

# FOIA MARKER

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**Collection/Record Group:** Clinton Presidential Records

**Subgroup/Office of Origin:** Counsel Office

**Series/Staff Member:** Marvin Krislov

**Subseries:** Steve Neuwirth

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**OA/ID Number:** 8191

**FolderID:**

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**Folder Title:**

Gays in the Military - Benefits: HIV / DOD [Department of Defense]

**Stack:**

**S**

**Row:**

**113**

**Section:**

**3**

**Shelf:**

**9**

**Position:**

**3**

# Withdrawal/Redaction Sheet

## Clinton Library

| DOCUMENT NO.<br>AND TYPE | SUBJECT/TITLE                                                       | DATE       | RESTRICTION |
|--------------------------|---------------------------------------------------------------------|------------|-------------|
| 001. list                | Friday DOD/HIV Briefing for Women's Groups [PII] [partial] (1 page) | 03/08/1996 | b(6)        |

### COLLECTION:

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

### FOLDER TITLE:

Gays in the Military - Benefits: HIV / DOD [Department of Defense]

2015-0017-F  
sb1240

### RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

to Steve  
N.

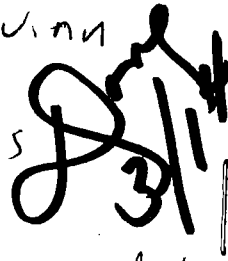
HIV/OOD

My law clerk,  
Chrysanthé, spent  
a lot of time  
on this. So if  
you need help,  
she'd be very  
good

red dot to Jack Quinn

I believe the letter is

fine -- I would omit  
appropriately. You do not need to  
read, unless you wish. Please  
advise

A handwritten signature, possibly 'J. Quinn', with the date '3/11' written below it.

**U.S. DEPARTMENT OF JUSTICE  
OFFICE OF LEGAL COUNSEL  
WASHINGTON, D.C. 20530**

---

**FACSIMILE TRANSMISSION SHEET**

**DATE:** 3.14.96

**FROM:** Marty Lederman

**OFFICE PHONE:** ( ) 514.2711

**TO:** Martin Kristlov

**OFFICE PHONE:** ( ) \_\_\_\_\_

**NUMBER OF PAGES:** 8 (NOT INCLUDING COVER SHEET)

**FACSIMILE NUMBER:** ( ) 456.1647

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**REMARKS:**

Martin -  
Please let us know ASAP if this is ok with you. There is a split of opinion at DoJ on the word "appropriately," bracketed at the bottom of p. 1. We thought it's really your call whether it seems like helpful DoJ approval or presumptuousness.

Call with any questions

Marty

**ANY QUESTIONS, PLEASE CONTACT OUR ADMINISTRATIVE OFFICE ON 514-2067  
OFFICE OF LEGAL COUNSEL FACSIMILE MACHINE NUMBER - 514-0563 (PTS - 368-0563)**

ORRIN G. HATCH, UTAH, CHAIRMAN

THURMOND, SOUTH CAROLINA  
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 RUSSELL D. FEINGOLD, WISCONSIN

# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

MARK R. DISLER, *Chief Counsel*  
 MANUS COONEY, *Staff Director and Senior Counsel*  
 CYNTHIA C. HOGAN, *Minority Chief Counsel*  
 KAREN A. ROSS, *Minority Staff Director*

February 21, 1996

The Honorable Andrew Foia  
 Assistant Attorney General  
 Office of Legislative Affairs  
 United States Department of Justice  
 Washington, D.C.

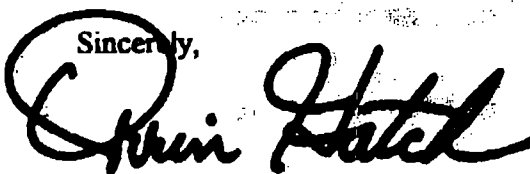
Dear Assistant Attorney General Foia:

I understand that the Justice Department has decided not to defend the constitutionality of a provision in the recently-passed Defense Department authorization bill. I would like information related to the administration's decision not to defend the requirement in the bill that carriers of the H.I.V. virus be discharged from the military. Please provide me with any Justice Department legal opinions relied upon in deciding not to defend the constitutionality of the H.I.V. provision. Also provide me with any guidelines or criteria that the Justice Department used in reaching this decision.

Please list all previous instances when the Justice Department has refused to defend the constitutionality of a statute. Please provide the guidelines used by the Justice Department to decide when it will defend the constitutionality of a statute and when it will not.

Thank you for your assistance in this matter. If you have any questions, please contact John Yoo, Majority General Counsel, at (202) 224-5225.

Sincerely,



Orrin G. Hatch  
 Chairman

96 FEB 26 19:34

OGH:jyy

DOJ-MAJ-100

March \_\_, 1996

The Honorable Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510-6275

Dear Chairman Hatch:

In your letter of February 21, 1996, you asked me to answer several questions regarding the President's directive that the Department decline to defend section 567 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 328-29 (1996), in the event of a constitutional challenge to that provision in court. Section 567 amends 10 U.S.C. § 1177 to require the Department of Defense to separate from the armed services most members of the armed forces who are HIV-positive. The President instructed the Secretary of Defense and other executive branch officials to implement section 567, but further instructed the Attorney General not to defend the constitutionality of section 567 in court.

You have asked me to provide "any Justice Department legal opinions relied upon in deciding not to defend the constitutionality of the H.I.V. provision," as well as "any guidelines or criteria that the Justice Department used in reaching this decision." Although the Department of Justice orally advised the President of the applicable legal standards to apply in evaluating the constitutionality of section 567, it did not provide the President any written advice.

After consulting with the Department of Justice, the President asked the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to assess the effect of section 567 on the needs and purposes of the armed services. As the President subsequently indicated in his Signing Statement, the Secretary and the Chairman advised the President that

the arbitrary discharge of these men and women would be both unwarranted and unwise; that such discharge is unnecessary as a matter of sound military policy; and that discharging service members deemed fit for duty would waste the Government's investment in the training of these people and would be disruptive to the military programs in which they play an integral role.

Statement by the President, 32 Weekly Comp. Pres. Doc. 260, 261 (Feb. 10, 1996) (attached).

In his Signing Statement, the President stated that he agreed with the assessment of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. Based on that assessment, the President [appropriately?] "concluded that this discriminatory provision [section 567] is unconstitutional," in that it "violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose." *Id.* The President further stated that, "[i]n accordance with

my constitutional determination, the Attorney General will decline to defend this provision." Id.<sup>1</sup> In addition, the President instructed the Secretaries of Defense, Veterans Affairs and Transportation to implement the Act in a manner that "ensure[s] that these [involuntarily discharged] service members receive the full benefits to which they are entitled." Id.

You also have asked me to list "all previous instances when the Justice Department has refused to defend the constitutionality of a statute." As far as we are aware, the most comprehensive catalogue of such cases is one previously compiled by the Senate Legal Counsel. The Senate Legal Counsel list, which is attached, indexes 45 communications and memoranda between Congress and the Department of Justice covering the years 1975-1993, detailing, inter alia, virtually all instances in that period in which either the Department has represented that it will decline to defend the constitutionality of a statute, or where the executive branch has determined that it will not enforce or implement a statute that it believes to be unconstitutional.<sup>2</sup>

As the documents compiled by the Senate Legal Counsel indicate, the Department has declared that it will decline to defend the constitutionality of a statute in a wide variety of circumstances. For example, in several of the cases listed by the Senate Legal Counsel, the Department defended the constitutionality of a statute in district court, but declined to appeal an adverse decision because of dispositive precedent, the risk of producing damaging appellate precedent, or other litigation considerations. In a smaller group of cases, such as those described in footnote 2, supra, the President or the Department of Justice declined to enforce

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<sup>1</sup> For another case in which the Department declined to defend the constitutionality of a statute as a direct result of a Presidential determination that the enactment was unconstitutional, see Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (Senate Legal Counsel document No. 38) (notifying Congress that because President Bush had determined that the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court). See also Drew S. Days III, In Search of the Solicitor General's Clients: A Drama with Many Characters, 83 Ky. L.J. 485, 489-94 (1994-95) (discussing instances in which the President has instructed the Department of Justice to adopt certain legal positions).

<sup>2</sup> In recent correspondence postdating the Senate Legal Counsel's list, the Attorney General notified the President of the Senate and the Speaker of the House (i) that the Department of Justice has had a longstanding policy to decline to enforce the abortion-related speech prohibitions in 18 U.S.C. § 1462 and related statutes because such prohibitions plainly violate the First Amendment, and (ii) that, in light of this policy, the Department will not enforce the abortion-related speech prohibition in § 1462, as amended by section 507(a)(1) of the Telecommunications Act of 1996, and will not defend the constitutionality of that prohibition in two recently filed district court cases. See Letters from Attorney General Janet Reno to President of the Senate Albert Gore, Jr. and Speaker of the House Newt Gingrich (Feb. 9, 1996) (discussing Sanger v. Reno, Civ. No. 96-0526 (E.D.N.Y.), and American Civil Liberties Union v. Reno, Civ. No. 96-963 (E.D. Pa.)). This notification was based upon, and consistent with, a similar notification to Congress made by Attorney General Civiletti in 1981. See Letter from Attorney General Benjamin R. Civiletti to President of the Senate Walter F. Mondale (Jan. 13, 1981) (Senate Legal Counsel document No. 10).



or implement a statute in the first instance, and the Department thereafter declined to defend the constitutionality of the statute in court.<sup>3</sup>

We are aware of several instances (some of which are reflected in the Senate Legal Counsel's list) analogous to the President's decision to enforce, but not defend the constitutionality of, section 567 of the Act. In these instances, the executive branch enforced a statute in the first instance but the Department of Justice challenged, or explicitly declined to defend, the constitutionality of that statute in court. Such cases include the following:

(a) United States v. Lovett, 328 U.S. 303 (1946). As required by statute, the President withheld the salaries of certain federal officials. The Solicitor General, representing the United States as defendant, nonetheless joined those officials in arguing to the courts that the statute was an unconstitutional bill of attainder. Id. at 306. The Attorney General suggested that Congress employ its own attorney to argue in support of the validity of the statute. Congress did so, id., and the Court of Claims and the Supreme Court gave Congress's counsel leave to appear as amicus curiae on behalf of the enactment. The Supreme Court ruled that the statute was an unconstitutional bill of attainder.

(b) INS v. Chadha, 462 U.S. 919 (1983). Pursuant to a provision of the Immigration and Nationality Act, the INS implemented a "one-house veto" of the House of Representatives that ordered the INS to overturn its suspension of Chadha's deportation. Id. at 928. See also Reply Brief of the Solicitor General on Behalf of the INS at 11, 14 (explaining that the INS implemented the law until the court of appeals held the law unconstitutional). Nonetheless, when Chadha petitioned for review of the INS's deportation order, the INS -- represented by the Solicitor General in the Supreme Court -- joined Chadha in arguing that the one-house veto provision was unconstitutional. 462 U.S. at 928, 939. Senate Legal Counsel intervened on behalf of the Senate and the House to defend the validity of the statute. Id. at 930 & n.5, 939-40. The Supreme Court invalidated the statutory one-house "veto" as a violation of the separation of powers.

(c) Morrison v. Olson, 487 U.S. 654 (1988). Pursuant to the Ethics in Government Act of 1978, the Attorney General requested appointment of an independent counsel to investigate possible wrongdoing of a Department official. Id. at 666-67. Despite the fact that the Department thus had "implemented the Act faithfully while it has been in effect,"<sup>4</sup> the Solicitor General nevertheless appeared in the Supreme Court on behalf of the United States as amicus curiae

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<sup>3</sup> In this category, see also, for example, Myers v. United States, 272 U.S. 52 (1926), and Humphrey's Executor v. United States, 295 U.S. 602 (1934).

<sup>4</sup> Letter from Acting Attorney General Arnold I. Burns to President of the Senate George Bush at 2 (Aug. 31, 1987) (Senate Legal Counsel document No. 26).

to argue, unsuccessfully, that the independent counsel provisions of the Act violated the constitutional separation of powers.

(d) Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). The FCC had a longstanding policy of awarding preferences in licensing to broadcast stations with a certain level of minority ownership or participation. After the FCC initiated a review of this policy, id. at 559, a statute was enacted forbidding the FCC from spending any appropriated funds to examine or change its minority ownership policies, id. at 560, 578 & n.29. The FCC "[c]ompl[ie]d with this directive": it terminated its policy review and reaffirmed license grants in accord with the minority preference policy. Id. at 560. Nonetheless, the Acting Solicitor General, appearing on behalf of the United States as amicus curiae, argued that, insofar as the statute required the FCC to continue its preference policy, it worked an unconstitutional denial of equal protection. See Brief for the United States as Amicus Curiae Supporting Petitioner in No. 89-453, at 26-27. The Acting Solicitor General authorized the FCC to appear before the Court through its own attorneys, "in order for the Court to have the benefit of the views of the administrative agency involved." Id. at 1 n.2. FCC's counsel, representing the Commission as Respondent, urged the Court to uphold the constitutionality of the FCC policy and the statutory enactment. Senate Legal Counsel also appeared on behalf of the Senate as amicus curiae to defend the constitutionality of the statute. The Court held that the statutorily mandated FCC policy was constitutional.

(e) Sinkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938 (1964). A federal statute permitted the Surgeon General to condition federal funding for hospital construction on assurance by an applying State that the hospital facilities in question did not discriminate on account of race; but the statute explicitly instructed the Surgeon General to make an exception to this requirement where discrimination was accompanied by "separate but equal" hospital facilities for all races. The Surgeon General issued a regulation that included such a "separate but equal" exception, id. at 961 & n.2 (quoting 42 C.F.R. § 53.112 (1960)), and subsequently approved federal funding to defendant hospitals, which were openly discriminatory, id. at 962-63, 966. In a private action against the hospitals, the Department intervened on behalf of the United States and joined the plaintiffs in a constitutional "attack on the congressional Act and the regulation made pursuant thereto." Id. at 962. The en banc court of appeals held that the statute and regulation violated the equal protection component of the Fifth Amendment's Due Process Clause. Id. at 969-70.

(f) Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979). In this case, a statute created a program pursuant to which the Army could sell surplus rifles at cost, but only to members of the National Rifle Association. The Army, in compliance with the statute, denied plaintiff an opportunity to purchase a rifle at

cost because he was not an NRA member. Nonetheless, the Department of Justice concluded -- and informed the court -- that the NRA membership requirement violated the equal protection component of the Fifth Amendment's Due Process Clause because the discrimination against non-NRA members "does not bear a rational relationship to any legitimate governmental interest and is therefore unconstitutional." *Id.* at 1044. The Department reached this conclusion on the basis of advice from the Army that the membership requirement "serves no valid purpose" that was not otherwise met. *Id.*<sup>5</sup> The district court afforded Congress an opportunity to "file its own defense of the statute should it choose to do so," *id.*, but Congress declined this invitation. *Id.* The NRA itself was permitted to intervene and defend the statute's constitutionality. The district court concluded that the statute was subject to strict scrutiny (because it discriminated on the basis of the fundamental right of association) and invalidated the enactment. *Id.* at 1044-49.

(g) League of Women Voters of California v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980). The Public Broadcasting Act of 1967, as amended, prohibited noncommercial television licensees from editorializing or endorsing or opposing candidates for public office. The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge.<sup>6</sup> The defendant FCC, through the Department of Justice, represented to the court that it would seek to impose sanctions on a licensee who violated the statute, if only for the purposes of "test litigation," 489 F. Supp. at 519-20; nevertheless, the FCC informed the court that it would not defend the statute's constitutionality, *id.* at 518. Senate Legal Counsel appeared in the case on behalf of the Senate as amicus curiae, *id.*, and successfully urged the trial court to dismiss the case as not ripe for adjudication in light of the unlikelihood that any enforcement action would transpire. While appeal of that decision was pending, a successor Attorney General reconsidered the Department's previous position and decided that the Department could defend the statute's constitutionality.<sup>7</sup> The court of appeals accordingly remanded the case to the district court for consideration of the merits of the case, and the Supreme Court ultimately held that the statute violated the

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<sup>5</sup> See also Letter from Assistant Attorney General Barbara Allen Babcock to President of the Senate Walter F. Mondale (May 8, 1979) (Senate Legal Counsel document No. 3).

<sup>6</sup> See Letter from Attorney General Benjamin R. Civiletti to Senate Legal Counsel Michael Davidson (Oct. 11, 1979) (Senate Legal Counsel document No. 6). See also FCC v. League of Women Voters of California, 468 U.S. 364, 370-71 & n.8 (1984).

<sup>7</sup> See Letter from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond and Ranking Minority Member Joseph R. Biden, Jr. (Apr. 6, 1981) (Senate Legal Counsel document No. 12) (reprinted as The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981)).

First Amendment. FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

It also is worth noting several other cases in which the Department of Justice argued against the constitutionality of a statute in court, either where there was no occasion for the executive branch to enforce or implement the statute prior to litigation, or where the statute did not provide for any executive branch implementation.<sup>8</sup>

Finally, you have asked me to provide "the guidelines used by the Justice Department to decide when it will defend the constitutionality of a statute and when it will not." There exist no formal guidelines that the Attorney General, the Solicitor General and other Department officials consult in making such decisions. As indicated by the cases on the Senate Legal Counsel's list, including those discussed above, different cases can raise very different issues with respect to statutes of doubtful constitutional validity; accordingly, there are a variety of factors that bear on whether the Department will defend the constitutionality of a statute.<sup>9</sup>

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<sup>8</sup> See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (Attorney General and Solicitor General, though representing the Attorney General and FEC in defending constitutionality of most parts of the Federal Election Campaign Act of 1971, also appeared for defendant Attorney General and for the United States as amicus curiae in declaratory judgment action, arguing against the constitutionality of the appointment of FEC members by members of Congress); In re Benny, 44 B.R. 581 (N.D. Cal. 1984), aff'd, 812 F.2d 1133 (9th Cir. 1987) (Department represented United States as intervenor in arguing that statute violated Appointments Clause by permitting Congress to appoint to new judgeships bankruptcy judges whose terms already had expired) (see Senate Legal Counsel document No. 15); Synar v. United States, 626 F. Supp. 1374, 1379 (D.D.C.), aff'd sub nom. Bowsher v. Synar, 478 U.S. 714 (1986) (Department of Justice appeared on behalf of defendant United States in declaratory judgment action to argue against the constitutionality of Gramm-Rudman-Hollings Act provision that gave Comptroller General a role in exercising executive functions under the Act) (see Senate Legal Counsel document No. 23); Hechinger v. Metropolitan Washington Airports Auth., 845 F. Supp. 902, 904 (D.D.C.), aff'd, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995) (Department of Justice appeared on behalf of United States as intervenor to argue that statute providing certain powers to Airport Authority violated separation of powers) (see Senate Legal Counsel document No. 37).

<sup>9</sup> From time to time, various Attorneys General, Solicitors General, and Assistant Attorneys General have attempted to articulate the various factors and rules of thumb that they consider in deciding whether to defend the constitutionality of statutes. See, e.g., Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 9-10 (1975) (Statement of Assistant Attorney General Rex Lee) (Senate Legal Counsel document No. 1); Memorandum from Assistant Attorney General John M. Harmon to Assistant Attorney General Barbara A. Babcock and Deputy Assistant Attorney General James P. Turner, re: Section 208 -- Applicable Standards for Determining Whether or Not to Defend the Constitutionality of a Congressional Enactment (Feb. 2, 1978) (Senate Legal Counsel document No. 2); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980) (Letter from Attorney General Benjamin R. Civiletti to the Chairman of the Senate Subcommittee on Limitations of Contracted and Delegated Authority). The most recent example is an article by the current Solicitor General: Days, In Search of the Solicitor General's Clients, *supra* note 1, 83 Ky. L.J. at 499-503.

I hope you find this letter helpful. Please let me know if I can be of further assistance.

Sincerely,

Andrew Fois

FYI Patsy Fleming  
Marsha Scott

Jeremy Ben Ami

In case you haven't  
seen... for your  
information use.

*[Signature]* 3/19  
3/19/96

re-sent via FAX to Patsy Fleming on 3/20

1:00 p.m.



## THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D. C. 20301-1200

HEALTH AFFAIRS

MAR 8 1996

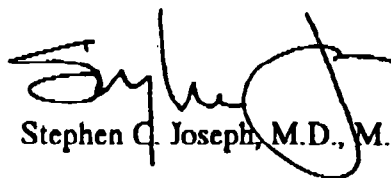
MEMORANDUM FOR SURGEON GENERAL OF THE ARMY  
SURGEON GENERAL OF THE NAVY  
SURGEON GENERAL OF THE AIR FORCE

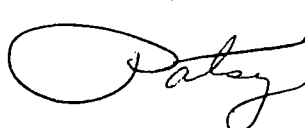
SUBJECT: Request for Medical Records or Medical Information Concerning HIV-Positive Members

A continued high degree of attention can be anticipated from Congress, the media and interested groups and individuals concerning the recently enacted requirement to separate HIV-positive members from the military.

Please communicate to all military medical treatment facility (MTF) commanders a reminder of the strong DoD policy of protecting the confidentiality of medical records and medical information. Under the Privacy Act, the release of medical or other personal information outside DoD is generally prohibited.

With respect to any request for medical or other personal records or information, if there is a basis under applicable law and regulations to consider release of protected records or information, MTF commanders should be instructed to first coordinate, through the Surgeon General, with my office. This will assure proper consultation with the Freedom of Information, Privacy and counsel offices.

  
Stephen C. Joseph, M.D., M.P.H.

92  
 Patsy Fleming 3-18-96  
3-20-96 via FAX

March 8, 1996

MEMORANDUM TO PATSY FLEMING AND MARVIN KRISLOV

FROM: MARILYN YAGER

RE: DOD HIV MEETING WITH THE WOMEN'S GROUPS

---

DATE/TIME: Friday, March 8  
3:00 pm

LOCATION: Room 180, OEOB

PURPOSE: To brief a broad array of women's groups about the issue, the status, and what needs to be done. Although some of these groups already support the repeal, they have really done anything. Others are not even familiar with the problem. We hope to get them all more focused and active on behalf of the repeal.

SUGGESTED FORMAT;

|                           |                                               |
|---------------------------|-----------------------------------------------|
| Welcome/Introductions     | Lisa Ross<br>Chief of Staff<br>Women's Office |
| Purpose of Meeting        | Marilyn Yager                                 |
| Overview of Issue/Problem | Patsy Fleming                                 |
| Legal Situation           | Marvin Krislov                                |
| Discussion                |                                               |



# Withdrawal/Redaction Marker

## Clinton Library

| DOCUMENT NO.<br>AND TYPE | SUBJECT/TITLE                                                       | DATE       | RESTRICTION |
|--------------------------|---------------------------------------------------------------------|------------|-------------|
| 001. list                | Friday DOD/HIV Briefing for Women's Groups [PII] [partial] (1 page) | 03/08/1996 | b(6)        |

### COLLECTION:

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

### FOLDER TITLE:

Guys in the Military - Benefits: HIV / DOD [Department of Defense]

2015-0017-F  
sb1240

### RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]  
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RR. Document will be reviewed upon request.

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MY

3:00

Rm. 180

3/8

List for Friday DOD/HIV Briefing for Women's Groups

Church Women United

Nancy Chupp

(b)(6) 001

American Nurses Association

Rose Iris Gonzalez

(b)(6) 001

National Association of Social Workers

James Brennan

(b)(6) 001

Woman's Legal Defense Fund

Joanne Houstead

(b)(6) 001

YWCA

Beverly Stripling

(b)(6) 001

Society for the Advancement of Women's Health Research

Phyllis Greenberger

(b)(6) 001

National Black Nurses Association

Milicent Gorham

(b)(6) 001

National Women's Health Network

Lisa Cox

(b)(6) 001

National Organization for Women

Karen Louise Johnson

(b)(6) 001

NOW LDEF

Tanya Lesley Domi

(b)(6) 001



## Facsimile Transmission

Office of the General Counsel (02)

Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420PHONE: (202) 273-6660 FTS (202) 273-6660  
FAX: (202) 273-6671 FTS (202) 273-6671

\*\*\*\*\*

DATE: 3-8-96Pages:  
COVER + 22TO: Marvin Krislov  
White House Counsel  
FAX 456-1647FROM: Mary Lou Keener  
General Counsel  
273-6660

## COMMENTS:

This proposed final rule has not been  
shared with anyone outside DVA other than  
yourself & Whit Peters. Please keep a close hold  
on distribution because the Secretary wants to  
release it to VSO's only if (and when) the  
legislative initiative fails.

Thanks.  
mt

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**DEPARTMENT OF VETERANS AFFAIRS**

**38 CFR Part 4**

**RIN 2900-AE95**

**Schedule for Rating Disabilities; Infectious Diseases, Immune Disorders  
and Nutritional Deficiencies (Systemic Conditions)**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document amends that portion of the Department of Veterans Affairs (VA) Schedule for Rating Disabilities concerning Infectious Diseases, Immune Disorders and Nutritional Deficiencies (formerly entitled Systemic Conditions). The effect of this action is to update this portion of the rating schedule to ensure that it uses current medical terminology, unambiguous criteria, and that it reflects medical advances that have occurred since the last review.

**EFFECTIVE DATE:** This amendment is effective [Insert date 30 days after date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Carol McBride, M.D., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington DC, 20420, (202) 273-7210.

**SUPPLEMENTARY INFORMATION:** As part of the first comprehensive review of its Schedule for Rating Disabilities since 1945, VA published in the Federal Register of April 30, 1993 (58 FR 26083-87) a proposal to amend the portion of the Schedule for Rating Disabilities concerning

Systemic Conditions. This document has renamed that portion of the rating schedule as Infectious Diseases, Immune Disorders and Nutritional Deficiencies. Interested persons were invited to submit written comments on or before June 29, 1993. We received comments from the Disabled American Veterans and the Paralyzed Veterans of America.

The final rule includes a diagnostic code (DC 6354) and diagnostic criteria (38 CFR 4.88a) for chronic fatigue syndrome. These provisions for chronic fatigue syndrome were added to the portion of the rating schedule then titled Systemic Conditions by a final rule published in the Federal Register of July 19, 1995 (60 FR 37012-13).

We proposed to reduce or eliminate the convalescence periods for several infectious diseases, and both commenters disagreed with those proposals.

We proposed to change the convalescent periods for Asiatic cholera (DC 6300), Bartonellosis (DC 6306), and scrub typhus (DC 6317) from six months to three months, noting that when treated in a straightforward manner, the active phase of the diseases resolves quickly, and need for convalescence is typically much less than six months. One commenter questioned what "treated in a straightforward manner" means. A second commenter felt that a shorter convalescent period for Bartonellosis is not justified because convalescence is slow, and gradual normalization of red blood cell mass begins three to six weeks after onset of disease.

The six-month periods of convalescence for these conditions were established prior to the modern antibiotic era, and were appropriate at the time. However, with modern therapy, the course of these infectious diseases has dramatically improved. Scrub typhus deaths are rare, and convalescence is short ("Harrison's Principles of Internal Medicine" 760 (Jean D. Wilson, M.D., et al., eds., 12th ed. 1991)); with specific therapy, recovery is prompt and uneventful ("The Merck Manual" 173 16th ed. 1992). Similarly, treatment for Asiatic cholera is simple, and the condition is self-limited to a few days (Harrison, 632). Bartonellosis responds rapidly to antibiotics and the red blood cells stabilize in about six weeks (Harrison, 634). While the characteristic severe anemia that occurs in an individual with Bartonellosis may require time after treatment to resolve, three months is an adequate period of convalescence in the average person. We have therefore adopted the proposed provisions, which provide for a three-month convalescent evaluation for these conditions.

The previous schedule called for a 100 percent evaluation for leprosy (DC 6302) as active disease and for one year's convalescence. We proposed to remove the one-year period of convalescence. One commenter said that a convalescent period should be retained because of the serious nature of the disease, and another questioned whether there is a medical basis for the change.

On further consideration, VA agrees that a continued 100 percent evaluation for convalescence of leprosy is warranted because the disease

is debilitating, sometimes extremely so, and a period of convalescence is warranted to allow recovery of strength. Accordingly, we have amended DC 6302 to continue the 100 percent evaluation indefinitely when the disease is no longer active. Further, the final rule amends DC 6302 to require an examination six months after the date that an examining physician has determined the leprosy is inactive. Any change in evaluation will be carried out under the provisions of § 3.105(e). This will assure that a total evaluation will continue long enough to allow recovery from the debilitating effects of the disease, and will also assure that the extent of any residual impairment is documented by examination. This method of determining the duration of the period of convalescence is consistent with the method we have used following treatment of malignancies, in previously published rules that revised other sections of the rating schedule.

The previous schedule provided a 100 percent evaluation for visceral leishmaniasis (DC 6301) as active disease and for one year's convalescence. We proposed to remove the one-year period of convalescence. One commenter questioned whether there is any medical basis for the change. Another commenter said that visceral leishmaniasis is still a debilitating disease and warrants a reasonable convalescent period.

In view of the frequency of debilitation in visceral leishmaniasis, with findings such as hepatosplenomegaly, emaciation, and pancytopenia, we have determined that a period of convalescence for DC 6302 similar to that for leprosy is appropriate. We have added a note to

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REGULATIONS MGMT (02D)

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continue the 100 percent evaluation indefinitely when treatment for active leishmaniasis has been completed, and to require an examination six months after cessation of treatment. Any change in evaluation will be carried out under the provisions of § 3.105(e). This will assure that a total evaluation will continue long enough to allow recovery from the debilitating effects of the disease, and will also assure that the extent of any residual impairment is documented by examination.

Another commenter stated that any reduction in the convalescence period exceeds the Congressional mandate that ratings be based upon "average impairment."

VA does not concur. The convalescence periods adopted in this change, as discussed above, represent, in our judgment, neither the longest nor the shortest periods that any individual patient might require for recovery, but the usual or normal periods during which an average patient, under normal circumstances, would be expected to recover from a specific condition.

Although the proposed regulation made only editorial changes to the evaluation criteria for beriberi, DC 6314, both commenters argued that the evaluation criteria at the 30 and 60 percent and 60 and 100 percent levels for beriberi were nearly identical and therefore unrealistic.

We agree and have revised the evaluation criteria for beriberi to reflect the different levels of disability with specific clinical symptoms. A 100 percent evaluation requires congestive heart failure, anasarca, or



Wernicke-Korsakoff syndrome. The 60 percent level requires cardiomegaly or peripheral neuropathy with footdrop or atrophy of thigh or calf muscles. The 30 percent level requires peripheral neuropathy with absent knee or ankle jerk and loss of sensation or weakness, fatigue, anorexia, dizziness, heaviness and stiffness of legs, headache or sleep disturbance. The revised criteria establish clear distinctions between the evaluation levels and will allow for more realistic and consistent evaluations.

We proposed to delete the previous evaluation formula for filariasis, DC 6305, which provided a 100 percent evaluation for the initial infection or severe recurrences, 60 and 30 percent evaluations for the chronic form of the disease with beginning permanent deformity or while symptomatic, and a zero percent evaluation if the disease subsided after a single attack. A second set of evaluation criteria for permanent deformities of an extremity or of the genitalia provided levels of 60 percent for "severe," 30 percent for "moderate," and 10 percent for "mild," and these evaluations for permanent deformities could be combined among themselves to cover multiple involvements. We proposed to provide a 100 percent evaluation while the disease is active, and to rate the residuals of the disease under the appropriate body system. One commenter felt that deleting the formula does not improve the schedule because the peculiarities of the disease require more detailed evaluation criteria.

We do not agree. The previous dual formula, plus the subjectivity of criteria such as "mild", may have resulted in inconsistent evaluations.

Any time the disease is active, it produces total disability, and this is reflected in the new criteria. The most equitable and consistent way to evaluate chronic residuals such as lymphadenitis or deformities of an extremity or of the genitalia, however, is to use evaluation criteria specifically intended for the body system affected. While allowing for the broadest possible scope of evaluations, this method will also assure more consistent evaluations because they will be based on more objective criteria.

A commenter from a major national veterans service organization felt that the criteria for evaluation of HIV-Related Illness, DC 6351, should be based on the 1993 revised classification system issued by the Centers for Disease Control (CDC).

Under the CDC system, the stage of the disease is classified in one of three progressive categories. The category is determined by the number of T4 cells and the presence or absence of clinical conditions associated with HIV infection. Once the condition is classified at a particular level, it may progress to a higher category, but it is never placed in a lower category, even though the specific complication or infection that warranted the classification subsequently resolves.

Based on this comment, we have revised the evaluation criteria for HIV-related illness to provide three evaluation levels, 30-, 60-, and 100-percent, based on T4 cell counts and the presence of opportunistic illnesses or other conditions associated with HIV infection. In view of the severe implications of the disease, a 30-percent level will be assigned for

all who are HIV-positive with a T4 cell count of 200 or more, whether or not they have signs, symptoms, or conditions that are attributed to HIV infection or are indicative of immunosuppression, as long as they have not developed an opportunistic illness. Those with a T4 cell count less than 200 are severely immunocompromised and will be evaluated at 60 percent as long as they have one or more signs, symptoms or conditions attributed to HIV infection or indicative of immunosuppression, but have not developed an opportunistic illness. Those with a T4 cell count less than 200 who have or have had an opportunistic illness (opportunistic infection; HIV-related neoplasm such as Kaposi's sarcoma, lymphoma, or invasive cervical carcinoma; recurrent pneumonia; HIV-related encephalopathy; or wasting syndrome due to HIV) will be evaluated at 100 percent.

We deleted the former note (1) under DC 6351 because it discussed medications, which are no longer part of the criteria. We made editorial revisions in the former note (2) (now note (1)) but no substantive changes. We added a note (2) listing the HIV-related neoplasms.

One commenter, noting that there were no zero percent evaluations proposed for any conditions other than HIV-Related Illness, suggested that we add zero percent evaluations for every diagnostic code in this section.

On October 6, 1993, VA revised its regulation addressing the issue of zero percent evaluations (38 CFR 4.31) to authorize assignment of a zero percent evaluation for any disability in the rating schedule when

minimum requirements for a compensable evaluation are not met. In general, that regulatory provision precludes the need for zero percent evaluation criteria. In the course of revising DC 6351, HIV-Related Illness, as previously discussed, we deleted the zero-percent evaluation criteria. As a result, none of the conditions in this portion of the rating schedule have specific criteria for zero percent evaluations.

The proposed rule, which would require stomatitis, persistent diarrhea and symmetrical dermatitis for a 40 percent evaluation for pellagra, DC 6315, was substantially unchanged from the previous rule. One commenter felt that the requirement of "persistent diarrhea" is too stringent. He noted that the term "persistent" is qualitative and suggested that it be replaced with a more reasonable, quantifiable alternative, but offered no alternate language for us to consider.

We agree in principle and have revised the criteria for both pellagra and avitaminosis (DC 6313), which have the same evaluation formula. While retaining the five evaluation levels, we have removed the adjectives modifying diarrhea in the 40 and 20 percent levels, and deleted the requirement for diarrhea at the 10 percent level. Without changing the essence of the criteria, this will give the rater clear instructions as to how to evaluate the disability and eliminate qualitative adjectives from the evaluation criteria.

The previous evaluation formula for brucellosis, DC 6316, provided a 100 percent evaluation for the active febrile disease with complications such as arthritis; 50, 30 and 10 percent evaluations for the chronic form

of the disease; and a Note instructing the rating specialist to rate complications separately. We proposed to revise this formula to provide a 100 percent evaluation while the disease is active, and to rate the residuals of the disease under the appropriate body system. One commenter felt that unless the previous evaluation criteria for brucellosis are retained, recurrent febrile undulation cannot be properly evaluated.

We disagree. The criteria in the previous rating schedule could lead to inconsistency in evaluations because arthritis and other complications were included as part of a 100 percent evaluation, but were also identified in the note as complications to be rated separately. By providing clear instructions to evaluate the active form of the disease as totally disabling and to rate residuals under the appropriate body system, any ambiguity is removed from this evaluation formula. The undulating or intermittent fever form of this disease is rare (Cecil, Textbook of Medicine, 19th edition, p.1727-8), but, in any event, it would be evaluated as the active incapacitating febrile stage and would be assigned a 100 percent evaluation.

We have revised the note proposed under DC 6350 (lupus erythematosus), to make it more clear that lupus erythematosus is evaluated either by combining the evaluations for residuals or by evaluating under the DC 6350 criteria, whichever method results in a higher evaluation.

VA appreciates the comments submitted in response to the proposed rule, which is now adopted as a final rule with the changes noted above.

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. The reason for this certification is that this amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

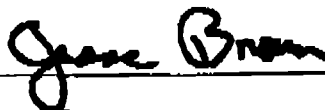
This regulatory action has been reviewed by the Office of Management and Budget under Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993.

The Catalog of Federal Domestic Assistance numbers are 64.104 and 64.109.

List of Subjects in 38 CFR Part 4

Disability benefits, Individuals with disabilities, Pensions,  
Veterans.

Approved: March 7, 1996

A handwritten signature in cursive script, appearing to read "Jesse Brown", is written over a horizontal line.

Jesse Brown,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 4 is amended as set forth below:

**PART 4--SCHEDULE FOR RATING DISABILITIES**

1. The authority citation for part 4 continues to read as follows:

**AUTHORITY: 38 U.S.C. 1155.**

**Subpart B--Disability Ratings**

2. The undesignated center heading appearing before § 4.88 is revised to read as follows:

**INFECTIOUS DISEASES, IMMUNE DISORDERS AND  
NUTRITIONAL DEFICIENCIES**

3. Section 4.88 is removed and that section is reserved.
4. Section 4.88b, including its heading, is revised to read as follows:

**§ 4.88b Schedule of ratings--infectious diseases, immune disorders and nutritional deficiencies.**



|                                                                                | Rating |
|--------------------------------------------------------------------------------|--------|
| <b>6300 Cholera, Asiatic</b>                                                   |        |
| As active disease, and for 3 months convalescence.....                         | 100    |
| Thereafter rate residuals such as renal necrosis under the appropriate system. |        |

|                                          |     |
|------------------------------------------|-----|
| <b>6301 Visceral Leishmaniasis</b>       |     |
| During treatment for active disease..... | 100 |

NOTE: A 100 percent evaluation shall continue beyond the cessation of treatment for active disease. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. Rate residuals such as liver damage or lymphadenopathy under the appropriate system.

|                                        |     |
|----------------------------------------|-----|
| <b>6302 Leprosy (Hansen's Disease)</b> |     |
| As active disease.....                 | 100 |

NOTE: A 100 percent evaluation shall continue beyond the date that an examining physician has determined that the has become inactive. Six months after the date of inactivity, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or

any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. Rate residuals such as skin lesions or peripheral neuropathy under the appropriate system.

#### 6304 Malaria

As active disease.....100

NOTE: The diagnosis of malaria depends on the identification of the malarial parasites in blood smears. If the veteran served an endemic area and presents signs and symptoms compatible with malaria, the diagnosis may be based on clinical grounds alone. Relapses must be confirmed by the presence of malarial parasites in blood smears.

Thereafter rate residuals such as liver or spleen damage under the appropriate system.

#### 6305 Lymphatic Filariasis

As active disease.....100

Thereafter rate residuals such as epididymitis or lymphangitis under the appropriate system.

#### 6306 Bartonellosis

As active disease, and for 3 months convalescence.....100

Thereafter rate residuals such as skin lesions under the appropriate system.

**6307 Plague**

As active disease.....100  
Thereafter rate residuals such as lymphadenopathy under the appropriate system.

**6308 Relapsing Fever**

As active disease.....100  
Thereafter rate residuals such as liver or spleen damage or central nervous system involvement under the appropriate system.

**6309 Rheumatic fever**

As active disease.....100  
Thereafter rate residuals such as heart damage under the appropriate system.

**6310 Syphilis, and other treponemal infections**

Rate the complications of nervous system, vascular system, eyes or ears. (See DC 7004, syphilitic heart disease, DC 8013, cerebrospinal syphilis, DC 8014, meningovascular syphilis, DC 8015, tabes dorsalis, and DC 9301, dementia associated with central nervous system syphilis.)

**6311 Tuberculosis, miliary**

As active disease.....100  
Inactive: See §§ 4.88c and 4.89

**6313 Avitaminosis**

Marked mental changes, moist dermatitis, inability to retain adequate nourishment, exhaustion, and cachexia..... 100

With all of the symptoms listed below, plus mental symptoms and impaired bodily vigor..... 60

With stomatitis, diarrhea, and symmetrical dermatitis..... 40

With stomatitis, or achlorhydria, or diarrhea..... 20

Confirmed diagnosis with nonspecific symptoms such as: decreased appetite, weight loss, abdominal discomfort, weakness, inability to concentrate and irritability..... 10

#### 6314 Beriberi

As active disease:

With congestive heart failure, anasarca, or Wernicke-Korsakoff syndrome..... 100

With cardiomegaly, or; with peripheral neuropathy with footdrop or atrophy of thigh or calf muscles..... 60

With peripheral neuropathy with absent knee or ankle jerks and loss of sensation, or; with symptoms such as weakness, fatigue, anorexia, dizziness, heaviness and stiffness of legs, headache or sleep disturbance..... 30

Thereafter rate residuals under the appropriate body system.

**6315 Pellagra**

Marked mental changes, moist dermatitis, inability to retain adequate nourishment, exhaustion, and cachexia..... 100

With all of the symptoms listed below, plus mental symptoms and impaired bodily vigor..... 60

With stomatitis, diarrhca, and symmetrical dermatitis..... 40

With stomatitis, or achlorhydrya, or diarrhea..... 20

Confirmed diagnosis with nonspecific symptoms such as: decreased appetite, weight loss, abdominal discomfort, weakness, inability to concentrate and irritability..... 10

**6316 Brucellosis**

As active disease..... 100

Thereafter rate residuals such as liver or spleen damage or meningitis under the appropriate system.

**6317 Typhus, scrub**

As active disease, and for 3 months convalescence..... 100

Thereafter rate residuals such as spleen damage or skin conditions under the appropriate system.

**6318 Melioidosis**

As active disease.....100

Thereafter rate residuals such as arthritis, lung lesions or meningitis under the appropriate system.

**6319 Lyme Disease**

As active disease.....100

Thereafter rate residuals such as arthritis under the appropriate system.

**6320 Parasitic diseases otherwise not specified**

As active disease.....100

Thereafter rate residuals such as spleen or liver damage under the appropriate system.

**6350 Lupus erythematosus, systemic (disseminated)**

Not to be combined with ratings under DC 7809

Acute, with frequent exacerbations, producing severe impairment of health.....100

Exacerbations lasting a week or more, 2 or 3 times per year.....60

Exacerbations once or twice a year or symptomatic during the past 2 years.....10

NOTE: Evaluate this condition either by combining the evaluations for residuals under the appropriate system, or by evaluating DC 6350, whichever method results in a higher evaluation.

### 6351 HIV-Related Illness

T4 cell count less than 200 with, or with a history of: opportunistic infection; HIV-related neoplasm; recurrent pneumonia; HIV-related encephalopathy; or wasting syndrome due to HIV.....100

T4 cell count less than 200, with one or more signs, symptoms, or conditions attributed to HIV infection or indicative of immunosuppression, but without, and without a history of: opportunistic infection; HIV-related neoplasm; recurrent pneumonia; HIV-related encephalopathy; or wasting syndrome due to HIV.....60

T4 cell count 200 or more, with or without any signs, symptoms, or conditions attributed to HIV infection or indicative of immunosuppression, and without a history of: opportunistic infection; HIV-related neoplasm; recurrent pneumonia; HIV-related encephalopathy; or wasting syndrome due to HIV.....30

NOTE (1): Conditions diagnosed as secondary to HIV infection may be rated separately if doing so would result in a higher overall

evaluation, but in that case the conditions may not be used to support the evaluation assigned under this diagnostic code.

NOTE (2): HIV-related neoplasms include Kaposi's sarcoma, lymphomas, and invasive cervical carcinoma.

#### 6354 Chronic Fatigue Syndrome (CFS)

Debilitating fatigue, cognitive impairments (such as inability to concentrate, forgetfulness, confusion), or a combination of other signs and symptoms:

Which are nearly constant and so severe as to restrict routine daily activities almost completely and which may occasionally preclude self-care.....100

Which are nearly constant and restrict routine daily activities to less than 50 percent of the pre-illness level, or; which wax and wane, resulting in periods of incapacitation of at least six weeks total duration per year.....60

Which are nearly constant and restrict routine daily activities to 50 to 75 percent of the pre-illness level, or; which wax and wane, resulting in periods of incapacitation of at least four but less than six weeks total duration per year.....40

Which are nearly constant and restrict routine daily activities by less than 25 percent of the pre-illness level, or; which wax



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and wane, resulting in periods of incapacitation of at least two  
but less than four weeks total duration per year.....20

Which wax and wane but result in periods of incapacitation of  
at least one but less than two weeks total duration per year,  
or, symptoms controlled by continuous medication.....10

NOTE: For the purpose of evaluating this disability, the  
condition will be considered incapacitating only while it  
requires bed rest and treatment by a physician.

THE WHITE HOUSE  
WASHINGTON

DATE: 3/14/96

TO: Jack Quinn

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

- ☒ FYI I believe the letter is fine  
I would omit appropriately
- ☐ Appropriate Action You do not need
- ☐ Let's Discuss to read unless you  
wish. Please
- ☐ Per Our Conversation Advise.
- ☐ Per Your Request Thank you
- ☐ Please Return
- ☐ Other

**U.S. DEPARTMENT OF JUSTICE  
OFFICE OF LEGAL COUNSEL  
WASHINGTON, D.C. 20530**

**FACSIMILE TRANSMISSION SHEET**

**DATE:** 3.4.96

**FROM:** Marty Lederman

**OFFICE PHONE:** ( ) 514.274

**TO:** Marvin Kristov

**OFFICE PHONE:** ( ) \_\_\_\_\_

**NUMBER OF PAGES:** 8 (NOT INCLUDING COVER SHEET)

**FACSIMILE NUMBER:** ( ) 456.1647

MARVIN

See comments.

I'd like

"appropriately"

in

JP

**REMARKS:**

Marvin -  
Please let us know ASAP if this is ok with you. There is a split of opinion at DoJ on the word "appropriately," bracketed at the bottom of p. 1. We thought it's really your call whether it seems like helpful DoJ approval or presumptuousness.

Call with any questions

Marty

ORRIN G. HATCH, UTAH, CHAIRMAN

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MANUS COONEY, Staff Director and Senior Counsel  
CYNTHIA C. HOGAN, Minority Chief Counsel  
KAREN A. ROSS, Minority Staff Director

## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

February 21, 1996

The Honorable Andrew Foiss  
Assistant Attorney General  
Office of Legislative Affairs  
United States Department of Justice  
Washington, D.C.

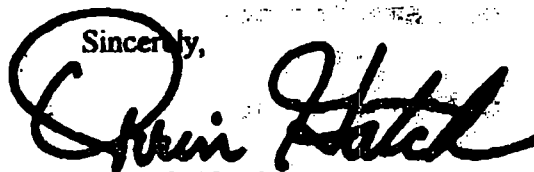
Dear Assistant Attorney General Foiss:

I understand that the Justice Department has decided not to defend the constitutionality of a provision in the recently-passed Defense Department authorization bill. I would like information related to the administration's decision not to defend the requirement in the bill that carriers of the H.I.V. virus be discharged from the military. Please provide me with any Justice Department legal opinions relied upon in deciding not to defend the constitutionality of the H.I.V. provision. Also provide me with any guidelines or criteria that the Justice Department used in reaching this decision.

Please list all previous instances when the Justice Department has refused to defend the constitutionality of a statute. Please provide the guidelines used by the Justice Department to decide when it will defend the constitutionality of a statute and when it will not.

Thank you for your assistance in this matter. If you have any questions, please contact John Yoo, Majority General Counsel, at (202) 224-5225.

Sincerely,



Orrin G. Hatch  
Chairman

96 FEB 26 A9 34

OGH:jyy

00-JAN-96

March \_\_, 1996

The Honorable Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510-6275

Dear Chairman Hatch:

In your letter of February 21, 1996, you asked me to answer several questions regarding the President's directive that the Department decline to defend section 567 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 328-29 (1996), in the event of a constitutional challenge to that provision in court. Section 567 amends 10 U.S.C. § 1177 to require the Department of Defense to separate from the armed services most members of the armed forces who are HIV-positive. The President instructed the Secretary of Defense and other executive branch officials to implement section 567, but further instructed the Attorney General not to defend the constitutionality of section 567 in court.

You have asked me to provide "any Justice Department legal opinions relied upon in deciding not to defend the constitutionality of the H.I.V. provision," as well as "any guidelines or criteria that the Justice Department used in reaching this decision." Although the Department of Justice orally advised the President of the applicable legal standards to apply in evaluating the constitutionality of section 567, it did not provide the President any written advice.

After consulting with the Department of Justice, the President asked the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to assess the effect of section 567 on the needs and purposes of the armed services. As the President subsequently indicated in his Signing Statement, the Secretary and the Chairman advised the President that

the arbitrary discharge of these men and women would be both unwarranted and unwise; that such discharge is unnecessary as a matter of sound military policy; and that discharging service members deemed fit for duty would waste the Government's investment in the training of these people and would be disruptive to the military programs in which they play an integral role.

Statement by the President, 32 Weekly Comp. Pres. Doc. 260, 261 (Feb. 10, 1996) (attached).

In his Signing Statement, the President stated that he agreed with the assessment of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. Based on that assessment, the President ~~appropriately~~ "concluded that this discriminatory provision [section 567] is unconstitutional," in that it "violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose." Id. The President further stated that, "[i]n accordance with

And, by the officials charged with the military missions of our government,

my constitutional determination, the Attorney General will decline to defend this provision." Id.<sup>1</sup> In addition, the President instructed the Secretaries of Defense, Veterans Affairs and Transportation to implement the Act in a manner that "ensure[s] that these [involuntarily discharged] service members receive the full benefits to which they are entitled." Id.

You also have asked me to list "all previous instances when the Justice Department has refused to defend the constitutionality of a statute." As far as we are aware, the most comprehensive catalogue of such cases is one previously compiled by the Senate Legal Counsel. The Senate Legal Counsel list, which is attached, indexes 45 communications and memoranda between Congress and the Department of Justice covering the years 1975-1993, detailing, inter alia, virtually all instances in that period in which either the Department has represented that it will decline to defend the constitutionality of a statute, or where the executive branch has determined that it will not enforce or implement a statute that it believes to be unconstitutional.

As the documents compiled by the Senate Legal Counsel indicate, the Department has declared that it will decline to defend the constitutionality of a statute in a wide variety of circumstances. For example, in several of the cases listed by the Senate Legal Counsel, the Department defended the constitutionality of a statute in district court, but declined to appeal an adverse decision because of dispositive precedent, the risk of producing damaging appellate precedent, or other litigation considerations. In a smaller group of cases, ~~such as those described in footnote 2, supra~~, the President or the Department of Justice declined to enforce

<sup>1</sup> For another case in which the Department declined to defend the constitutionality of a statute as a direct result of a Presidential determination that the enactment was unconstitutional, see Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (Senate Legal Counsel document No. 38) (notifying Congress that because President Bush had determined that the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court). See also Drew S. Days III, In Search of the Solicitor General's Clients: A Drama with Many Characters, 83 Ky. L.J. 485, 489-94 (1994-95) (discussing instances in which the President has instructed the Department of Justice to adopt certain legal positions).

<sup>2</sup> ~~In recent correspondence postdating the Senate Legal Counsel's list, the Attorney General notified the President of the Senate and the Speaker of the House (i) that the Department of Justice has had a longstanding policy to decline to enforce the abortion-related speech prohibitions in 18 U.S.C. § 1462 and related statutes because such prohibitions plainly violate the First Amendment, and (ii) that, in light of this policy, the Department will not enforce the abortion-related speech prohibition in § 1462, as amended by section 507(a)(1) of the Telecommunications Act of 1996, and will not defend the constitutionality of that prohibition in two recently filed district court cases. See Letters from Attorney General Janet Reno to President of the Senate Albert Gore, Jr. and Speaker of the House Newt Gingrich (Feb. 9, 1996) (discussing Sanger v. Reno, Civ. No. 96-0526 (E.D.N.Y.), and American Civil Liberties Union v. Reno, Civ. No. 96-963 (E.D. Pa.)). This notification was based upon, and consistent with, a similar notification to Congress made by Attorney General Civiletti in 1981. See Letter from Attorney General Benjamin R. Civiletti to President of the Senate Walter F. Mondale (Jan. 13, 1981) (Senate Legal Counsel document No. 10).~~

only the antecedents are necessary  
relevant, I think

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or implement a statute in the first instance, and the Department thereafter declined to defend the constitutionality of the statute in court.<sup>3</sup>

We are aware of several instances (some of which are reflected in the Senate Legal Counsel's list) analogous to the President's decision to enforce, but not defend the constitutionality of, section 567 of the Act. In these instances, the executive branch enforced a statute in the first instance but the Department of Justice challenged, or explicitly declined to defend, the constitutionality of that statute in court. Such cases include the following:

(a) United States v. Lovett, 328 U.S. 303 (1946). As required by statute, the President withheld the salaries of certain federal officials. The Solicitor General, representing the United States as defendant, nonetheless joined those officials in arguing to the courts that the statute was an unconstitutional bill of attainder. Id. at 306. The Attorney General suggested that Congress employ its own attorney to argue in support of the validity of the statute. Congress did so, id., and the Court of Claims and the Supreme Court gave Congress's counsel leave to appear as amicus curiae on behalf of the enactment. The Supreme Court ruled that the statute was an unconstitutional bill of attainder.

(b) INS v. Chadha, 462 U.S. 919 (1983). Pursuant to a provision of the Immigration and Nationality Act, the INS implemented a "one-house veto" of the House of Representatives that ordered the INS to overturn its suspension of Chadha's deportation. Id. at 928. See also Reply Brief of the Solicitor General on Behalf of the INS at 11, 14 (explaining that the INS implemented the law until the court of appeals held the law unconstitutional). Nonetheless, when Chadha petitioned for review of the INS's deportation order, the INS -- represented by the Solicitor General in the Supreme Court -- joined Chadha in arguing that the one-house veto provision was unconstitutional. 462 U.S. at 928, 939. Senate Legal Counsel intervened on behalf of the Senate and the House to defend the validity of the statute. Id. at 930 & n.5, 939-40. The Supreme Court invalidated the statutory one-house "veto" as a violation of the separation of powers.

(c) Morrison v. Olson, 487 U.S. 654 (1988). Pursuant to the Ethics in Government Act of 1978, the Attorney General requested appointment of an independent counsel to investigate possible wrongdoing of a Department official. Id. at 666-67. Despite the fact that the Department thus had "implemented the Act faithfully while it has been in effect,"<sup>4</sup> the Solicitor General nevertheless appeared in the Supreme Court on behalf of the United States as amicus curiae

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<sup>3</sup> In this category, see also, for example, Myers v. United States, 272 U.S. 52 (1926), and Humphrey's Executor v. United States, 295 U.S. 602 (1934).

<sup>4</sup> Letter from Acting Attorney General Arnold I. Burns to President of the Senate George Bush at 2 (Aug. 31, 1987) (Senate Legal Counsel document No. 26).

to argue, unsuccessfully, that the independent counsel provisions of the Act violated the constitutional separation of powers.

(d) Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). The FCC had a longstanding policy of awarding preferences in licensing to broadcast stations with a certain level of minority ownership or participation. After the FCC initiated a review of this policy, id. at 559, a statute was enacted forbidding the FCC from spending any appropriated funds to examine or change its minority ownership policies, id. at 560, 578 & n.29. The FCC "[c]ompl[ied] with this directive": it terminated its policy review and reaffirmed license grants in accord with the minority preference policy. Id. at 560. Nonetheless, the Acting Solicitor General, appearing on behalf of the United States as amicus curiae, argued that, insofar as the statute required the FCC to continue its preference policy, it worked an unconstitutional denial of equal protection. See Brief for the United States as Amicus Curiae Supporting Petitioner in No. 89-453, at 26-27. The Acting Solicitor General authorized the FCC to appear before the Court through its own attorneys, "in order for the Court to have the benefit of the views of the administrative agency involved." Id. at 1 n.2. FCC's counsel, representing the Commission as Respondent, urged the Court to uphold the constitutionality of the FCC policy and the statutory enactment. Senate Legal Counsel also appeared on behalf of the Senate as amicus curiae to defend the constitutionality of the statute. The Court held that the statutorily mandated FCC policy was constitutional.

(e) Sinkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938 (1964). A federal statute permitted the Surgeon General to condition federal funding for hospital construction on assurance by an applying State that the hospital facilities in question did not discriminate on account of race; but the statute explicitly instructed the Surgeon General to make an exception to this requirement where discrimination was accompanied by "separate but equal" hospital facilities for all races. The Surgeon General issued a regulation that included such a "separate but equal" exception, id. at 961 & n.2 (quoting 42 C.F.R. § 53.112 (1960)), and subsequently approved federal funding to defendant hospitals, which were openly discriminatory, id. at 962-63, 966. In a private action against the hospitals, the Department intervened on behalf of the United States and joined the plaintiffs in a constitutional "attack on the congressional Act and the regulation made pursuant thereto." Id. at 962. The en banc court of appeals held that the statute and regulation violated the equal protection component of the Fifth Amendment's Due Process Clause. Id. at 969-70.

(f) Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979). In this case, a statute created a program pursuant to which the Army could sell surplus rifles at cost, but only to members of the National Rifle Association. The Army, in compliance with the statute, denied plaintiff an opportunity to purchase a rifle at



cost because he was not an NRA member. Nonetheless, the Department of Justice concluded -- and informed the court -- that the NRA membership requirement violated the equal protection component of the Fifth Amendment's Due Process Clause because the discrimination against non-NRA members "does not bear a rational relationship to any legitimate governmental interest and is therefore unconstitutional." Id. at 1044. The Department reached this conclusion on the basis of advice from the Army that the membership requirement "serves no valid purpose" that was not otherwise met. Id.<sup>5</sup> The district court afforded Congress an opportunity to "file its own defense of the statute should it choose to do so," id., but Congress declined this invitation. Id. The NRA itself was permitted to intervene and defend the statute's constitutionality. The district court concluded that the statute was subject to strict scrutiny (because it discriminated on the basis of the fundamental right of association) and invalidated the enactment. Id. at 1044-49.

(g) League of Women Voters of California v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980). The Public Broadcasting Act of 1967, as amended, prohibited noncommercial television licensees from editorializing or endorsing or opposing candidates for public office. The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge.<sup>6</sup> The defendant FCC, through the Department of Justice, represented to the court that it would seek to impose sanctions on a licensee who violated the statute, if only for the purposes of "test litigation," 489 F. Supp. at 519-20; nevertheless, the FCC informed the court that it would not defend the statute's constitutionality, id. at 518. Senate Legal Counsel appeared in the case on behalf of the Senate as amicus curiae, id., and successfully urged the trial court to dismiss the case as not ripe for adjudication in light of the unlikelihood that any enforcement action would transpire. While appeal of that decision was pending, a successor Attorney General reconsidered the Department's previous position and decided that the Department could defend the statute's constitutionality.<sup>7</sup> The court of appeals accordingly remanded the case to the district court for consideration of the merits of the case, and the Supreme Court ultimately held that the statute violated the

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<sup>5</sup> See also Letter from Assistant Attorney General Barbara Allen Babcock to President of the Senate Walter F. Mondale (May 8, 1979) (Senate Legal Counsel document No. 3).

<sup>6</sup> See Letter from Attorney General Benjamin R. Civiletti to Senate Legal Counsel Michael Davidson (Oct. 11, 1979) (Senate Legal Counsel document No. 6). See also FCC v. League of Women Voters of California, 468 U.S. 364, 370-71 & n.8 (1984).

<sup>7</sup> See Letter from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond and Ranking Minority Member Joseph R. Biden, Jr. (Apr. 6, 1981) (Senate Legal Counsel document No. 12) (reprinted as The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981)).

First Amendment. FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

It also is worth noting several other cases in which the Department of Justice argued against the constitutionality of a statute in court, either where there was no occasion for the executive branch to enforce or implement the statute prior to litigation, or where the statute did not provide for any executive branch implementation.<sup>8</sup>

Finally, you have asked me to provide "the guidelines used by the Justice Department to decide when it will defend the constitutionality of a statute and when it will not." ~~There exist no formal guidelines that the Attorney General, the Solicitor General and other Department officials consult in making such decisions.~~ As indicated by the cases on the Senate Legal Counsel's list, including those discussed above, different cases can raise very different issues with respect to statutes of doubtful constitutional validity; accordingly, there are a variety of factors that bear on whether the Department will defend the constitutionality of a statute.<sup>9</sup>

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<sup>8</sup> See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (Attorney General and Solicitor General, though representing the Attorney General and FEC in defending constitutionality of most parts of the Federal Election Campaign Act of 1971, also appeared for defendant Attorney General and for the United States as amicus curiae in declaratory judgment action, arguing against the constitutionality of the appointment of FEC members by members of Congress); In re Benny, 44 B.R. 581 (N.D. Cal. 1984), aff'd, 812 F.2d 1133 (9th Cir. 1987) (Department represented United States as intervenor in arguing that statute violated Appointments Clause by permitting Congress to appoint to new judgeships bankruptcy judges whose terms already had expired) (see Senate Legal Counsel document No. 15); Synar v. United States, 626 F. Supp. 1374, 1379 (D.D.C.), aff'd sub nom. Bowsher v. Synar, 478 U.S. 714 (1986) (Department of Justice appeared on behalf of defendant United States in declaratory judgment action to argue against the constitutionality of Gramm-Rudman-Hollings Act provision that gave Comptroller General a role in exercising executive functions under the Act) (see Senate Legal Counsel document No. 23); Hechinger v. Metropolitan Washington Airports Auth., 845 F. Supp. 902, 904 (D.D.C.), aff'd, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995) (Department of Justice appeared on behalf of United States as intervenor to argue that statute providing certain powers to Airport Authority violated separation of powers) (see Senate Legal Counsel document No. 37).

<sup>9</sup> From time to time, various Attorneys General, Solicitors General, and Assistant Attorneys General have attempted to articulate the various factors and rules of thumb that they consider in deciding whether to defend the constitutionality of statutes. See, e.g., Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 9-10 (1975) (Statement of Assistant Attorney General Rex Lee) (Senate Legal Counsel document No. 1); Memorandum from Assistant Attorney General John M. Harmon to Assistant Attorney General Barbara A. Babcock and Deputy Assistant Attorney General James P. Turner, re: Section 208 -- Applicable Standards for Determining Whether or Not to Defend the Constitutionality of a Congressional Enactment (Feb. 2, 1978) (Senate Legal Counsel document No. 2); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980) (Letter from Attorney General Benjamin R. Civiletti to the Chairman of the Senate Subcommittee on Limitations of Contracted and Delegated Authority). The most recent example is an article by the current Solicitor General: Days, In Search of the Solicitor General's Clients, *supra* note 1, 83 Ky. L.J. at 499-503.

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I hope you find this letter helpful. Please let me know if I can be of further assistance.

Sincerely,

Andrew Fois