better addressed separately.

Very truly yours,


Jonathan M. Bowie *per: jon*

cc: General Counsel Steven S. Honigman
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Ms. Judith A. Miller
October 18, 1995
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Servicemembers Legal Defense Network

★★★★★

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10/25
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Servicemembers Legal Defense Network

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: Gays in the Military: Message & Legal Issues

President Clinton promised that the new regulations on gays in the military would at the very least stop witch hunts, harassment and investigative excesses. To date witch hunts continue, investigative abuses continue and harassment has skyrocketed. These violations have been fueled by actions and omissions at the top levels of the Department of Defense, including:

- ♦ instructing investigators, for the first time ever, to question parents about their kids to gather evidence for discharge;
- ♦ failing to establish a means, despite numerous requests, whereby gay servicemembers can report death threats and harassment without fear of being investigated and discharged themselves; and
- ♦ allowing the Departments of Defense, Air Force and Navy to issue memoranda, without White House input, that gut the regulatory limits on investigations into the lives of suspected gay servicemembers.

If President Clinton does not take steps --and they do not have to be public steps-- to ensure that even the most basic and uncontroversial requirements of "Don't Ask, Don't Tell, Don't Pursue" are implemented, the Administration threatens to reinforce the perception among many Americans that the President has difficulty standing by his word.

A recent poll done by Celinda Lake for the Human Rights Campaign asked 800 registered voters what bothered them most about President Clinton's "Don't Ask, Don't Tell, Don't Pursue" policy: the priority he gave the issue, that he flip-flopped on the issue, that he left gays in the military, or that he did not give gays their rights. Thirty-three percent, the largest response, said that they were most disturbed by President Clinton's flip-flopping, his unwillingness to take a stand. Only 8% criticized President Clinton for taking a stand in support of gays in the military.

By failing to implement the few promises in the new policy, the Administration further risks needless, embarrassing media and litigation for lack of good faith implementation of the

new policy. When the system utterly fails them, servicemembers have nowhere else to turn but federal court and the court of public opinion.

We will be issuing our Second Annual Report on "Don't Ask, Don't Tell, Don't Pursue" in February and would welcome the opportunity to say that, as promised by the new policy, witch hunts, harassment and other investigative abuses have stopped. Today, we cannot. A proposal submitted previously to the White House and the Department of Defense that would address many of the concerns raised here is attached.

The Administration's public statements that the new policy is working as intended are wrong and only make the situation worse. Reports by *The New York Times*, *The New Republic*, *Newsweek*, *The Los Angeles Times*, CNN, CBS, NBC and CNN, among others, reveal to the public that the "Don't Ask, Don't Tell, Don't Pursue" policy is being flaunted by the Department of Defense. The statements send a harmful message to those who believe they can continue to witch hunt and harass with impunity, make matters worse for servicemembers caught in the trap of an intransigent commander, and erode public confidence in the President's willingness to stand by his word. !!

If President Clinton addressed the abuses of the new policy that continue to happen, he could develop a cohesive message and deflect much of the anticipated criticism. The message would not only be supportive of those who wanted to see the President implement an evenhanded policy, but would help to defuse the perception that Clinton is unwilling to take a stand or stick by his decisions. The elements of such a message should include the following:

- ♦ No American tolerates death threats and harassment against any person, for any reason. Nor can we. No American supports government investigators questioning parents about their kids to have them discharged from the military. Nor can we.
- ♦ I am deeply disturbed by reports that some military commanders are disregarding the mandate to stop witch hunts, asking questions about sexual orientation and harassment. If I catch anyone going on witch hunt, or find out about other command abuses, it will mean the end of their career.
- ♦ This policy is not a perfect solution. It is not identical with some of my own goals. Americans should be treated equally for saying and doing the same things.

Servicemembers Legal Defense Network

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EXHIBITS

1. SLDN Memorandum: Department of Defense Violations of Current Regulations
2. SLDN Memorandum: First Steps to Bring DoD Into Compliance With Current Regulations
3. SLDN Memorandum: A Few Examples of Administration's Public Misstatements

Servicemembers Legal Defense Network

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: Department of Defense Violations of Current Regulations

Death Threats/Harassment/Hate Crimes. The new regulations state "harassment will not be tolerated against any servicemember for any reason." Gay servicemembers, however, cannot report death threats, harassment and hate crimes and their basis (because they are gay). Nor can they cooperate in police investigations -- civilian or military -- where their sexual orientation may be revealed. Straight women cannot report sexual harassment or rape without risking retaliatory, false accusations and investigation.

One SLDN client was threatened with rape and death based on her perceived sexual orientation in a letter delivered to her home and addressed to her by name, rank and social security number. She was afraid to inform military officials because of the threat of investigation. Civilian police said they would turn the letter over to the military. This woman learned of SLDN only by chance, two terrifying weeks later. We resolved this dilemma only after negotiating with top Pentagon officials to ensure the source of the threats, and not her life, would be investigated. This is not satisfactory and it is not excusable under current regulations. DoD must enforce its zero-tolerance policy against harassment, permit all servicemembers to report death threats, harassment and hate crimes without retribution, and investigate those who harass.

Witch Hunts and Fishing Expeditions. In Okinawa, Japan, more than twenty marines were *asked* about their own and others' sexual orientation from April - June 1994. Agents searched the room of Corporal Craig Haack based merely on the "suspicion of homosexuality," seizing his personal diary, letters from home, word processor, disks and photo album to fish for "evidence" that he might be gay. SLDN cooperating attorneys documented over 50 command violations. More recently, in Korea, PFC Shannon Emery was targeted in a witch hunt that began immediately after she reported an attempted rape. Emery was held for six months beyond her transfer date and pressured to accuse coworkers as lesbians in exchange for leniency. The witch hunt, subsequently confirmed by the IG, as stopped only after intensive intervention by SLDN with top Administration officials.

Pentagon guidance is fueling these abuses. Air Force officers have been encouraged to pursue suspected homosexuals "discovered" during inquiries against other servicemembers. Air Force, Navy and DoD memos have instructed officers to expand the scope of inquiries in statements cases beyond permissible limits by fishing for additional statements and any homosexual acts.

Questions to Parents. The same Air Force memo directs inquiry officers to question parents about the sexual orientation and private lives of their children for purposes of discharge. This memo conflicts with and exploits traditional security clearance guidance not to conceal one's private life from family members. Parents have been shocked that military officials would intrude into private family relationships and attempt to turn family members against one another, which they assumed was forbidden under the new policy.

Servicemembers Legal Defense Network

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: First Steps to Bring DoD Into Compliance With Current Regulations

We are concerned that the Administration is not taking the necessary steps to prevent and rectify improper implementation of the "don't ask, don't tell, don't pursue" policy. The following are first steps that we believe would stop many of the abuses we have documented under the new policy.

Take Disciplinary Actions. Discipline commanders and investigative agents who violate the new policy, as provided for in the regulations, beginning with those responsible for the Okinawa and Korea witch hunts. Commanders who tolerate harassment, hate crimes and death threats should also be disciplined. To date, no military official has been disciplined for violating the policy, despite numerous substantiated complaints. This lack of action tells commanders they can violate the policy with impunity and fosters a climate resistant to its implementation.

Conduct Training. Train all military members on the intent and letter of the new regulations, including all levels of command, all unit levels and all schools. Formalize the training once or twice every year. Ensure that servicemembers understand what they can and cannot do under the policy and what their legal rights are. We understand that no training has been conducted in the field since the regulations were implemented; new troops are told only that homosexual conduct is against regulations.

Issue Additional Guidance. Issue additional guidance to the field in an appropriate form such as a Letter of Instruction based on a first year review of the new policy. Clarify that (1) servicemembers will not be investigated for reporting death threats, hate crimes and harassment and their underlying basis; (2) inquiry officers do not have the authority to conduct fishing expeditions, but must limit their inquiries to the specific allegations; and (3) commanders cannot launch inquiries without credible information and credible information does not include all information.

Rescind Memoranda. Rescind the Air Force memorandum dated November 4, 1994, the Navy memorandum issued in June 1994 and the Department of Defense memo dated August 18, 1995 that gut the prohibitions against fishing expeditions into the lives of suspected gay personnel.

Appoint Troubleshooters. For the next year, as a pilot project, assign troubleshooters, perhaps one from the DoD General Counsel's office and one from the staff of the Assistant Secretary of Defense for Manpower and Readiness, to advise attorneys, commanders and others about appropriate actions and interpretations under the new policy to clear up ambiguity and misunderstanding.

Servicemembers Legal Defense Network

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: Gays in the Military: A Few Examples of Administration's Public Misstatements

1. "Is Clinton happy with implementation of the policy over the past year? 'He is,' White House spokesman Michael McCurry said at a March 13 briefing. 'Military commanders in the field are satisfied with it, and the number of expulsions clearly is declining.'" *National Journal* March 25, 1995. **[Inaccurate. The rate of expulsion of gays is exactly the same. Clinton should not say that he is happy with the new policy as it puts into law exactly the same differential standards as the policy he attempted to repeal.]**
2. "[A]sked how Reserve Officer Training Corps can operate on campuses that have anti-discrimination policies [Mr. Clinton said,] 'If the policy were implemented in spirit and in letter the way it was written, ... I don't think it would be a conflict'." *Washington Times*, March 24, 1995. **[Wrong. The new policy, even if implemented as intended, treats gay and straight soldiers differently for saying and doing the same things, and thus in no way meets the standards of an anti-discrimination policy.]**
3. "Senior military officials, however, insist that the policy has been successfully implemented. 'My sense is ... in the absence of different information, the force has adapted to the new policy and is doing a good job with it,' says Gen. John Shalikashvili, chairman of the Joint Chiefs of Staff. *Christian Science Monitor*, March 17, 1995. **[Misleading and disingenuous. The Department of Defense has established no means of monitoring abuses of the new policy or allowing soldiers to report abuses without fear of being discharged. SLDN, Members of Congress and private attorneys have, however, presented DOD with different information. Secretary Perry and others have made similar misleading comments.]**
4. "DOD spokesman Doug Hart insists the rules are applied in an 'evenhanded' manner and that no abuses occur. When I recounted specific incidents, he said they were 'impossible.' What about servicemembers asked to turn in others? 'You can't ask about other people. It's explicit in the new directives,' Hart said. 'It doesn't happen'." *The New Republic*, May 2, 1994. **[Wrong. Denial of reported and documented abuses of the new policy creates a perception of hypocrisy and erodes public confidence in the President's ability to take a principled stand and control his own military.]**

DOD DIRECTIVE

1332.30

"SEPARATION OF
REGULAR
COMMISSIONED
OFFICERS"

2/28/94

ARMED FORCES

Legislative History

For legislative history and purpose of Pub.L. 98-94, see 1983 U.S. Code Cong. and Adm. News, p. 1081.

DECISIONS

forces can only be honorably terminated by a completion of the service obligation or a valid discharge. *Wickham v. Hall*, C.A.Tex.1983, 706 F.2d 713, rehearing denied 712 F.2d 1416.

v. A, Title XVI, § 1661(a)(3)(A), Oct. 5, 1994,

STATUTORY NOTES

Effective Date of Repeal

Repeal effective Dec. 1, 1994, see section 1691(a) of Pub.L. 103-337, set out as a note under section 10001 of this title.

for certain flight crew positions

ation of any member who successfully completed shall be 8 years, if the member is trained to fly any other type of

ers.—The minimum service obligation of any member in the armed forces as a navigator or naval

rm "service obligation" means the period of service of a reserve component who completed flight training as a member of a reserve component, the Selected Reserve required to be served

ot training, in the case of training as a pilot; navigator training, in the case of training as a navigator; and, in the case of training as a naval flight officer, in the case of

a)(1), Nov. 29, 1989, 103 Stat. 1454, and amended Nov. 5, 1990, 104 Stat. 1719; Pub.L. 102-484, Div. A,

STATUTORY NOTES

and (2), "pilot training," for "pilot training" and "navigator training," for "navigator training"; and in par. (3), "naval flight officer, in the case" for "naval flight officer in the case", respectively.

Effective Date of 1992 Amendment

Section 506(b) of Pub.L. 102-484 provided that: "The amendments made by subsection (a) [amending this section] shall take effect as of November 29, 1989."

Effective Date

Div. A, Title VI, Section 634(b) of Pub.L. 101-189 provided that:

"(1) Except as provided in paragraphs (2) and (3), section 653 of title 10, United States Code, as added by subsection (a)(1) [this section], shall apply to persons who begin under-

ARMED FORCES

10 § 654

graduate pilot training, undergraduate navigator training, or undergraduate naval flight officer training, as the case may be, after September 30, 1990.

"(2) Such section shall apply to persons who graduate from the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the Coast Guard Academy after December 31, 1991; and to persons who satisfactorily complete the academic and military requirements of the Senior Reserve Officers' Training Corps program (provided for in chapter 103 of title 10, United States Code [section 2101 et seq. of this title]) after December 31, 1991.

"(3) The minimum service requirements provided for such section shall not apply in the case of any person who entered into an agreement

with the Secretary concerned before October 1, 1990, and who is obligated under the terms of such agreement to serve on active duty for a period less than the applicable period specified in section 653 of such title.

"(4) For purposes of this subsection, the term 'Secretary concerned' has the meaning given that term in section 101(8) of title 10, United States Code [section 101(8) of this title]."

Legislative History

For legislative history and purpose of Pub.L. 101-189, see 1989 U.S. Code Cong. and Adm. News, p. 889. See, also, Pub.L. 101-510, 1990 U.S. Code Cong. and Adm. News, p. 2931; Pub.L. 102-484, 1992 U.S. Code Cong. and Adm. News, p. 1636.

LIBRARY REFERENCES

Armed Services 6-6, 15.
C.J.S. Armed Services §§ 5, 25 to 33.
WESTLAW Topic No. 34.

§ 654. Policy concerning homosexuality in the armed forces

(a) Findings.—Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

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

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

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

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

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

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

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

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces be at all for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) **Policy.**—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was 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 interests 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) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) **Entry standards and documents.**—(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) **Required briefings.**—The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) **Rule of construction.**—Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—

(1) the member engaged in conduct or the statements for the purpose of avoiding or terminating military service;

(2) separation of the member would not be in the best interest of the armed forces.

(f) **Definitions.**—In this section:

(1) The term "homosexual" means 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, and includes the terms "gay" and "lesbian".

(2) The term "bisexual" means 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) The term "homosexual act" means—

(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 which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

(Added Pub.L. 103-160, Div. A, Title V, § 571(a)(1), Nov. 30, 1993, 107 Stat. 1670.)

HISTORICAL AND STATUTORY NOTES

Regulations; Savings Provision; Sense of Congress; Implementation of Discriminatory Policy Against Homosexual Members of the Armed Forces

Section 571(b)-(d) of Pub.L. 103-160 provided that:

"(b) **Regulations.**—Not later than 90 days after the date of enactment of this Act [Nov. 30, 1993], the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a) [this section].

"(c) **Savings provision.**—Nothing in this section [probably means this note] or section 654 of title 10, United States Code, as added by subsection (a) [this section], may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654 [this section].

"(d) **Sense of Congress.**—It is the sense of Congress that—

"(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a) [this section]; and

"(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice) [section 831(b) of this title]."

Legislative History

For legislative history and purpose of Pub.L. 103-160, see 1993 U.S. Code Cong. and Adm. News, p. 2013.

LIBRARY REFERENCES

Armed Services § 7, 20.5.
Constitutional Law § 224(2).
C.J.S. Armed Services §§ 27, 41, 50.

C.J.S. Constitutional Law §§ 736, 737, 741.
WESTLAW Topic Nos. 34, 92.

CHAPTER 38—JOINT OFFICER MANAGEMENT

Sec.		Sec.	
661.	Management policies for joint specialty officers.	665.	Procedures for monitoring careers of joint officers.
662.	Promotion policy objectives for joint officers.	666.	Reserve officers not on the active-duty list.
663.	Education.	667.	Annual report to Congress.
664.	Length of joint duty assignments.		Definitions.

the Fair Labor Standards Act (29 U.S.C. §§ 206, 211(c), and 212).

- (4) Plaintiff shall have and recover its costs and expenses including such attorney's fees as may be approved by the Court based on affidavits filed by the Plaintiff.



Lt. Paul G. THOMASSON,
USN, Plaintiff,

The Honorable William J. PERRY,
Secretary of Defense,

and

The Honorable John H. Dalton, Secretary
of the Navy, Defendants.

Civ. A. No. 95-252-A.

United States District Court,
E.D. Virginia,
Alexandria Division.

June 8, 1995.

Service member brought suit seeking declaratory and injunctive relief to prevent his discharge from the Navy, after Board of Review recommended his discharge for failing to rebut presumption that he engaged in, or was likely to engage in, homosexual acts, arising from his declaration that he was a homosexual. On cross-motions for summary judgment, the District Court, Hilton, J., held that: (1) statute embodying "Don't Ask Don't Tell" policy regarding homosexuals in the military is not unconstitutional on its face or as applied, and (2) statute does not violate the Administrative Procedure Act (APA).

Defendant's motion granted; plaintiff's motion denied.

1. Armed Services §11, 22

Constitutional Law §90.1(1), 91

Statute embodying "Don't Ask Don't Tell" policy whereby a service member's statement that he or she is a homosexual gives rise to rebuttable presumption that member engages in, or is likely to engage in, homosexual acts, does not violate rights of freedom of speech and association; policy allows use of speech as evidence, which is permissible, and under policy, service member is free to affiliate with group that opposes policy, to make statements criticizing the policy, to attend demonstrations in favor of homosexual rights, to read homosexual newspapers, or engage in other such expressive activities. U.S.C.A. Const.Amend. 1; 10 U.S.C.A. § 654.

2. Constitutional Law §242.1(3)

Standard of review applicable to equal protection challenge to military's policy governing service by homosexuals was rational basis standard, rather than strict scrutiny, considering that homosexuals do not constitute suspect class and policy does infringe on exercise of a fundamental right. U.S.C.A. Const.Amend. 5, 14.

3. Constitutional Law §213.1(2)

When evaluating statute or regulation under rational basis standard of equal protection review, court must ask two questions: are regulations directed at achievement of legitimate governmental purpose and do they rationally further that purpose? U.S.C.A. Const.Amend. 5, 14.

4. Armed Services §11, 22

Constitutional Law §242.1(3)

Statute embodying "Don't Ask Don't Tell" policy regarding homosexuals in the military does not violate equal protection clause of the Fifth Amendment, under rational basis review; military has concluded that allowing acknowledged homosexuals to serve in the military would undermine unit cohesion and military readiness, a legitimate governmental purpose, and means employed by government are rationally related to legitimate purpose of excluding from service in the military those engage in or demonstrate a propensity to engage in homosexual

THOMASSON v. PERRY

Cite as 895 F.Supp. 820 (E.D.Va. 1995)

821

duct. U.S.C.A. Const.Amends. 5, 14; 10 U.S.C.A. § 654.

5. Armed Services ⇐11, 22

Statute embodying "Don't Ask Don't Tell" policy regarding service of homosexuals in the military is not unconstitutionally overbroad on theory that it provides for discharge of service members who may be homosexual but who may not actively engage in prohibited homosexual conduct; policy provides for discharge of members who cannot rebut presumption that they will engage in such conduct based on their statements, and fact that some service members who state that they are homosexuals may have subjective intentions of remaining celibate does not make statute overbroad. U.S.C.A. Const. Amends. 5, 14; 10 U.S.C.A. § 654.

6. Administrative Law and Procedure ⇐473

Armed Services ⇐11, 22

Administrative Procedure Act (APA) was not violated in case of service member discharged from the Navy because he failed to rebut presumption arising from his statement that he was homosexual and that he engaged in, or was likely to engage in, homosexual acts; member was given full hearing on the merits, and substantial evidence supported determination that he failed to rebut presumption that he had propensity to engage in homosexual conduct arising from his declaration that he was a homosexual. 5 U.S.C.A. § 551 et seq.

Mark Lynch, Allan B. Moore, Georgia Kazakis, Robert D. Wick, Covington & Burling, Washington, DC, for plaintiff.

Helen Fahey, United States Attorney, Jeri K. Somers, Assistant United States Attorney, Alexandria, VA, Frank W. Hunger, Assistant Attorney General, John A. Rogovin, Deputy Assistant Attorney General, Washington, DC, David Anderson, Vincent M. Garvey, Michael J. Haungs, Civil Division, Department of Justice, Washington, DC, CDR Robert P. Monahan, LCDR Edward S. White

Department of Navy, Office of Judge Advocate General, Alexandria, VA, for defendants.

MEMORANDUM OPINION

HILTON, District Judge.

This matter came before the Court on cross-motions for summary judgment. Plaintiff Lt. Paul G. Thomasson brings this action seeking permanent injunctive and declaratory relief to prevent the Defendants from discharging or otherwise removing him from active duty in the United States Navy as a result of his statement that he is a homosexual. The Plaintiff maintains that the National Defense Authorization Act for the Fiscal Year 1994, 10 U.S.C. § 654, known colloquially as the "Don't Ask Don't Tell" policy, is unconstitutional on its face and as applied to the Plaintiff in this action. Lt. Thomasson challenges the statute under the First Amendment, the Equal Protection Clause of the Fifth Amendment, the Due Process Clause of the Fifth Amendment, and the Administrative Procedure Act. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1346. Venue lies under 28 U.S.C. § 1391.

BACKGROUND OF THE ACT

On January 29, 1993, President Clinton directed then Secretary of Defense Les Aspin to re-evaluate the Department of Defense's ("DOD's") longstanding policy excluding homosexuals from service in the armed forces. From March through late July, 1993, the Armed Services Committees of the House and Senate held extensive public hearings on the matter. The Committees received testimony from military commanders, gay rights activists, experts in military personnel policy, professors, social scientists, interested civilians and members of the armed forces, and conducted a field visit to Norfolk Naval Complex.¹ On July 19, 1993, the Pres-

(1993). The House held hearings on May 4 and 5 and on July 21-23, 1993. See *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong., 1st Sess. (1993);

¹ The Senate held hearings on March 29, and 31, on April 29, on May 7, 10, 11 and on July 20-22, 1993. See *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong., 2d Sess.

ident announced a new "Policy on Homosexual Conduct in the Armed Forces," which was subsequently enacted in the National Defense Authorization Act for Fiscal Year 1994, Pub.L. No. 103-160, § 571, 107 Stat. 1670-73, codified at 10 U.S.C. § 654 (1995). The Act was signed by the President on November 30, 1993. On December 22, 1993, DOD issued implementing Directives, modified slightly on February 28, 1994, and made effective on that date. On the same date, each of the DOD military services issued service-specific instructions to the field implementing the DOD Directives.

Section 571 of the Act sets forth the "Policy concerning homosexuality in the armed forces," which reflects Congress' policy determination made on the basis of the testimony and information garnered from the hearings. This Section contains fifteen findings which recognize, among other things, "military life is fundamentally different from civilian life," and, therefore, its "society includes numerous restrictions on personal behavior that would not be acceptable in civilian society." 10 U.S.C. § 654(a)(8)(B)(1995). Congress also noted that "[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion." *Id.* The Act concludes that the longstanding exclusion from service in the military of persons who engage in, or demonstrate a propensity to engage in, homosexual conduct continues to be necessary because the presence of such service members "would create an unacceptable risk" to these fundamental components of military capability. *Id.* § 654(a)(15).

Accordingly, the statute provides for mandatory separation from the military if one or more of the following three findings is made:

(1) the member is found to have engaged, attempted to engage, or solicited another to engage, in homosexual acts; (2) "stated that he or she is a homosexual or bisexual ... unless [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," *id.* § 654(b)(2); or (3) "married or attempted to marry a person known to be of the same biological sex." *Id.* § 654(b)(3). As the language of Section 654(b)(2) indicates, and the legislative history confirms, a member's statement that he or she is a homosexual gives rise to a rebuttable presumption that the member engages in, or is likely to engage in, homosexual acts. S.Rep. No. 112, 103d Cong., 1st Sess., at 293-94 (1993), U.S. Code Cong. & Admin. News 1993 at pp. 2080-81.

The implementing Directive applicable to military officers, such as Plaintiff, is DOD Directive 1332.30, captioned "Separation of Regular Commissioned Officers," which the Navy has implemented.² This Directive provides that the military will not ask about an applicant's sexual orientation because homosexual orientation "is considered a personal and private matter and is not a bar to continued service ... unless manifested by homosexual conduct." DOD Dir. 1332.30, Encl. 2, ¶ C, at 2-1 (March 4, 1994). The Directive defines "Homosexual Conduct" as including "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." *Id.* Under the Directive, "[p]ropensity 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." *Id.* Although a statement demonstrate a propensity or intent to engage in homosexual conduct, the Directive provides the service member with an opportunity "to rebut the presumption by presenting evidence demonstrating that he or she did not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Id.* ¶ C.1.b., at 2-2.

The Directive provides explicit guidance to administrative boards when assessing whether an officer has rebutted the presumption.

Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services, 103d Cong., 1st Sess. (1993).

2. CNO message 01300Z MAR 94 (NAVADMIN 033/94). See 11 Rec. GE10, at 272.

The Directive instructs the boards to consider, among other things,

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

Id. ¶ C.1.b.(1)-(5), at 2-2; see 10 U.S.C. § 654(b)(1)(A)-(E).

As the Senate Committee found, the new policy is essentially the same as the pre-1994 policy in that it provides for mandatory separation from the military on the basis of homosexual acts, marriages, or statements indicating a propensity to engage in homosexual conduct. The primary difference is that the DOD will not ask questions about sexual orientation as part of accession processing. The new policy also provides guidance on the conduct of investigations. S.Rep. No. 112, at 289-90, U.S.Code Cong. & Admin.News, at 2076-77.

On March 2, 1994, the day after the Navy implemented the DOD Directives with regard to service by homosexuals, Lt. Thomasson delivered a letter to four Navy admirals for whom he had served at the Bureau of Naval Personnel stating that he was a homosexual. Lt. Thomasson indicated in his letter that this characteristic was "more deeply rooted than all societal, religious, parental, or peer pressures can effect [sic]." I Rec.Tr., at 4-5. In accordance with military policy, the Navy instituted separation proceedings.

An administrative Board of Inquiry was convened at which Plaintiff was represented by military counsel as well as his current civilian counsel. The Board heard two days of testimony and argument and received into evidence several volumes of materials relating both to Lt. Thomasson's record and the Navy's policy on homosexuality. Lt. Thomasson submitted evidence of his service record, expert testimony regarding the meaning and nature of both homosexuality and the military's policy on homosexuality, and written and live testimony from 15 witnesses with whom he had served and worked over the course of his career. The Navy did not

introduce any rebuttal evidence or dispute the substance of any of Lt. Thomasson's evidence. Indeed, during its phase of the proceedings, the Navy acknowledged that Lt. Thomasson had attained an "enviable" service record. I.Rec.Tr. at 0036, 0148. The Navy also acknowledged that there was no evidence that Lt. Thomasson had engaged in any "homosexual acts." Plaintiff refused, however, to introduce evidence to rebut the presumption that he engages in or has a propensity to engage in homosexual acts by reading an unsworn statement to the Board, stating: "I will not go further in degrading myself by disproving a charge about sexual conduct that no one has made." I Rec.Tr., at 141, IV Rec. T2A.

After hearing all of the evidence, the Board of Inquiry unanimously voted that Lt. Thomasson had made statements that indicated he "engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts" as prohibited by the policy and that he had not rebutted the presumption raised by those statements, thereby failing to show cause for retention. The Board accordingly recommended that Lt. Thomasson be honorably discharged.

On September 9, 1994, a three-member Board of Review convened to examine Lt. Thomasson's case. The Board of Review, without comment, unanimously upheld the Board of Inquiry's finding that Lt. Thomasson had failed to establish that he should be retained on active duty, and recommended that he be separated with an honorable discharge. The Assistant Secretary of the Navy for Manpower and Reserve Affairs approved the discharge on January 17, 1994. Lt. Thomasson's honorable discharge certificate has been signed but it has not yet been dated or delivered. On February 27, 1995, Lt. Thomasson filed suit in this Court, seeking declaratory and injunctive relief to prevent his discharge. This Court granted a preliminary injunction enjoining the Navy from any further action pending resolution of this case.

Summary judgment must be entered when "there is no genuine issue as to any material fact" and therefore "the moving party is enti-

led to judgment as a matter of law." Fed. R.Civ.P. 56(c). A fact is material when proof of its existence or non-existence would affect the outcome of the case, and an issue is genuine if a reasonable jury might return a verdict in favor of the non-moving party on the basis of such issues. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Both parties in the instant action agree that the facts in this case are not in dispute. This action, therefore, is ripe for summary judgment.

THE FIRST AMENDMENT

[1] Lt. Thomasson contends that the policy at issue violates his rights of freedom of speech and association as guaranteed him by the First Amendment, both on its face and as applied to him in particular. The Plaintiff argues that the policy infringes on the First Amendment because it is a content-based restriction on speech. By making certain statements in and of themselves a sufficient ground for discharge, he contends that the policy is directly aimed at the suppression of free expression—statements that a service member is gay—rather than at any conduct that the military might legitimately regulate.

The Plaintiff, however, misses the fundamental point that the policy uses the speech as evidence, via rebuttable presumption, that the service member's declaration of his homosexuality will lead to homosexual conduct. In the instant matter, the Navy did not, as Plaintiff claims, argue at Lt. Thomasson's discharge hearing that the Board should recommend discharge solely "because Lt. Thomasson's verbal acknowledgement of his sexual orientation was—in and of itself—'forbidden homosexual conduct.'" Pl's Mem. of P.A. in Supp. of Mot. for Sum.J. at 43. Rather, the Navy argued that Plaintiff's statement gave rise to a presumption that he engages in, or has a propensity or intent to engage in, homosexual acts.

The Supreme Court has recently held in the criminal context that "[t]he First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, — U.S. —, —, 113 S.Ct.

2194, 2201, 124 L.Ed.2d 436 (1993). See also *Dawson v. Delaware*, 503 U.S. 159, 164, 112 S.Ct. 1093, 1097, 117 L.Ed.2d 309 (1992) ("[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."). If this holds true in the criminal context, it is certainly applicable in the civil context, where the litigant is not afforded the same constitutional protections as is a criminal defendant. And certainly nothing in the First Amendment bars the use of a statement constituting an admission. See *Pruitt v. Cheney*, 963 F.2d 1160, 1164 (9th Cir.1991) (an "admission [of homosexuality], like most admissions, was made in speech, but does not mean that the first amendment precludes the use of the admission evidence of the facts admitted"), *cert. denied*, — U.S. —, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992) (citing *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563, 578–80 (9th Cir.1990)). Although the DOD regulation does affect speech, as the Seventh Circuit recognized, "it does so only incidentally, in the course of pursuing other legitimate goals." *Ben-Shalom v. Marsh*, 881 F.2d 454, 462 (7th Cir. 1989). Indeed, every court of appeals to address this issue under the military's former policy, which contained the same rebuttable presumption, concluded that the use of a statement in this circumstance did not violate the First Amendment. *Pruitt*, 963 F.2d at 1163–64; *Schweninger v. United States*, 944 F.2d 483, 489 (9th Cir.1991); *Ben-Shalom*, 881 F.2d at 458–62; *Rich v. Secretary of the Army*, 735 F.2d 1220, 1228–29 (10th Cir. 1984).

The Plaintiff attempts to distinguish this policy from the pre-1994 policy by arguing that unlike the prior policy, the present policy now means that only homosexuals who speak about their sexual orientation are presumptively unfit for military service. The Plaintiff argues that the policy now concedes that "there is nothing impermissible about being gay and that [because] homosexuals may continue to serve [in the military,] the acknowledgement that one is gay has no

conceivable evidentiary value." Pl's Opp. to Def's Mot. for Summ.J. at 34. Again, however, the Plaintiff misreads the policy. Service members who engage in, or demonstrate a propensity to engage in, homosexual conduct are unfit for service under the policy. Statements made by those acknowledging their homosexuality are taken as evidence that the person has, or will in the future, engage in prohibited conduct. But statements are not the only means for discharge. Those that don't speak about their sexual orientation may still be discharged if it is discovered that they engage in or have a propensity to engage in prohibited conduct. The statute, therefore, does not punish only those homosexuals who speak about their sexual preference.

Lt. Thomasson further argues that the policy implicates the First Amendment and is "particularly pernicious" because it penalizes an individual's honest statements about his personal identity and his affiliation with a particular group. The Court has indicated that a service member's expressive rights must often yield to the necessities of military life. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 508, 106 S.Ct. 1310, 1313-14, 89 L.Ed.2d 478 (1986) (upholding regulations precluding Orthodox Jew and ordained rabbi from wearing yarmulke while in military uniform); *Greer v. Spock*, 424 U.S. 828, 838, 96 S.Ct. 1211, 1217-18, 47 L.Ed.2d 505 (1976) (upholding restrictions of political speech on military base). As the Supreme Court has recognized, the judiciary's "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman*, 475 U.S. at 507, 106 S.Ct. at 1313. See also *Brown v. Glines*, 444 U.S. 348, 354, 100 S.Ct. 594, 599, 62 L.Ed.2d 540 (1980) ("Thus, while members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.'") (quoting *Parker v. Levy*, 417 U.S. 733, 759, 94 S.Ct. 2547, 2563, 41 L.Ed.2d 439 (1974)).

In this instance, however, Lt. Thomasson was not discharged from the Navy because of

his stated or symbolic expression of an opinion opposing the policy, or because of his support for a group that opposes the policy. Instead, he was discharged for stating that he was a homosexual and refusing to rebut the presumption that he would thereby engage in homosexual conduct—conduct which the military may validly proscribe. Under the policy, a service member is free to affiliate with a group that opposes the policy, to make statements criticizing the policy, to attend demonstrations in favor of homosexual rights, to read homosexual newspapers, or engage in other such expressive activities. See DOD Dir. 1332.30, Enc. 8 ¶ C.3.d., at 8-2; S.Rep. No. 112, at 292; U.S.Code Cong. & Admin.News, at 2079. What the service member is not free to do is declare himself to be a homosexual and fail to rebut the entirely reasonable presumption that as a homosexual he will engage in homosexual conduct. See *Ben-Shalom*, 881 F.2d at 464 (holding that a service member's statement indicating a likelihood of homosexual acts "can be rationally and reasonably viewed as reliable evidence" that the service member engages in or is likely to engage in homosexual acts). Thus, the basis for separation is acts and the likelihood of acts, not "speech." See *Pruitt*, 963 F.2d at 1160 (holding that pre-1994 policy does not implicate First Amendment).

It is for these reasons that the policy likewise does not infringe on Lt. Thomasson's right to freedom of association as guaranteed by the First Amendment. The policy is not directed, as Plaintiff claims, toward statements of "personal identity," or "affiliation with a particular group," or "a firmly held affiliation with homosexuality." Service members, whatever their sexual orientation, are free to identify themselves as sympathetic to gay rights causes, criticize the policy, and advocate change. Indeed, the policy expressly provides that participation in such associational activities in and of itself is not a sufficient basis for discharge. DOD Dir. 1332.30, Encl. 8, ¶ C.3.d., at 8-2. For these reasons, the Court finds that the instant policy does not infringe on the protections afforded Lt. Thomasson under the First Amendment.

EQUAL PROTECTION

[2] Lt. Thomasson argues that both on its face, and as applied to him in particular, the Defendants' policy regarding service by homosexuals in the military violates the equal protection guarantee of the Fifth Amendment in three ways: (1) by discriminating against homosexuals on the basis of their status as homosexuals; (2) by discriminating against acknowledged (or "open") homosexuals on the basis of their status as open homosexuals and their statements about their status; and (3) by illegitimately and irrationally presuming that open homosexuals, by definition, will violate military codes of conduct.

The Equal Protection Clause of the Fourteenth Amendment directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws." It is made binding on the federal government by the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 498-99, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). Fifth Amendment equal protection claims are treated precisely the same as equal protection claims under the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2, 95 S.Ct. 1225, 1228, n. 2, 43 L.Ed.2d 514 (1975).

In evaluating the Plaintiff's equal protection claim, the Court must first determine which of the three recognized levels of equal protection review to employ: rational review, intermediate scrutiny, or strict scrutiny. See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985) (describing various standards of review). At the outset, it is important to recognize the particularly limited role of the judiciary in reviewing policies implemented by Congress in the military arena. Article I, Section 8 of the Constitution provides Congress with exclusive power to raise and support armies. As the Supreme Court has recognized, "judges are not given the

3. In the alternative, Lt. Thomasson maintains that the policy is at least subject to intermediate scrutiny because sexual orientation is a phenomenon that is somehow legally akin to gender. Intermediate scrutiny, however, has only been applied to cases involving classifications based on gender, *Mississippi Univ. for Women v. Hogan*,

task of running the Army, ... [t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters...." *Orloff v. Willoughby*, 345 U.S. 83, 93-94, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953).

The issue of what standard of review to apply to equal protection challenges to the military's policy governing service by homosexuals has been addressed previously by five federal courts of appeals. Each court has held that rational basis is the proper standard, whether the challenge involved exclusion because of homosexual acts or on statements. See *Steffan v. Perry*, 41 F.3d 677, 684 (D.C.Cir.1994) (*en banc*); *Meinhold v. Department of Defense*, 34 F.3d 1478 (9th Cir.1994); *Ben-Shalom*, 881 F.2d at 464; *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed.Cir.1989), *cert. denied*, 494 U.S. 1003, 110 S.Ct. 1295, 108 L.Ed.2d 473 (1990); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir.1984); *accord High Tech Gays*, 895 F.2d at 574 (applying rational basis test to challenge by civilian homosexual applicants to Department of Defense security clearance policy). See also *Walmer v. United States DOD*, 52 F.3d 851 (10th Cir.1995) (reaffirming validity of rational basis review in evaluating equal protection challenges to the military's policy regarding service by homosexuals as previously articulated in *Rich*).

The Plaintiff contends, however, that his claim is subject to review under strict scrutiny³ because the Defendants' policy creates a suspect classification by disadvantaging homosexuals solely on the basis of their sexual orientation and because the policy infringes on the Plaintiff's fundamental right of free speech. As discussed above, the policy does not violate Lt. Thomasson's rights under the First Amendment so application of strict scrutiny on that basis is not appropriate.

458 U.S. 718, 723-24, 102 S.Ct. 3331, 3335-36, 73 L.Ed.2d 1090 (1982), and illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978). This Court is unwilling to expand the law in that regard based on an oblique theory linking gender and sexual orientation.

The Plaintiff in this action correctly maintains that, while courts must accord deference to the policy determinations made by Congress in the arena of military affairs, there is no "military exception" to the Constitution. Indeed, as Lt. Thomasson points out, "a different equal protection test" does not apply simply because a case arises in the military context. *Rostker v. Goldberg*, 453 U.S. 57, 71, 101 S.Ct. 2646, 2655, 69 L.Ed.2d 478 (1981). As the Plaintiff acknowledges, however, homosexuals have not been characterized as a "suspect class," which would require the Court to analyze any classification under strict scrutiny.

The Plaintiff argues that this Court should extend the class to include homosexuals because homosexuals constitute a "discrete and insular minorit[y]" under the test articulated by the Supreme Court in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53, n. 4, 58 S.Ct. 778, 783-84, n. 4, 82 L.Ed. 1234 (1938). Because the government is free to criminalize homosexual conduct, however, "a group that is defined by reference to that conduct cannot constitute a 'suspect class.'" *Steffan*, 41 F.3d at 684. See also *Ben-Shalom*, 881 F.2d at 464. Further, the Supreme Court has expressed great "reluctan[ce]" to expand the number of classifications afforded heightened scrutiny. *Cleburne*, 473 U.S. at 441, 105 S.Ct. at 3255. The Court has refused to accord heightened scrutiny to the elderly, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566-67, 49 L.Ed.2d 520 (1976); the mentally retarded, *Cleburne*, 473 U.S. at 442, 105 S.Ct. at 3255-56; "close relatives," *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 2729, 91 L.Ed.2d 527 (1986); and a statutorily-defined "family unit," *Bowen v. Gilliard*, 483 U.S. 587, 601-03, 107 S.Ct. 3008, 3017-18, 97 L.Ed.2d 485 (1987). Therefore, because homosexuals do not constitute a suspect class and the policy does not infringe on the exercise of a fundamental right, analysis of the regulations at issue under strict scrutiny is not appropriate.

[3] The Plaintiff's challenge of the regulations based on the Equal Protection Clause must be examined under the standard of rational review. When evaluating a statute

or regulation under rational-basis review, the court must ask two questions: First, are the regulations directed at the achievement of a legitimate governmental purpose and, second, do they rationally further that purpose? *Trimble v. Gordon*, 430 U.S. 762, 766, 97 S.Ct. 1459, 1463, 52 L.Ed.2d 31 (1977); *Heller v. Doe*, — U.S. —, —, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993). "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller*, — U.S. at —, 113 S.Ct. at 2642. Under this standard of review, the government "has no obligation to produce evidence to sustain the rationality of a [regulatory] classification." *Id.* at —, 113 S.Ct. at 2643. Because "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity," *id.* at —, 113 S.Ct. at 2642, "[t]he burden is on the one attacking the [governmental] arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record." *Id.* at —, 113 S.Ct. at 2643 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973)).

Moreover, the Plaintiff in an action challenging the validity of a military regulation has an even greater burden to overcome given the deference courts must accord to action by the political branches in the military context. The Supreme Court has recognized that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). Because the military is, "by necessity, a specialized society separate from civilian society," *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974), the Supreme Court has held that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed...." *Id.* at 743, 756, 94 S.Ct. at 2555-56, 2561-62. Indeed, "perhaps in no other area has the Court accorded Congress great-

er deference" than in the military context. *Rostker*, 453 U.S. at 61, 64-65, 101 S.Ct. at 2649-50, 2651-2652 (1981).

In addition, the Supreme Court has noted the lack of competence on the part of courts to second-guess decisions made by Congress in the military context. In *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) the Court emphatically declared:

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

Id. at 10, 93 S.Ct. at 2446. The Court has recognized that "the military must insist upon a respect for duty and a discipline without counterpart in civilian life" to "foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman*, 475 U.S. at 507, 106 S.Ct. at 1313 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757, 95 S.Ct. 1300, 1312-13, 43 L.Ed.2d 591 (1975)). See also 10 U.S.C. § 654(a)(8) (1995). Restrictions promulgated to achieve these goals are matters entrusted to the military's "considered professional judgment," *Goldman*, 475 U.S. at 508, 106 S.Ct. at 1313, and courts have traditionally recognized that "judicial deference is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker*, 453 U.S. at 70, 101 S.Ct. at 2654-55.

These principles are particularly pertinent in this matter. Like the regulation at issue in *Rostker v. Goldberg*, where the Court upheld a military regulation requiring the registration of males and not females in the face of an equal protection challenge, this regulation "was extensively considered by Congress in hearings, floor debate, and in committee." 453 U.S. at 72, 101 S.Ct. at 2655. Accordingly, the Supreme Court has cautioned that in making a determination on the merits in this circumstance, a court "must be particularly careful not to substitute [its] judgment of what is desirable for that of Congress, or

[its] own evaluation of evidence for a reliable evaluation by the Legislative Branch." *Id.* at 68, 101 S.Ct. at 2653, especially when "Congress specifically considered the question of the Act's constitutionality." *Id.* at 64, 101 S.Ct. at 2651. See S.Rep. No. 112, at 284-87 U.S.Code Cong. & Admin.News at 2070-72 (addressing impact of policy on constitutional rights of homosexual service members).

[4] In promulgating the "Don't Ask Don't Tell" policy, the government has clearly articulated a legitimate purpose for excluding persons who engage in or who demonstrate a propensity to engage in homosexual conduct. The military has concluded that allowing acknowledged homosexuals to serve in the military would undermine unit cohesion and military readiness. Congress heard testimony from top military professionals that unit cohesion is the single most important factor in maintaining an effective militia. General Colin Powell, then Chairman of the Joint Chiefs of Staff, testified that "[t]o win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies." S.Rep. No. 112, at 275, U.S.Code Cong. & Admin.News, at 2061. See also *id.* at 276, U.S.Code Cong. & Admin.News at 2062 (quoting testimony of Dr. William Daryl Henderson, former Commander of the Army Research Institute and author of *Cohesion: The Human Element in Combat* regarding importance of unit cohesion to success in combat). Military professionals testified that unit cohesion must be developed long before the unit is sent to the battlefield or the unit simply will not perform effectively. See *id.* at 275-76, U.S.Code Cong. & Admin.News at 2061-62 (citing testimony of Dr. David Marlowe, Chief of the Department of Military Psychology at the Walter Reed Army Institute of Research General Colin Powell).

The first reason cited by the government that the presence of homosexuals in the military undermines unit cohesion focuses on privacy concerns of service members who are required to live in conditions "characterized

by forced intimacy with little or no privacy." 10 U.S.C. § 654(a)(12) (1995). The Senate Committee noted the testimony of several witnesses who stated that permitting persons who engage in, or will likely engage in, homosexual conduct to serve in the military would infringe on the privacy concerns of other service members. Concern for the privacy of service members is clearly legitimate as evidenced by the fact that the military places men and women in different living quarters. As the Senate Armed Forces Committee concluded, "[i]n civilian life, people are not compelled to live with individuals who are sexually attracted to persons of the same sex, and the committee finds no military necessity to compel persons to do so in the military." S.Rep. No. 112, at 281, U.S.Code Cong. & Admin.News, at 2067-68.

Closely related to the military's concern for the privacy of its service members is the concern over introduction of sexual tension into units. The military has determined that sexual tension jeopardizes military readiness. Again, because sexual behavior is a powerful force, the military has provided separate living quarters and assignment policies based on gender. Just as it is reasonable for the military to take sexual behavior and sexual tension into account in establishing gender-based assignment policies, the Senate Committee found it was reasonable for the military to take these considerations into account "when addressing issues concerning persons who engage in or have the propensity or intent to engage in sexual activity with persons of the same sex." *Id.* at 278, U.S.Code Cong. & Admin.News at 2064.

The Plaintiff asserts in Counts II and III that the true purpose of the policy is to exclude homosexuals from the military because of their status as homosexuals, not because of their conduct. The Plaintiff argues that the government's policy is based on irrational and invidious prejudice and stereotypes and has no empirical basis. Lt. Thomason maintains, and indeed the government concedes, that his service record is outstanding. He argues that his sexual orientation is of no consequence to his performance and has no impact on unit cohesion. The policy, however, is not based on prejudice but on the

military's need to address the legitimate concern that service by homosexuals in the military will adversely impact unit cohesion and military readiness. The Committee noted that these restrictions reflect "professional military judgment as to what categories of personnel contribute to overall combat effectiveness rather than narrow performance criteria related to the performance of a specific task." S.Rep. 112 at 273, U.S.Code Cong. & Admin.News at 2061.

While it is true that some service members may view themselves as homosexuals but nonetheless remain celibate, it would not be rational to develop military personnel policies on the basis that all homosexuals will remain celibate or that they will not be sexually attracted to others. It would be similarly irrational for the military to ignore the obvious implications of placing people who are sexually attracted to each other in the same living quarters. As such, the policy is not based on irrational prejudices but on concrete, articulated concerns about privacy and sexual tension and the resulting impact on unit cohesion. The military is entitled to deference for its professional determination that these legitimate concerns would adversely impact our nation's military readiness.

Under the second prong of rational basis review, the Court must determine whether the means employed by the government are rationally related to the legitimate purpose of excluding those who engage in or demonstrate a propensity to engage in homosexual conduct from service in the military. In Count III, Lt. Thomason argues that it is irrational to assume that because a service member makes a statement as to his or her sexual orientation that the member thereby has demonstrated a propensity to engage in prohibited sexual conduct. As the Court of Appeals for the District of Columbia Circuit recently noted in *Steffan v. Perry*, the government's presumption, as embodied in the DOD Directives, that statements as to sexual preference indicate a propensity to engage in sexual conduct is "certainly rational given that the human sexual drive is enormously powerful and that an open declaration that one is a homosexual is a rather reliable indi-

cation as to the direction of one's drive." *Steffan*, 41 F.3d at 690. Congress recognized that military policies properly take into account the sexual attractions that can exist between men and women, and "[s]imilar considerations apply to the development of policies with respect to homosexuality." S.Rep. No. 112, at 284, U.S.Code Cong. & Admin.News, at 2070. Indeed, advocates of gay rights have themselves linked homosexuality and homosexual acts in arguing against the criminalization of homosexual sodomy.⁴ Further, the DOD need not be "compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts." *Ben-Shalom*, 881 F.2d at 464. Even assuming some homosexuals may state their sexual preference yet not engage in prohibited conduct, when analyzing the constitutionality of a statute under rational basis review, especially in the arena of military affairs, Congress is entitled to deference and this Court is compelled "to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, — U.S. at —, 113 S.Ct. at 2643.

It is asserted that the rebuttable presumption irrationally presumes that homosexuals who acknowledge their homosexuality will violate the law. The Supreme Court, however, has sanctioned the government's use of classifications based on identifiable characteristics as a proxy for conduct when making employment decisions. In *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979), the Court upheld the Transit Authority's refusal to employ methadone users enrolled in a treatment program, finding that it is rational to assume that an addict might engage in unacceptable conduct while on the job. Like the regulation in *Beazer*, the instant regulation is, at bottom, a regulation governing employment in a profession with somewhat unique criteria.

4. As the Court of Appeals for the District of Columbia pointed out, the Lambda Legal Defense & Education Fund, a well-known gay rights advocacy group, argued in its amicus brief submitted to the Supreme Court in *Bowers v. Hardwick* that homosexual sodomy should not be

Further, as the D.C. Circuit noted, vice members like Lt. Thomasson "who identify themselves as homosexual in a military setting—where a declaration of homosexuality is a ground for discharge—convey the impression that they are not in doubt as to the direction of their sexual drive." *Steffan*, 41 F.3d at 691. This is particularly pertinent in the instant case because Lt. Thomasson refused to state whether or not he intended to engage in homosexual conduct.

In short, the government's use of a rebuttable presumption is an entirely rational means of effectuating the military's legitimate purpose of prohibiting individuals who engage in, or have a propensity to engage in, homosexual conduct from serving in the military. It is not within the province of the Court to second guess the government's action, or indeed search for other motives or rationales. Rather, the Court, applying a "healthy deference to legislative and executive judgments in the area of military affairs," *Rostker*, 453 U.S. at 66, 101 S.Ct. at 2652, must simply determine whether the stated purpose is legitimate and the means rationally related to that purpose. In this case, the government has clearly articulated a legitimate purpose and has provided a means that is rationally related to the fulfillment of that purpose.

DUE PROCESS AND THE ADMINISTRATIVE PROCEDURE ACT

Lt. Thomasson contends in Count V that the policy at issue violates his rights to due process and procedural fairness under the Fifth Amendment to the United States Constitution by (1) creating and applying a legal classification that is unconstitutionally overbroad; (2) applying a presumption that is in fact irrebuttable; and (3) imposing an irrebuttable presumption grounded on a based expectation. He also contends that the Navy's decision to discharge him is arbitrary, capricious, and unsupported by

criminalized because "the 'regulation of sex behavior constitutes the total prohibition of an entire way of life' since homosexuality is inexorably intertwined with 'homosexual conduct.'" See *Steffan*, 41 F.3d at 690, n. 11.

substantial evidence in violation of the Administrative Procedure Act ("APA").

[5] In contending that the Defendants have created and applied a legal classification that is unconstitutionally overbroad, the Plaintiff presumably means that the policy is overbroad in that it provides for discharge of members who may be homosexual but may not actively engage in prohibited homosexual conduct. The policy, however, provides for discharge of those members who cannot rebut the presumption that they will engage in such conduct based on their statements. The fact that some service members who state that they are homosexuals may have subjective intentions of remaining celibate does not make the statute overbroad. As previously mentioned, under rational basis review, a court is compelled to accept Congress' generalizations "even when there is an imperfect fit between means and ends." *Heller*, — U.S. at —, 113 S.Ct. at 2643.

[6] The Plaintiff's next argument, that the presumption is in fact irrebuttable, is non-meritorious since, as mentioned previously, three service members thus far have been able to rebut the presumption after making statements relating to their homosexuality. Finally, the Plaintiff argues rather obtusely that "it violates due process to impose an irrebuttable presumption, which is rounded on a class-based expectation, on an individual, when that individual may prove an exception to the expected rule and the issue in question plainly calls for an individualized assessment." This policy provides for individualized assessment because the service member is afforded the opportunity to rebut the presumption and is afforded a full hearing on the merits. Again, the military is entitled to rely on reasonable inferences based on classifications to make employment decisions. See *Murgia*, 427 U.S. at 307, 96 S.Ct. at 2562 (holding that mandatory retirement age of 50 for police officers rationally furthers the government's purpose of assuring the physical preparedness of its police force).

It is for this reason that the policy also does not run afoul of the APA. The policy provides, and indeed Lt. Thomasson was given, a full hearing on the merits. There is

substantial evidence in the record supporting the Navy's determination that Lt. Thomasson failed to rebut the presumption that he has a propensity to engage in homosexual conduct based on his statement.

Accordingly, the "Don't Ask Don't Tell" policy does not violate Lt. Thomasson's rights under the First Amendment, the Equal Protection Clause of the Fifth Amendment, the Due Process Clause of the Fifth Amendment, or the APA, either on its face or as applied to him. The Plaintiff's motion for summary judgment, therefore, should be denied and the Defendant's cross motion for summary judgment should be granted.

An appropriate order shall issue.

ORDER

This matter came before the Court on cross-motions for summary judgment. For reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is denied and Defendants' Motion for Summary Judgment is granted and this case is dismissed.



Stephanie J. KING, Plaintiff,

v.

John H. DALTON, Secretary of the
Navy, et al., Defendants.

Civ. A. No. 95-250-A.

United States District Court,
E.D. Virginia,
Alexandria Division.

July 28, 1995.

Worker who was employed by government contractor brought Title VII sexual harassment action against Secretary of the

Send this to Mawry for his
enlightenment—

MS

Marvin Kriskov
Room 128

Servicemembers Legal Defense Network

November 3, 1995

★ ★ ★ ★ ★

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

Dear Marsha:

We would like to commend you for recent comments in *The Advocate* dated October 31, 1995 regarding gays in the military. You said that "I'm not here to defend that. I don't like that compromise. I don't think it works well."

Likewise, we would like to commend George Stephanopoulos for his comments at the recent NLGJA conference where he said, "And though we tried -- I know we didn't achieve what we set out to achieve.... We'll continue to do what we can to ensure that at the very least, gays and lesbians serving honorably in the military, as they have always done, can do so without the harassment that has scarred too many lives and marred too many careers. I understand your disappointment. 'Don't Ask, Don't Tell' has not worked as well as we had hoped."

These comments begin to acknowledge that the "Don't Ask, Don't Tell, Don't Pursue" policy has not stopped the witch hunts, harassment and investigative abuses as promised and imply that the President is willing to take corrective actions. These comments also help bring the President back to his original position that any policy that treats people differently for saying and doing the same things is wrong.

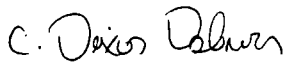
We would like to bring to your attention, however, two recent occasions when the message has gotten off-track. First, in the same issue of *The Advocate* in which your comments appear, President Clinton is quoted as supporting a ban on so-called homosexual activity. President Clinton never took such a position in 1992 and need not raise it at this late date. Indeed, such assertions will only erode the President's support among lesbian, gay and bisexual voters and their supporters.

Second, this week's "Reliable Source" column in *The Washington Post* quoted George Stephanopoulos, when asked whether his cigars were from trade-embargoed Cuba, as saying "don't ask, don't tell." This flippant attempt at humor, like the "Don't Ask, Don't Tell, Don't Pursue" policy itself, is not funny to lesbian, gay and bisexual constituents. We certainly would never expect the Administration to make callous jokes at the expense of any other group of citizens and we would like assurances from Mr. Stephanopoulos that it will not occur again.

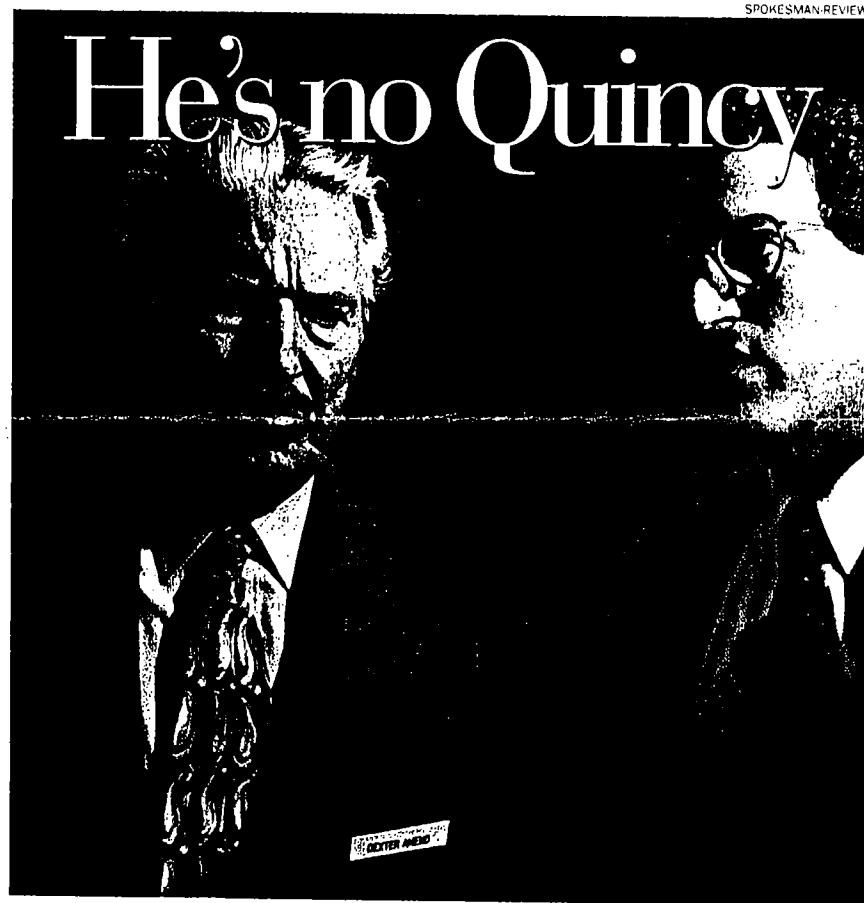
Thank you for your tireless efforts. As always, we are eager to stop the abuses of the current policy in the field and ensure that President Clinton's few promises are carried out as intended.

Sincerely,


Michelle M. Benecke, Esq.
Co-Executive Director


C. Dixon Osburn, Esq.
Co-Executive Director

Agenda



SPOKESMAN-REVIEW

He's no Quincy

There's more hot water for embattled Spokane County, Wash., coroner Dexter Amend.

Cornered coroner

Amend (left) and his attorney, Donald Kellman, following a court hearing

Amend, who cited the Bible and a medical dictionary while railing against "sodomites" in an August TV interview.

A recall petition targeting Amend, a 76-year-old retired urologist, was OK'd by a superior court judge September 22, and Gov. Mike Lowry's legal counsel has asked the state medical quality assurance commission to check Amend out. Meanwhile, the Associated Press reported that during Amend's tenure, Spokane has become a lousy place to lose a loved one. The newspaper alleged that the coroner

• advised a divorced woman who couldn't afford to cremate her dead brother to go to church and find a husband;

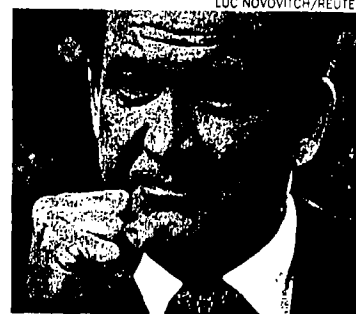
ing you. After all, he lived on the fringe—what did you expect?"; and • tripped over the body of a 3-year-old choking victim in front of the child's grieving parents.

Reported a former employee in Amend's office: "He has no social skills."

Selective memory: Once again President Clinton seems to have forgotten just what he promised during the 1992 campaign, when he vowed to lift the ban on gays in the military. Then his campaign said he would open the military's doors to gays and lesbians as a matter of civil rights.

During a lunch with journalists

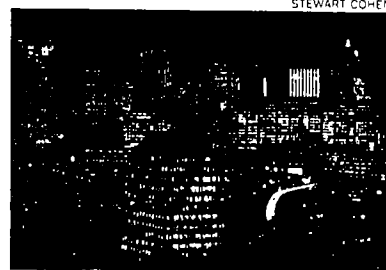
• told a sobbing couple whose son had died from a drug overdose. "I don't know what's bother-



LUC NOVOVITCH/REUTER

"THEY SAY THERE AREN'T TWO SEXES, THERE ARE FIVE GENDERS. They started with heterosexual; I followed them there. They went on to homosexual; I was slowing down. They said transsexual; that's the third one. I don't understand the last two. I tell you this: God created man and woman—I don't care what Bella Abzug says."

Presidential candidate Pat Buchanan, trashing the U.N.'s Beijing conference on women



STEWART COHEN

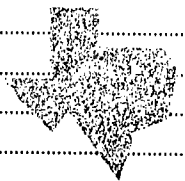
One third of documented hate crimes in Dallas in the first nine months of 1995 were antigay incidents.

SOURCE: Dallas Police Department

Top five causes of death from January 1 through August 13 for felons in Texas prisons:

1. AIDS
2. Cancer
3. Heart disease
4. Liver disease
5. Lethal injection

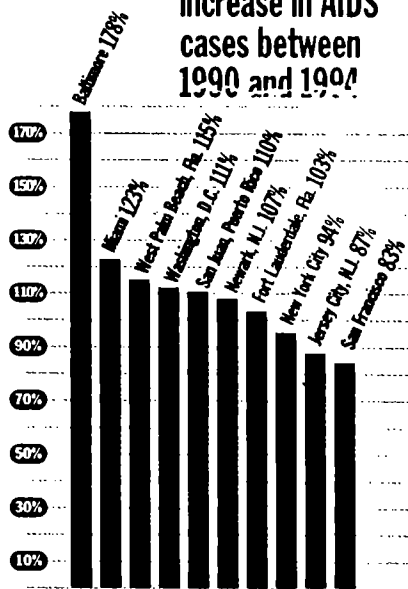
SOURCE: Texas Department of Criminal Justice



"I don't appreciate the mayor and city council members referring to me as a 'clown act.'"

Kitty Cole, a self-described "glamour drag queen" candidate for mayor of Palm Springs, Calif., responding to criticism in the letters-to-the-editor section of a local newspaper

Metro areas with the largest increase in AIDS cases between 1990 and 1994



SOURCE: Associated Press

AIDS benefits of the rich and famous

Overcoming humble beginnings, mass-participation AIDS fund-raisers have blossomed into major magnets for celebrities in sneakers. Among this year's star-studded events were

- AIDS Walk New York** (May 21): Tony Randall
- AIDS Walk San Francisco** (July 16): Holly Near
- AIDS Walk Los Angeles** (September 17): Sandra Bullock, Jamie Lee Curtis
- AIDS Walk Wisconsin** (September 17): Tipper Gore
- AIDS Walk Colorado** (September 10): Rosie Perez
- Boston-to-New York AIDS Ride** (September 14-17): Doug Savant
- Vancouver AIDS Walk** (September 24): Tom Arnold

September 25, a reporter asked if he wished he had never confronted the issue. "Well, to be fair, I didn't take that on; that was an issue that was visited on the presidency," Clinton said.

"The position I took, remember, was not that we should change the rules of conduct, which prohibited homosexual activity, but that we should not ask people or persecute people for their failure to lie about their sexual orientation," he said. "I suppose the easy thing to do would be to say, 'Oh, well, let the courts go forward.' I was trying to find a way to put an end to this so that the military could just put this issue behind it and go on being the world's best military."

In 1992, however, Clinton maintained that discrimination was wrong—pure and simple. Candidate Clinton also never mentioned keeping the ban on homosexual conduct.

Different strokes: "Homosexuality is a mental disorder similar to schizophrenia or depression." That's the word from psychologist Robert Drummond, president of the Olathe, Kan., school board.

Drummond made the assessment September 22 in a trial stemming from the suburban school district's 1994 decision to remove a lesbian-themed book from three high school libraries. "I believe homosexuals have a difficult problem," Drummond testified. "I believe in what the Bible says about homosexuality, and the Bible says homosexuality is a sin." In addition to his roles as a psychologist and school-board head, Drummond is also vice president of Mid-America Nazarene College in Olathe.

Breakup in lobster land: It's splitsville for the two groups backing Maine's antigay referendum. One of the groups, the Coalition to End Special Rights, refused in late September to sign "standards for principled campaigning" devised by the other group. Concerned Maine Families. Peeved, a CMF spokesman dubbed CESR a pawn of "the big right" and accused it of "engaging in politics motivated by the malevo-

lent spirit of disgust and big The referendum is scheduled considered by voters in Novem

As for Beavis and Butt- Britain—the nation that spawned scatological comedy stylin Benny Hill—is suddenly sque about safe-sex television proming. Britain's Independent Vision Commission said Septemb that it had fined MTV Europe \$23,170 for airing *Safe 'n' Se* AIDS education program. "I clearly aimed at sexually active ers and included sections, ne on sadomasochism and anal se suited to young viewers," sa commission. MTV was also \$46,350 for airing a program the commission said incl "smutty banter about underap and \$23,170 for a commerci "appeared to condone the wrecking by a teenage boy of ther's car."

AIDS act extended: The of Representatives voted Se ber 18 to extend the Ryan Comprehensive AIDS Reso Emergency Act through the 2000. The House version of t tension was sent to a conf committee to be reconciled Senate version.

The Réal thing: Gay Can lawmaker Réal Ménard was out September 18 in an att advance gay and lesbian mar. The House of Commons vote 52 to reject a measure intro by Ménard that would extend recognition to same-sex mar. Ménard said he was disapp by the vote but would keep to advance gay rights causes i liment.

Coming soon—Show Heavy security, 200 praying ers, and bomb threats: It wa run-of-the-mill movie pre when *Priest* opened in Wars September 15. The film, whi tains a depiction of a gay pri scheduled to be shown in ni

The Reliable Source

By Annie Groer and Ann Gerhart

Viscount of Monte Cristos

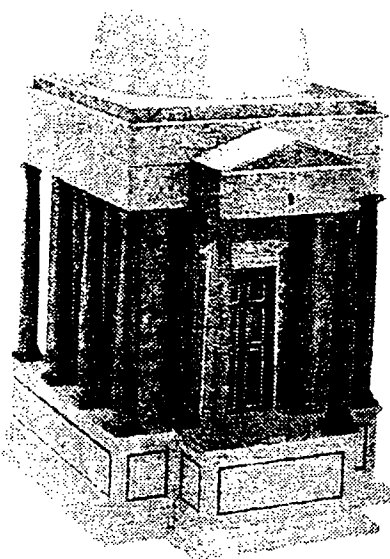
The chic cigar set fired up their stogies Sunday night at a Ritz-Carlton dinner honoring David, Viscount Linley, one of the few British royals who actually work for a living. He is a furniture maker. Lots of women joined the men in post-prandial puffing on Monte Cristos, including yacht charter broker Sandy Acker, arts maven Wilma Bernstein and boutique owner Paula Abu Rahmeh. George Stephanopoulos pocketed two cigars—one for himself and another for President Clinton (who will probably have to smoke his outside, by order of the first lady). When it was suggested that the party favors might have been made in trade-embargoed Cuba, George retorted, "Don't ask, don't tell." David Salz, CEO of Alfred Dunhill of North America, insisted that this particular (unmarked) batch came from the Dominican Republic. Neither Stephanopoulos nor his date, Wendy Smith of the White House political affairs office, lit up at the dinner.

Lord Linley—son of Princess Margaret and her ex-husband, Lord Snowdon—was here hawking exquisite handmade, castle-shaped wooden folies (cigar or treasure boxes at \$14,000 each) and other high-end accessories (\$125 for a pencil cup) for Dunhill.

Not everyone smoked after dinner. But cancer surgeon LaSalle Leffall Jr. invoked his good manners as a party guest and refrained from lecturing his table-mates.



Viscount Linley and his handiwork: a \$14,000 folly, or "Gentleman's Keep-Safe Box."



FROM THE ALFRED DUNHILL CATALOGUE

Gardick

1) Okinawa -

? results of Bowie letter to Miller
policy

? denial of assistance of counsel

SLON

DOD - Miller Aug. 91

statement →

of ~~the~~ prearrest

burden of proof.

11/9/95 MSA, R Soc, SE, ME

1) Coles-briefs?? 90%
military

2) Military { a) military - selective + uneven enforcement
servicemen's have tried talking to DOS, DoD
legal def network } don't whether true
J. Miller

GLOBE -

b) DOT prosecution
gort. lawyer - difficult

3) Gay marriage

Gay - POTUS opp. to gay marriages
states' rights
committed

domestic partners

4) Initiative cases -

- Cinti case - 6th Circuit
- Cal.

5) Language inclusion - gays + lesbians
hate crimes

F.Y.I.

MARSHA
SCOTT

Servicemembers Legal Defense Network

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: Gays in the Military: Message & Legal Issues

President Clinton promised that the new regulations on gays in the military would at the very least stop witch hunts, harassment and investigative excesses. To date witch hunts continue, investigative abuses continue and harassment has skyrocketed. These violations have been fueled by actions and omissions at the top levels of the Department of Defense, including:

- ♦ instructing investigators, for the first time ever, to question parents about their kids to gather evidence for discharge;
- ♦ failing to establish a means, despite numerous requests, whereby gay servicemembers can report death threats and harassment without fear of being investigated and discharged themselves; and
- ♦ allowing the Departments of Defense, Air Force and Navy to issue memoranda, without White House input, that gut the regulatory limits on investigations into the lives of suspected gay servicemembers.

If President Clinton does not take steps --and they do not have to be public steps-- to ensure that even the most basic and uncontroversial requirements of "Don't Ask, Don't Tell, Don't Pursue" are implemented, the Administration threatens to reinforce the perception among many Americans that the President has difficulty standing by his word.

A recent poll done by Celinda Lake for the Human Rights Campaign asked 800 registered voters what bothered them most about President Clinton's "Don't Ask, Don't Tell, Don't Pursue" policy: the priority he gave the issue, that he flip-flopped on the issue, that he left gays in the military, or that he did not give gays their rights. Thirty-three percent, the largest response, said that they were most disturbed by President Clinton's flip-flopping, his unwillingness to take a stand. Only 8% criticized President Clinton for taking a stand in support of gays in the military.

By failing to implement the few promises in the new policy, the Administration further risks needless, embarrassing media and litigation for lack of good faith implementation of the

new policy. When the system utterly fails them, servicemembers have nowhere else to turn but federal court and the court of public opinion.

We will be issuing our Second Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue” in February and would welcome the opportunity to say that, as promised by the new policy, witch hunts, harassment and other investigative abuses have stopped. Today, we cannot. A proposal submitted previously to the White House and the Department of Defense that would address many of the concerns raised here is attached.

The Administration’s public statements that the new policy is working as intended are wrong and only make the situation worse. Reports by *The New York Times*, *The New Republic*, *Newsweek*, *The Los Angeles Times*, CNN, CBS, NBC and CNN, among others, reveal to the public that the “Don’t Ask, Don’t Tell, Don’t Pursue” policy is being flaunted by the Department of Defense. The statements send a harmful message to those who believe they can continue to witch hunt and harass with impunity, make matters worse for servicemembers caught in the trap of an intransigent commander, and erode public confidence in the President’s willingness to stand by his word.

If President Clinton addressed the abuses of the new policy that continue to happen, he could develop a cohesive message and deflect much of the anticipated criticism. The message would not only be supportive of those who wanted to see the President implement an evenhanded policy, but would help to defuse the perception that Clinton is unwilling to take a stand or stick by his decisions. The elements of such a message should include the following:

- ♦ No American tolerates death threats and harassment against any person, for any reason. Nor can we. No American supports government investigators questioning parents about their kids to have them discharged from the military. Nor can we.
- ♦ I am deeply disturbed by reports that some military commanders are disregarding the mandate to stop witch hunts, asking questions about sexual orientation and harassment. If I catch anyone going on witch hunt, or find out about other command abuses, it will mean the end of their career.
- ♦ This policy is not a perfect solution. It is not identical with some of my own goals. Americans should be treated equally for saying and doing the same things.

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EXHIBITS

1. SLDN Memorandum: Department of Defense Violations of Current Regulations
2. SLDN Memorandum: First Steps to Bring DoD Into Compliance With Current Regulations
3. SLDN Memorandum: A Few Examples of Administration's Public Misstatements

Servicemembers Legal Defense Network

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: Department of Defense Violations of Current Regulations

Death Threats/Harassment/Hate Crimes. The new regulations state "harassment will not be tolerated against any servicemember for any reason." Gay servicemembers, however, cannot report death threats, harassment and hate crimes and their basis (because they are gay). Nor can they cooperate in police investigations -- civilian or military -- where their sexual orientation may be revealed. Straight women cannot report sexual harassment or rape without risking retaliatory, false accusations and investigation.

One SLDN client was threatened with rape and death based on her perceived sexual orientation in a letter delivered to her home and addressed to her by name, rank and social security number. She was afraid to inform military officials because of the threat of investigation. Civilian police said they would turn the letter over to the military. This woman learned of SLDN only by chance, two terrifying weeks later. We resolved this dilemma only after negotiating with top Pentagon officials to ensure the source of the threats, and not her life, would be investigated. This is not satisfactory and it is not excusable under current regulations. DoD must enforce its zero-tolerance policy against harassment, permit all servicemembers to report death threats, harassment and hate crimes without retribution, and investigate those who harass.

Witch Hunts and Fishing Expeditions. In Okinawa, Japan, more than twenty marines were *asked* about their own and others' sexual orientation from April - June 1994. Agents searched the room of Corporal Craig Haack based merely on the "suspicion of homosexuality," seizing his personal diary, letters from home, word processor, disks and photo album to fish for "evidence" that he might be gay. SLDN cooperating attorneys documented over 50 command violations. More recently, in Korea, PFC Shannon Emery was targeted in a witch hunt that began immediately after she reported an attempted rape. Emery was held for six months beyond her transfer date and pressured to accuse coworkers as lesbians in exchange for leniency. The witch hunt, subsequently confirmed by the IG, as stopped only after intensive intervention by SLDN with top Administration officials.

Pentagon guidance is fueling these abuses. Air Force officers have been encouraged to pursue suspected homosexuals "discovered" during inquiries against other servicemembers. Air Force, Navy and DoD memos have instructed officers to expand the scope of inquiries in statements cases beyond permissible limits by fishing for additional statements and any homosexual acts.

Questions to Parents. The same Air Force memo directs inquiry officers to question parents about the sexual orientation and private lives of their children for purposes of discharge. This memo conflicts with and exploits traditional security clearance guidance not to conceal one's private life from family members. Parents have been shocked that military officials would intrude into private family relationships and attempt to turn family members against one another, which they assumed was forbidden under the new policy.

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: First Steps to Bring DoD Into Compliance With Current Regulations

We are concerned that the Administration is not taking the necessary steps to prevent and rectify improper implementation of the "don't ask, don't tell, don't pursue" policy. The following are first steps that we believe would stop many of the abuses we have documented under the new policy.

Take Disciplinary Actions. Discipline commanders and investigative agents who violate the new policy, as provided for in the regulations, beginning with those responsible for the Okinawa and Korea witch hunts. Commanders who tolerate harassment, hate crimes and death threats should also be disciplined. To date, no military official has been disciplined for violating the policy, despite numerous substantiated complaints. This lack of action tells commanders they can violate the policy with impunity and fosters a climate resistant to its implementation.

Conduct Training. Train all military members on the intent and letter of the new regulations, including all levels of command, all unit levels and all schools. Formalize the training once or twice every year. Ensure that servicemembers understand what they can and cannot do under the policy and what their legal rights are. We understand that no training has been conducted in the field since the regulations were implemented; new troops are told only that homosexual conduct is against regulations.

Issue Additional Guidance. Issue additional guidance to the field in an appropriate form such as a Letter of Instruction based on a first year review of the new policy. Clarify that (1) servicemembers will not be investigated for reporting death threats, hate crimes and harassment and their underlying basis; (2) inquiry officers do not have the authority to conduct fishing expeditions, but must limit their inquiries to the specific allegations; and (3) commanders cannot launch inquiries without credible information and credible information does not include all information.

Rescind Memoranda. Rescind the Air Force memorandum dated November 4, 1994, the Navy memorandum issued in June 1994 and the Department of Defense memo dated August 18, 1995 that gut the prohibitions against fishing expeditions into the lives of suspected gay personnel.

Appoint Troubleshooters. For the next year, as a pilot project, assign troubleshooters, perhaps one from the DoD General Counsel's office and one from the staff of the Assistant Secretary of Defense for Manpower and Readiness, to advise attorneys, commanders and others about appropriate actions and interpretations under the new policy to clear up ambiguity and misunderstanding.

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: Gays in the Military: A Few Examples of Administration's Public Misstatements

1. "Is Clinton happy with implementation of the policy over the past year? 'He is,' White House spokesman Michael McCurry said at a March 13 briefing. 'Military commanders in the field are satisfied with it, and the number of expulsions clearly is declining.'" *National Journal* March 25, 1995. **[Inaccurate. The rate of expulsion of gays is exactly the same. Clinton should not say that he is happy with the new policy as it puts into law exactly the same differential standards as the policy he attempted to repeal.]**

2. "[A]sked how Reserve Officer Training Corps can operate on campuses that have anti-discrimination policies [, Mr. Clinton said,] 'If the policy were implemented in spirit and in letter the way it was written, ... I don't think it would be a conflict'." *Washington Times*, March 24, 1995. **[Wrong. The new policy, even if implemented as intended, treats gay and straight soldiers differently for saying and doing the same things, and thus in no way meets the standards of an anti-discrimination policy.]**

3. "Senior military officials, however, insist that the policy has been successfully implemented. 'My sense is ... in the absence of different information, the force has adapted to the new policy and is doing a good job with it,' says Gen. John Shalikashvili, chairman of the Joint Chiefs of Staff. *Christian Science Monitor*, March 17, 1995. **[Misleading and disingenuous. The Department of Defense has established no means of monitoring abuses of the new policy or allowing soldiers to report abuses without fear of being discharged. SLDN, Members of Congress and private attorneys have, however, presented DOD with different information. Secretary Perry and others have made similar misleading comments.]**

4. "DOD spokesman Doug Hart insists the rules are applied in an 'evenhanded' manner and that no abuses occur. When I recounted specific incidents, he said they were 'impossible.' What about servicemembers asked to turn in others? 'You can't ask about other people. It's explicit in the new directives,' Hart said. 'It doesn't happen'." *The New Republic*, May 2, 1994. **[Wrong. Denial of reported and documented abuses of the new policy creates a perception of hypocrisy and erodes public confidence in the President's ability to take a principled stand and control his own military.]**

Servicemembers Legal Defense Network

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September 7, 1995

Judith Miller
General Counsel
Department of Defense
1600 Pentagon
Washington, D.C. 20301-1000

Dear Ms. Miller:

We were surprised to learn that you issued a memorandum dated August 18, 1995 that encourages commanders and inquiry officers to conduct wide-ranging fishing expeditions into the private lives of gay soldiers, but not heterosexuals, to determine if they are in violation of military regulations.¹ As the first Department of Defense statement on "Don't Ask, Don't Tell, Don't Pursue" since its implementation, this memorandum clearly contravenes the letter and intent of the new policy and provides strong evidence that the Administration is violating laws requiring a good faith effort to implement the new policy as intended.

Contrary to your memorandum, the new regulations on homosexual conduct do not require the government to "inquire" about or produce so-called "evidence" that a servicemember engages in acts that violate military regulations. Instead, as President Clinton stated in announcing the new policy, the regulations require that the government proceed "with an even hand against everyone, regardless of sexual orientation." If the Department of Defense does not inquire into the acts of heterosexual servicemembers when they reveal their identity, it cannot do so against gay servicemembers.

Further, the new regulations state that inquiries "must be limited to the factual circumstances directly relevant to the specific allegations." The policy also provides that "at any point during an inquiry, the commander or appointed inquiry officer must be able to clearly and specifically explain which grounds for separation he or she is attempting to verify." Under the regulations, the only legitimate inquiry is whether a servicemember in fact said he or she is gay. The military simply may not use a statement of sexual identity as an excuse to go searching for other grounds of discharge. Your instructions circumvent the clear limitations set forth in the new regulations and reduce administrative inquiries into fishing expeditions.

The danger is clear. Evidence of acts, gay or straight, can subject a servicemember to criminal prosecution. Your memorandum, however, only targets gays for fishing expeditions and threatens them, as a result, with the possibility of criminal prosecution. Your memorandum, therefore, potentially criminalizes anything that a gay person says about his or her identity.

¹ The memorandum also forecloses legitimate opportunities to rebut the presumption under the new policy, making clear that the Department of Defense will take all steps necessary to prevent acknowledged gays from serving in the military. We will address this direct violation of "Don't Ask, Don't Tell, Don't Pursue" under separate cover.

Heterosexual servicemembers simply do not face fishing expeditions and criminal prosecution resulting from their statements.

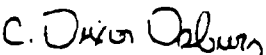
This memorandum provides conclusive evidence that the Department of Defense and its branches of service are eviscerating the spirit, intent, and letter of "Don't Ask, Don't Tell, Don't Pursue."

As you are aware, the Department of the Air Force issued a memorandum on November 13, 1994 that condones the interrogation of parents in an attempt to gather evidence against their children for purposes of discharge. The memorandum also instructs commanders to investigate a servicemembers' associational activities in clear violation of the new policy. And, in perhaps the most flagrant disregard of the goals set forth by President Clinton, General Powell and Congress, the memorandum encourages witch hunts by permitting inquiry officers to pursue "other [gay] military members" uncovered during fishing expeditions. Though these clear violations of "Don't Ask, Don't Tell, Don't Pursue" have been brought to your attention on more than one occasion, you have taken no action.

You are also aware of a Navy memorandum issued in June 1994 that explicitly instructs the government to conduct fishing expeditions against gay soldiers, but not heterosexuals, in violation of the new policy. With astonishing candor, the memorandum states that the government should go beyond the allegations and attempt to uncover evidence of a gay, but not a heterosexual, servicemember's desire "to commit criminal acts," referring to private, adult, consensual relationships. The Navy memorandum, like the Air Force's, also penalizes servicemembers for their associational activities in direct violation of "Don't Ask, Don't Tell, Don't Pursue," stating that a servicemember's support of "homosexual interests may violate" military regulations. Never before has the military adopted a policy that a servicemember's legitimate support of gay family members, friends, churches or other organizations can result in reprimand or the loss of a career. Though these clear violations of the new policy have been brought to your attention on more than one occasion, again, you have taken no action.

Your memorandum is simply the latest attempt by the Department of Defense to ensure that gays cannot serve their country as promised by "Don't Ask, Don't Tell, Don't Pursue." Indeed, under your leadership, it is arguable that the new policy is now worse than the old. Never before has the Department of Defense, as a matter of policy, sanctioned fishing expeditions, witch hunts, interrogation of parents, and penalties for supporting gay friends, churches and other organizations. We ask that you rescind all three memoranda immediately to bring the Department of Defense into compliance with current laws and regulations governing gays in the military.

Sincerely,


C. Dixon Osburn, Esq.
Co-Executive Director


Michelle M. Benecke, Esq.
Co-Executive Director

cc: The Honorable William J. Perry, Secretary of Defense

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

18 AUG 1995



MEMORANDUM FOR THE GENERAL COUNSELS OF THE MILITARY DEPARTMENTS
THE JUDGE ADVOCATE GENERAL OF THE ARMY
THE JUDGE ADVOCATE GENERAL OF THE NAVY
THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE
THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE
MARINE CORPS

SUBJECT: Policy on Homosexual Conduct in the Armed Forces

With reference to the policy on homosexual conduct in the armed forces, this memorandum is to provide guidance with respect to two issues: (1) investigative actions a commander may take in "statements" cases; and (2) the circumstances in which a person who states that he or she is a homosexual claims that the rules preclude separation of anyone based on their sexual orientation.

With respect to the first issue, DoD Directives 1332.14 and 1332.30 provide that upon receipt of credible information that there is a basis for discharge, a commander may initiate a fact-finding inquiry, which may consist of an examination of the information reported or a more extensive inquiry, as necessary. The Directives further provide that the inquiry should gather all credible information that directly relates to the grounds for possible separation.

In "statements" cases, the statute authorizes the service member to seek to demonstrate 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. Included among the permissible issues into which a commander or inquiry officer may inquire in such cases are whether the service member has engaged in homosexual acts or marriages, attempted to engage in homosexual acts or marriages, or intends or has a propensity to engage in homosexual acts. In addition, the service member may be asked why he or she made the statement and what he or she meant by the statement.

With respect to the second issue, both the statute and Directives provide for discharge if a service member makes a statement that he or she is a homosexual, or words to that effect, unless the member demonstrates that he or she does not engage in, attempt or intend to engage in, or have a propensity to engage in homosexual acts. The Directives further make clear that a "statement" that is grounds for discharge can include "statements such as . . . 'I have a homosexual orientation.' See DoD Dir. 1332.14 (Encl. 3, Att. 4, § B.4.b); DoD Dir. 1332.30 (Encl. 3, § B.4.b). Thus, although "sexual orientation" (as



ENCLOSURE(1)

defined in the Directives¹) in itself is not a basis for discharge "unless manifested by homosexual conduct," *see* DoD Dir. 1332.14 (Encl. 3, Att. 1, § H.1); DoD Dir. 1332.30 (Encl. 2, § C). the Directives make clear that a statement that one has a "homosexual orientation" is treated like any other statement that one is a homosexual. It raises the presumption that one engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and will result in separation unless the member successfully rebuts the presumption.

A member may not avoid the burden of rebutting the presumption merely by asserting that his or her statement of homosexuality was intended to convey only a message about sexual orientation, as defined in the Directives, and not to convey any message about propensity or intent to engage in homosexual acts. To the contrary, by virtue of the statement, the member bears the burden of proof that he or she does not engage in, and does not attempt, have a propensity, or intend to engage in homosexual acts. If the member in rebuttal offers evidence that he or she does not engage in homosexual acts or have a propensity or intent to do so, the offering of the evidence does not shift the burden of proof to the government. Rather, the burden of proof remains on the member throughout the proceeding. *See* DoD Dir. 1332.14 (Encl. 3, Att. 1, § H.4.e); DoD Dir. 1332.30 (Encl. 2, § C.2).

In determining whether a Service member has successfully rebutted the presumption, a Board may consider, among other evidence: 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 engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Please take all necessary steps to ensure that these aspects of the policy are fully understood in the field. In connection therewith, please provide me within 30 days of the date of this memorandum with evidence that guidance and training for judge advocates and commanders in these regards is unambiguous and clear. If you contemplate sending new training materials or additional guidance to the field, please provide it to me in draft form so that I may review it prior to implementation.

¹ The Directives define "sexual orientation" as "(a) an abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." DoD Dir. 1332.14 (Encl. 2, Definition C); DoD Dir. 1332.30 (Encl. 1, Definition 16).

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 1993 Decided November 16, 1993

No. 91-5409

JOSEPH C. STEFFAN,
APPELLANT

v.

LES ASPIN, SECRETARY OF DEFENSE, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civ. No. 88-3669)

Marc Wolinsky argued the cause for appellant. With him on the briefs was *Calvin Steinmetz*.

Anthony J. Steinmeyer, Attorney, United States Department of Justice, argued the cause for appellees. With him on the brief were *J. Ramsey Johnson*, Acting United States Attorney, and *E. Roy Hawkins*, Attorney, United States Department of Justice.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

On the brief for *amici curiae* The American Jewish Committee, et al., was *David C. McBride*.

On the brief for *amicus curiae* The American Association of University Professors were *Robert C. Post*, *Scott L. Nelson*, and *Ann H. Franke*. *Mark D. Laponsky* entered an appearance.

On the brief for *amici curiae* NOW Legal Defense and Education Fund, et al., were *Deborah A. Ellis* and *Anne L. Clark*.

On the brief for *amici curiae* The American Civil Liberties Union AIDS Project, et al., were *Steven R. Shapiro* and *Arthur B. Spitzer*.

Before: *MIKVA*, Chief Judge, *WALD* and *EDWARDS*, Circuit Judges.

Opinion for the Court filed by Chief Judge *MIKVA*.

MIKVA, Chief Judge: Joseph Steffan was, by all accounts, an exceptional midshipman as he prepared to graduate from the United States Naval Academy in 1987. Mr. Steffan's exemplary performance at the Academy had earned him numerous honors and the respect and praise of his superior officers. Most notably, he was selected in his senior year to serve as Battalion Commander, one of the Academy's ten highest ranking midshipmen. But only six weeks before his expected graduation, the Academy forced Mr. Steffan to resign—denying him a degree and a commission in the Navy—after he truthfully answered, "Yes, sir" to a superior officer's question, "[A]re you a homosexual?" In dismissing Mr. Steffan, the Academy applied Department of Defense Directives instructing that "[h]omosexuality is incompatible with military service," and mandating discharge of any servicemember who "has stated that he or she is a homosexual or bisexual, unless there is a further finding that the member is not a homosexual or bisexual." 32 C.F.R. Part 41, App. A §§ H.1.a, H.1.c(2). Mr. Steffan argues that his constructive discharge, based solely on his homosexual orientation, violates the equal protection component of the Fifth Amendment's Due Process Clause. He further argues that the truncated

procedures the Navy used in effecting that discharge were arbitrary and capricious, violating both the equal protection component and the Administrative Procedure Act.

Because we find no rational basis for the Directives under which the Navy excluded Mr. Steffan solely because he truthfully admitted his sexual orientation, we hold that these Directives are facially unconstitutional. We need not and do not decide the alternative procedural claims because, under the plain mandate of the Directives, Mr. Steffan's discharge was inevitable and would have occurred under any procedures through which the Navy may have chosen to effectuate it.

I. Background

In February 1987, Joseph C. Steffan was one of the most promising students at the United States Naval Academy ("Academy"). He had received consistently outstanding marks for his leadership and military performance. By his sophomore year, his instructors considered him "gifted," an "outstanding performer" who had "exhibited excellent leadership." He was praised as an "asset to the Academy." In his junior year, Mr. Steffan was selected as the Regimental Commander of one half of his class. His stellar evaluations continued: Mr. Steffan was a "model for his classmates and subordinates," whose "training [was] best characterized by his constant dedication to superior performance." None questioned that he would "undoubtedly make an outstanding naval officer." In his senior year, Mr. Steffan was selected as Battalion Commander, one of the ten highest ranking midshipmen at the Academy. In this capacity, Mr. Steffan had direct command over one-sixth of the Academy's 4,500 midshipmen.

In addition to his outstanding military performance, Mr. Steffan also excelled at extracurricular activities. In his senior year, he served as President and Cantor of the Catholic Choir and as premier soloist of the Glee Club. In his junior and senior years he sang the National Anthem as a soloist on national television at the Army-Navy game, for which he earned a Citation from the Superintendent of the

Academy. It appeared that the sky was the limit for Mr. Steffan's career in the United States Navy.

But Joseph Steffan's promising military career was not to be realized. In February 1987, the Naval Intelligence Service ("NIS") received a report from the Academy alleging that Mr. Steffan had stated to another student that he was gay. The NIS commenced an investigation. When Mr. Steffan learned of the investigation, he asked an Academy Chaplain to intercede on his behalf with the Commandant of Midshipmen, Captain H.W. Habermeyer, in hopes that he would be allowed to graduate. The Chaplain was unable to convince Captain Habermeyer, who advised only that Mr. Steffan seek legal counsel. Several days later, Mr. Steffan himself approached Captain Habermeyer to request a meeting with the Superintendent. Captain Habermeyer asked him, "Are you willing to state at this time that you are a homosexual?" Mr. Steffan responded, "Yes, sir." He then asked Captain Habermeyer if he would be allowed to graduate. The Captain told him it was unlikely and asked him what he would do in that event. Mr. Steffan responded, "I guess I would have to leave the Naval Academy." Captain Habermeyer then informed Mr. Steffan that he would convene a Brigade Military Performance Board the next day and that he would arrange for a psychological evaluation.

At the Performance Board hearing, Mr. Steffan declined to present any evidence to show that he was not a homosexual. Captain Konetzni, the Deputy Commandant and presiding officer, stated that Mr. Steffan's performance at the Academy had been "outstanding." Captain Konetzni then asked Mr. Steffan, "I'd like your word, are you a homosexual?" Mr. Steffan responded, "Yes, sir." At that point, the hearing was terminated. After secret deliberations, the Board decided to change Mr. Steffan's military performance rating from an "A" to an "F", to suspend him from classes, and to recommend his discharge for "insufficient aptitude for commissioned service."

Based on this recommendation, an Academic Board was convened on April 1, 1987; after a hearing, it too recommended Mr. Steffan's discharge. Subsequently, Mr. Steffan

met with the Conduct Officer, Major Funk, who advised him to resign. Major Funk noted that Mr. Steffan's discharge was a foregone conclusion and that it would necessitate a notation on the record of his homosexuality. Major Funk opined that Mr. Steffan's job prospects would suffer from such a notation. Mr. Steffan followed the Major's advice. On April 1, 1987, a mere six weeks before he was to graduate after nearly four years of exemplary performance, Mr. Steffan submitted his resignation from the Academy.

But on December 9, 1988, Mr. Steffan wrote to the Secretary of the Navy, asking that his resignation be withdrawn and that he be awarded his diploma. On February 9, 1989, based on the advice of the Superintendent of the Naval Academy, the Secretary denied that request. The sole stated basis of this denial was Mr. Steffan's status as a homosexual, as revealed by his un rebutted admission before the Performance Board.

Mr. Steffan filed this action on December 29, 1988. He claims that the defendants, the Secretary of Defense, the Secretary of the Navy, the Superintendent of the Naval Academy, and the Academy's Commandant of Midshipmen (collectively, "Secretary"), denied him the equal protection of the laws when they forced him to resign solely because of his homosexual orientation. In the alternative, Mr. Steffan alleges that the Secretary both denied him equal protection and violated the Administrative Procedure Act when the Academy truncated his discharge proceedings. His case has reached this Court on two prior occasions. On the first occasion, we reversed the district court's order dismissing this case for discovery violations when Mr. Steffan refused to answer questions in deposition designed to elicit whether he had engaged in any homosexual conduct. *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990). On the second occasion, in an unpublished opinion, we upheld the district judge's refusal to recuse himself for his prior references to gays and lesbians as "homos."

The district court entered summary judgment for the Secretary on December 9, 1991. In a lengthy opinion, the court

explained, first, that the Academy's expedited procedures were not arbitrary and capricious, but were an "accommodation to an accomplished young man," who desired speedy resolution of his status. *Steffan v. Cheney*, 780 F. Supp. 1, 6 n.11 (D.D.C. 1991). Going on to evaluate the constitutionality of the military's gay ban, the court noted that Mr. Steffan was discharged because of his homosexual status, and not because of any homosexual conduct. *Id.* at 4-5. But it held that (1) homosexuals are not a suspect class, so regulations discriminating on the basis of homosexuality are subject only to rational-basis review, *id.* at 5-10; and (2) the military's gay ban bears a rational relation to the legitimate goals of "maintenance of discipline, morale, good order, a respected system of rank and command, ... morality and respect for the privacy interests of both officers and the enlisted," *id.* at 16, and to the goal (not raised by the Secretary) of preventing the spread of AIDS in the armed forces. *Id.* at 13-16. Mr. Steffan appeals from the entry of summary judgment.

II. Discussion

Mr. Steffan argues that the Navy constructively discharged him in violation of the equal protection component of the Fifth Amendment's Due Process Clause. The equal protection component imposes the same restrictions upon the federal Government that the Fourteenth Amendment's Equal Protection Clause places upon the States. *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975). Mr. Steffan challenges the regulations that were in effect when he resigned and when the Secretary of the Navy refused his request that he be allowed to graduate. The military's newly announced policy toward homosexuals in the armed forces was discussed at oral argument, but it is not at issue in this case. Both parties seem eager to have us resolve in advance the constitutionality of whatever guidelines the new regulations might ultimately prescribe. We decline their invitation. Mr. Steffan's appeal turns solely upon the legality of the regulations under which the military discharged him. Those regulations—and *only* those regulations—are properly before us in this case.

The regulations in effect at the relevant times were Department of Defense Directives 1332.14 and 1332.30, 32 C.F.R. Part 41, Appendix A ("DOD Directives" or "Directives"). They read, in part:

H. Homosexuality

1. Basis

a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and maintain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

b. As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts;

....

(3) A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

c. The basis for separation may include preservice, prior service, or current service conduct or statements. 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 conduct is a departure from the member's usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(d) Under 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; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

Mr. Steffan was forced to leave the Navy because of the last provision: he truthfully stated that he was a homosexual. Because of the Directives, Mr. Steffan no longer had a future in the United States Military Services, despite the Navy's prior opinion of him as one of its most promising midshipmen. Therefore, the district court held, and we agree, that Mr. Steffan's resignation, tendered after his superiors informed him of the consequences of refusing to resign, amounted to a "constructive discharge" under the DOD Directives. *Steffan v. Cheney*, 733 F. Supp. 115, 117-19 (D.D.C. 1989). Mr. Steffan resigned because he knew, and his superiors told him, that under the Directives admitting one's homosexual orientation was cause for dismissal. The Secretary denied Mr. Steffan's request to withdraw his resignation for the same reason. Therefore, the constitutionality of the Directives is the central issue in this case.

The Secretary's brief relies heavily upon the concept of "military deference" to sustain its Directives. And not without reason—for it is surely true that we accord great inde-

pendence to decisions of the military branches in their areas of expertise. For example, the Supreme Court (as well as this Court) upheld a military prohibition on servicemembers wearing yarmulkes, because of the military's professed need for uniformity of dress. *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) ("traditional outfitting ... encourages the subordination of personal preferences and identities in favor of the overall group mission."), affirming *Goldman v. Secretary of Defense*, 734 F.2d 1531 (D.C. Cir. 1984). This regulation would likely have been struck down as violative of the First Amendment in another context, but the Court deferred to the military's judgment that it had a compelling secular interest in uniformity. A strong and independent military is essential to the national security, and courts should not lightly overturn military judgments as to the best means of ensuring that security.

But contrary to the Secretary's implication, a court need not close its eyes to the dictates of the Constitution whenever the military is involved—not even when it professes a national security interest in its conduct. There is no "military exception" to the Constitution. Indeed, even when the Supreme Court has deferred to a military judgment, it has been careful to do so only within the confines of ordinary constitutional analysis. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). This is particularly true for equal protection cases. When the military fails to accord individuals the equal protection of the laws, it treads upon an area of expertise that has long been conceded to the courts. In deciding such cases, therefore, courts should not stray from the boundaries of ordinary equal protection review. For example, faced with a claim that the military discriminates against African-Americans or women, the court should not fail to apply strict or intermediate scrutiny to the military's action. See *Frontiero v. Richardson*, 411 U.S. 677 (1973). Although the concept of military deference should lead a court to grant the benefit of the doubt to the Government's opinion that a "compelling" or "important" military interest exists (at least where there is a colorable claim of such an interest), the court should not hesitate to review the case with its customary thoroughness.

In this case, however, we decline to rule on whether a "compelling" or "important" state interest is necessary. This

would depend, of course, on whether homosexuals, defined by their sexual orientation, are a "suspect" or "quasi-suspect" class accorded "heightened scrutiny" under equal protection review. This Court has only had occasion to rule on the suspect status of homosexuals as defined by homosexual conduct. *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984). In that context, we have noted the anomaly of according special protection to a class whose defining characteristic, homosexual conduct, can be made illegal. *Padula*, 822 F.2d at 103 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). This is a different case: the class at issue is defined by homosexual orientation, not conduct. The Secretary does not allege that Mr. Steffan ever engaged in homosexual conduct. Accordingly, the district court acknowledged that Mr. Steffan was discharged solely because of his status as a homosexual. *Steffan v. Cheney*, 780 F. Supp. 1, 5 (D.D.C. 1991) ("[T]his is primarily a case about the plaintiff's status as a homosexual."). As we have previously noted, "whether an agency of the federal government can discriminate against individuals merely because of sexual orientation" remains an open question in this Circuit. *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 (1988) (emphasis in original). It is that open question that we must begin to answer today in deciding the constitutionality of the military regulations applied to Mr. Steffan.

Nevertheless, we will leave unaddressed one important aspect of that question. We find it unnecessary to inquire whether homosexuals, as defined solely by orientation, comprise a "suspect" or "quasi-suspect" class. We need not decide, because we find that even if homosexuals are not accorded suspect status, the DOD Directives cannot survive constitutional scrutiny.

A. Rationality Review

Any governmental action that burdens individuals unequally but does not burden a "suspect class" need only survive

"rationality," or "rational-basis" review. Rationality review requires that the action be "rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985). This is not an exacting standard. Nor should it be: Every governmental action burdens some individuals more than others. Thus, a strict standard of review invalidating a large percentage of regulations based only on their differential impact or purpose would handcuff government in the name of equality. The Constitution neither requires nor permits courts to reach for a constitutional blunderbuss to resolve every equal protection challenge. Absent a burden upon a suspect class, the court's role is merely to ensure: (1) that the government has a legitimate purpose for distinguishing among the individuals affected; and (2) that the means chosen to effect that purpose bear some reasonable relation to it, and thus are not wholly arbitrary. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982). The government is under no obligation to justify its behavior; instead, before striking down a statute or regulation on rationality review the court must evaluate and find wanting any potentially legitimate grounds upon which to uphold the government's action. *Heller v. Doe*, 113 S. Ct. 2637, 2642-43 (1993).

Although the court has a limited role under rationality review, that role remains significant as a bulwark against unreasonable and illegitimate restrictions. When individuals are deprived of the equal protection of the laws by a governmental actor for entirely arbitrary reasons, or for reasons that rest solely upon irrational and invidious prejudices against a class of people (whether or not a "suspect class"), a court should declare the government action unconstitutional even under rational-basis review. *Cleburne*, 473 U.S. at 450. Otherwise, rationality review would be tantamount to no review at all—a result manifestly inconsistent with Supreme Court precedent. See, e.g., *Zobel*, 457 U.S. at 61-64; *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533-38 (1973).

With these principles in mind, we must decide whether Mr. Steffan's unequal treatment was rationally related to a legiti-

mate military purpose. We will begin by addressing the purposes articulated in the Secretary's brief. We will then proceed to discuss other possible rationales for excluding homosexuals from military service.

B. *Propensity to Engage in Illegal Conduct*

According to the Secretary's attorney, the primary purpose of the regulations is to exclude from the military those individuals who have a propensity to engage in unlawful conduct. The Directives define "homosexual" as "a person ... who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directives § H.1.b(1). Those "homosexual acts" are forbidden to military servicemembers, and there is no dispute that laws forbidding such conduct are constitutional. By excluding those who "engage[] in, desire[] to engage in, or intend[] to engage in homosexual acts," the military claims it is excluding those with a "propensity" to engage in forbidden conduct, and it is that conduct—and not merely a person's orientation—that has a deleterious effect upon the morale of the armed forces. Accordingly, when a servicemember "has stated that he or she is a homosexual," he is admitting that he "engages in, desires to engage in, or intends to engage in" acts that are harmful to morale, and he will be dismissed from the military, "unless there is a further finding that the member is not a homosexual"—that is, unless the member's statement turns out to be false. DOD Directives § H.1.c(2).

In this case, Mr. Steffan stated that he was a homosexual and thereafter resigned under pressure because he was led to understand that his mere homosexual orientation was sufficient to compel dismissal. His superiors never asserted that Mr. Steffan had engaged in homosexual conduct, and he never admitted to any. On its face, therefore, his discharge seems unrelated to any conduct—his statement revealed nothing more than a sexual orientation. But the Secretary argues that even if Mr. Steffan had a "homosexual orientation" he could have rebutted the presumption that he was a "homosexual" by showing that he did not "engage[] in,

desire[] to engage in, or intend[] to engage in homosexual acts." To explain how this might be, counsel for the Secretary attempted at oral argument to draw a distinction between "attraction" and "desire." A person might be attracted to members of the same sex, and thus have a "homosexual orientation," yet that person might not "desire" to engage in homosexual conduct. Counsel for the Secretary described individuals fitting this description as "celibate homosexuals." Oral argument was the first time this Court became aware of the "celibate homosexual" exception. Evidently, we are not alone: to the Secretary's knowledge, no servicemember seeking to remain in the military has ever invoked this purported defense. No reference to "celibate homosexuals," or to any supposed distinction between "attraction" and "desire," can be found in the Directives. Therefore, Mr. Steffan could hardly be expected to divine the existence of this "exception" either from the language of the Directives or from past practice. Nonetheless, we will concede for the purpose of argument that it is (at least semantically) possible that a person with a homosexual orientation might not be a "homosexual" under the Directives because that person lacked a "desire" to engage in prohibited conduct.

The Secretary's argument was designed to prove that the Directives are aimed entirely at rooting out homosexual conduct and not persons of homosexual orientation. Evidently, the Navy believes that the difference between "attraction" and "desire" determines whether a servicemember has a propensity to engage in misconduct, and it is only this misconduct, and not the mere presence of persons of homosexual orientation, that the Navy fears. The disingenuousness of this argument is plain from the face of the Directives. Even accepting the existence of the "celibate homosexual" defense, the Directives as a whole are far more concerned with status—with thoughts and desires—than with conduct. And, as we will discuss in detail below, a presumption of misconduct based solely on status is insupportable even under rationality review.

1. *The plain meaning of the Directives.*

From the face of the DOD Directives, it is plain that they primarily target homosexual *status*, and not homosexual *conduct*. Mr. Steffan was forced to resign under section H.1.c(2), which mandates dismissal of any servicemember who states that he or she is a homosexual unless there is a further finding that the servicemember is not, in fact, a homosexual. Section H.1.b(1) defines "homosexual" as someone "who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directives § H.1.b(1).

Although this definition ultimately relies upon some connection to homosexual conduct, the primary focus of the Directives is not, in fact, the conduct itself, but the "desire" to engage in that conduct. This becomes clear when one compares section H.1.c(2), under which Mr. Steffan was discharged, with section H.1.c(1). Under c(1), a servicemember who actually *engages* in homosexual acts can escape discharge if he can show that "such conduct is a departure from the member's usual and customary behavior"; that it is unlikely to recur; that it was not coercive; that it will not harm the morale of the armed forces; and (most significantly) that "[t]he member does not desire to engage in or intend to engage in homosexual acts." DOD Directives § H.1.c(1). For all intents and purposes, the servicemember must prove that he is not a "homosexual," as defined in section H.1.b(1), except that he happened to engage in homosexual conduct. If his thoughts are in accord with his conduct (if he "desires" to engage in homosexual acts), then he cannot escape dismissal.

As an example, imagine that two servicemembers engage in homosexual conduct. One is homosexual by orientation—that is, he "desires" to engage in homosexual acts. The other is heterosexual—that is, although he did engage in a homosexual act on this occasion, it was a departure from his usual practice and he does not "desire" to engage in any more such acts. Both servicemembers admit their conduct to their superiors; both truthfully represent their sexual orientations. Under section c(2), the homosexual servicemember will be discharged—period. But under c(1), the heterosexual ser-

vicemember stands a good chance of remaining in the military.

As this example illustrates, both c(1) and c(2) are aimed at the same thing: homosexual orientation. Whether the servicemember has engaged in homosexual conduct or has stated that he is a homosexual, he can escape dismissal by showing that he is a heterosexual. But he can never escape dismissal, once he truthfully admits his orientation or his conduct, if he "desires" to engage in homosexual acts. The Directives thus attack status, not conduct; and the status they are after is defined only by one's thoughts.

2. *Status predicting conduct.*

The Secretary's asserted rationale for the Directives can thus be stated as follows: a person who, by his own admission, "desires" to engage in homosexual conduct has a "propensity" to engage in repeated homosexual conduct (one assumes "repeated" conduct is the concern, because a single incidence does not automatically require dismissal under c(1)), and that person must be dismissed from the military as a prophylactic measure. As a factual matter, such a proposition—that a person who "desires" to engage in misconduct will do so—is hardly self-evident. Many of us "desire" in the abstract to do things and yet refrain from doing them simply because they are against the rules. Nonetheless, under rationality review, the Secretary need not show a perfect means-ends fit, but only a reasonable relation between the means (excluding persons of homosexual orientation) and the end (preventing homosexual conduct). *Heller*, 113 S. Ct. at 2643.

But there is no such rational relation here. Homosexual conduct is more than a practice discouraged by the military: it is grounds for discipline and sometimes (in the case of sodomy) a criminal act. Therefore, the Secretary's justification for the gay ban presumes that a certain class of persons will break the law or the rules solely because of their thoughts and desires. This is inherently unreasonable. In a recent entrapment case the Supreme Court held that even a defendant's prior *conduct* did not demonstrate a propensity to engage in the exact same actions when they were later made

illegal. "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it." *Jacobson v. United States*, 112 S. Ct. 1535, 1542 (1992).

A conclusion as to future conduct is even less justifiable when based, not on past conduct, but on mere thoughts and desires. "[A] person's inclinations and 'fantasies ... are his own and beyond the reach of government....'" *Id.* (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67, (1973)). "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (government may not forbid private ownership of obscene materials in one's own home). By firing Mr. Steffan purely for his "inclinations and fantasies," the Secretary seeks to exercise this very power over the minds of those in the military.

The "constitutional heritage" to which Justice Marshall referred in *Stanley* is evident in the evolution of the law of treason. Under a statute of Edward III, it was a crime to "compass or imagine the Death of ... the King." Statute of Treasons, 25 Edw. III. This became the crime of "constructive treason," which was enforced against supposed "compassers" and "imagers" even in the absence of any overt act (other than mere words) or any conspiracy to carry out the regicide. See, e.g., *Case of Thomas Burdet*, 79 Eng. Rep. 706 (1477); *Trial of Sir John Perrot*, 1 How. St. Tr. 1315, 1318 (1592); *Trial of Thomas Hardy*, 24 How. St. Tr. 199, 894 (1794) (all cited in *Watts v. United States*, 394 U.S. 705, 709-10 & n.1 (1969) (Douglas, J., concurring)). See generally *Cramer v. United States*, 325 U.S. 1, 8-22 (1945) (discussing the law of treason in England and America prior to the Constitutional Convention). Our Constitution expressly repudiates constructive treason. Article III, section 3 declares: "treason against the United States shall consist *only* in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same *overt Act*, or on Confession in open Court." U.S. Const.

art. III, § 3 (emphasis added). These restrictions, limiting the definition of treason to certain discrete types of conduct and requiring an "overt act" for conviction, express the constitutional principle that a person's thoughts are his own—however distasteful they may be to the state.

These considerations were present even in the cases that upheld the Smith Act's broad proscriptions of subversive activities. Despite the nation's fear of a supposed communist threat to overthrow the state, the Supreme Court never went so far as to allow individuals to be prosecuted merely for private communist sympathies. For example, in *Scales v. United States*, 367 U.S. 203, 221-24 (1961), the Court accepted as reasonable a construction of the Smith Act's "membership clause" that required for conviction proof of "active" membership in a communist-affiliated organization and a "specific intent" to overthrow the Government of the United States. Only with these limits did the Court uphold this provision, and it noted that a broader construction would render the statute's constitutionality doubtful. *Scales*, 367 U.S. at 222, 224; *Yates v. United States*, 354 U.S. 298, 318-20 (1957). Under the Court's approved construction, a connection existed between membership in the organization and an overt act of conspiracy that sufficed to bring the statute "within established, and therefore presumably constitutional, standards of criminal imputability." *Scales*, 367 U.S. at 228. Similarly, in *Dennis v. United States*, 341 U.S. 494, 499-502 (1951), the Court construed the subversive advocacy provisions of the Act as requiring both a specific conspiratorial intent to overthrow the Government of the United States at some future date, and active advocacy of (as opposed to a mere statement of support for) that position. Later, as the nation's fear of domestic communism waned, the Supreme Court reasserted its view that mere status—mere membership in a "subversive organization"—could not be sufficient grounds for a deprivation of rights, when the Court held unconstitutional a law that indiscriminately deprived Communist Party members of their passports. *Aptheker v. Secretary of State*, 378 U.S. 500, 509-11 (1964). Thus, although the subversive activity cases are not beloved of civil libertarians, even these cases manifestly stop short of allowing the kind of

presumption that the Secretary claims in this case: a presumption of misconduct from mere status, in the absence of evil intent.

In the present case, of course, Mr. Steffan has not been convicted of treason, nor subversive advocacy, nor any other crime. But he has been denied something that equally qualified and less qualified individuals have enjoyed: the privilege of serving and defending his country in the armed forces. In cases analogous to those under the Smith Act, the Supreme Court has consistently held that government may not deny a job to an individual solely because of his status as a member of a "subversive organization," absent any specific intent to further unlawful action. *Elfbrandt v. Russell*, 384 U.S. 11, 17-19 (1966); *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952). See also *Elrod v. Burns*, 427 U.S. 347 (1976) (government cannot fire non-policymaking employee solely because of political affiliation); *Branti v. Finkel*, 445 U.S. 507 (1980) (same); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (prohibition against discrimination based on political affiliation extends to employment decisions other than firing). Despite these warnings, the Secretary has accorded Mr. Steffan differential treatment solely because of the content of his thoughts, as revealed by his truthful statement that he is a homosexual. We think this is repugnant to the various common law and constitutional principles that guard the sanctity of a person's thoughts against government control, as expressed in the cases discussed above. A person's status alone, whether determined by his thoughts or by his membership in a certain group, is an inadequate basis upon which to impute misconduct. Accordingly, we find that the Secretary's "propensity" argument, which presumes that "desire" will lead to misconduct, is illegitimate as a matter of law. It cannot provide a rational basis for the DOD Directives.

C. Effect on Morale, Discipline, and Recruitment of Heterosexuals

The Secretary's argument that the Directives protect morale and discipline in the armed forces and aid recruitment of

new soldiers goes beyond preventing homosexual conduct. The Secretary apparently also fears the impact that the mere presence of persons of homosexual orientation will have on these vital military interests. The Directives state, in part:

The *presence* in the military environment of persons who ... by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The *presence* of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; ... [and] to recruit and retain members of the Military Services....

DOD Directives § H.1.a (emphasis added) (see *supra* page 7 for the full text of § H.1.a). The Secretary does not claim that homosexual servicemembers themselves will have poor morale or discipline, nor does he assert that they will intentionally sabotage the interests of the military. Instead, as the district court observed, the Secretary fears that these grievous consequences will arise because heterosexual soldiers will be appalled at the requirement that they serve alongside homosexuals. *Steffan v. Cheney*, 780 F. Supp. 1, 12-13 (D.D.C. 1991).

Under rationality review, the court must presume that the Secretary's fears are well-founded, even though we may have a higher opinion of the maturity of members of the armed forces than do their policymakers. But these fears are patently insufficient to justify a discriminatory policy, even under rationality review, because each depends solely upon the prejudice of third parties. Because third parties do not like homosexuals, the argument runs, they will not wish to serve alongside them. Forcing them to serve with homosexuals will lower their morale, impair their discipline, and discourage them from enlisting. Similar objections were voiced by opponents of President Truman's 1948 executive order requiring racial integration of the armed forces. See *Dahl v. Secretary of United States Navy*, 1993 Westlaw 328364 at 8-9 (E.D. Cal. 1993) (quoting Defense Personnel Security Research and Education Center, *Nonconforming Sexual Orien-*

tations and Military Suitability at 8-10 (1988)). But a cardinal principle of equal protection law holds that the government cannot discriminate against a certain class in order to give effect to the prejudice of others. Even if the government does not itself act out of prejudice, it cannot discriminate in an effort to avoid the effects of others' prejudice. Such discrimination plays directly into the hands of the bigots; it ratifies and encourages their prejudice.

In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Court overturned a state court's child custody order, which took the child away from her mother and delivered custody to the child's father solely because the mother had remarried to an African-American. The state court had not acted out of prejudice, but stated that its order was in the best interest of the child because of society's prejudice. Although the mother and father were equally fit parents, the state court reasoned that the child would be subject to discrimination in her community if she lived with parents of mixed races. The Supreme Court reversed. In a unanimous opinion, it held that even if the child's welfare would indeed be impaired by living with parents of mixed races, the court could not determine custody on that basis because such a decision would merely give effect to the prejudice of others—a result that the Constitution does not allow. "The Constitution cannot control such prejudices but neither can it tolerate them," the Court held. *Palmore*, 466 U.S. at 433.

Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'

Id.

Although *Palmore* involved a "suspect class" and was decided under strict scrutiny, the Court extended its reasoning to rational-basis review in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). In *Cleburne*, the city had denied a zoning permit to construct a home for the mentally disabled in a residential neighborhood. One of the

city's arguments for rejecting the permit was that neighborhood residents, angered by the presence of the home, would pose a danger to the mentally disabled residents. The Court (citing *Palmore*) rejected this argument as giving effect to irrational private biases, and held that it could not provide a rational basis for denying the permit. *Cleburne*, 473 U.S. at 448.

The *Palmore/Cleburne* principle has a parallel in First Amendment law: the "heckler's veto." The First Amendment forbids the government to silence speech based on the reaction of a hostile audience, unless there is a "clear and present danger" of grave and imminent harm. See, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Otherwise, a vocal minority (or even majority) could prevent the expression of disfavored viewpoints—a result contrary to the central purpose of the First Amendment's guarantee of free expression. See *Christian Knights of the KKK v. District of Columbia*, 919 F.2d 148, 150, 152-53 (D.C. Cir. 1990) (Edwards, J., concurring; Wald, J., dissenting); *NAACP Legal Defense & Educ. Fund, Inc. v. Devine*, 727 F.2d 1247, 1261-62 (D.C. Cir. 1984), *rev'd on other grounds sub nom. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992); Harry Kalven, Jr., *The Negro and the First Amendment* 140-160 (1965).

These constitutional principles mandate that government may not disadvantage a person on the basis of his status or his views solely for fear that others may be offended or angered by them. That is precisely the substance of the Secretary's argument in this case: that heterosexual service-members and potential recruits will be offended by the presence of homosexuals, and this will affect their morale, discipline, and enlistment. The Constitution does not allow government to subordinate a class of persons simply because others do not like them.

D. Privacy

The Secretary also argues, and the Directives state, that the presence of homosexuals in the military will invade the

privacy of heterosexual servicemen. DOD Directives § H.1.a (presence of homosexuals impairs military's ability "to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy").

This argument can mean one of two things: either (1) that homosexual servicemembers will ogle and stare at their heterosexual counterparts in the shower or other close quarters; or (2) that heterosexuals will fear such staring and feel an invasion of privacy. The argument that homosexuals will stare is very similar to the argument that they will engage in homosexual acts. Again, it equates thoughts and desires with propensity to engage in misconduct. The argument that heterosexuals will fear such staring is, in turn, a version of the argument that government should be allowed to give effect to the irrational fears and stereotypes of third parties. That argument is foreclosed by *Palmore* and *Cleburne*.

Moreover, even the Secretary's own interpretation of the Directives casts doubt upon the seriousness of his privacy rationale. Recall that counsel for the Secretary maintains that the Directives permit "celibate homosexuals," who are attracted to members of the same sex but do not "desire" homosexual conduct, to serve in the military. See *supra* pages 12-13. So, if the Navy is not concerned about heterosexual servicemembers perceiving an invasion of privacy from the presence of a "celibate homosexual," then the marginal increase in invasiveness from a homosexual who "lusts in his heart" but does not intend conduct should be minimal. Thus, even if the privacy rationale were legitimate in the abstract, these Directives plainly do not protect privacy.

E. Rationales Not Offered by the Secretary

Under the *Heller* formulation of rationality review, we must also evaluate arguments that the Secretary does not himself proffer, if they may present a rational basis for the Directives. *Heller*, 113 S. Ct. at 2642-43. The district court relied on one such rationale: preventing the spread of AIDS in the armed forces. We do not agree that this could be a

rational basis for the Directives. Homosexual *orientation* cannot spread the AIDS virus. Homosexual, or heterosexual, *conduct* can—and then only if one of the participants carries the virus. Even if AIDS happens to be more prevalent today among homosexuals than among heterosexuals, justifying the Directives on this basis requires the illegitimate assumption that persons of homosexual orientation will break the rules by engaging in homosexual conduct as members of the armed forces.

Finally, another rationale on which the Secretary does not rely in his brief, but to which the Directives allude, is homosexuals' alleged susceptibility to blackmail. DOD Directives § H.1.a (presence of homosexuals impairs military's ability "to prevent breaches of security"). But as Judge Norris has aptly pointed out, the military's policy only *increases* the risk of blackmail by making gays and lesbians remain in the closet for fear of forfeiting their careers. *Watkins v. United States Army*, 875 F.2d 699, 730-31 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 498 U.S. 957 (1990); *see also Dahl v. Secretary of United States Navy*, 1993 Westlaw 328364 at 13 (E.D. Cal. 1993) ("the only possible threat homosexuals could pose to military security (i.e., that undeclared homosexuals might be 'discovered' and blackmailed) could be obviated by the very policy that the threat allegedly justifies...."). The gay ban raises the stakes of silence enormously, and gives potential blackmailers leverage they would not otherwise have. If there is a risk to military security from homosexuality, then, the Directives themselves are to blame for it.

III. Conclusion

The DOD Directives, the military regulations in effect when the Navy compelled Joseph Steffan to resign solely because he admitted his homosexual orientation, are not rationally related to any legitimate goal. Instead, it is apparent that the Directives exclude a particular class of individuals, identifiable only by their thoughts and desires, for no other reason than the military's fear and dislike of that group.

September 13, 1993

MEMORANDUM FOR CLIFFORD M. SLOAN

FROM: JOHN NIBLOCK

SUBJECT: NOTES FROM STEFFAN V. ASPIN ORAL ARGUMENT

Following is a typed copy of my notes from the oral argument. There are some gaps, and I am not sure about the spellings of all the names, but I think this is the gist of the matters covered.

Judges: Abner J. Mikva, Chief Judge
Patricia M. Wald
Harry T. Edwards

Counsel for Appellant (Steffan): Walinski

Counsel for Appellee (U.S.): Steinmeyer

Walinski: Joe Steffan was discharged six weeks before graduation, simply because he said he was gay. Homosexual orientation is not grounds for discharge. Homosexuals are not predisposed to misconduct. They can serve and have served effectively -- and the government has admitted as much. This being the case, should the government be able to exclude homosexuals from the military simply on the basis of the prejudice and fears of others?

Wald, J.: What is your best case?

Walinski: Cleburne. Fears of the private prejudices of others are not grounds for discrimination.

Wald, J.: Are there any differences between this case and Cleburne? Aren't fears of neighbors about a group home for the retarded different from fears of gays by straights in the military, with close quarters and necessity for "going to the wall" for fellow soldiers?

Walinski: No difference between the cases. The Court is concerned with the conduct of individuals.

Individuals should not be excluded because of private prejudice.

Mikva, J.: Doesn't the government say that the presence of homosexuals in the military will interfere with good order?

Walinski: Fears of interference with "good order" is an issue only if "good reason" for those fears exists.

Mikva, J.: Isn't there a difference when the military is involved?

Walinski: Goldman is the best case on that.

Wald, J.: What if a soldier quietly stated that he was anti-Semitic?

Walinski: The army could not take any action against the soldier.

Mikva, J.: What if he said he was an anarchist?

Walinski: The army could not take action against him -- as long as he continued to do his duties. If conduct conforms . . . then soldiers should not be excluded.

Wald, J.: I can't recall that the Supreme Court has made a definitive statement on the "heckler's veto." Can the public interest be endangered by the reaction of the crowd to the speaker to such an extent as to justify silencing the speaker?

Walinski: I can't help you with a case on that.

Edwards, J.: What is the impact of the fact that there was no conduct involved in this case?

Walinski: Discrimination based on status alone is troubling. In Goldman, could a soldier be discharged for wanting to bear a yarmulke?

Wald, J.: Or for saying they want to wear a yarmulke?

Walinski: The government will be distinguishing between wanting and saying. [cites Dahl (sp?)].

Edwards, J.: What was the military's practice regarding diploma's?

Walinski: If a midshipman enters his last year, and is found unsuitable for [commission?] such as for medical reasons, he could still be graduated, but not commissioned. That was the practice -- not necessarily the policy.

Wald, J.: Can this case be won after Heller?

Walinski: Especially after Heller. Heller [established a standard of] "in reality." The government has conceded below that this is no difference between the effectiveness of gays and straights in the military.

Dronenberg was decided on an assumption that conduct was involved.

Wald, J.: And Padula also made reference to acts.

Walinski: Yes. The government's syllogism is this: if you can exclude someone for conduct, you can exclude them for predisposition to engage in conduct . . . but the "reality" is that homosexuals conform their conduct.

Wald, J.: What about this national debate we've just had -- isn't the reaction to homosexuals a "reality"? Can the court just ignore the reactions of others?

Walinski: The judges can consider the reactions of others -- but within the framework of the Constitution. [Discussion of Dahl (sp?)].

The testimony of experts [before Congress] is that status does not predict misconduct. The Per... study says the same. The D.O.D. policy memo itself says that gays have served and do serve without incident. Under the new policy, sexual orientation by itself is not a bar to service. All of this means that sexual orientation itself does not indicate a predisposition to engage in misconduct.

Edwards, J.: The new policy doesn't necessarily compel this conclusion. Maybe you're reading into it.

Walinski: Even President Clinton's speech says there is no evidence of misconduct by homosexuals . . .

Wald, J.: But the new policy says that a statement by a soldier that he is gay creates a rebuttable presumption of homosexual conduct.

Mikva, J.: In light of Heller did the District Court below appropriately consider whether AIDS was an issue in this case?

Walinski: AIDS was not properly considered. Even the government had said that fear of AIDS was not a rationale to exclude gays. The court should have deferred to the government on this.

Wald, J.: But has the government conceded that homosexual orientation indicates a predisposition to conduct?

Walinski: No . . . but conduct is different from misconduct.

Wald, J.: Could the army say, "You can be gay and say you are gay," and still forbid all homosexual acts? Even two men holding hands together? [discussion of rule prohibiting holding hands in or out of uniform].

Walinski: Yes, if it is a broadly applied policy. But I don't agree with such a policy -- and that is not the case before us.

Wald, J.: But doesn't the hypo of holding hands (o.k. while out of uniform, but not while not in uniform) inform this argument?

Walinski: I don't get your point.

Wald, J.: Can the army take any action at all based on a soldier's statement that he is homosexual?

Walinski: The statement says nothing about conduct.

Mikva, J.: But the new policy says that a statement creates a rebuttable presumption . . .

Walinski: But there is not a predisposition to misconduct.

Edwards, J.: What about a privacy rationale?

Walinski: The Government can't rely on the Cameron article is cited -- comparing gays to prostitutes and saying they can't restrain themselves. This can't be the rationale because the new policy itself says that homosexual orientation is not itself grounds for discharge.

Edwards, J.: [raises analogy of men and women together in barracks to illustrate privacy concerns].

Walinski: I disagree with your analogy to males and females together. In our society men and women are raised separated by gender.

Mikva, J.: Aren't men brought up separated by sexual preference?

Walinski: People are not generally separated by sexual preference.

Mikva, J.: But aren't there people who don't want to associate with homosexuals?

Walinski: Yes, but that is an improper prejudice.

Wald, J.: Under the regulations at the time the Steffan case arose, could Steffan's statement have been rebutted?

Walinski: Only by saying that his admission of homosexuality had been untrue.

Wald, J.: Under the regulations at the time, could have just said, "Look, I have absolutely no propensity to engage in homosexual conduct."

Walinski: No.

Wald, J.: What about a straight person who said he was gay as a joke, or engaged in an isolated gay act while drunk, could he have won under the old rules?

Walinski: Yes.

Wald, J.: But if you said you were gay, and you were not?

Edwards, J.: Evidently under the old rules, if you engaged in conduct [while drunk] you could stay in, but if you said you were gay you were out.

[Laughter]

Steinmeyer: I am appearing for the Secretary of Defense. I have four points:

1. This is a military, not a civilian case
2. Look at the posture: we are dealing with a resignation, not a discharge

3. This case falls under the old rules

4. Did the old party cater to prejudices?

First, in civilian cases we look at individual liberties first, but in military cases we look first at national security, not individual rights. Greer v. Spock shows how the Supreme Court allows prior restraints in a military context.

Mikva, J.: We acknowledge that the Court gives special deference to the military.

Steinmeyer: The Goldberg case would have been inconceivable in a civilian context.

Wald, J.: But there are some limits, even in the military context. For example, if the military imposed restrictions on Blacks. What is the principled line here for allowing prejudice?

Steinmeyer: The line here is "utmost deference."

Mikva, J.: But isn't it true that racial tension causes some disorder in the army?

Steinmeyer: The military is working hard to eliminate racial tension.

Mikva, J.: Then why is disorder caused by concern over homosexuals any different?

Steinmeyer: For several reasons. First, the clear constitutional command for racial integration, but not for homosexual conduct.

Mikva, J.: But we are talking about racial status versus homosexual status.

Steinmeyer: Under the old policy the government was concerned with conduct. Moreover, General Powell gave the best refutation of comparisons between homosexuality and race [quote from Powell, "Unlike race or gender, sexuality is not a benign trait, it is manifested in behavior . . . "].

Wald, J.: Then you assume that behavior will follow from orientation.

Steinmeyer: Yes. Under the prior policy manual, the military was concerned . . .

Mikva, J.: If Steffan had said he would be celibate?

Steinmeyer: Steffan has never claimed he would be celibate.

Wald, J.: Would Steffan have a defense under the new policy by saying he would never engage in homosexual conduct?

Steinmeyer: The presumption [that someone who says they are homosexual will engage in homosexual conduct] can be rebutted.

Wald, J.: How?

Steinmeyer: By testifying that he has never engaged in and will never engage in homosexual conduct.

Wald, J.: But how do you rebut the presumption? Other than by denying that you really are gay? Ca a proven record and an announced intent to be celibate be sufficient rebuttal?

Steinmeyer: That is a factual question for the trier of fact to decide.

Wald, J.: But what is the legal standard?

Steinmeyer: There is a limit . . .

Edwards, J.: But what if Judge Wald's hypo is accepted -- [that the soldier says he will not engage in misconduct and there is no other testimony or evidence to rebut his word].

Steinmeyer: In St. Mary's ... Academy the court said that once a plaintiff has [made a prima facie case of discrimination and the employer produces a couple of justifications] the factfinder can disbelieve the plaintiff.

Edwards, J.: But in this hypo there is not contradicting testimony.

Steinmeyer: The factfinder can choose to disbelieve the soldier if it wants to -- for any reason.

Mikva, J.: So the military would always win?

Edwards, J.: But how will the military do this with un rebutted testimony that the serviceman has not and will no engage in misconduct?

Steinmeyer: It is a similar situation to that when a soldier tries to get out of the military by claiming to be homosexual. If his testimony is un rebutted, the factfinder must decide one way or the other whether to discharge.

Wald, J.: Just like Corporal Klinger on M*A*S*H. [Laughter]. But I am worried about the standard. I didn't get this [what the standard is] from the C-Span hearings.

Steinmeyer: The directive to be issued October 1 will give more direction.

Wald, J.: What was the old policy?

Steinmeyer: The old policy said a member shall be separated if he states he is gay unless there is a finding that the member is not homosexual. [Under the old policy someone who "desires" to engage in homosexual acts is considered a homosexual]. In interpreting the old policy, Steffan gives "desires" a broad reading -- essentially encompassing all homosexual orientation -- but the military gives "desires" a narrow reading.

Wald, J.: A "statement" that one is homosexual is a separate ground for discharge . . .

Steinmeyer: It all comes back to the definition of "desires". A "celibate homosexual" has desires in a general sense, but not a specific sense. Therefore, the "celibate homosexual" does not meet the standard for homosexual. Therefore, a "celibate homosexual" could get out [from under an attempted discharge].

Wald, J.: Has anyone ever succeeded in this defense?

Steinmeyer: No, nobody has attempted this defense. Why? Because making the statement is an indication of past or present conduct.

Mikva, J.: What is the concern of the government with off-base homosexual conduct? [For example, if a servicemember has a lover in Nebraska they saw only every six months].

Steinmeyer: The Supreme Court has said that the military can be concerned with sexual misconduct off base.

Mikva, J.: But that is misconduct. What about a purely private homosexual act? What is the interest in the government in getting at that? Doesn't the "celibate homosexual" present the same problem?

Steinmeyer: No, because of the different propensity to act. The government should not take action purely against the thoughts in one's head.

Edwards, J.: What is the impact of a statement that one is homosexual. In this case [Steffan] what is the concern?

Steinmeyer: Unit cohesion.

Edwards, J.: But in this case?

Steinmeyer: If you were interviewing clerks, and at the end of an interview one of them said to you, "I am a racist," or "I am an anti-Semite" or "I am an anarchist" wouldn't that indicate a propensity to conduct that might disrupt your chambers?

Mikva, J.: But you said the "celibate homosexual" gets a pass. How can the military draw a line between the "celibate homosexual" and a gay soldier who engages in private sexual behavior off base?

Steinmeyer: But there is a greater propensity to misconduct when off-base conduct is an issue, than in the case of a "celibate homosexual." One has shown a propensity by a voluntary statement.

Wald, J.: What if a soldier says he is gay and then gives a celibacy defense? Will he not be discharged?

Steinmeyer: He will not be discharged under either the new or the old policy.

Wald, J.: By the way, many of us do hire gay clerks.

Steinmeyer: But Steffan was not discharged because he was gay. He resigned. He got the typical honorable discharge. It ended the sodomy investigation. Therefore, we'll never know if any misconduct was involved. Steffan could have raised his "desires" argument without resigning. This is not as hard a case as the Brady [kidnapping] case. Admittedly, Steffan had to make a tough choice -- but he should be held to that choice.

Wald, J.: But at the hearing the decision had been made that he could not graduate.

Steinmeyer: But the process did not run its full course. We don't know if he was discharged for thoughts or conduct.

Wald, J.: But he is saying that he was constructively discharged.

Steinmeyer: But this could not be rebutted now.(?)

Wald, J.: But, there is in principle a past and a current celibacy defense?

Steinmeyer: Yes.

(Rebuttal)

Walinski:

- Steffan wrote a letter to the Sec. of Defense asking to withdraw his resignation, and that request was denied on the grounds that he was homosexual
- the investigation into Steffan's conduct continued for three months after his termination
- Steffan was told that any appeal to his hearing would be futile and told that if he resigned there would be no scarlet letter on his record

Wald, J.: Do you agree with the government that there was a celibacy defense available?

Walinski: That is preposterous.

Wald, J.: Had Steffan been counselled before his hearing, and was the "celibacy" defense the prevailing interpretation at the time?

Walinski: He had been counselled. That was not the prevailing interpretation. The "celibacy" defense is preposterous. The government agreed just now that it is unconstitutional to take action against thoughts in one's head. The government conceded

...
this. All that Joe Steffan did was reveal the thoughts in his head.

Wald, J.: I think your argument proves too much. By saying you are gay -- if being gay is defined in the regs. as being "inclined to engage in conduct"-- aren't you admitting a propensity?

Mikva, J.: Is propensity just a thought process?

Walinski: Yes.

The government did not provide a rational basis for its restrictions on completely off-duty conduct.

Wald, J.: Would the government be able to question a soldier and engage in dialogue after the soldier makes the statement that he is gay.

Walinski: Yes, subject to protections against self-incrimination.

End