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[Gays in the Military]

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THE WHITE HOUSE

WASHINGTON

November 17, 1993

*I want to be
consulted before
final decision
is made to do
is made*

MEMORANDUM FOR THE PRESIDENT

FROM:

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

SUBJECT:

New gays-in-the-military decision

Overview

As you know, the U.S. Court of Appeals for the D.C. Circuit yesterday issued a major gays-in-the-military decision. In a decision by Chief Judge Mikva, the court held that adverse actions taken against a standout midshipman, on the basis of his statements of homosexuality, are unconstitutional.

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Steffan filed suit, claiming that his constitutional right to equal protection had been violated. The D.C. Circuit agreed. It found that the military regulations in effect at the time were "not rationally related to any legitimate goal" and rejected each of the military's stated reasons for the former policy. The court concluded:

(1) the military's former policy addresses status, not conduct;

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*This is in
President
D. Steffan*

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It should be noted that the court's panel in this case -- Mikva, Patricia Wald, and Harry Edwards -- is quite liberal and may not reflect the views of the entire D.C. Circuit.

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Talking points

Comments on the Steffan decision should be as limited as possible. It would be appropriate simply to say that we are reviewing the Steffan decision and that we have no further comment on it at this time. You may also wish to say that, in our system of government, courts are always the ultimate judges of constitutional challenges to government policies.

WHITE HOUSE STAFFING MEMORANDUM

DATE: 02/16/95 ACTION/CONCURRENCE/COMMENT DUE BY: 8:15 AM 02/17SUBJECT: PRESIDENTIAL REMARKS: J. WILLIAM FULBRIGHT MEMORIAL SERVICE
ON 02/17

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	QUINN	☐	☐
PANETTA	☒	☐	RASCO	☐	☐
McLARTY	☒	☐	RUBIN	☐	☐
ICKES	☒	☐	SEGAL	☐	☐
BOWLES	☒	☐	STEPHANOPOULOS	☒	☐
RIVLIN	☐	☐	TYSON	☐	☐
EMANUEL	☐	☐	WEBSTER	☐	☐
GEARAN	☒	☐	WILLIAMS	☐	☐
GIBBONS	☐	☐	<i>Curry</i>	☒	☐
GRIFFIN	☐	☐		☐	☐
HALE	☒	☐		☐	☐
HERMAN	☐	☐		☐	☐
LAKE	☐	☐		☐	☐
LINDSEY	☒	☐		☐	☐
MIKVA	☒	☐		☐	☐
McCURRY	☒	☐		☐	☐
McGINTY	☐	☐		☐	☐

REMARKS:

RESPONSE: *Comments to Baer by 8:15 am*JOHN D. PODESTA
Assistant to the President
and Staff Secretary
Ext. 2702

2/16/95, 7:30p.m.

President William Jefferson Clinton
Remarks at the Funeral of J. William Fulbright
Washington Cathedral
February 17, 1995

In the words of the passage we read moments ago, let us now praise this famous man. J. William Fulbright changed forever the lives of each of us here, of men and women across our land and throughout the world.

To his beloved wife Harriet, to his daughters and to hers, to their husbands and to his five grandchildren: I say on behalf of all Americans, you are in our thoughts and our prayers, as J. William Fulbright will be for all our days.

But, as we remember him, we must keep in mind the title Harriet chose for this service: We are here to celebrate and give thanks for the life of James William Fulbright. Those who loved him knew how much he disliked austere funerals. He would want us to leave this place not in sorrow, but in hope; not with a sense of loss but with a sense of the God-given possibility that lives in every one of us to carry on his work.

I want to begin where he began, where many of us here had important beginnings -- in Fayetteville, the seat of the University of Arkansas. There, he was the President of that great university before he went to Congress.

No matter how high he climbed, the essence of William Fulbright was the essence of his work there: A public educator -- a teacher -- in public life. He was my teacher, my mentor, one of the people who inspired in me the spirit of public service. I worked in his 1968 reelection campaign. But long before I ever knew him, he touched my life, much as he touched the lives of generation after generation of young people in Arkansas.

It is almost impossible to capture for you his impact on those of us who grew up in that small state during the 40s, 50s and 60s. Others scorned us, called us backwards. But we knew that we had a Senator in Washington who doubled the IQ of any room he walked into. That gave us hope that we, too, could amount to something.

He taught us that education could lift us up. And he made us believe that our obligation was to build our minds and use them, as he did, to engage in the action and passion of our times.

He believed in the power of reason over the power of fear and that we should always try to see the other side of an argument. I remember working for him as a young man in that campaign, driving him around the state. Sometimes I would get exasperated arguing with him, because, of course, I could never win. One day, we were in a town, and I started to drive back out

of town the same way I had driven in. I would have taken us 100 miles in the wrong direction -- except, of course, I received the benefit of his courtly correction.

His lesson to those of us who worked for him was his lesson to America and to the world: That mankind's best hope -- America's best hope -- was in education. Not just in the sense of good schooling. But in its largest sense: that knowledge inspires understanding and respect across every kind of divide imaginable. Of geography. Of race. Of religion. Of ideology. He knew that we will have -- we should have -- our differences. But he taught that deep divisions were vastly less important than the common bonds of humanity that can unite us if only we will take our blinders off. In the end, democracy can only prevail if we have the courage to seek out and face the truth -- together.

His generation had to put those lessons to the test in ways that no Americans ever had before. They had saved the world for freedom in World War II. But, afterwards, they were left to defend their hard-won freedom against a very different kind of enemy -- the tyranny of Communism. And they had to meet that test under constraints the world had never seen, in the face of the awesome power of the atom. As Senator Fulbright once wrote: "For the first time in human history, a living generation has the power of veto over the next."

More than any American of his generation, William Fulbright gave America the strength and the vision to win the Cold War. Some in his generation wanted to put the blinders back on, whether that meant blind anger or blind retreat. He sought another way. His teaching was simple yet powerful: Understanding between all peoples is the best inoculation against war. For he knew the lesson of Ecclesiastes: "Wisdom is better than weapons of war. But one sinner destroys much good."

He wanted to bring the power of tolerance and understanding to the lives of as many individuals as possible. Others gave in to their fears and doubts about America's strength. But he never lost his deep faith that democracy and freedom will triumph, not just by the use of force, but by the force of example.

Time and again, for 32 years -- as a Congressman, a Senator and the Chairman of the Senate Foreign Relations Committee -- he backed up his belief with action: Leading the way to found the United Nations. Taking a lonely stand against Joseph McCarthy. Expanding the reach of our culture as the driving force behind the Kennedy Center. And, of course, in a cold dawn only two weeks after Hiroshima, calling for the creation of the international exchange program that will live as his most profound legacy.

The Fulbright Scholars program is the perfect reflection of his faith: Different kinds of people learning side by side, building what he called: "a capacity for empathy, a distaste for killing other men, and an inclination for peace." Next year, we

will celebrate the 50th anniversary of that program. Just think about its impact: Its alumni include Nobel Prize winners, members of Congress, leaders for peace and freedom the world over. And many not-so-famous people who went home to live out the faith of Senator Fulbright. More than 120,000 people from other countries have come to the United States and more than 90,000 Americans have gone overseas. No matter what their native tongue, all of them are now known by the same name: Fulbrights.

He tried to teach the same lesson to his own nation, at a time of deep division -- even if it was not always ready to listen. The "Great Dissenter," as he was called, knew very well that conflict is the catalyst of progress in a democracy. But the lesson of his life was that tension must be tempered by civility -- especially in a democracy. You should, as he did, fight hard for what you believe in. You can, as he did, even challenge a President if that is the course of your convictions. But you must, as he did, do it with respect, without anger.

That is a good prescription for our times, when we see so much anger and frustration all around. We must learn to lower not our ideals, but our voices. To use our words not to tear down and divide, but to build up and unify. We will disagree. Disagreement is at the heart of democracy. But we must learn again to do it without the bitterness that tears at the soul of democracy.

We see all around us reasons for hope. When, after hundreds of years, the Catholics and Protestants in Northern Ireland decide it may be time to stop the killing; when, after 27 years, prisoner Nelson Mandela walks free and becomes President Nelson Mandela; when we see the miracle of understanding take hold in the Middle East. That is the power of our example. That is the light William Fulbright sought to shine throughout the world.

And that is the great legacy of a great teacher. As Henry Adams said, a teacher affects eternity. He never knows where his influence stops. Senator Fulbright's powerful lesson is forever captured on his statue in the Fayetteville town square: "In the beauty of these gardens, we honor the beauty of his dream: peace among nations, and free exchange of knowledge and ideas across the earth."

Now it falls to our generation -- the inheritors of the peace he helped to build -- to carry on his dream. Around the world. And here, at home, in the country he so dearly loved.

And so, on behalf of a grateful nation and a world, both stronger for his life, we bid farewell to James William Fulbright.

file: Gays in the Military
VBR

THE WHITE HOUSE

WASHINGTON

November 17, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: New gays-in-the-military decision

Overview

As you know, the U.S. Court of Appeals for the D.C. Circuit yesterday issued a major gays-in-the-military decision. In a decision by Chief Judge Mikva, the court held that adverse actions taken against a standout midshipman, on the basis of his statements of homosexuality, are unconstitutional.

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Joseph Steffan was an exceptional midshipman at the United States Naval Academy -- a recipient of numerous honors, a Battalion Commander (one of the Academy's ten highest ranking midshipmen), and a soloist singing the National Anthem at the Army-Navy game in his junior and senior years. In February 1987, during Steffan's senior year, the Naval Intelligence Service (NIS) received a report that Steffan had stated to another student that he was gay. Steffan was subsequently asked if he was a homosexual and twice answered, "Yes, sir." On the basis of these statements, academy officials instituted discharge proceedings, changed Steffan's ratings, and advised him to resign. Six weeks before his scheduled graduation from the Academy, he resigned.

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It should be noted that the court's panel in this case -- Mikva, Patricia Wald, and Harry Edwards -- is quite liberal and may not reflect the views of the entire D.C. Circuit.

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SUBJECT: NEW GAYS-IN-THE-MILITARY DECISION

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☒	PASTER	☐	☐
McLARTY	☐	☒	RASCO	☐	☒
NEEL	☐	☐	RUBIN	☐	☐
PANETTA	☐	☐	SEGAL	☐	☐
BAGGETT	☐	☐	SEIDMAN	☐	☐
EMANUEL	☐	☐	STEPHANOPOULOS	☐	☒
GEARAN	☐	☒	TYSON	☐	☐
GERGEN	☐	☒	VARNEY	☐	☐
GIBBONS	☐	☐	WATKINS	☐	☐
HALE	☐	☐	WILLIAMS	☐	☐
HERMAN	☐	☐		☐	☐
LAKE	☐	☐		☐	☐
LINDSEY	☐	☒		☐	☐
McGINTY	☐	☐		☐	☐
MYERS	☐	☒		☐	☐
NUSSBAUM	☐	☐		☐	☐

REMARKS: The attached has been forwarded to the President.

RESPONSE:

JOHN D. PODESTA
Assistant to the President
and Staff Secretary
Ext. 2702

THE WHITE HOUSE

WASHINGTON

November 17, 1993

17 P6:05

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ASSOCIATE COUNSEL TO THE PRESIDENT

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U.S. Department of Justice
Office of the Solicitor General
10th & Constitution Avenue, NW
Washington, DC 20530

File: GAYS IN THE
MILITARY

FAX TRANSMISSION COVER PAGE

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DATE: 10/25 TIME: _____

TO: Cliff Glean

TELEPHONE: 456-7900

DESTINATION FAX NO.: FIS: 456-2146 or 456-1647

FROM: Rick Securon

OFFICE OF THE SOLICITOR GENERAL

ROOM:

TELEPHONE: 514-3344

FAX: 307-4613 or FTS 8-367-4613

NUMBER OF PAGES: 20 (EXCLUDING COVER PAGE)

NOTE: IF YOU DO NOT RECEIVE THE TOTAL NUMBER
OF PAGES INDICATED, PLEASE CALL THE
SENDING INDIVIDUAL LISTED ABOVE ASAP.

DECLARATION OF EDWIN DORN,
ASSISTANT SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS

I, Edwin Dorn, declare and state as follows:

1. I am the Assistant Secretary of Defense for Personnel and Readiness. In this capacity, I am responsible for personnel and manpower policies of the Department of Defense. In particular, I am responsible for those policies concerning recruiting, retention, and separation of military personnel.

2. I appeared as the representative of the Secretary of Defense and the Secretary of the Navy at a show-cause hearing held on September 30, 1993 before Judge Terry H. Hatter of the United States District Court for the Central District of California in the case of Meinhold v. Department of Defense, CV 92-6044. The purpose of that hearing was to determine whether the Secretary of Defense, the Secretary of the Navy, and the Commanding Officer of the Naval Air Station at Moffet Field should be held in contempt for allegedly violating the January 29, 1993 order issued by Judge Hatter in this case. Judge Hatter did not hold any of those officials in contempt, but instead amended the January 29 order.

3. I have examined the amended order and judgment issued by Judge Hatter on September 30. Part of the order prohibits the Department of Defense "and its agents, servants, employees and those persons in active participation and concert with it * * * from creating or maintaining, or permitting any person or entity to create or maintain, any record or file, including, but not limited to, lists, evaluations, reports, classifications, and designations, whether official or unofficial, at any level of command, of any member of the armed forces of the United States, which is based on sexual orientation in the absence of proven sexual conduct -- if such conduct is proven to interfere with the military mission of the armed forces of the United States."

4. This part of the order requires the Department of Defense to review all of its own files, as well as the official and unofficial files of its "agents, servants, employees, and those persons in active participation and concert with it," and identify any records that are "based on sexual orientation." It is impossible to overstate the magnitude of the task imposed by this part of the order.

5. First, because the order encompasses all records concerning "any member of the armed forces of the United States," it requires a review of the files and records on some 5.1 million servicemembers (including 1.7 million active duty members, 1.8 million reserve members, and 1.6 million retired members).

6. Second, the records of the Department and the military services are not located in one central location or contained in

a comprehensive computer data-base. They are literally located wherever the armed forces are located, from the Pentagon to the smallest military outposts around the world. The types of records that could possibly refer to sexual orientation include not only personnel records (maintained at the unit, headquarters, and service levels), but also medical, security, investigative, training, education, counseling, pastoral, applicant, legal, and judicial records. Indeed, because the order applies to both "official" and "unofficial" records, it is difficult even to identify all of the records that may be affected.

7. Third, because the order applies not only to the Department and the services, but also to any of the Department's "agents, servants, employees, and those persons in active participation and concert with it," it appears to require the Department to review all of the files and records maintained by a vast number of individuals and entities that work for or with the Department -- such as defense contractors, teachers at schools for military dependents, etc.

might be read

8. As a result of all of these factors, compliance with the court's order requires the expenditure of an extraordinary amount of time, manpower, and financial resources.

9. Because the order prohibits the Department and other affected entities from "maintain[ing]" any records "based on sexual orientation," literal compliance appears to require not only the search for and identification of such records, but also their destruction. Such records, however, are vital to the proper management and deployment of military personnel. Their destruction will therefore have an immediate detrimental effect on the Armed Forces. Furthermore, once such documents are destroyed, there would be no way to retrieve them if the district court's order is reversed.

10. The district court's order also bars the Department and other affected entities from "discharging, changing enlistment status or denying enlistment" and "taking * * * or permitting * * * any action whatsoever, against gay or lesbian service members, or prospective service members, that in any way affects, impedes, interferes with, or influences their military status, advancement, evaluation, duty assignment, duty location, promotion, enlistment or reenlistment based upon their sexual orientation in the absence of proven sexual conduct -- if such conduct is proven to interfere with the military mission of the armed forces of the United States."

11. This part of the order is already having an immediate impact on the armed forces. Each year, a number of service members are separated from the armed forces under the Department's policy on homosexuality. Since 1989, over 3500 service members have been separated under that policy.

Currently, there are at least 115 such separation cases pending, which have now been held in abeyance as a result of the district court's injunction.

12. In addition, as a result of the district court's injunction, the Department must now admit applicants for enlistment who would otherwise be subject to discharge -- such as persons who, by their own volunteered statements, demonstrate a propensity or intent to engage in homosexual acts. If the district court's injunction is reversed, such persons will be subject to discharge. Yet, in the interim, the armed forces will have expended resources on the accession and training of such individuals, and the persons admitted pursuant will have disrupted their lives for the period in which the injunction remains in place.

13. Finally, because the order prohibits the Department and other affected entities from taking or permitting "any action whatsoever" based on sexual orientation in the absence of proven sexual conduct, literal compliance will tie the hands of commanders in the field and prevent them from taking measures that they feel are necessary to the effectiveness and readiness of our armed forces. For example, the order appears to prohibit the commander of a unit located in a zone of hostilities from temporarily transferring to another unit a service member who, by his statements, has demonstrated a propensity to engage in homosexual acts and has thereby caused turmoil in the unit and jeopardized its preparedness. Under the order, the commander could not take protective measures unless he could prove that the member engaged in specific disruptive sexual conduct. Literal compliance therefore could pose an immediate threat to the safety and readiness of our armed forces.

Pursuant to 28 U.S.C. sec. 1746, I declare that this statement is true and correct to the best of my knowledge and belief.

Executed on October 15, 1993, at Washington D.C.

2



OFFICE OF THE SECRETARY OF DEFENSE

WASHINGTON, DC 20301-1000

MEMORANDUM FOR THE SECRETARY OF DEFENSE

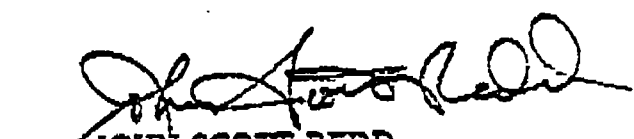
SUBJECT: Recommended DoD Homosexual Policy

Reference: OSD Working Group memorandum, 8 June 1993, "Recommended DoD Homosexual Policy Outline"

On 8 June, we forwarded a recommended policy outline (reference) describing, in our judgement, the only option that complies with the President's direction to end discrimination while maintaining high standards of combat effectiveness and unit cohesion. The attachment provides a more in-depth explanation of the policy detailing the process and explaining the findings and conclusions that led to our recommendation.



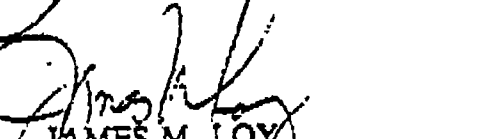
JOHN P. OTJEN
Major General, USA
Member, OSD Working Group



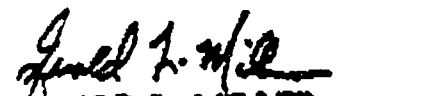
JOHN SCOTT REDD
Rear Admiral, USN
Member, OSD Working Group



WILLIAM B. DAVITTE
Major General, USAF
Member, OSD Working Group



JAMES M. LOY
Rear Admiral, USCG
Member, OSD Working Group



GERALD L. MILLER
Brigadier General, USMC
Member, OSD Working Group

Attachment

OCT 13 '93 15:32

PAGE 003

3

OFFICE OF THE SECRETARY OF
DEFENSE

SUMMARY REPORT
OF THE
MILITARY WORKING GROUP



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I. BACKGROUND

A. Guidance

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

2. On 5 April 1993, the Secretary of Defense directed that a Military Working Group (MWG) be formed to develop and assess alternative policy options to meet the President's requirements.

B. Perspective in formulating this policy. Although the all volunteer military is drawn from civilian society, and generally reflects society's norms, the military institution differs in several important ways. These differences were an essential part of MWG's perspective in formulating this policy.

1. *Military mission.* Ultimately, the military's mission is to fight and win the nation's wars.

a. The "terms of employment" for an individual servicemember include the real possibility that he or she will be called upon to make the ultimate sacrifice in service to our country. For military leaders, the moral imperative is to accomplish the mission with the least loss of life possible. Accordingly, any change to the military institution must be weighed in light of this responsibility.

b. Similarly, there is no "right to serve" in the Armed Forces. Military service is clearly a privilege afforded only to those who are qualified. There are many features that are disqualifying, such as height, weight, prior conduct record, membership in groups with certain objectives, or mental category. These disqualifying factors are directly related to combat effectiveness and apply whether the force is all-volunteer or conscript.

2. *Institutional values.* Values are important to any institution, but they

are critical to the military of a democratic nation.

a. The nation calls upon its military to be prepared to kill and destroy – acts which, in any other context, would be immoral. The shared moral values of the institution – the collective sense of right and wrong – provide the foundation which ensures that license will not be abused. This foundation is the essential difference between a professional armed force and a mercenary force. It also provides to individual servicemembers the moral basis for personal service, commitment, and sacrifice in a profession which is demanding in the extreme.

b. As citizen soldiers, military members bring their values with them when they enter the Service. Whether based on moral, religious, cultural, or ethical considerations, those values and beliefs are often strongly held and not amenable to change. While we indoctrinate and train recruits, leadership and discipline cannot – and generally should not – attempt to counter the basic values which parents and society have taught. Indeed, efforts to do so will likely prove counter-productive.

3. Military environment. Military operations are team operations – units win wars, not individuals.

a. The rights and needs of the group are emphasized while individual rights and needs are often set aside or sacrificed for military necessity. For example, if military members aren't satisfied with the conditions of their environment, they have no right to quit and, in fact, are subject to prosecution if they do. Similarly, members of the military often are not able to separate their private lives from their working environment. They may be required to work, eat, recreate, sleep, and bathe in cramped spaces for prolonged periods of time, sometimes in the most remote parts of the world. Indeed, separation of the sexes is often the only concession to privacy.

b. In the short term, the military is facing a number of issues – budget reductions, early retirements, reorganizations, health care worries, base closures, reductions in force – that have had a severe negative impact on morale. Any change in policy which would further exacerbate this "misery squeeze" must be carefully weighed.

II. PROCESS

A. Composition and organization. The MWG, composed of a general or flag officer from each Service and a support staff of approximately 50 officers, enlisted personnel, and civilian employees convened on 6 April 1993. To facilitate examination of various options, the staff was organized into four functional panels: military operations, service life, personnel policy, and legal.

B. Policy boundaries. The MWG worked within specific limitations which were confirmed with the Office of the Secretary of Defense. Returning to the pre-29 January 1993 policy of "asking the question" was not an option; nor was changing the Uniform Code of Military Justice. These limitations defined the boundaries within which the MWG developed its recommended options.

C. Deliberations. Fairness and objectivity were major aims of the MWG's process. In pursuit of those aims, the MWG met with individuals and groups holding a broad spectrum of views on the subject. This included meetings with uniformed and civilian experts from inside and outside the Department of Defense (DoD), including the soldiers, sailors, airmen, Marines, and Coast Guardsmen who would be most affected by the policy. To broaden understanding of the issue, the MWG also compared experiences of the militaries of other countries, researched available literature, and performed statistical analyses of military separation data obtained from the Services.

D. Results. Several policy options were developed and assessed. After extensive review and consultation, the MWG ultimately focused on a single policy recommendation and a plan to implement that policy. This policy, discussed in detail below, meets the President's guidance, maintains combat effectiveness, and is sustainable for the foreseeable future.

E. Definitions. The public debate over homosexuals in the military has often been further confused by a lack of a common usage of terms. For clarity, the MWG used the following definitions:

1. *Bisexual.* A person who engages in, desires to engage in, or intends to engage in both homosexual and heterosexual acts. (DoDDir 1332.14 of 28 January 1982)

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2. *Homosexual*. A person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts. (DoDDir 1332.14 of 28 January 1982)

3. *Homosexual act*. Bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires. (DoDDir 1332.14 of 28 January 1982) (This includes sodomy and acts other than sodomy, such as kissing and dancing between members of the same sex for the purpose of satisfying sexual desires.)

4. *Homosexual conduct*. Evidenced by homosexual acts and attempts or solicitations to engage in such acts, statements by a member that he or she is homosexual or bisexual, or homosexual marriage or attempted homosexual marriage. (OSD MWG)

5. *Homosexual marriage*. When a member has married, or attempted to marry, a person he or she knows to be of the same biological sex (as evidenced by external anatomy). (OSD MWG)

6. *Homosexual statement*. The member has stated that he or she is homosexual or bisexual. (DoDDir 1332.14 of 28 January 1982)

7. *Homosexuality*. The quality, condition, or fact of being a homosexual. (OSD MWG)

8. *Sexual orientation*. A sexual attraction to individuals of a particular gender. (OSD MWG)

III. FINDINGS

Following extensive review, the MWG made the following findings:

A. Combat effectiveness. The Armed Forces of the United States serve an important role in our society by furthering our national interests abroad, defending our borders, and protecting the American way of life. To accomplish this unique mission, the military must be fully combat effective. Combat effectiveness is the *sine qua non* of any armed force and any prospective change must be assessed first and foremost in light of its effect on the military's ability to fight. High combat effectiveness embodies a synergistic mix that can be best expressed as the product of unit cohesion and readiness.

1. **Unit cohesion.** Unit cohesion encompasses a number of factors which, although often intangible, are fundamental to combat effectiveness. These include:

a. **Bonding.** The essence of unit cohesion is the bonding between members of a unit which holds them together, sustains their will to support each other, and enables them to fight together under the stress and chaos of war. The MWG found that the presence of open homosexuals in a unit would, in general, polarize and fragment the unit and destroy the bonding and singleness of purpose required for effective military operations. This phenomenon occurs whether or not homosexual acts are involved. By simply stating that he or she is a homosexual, the individual becomes isolated from the group and combat effectiveness suffers.

b. **Leadership.** In addition to tactical and technical competency, effective leadership depends on mutual respect, fairness, and concern for the well-being of subordinates. If the values and lifestyle of a leader are perceived as contrary to those of the unit, the leader will be, at best, ineffective. That ineffectiveness would be further undermined by perceptions of unfairness or fraternization. The MWG found it would be extremely difficult for an open homosexual to exercise authority or serve effectively as a leader in the Armed Forces of the United States.

c. **Good order and discipline.** Good order and discipline refers to behavior based on respect for authority, other servicemembers, established laws, and regulations and is critical for the effectiveness of leadership and the ability of the unit to carry out its mission. Information presented to the

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MWG clearly indicated that the introduction of individuals identified as homosexuals into the military would severely undermine good order and discipline. Moral and ethical beliefs of individuals would be brought into open conflict. Leadership priorities would, of necessity, be reoriented from training for combat to preventing internal discord. Additionally, the military would be perceived as "turning a blind eye" to conduct proscribed by the Uniform Code of Military Justice and regulations, thereby undermining the very basis for good order and discipline.

d. Privacy. Sexual orientation alone is, and should remain, a personal and private matter. However, once an individual's homosexual orientation becomes known, privacy becomes a significant issue. Military members give up many rights -- including the right to free association -- upon joining the military. When deployed on ships or overseas, members often work, eat, relax, bathe, and sleep together in close proximity 24 hours a day. Further, the space individuals can call their own -- their personal sanctuary -- may be only slightly larger than a coffin. For many members, the presence of openly homosexual individuals in that environment constitutes a major and unacceptable invasion of what little privacy remains.

e. Morale. Lifting the ban on homosexuals serving in the military would be perceived by many servicemembers as the imposition of a political agenda by a small group -- an agenda which is seen as having no military necessity and as being, in fact, destructive to the finest fighting force in the world. Morale would suffer accordingly.

f. Core values. The core values of the military profession would be seen by many to have changed fundamentally if homosexuals were allowed to serve. This would undermine institutional loyalty and the moral basis for service, sacrifice, and commitment for those members.

2. Readiness. Readiness includes traditional hardware areas such as technology, equipment, and spare parts as well as the training, education, and fitness of quality personnel. The presence of homosexuals in the military would impact readiness in several ways.

a. Medical. The readiness of the military to deploy and perform its combat mission is directly linked to the medical well-being of the force. The homosexual lifestyle has been clearly documented as being unhealthy. Due to their sexual practices, active male homosexuals in the military could be expected to bring an increased incidence of sexually transmitted diseases and other diseases spread by close personal contact. Additionally, the association of the homosexual lifestyle as a high risk behavior in contracting

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AIDS could create the perception of an "enemy within" which has the potential to harm not only other servicemembers, but family members as well.

b. Recruiting. Open homosexuality in the military would likely reduce the propensity of many young men and women to enlist due to parental concerns, peer pressure, and a military image that would be tarnished in the eyes of much of the population from which we recruit.

c. Retention. Discharges for homosexual conduct account for only about one-third of one percent of all United States military discharges. Conversely, recent surveys indicate a significant number of servicemembers say they would not reenlist if open homosexuals were allowed to serve. These views were supported by military personnel who appeared before the MWG. Of note, the members most likely to leave the service would be those with the best options for employment elsewhere -- i.e., the most skilled -- and those with strong moral beliefs.

3. *All homosexuality is incompatible with military service.* The effect on combat effectiveness is not limited to known homosexuals.

a. Even if officially unknown, individuals who engage in homosexual conduct can undermine combat effectiveness through, for example, high risk behavior and the formation of "sub-cultures" outside the chain of command. Further, they may not remain unknown over the course of several years of an enlistment or for a full military career. For example, an "unknown" homosexual can become "known" overnight as a result of a police blotter entry or any other incident by which his or her homosexuality becomes officially known. The resultant effect on readiness can thus manifest itself quickly and without warning.

b. Currently unknown and non-practicing homosexuals are also cause for concern. Homosexual activist groups argue that the productivity of individual homosexuals is reduced by virtue of having to hide their true orientation. While the immediate impact on combat effectiveness for those individuals is limited, it nonetheless exists. Further, by definition, even non-practicing homosexuals either intend to engage in homosexual acts or desire to engage in homosexual acts. Some may remain celibate for a time, but it is reasonable to presume that, over a period of years, many will engage in homosexual conduct.

c. The salient point is that what the military doesn't know can -- and over time will -- negatively impact combat effectiveness. While the

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immediate effect on combat readiness varies depending on whether a homosexual is known or unknown, and whether or not the servicemember engages in homosexual conduct, it is nonetheless true that all homosexuality is incompatible with military service and has some measure of negative impact.

B. **Practical considerations.** In addition to the direct effects on combat effectiveness described above, a number of practical considerations were examined in assessing policy options.

1. ***Longevity of the policy.*** One of the tests for an effective policy is that it withstand the test of time.

a. A key element is the likelihood of surviving challenge in the courts. A central finding of the MWG is that statements that one is a homosexual are inextricably linked to homosexual acts. To suggest otherwise is contrary to logic, MWG research, and the publicly expressed view of homosexual advocates. Authorities on military law expressed concern that drawing an artificial distinction between homosexual statements and homosexual acts would undercut the legal precedent upholding the military's homosexual policy. Conversely, a policy which correctly includes as its underlying premise the linkage between homosexual statements and homosexual acts can draw from established precedent and is therefore likely to endure.

b. Any policy that condones homosexual conduct would require congressional action to change the Uniform Code of Military Justice. Failure to do so would establish an untenable situation, creating a perceived conflict between stated policy and military law. This would, in turn, create leadership and legal problems and ultimately would have to be resolved.

2. ***Personnel policies.*** Military personnel policies are designed by necessity to manage large groups or categories of people, as opposed to individuals, for the purpose of achieving maximum combat effectiveness. During its deliberations, the MWG found that current DoD policy, directives, and regulations regarding homosexuality generally are not well understood.

a. **Accessions.** The questions formerly asked during the accession process regarding an applicant's sexual orientation appear to have been ineffective either in deterring homosexuals from entering the military or in articulating DoD policy on homosexuality.

b. **Assignments.** The issue of assignment restrictions poses a particular dilemma. On the one hand, there are significant problems with

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overall combat effectiveness associated with assigning open homosexuals to units that require higher degrees of cohesion (e.g., combat units, special forces) or close quarters berthing. On the other hand, restricting their assignments would cause resentment among those who must serve in their place while tending to concentrate open homosexuals into a narrow selection of skill fields. Since assignment to combat skills and combatant vessels is career enhancing, excluding homosexuals from these duties would inhibit their promotion and advancement opportunities and bring a new set of problems.

c. Berthing/billeting. The presence of known homosexuals in a unit will create tension which may require them to be berthed/billeted and segregated from the remainder of the unit in order to maintain good order and discipline. This would entail additional and unbudgeted costs. On the other hand, segregating certain members of the group will isolate those individuals, possibly highlighting them as a special class, and further degrade unit cohesion. Additionally, there are situations where separate berthing/billeting -- such as aboard ships -- is not practical at any cost.

3. Investigations

a. DoD has no written, uniform policy guidelines for investigating cases involving allegations of homosexuality. This lack of policy may have contributed to a misperception that the military's investigative agencies conduct "witch hunts" to weed out suspected homosexuals.

b. Commanders must have the discretion to inquire and investigate when there is credible information of misconduct or basis for discharge. However, a balance must be struck. While servicemembers set aside certain individual rights while they serve, they still retain freedom from unwarranted intrusion into their private lives.

4. Military family issues. Service life is all encompassing. While spouses and children obviously do not serve in the Armed Forces, military policies and personnel touch every aspect of family life. Servicemembers, both single and married, are often involved as leaders in military youth activities -- for example, scouting, little league, church youth groups, and social clubs. Indeed, most Morale, Welfare, and Recreation programs rely almost exclusively on these volunteers. Many military families would object to the participation of open homosexuals in these programs -- programs to which they entrust their children. Additionally, family members are worried about the same issues that concern their military sponsors -- such as, encumbered privacy during deployments, medical risks, and the breakdown

of the unit -- because they are perceived as a threat to their loved ones.

5. *Common misperceptions concerning homosexuals and the military*

a. Foreign militaries

(1) The policy and practice of foreign militaries regarding homosexuals actively serving do not always match. In countries where policies are "accepting," practice typically involves exclusion of homosexuals for medical/psychological reasons. Even where policy and law allow homosexuals to serve, few servicemembers openly declare their homosexuality due to fears of baiting, bashing, and negative effects to their careers.

(2) Extended deployments and berthing/billeting privacy are not significant issues for most foreign militaries. Additionally, no country has as high a proportion of its servicemembers billeted/berthed together on military installations and deployed aboard ships or overseas at any given time as does the United States. Most importantly, no other country has the global responsibilities, operational tempo, or worldwide deployment commitments of the Armed Forces of the United States.

b. Police/Fire departments. Parallels cannot be accurately drawn between the experiences of police and fire departments and the Armed Forces. While there are some organizational similarities, there are also some very fundamental differences in the areas of mission and related training, deployments, work environment, authority of the commander over subordinates, living conditions, and personal privacy.

c. Discharge and discipline of homosexuals in the Armed Forces. Incorrect perceptions exist that the military discharges large numbers of personnel for homosexuality and that most of those discharges are for reasons of homosexual "status" only -- i.e., statements alone that one is a homosexual, with no homosexual acts involved. Additionally, some believe the military prosecutes homosexual sodomy cases but does not prosecute heterosexual sodomy cases.

(1), Analysis of Armed Forces separations over the four-year period of fiscal years 1989 through 1992 reveals:

(a) Only one-third of one percent (0.3 percent) of all separations were for homosexuality.

(b) Of those discharged for administrative or punitive reasons, only 15 percent were for homosexuality.

(c) Drug and alcohol abuse discharges were nine times greater than those for homosexuality. Overweight discharges were five times greater.

(d) Of all discharges for homosexuality, at least 79 percent clearly involved homosexual conduct. There was insufficient documentation to determine whether conduct was involved in the remaining 21 percent.

(2) Similarly, a review of 1,141 military courts-martial involving Article 125 (sodomy) indicated that heterosexual sodomy cases outnumbered homosexual sodomy cases by a 4 to 1 ratio.

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V. THE RECOMMENDED POLICY

A. Overview. After extensive research and assessment of several options, the MWG submitted the following policy for consideration by the Secretary of Defense on 8 June 1993. In the judgement of the MWG, the policy represented the only option which complied with the President's guidance to end discrimination while maintaining high standards of combat effectiveness and unit cohesion.

B. Key policy features

1. Sexual orientation will be considered a personal and private matter. The Armed Forces won't ask and servicemembers will not be required to reveal their sexual orientation.

2. The presence in the Armed Forces of persons who engage in homosexual acts, who state they are homosexual or bisexual, or marry or who attempt to marry persons of the same gender remains inconsistent with the requirement to maintain high standards of combat effectiveness and unit cohesion.

3. Sexual orientation alone is not a bar to service entry or continued service unless manifested by homosexual acts, statements, or marriages.

4. Neither commander's inquiries (normally for minor offenses) nor military criminal law enforcement investigations (normally for criminal violations) will be conducted absent credible information. Commanders will continue to initiate inquiries or investigations, as deemed necessary, when credible information that a basis for discharge or disciplinary action exists.

5. Servicemembers will be discharged if they are found to have engaged in homosexual conduct.

6. An education plan will be developed to inform servicemembers, commanders, and military investigators about this policy so as to reinforce the principle that all service-members can serve without fear of unwarranted intrusion into their personal lives.

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C. Discussion of the policy

1. Military personnel policies are designed by necessity to manage large groups or categories of people for the purpose of achieving maximum combat effectiveness. The basis for our personnel policy regarding homosexuals has been and remains that homosexuality is incompatible with service in the Armed Forces.

2. For practical reasons, we implement that policy by discharging servicemembers only when their homosexuality is manifested by objective criteria -- homosexual acts, statements, or marriage. As a practical result of the implementation of this policy, homosexuals who keep their sexual orientation private have served and will continue to serve.

3. While maintaining the *de jure* basis of the previous policy, this policy acknowledges the *de facto* situation that some homosexuals have served, and presumably will continue to serve, in the Armed Forces under the unique constraints of military life. These constraints require members of the Armed Forces to keep certain aspects of their personal life private for the benefit of the group.

D. Implementation

1. *Accessions policy.* Applicants for service in the Armed Forces will not be required to declare their sexual orientation or answer questions about their orientation. They will be briefed on departmental policies governing conduct proscribed for members of the Armed Forces. All applicants will sign a statement acknowledging they understand these policies. Additionally, homosexual behavior will no longer be listed as a mental disorder in the DoD Physical Standards directive.

2. *Investigative policy.* Commanders may initiate investigations or inquiries into homosexual conduct as defined by DoD policy. However, no investigations or inquiries will be conducted solely to establish an individual's sexual orientation, nor will servicemembers be required to answer questions concerning their sexual orientation. This provision does not create a protected class. Acknowledgement by a member that he or she is a homosexual -- even in reply to a question asked in error -- continues to be a basis for separation. No investigations or inquiries will be conducted absent credible information of the commission of a crime or basis for discharge or disciplinary action. Military investigative agencies, at the direction of a commander, may investigate misconduct and violations of the Uniform Code of Military Justice. Investigations will not go beyond establishing the

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elements of the offense or basis for discharge. There will be no stake-outs, sung operations, or round-ups absent specific allegations of proscribed conduct.

3. Discharge policy. Homosexual conduct is inconsistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain. Servicemembers will be discharged if they engage in homosexual conduct. Homosexual conduct is evidenced by any act involving bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of sexual gratification, and attempts or solicitations to engage in such acts; a statement by the member that he or she is a homosexual or bisexual; or homosexual marriage or attempted homosexual marriage. Normally, administrative separations involving homosexual conduct will be under honorable conditions, unless there are aggravating circumstances -- such as acts with a minor.

4. Education policy. Each Service will provide training to their personnel, at every level, to explain the new policy regarding homosexuals. The DoD will provide an education plan for the Services to use as a guideline in their separate training programs. The education package will focus on the changes to the DoD policy and will not be an attempt to change any deeply held religious and ethical beliefs; that is, sensitivity training.

Revised version *File. Gays in the MILITARY*



U.S. Department of Justice
Office of the Solicitor General
10th & Constitution Avenue, NW
Washington, DC 20530

10/25/93

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No. A-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES DEPARTMENT OF DEFENSE, ET AL., APPLICANTS

v.

VOLKER KEITH MEINHOLD

EMERGENCY APPLICATION FOR A STAY PENDING APPEAL
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the Department of Defense and the Secretary of Defense, respectfully applies for a partial stay of the orders entered by the United States District Court for the Central District of California on January 29 and September 30, 1993, pending appeal of those orders to the United States Court of Appeals for the Ninth Circuit.

This action was brought by a single individual, respondent Meinhold, to challenge his discharge from the United States Navy under the military policy regarding homosexuals then in effect. The district court declared that the policy violated equal protection, and it ordered Meinhold's discharge rescinded. In addition, however, the court granted a nationwide injunction that

bars any officer of the Defense Department from discharging, denying enlistment, or taking "any action whatsoever" regarding military status or duties against any person in any of the military services "based on sexual orientation," except in cases involving "proven sexual conduct" -- and, even then, only "if such conduct is proven to interfere with the military mission of the armed forces of the United States." App. H, infra, 2. The injunction also prohibits the Department from "creating or maintaining" any record based on sexual orientation, with the same narrow exception. Ibid. By this application, the government seeks a stay of this broad injunction to the extent that it grants relief to persons other than Meinhold.

The court clearly erred with respect to issues of great importance. The entry of a nationwide injunction in this non-class action conflicts with decisions of this Court and numerous courts of appeals holding that an injunction may not be broader than necessary to provide relief to the party before the court. The district court's injunction broadly intrudes the court into the day-to-day management and discipline of military personnel -- a responsibility which, as this Court repeatedly has recognized, is confided by the Constitution to the political Branches, and in which courts have little competence. Moreover, the district court's ruling on the merits conflicts with numerous decisions rejecting equal protection challenges in this setting.

The district court's injunction will cause irreparable harm unless stayed pending appeal. First, it prevents the implementa-

tion of the new Policy on Homosexual Conduct in the Armed Forces, which was announced by the President on July 19, 1993, and which is ready for effectuation in regulations to be issued by the Secretary of Defense. That policy directive by the Commander-in-Chief has, moreover, been approved in bills passed by both Houses of Congress. Those identical bills are now before a conference committee and are expected to be enacted into law as part of the Defense Authorization Act of 1994 within the next few weeks. Yet the validity of the President's new policy and the military judgments supporting it were never at issue in this case.

Second, the injunction interferes with the administration of the military services and creates grave uncertainty for military commanders at the present time: It prohibits them from taking measures in response to homosexual conduct that is prohibited not only under the President's new policy, but also under the interim policy that the President announced on January 29 and that remains in place pending implementation of the new policy. By prescribing a stringent yet vague standard prohibiting "any action whatsoever * * * based on sexual orientation" and permitting such actions only for what the district court would regard as "sexual conduct * * * proven to interfere with the military mission of the armed forces," App. E, infra, 2, the injunction makes a wide range of military decisions a possible basis for contempt proceedings. The uncertainty also adversely affects members of the military, who may be encouraged by the district court's injunction to make statements or take other actions that

they believe are permitted under the injunction, but that may be the basis for discipline or discharge under the President's new policy and the pending legislation if the injunction is set aside upon further review.

Finally, the injunction appears to require the Department of Defense to search records regarding some 5.1 million present and retired servicemembers, and to identify all records "based on sexual orientation" that do not relate to "proven sexual conduct." Moreover, because the injunction prohibits the Department from "maintain[ing]" such documents, it could be read to require the destruction of records pertaining to sexual orientation. Injunctions that have such adverse consequences -- and that are wholly beyond the power of a court to issue -- should not remain in effect.^{1/}

^{1/} Appended to this application are the First Amended Verified Complaint for Equitable Relief and Injunction (App. A, infra); the January 29, 1993, Order and Judgment of the district court granting summary judgment and a permanent injunction in favor of Meinhold (App. B, infra); the January 29, 1993, Amended Opinion of the district court ruling on cross-motions for summary judgment (App. C, infra); the February 19, 1993, Order of the district court denying the government's motion for clarification or, in the alternative, for stay pending appeal (App. D, infra); the March 12, 1993, Order of the court of appeals denying the government's emergency motion for a stay pending appeal (App. E, infra); the September 22, 1993, Order of the district court ordering the Secretary of Defense and others to appear to show cause why they should not be held in contempt (App. F, infra); the September 22, 1993, Order of the court of appeals denying the government's emergency motion for summary reversal and, in the alternative, for a stay of the district court's injunction (App. G, infra); the September 30, 1993, Amended Order and Judgment of the district court (App. H, infra); Tr. of September 30, 1993, hearing before the district court on the show cause order (App. I, infra); the October 8, 1993, Order of the court of appeals denying the government's outstanding motions (App. J, infra); Memorandum from the Secretary of Defense regarding "Policy on

STATEMENT

1. In May 1992, the respondent, Volker Keith Meinhold, announced on a television broadcast that he is a homosexual. App. C, infra, 1-2. At that time, Meinhold was a Petty Officer on active duty in the United States Navy. App. A, infra, 8. Military regulations then in effect barred service by "persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct." App. L, infra, 1. The Navy convened an administrative discharge board to assess Meinhold's continued suitability for service. The board concluded, based on Meinhold's televised statement, that his discharge was required under the regulations. On August 12, 1992, Meinhold received an honorable discharge. App. A, infra, 11-12; App. C, infra, 1-2.

Homosexual Conduct in the Armed Forces" (July 19, 1993) (App. K, infra); Department of Defense (DOD) Directive 1332.14 (App. L, infra); Naval Military Personnel Manual 3630400 (App. M, infra); Memorandum from Edwin Dorn, Assistant Secretary of Defense, re Policy on Homosexual Conduct in the Armed Forces (Sept. 30, 1993) (App. N, infra); Memorandum from Edwin Dorn, Assistant Secretary of Defense, re Policy on Homosexual Conduct in the Armed Forces (Oct. 1, 1993) (App. O, infra); S. 1298, 103d Cong., 1st Sess. § 546 (1993) (App. P, infra); H.R. 2401, 103d Cong., 1st Sess. § 575 (1993) (App. Q, infra); S. Rep. No. 112, 103d Cong., 1st Sess. 263-301 (1993) (App. R, infra); H.R. Rep. No. 200, 103d Cong., 1st Sess. 286-290 (1993) (App. S, infra); Office of the Secretary of Defense, Summary Report of the Military Working Group (July 1, 1993) (App. T, infra); Selland v. Aspin, Civ. No. 93-1924-LFO (D.D.C. Sept. 28, 1993) (App. U, infra); Tr. of July 20, 1993, Hearing Before the Sen. Comm. on Armed Services to Receive Testimony on Dep't of Defense Policy on the Service of Gay Men and Lesbians in the Armed Forces 12-28 (App. V, infra); Declaration of Edwin Dorn, Assistant Secretary of Defense for Personnel and Readiness (App. W, infra); Air Force Regulation 110-19 (Supp. July 20, 1992) (App. X, infra); Army Regulation 27-10, Ch. 20 (App. Y, infra); U.S. Navy Regulations, Ch. III (App. Z, infra).

Meinhold then filed this action, alleging that his discharge violated the equal protection guarantees of the Fifth Amendment. App. A, infra, 16.^{2/} The suit was not brought as a class action, and Meinhold did not seek injunctive relief on behalf of anyone other than himself. More specifically, Meinhold sought a declaration that the regulations under which he was discharged are unconstitutional and an injunction requiring his reinstatement. Id. at 17.

On January 29, 1993, the district court granted summary judgment in favor of Meinhold. App. B, infra. Without first addressing either of Meinhold's non-constitutional arguments, the court held that the policy under which Meinhold was discharged violated the equal protection component of the Due Process Clause. App. C, infra, 2-6. The court understood that policy to permit discharges "based merely on [homosexual] status, and not conduct." Id. at 2. The court determined that the government bore the burden of proving, "through a factual record" in court, that the policy was rationally related to permissible goals; it declined to defer to "military judgment" on that matter. Id. at 2-3. The court concluded that the government had failed to carry its evidentiary burden. Id. at 3-6.^{3/}

^{2/} The complaint also alleged violations of the Administrative Procedure Act, 5 U.S.C. 551 et seq., "traditional principles of equitable estoppel," and the Bill of Attainder Clause, Art. I, § 9. App. A, infra, 12-16.

^{3/} The court nonetheless acknowledged the Navy's submission that the policy under which Meinhold was discharged "is rationally related to its goals of maintaining discipline, good order and morale; fostering mutual trust and confidence among service-

As relief, the court issued an order "rescind[ing]" Meinhold's discharge, as Meinhold had requested. But the order also went much further. It permanently enjoined the Department of Defense "from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." App. B, infra, 2. Nothing in the court's opinion offered a justification for the nationwide scope of the injunction. See App. C, infra, 1-6.

2. That same day, January 29, 1993, the President directed the Secretary of Defense to undertake a comprehensive review of the military's policy regarding homosexuals.^{4/} At the same time, the President directed that an interim policy be put in effect pending completion of the review and implementation of any new policy.^{5/} The interim policy modified then-existing policy in two ways. First, it provided that new recruits are not to be questioned about homosexuality during the enlistment process. Second, the interim policy authorized the Attorney General to

members; the need to recruit and retain servicemembers; and maintaining public acceptability of the Navy." Id. at 3 (citing Navy Military Personnel Manual 3630400(1) (App. M, infra)).

^{4/} The President's directive was not related to the order in this case.

^{5/} The interim policy remains in effect (to the extent it is not enjoined) until the new policy is implemented. Memorandum from Edwin Dorn, Assistant Secretary of Defense, re Policy on Homosexual Conduct in the Armed Forces (Sept. 30, 1993) (App. N, infra); see also Memorandum from Edwin Dorn, Assistant Secretary of Defense, re Policy on Homosexuality in the Armed Forces (Oct. 1, 1993) (App. O, infra).

suspend the discharge of, and to transfer to standby reserve status pending implementation of a new policy, any servicemember who is subject to separation based solely on his or her acknowledgement of homosexuality (without specific proof of homosexual acts). S. Rep. No. 112, 103d Cong., 1st Sess. 268 (1993).

The government filed a motion in the district court pursuant to Fed. R. Civ. P. 59(e), asking the court to clarify its January 29 order to specify that the Department could implement the President's interim policy. In the alternative, the government asked the court to stay its order pending appeal to the extent it grants relief to persons other than Meinhold. The court, without explanation, denied the motion on February 17, 1993. App. D, infra.

3. On March 3, 1993, the government filed a motion asking the Ninth Circuit to stay the district court's order to the extent it confers relief on persons other than Meinhold. On March 12, 1993, the Ninth Circuit denied the motion. App. E, infra. It recognized that "there is a legitimate dispute as to whether the permanent injunction entered by the district court should extend beyond Meinhold." Ibid. It nonetheless denied relief because it discerned no conflict between the injunction and the President's interim policy. The court reasoned that because the injunction bars "discharg[es]," the Department of Defense could transfer to standby reserve status servicemembers who had acknowledged being homosexual, since "transfer to the standby reserve is not a discharge from military service." Ibid.

In light of the court of appeals' interpretation of the district court's January 29 order, the government did not seek a stay in this Court. The government's appeal of that order then proceeded to briefing in the ordinary course.

4. On July 19, 1993, the President and the Secretary of Defense announced a new policy, to be instituted by October 1, 1993, regarding homosexual conduct by members of the Armed Forces. App. K, infra. The policy is the result of an exhaustive six-month review of existing policy by the Secretary of Defense, in consultation with the Joint Chiefs of Staff, the acting Secretary of each military department, a working group of senior officers in the Defense Department, outside experts, and the Department of Justice. 7/20/93 Tr. of Hearing Before the Senate Comm. on Armed Services 15-17 (testimony of Secretary of Defense Les Aspin) (App. V, infra); see also id. at 22-24 (testimony of General Colin Powell) (App. V, infra); Office of the Secretary of Defense, Summary Report of the Military Working Group (July 1, 1993) (App. T, infra).

In his formal memorandum setting forth the basic principles of the new policy, the Secretary of Defense explained that "[t]he Department of Defense has long held that, as a general rule, homosexuality is incompatible with military service because it interferes with the factors critical to combat effectiveness, including unit morale, unit cohesion and individual privacy." App. K, infra, 1. "Nevertheless," he continued, "the Department of Defense also recognizes that individuals with a homosexual

orientation have served with distinction in the armed services of the United States." Ibid. The Secretary then stated (id. at 1-2):

Therefore, it is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct. Homosexual conduct will be grounds for separation from the military services. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.

* * * * *

The constraints of military service require servicemembers to keep certain aspects of their personal lives private for the benefit of the group.

The new policy addresses three areas: accession, discharge, and investigations. With regard to accession, it provides that applicants for military service will not be asked if they are homosexual, but they will be told that homosexual conduct by servicemembers is prohibited. App. K, infra, 4. The policy further provides that "[t]he military will discharge members who engage in homosexual conduct, which is defined as a homosexual act, [6/] a statement that the member is homosexual or bisexual, or a marriage or attempted marriage to someone of the same gender." Ibid. The policy elaborates (id. at 2):

A statement by a servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts

^{6/} The term "homosexual act" is defined to include "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires or any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts." App. K, infra, 2.

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or has a propensity or intent to do so. The service-member has the opportunity to present evidence that he does not engage in homosexual acts and does not have a propensity or intent to do so. The evidence will be assessed by the relevant separation authority.

With regard to investigations, the policy provides that no investigations or inquiries will be conducted solely to determine a servicemember's sexual orientation. Commanders will initiate an investigation or inquiry only when there is credible information that a basis for discharge or disciplinary action exists, and an allegation or statement by another person that a service-member is a homosexual, alone, is not grounds for either a criminal investigation or a commander's inquiry. App. K, infra, 2.

The Secretary's memorandum announcing the policy stated that the Secretaries of the Military Departments were to implement the policy by October 1, 1993. Id. at 3.

5. On September 7, 1993, the government filed a motion in the Ninth Circuit seeking partial summary reversal, or, in the alternative, a stay pending appeal of the district court's January 29 injunction to the extent that it confers relief on persons other than Meinhold. In support of the motion, the government explained that the injunction would bar implementation of the President's new policy on October 1. The government pointed out that the new policy includes in its definition of prohibited sexual conduct statements that demonstrate an intent or propensity to engage in homosexual acts, whereas the injunction prohibits discharges in the absence of proof of what the

district court would regard as specific sexual conduct proven to interfere with the military mission. On September 22, 1993, the Ninth Circuit denied the government's motion without explanation and directed that the appeal be scheduled for oral argument in December 1993. App. G, infra. On September 30, 1993, the government filed a motion for reconsideration by the Ninth Circuit, with a suggestion for reconsideration en banc.

6. In the meantime, the district court had entered an order on September 22, 1993, directing the Secretary of Defense and the Secretary of the Navy (or their representatives) to appear and show cause why they should not be held in contempt for violating the January 29 injunction. App. F, infra. The district court held a hearing on the show-cause order on September 30, 1993.^{7/} At the hearing, Meinhold argued that the government had violated the injunction by, inter alia, implementing the President's interim policy insofar as members (other than Meinhold) who made statements acknowledging their homosexuality were placed on standby reserve. App. I, infra, 8-12.^{8/} The court indicated its

^{7/} In accordance with the court's order that defendants appear "personally, or through an agent, other than counsel" (App. F, infra), the hearing was attended by the Assistant Secretary of Defense for Personnel and Readiness, the Lieutenant Commander for Meinhold's command, and officials from the Judge Advocate General's Office of the Department of Navy, the Office of the General Counsel of the Department of Defense, and the Office of the Secretary of Defense. App. I, infra, 4.

^{8/} Meinhold cited (App. I, infra, 8-11) Selland v. Aspin, Civ. No. 93-1924-LFO (D.D.C. Sept. 28, 1993) (App. U, infra), a case that involved a servicemember who was scheduled to be transferred to standby reserve on September 30, 1993. On September 29, 1993, Judge Oberdorfer issued a preliminary injunction barring Selland's transfer to standby reserve. In issuing the

willingness to entertain claims by non-party servicemembers that the Secretary was violating its injunction. Id. at 31. It declined, however, to make a finding of contempt. Id. at 37.

Instead, the district court issued an amended order broadening the January 29 injunction. App. H, infra. The amended order purports to grant injunctive relief to some 5.1 million present and retired servicemembers worldwide and to all persons seeking to become servicemembers. It enjoins the Department and any of its officers and employees from taking any of the following actions "based on sexual orientation in the absence of proven sexual conduct -- if such conduct is proven to interfere with the military mission of the armed forces of the United States":

(1) "discharging, changing enlistment status or denying enlistment to any person";

(2) "creating or maintaining * * * any record or file, including, but not limited to, lists, evaluations, reports, classifications, and designations, whether official or unofficial, at any level of command, of any member of the armed forces of the United States"; and

(3) "any actions whatsoever, * * * against gay or lesbian service members, or prospective service members, that in any way affects, impedes, interferes with, or influences their military status, advancement,

injunction, Judge Oberdorfer characterized the January 29 injunction in Meinhold as the "law of the land," even "if only temporarily." App. U, infra, 7. The preliminary injunction in Selland had not been issued, however, when Meinhold filed the motion seeking to hold the defendants in contempt of the injunction entered in this case. Meinhold also relied on Elzie v. Aspin, Civil No. 93-1853 (D.D.C. Compl. filed Sept. 7, 1993), an action brought by a servicemember who was transferred to standby reserve on September 1, 1993, based on an admission of homosexuality. On October 14, 1993, Elzie demanded reinstatement to active duty based on the September 30 order entered in the present case. Under compulsion of the injunction, Selland and Elzie have been returned to active duty.

evaluation, duty assignment, duty location, promotion, enlistment or reenlistment."

App. H, infra, 2. The district court stated at the September 30 hearing that it would punish future violations of the new injunction with fines "at a minimum of \$10,000 per day." App. I, infra, 36.

7. The Government filed a notice of appeal from the district court's amended order and judgment on the day after it was entered, October 1, 1993. On the same day, the government filed: (1) a motion (with suggestion of initial en banc consideration) for partial summary reversal, or a stay pending appeal, of the portion of the district court's September 30, 1993, amended order and judgment that affords relief to persons other than Meinhold;^{9/} and (2) an emergency motion for a temporary stay of the amended order pending disposition of the motion for partial summary reversal or stay pending appeal.^{10/}

On October 8, 1993, the Ninth Circuit issued an order denying all of the government's outstanding motions. App. J, infra. The court gave no reason for its denial of relief.

^{9/} The motion also sought a stay of the order insofar as it requires destruction of any records pertaining to Meinhold.

^{10/} The government also filed a supplemental memorandum in support of its motion for reconsideration of the Ninth Circuit's September 21 order denying the government's motion for partial summary reversal or a stay of the district court's January 29, 1993 order. On October 6, 1993, the court of appeals granted the government's motion to consolidate the appeals from the January 29 and September 30 orders. Oral argument will be heard on both appeals in December 1993.

8. As noted above, on July 19, 1993, the President directed that the new policy concerning homosexuality in the Armed Forces be implemented on October 1. The Department of Defense has prepared the regulations necessary to implement the basic principles announced by the President on July 19, and it is ready to implement the new policy. In addition, the President's new policy has been approved in bills passed by the Senate and the House of Representatives. S. 1298, 103d Cong., 1st Sess. § 546 (1993) (App. P, infra); H.R. 2401, 103d Cong., 1st Sess. § 575 (1993) (App. Q, infra); see 139 Cong. Rec. S11,628 (daily ed. Sept. 14, 1993), S11,773 (daily ed. Sept. 15, 1993), H7227 (daily ed. Sept. 29, 1993), and S13,135 (daily ed. Oct. 6, 1993). Those identical provisions are before the conference committee as part of the Defense Authorization Act for 1994, which is expected to be passed and signed into law in the next few weeks. See 139 Cong. Rec. S13,135 (daily ed. Oct. 6, 1993).

Each House's passage of the bill followed extensive hearings in which congressional committees received testimony from military leaders, military historians, sociologists, and individual citizens. See S. Rep. No. 112, supra, at 268-270; see also id. at 272-273, 286-292 (App. R, infra); H.R. Rep. No. 200, 103d Cong., 1st Sess. 287 (1993) (App. S, infra). Based on that legislative record, each bill begins with a lengthy set of findings, including the following one:

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.

S. 1298, supra, § 546(a) (proposed 10 U.S.C. 654(a)(15)) (App. P, infra); H.R. 2401, supra, § 575(a) (same) (App. Q, infra). Each bill then provides that, with certain exceptions, "[a] member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense" if it is found (1) "[t]hat the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act"^{11/}; (2) "[t]hat the member has stated that he or she is a homosexual or bisexual"; or (3) "[t]hat the member has married or attempted to marry a person known to be of the same biological sex." S. 1298, supra, § 546(a) (proposed 10 U.S.C. 654(b)) (App. P, infra); H.R. 2401, supra, § 575(a) (same) (App. Q, infra). Each bill requires the Secretary to issue implementing regulations. S. 1298, supra, § 546(b) (App. P, infra); H.R. 2401, supra, § 575(b) (App. Q, infra).^{12/}

^{11/} The definition of the term "homosexual act" in the bills is substantially identical to the definition of that term in the directive announcing the President's new policy. Compare S. 1298, § 546(a) (proposed 10 U.S.C. 654(f)(3)) (App. P, infra) and H.R. 2401, § 575(a) (same) (App. Q, infra) with App. K, infra, 2.

^{12/} The bills require the regulations to be issued within 90 days of enactment. S. 1298, supra, § 546(b) (App. P, infra); H.R. 2401, supra, § 575(b) (App. Q, infra). As discussed earlier, however, the Department of Defense is prepared to issue the implementing regulations forthwith.

ARGUMENT

It is well settled that this Court, or a single Justice, has authority under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, to stay a district court order pending appeal to the court of appeals. See Baker v. Haitian Refugee Center, Inc., 112 S. Ct. 1072 (1992); United States Dep't of Justice v. Rosenfeld, 111 S. Ct. 2846 (1991); Bureau of Economic Analysis v. Long, 450 U.S. 975 (1981); Heckler v. Redbud Hospital Dist., 473 U.S. 1308 (1985) (Rehnquist, Circuit Justice); Heckler v. Lopez, 463 U.S. 1328 (1983) (Rehnquist, Circuit Justice); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 17.13 (6th ed. 1986). An application for a stay in these circumstances calls for a weighing of (a) the probability that the courts below were in error and that this Court would grant review; (b) whether irreparable injury may occur absent a stay; and (c) the public interests that may be affected. See Republican State Central Comm. v. Ripon Society, 409 U.S. 1222, 1224 (1972) (Rehnquist, Circuit Justice); see also California v. American Stores Co., 492 U.S. 1301 (1989) (O'Connor, Circuit Justice); John Doe Agency v. John Doe Corp., 488 U.S. 1306 (1989) (Marshall, Circuit Justice). Those factors strongly support a stay of the district court's injunction, which, as amended by the court's September 30 order, broadly intrudes into all aspects of military life and peremptorily prevents implementation of a policy that has been formally adopted by the President, as Commander-in-Chief, in the interests

of national security and personal privacy, and has been approved by both Houses of Congress.

A. THERE IS A STRONG PROBABILITY THAT THE DISTRICT COURT'S DECISION WILL BE REVERSED UPON FURTHER REVIEW

1. The district court's nationwide injunction violates fundamental principles governing the permissible scope of injunctive relief. The injunction improperly extends relief to persons other than the sole named plaintiff and bars implementation of the President's new policy, which was not applied to Meinhold and which the court did not -- and was in no position to -- review.

a. As this Court and numerous courts of appeals have recognized, an injunction may be no broader than necessary to afford relief to the parties before the court. The district court's injunction conflicts with that principle. Indeed, as the Ninth Circuit seemed to recognize in its March 12 order in this very case, there is controlling precedent in that Circuit making clear that the injunction below could not extend beyond Meinhold. See App. E, infra, 1, citing Zepeda v. INS, 753 F.2d 719 (9th Cir. 1983). But even if the court of appeals should nevertheless affirm the injunction, there is a very strong probability that this Court would grant review and reverse.

This Court has made clear that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). Indeed, it is well settled that "[i]n-junctive relief * * * cannot be granted to persons who are not

before the court." 7 J. Moore, J. Lucas & K. Sinclair, Moore's Federal Practice ¶ 65.17, at 65-167 (2d ed. 1993). In order for a court to grant relief to such persons, the court must properly certify a class action under Fed. R. Civ. P. 23. Otherwise, "[w]hensoever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases." Zepeda, 753 F.2d at 730 n.1. "But such broad authority has never been granted to individual plaintiffs absent certification of a class." Ibid.; accord Bresgal v. Brock, 843 F.2d 1163, 1170-1171 (9th Cir. 1987).

Under these principles, the district court's injunction is plainly overbroad. Meinhold is the only plaintiff in this case; he did not bring it as a class action. The injunctive relief he sought, a rescission of his discharge, was solely for his own benefit. He sought declaratory relief solely with respect to the validity of "the regulations pursuant to which the Navy discharged [him]," App. A, infra, 17, and not with respect to the interim policy or the new policy announced after his discharge. Thus, the only relief sought, and the only relief that could properly be granted, related to Meinhold's own discharge under the policy regarding homosexuality then in effect.

The injunction nonetheless is not limited to Meinhold or the policy under which he was discharged. As amended by the district court's September 30 order, the injunction purports to grant relief for the benefit of millions of members of the United

States armed services and all persons who seek to become service-members. It enjoins the defendants from discharging, denying enlistment, or taking "any action whatsoever" regarding "any person," and from creating or maintaining "any record or file," based on sexual orientation, except in cases of "sexual conduct * * * proven to interfere with the military mission of the armed forces of the United States." App. H, *infra*, 2-3. This breathtakingly broad order far exceeds what was necessary to provide relief to Meinhold.

In analogous circumstances, at least three other circuits have set aside injunctions granting relief to nonparties. In Lever Brothers Co. v. United States, 981 F.2d 1330, 1338 (1993), the D.C. Circuit vacated an injunction to the extent it barred the Customs Service from enforcing a regulation as to all foreign goods, and not merely those of the plaintiff's foreign affiliates. In Brown v. Trustees of Boston Univ., 891 F.2d 337, 361 (1989), cert. denied, 496 U.S. 937 (1990), the First Circuit vacated that portion of a district court order that enjoined a university from discriminating on the basis of sex with respect to the appointment, promotion, and tenure of all faculty members, and not just the plaintiff. Finally, in Everhart v. Bowen, 853 F.2d 1532, 1538-1539 (1988), rev'd on other grounds, 494 U.S. 83 (1990), the Tenth Circuit vacated a statewide injunction barring the Social Security Administration from enforcing a regulation that was held invalid as applied to a single disability claimant. See also, e.g., Ameron, Inc. v. United States Army Corps of

Eng'rs, 787 F.2d 875, 887-891, modified on other grounds, 809 F.2d 979 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988); Professional Ass'n of College Educators v. El Paso County Community College Dist., 730 F.2d 258, 273-274 (5th Cir.), cert. denied, 469 U.S. 881 (1984); Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974); Tape Head Co. v. RCA Corp., 452 F.2d 816, 819 (10th Cir. 1971). But cf. Soto-Lopez v. New York City Civil Service Comm'n, 840 F.2d 162, 168 (2d Cir. 1988).

In Brown, the First Circuit held that, in a non-class action, an injunction prohibiting sex discrimination against all faculty members would improperly "embroil the courts in the University's internal affairs, allowing faculty members to circumvent administrative procedures by simply invoking the contempt jurisdiction of the district court whenever a dispute arises." 891 F.2d at 361. Similar considerations apply with far greater force in this case. The injunction at issue here directly involves the court in the ongoing management and discipline of U.S. military personnel throughout the world, under the threat of contempt sanctions. Yet as this Court has observed, it is "difficult to conceive of an area * * * in which the courts have less competence" than in the "complex, subtle, and professional decisions as to the composition * * * and control of a military force." Rostker v. Goldberg, 453 U.S. 57, 65 (1981). The Court's decisions accordingly evince particular "concern with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were

allowed to hale his superiors into court." Chappell v. Wallace, 462 U.S. 296, 304 (1983) (quoting Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting), quoting in turn United States v. Brown, 348 U.S. 110, 112 (1954)).

The district court's injunction flouts that concern. It purports to grant relief to "any person" with respect to discharges, denials of enlistment, the maintenance and creation of records, and "any action whatsoever" that "in any way affects" the military status or duties of "gay or lesbian service members," in the absence of what the district court would regard as "sexual conduct * * * proven to interfere with the military mission of the armed forces." App. E, infra, 2-3. The breadth of this relief threatens to convert the district court into a specialized tribunal asserting worldwide jurisdiction over persons with claims based on sexual orientation against any military officer or any person acting in concert with a military officer. Indeed, the district court has indicated its willingness to entertain such claims. App. I, infra, 31.^{13/}

^{13/} Meinhold argued in the court of appeals that a nationwide injunction was justified because it is necessary to afford him effective relief. See 93-55242 Appellee's Br. at 44 (9th Cir.); cf. Brown, 891 F.2d at 361. However, the federal courts provide complete relief in hundreds of employment discrimination cases by issuing injunctions limited solely to the individual plaintiff. Meinhold's case is no different. Meinhold also argued that the scope of relief was justified by his request for declaratory relief stating that the regulations under which he was discharged are unconstitutional on their face. See 93-55242 Appellee's Br. at 43 (9th Cir.). That argument ignores a crucial difference between injunctive and declaratory relief. Under United States v. Mendoza, 464 U.S. 154 (1984), a declaration that

b. For the reasons just explained, the district court had no power to grant injunctive relief to persons other than the sole plaintiff in the case, respondent Meinhold. But the injunction is especially improper in this case for several further reasons. First, it applies to any actions under the President's new policy, even though the new policy has not been applied to Meinhold or to any other individual. Any effect on the new policy by the district court's injunction is plainly improper.

In addition, the injunction even now reaches a broad range of actions throughout the military and subjects military officers and others who take such actions to possible contempt proceedings. As extended by the district court's order of September 30, the injunction covers not only discharges and denials of enlistment but also

any action whatsoever, that in any way affects, impedes, interferes with, or influences [homosexual servicemembers'] military status, advancement, evaluation, duty assignment, duty location, promotion, enlistment or reenlistment based upon their sexual orientation in the absence of proven sexual conduct -- if such conduct is proven to interfere with the military mission of the armed forces of the United States.

App. E, infra, 2-3. The validity of that broad array of actions, however, has never been at issue in this case. In granting summary judgment for Meinhold on January 29, the district court held only that the government had failed, on the basis of the

the Navy's regulations are invalid would be binding only as between the Navy and Meinhold; it would not have subjected the defendants to contempt sanctions for implementing those regulations as to other servicemembers. See Steffel v. Thompson, 415 U.S. 452, 471 (1974); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155 (1963).

rationale and materials it then offered, to prove a rational basis for Meinhold's discharge under the military policy regarding homosexuals then in effect.^{14/}

Furthermore, the injunction permits the district court to entertain challenges to the interim policy that are not ripe for judicial review and as to which administrative remedies must be exhausted -- for example, challenges by a servicemember who, because of statement of homosexuality, has been transferred to standby reserve pursuant to the interim policy. There are, however, procedures within each of the military services that must be exhausted before such challenges are presented to a court. Each of the military services has administrative procedures for separation that provide for evidentiary hearings and administrative appeals. See 32 C.F.R. pt. 41; see also App. A, infra, 9-12 (describing administrative proceedings leading to Meinhold's discharge). In addition, pursuant to 10 U.S.C. 938, each of the services has established administrative procedures for consideration of grievances by servicemembers concerning matters short of discharge. See Chappell v. Wallace, 462 U.S. at 302-303; Apps. X, Y, & Z, infra (armed service grievance procedures).

The discharge and grievance procedures allow a servicemember to develop evidence concerning his or her case and provide the

^{14/} Because the September 30 order drastically expanded the January 29 order, there is a serious question whether the district court had jurisdiction to enter the September 30 order pending the appeal from the January 29 order that had by then been filed.

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military service involved with an opportunity to resolve the case on non-constitutional grounds. For example, if an individual made a statement of homosexuality, the hearing would provide an opportunity for the individual to rebut the regulatory presumption that arises under the interim policy that he or she engages in homosexual acts or has a propensity or intent to do so. See App. K, infra, 2; see also pp. __-__, infra. Utilization of the internal military procedures would then furnish a court with a basis for evaluating the individual's constitutional claims in light of the service's factual determinations and in the context of the application of the relevant portion of the governing policy to a concrete factual situation. See, e.g., Reno v. Catholic Social Services, Inc., 113 S. Ct. 2485, 2494-2497 (1993); Weinberger v. Salfi, 422 U.S. 749, 765-766 (1975).

The factors weighing against premature judicial intervention are especially compelling in this case. This case arose under the prior policy regarding homosexuality in the armed services. Thus, the validity of the President's new policy and of the interim policy now in effect was not at issue. Consequently, the record does not contain any evidence concerning the interim policy or the new policy, the report of the Military Working Group, upon which the new policy is based (App. T, infra), or the congressional testimony concerning the President's policy, upon which the pending legislation is based (App. V, infra). This case, in short, is plainly an improper vehicle for addressing the

multifarious claims that undoubtedly will arise under the injunction.^{15/}

c. This Court need not review the district court's ruling on the merits for purposes of considering this application for a stay. We seek relief from the district court's injunction only insofar as it (1) grants relief to persons other than Meinhold, and is therefore overbroad and intrudes the court into military affairs entrusted to the political Branches, and (2) may be read to require the destruction of documents (including those related to Meinhold), a requirement that must be stayed not only to prevent the irreparable harm that will result from destruction of the documents but also to preserve for appellate review the issue of the validity of the document-destruction provision, cf. John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, Circuit Justice), discussed pp. __-__, infra. Under Heckler v. Lopez, 463 U.S. 1328 (Rehnquist, Circuit Justice), motion to vacate stay denied, 464 U.S. 879 (1983); see also 464 U.S. at 881 (Stevens, J., with Blackmun, J., dissenting in part), it is clear that a district court's injunction may be stayed by this Court pending appeal to a court of appeals when, as here,

^{15/} The district court recognized that it was in no position to rule on the validity of the President's new policy. App. I, infra, 4-5. Yet its injunction plainly bars the implementation of that policy. See pp. __-__, infra. Most obviously, the injunction requires that discharges be based on proof that homosexual conduct has occurred and will interfere with the military mission, whereas under the President's new policy prohibited sexual conduct includes un rebutted statements demonstrating an intent or propensity to engage in homosexual acts. Compare App. H, infra, 2-3, with App. K, infra, 2.

the injunction imposes a significant burden on an agency in the Executive Branch by requiring relief to persons who are not properly before the court.

Id. was a class action challenging the Secretary's failure to follow two Ninth Circuit decisions in terminating the payment of disability benefits under Title II and Title XVI of the Social Security Act. 463 U.S. at 1328. After certifying a class, the district court granted a preliminary injunction that, among other things, required the Secretary to pay benefits to every recipient of disability benefits whose benefits had been terminated within the preceding two years because of cessation of disability, until the Secretary established their lack of disability in accordance with the two Ninth Circuit decisions that she had declined to follow. Id. at 1329-1330, 1334. Then-Justice Rehnquist stayed that portion of the injunction pending appeal to the Ninth Circuit, and this Court subsequently sustained the stay.

The stay was based solely on the overbreadth of the district court's injunction. Then-Justice Rehnquist assumed that the Ninth Circuit would rule for the plaintiff class on the merits of its challenge to the Secretary's policy and that a majority of the members of this Court would not vote to review the Ninth Circuit's ruling on the merits. Id. at 1331. He also accepted the determinations of both lower courts, upon the Secretary's application to those courts for a stay, that the balance of equities favored the plaintiffs. Id. at 1337. He nonetheless granted a stay because the district court's injunction went "far

beyond the application of [the two prior Ninth Circuit decisions that the Secretary declined to follow] to concrete cases before it." Id. at 1331. More specifically, it granted relief to persons who, after having their benefits terminated, failed to exhaust their administrative remedies. Id. at 1334-1336. Then-Justice Rehnquist rejected the plaintiffs' argument that "the District Court ha[d] merely exercised its broad remedial powers to return the class members to the positions they occupied before the unlawful termination." Id. at 1336. He stated, "Whatever might be the merits of such a determination in a lawsuit between private litigants, the remedial powers of a federal court in an action seeking to enjoin an agency of a coordinate branch of the government are circumscribed." Ibid. As indicated above, this Court subsequently refused to vacate the stay. 464 U.S. 879 (1983).

This Court's action in Lopez compels the conclusion that a stay is warranted here. In Lopez, a class had been certified; thus, the injunction, though overbroad, at least did not extend beyond the plaintiffs. Nevertheless, a stay was entered because it provided relief to plaintiffs who had failed to exhaust administrative remedies. Here, respondent Meinhold was and is the sole plaintiff in this case. Yet the injunction plainly extends well beyond him by granting relief to persons who are not entitled to such relief both because they are not parties to this case and because they have failed to exhaust their administrative remedies. Moreover, Lopez involved the administration of the

Social Security program in the civilian sector. In that context, it is well settled that courts generally may not grant relief that "propel[s] [them] into the domain which Congress has set aside exclusively for the administrative agency." Lopez, 463 U.S. at 1333 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). That principle applies with much greater force in the context of judicial relief that intrudes directly into military affairs and interferes with the policy of the Commander-in-Chief and Congress. See Chappell v. Wallace, 462 U.S. at 301.

2. As we have said, this Court need not reach the merits of the equal protection issue (either as it affects Meinhold's own discharge or more generally) in order to grant this application for a stay, in light of the fundamental defects in the scope and intrusiveness of the injunction. Nevertheless, the district court seriously erred in its analysis of Meinhold's equal protection challenge to his discharge. The district court's equal protection analysis conflicts with the decisions of the other courts of appeals that have considered equal protection challenges to military discharges based on homosexuality.^{16/} Thus,

^{16/} Dronenburg v. Zech, 741 F.2d 1388, 1391-1398 (D.C. Cir. 1984); Ben-Shalom v. Marsh, 881 F.2d 454, 463-466 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Rich v. Secretary of Army, 735 F.2d 1220, 1229 (10th Cir. 1984); Woodward v. United States, 871 F.2d 1068, 1075-1077 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); see also Schowengerdt v. United States, 944 F.2d 483, 489-490 (9th Cir. 1991) (rejecting substantive due process challenge), cert. denied, 112 S. Ct. 1514 (1992); Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980) (same), cert. denied, 452 U.S. 905 (1981); High Tech Gays v. Defense Indus. Security Clearance Off., 895 F.2d 563, 570-578 (9th Cir. 1990) (rejecting equal protection challenge); but see Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655

quite apart from the improper breadth and intrusiveness of the injunction, there is a strong probability that this Court would grant further review and reverse if the Ninth Circuit were to affirm the district court's decision.

Judicial consideration of an equal protection challenge in this setting is governed by three principles. First, it is firmly established that courts owe great deference to the "considered professional judgment" of the "appropriate military officials" regarding the composition of the Armed Forces. Goldman v. Weinberger, 475 U.S. 503, 509 (1986); see also Department of Navy v. Egan, 484 U.S. 518, 527-530 (1988) (courts must show "utmost deference" to "[p]redictive judgments[s]" by the Executive Branch such as those in the military context). Second, in light of the foregoing principles of deference, it is appropriate in the special military setting to apply the rational-basis standard for reviewing equal protection challenges set forth in Heller v. Doe, 113 S. Ct. 2637 (1993). Under that standard, a classification challenged on equal protection grounds "must be upheld * * * if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. at 2642. Such a classification is "not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data," and the burden is on the one attacking the classification "to negative every conceivable basis which might support it whether or not the

(1992), discussed in note __, infra.

basis has a foundation in the record." *Id.* at 2643 (internal quotation marks and citations omitted). Third, with regard to classifications in the military context, nothing in the Constitution requires the President or the Congress to eschew categorical rules in favor of a case-by-case inquiry into the extent to which particular conduct may interfere with the military mission. Solorio v. United States, 483 U.S. 435 (1987); see also Weinberger v. Salfi, 422 U.S. 749 (1975); Beller v. Middendorf, 632 F.2d 788, 808-809 n.20 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

The district court's analysis and the resulting injunction violate these principles. First, the court refused to accord any deference to the judgment of the military under the former policy that "[t]he 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." DOD Directive 1332.14(H)(1)(a) (App. L, infra, 1).^{17/} App. C, infra, 2-3.

^{17/} The directive setting forth the military policy on homosexuality at the time of Meinhold's discharge explained that the presence of actively homosexual members "adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence 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 retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security." DOD Directive 1332.14(H)(1)(a) (App. L, infra, 1); see also Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980) (Kennedy, J.), cert. denied, 452 U.S. 905 (1981).

Second, the court required the government to establish a rational basis for the policy regarding homosexuals through record evidence, a requirement that cannot be squared with Heller.^{18/} Finally, the court erred by entering an injunction that bars the discharge of a servicemember on the basis of homosexual acts or statements in the absence of proof of specific "sexual conduct * * * proven to interfere with the military mission of the armed forces of the United States." App. B, infra, 2. That prohibition cannot be squared with the authority of the political Branches to adopt categorical rules governing military personnel that operate without the need to establish that application of the rule in each particular case is necessary to prevent interference with the military mission. See Solorio v. United States, supra.^{19/}

^{18/} The district court gleaned such a requirement from Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992). App. C, infra, 2-3. In Pruitt, the Ninth Circuit reversed an order dismissing an equal protection challenge by a homosexual servicemember to her discharge and remanded the case for further proceedings on whether the government had established, through evidence in the record, a rational basis for the discharge. 963 F.2d at 1165-1167. Pruitt does not survive Heller v. Doe, supra. In any event, the government did produce declarations and other evidence in the district court in this case setting forth the basis for the policy. See Excerpts of Record 52-74, 84.

^{19/} Contrary to the district court's belief, the policy it invalidated was not based "merely on status." App. C, infra, 2. The Seventh and Federal Circuits have recognized as much, holding that the policy targets past and prospective homosexual conduct. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1074 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); cf. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 788-789 (1990) (discussing use of rebuttable presumptions).

Although the President's new policy differs in meaningful ways from the policy that Meinhold challenged, particularly with respect to conditions of enlistment, recognition of sexual orientation per se as a personal and private matter, and grounds for investigations, the new policy does not require that particular sexual conduct be proven, in each instance, to interfere with the military mission of the Armed Forces. Applying this aspect of the district court's injunction to the new policy thus is similarly flawed. Furthermore, the new policy includes in its definition of prohibited sexual conduct un rebutted statements that demonstrate an intent or propensity to engage in homosexual acts. To the extent that the district court's injunction excludes such statements from the coverage of "sexual conduct * * * proven to interfere with the military mission of the armed forces of the United States," it fails to accord appropriate deference to military judgments. The serious flaws in the district court's ruling on the equal protection issue thus provide powerful support for a stay.

B. THE DISTRICT COURT'S INJUNCTION WILL CAUSE
IRREPARABLE INJURY UNLESS STAYED PENDING
APPEAL

1. Most importantly, the district court's injunction causes irreparable injury by preventing the implementation of the new policy on homosexual conduct in the Armed Forces. That policy, the central principles of which were announced on July 19, 1993, was developed by the President as Commander-in-Chief and has been approved by each House of Congress in identical bills. Both

political Branches have determined that the new policy is necessary to the effectiveness and readiness of our Armed Forces, and the Department of Defense has prepared the necessary implementing regulations.

Although Meinhold did not challenge the President's new policy, the injunction bars implementation of that policy by setting forth standards that conflict with the standards developed by the President and Congress. Specifically, as explained above, under the new policy (as well as under the pending legislation), servicemembers who, like Meinhold, make unrebutted statements demonstrating their propensity or intent to engage in homosexual acts are subject to discharge. App. K, infra, 1-2; see pp. __-__, supra. Yet the injunction bars the discharge of persons who make such statements unless the military can prove both that they engaged in specific "sexual conduct" that is proven to "interfere with the mission of the armed forces." App. H, infra, 1-2. Indeed, the injunction appears to prohibit the Department of Defense even from creating records regarding such persons in the absence of proven conduct that satisfies the district court's standard.

The barrier erected by the district court to implementation of the President's new policy and the pending legislation is all the more egregious in light of the enormous amount of time and attention that the political Branches devoted to developing that policy. The policy is the result of an exhaustive review by the Secretary and other high-level military and civilian officials,

including the Joint Chiefs of Staff and a military working group in the Department of Defense. Those officials consulted extensively with members of Congress, military officers, enlisted personnel, and outside experts, and they considered "a huge outpouring of mail from the American people on all sides of this issue." 7/20/93 Tr. of Hearing Before the Senate Comm. on Armed Services, supra, at 22 (testimony of Gen. Powell).

The resulting policy reflects a carefully crafted compromise on an extraordinarily sensitive issue of great importance to both servicemembers and the general public. It has, moreover, been approved by both Houses of Congress in identical provisions of a bill that is now pending before the conference committee and is expected to be enacted shortly. See S. 1298, supra, § 546 (App. P, infra); H.R. 2401, supra, § 575 (App. Q, infra); see also pp. ____-____, supra. The policy thus bears the clear stamp of approval of the politically accountable Branches. Its implementation should not be thwarted by a single district court in a suit brought by a single individual. Cf. Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist J., Circuit Justice).

→ 2. As extended by the district court's September 30 order, the injunction by its terms also has an immediate impact on the effectiveness and readiness of our Armed Forces. The injunction prohibits discharges of servicemembers on the basis of homosexual acts or statements except in conformity with the stringent standard that the court imposed -- i.e., proof of specific

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"sexual conduct * * * proven to interfere with the military mission of the armed forces." App. E, infra, 2. That prohibition, standing alone, has a dramatic impact. Since 1989, more than 3500 servicemembers have been discharged under the military's regulations regarding homosexuality. Declaration of Edwin Dorn, Assistant Secretary of Defense for Personnel and Readiness (App. W, infra). Moreover, at least 115 separation proceedings are pending under those regulations. Ibid. Those proceedings have been held in abeyance as a result of the Meinhold injunction.

In addition to discharges, the injunction applies to "any action[] whatsoever" that "in any way affects" an individual's "military status, advancement, evaluation, duty assignment, duty location, promotion, enlistment or reenlistment." App. H, infra, 2-3. Thus, a commanding officer must refrain from taking actions that he or she considers necessary to maintaining the readiness of his or her units, if the action adversely affects a servicemember in one of the ways specified in the injunction, unless the commanding officer can prove that the servicemember has engaged in specific sexual conduct that "interferes with the military mission." For example, a commander in charge of a unit engaged in hostilities apparently could not transfer to another unit a servicemember who had engaged in prohibited homosexual conduct, even if the commander concluded that the person's presence were having an immediate adverse impact, unless the commander could prove that the member engaged in specific sexual conduct and that

such conduct (as opposed to the mere presence of the service-member) interfered with the military mission. Military commanders should not be placed in such a dilemma when the court of appeals has yet to pass upon the validity of the injunction.

The effect of the injunction in this regard is not merely hypothetical. One servicemember previously transferred to standby reserve under the interim policy has already been restored to active duty under compulsion of the Meinhold injunction, despite the military's determination that the presence of persons who had engaged in conduct prohibited by that policy undermines military readiness and effectiveness. Elzie v. Aspin, et al., Civil No. 93-1853 (D.D.C.); see also Selland v. Aspin, supra, (App. U, infra), discussed in note __, supra. Another servicemember -- against whom discharge proceedings were instituted based on her homosexual affair with a subordinate officer and who subsequently brought an action challenging those proceedings -- has invoked the Meinhold injunction to demand that the proceedings be stayed and that she be promoted; she contends that the military has failed to prove that her conduct interfered with the military mission of the armed services and that such proof is required under the Meinhold injunction. See De Jesus Lopez v. Donley, No. 93-1162 (5th Cir. June 7, 1993).

3. The potential for irreparable injury resulting from the injunction is compounded by its breadth and vagueness. The Department of Defense is a vast organization, composed of hundreds of components and millions of personnel worldwide. Imple-

It is also unclear how "sexual conduct" can be "proven to interfere with the military mission of the armed forces of the United States." The injunction could be read to require individualized proof in each case that the particular sexual conduct interfered with the military mission of the Armed Forces. See Selland v. Aspin, supra, at 2 (App. U, infra). Yet the district court did not indicate what type of interference (or proof thereof) it would regard as sufficient. More fundamentally, a requirement of case-by-case proof ignores the overriding need for clear rules in regulating the behavior of large numbers of people, especially in the military setting. That need is reflected both in the policy under which Meinhold was discharged and the President's new policy, which are premised on the considered military judgment that the presence of individuals who engage in (or demonstrate an intent or propensity to engage in) homosexual acts is, as a categorical matter, detrimental to the military mission of the Armed Forces. App. L, infra, 1. It is also reflected in the provision of the Uniform Code of Military Justice that makes it illegal to commit sodomy, without regard to whether that conduct is proven, in any particular case, to interfere with the military mission. See 10 U.S.C. 925.^{20/}

The prospects of irreparable injury flowing from the breadth and vagueness of the injunctions are not limited to the military

^{20/} See also S. Rep. No. 112, supra, at 284 (under prior policy and President's new policy, "[t]he government is not required to prove in each individual case that a service member will not remain celibate or to otherwise prove adverse impact on a specific unit").

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and its commanding officers; they also extend to the very persons the injunction purports to benefit. That is so because service-members and applicants for enlistment may be lulled by the injunctions into the belief that they may make statements demonstrating an intent or propensity to engage in homosexual acts, or may engage in homosexual acts, without exposing themselves to discharge or disciplinary action. If the injunctions are subsequently set aside, however, those individuals could be subject to discharge under the new policy.

4. As extended on September 30, the district court's injunction requires the Department of Defense to undertake a massive search to identify all records, "whether official or unofficial," that are "based on sexual orientation," except those involving "proven sexual conduct," and it prohibits the Department from "maintaining or creating" such records. App. H, infra, 2. The burdensomeness of that requirement cannot be overstated.

Because the order encompasses "any member of the armed forces of the United States" (App. H, infra, 2), the required search would have to cover files and records relating to some 5.1 million individuals (1.7 million on active duty, 1.8 million on reserve, and 1.6 million retired). Most of those records are not available in a full-text computer data base, and a search would therefore require hand-processing of millions of pages. Moreover, the records are not in a single location; they may be found anywhere in the world that the Armed Forces are found. It would require an enormous expenditure of financial and human resources

just to set up a program for complying with the record-search requirement.^{21/}

The September 30 order does not end with requiring the identification of files and records "based on sexual orientation"; it also prohibits the Department from "creating or maintaining" such records. Many basic files are covered by the order: enlistment records, which previously required servicemembers to disclose whether they were homosexual; medical records, including the records of mental health professionals; legal assistance and defense counsel records, including attorney-client communications; security records, including reports on background investigations required for security clearance; and chaplaincy records. Many of those records might contain information on a servicemember's sexual orientation, and therefore could be subject to destruction under the vaguely worded prohibition on the maintenance or creation of records "based on sexual orientation in the absence of proven sexual conduct." App. H, *infra*, 2. The integrity of the Department's and Armed Forces' recordkeeping systems, however, is vital to the proper management and deploy-

^{21/} In the court of appeals, Meinhold did not dispute that the injunction appears to require the massive search of records described in the text. Instead, he suggested that the defendants could temporarily avoid contempt sanctions by developing a program for the records search. See Meinhold's Opp. to Gov't's Emergency Motions Under Rule 27-3, etc., at 11 n.6. That passing suggestion is scant assurance for the thousands of civilian and military personnel who will have custody of records over the period of months (perhaps a year or more) that proceedings are pending in the Ninth Circuit (and then, perhaps, in this Court). In any event, even the burden of putting such a plan in place is staggering. See Dorn Decl. at ___ (App. W, *infra*).

ment of military personnel. If the documents were destroyed, they would be irretrievably lost. Even if references to homosexuality that do not meet the district court's standards could be redacted in a manageable fashion, those redacted portions would be irretrievably lost in the absence of a stay. A stay therefore is justified to prevent the issue of the validity of the document-destruction provision in the injunction from becoming moot on appeal, John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, Circuit Justice), and to prevent the irreparable injury that loss of the documents would entail.

C. THE PUBLIC INTEREST AND THE BALANCE OF THE
EQUITIES WEIGH HEAVILY IN FAVOR OF A STAY

The public debate on the issue of homosexual conduct by members of the Armed Services has been prolonged and intense. It has consumed the attention of the Commander-in-Chief, other military leaders, and Congress. That process has resulted in the adoption of a policy by the President, approved by both Houses of Congress, that embodies a considered judgment by military officers and the political Branches regarding the appropriate accommodation between a matter of personal privacy and the overriding national interest in ensuring military readiness. That policy and the military judgment that underlies it are owed the utmost deference by the courts, and the policy is presumptively constitutional. Cf. Walters, 473 U.S. at 319. Correspondingly, an injunction that peremptorily bars implementation of such a policy in the military context -- adopted by the President and approved by both Houses of Congress based on an extensive legislative

record -- must be presumed to cause irreparable injury. Cf. Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (Rehnquist, Circuit Justice), motion to vacate stay denied, 469 U.S. 877 (1984). The public has a strong interest in having the President's new policy regarding homosexual conduct in the Armed Forces implemented forthwith, so as to preserve the confidence of members of the Armed Forces and the public in the ability of their elected and military officers to address the governance of the Armed Forces, a power vested in the Executive and Legislative Branches by the Constitution. U.S. Const. Art. I, § 8, Cls. 12-14, Art. II, § 2, Cl. 1.

Moreover, the irreparable harm that would result from denial of a stay far outweighs any cognizable harm that might result from the granting of a stay. Meinhold, the only named plaintiff, has already been granted complete relief. He has been reinstated and reassigned to his previous position, and we do not, in this application, seek a stay of the injunction insofar as it grants him that relief. Therefore, if a stay is granted, Meinhold will suffer, at most, a delay in the vindication of his generalized and abstract interest in the nationwide scope of the injunction -- relief that he has no standing to obtain. Any potential for harm to other servicemembers should not weigh in favor of a stay, because they are not parties to the suit; because the injunction may actually harm other servicemembers and enlistees by inducing statements and conduct that would violate military policy and lead to discharge; because any potential for harm to any other

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servicemember if a stay is granted is speculative until final action has been taken against that member; and because at that point each such servicemember may seek relief on his or her own behalf. In short, the public interest and balance of the equities strongly favor a stay of the district court's broad injunctions, which were wholly beyond its power to enter.

CONCLUSION

The January 29 and September 30, 1993, orders of the United States District Court for the Central District of California should be stayed pending appeal, insofar as they grant relief to anyone other than respondent Meinhold and require destruction of records, including records pertaining to Meinhold.

Respectfully submitted.

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