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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTYUNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLEMARGARETHE CAMMERMEYER,
Plaintiff,

v.

LES ASPIN, Secretary of
Defense, et al.,

Defendants.

NO. C92-9422

ORDER

Margarethe Cammermeyer brings this declaratory judgment action against the Government claiming that her discharge from military service under Army Regulation 135-175, based solely on her admission that she is a lesbian, violated her rights to equal protection of the laws guaranteed under the Fifth Amendment to the United States Constitution. She also claims her discharge violated her right to privacy under the First, Fourth, Fifth and Ninth Amendments to the Constitution, her substantive due process rights under the Fifth Amendment and her right to freedom of speech under the First Amendment.

¹ Although William J. Perry is now the Secretary of Defense, he has not yet been formally substituted as a named defendant.

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1 Cammermeyer further claims that Army Regulation 135-176 is an
2 invalid exercise of executive power violative of the
3 constitutional separation of powers, and that the regulation
4 violates principles of federalism.

5 The parties have now filed cross-motions for summary
6 judgment. Plaintiff moves for summary judgment on her equal
7 protection claim (docket no. 50). Defendants move for
8 judgment on the pleadings or, in the alternative, summary
9 judgment on all of plaintiff's claims (docket no. 59). The
10 Court heard oral argument on these cross-motions on April 30,
11 1994, and took the matter under advisement. The Court has
12 reviewed all of the materials submitted by the parties and now
13 GRANTS plaintiff's motion for summary judgment as to her equal
14 protection and substantive due process claims under the Fifth
15 Amendment, and GRANTS defendants' motion for summary judgment
16 as to the remainder of plaintiff's claims.

17 I. BACKGROUND

18 Margarethe Cammermeyer is a former Colonel of the
19 Washington State National Guard. She entered the Army Student
20 Nurse Corps in 1961, and with the exception of a four year
21 period when she was ineligible for service,² Cammermeyer
22 served in the Army until 1986. In that year, Cammermeyer

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25 ² Cammermeyer was married from 1966 until 1980 and she
26 and her husband had four sons. She was forced to resign upon
her first pregnancy in 1968 following more than seven years of
active duty as a result of then-applicable Army regulations.
Due to a change in Army regulations, she was able to reenlist
in the Army Reserve in 1972.

1 transferred to the Washington State National Guard where she
2 continued to serve until she was discharged on June 11, 1992.

3 Cammermeyer's expertise as an Army Nurse is remarkable.
4 She has earned bachelor's, master's and doctorate degrees in
5 Nursing. She was a member of the Clinical Faculty of the
6 University of San Francisco School of Nursing where she co-
7 authored four research articles published in the Journal of
8 Military Medicine. Cammermeyer Decl. at ¶¶ 3, 8, 12, 19. In
9 addition, she has received numerous awards and distinctions,
10 including the Bronze Star for distinguished service in
11 Vietnam.³ Id. at ¶ 6. She volunteered and served in Vietnam
12 for fifteen months with distinction. Id. at ¶¶ 5-6.
13 Cammermeyer has served in numerous other capacities in the
14 Army and Washington State National Guard, including medical-
15 surgical supervisor and Assistant Chief Nurse of the 50th
16 General Hospital in Fort Lawton, Washington, Chief Nurse of
17 the 352nd Evacuation Hospital in Oakland, California, and
18 State Chief Nurse and consultant to the State Chief Surgeon at
19 Camp Murray, Washington. Id. at ¶¶ 8, 11, 15.

20 In April, 1989, Cammermeyer applied for admission to the
21 Army War College to receive training she considered essential
22 to her goal of becoming Chief Nurse of the National Guard
23 Bureau ("NGB"). Id. at ¶ 16. During a top secret security
24

25 ³ The recommendation for her Bronze Star provided, in
26 part, that "[h]er professional and personal conduct merit the
highest praise and reflect great credit upon herself and the
United States Army Medical Service" Complaint
(Exhibit 1) at ¶ 4.6.

1 check required for admission to the Army War College,
2 Cammermeyer was asked about her sexual orientation and
3 answered that she is a lesbian.⁴ Notwithstanding this
4 admission, Cammermeyer was told by the Washington State
5 National Guard that she could continue to serve as Chief
6 Nurse, and that the Guard would not pursue her discharge
7 "unless forced to do so" by the Department of the Army. *Id.*
8 at ¶ 18. Alternatively, she was told she could resign.
9 Cammermeyer chose to continue to serve. Six months later,
10 pursuant to service-wide federal regulations barring
11 homosexuals from the military, the United States Army
12 commenced proceedings to withdraw Cammermeyer's "federal
13 recognition" and thus render her ineligible to serve in the
14 Washington State National Guard or any other branch of the
15 military.⁵

16
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18 ⁴ Her formal statement, written by the DIS Investigator
19 based upon their conversation but edited and initialed by Col.
20 Cammermeyer, states: "I am a lesbian. Lesbianism is an
orientation I have, emotional in nature, towards women. It
does not imply sexual activity" Cammermeyer Decl.,
Ex. G.

21 ⁵ The Army National Guard is comprised of two separate
22 but overlapping organizations, the National Guards of the
23 various states and the National Guard of the United States
24 ("NGUS"). Under the dual system, a servicemember may not
25 become an officer in the NGUS until he or she has been
26 promoted to the same grade in the state National Guard and
been "federally recognized." 10 U.S.C. § 591(a). A board of
officers may be convened at any time to investigate an
officer's "capacity and general fitness" to retain his or her
Federal recognition. 32 U.S.C. § 323(b). On the board's
recommendation, an officer's Federal recognition may be
withdrawn, requiring mandatory discharge from the State
National Guard. 32 U.S.C. §§ 323(b), 324(a)(2).

1 Cammermeyer continued to serve in her position as Chief
2 Nurse for more than three years after she admitted that she is
3 a lesbian. During this period, a military retention board was
4 convened to review whether Cammermeyer's federal recognition
5 should be withdrawn because of her lesbian status. On July
6 14, 1991, after a two-day hearing, the Board recommended
7 withdrawal of Cammermeyer's federal recognition. In presiding
8 over the Board, former Chief Nurse, NGB, Colonel Patsy
9 Thompson openly regretted her "sad duty" of reading the
10 Board's adverse recommendation to "one of the great
11 Americans." Tr. of Hearing before Federal Recognition Board,
12 Vol. 2, at 131-33. Colonel Thompson stated that Cammermeyer
13 "has consistently provided superb leadership and has many
14 outstanding accomplishments to her credit." *Id.* at 132.

15 On June 11, 1992, Cammermeyer was discharged based upon
16 the Board's recommendation and received an honorable
17 discharge.⁶ Cammermeyer's final evaluation, dated July 31,
18 1992, describing her contributions to the Army and noting her
19 discharge, concluded that "[t]his officer has the potential to
20 serve as Chief Nurse, NGB; and to represent her profession in
21 major research projects in military medicine anywhere in the
22 world." Cammermeyer Decl., Exhibit D, Officer Evaluation
23 Report (OER) dated July 31, 1992. Prior to her discharge,
24 Washington Governor Booth Gardner, Commander-in-Chief of the
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26 ⁶ Cammermeyer is believed to be the highest ranking officer in any service of the U.S. Armed Forces to have been discharged because of homosexual status.

1 Washington State National Guard, wrote a letter to then
2 Secretary of Defense Richard Cheney requesting that
3 Cammermeyer be retained. Cammermeyer Decl. Exhibit H. That
4 letter states, in part, that "if Colonel Cammermeyer's
5 discharge becomes final, this would be both a significant loss
6 to the State of Washington and a senseless end to the career
7 of a distinguished, long-time member of the armed services."
8 Id.

9 II. DISCUSSION

10 A. Summary Judgment Standard

11 Summary judgment is appropriate if the record shows
12 "that there is no genuine issue as to any material fact and
13 that the moving party is entitled to a judgment as a matter of
14 law." Williams v. I.B. Fischer Nev., 999 F.2d 445, 447 (9th
15 Cir. 1993) (quoting Fed. R. Civ. P. 56(c)). In determining
16 whether there are any genuine issues of material fact for
17 trial, the court must view all of the evidence in the light
18 most favorable to the nonmoving party. Abuan v. General
19 Electric Co., 3 F.3d 329, 332 (9th Cir. 1993), cert. denied,
20 114 S.Ct. 1064, 127 L.Ed.2d 383 (1994). This is true even
21 when the court is presented with cross-motions for summary
22 judgment. High Tech Gays v. Defense Indus. Sec. Clearance
23 Office, 895 F.2d 563, 574 (9th Cir. 1990). "Summary judgment
24 must be entered 'against a party who fails to make a showing
25 sufficient to establish the existence of an element essential
26 to that party's case, and on which that party will bear the

1 burden of proof at trial.'" Abuan, 3 F.3d at 331 (quoting
2 Calotex Corp. v. Catratt, 477 U.S. 317, 322, 106 S.Ct. 2548,
3 2552, 91 L.Ed.2d 265, (1986)). Once a summary judgment motion
4 is made and properly supported, the adverse party may not rest
5 on the mere allegations of his or her pleadings, but must set
6 forth specific facts showing that there is a genuine issue for
7 trial. Fed. R. Civ. P. 56(e). If there is any need to weigh
8 the evidence at issue, summary judgment is inappropriate.
9 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct.
10 2505, 2510, 91 L.Ed.2d 202 (1986).

11 B. Equal Protection Challenge

12 Both parties move for summary judgment on plaintiff's
13 claim that her discharge from the Washington State National
14 Guard violated her equal protection rights under the Fifth
15 Amendment to the United States Constitution.

16 1. Equal Protection Standard

17 "The Equal Protection Clause of the Fourteenth Amendment
18 commands that no State shall 'deny to any person within its
19 jurisdiction the equal protection of the laws,' which is
20 essentially a direction that all persons similarly situated
21 should be treated alike." City of Cleburne v. Cleburne Living
22 Center, Inc., 473 U.S. 432, 439, 103 S.Ct. 3249, 3254, 87
23 L.Ed.2d 313, 320 (1985) (quoting Plyler v. Doe, 457 U.S. 202,
24 216 (1982)). While the Fifth Amendment does not contain an
25 equal protection clause, the due process clause of the Fifth
26 Amendment has an equal protection component that applies to

1 the federal government. Hollings v. Sharna, 347 U.S. 497, 74
2 S.Ct. 693, 98 L.Ed. 884 (1954).

3 There are three standards of review applicable to equal
4 protection challenges to governmental regulations: strict
5 scrutiny, heightened scrutiny, and rational basis review.
6 High Tech Gays, 895 F.2d at 571 (citing Cleburne, 473 U.S. at
7 440-41, 105 S.Ct. at 3254-55, 87 L.Ed.2d 320-21). Legislative
8 classifications based on race, alienage, or national origin
9 require strict scrutiny. The classification will be upheld
10 only if it is "suitably tailored to serve a compelling state
11 interest." Cleburne, 473 U.S. at 440, 105 S.Ct. at 3254, 87
12 L.Ed.2d at 320. Strict scrutiny is also required when laws
13 impinge upon constitutionally protected "fundamental" rights.
14 Id. Legislative classifications based on gender call for a
15 heightened standard of review; the classification survives
16 only if it is "substantially related to a sufficiently
17 important governmental interest." Id. at 441, 105 S.Ct. at
18 3255, 87 L.Ed.2d at 321. Certain restrictions beyond a
19 person's control, such as illegitimacy, are also subject to
20 heightened review. These restrictions "will survive equal
21 protection scrutiny to the extent they are substantially
22 related to a legitimate state interest." Mills v. Habluetzel,
23 456 U.S. 91, 99, 102 S.Ct. 1549, 1554, 71 L.Ed.2d 770, 777-78
24 (1982). Finally, equal protection challenges that do not
25 involve suspect classifications or fundamental rights are
26 subject to "rational basis" review. Haller v. Doe, 509 U.S.

1 ___, 113 S.Ct. 2637, 125 L.Ed.2d 257, 270 (1993). Under this
2 standard, a discriminatory classification is presumed valid
3 and will be sustained "if there is a rational relationship
4 between the disparity of treatment and some legitimate
5 governmental purpose." *Id.*

6 The Ninth Circuit has previously held that homosexuals
7 are not a suspect or quasi-suspect class for equal protection
8 purposes, and that classifications based on homosexuality are
9 entitled only to rational basis review. High Tech Gays, 895
10 F.2d at 571. In this case, the parties agree that the
11 rational basis standard of review applies to plaintiff's equal
12 protection challenge.

13 2. Rational Basis Review

14 Rational basis review is a two-step process. Jackson
15 Water Works, Inc. v. Public Utilities Comm'n, 793 F.2d 1090,
16 1094 (9th Cir. 1986), cert. denied, 479 U.S. 1102, 107 S.Ct.
17 1334, 94 L.Ed.2d 184 (1987). Initially, the court must
18 determine whether the challenged classification serves a
19 legitimate governmental purpose. If the court answers this
20 question in the affirmative, the court must then determine
21 whether the discriminatory classification is rationally
22 related to the achievement of that legitimate purpose. A
23 discriminatory classification that is based on prejudice or
24 bias is not rational as a matter of law. See Palmore v.
25 Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421, 426
26 (1984) (mother could not be denied custody of her child based

1 on social disapproval of her interracial marriage); Gleburne,
2 473 U.S. at 448, 105 S.Ct. at 3259, 87 L.Ed.2d at 326 (city
3 could not require a special use permit for group home for the
4 mentally retarded where the requirement was based on
5 prejudice).

6 The defendants contend that Army Regulation 135-175
7 serves the government's legitimate interest in maintaining the
8 readiness and combat effectiveness of its military forces.
9 Plaintiff does not dispute that this is a legitimate
10 governmental purpose. Thus, the Court can proceed to the
11 second step of its rational basis analysis and determine
12 whether the government's exclusion of homosexuals from
13 military service is rationally related to this legitimate
14 governmental purpose.

15 Before proceeding with this analysis, however, the Court
16 must resolve three preliminary issues: (a) the appropriate
17 level of deference to accord to military decisions; (b) the
18 viability of the standard of review applied in Pruitt v.
19 Cheney, 963 F.2d 1160 (9th Cir.), cert. denied, 113 S.Ct. 655,
20 121 L.Ed.2d 581 (1992), following Heller v. Doe, 509 U.S. ____,
21 113 S.Ct. 2637, 125 L.Ed.2d 257, 270 (1993); and (c) whether,
22 for purposes of equal protection analysis, there is a
23 meaningful distinction between homosexual orientation and
24 homosexual conduct.

1 a. Deference to the Military

2 The Constitution confers broad powers on the President
3 and Congress to raise and support armies, provide and maintain
4 a naval force, and promulgate rules governing and regulating
5 both land and naval forces. Traditionally, courts have
6 recognized the Constitution's mandate by according significant
7 deference to the "considered professional judgment" of
8 military officials regarding the composition of the armed
9 forces. Goldman v. Weinberger, 475 U.S. 503, 508, 106 S.Ct.
10 1310, 1313, 89 L.Ed.2d 478 (1986). "While it is clear that
11 one does not surrender his or her constitutional rights upon
12 entering the military, the Supreme Court has repeatedly held
13 that constitutional rights must be viewed in light of the
14 special circumstances and needs of the armed forces." Beller
15 v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980). As the
16 Supreme Court has reflected:

17 "[It] is difficult to conceive of an area of
18 governmental activity in which the courts have less
19 competence. The complex, subtle, and professional
20 decisions as to the composition, training,
21 equipping, and control of a military force are
22 essentially professional military judgments, subject
23 always to civilian control of the Legislative and
24 Executive Branches."

25 Rostker v. Goldberg, 453 U.S. 57, 65-66, 101 S.Ct. 2646, 2652,
26 69 L.Ed.2d 478, 487 (1981) (quoting Gilligan v. Morgan, 413
27 U.S. 1, 10 (1973)). Furthermore, "[r]egulations which might
28 infringe constitutional rights in other contexts may survive
scrutiny because of military necessities." Beller, 632 F.2d
at 811.

1 In view of this standard, the Court must be particularly
2 careful not to substitute its own judgment as to what is
3 "desirable" or its own evaluation of what the executive branch
4 may have intended by a given policy. The Court is also
5 mindful, however, that there is not and must never be a
6 "military exception" to the Constitution. Indeed, courts have
7 been willing to defer to the military only within the confines
8 of ordinary constitutional analysis. See Rostker, 453 U.S. at
9 67, 69 L.Ed.2d at 488 (deference to the judgment of other
10 branches in the area of military affairs does not require
11 abdication of "ultimate responsibility to decide
12 constitutional question"). This principle applies with even
13 greater force to equal protection claims since it has
14 traditionally been the domain of the federal courts to
15 scrutinize classifications challenged on equal protection
16 grounds.

17 This Circuit, in Pruitt, 963 F.2d at 1166-67, recognized
18 that deference to the military does not preclude judicial
19 review of military decisions. In Pruitt, the plaintiff, a
20 former Army Reserve officer who was discharged because she
21 acknowledged her homosexual orientation, sued to be
22 reinstated. The trial court dismissed the claim, holding that
23 the Army's determination that homosexuality is incompatible
24 with the military mission was entitled to substantial
25 deference. The Ninth Circuit reversed and remanded, holding
26 that the plaintiff had stated an equal protection claim. The

1 court rejected the Army's contention that the court should
2 defer to military judgment and uphold its regulation "without
3 a record to support its rational basis." Id. at 1167. The
4 court reasoned that:

5 We readily acknowledge, as we must, that military
6 decisions by the Army are not lightly to be
7 overruled by the judiciary. That admonition,
8 however, is best applied in the process of judging
9 whether the reasons put forth on the record for the
10 Army's discrimination against Pruitt are rationally
11 related to any of the Army's permissible goals.

12 Id. at 1166 (citations omitted). The Pruitt court further
13 stated that if it were to defer to military judgment by
14 affirming the district court's dismissal of Pruitt's
15 complaint, without any supporting factual record, it would
16 "come close to denying reviewability at all." Id. at 1167.
17 Thus, simply labeling the government's decision as "military"
18 does not prevent a meaningful review of the decision to
19 discharge the plaintiff because she is a homosexual.

20 Although this Court must give appropriate deference to
21 the military decisionmaking process, the Court must also
22 review the reasons provided by the defendants to determine
23 whether the classification is "rationally related to any of
24 the Army's permissible goals." Id. at 1166.

25 b. Scope of Rational Basis Review

26 The parties in this case dispute the proper standard for
review of government policy under the rational basis test.
Plaintiff relies on Pruitt, and asserts that the defendants
have the burden to demonstrate with facts on the record that

1 the challenged policy is rational and legitimate. The Pruitt
2 Court, in rejecting the Army's argument that it could
3 discharge Pruitt "without any justification in the record" for
4 the policy, stated that "[a]ssuming that Pruitt supports her
5 allegations with evidence, we will not spare the Army the
6 task, . . . of offering a rational basis for its regulation,
7 nor will we deprive Pruitt of the opportunity to contest that
8 basis." Id. The court then remanded the case for development
9 of a factual record and a determination of whether the Army's
10 discriminatory regulation was "rationally related to a
11 permissible governmental purpose." Id. at 1167.

12 The defendants argue that "the continuing validity of
13 Pruitt is undercut" by Heller. Defendants' Memorandum of
14 Points and Authorities (docket no. 59) at 13. At oral
15 argument, the Government further contended that Pruitt was
16 "superseded" and "rendered moot" by Heller. Tr. April 20,
17 1994 Hearing (docket no. 93) at 25. Defendants contend that
18 under Heller, they have no burden to submit evidence
19 justifying the challenged policy and this Court may reject
20 plaintiff's equal protection claim as a matter of law, without
21 considering any such evidence.

22 In Heller, 509 U.S. ____, 113 S.Ct. 2637, 125 L.Ed.2d 257
23 (1993), plaintiffs challenged a Kentucky statute that mandated
24 a higher burden of proof in involuntary commitment proceedings
25 for mentally ill persons than for mentally retarded persons.
26 Plaintiffs claimed that this distinction lacked a rational

1 basis.⁷ The Supreme Court rejected plaintiffs' argument that
2 the statutory distinctions were irrational, finding that the
3 State had "rationally advance[d] a reasonable and identifiable
4 governmental objective." *Id.*, 125 L.Ed.2d at 277. The Court
5 further found that the State's proffered rationales provided a
6 rational basis for the statutory classification. *Id.*, 125
7 L.Ed.2d at 276. In so finding, the Court stated that a
8 challenged discriminatory classification:

9 "must be upheld against equal protection challenge
10 if there is any reasonably conceivable state of
11 facts that could provide a rational basis for the
12 classification." A State, moreover, has no
13 obligation to produce evidence to sustain the
14 rationality of a statutory classification. "[A]
15 legislative choice is not subject to courtroom
16 factfinding and may be based on rational speculation
17 unsupported by evidence or empirical data." A
18 statute is presumed constitutional, . . . and "[t]he
19 burden is on the one attacking the legislative
20 arrangement to negative every conceivable basis
21 which might support it," . . . whether or not the
22 basis has a foundation in the record.

23 *Id.*, 125 L.Ed.2d at 270-71 (citations omitted).

24 The defendants' contention that Pruitt's vitality has
25 been extinguished by Heller is without merit.⁸ While it is

26 ⁷ The Kentucky statute allowed close relatives and
guardians to participate as parties in proceedings to commit
the mentally retarded but not the mentally ill. The Court
noted that mental retardation has its onset during a person's
development, in contrast to mental illness, which may arise or
manifest itself after minority when family members have far
less knowledge of the medical condition. Heller, 125 L.Ed.2d
at 272.

⁸ The Government contended at oral argument that under
Heller no review of the rational basis for the Army regulation
is necessary because "we are completely free to rely on
rational speculation unsupported by empirical data or
evidence." Tr. April 20, 1994 Hearing (docket no. 93) at 26.

1 true that, under Heller, the government policymaker is not
2 required to submit evidence to justify its policy, and may
3 offer only "rational speculation" to explain the
4 discriminating classification, the court remains obligated to
5 determine whether there is a rational basis for the policy.
6 Otherwise, it would not have been necessary for the Heller
7 court to examine the assumptions underlying the Kentucky
8 statute. If the Government's position were correct, the
9 Heller court could have simply upheld the statute as a matter
10 of law, without any inquiry into its rationality. In fact,
11 the Heller court closely examined the State's asserted bases
12 for the differential treatment of the two classes and found
13 that there were plausible rationales for each of the statutory
14 distinctions challenged in the case. The Court concluded
15 that, "even the standard of rationality as we so often have
16 defined it must find some footing in the realities of the
17 subject addressed by the legislation." Heller, 125 L.Ed.2d at
18 271.

19 The continued vitality of Pruitt, following Heller, is
20 further demonstrated by Jackson v. Brigle, 17 F.3d 280 (9th
21 Cir. 1994), a sovereign immunity case, where the Ninth Circuit
22 stated in dicta at the end of its opinion:

23 The Pruitt and High Tech Gays cases, upon which the
24 district court relied, do stand for the proposition
25 that if the Government discriminates against an
26 individual on the basis of homosexuality and does
not demonstrate a rational basis for doing so, it
will have violated that individual's constitutional
rights.

1 Id. at 284.

2 Keller did not address the proper scope of a court's
3 rational basis review where, as here, the plaintiff alleges
4 the governmental policy at issue is based solely on prejudice.
5 If the policy is shown to be based solely on prejudice, it
6 cannot survive rational basis review. Cleburne, 473 U.S. at
7 450, 105 S.Ct. at 3259, 87 L.Ed.2d at 327.

8 In a recent district court case in this circuit, Dahl v.
9 Secretary of the United States Navy, 830 F.Supp. 1319 (E.D.
10 Cal. 1993),⁹ the court rejected the same arguments made by the
11 government here. Dahl was discharged from the Navy because he
12 admitted during an official interview that he was a
13 homosexual. The Dahl court concluded that:

14 In sum, there is no support for defendants' argument
15 that the court must accept without question
16 defendants' proffered bases for the homosexual
17 exclusion policy without analyzing the relevant
evidence and determining whether the policy is
motivated by prejudice against homosexuals.

18 Id. at 1327.

19 In Dahl, as in this case, each party moved for summary
20 judgment on the plaintiff's equal protection claim and both
21 offered evidence in support of their respective motions. The
22 Dahl court considered the parties' respective burdens of
23 production under Rule 56 as to the policy's rationality or
irrationality under the Keller standard, and concluded:

24 If the evidence, construed in the light most
25 favorable to defendants, shows that there is no
26 reasonably conceivable rational basis for the

1 homosexual exclusion policy, and the court cannot
2 conceive of a rational basis (i.e. because it is
3 based solely on illegitimate prejudice), then
4 plaintiff is entitled to summary judgment.
5 Alternatively, if the evidence, construed in the
6 light most favorable to plaintiff, shows that there
7 is any reasonably conceivable rational basis for the
8 policy, then defendants are entitled to summary
9 judgment. Finally, if the evidence creates a
10 disputed issue of material fact as to the policy's
11 rationality, then neither party is entitled to
12 summary judgment.

13 Dahl, 830 F.Supp. at 1327. This Court agrees that this is the
14 proper standard to be applied in evaluating the parties'
15 cross-motions for summary judgment on plaintiff's equal
16 protection claim.

17 (c) Orientation v. Conduct

18 The undisputed evidence in the record establishes that
19 Cammermeyer was discharged from military service solely
20 because she admitted her homosexual orientation. The
21 Government argues, nevertheless, that Cammermeyer's admission
22 that she is a lesbian is reliable evidence of her propensity
23 to engage in homosexual conduct. The Government's position,
24 in sum, is that homosexual "orientation" is equivalent to
25 homosexual "conduct." This is a critical issue for plaintiff
26 because the parties acknowledge for purposes of this
litigation that, under Bowers v. Hardwick, 478 U.S. 186, 106

1 S.Ct. 2841, 92 L.Ed.2d 140 (1986),¹⁰ and Pruitt, 963 F.2d at
2 1165, the government may exclude individuals from military
3 service on the basis of homosexual conduct.

4 The Government cites Ben-Shalom v. Marsh, 881 F.2d 454,
5 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004, 110 S.Ct.
6 1296, 108 L.Ed.2d 473 (1990), as support for its position that
7 acknowledgment of homosexual orientation can "rationally and
8 reasonably be viewed as reliable evidence of a desire and
9 propensity to engage in homosexual conduct." In Ben-Shalom,
10 plaintiff Miriam Ben-Shalom, a sergeant in the Army Reserve,
11 admitted that she was a lesbian. As a result of this
12 admission, she was discharged from the Army Reserve pursuant
13 to Army Regulation 135-178,¹¹ which provided for the discharge
14 of any servicemember who "evidenced homosexual tendencies,
15 desire or interest, but is without overt homosexual acts."
16 The trial court found no reason to believe that the
17 plaintiff's admission that she was a lesbian meant the
18 plaintiff was likely to commit homosexual acts, and ordered
19 injunctive relief in plaintiff's favor. The Seventh Circuit
20 reversed, holding that Ben-Shalom's "lesbian acknowledgement,

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22
23 ¹⁰ Hardwick involved a due process challenge to a
24 Georgia statute which criminalized sodomy. Hardwick
25 challenged the statute after being discovered engaging in
26 sodomy with another consenting adult while in the privacy of
his own home. The Supreme Court held that the Constitution
confers no fundamental right upon homosexuals to engage in
sodomy.

¹¹ This is substantially the same Army regulation
challenged by Cammermeyer.

1 if not an admission of its practice, at least can rationally
2 and reasonably be viewed as reliable evidence" of a desire or
3 propensity to engage in homosexual conduct. *Id.* at 464. The
4 Ben-Shalom court, relying on Bowers, denied relief, holding
5 that the Army regulation promoted a legitimate governmental
6 interest sufficient to survive rational basis scrutiny. The
7 Government's reliance on Ben-Shalom, and other cases cited in
8 the defendants' Opposition to Plaintiff's Motion for Summary
9 Judgment (docket no. 75) at 5, is misplaced.

10 The Ninth Circuit has recognized a distinction between
11 homosexual status or orientation and conduct. In Pruitt, the
12 plaintiff was discharged from the Army because of her public
13 acknowledgment in a newspaper interview that she is a
14 homosexual. She subsequently brought an action to challenge
15 the same Army regulation at issue in this case. The
16 Government argued, citing several cases, that its right to
17 discharge homosexual servicemembers was so firmly supported in
18 the law that any equal protection claim asserted by Pruitt was
19 legally insufficient on its face. In rejecting this argument,
20 the Ninth Circuit distinguished these prior cases, including
21 Bowers and other cases relying on Bowers, as cases "relating
22 to conduct, not orientation." Pruitt, 963 F.2d at 1165-66 n.
23 4 and 5.¹²

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25 ¹² In the present case, the Government also relies on
26 Dronenburg v. Zach, 741 F.2d 1388 (D.C. Cir. 1984), to support
its argument that homosexual orientation equals homosexual
conduct. However, whether any agency of the federal
government can discriminate against individuals merely because
of sexual orientation remains an open question in the D.C.

1 Supreme Court precedents have also recognized a status-
2 conduct distinction in other contexts. In Robinson v.
3 California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962),
4 the Court struck down a statute criminalizing "status" as a
5 drug addict, absent evidence of drug use, as a violation of
6 the Eighth Amendment prohibition against cruel and unusual
7 punishment. Similarly, in Powell v. Texas, 392 U.S. 514, 532,
8 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), the Court upheld a
9 conviction for drinking in public but disapproved of arrests
10 based solely on status as a chronic alcoholic. Furthermore,
11 Supreme Court precedents prohibit presumptions of criminal
12 conduct based on orientation. See Jacobson v. United States,
13 503 U.S. ___, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992) (prior
14 conduct does not demonstrate a propensity to engage in
15 identical conduct later made illegal); Aptheker v. Secretary
16 of State, 379 U.S. 500, 501-02, 84 S.Ct. 1659, 12 L.Ed.2d 992,
17 995 (1964) (government may not deny member of Communist Party
18 right to travel based on statutory presumption the individual
19 will compromise national security). These cases stand for the
20 proposition that status and conduct are distinct, and that it
21 is inherently unreasonable to presume that a certain class of

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24 Circuit. See Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir.
25 1986), aff'd in part and rev'd in part sub. nom., Webster v.
26 Doe, 486 U.S. 592 (1988); Steffan v. Aspin, 8 F.3d 57, 62
(D.C. Cir. 1993), vacated for reh'g en banc, 1994 U.S. App.
LEXIS 9977 (D.C. Cir. January 7, 1994). Moreover, the Ninth
Circuit distinguished Dronenburg in Pruitt, 963 F.2d at 1165
n. 4.

1 persons will violate the law solely because of their
2 orientation or status.

3 This status-conduct distinction is particularly relevant
4 in the military context, where homosexual conduct by
5 servicemenbers is not just discouraged, but is grounds for
6 discipline and, if the conduct is sodomy, criminal charges.
7 The Court notes that the military does not make similar
8 presumptions with regard to other groups.¹³

9 Plaintiff has also provided the Court with substantial
10 uncontroverted evidence that a distinction between homosexual
11 orientation and homosexual conduct is well grounded in fact.
12 According to Dr. Herek,¹⁴ "no data exist to indicate that
13 lesbians and gay men are less capable than heterosexuals of
14 controlling their sexual or romantic urges, refraining from
15 the abuse of power, or exercising good judgment in handling
16 authority." Herek Decl., ¶ 14. Dr. Herek also states that a
17 person's public identification of his or her sexual
18 orientation does not necessarily imply sexual conduct, past or
19 present, or a future desire for sexual behavior. *Id.* ¶ 8.
20 The plaintiff also relies on the testimony of Dr. Laura S.

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23 ¹³ The military does not discharge servicemenbers who
24 identify themselves as alcoholics or drug addicts. See
25 OPNAVINST 5350.4B (titled "Alcohol and Drug Abuse Prevention
26 and Control"), Himes Decl., Ex. 7. Rather, the military
requires actual evidence of substance abuse or that the
individual's status impairs his or her ability to function in
the military. *Id.*

¹⁴ Dr. M. Herek is an Associate Research Psychologist at
the University of California at Davis.

1 Brown,¹⁵ who testified that "[t]here is almost no relationship
2 between an individual's orientation and his or her sexual
3 conduct." Brown Decl., ¶ 21. Brown also testified that
4 homosexuals are more likely to control their sexual urges than
5 heterosexuals because they have less opportunity to express
6 their sexuality and have to exercise great discretion in
7 choosing settings and persons who are likely to be receptive,
8 and circumstances that are not likely to result in career
9 problems. Brown Decl., ¶ 22.

10 Significantly, the very policy challenged by plaintiff in
11 this case recognizes a distinction between orientation and
12 conduct. Dr. Lawrence J. Korb, the former Assistant Secretary
13 of Defense (Manpower, Reserve Affairs, Installation and
14 Logistics) who was responsible for implementing the policy at
15 issue in this case, testified by declaration that:

16 As the policy clearly states, the purpose was to
17 authorize the military to discharge gay
18 servicemembers who demonstrate a propensity to
19 engage in homosexual conduct. The policy was never
20 intended to authorize the military to discharge
21 someone simply based on his or her status -- absent
22 any evidence of conduct. To the contrary, conduct
23 was the real focus of the policy.

24 A servicemember's own admission of being gay --
25 absent any indication of her propensity to engage in
26 homosexual conduct -- is simply not sufficient
grounds for discharging her under the existing
policy. Discharging someone based on his or her
status is irrational and has no basis in furthering
the military mission. The policy I authorized
should not be construed as authorizing such an
irrational outcome.

¹⁵ Dr. Laura S. Brown is a clinical professor of
psychology at the University of Washington.

1 Korb. Decl., ¶ 5.

2 The Court concludes that plaintiff's acknowledgment of
3 her lesbian orientation itself is not reliable evidence of her
4 desire or propensity to engage in homosexual conduct. The
5 Court therefore concludes that there is no rational basis for
6 the Government's underlying contention that homosexual
7 orientation equals "desire or propensity to engage" in
8 homosexual conduct.

9 3. Rational Review Analysis of the Equal
10 Protection Claim

11 Plaintiff was discharged from service in the Washington
12 State National Guard pursuant to Army Regulation 135-175 and
13 Department of Defense ("DOD") Directives 1332.14 and 1332.30,
14 32 C.F.R. Part 41, Appendix A, 46 Fed. Reg. 9571 (Jan. 29,
15 1981). Army Regulation 135-175 defines homosexual as "a
16 person, regardless of sex, who engages in, desires to engage
17 in, or intends to engage in homosexual acts." 32 C.F.R. Part
18 41, Appendix A, 46 Fed. Reg. 9571, 9577 (January 29, 1981).
19 The regulation requires the discharge of any member of the
20 service who has: (1) "engaged in, attempted to engage in, or
21 solicited another to engage in a homosexual act;"¹⁶ or (2)

22 ¹⁶ Discharge is not required under these
23 circumstances, however, if there are findings that: (i) such
24 conduct is a departure from the member's usual and customary
25 behavior; (ii) such conduct under all the circumstances is
26 unlikely to recur; (iii) such conduct was not accomplished by
use of force, coercion, or intimidation by the member during a
period of military service; (iv) under the particular
circumstances of the case, the member's continued presence in
the Service is consistent with the interest of the Service in
proper discipline, good order, and morale; and (v) the member
does not desire to engage in or intend to engage in homosexual

1 "stated that he or she is a homosexual or bisexual unless
2 there is a further finding that the member is not a homosexual
3 or bisexual." *Id.*, 46 Fed. Reg. 9571, 9577-78. The plain
4 language of the regulation makes clear that the policy targets
5 not only individuals who engage in homosexual conduct but also
6 individuals who merely acknowledge their homosexual
7 orientation. This litigation does not challenge the
8 classification of persons who engage in homosexual conduct,
9 and the constitutionality of laws forbidding such conduct is
10 not at issue here. Rather, this litigation concerns the
11 exclusion of individuals from military service solely on the
12 basis of homosexual status or orientation.

13 The Government contends that the rational basis for the
14 Army's policy of excluding homosexuals is evident from the
15 policy itself and from legislative findings made in connection
16 with the military's new "don't ask, don't tell" policy,
17 effective November 1993. Because the policy is rational on
18 its face, the Government argues, no further judicial inquiry
19 into the policy's rationality is necessary or appropriate.

20 The regulation, at 32 C.F.R. Part 41.13, provides that
21 homosexuality is incompatible with military service. The
22 regulation provides that the presence of homosexuals in the
23 military environment: (1) seriously impairs the accomplishment
24 of the military mission; (2) adversely affects the ability of

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acts. 46 Fed. Reg. 9571, 9578 (January 29, 1981).

1 the armed forces to maintain discipline, good order and
2 morale; (3) seriously impairs the military's ability to foster
3 mutual trust and confidence among servicemembers; (4)
4 adversely affects the military's ability to insure the
5 integrity of the system of rank and command; (5) impairs the
6 military's ability to facilitate assignment and worldwide
7 deployment of servicemembers who frequently must live and work
8 under close conditions affording minimal privacy; (6)
9 adversely affects the military's ability to recruit and retain
10 members of the armed forces; (7) adversely affects the ability
11 of the armed forces to maintain the public acceptability of
12 military service; and (8) seriously impairs the military's
13 ability to prevent breaches of security. 46 Fed. Reg. 9571,
14 9577 (January 29, 1981).

15 Recently, Congress made fifteen express findings in
16 support of its new policy concerning homosexuals in the armed
17 forces. See 10 U.S.C. § 654(a)(1)-(15). The Government
18 argues that these findings also support the exclusion from
19 military service of "persons who demonstrate a propensity or
20 intent to engage in homosexual acts" under the policy at issue
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1 in this case.¹⁷ One such finding, cited by the Government, is
2 that the presence of such persons in the military "would
3 create an unacceptable risk to the high standards of morale,
4 good order and discipline, and unit cohesion that are the
5 essence of military capability." 10 U.S.C. § 654(a)(15).

6 Notwithstanding the Government's arguments to the
7 contrary, this Court is not required to accept the
8 justifications in the regulation or the legislative findings
9 at face value. Rather, the Court must determine if these
10 justifications provide a rational basis for the challenged
11 policy. Both parties have submitted substantial evidence
12 concerning the rationality or irrationality of the military's
13 policy. Under these circumstances, the Court should review
14 the entire record to determine whether the proffered bases for
15 the Government's policy are rational or motivated solely by
16 prejudice against homosexuals.

17 The Government relies heavily upon the professional
18 military judgment of this country's military leaders that the
19 presence of homosexuals in the military will adversely affect
20 the morale, good order and discipline of the military. The

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23 ¹⁷ The Court may consider relevant factfinding by
24 Congress as evidence in determining whether the Army's
25 regulations possess a rational basis. See generally EEOC v.
26 Boeing Co., 843 F.2d 1213, 1217 (9th Cir.), cert. denied, 488
U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 212 (1988). Both parties
rely on the Congressional findings in the new policy, and
neither party has filed a formal objection to the other
party's use of this factfinding as evidence.

1 Government cites the testimony of General Colin Powell in
2 hearings before the Senate Armed Service Committee in July,
3 1993 that:

4 Open homosexuality in units is not just the
5 acceptance of benign characteristics such as race or
6 color or background. It involves matters of privacy
and human sexuality that, in our judgment, if
allowed to exist in the force would affect the
cohesion and well-being of the force.

7 Hearing to Receive Testimony on DOD Policy on Service of Gay
8 Men & Lesbians in the Armed Forces: Hearing Before the Senate
9 Armed Services Comm., 103d Cong., 1st Sess. (July 20, 1993)
10 (hereinafter "Senate Hearing"), Glass Decl., Ex. T, at 25.

11 The Government also relies on the testimony of various
12 military officials who testified before the Armed Services
13 Committee, including Generals Mundy, Sullivan, and McPeak,
14 Admiral Kelso, and former Secretary of Defense Les Aspin. See
15 Glass Decl., Ex. T, at 29-37, 86, and 94. The Court
16 concludes, however, that the testimony of these officials
17 merely restates the justifications listed in the Army
18 regulation.

19 Most notably, the defendants offer the Rule 30(b)(6)
20 deposition testimony of Major General John P. Otjen and former
21 Assistant Secretary of Defense Edwin Dorn. General Otjen was
22 a member of the Military Working Group ("MWG") that studied
23 the issue of homosexuals in the military and reported its
24 findings to the Secretary of Defense in June, 1993.¹⁸ See
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26 ¹⁸ The MWG Report made findings as to each of the
rationales stated in the Army regulation, with the exception
of the security risk rationale, for the purpose of

1 Summary Report of Military Working Group (hereinafter "MWG
2 Report"), at 5-7, Otjen Dep., Ex. 10. General Otjen testified
3 that allowing homosexuals in the military would adversely
4 affect unit cohesion¹⁹ and morale. Otjen Dep. 188:3-190:4,
5 192:19-201:1, 263:10-265:3. Assistant Secretary Dorn
6 testified similarly. General Otjen testified, based on his
7 experience, the experience of members of the MWG, and the
8 experiences of servicemembers who spoke to the MWG, that when
9 a unit is "confronted with a homosexual situation -- for lack
10 of a better description -- that there is a casting out, if you
11 will, of the individual." See Otjen Dep., 194:4-9. Otjen
12 testified that this "casting out," which can destroy unit
13 cohesion, occurs because the persons doing the casting out are
14 afraid of or prejudiced against the homosexual person or feel
15 "let down," "out of surprise." See Otjen Dep., 196:14-197:4.

16 The Government's evidence offers justifications for the
17 policy of excluding homosexuals from military service. Under
18 Haller, 125 L.Ed.2d at 271, the burden is on the plaintiff "to
19 negative every conceivable basis which might support" the

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22 recommending to the President a new policy on homosexuals in
23 the military that would "compl[y] with the President's
24 direction to end discrimination while maintaining high
standards of combat effectiveness and unit cohesion." See
Memorandum for the Secretary of Defense, Attached to MWG
Report, Otjen Dep., at Ex. 10.

25 ¹⁹ The Congressional findings define unit cohesion as
26 "the bonds of trust among individual service members that make
the combat effectiveness of a military unit greater than the
sum of the combat effectiveness of the individual unit
members." 10 U.S.C. § 654(a)(7).

1 government's policy. To meet this burden, plaintiff offers
2 evidence to the effect that the rationale, as stated in the
3 Army Regulation and advanced by the Government, has no factual
4 foundation, is contradicted by the government's own studies
5 and evidence, and is based solely on prejudice against
6 homosexuals.

7 (1) Incompatibility with Military Service and
8 Interference with Military Mission. Plaintiff offers evidence
9 that homosexuality is compatible with military service, and in
10 fact, a large number of homosexuals have served and continue
11 to serve in the military with distinction. Plaintiff cites
12 the statements of President Clinton that, "there have been and
13 are homosexuals in the military who serve with distinction,"
14 and "there is no study showing them to be less capable or more
15 prone to misconduct." Himes Dec., Ex. 4. Plaintiff also
16 offers the statement of Vice Admiral Joseph S. Donnell, the
17 Commander of the Navy's surface Atlantic Fleet, describing his
18 experience with lesbian servicemenbers as follows:
19 "Experience has ... shown that the stereotypical female
20 homosexual in the Navy is hardworking, career-oriented,
21 willing to put in long hours on the job and among the
22 command's top professionals." Foote Decl., Ex. A.

23 Plaintiff also relies upon numerous military and
24 government studies, such as the 1957 study popularly known as
25 the "Crittenden Report," and a more recent study, commissioned
26 by the military and performed by the Defense Personnel

1 Security Research and Education Center (PERSEREC), known as
2 the PERSEREC Report. These studies establish that gays and
3 lesbians not only serve in the military, but also that the
4 majority of them do so without incident and receive honorable
5 discharges at the conclusion of their service. See Report of
6 the Board Appointed to Prepare and Submit Recommendations to
7 the Secretary of the Navy for the Revision of Policies,
8 Procedures and Directives Dealing with Homosexuals in the
9 Military, Himes Decl., Ex. 5 (hereinafter "Crittenden
10 Report"); and Sarbin & Karols, Nonconforming Sexual
11 Orientations and Military Suitability (1988), Himes Decl., Ex.
12 6 (hereinafter PERSEREC Report).

13 Plaintiff also offers evidence concerning the experience
14 of foreign countries, such as Canada, Australia, France,
15 Israel, Spain, Sweden, the Netherlands, Denmark, Finland,
16 Norway and Japan, all of which allow homosexuals to serve in
17 their armed forces. It is undisputed that the United States
18 Government has commissioned studies of these militaries, and
19 those studies have concluded that "the presence of homosexuals
20 in the military is not an issue and has not created problems
21 in the functioning of military units." See Homosexuals in the
22 Military: Policies and Practices of Foreign Countries (1993),
23 Himes Decl., Ex. 8, at 3 (hereinafter "GAO Report"). See also
24 the "RAND Report," Sexual Orientation and U.S. Military
25 Personnel Policy: Options and Assessment. Himes Decl., Ex. 9
26

1 at 65-104 (hereinafter "RAND Report") (homosexuals pose no
2 special problems in foreign militaries).

3 (2) Effect on Discipline, Good Order, and Morale.

4 Plaintiff offers evidence demonstrating that this
5 justification is based solely on prejudice. President Clinton
6 has stated that "most military people [are] opposed to lifting
7 the ban because of the feared impact on unit cohesion, rooted
8 in disapproval of homosexual lifestyles," and "those who
9 oppose lifting the ban are clearly focused not on the conduct
10 of individual gay servicemembers, but on how nongay
11 servicemembers feel about gays in general and, in particular,
12 those in the military service." Himes Decl., Ex. 4.

13 Plaintiff also notes that this rationale, as well as virtually
14 every other justification used today to exclude homosexuals
15 from military service, was also used to justify the military's
16 discrimination against African-Americans in World War II.

17 Herek Decl. at ¶¶ 19-22, Ex. I. There is no dispute that the
18 exclusion of African-Americans from military service was based
19 solely on prejudice.

20 (3) Unit Cohesion. Plaintiff relies on the
21 comprehensive analysis of the impact of homosexual
22 servicemembers on unit cohesion contained in the RAND Report.
23 The RAND Report concludes:

24 At present, there is no scientific evidence
25 regarding the effects of acknowledged homosexuals on
26 a unit's cohesion and combat effectiveness. Thus,
any attempt to predict the consequences of allowing
them to serve in the U.S. military is necessarily
speculative.

1 RAND Report, Himes Decl., Ex. 9, at 283.

2 (4). Rank and Command. Plaintiff argues that there is no
3 evidence supporting the defendants' contention that the
4 presence of homosexuals in the military will be detrimental to
5 the military's rank and command structure. Plaintiff offers a
6 statement by the Chief of Naval Personnel in a 1976 memorandum
7 to the Judge Advocate General that, "no empirical proof exists
8 at this time [to support the Navy's contention that]
9 homosexuality has an adverse effect upon the completion of the
10 [military] mission." See Mainhold v. United States Dep't of
11 Defense, 808 F. Supp. 1455, 1457 (C.D. Cal. 1993). Plaintiff
12 also cites the Crittenden Report, which found that there is no
13 "visible supporting data [to support the conclusion that gays
14 and lesbians] cannot acceptably serve in the military."
15 Crittenden Report, Himes Decl., Ex. 5, at 5. Finally,
16 plaintiff offers government-commissioned reports on foreign
17 militaries. These reports have concluded, "in all cases where
18 a decision has been made to include homosexuals in the
19 [foreign military] force, the organization's leaders believe
20 that the force's organizational performance is unaffected by
21 that presence." RAND Report, Himes Decl., Ex. 9, at 15; Korb
22 Decl. at 9-10; GAO Report, Himes Decl., Ex. 8, at 3.

23 (5) Privacy. Plaintiff has submitted substantial
24 evidence refuting the privacy rationale. Plaintiff offers,
25 for example, the PERSEREC Report which concludes that concerns
26 regarding homosexuals invading the privacy of heterosexuals

1 are unfounded because homosexuals, like heterosexuals, are
2 "selective in their choice of intimate partners and in their
3 expression of sexual behavior" and are selective "in observing
4 rules of privacy, in considering appropriateness of time and
5 place, in connecting sexuality with the tender sentiments, and
6 so on." Himes Decl., Ex. 6, at 31.

7 (6) Recruitment and Retention of Military Personnel.

8 According to plaintiff's expert, Dr. Lawrence Korb, the
9 Assistant Secretary of Defense who was directly responsible
10 for military personnel matters between 1981 and 1985, there is
11 no evidence supporting the defendants' assertion that allowing
12 homosexuals to serve in the military will adversely affect
13 recruitment and retention of military personnel. Korb Decl.
14 at 7. The RAND report similarly concludes that lifting the
15 ban would likely have no effect on recruitment and only
16 nominal effect on reenlistment. Himes Decl., Ex. 9, at 397-
17 407.

18 (7) Public Disapproval of Homosexuals in the Military.

19 Plaintiff submits the RAND Report, which found that depending
20 upon how the question is phrased, approximately 40-79% of the
21 public favors allowing homosexuals to serve in the military.
22 Himes Decl., Ex. 9, at 201-02. Public polls have yielded
23 similar results. Herek Decl. at ¶ 16; Korb Decl. at 6-7. In
24 any event, to the extent public disapproval of homosexual
25 service in the military is based on prejudice, such
26 disapproval would not be a legitimate basis for the

1 government's policy. See Cleburne, 473 U.S. at 448, 87
2 L.Ed.2d at 326.

3 (8) Security Risk. Plaintiff argues that there is no
4 factual support for the security risk rationale.²⁰ Former
5 Defense Secretary Cheney has essentially admitted this by
6 acknowledging that the military's argument that homosexuals
7 are greater security risks than heterosexuals is a "bit of an
8 old chestnut." Himes Decl., Ex. 14; Mainhold, 808 F. Supp. at
9 1457. See also the Crittenden Report, Himes Decl., Ex. 5, at
10 6; PERSEREC Report, Himes Decl., Ex. 6, Korb Decl., at 6;
11 Brigadier General Evelyn Foote Decl., ¶ 34.

12 Plaintiff has successfully met her burden of negating the
13 proffered justifications for the government's policy of
14 excluding homosexuals from service by offering uncontroverted
15 evidence that the individual justifications either have no
16 basis in fact or are based solely on prejudice. The
17 Government, for its part, has failed to offer any evidence
18 showing that its justifications are based on anything but
19 prejudice.

20 An examination of the record demonstrates that the sole
21 motivation for the exclusion of acknowledged homosexuals from
22 military service is prejudice. President Clinton has admitted
23 that opposition to lifting the ban on homosexual service is
24 "rooted in disapproval of homosexual lifestyles," and based on
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26 ²⁰ Defendants would appear to concede this, as the new
"don't ask, don't tell" policy, as codified in 10 U.S.C. §
does not include this rationale.

1 "the fear of invasion of privacy of heterosexual soldiers" and
2 "how nongay servicemembers feel about gays in general and, in
3 particular, those in the military service." Hines Decl., Ex.
4 4.²¹ General Colin Powell has also admitted in testimony
5 before Congress that the policy was originally implemented
6 more than ten years ago "[i]n simple language, to keep
7 homosexuals out of the service." Glass Decl., Ex. T at 111.
8 Dr. Lawrence Korb, the former Assistant Secretary of Defense
9 who was responsible for implementing the policy at issue in
10 this case, testified that:

11 Based on my experience in the Pentagon, as a long-
12 time student of national defense policy, and as a
13 retired Navy Captain, I am of the opinion that there
14 is no longer any justification for the armed
15 services' current ban on homosexuals serving in the
16 military. As detailed below, each of the
17 justifications offered in support of this policy is
18 without factual foundation. Moreover, there is
19 substantial evidence that gays and lesbians have
20 served and continue to serve their country as ably
21 as heterosexuals. Sexual orientation simply does
22 not provide a rational basis upon which to exclude a
23 person from military service. On the other hand, to
24 the extent that sexual misconduct threatens to
25 undermine the discipline, good order, and morale
26 that is critical to the accomplishment of the
military mission, such misconduct can be and is
adequately addressed through existing regulations
which prohibit such misconduct whether committed by
homosexuals or heterosexuals.

21 Korb Decl. ¶ 6. The uncontroverted evidence establishes that
22 many homosexuals have served, and currently serve, in the
23 military, and that the majority of them do so without incident
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26 ²¹ Assistant Secretary of Defense Dorn testified that
President Clinton's statements reflect the views of the
Department of Defense. Dorn Dep. at 31:1-9.

1 and receive honorable discharges at the conclusion of their
2 service. See Crittenden Report, Hines Decl., Ex. 5; PERSEREC
3 Report, Hines Decl., Ex. 6; Remarks by President Clinton at
4 National Defense University, Hines Decl., Ex. 4; Testimony of
5 General Colin Powell, Senate Hearing, Glass Decl., Ex. T, at
6 23.

7 The testimony of defendants' own witnesses further
8 demonstrates that the policy is rooted solely in prejudice.
9 Both General Otjen and former Assistant Secretary of Defense
10 Dorn admitted in their depositions that the defendants have no
11 facts supporting any of the stated rationales.²² See Otjen
12 Dep., at 54, 68-79, 287-91, 307-14; Dorn Dep., at 190-92 (as
13 to new policy), 199-200 (as to old policy). In addition, and
14 more compelling, both witnesses testified to the effect that
15 the government's objection to homosexual service is based
16 solely on the fears and prejudices of heterosexual
17 servicemembers.

18 General Otjen was asked hypothetically whether, if
19 everyone in the military had no fear or prejudice against
20 homosexuals and did not morally disapprove of the homosexual
21 lifestyle, there would be any problem with unit cohesion in
22 the military as a result of permitting open homosexuals to
23 serve. See Otjen Dep., at 226:2-10. While General Otjen had
24 difficulty accepting this assumption, he agreed that if
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26 ²² Defining "facts" as statistics, scientific studies,
and reports rather than opinions and anecdotes.

1 that assumption were true, there would be no problem with unit
2 cohesion. See Otjen Dep. at 226:4-233:13; see also Otjen Dep.
3 at 192:3-15, 234:8-237:14, 262, 263-264:14, 264:15-266:3
4 (testifying to the same effect regarding the rank and command,
5 privacy, morale, and retention rationales). General Otjen
6 also admitted during his deposition that he had no facts to
7 support the finding in the MWG's Report that "the presence of
8 open homosexuals would in general polarize and fragment the
9 unit and destroy the bonding and singleness of purpose
10 required for effective military operation." See Otjen Dep. at
11 192:19-193:5

12 Former Assistant Secretary of Defense Dorn testified
13 similarly. For example, Dorn admitted that he was accurately
14 quoted as saying, "[a]s with the racial desegregation of the
15 military, much of the resistance to gays is grounded in fear
16 and in prejudice." See Dorn Dep. at 133:3-9, Ex. 7, at 3.
17 Secretary Dorn also testified that the problems with unit
18 cohesion and rank and command cited in the policy were based
19 on anticipated negative reactions of heterosexual
20 servicemembers to homosexuals and a "general spirit of ill
21 ease within the unit." See Dorn Dep. at 197:1-4; 221:12-17;
22 225:3-12. Although Dorn emphasized that the policy excluding
23 homosexuals from service was based on the personal experiences
24 of military professionals with open homosexuals in their
25 units, he admitted that the sum of these personal experiences
26 was that "many individual soldiers don't want to be around

1 gays." Dorn Dep. at 194:14-18. Other problems with
2 homosexual service cited by Dorn, such as lovers' quarrels,
3 involve matters of homosexual conduct, rather than homosexual
4 orientation or status. Dorn Dep. at 196:10-14. See also Dorn
5 Dep. at 159:7-14; 186:12-21.

6 Defendants' argument that the Army regulation banning
7 homosexuals from service is based on rational, nonprejudicial
8 reasons is unpersuasive. Defendants' military experts have
9 conceded that their justifications for the policy are based on
10 heterosexual servicemembers' fear and dislike of homosexuals.
11 Mere negative attitudes, or fear, are constitutionally
12 impermissible bases for discriminatory governmental policies.
13 Cleburne, 473 U.S. at 448, 87 L.Ed.2d at 326. Unsubstantiated
14 presumptions concerning a particular group also constitute
15 prejudice and cannot serve as the rational basis for a
16 discriminatory governmental policy. Thus, to the extent the
17 Government's policy is based on the unfounded presumption that
18 servicemembers with a homosexual orientation will engage in
19 proscribed homosexual conduct,²³ the policy is not rationally
20 based. This Court cannot defer to military decisions based
21 solely on prejudice against a particular group. Id. The
22 defendants have not submitted any evidence that supports any
23 other basis for the policy.

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²³ This Court has already concluded that the
Government's presumption has no foundation in law or fact.

1 Certainly, the undisputed evidence in this case relating
2 to Colonel Cammermeyer's service strongly supports the
3 conclusion that acknowledged homosexuality is not incompatible
4 with military service. Cammermeyer served in the Army and the
5 Washington State National Guard with distinction. She was a
6 highly trained, decorated and dedicated officer in the
7 military. The events that gave rise to her discharge involved
8 her quest to achieve the position of Chief Nurse of the
9 National Guard Bureau. After she disclosed her lesbian status
10 in April 1989, she continued to perform her military duties
11 for over three years until her discharge. Her final
12 evaluation, dated July 31, 1992, provides in part that,
13 "[t]his officer is exemplary in her dedication," that she "has
14 clearly demonstrated outstanding administrative and technical
15 skills" and that "Colonel Cammermeyer's strong leadership has
16 been a key element in improving WAARNG medical readiness."
17 Cammermeyer Decl., Ex. D at 1-3. The rating officer described
18 Cammermeyer in the professionalism section of her final
19 evaluation as "the most knowledgeable military nurse with whom
20 I have had the pleasure to work," and the senior rater
21 described her as having continued to serve the Washington Army
22 National Guard "with dedicated professionalism." It is ironic
23 that after over three years as an acknowledged homosexual
24 servicemember, Cammermeyer was evaluated as having "the
25 potential to assume responsibility at NGB level as Chief
26 Nurse," yet she was discharged because of the alleged

1 incompatibility of her sexual orientation with military
2 service.. *Id.*

3 In conclusion, viewing all the evidence in the light most
4 favorable to the Government, the Court must conclude that the
5 rationales offered by the Government to justify its exclusion
6 of homosexual servicemen are grounded solely in prejudice.
7 Under Palmox and Cleburne, this is impermissible. A cardinal
8 principle of equal protection law is that the federal
9 government cannot discriminate against a class in order to
10 give effect to the prejudice of others. The government has
11 discriminated against Colonel Cammermeyer solely on the basis
12 of her status as a homosexual and has failed to demonstrate a
13 rational basis for doing so. The Court holds that plaintiff's
14 discharge pursuant to the regulation banning homosexuals who
15 merely acknowledge their orientation violates plaintiff's
16 equal protection rights under the Fifth Amendment, and the
17 Court grants summary judgment in favor of plaintiff and
18 against defendants on this claim.

19 **B. Substantive Due Process Claim**

20 Defendants also move for summary judgment on plaintiff's
21 claim that Army Regulation 135-175 violates the due process
22 clause of the Fifth Amendment. Plaintiff claims that the
23 regulation "mandates discharge solely upon an admission of
24 homosexuality, without any nexus between homosexual status and
25 the ability to perform the work duties and responsibilities of
26 the Armed Forces." Complaint at ¶ 6.3. Plaintiff did not

1 move for summary judgment on this issue; however, the parties
2 have briefed and argued the issue. The Court concludes that
3 the issue has been fully and fairly addressed by the parties,
4 and thus the Court may consider the issue as if cross motions
5 for summary judgment were presented. See Coal Fuel, Inc. v.
6 Connett, 685 F.2d 309, 311 (9th Cir. 1982).

7 1. Standard of Review

8 The due process clause of the Fifth Amendment provides
9 that no person shall "be deprived of life, liberty, or
10 property, without due process of law." U.S. Const. amend V.
11 The due process clause contains both substantive and
12 procedural components. The procedural component requires the
13 government to follow appropriate procedures whenever its
14 agents decide to deprive any person of life, liberty or
15 property. Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662,
16 665, 88 L.Ed.2d 662 (1986) (discussing due process clause of
17 Fourteenth Amendment). The due process clause also "contains
18 a substantive component, sometimes referred to as 'substantive
19 due process,' which bars certain arbitrary government actions
20 'regardless of the fairness of the procedures used to
21 implement them.'" Id. at 337, 106 S.Ct. at 678, 88 L.Ed.2d at
22 672 (Stevens, J., concurring). The substantive due process
23 clause "serves to prevent governmental power from being 'used
24 for purposes of oppression.'" Id. at 331, 106 S.Ct. at 665,
25 88 L.Ed.2d at 668 (quoting Murray's Lessee v. Hoboken Land &
26 Improvement Co., 18 How. 272, 277, 15 L.Ed. 372 (1856)).

1 Plaintiff's challenge to Army Regulation 135-178 is based on
2 the substantive component of the due process clause.

3 Federal regulations that infringe upon personal rights
4 may be challenged on either substantive due process or equal
5 protection grounds. Although courts approach equal protection
6 and due process analyses differently, there are similarities
7 in the doctrines:

8 When conduct, either by virtue of its inadequate
9 foundation in the continuing traditions of our society or
10 for some other reason, such as lack of connection with
11 interests recognized as private and protected, is subject
12 to some government regulation, then analysis under the
13 substantive due process clause proceeds in much the same
14 way as analysis under the lowest tier of equal protection
15 scrutiny. A rational relation to a legitimate government
16 interest will normally suffice to uphold the regulation.
17 At the other extreme, where the government seriously
18 intrudes into matters which lie at the core of interests
19 which deserve due process protection, then the compelling
20 state interest test employed in equal protection cases
21 may be used by the Court to describe the appropriate due
22 process analysis.

23 Beller, 632 F.2d at 808 (citing Roe v. Wade, 410 U.S. 113,
24 155, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973); Griswold v.
25 Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 1688, 14
26 L.Ed.2d 510 (1965) (Goldberg, J., concurring); Skinner v.
Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed.
1655 (1942)). Thus, when a classification penalizes the
exercise of a fundamental constitutional right, heightened
scrutiny is required. Reno v. Flores, 507 U.S. ___, 113 S.Ct.
1439; 123 L.Ed.2d 1, 16 (1993); High Tech Gays, 895 F.2d at
572. On the other hand, where a regulation impairs a lesser
interest, there need only be a rational relationship between

1 the challenged regulation and a legitimate governmental
2 purpose. Flora, 123 L.Ed.2d at 18.

3 2. Due Process Analysis

4 Plaintiff asks this Court to hold that the Constitution
5 confers a fundamental right of privacy upon a person to be a
6 homosexual.²⁴ The United States Constitution does not
7 explicitly mention any right of privacy. The Supreme Court
8 has previously recognized, however, that one aspect of
9 "liberty" protected by the due process clause is "a right of
10 personal privacy, or a guarantee of certain areas or zones of
11 privacy." Roe, 410 U.S. at 152. See also Carey v. Population
12 Services International, 431 U.S. 678, 97 S.Ct. 2010, 52
13 L.Ed.2d 675 (1977). The Court has recognized, for example, a
14 right of privacy in personal decisions relating to marriage,
15 contraception, procreation, family relationships and child
16 rearing, education and abortion. Carey, 431 U.S. at 685, 52
17 L.Ed.2d at 684. The Supreme Court has refused, however, to
18 find a fundamental right of privacy to engage in homosexual
19 sodomy. Bowers, 478 U.S. at 192, 92 L.Ed.2d at 146-47.

20 In seeking to identify constitutional rights entitled to
21 heightened judicial scrutiny, the Supreme Court has limited
22 these rights to rights that are "deeply rooted in this
23 Nation's history and traditions," Moore v. East Cleveland, 431

24
25 ²⁴ This issue necessarily encompasses the basic question
26 of whether individuals have a fundamental right under the
Constitution to their sexual orientation, whether
heterosexual, homosexual or bisexual.

1 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977), or
2 liberties that are "implicit in the concept of ordered
3 liberty" such that "neither liberty nor justice would exist if
4 they were sacrificed." Palko v. Connecticut, 302 U.S. 319,
5 325-26, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Although
6 plaintiff raises an important issue, it is not clear that
7 either of these formulations would confer a fundamental right
8 of privacy to be a homosexual. Moreover, plaintiff concedes
9 that no court has ever found a fundamental right to be, and to
10 identify oneself as, a homosexual.²⁵

11 The Court need not decide whether plaintiff has a
12 fundamental right to be a homosexual in order to resolve her
13 substantive due process claim. The Court has already held
14 that the Army regulation challenged here is based solely on
15 prejudice. As such, it cannot withstand even rational basis
16 review. Regulations based solely on prejudice are irrational
17 as a matter of law and serve no legitimate governmental
18 purpose.

19 The Government argues that plaintiff's substantive due
20 process claim is foreclosed by Woodward v. United States, 871

21
22 ²⁵ Because no authority exists for plaintiff's
23 proposition that homosexual orientation is a fundamental
24 right, she analogizes to Supreme Court precedents that
25 distinguish between "status" and "conduct" in the criminal
26 context. See Robinson v. California, 370 U.S. 660, 82 S.Ct.
1417, 8 L.Ed.2d 758 (1962) (striking down California statute
criminalizing status of narcotics addiction as violative of
Eighth Amendment), and Powell v. Texas, 392 U.S. 514, 88 S.Ct.
2145, 20 L.Ed.2d 1254 (1968) (upholding conviction for public
drunkenness, as distinguished from arrests based on status of
being a chronic alcoholic).

1 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003, 110
2 S.Ct. 1295, 108 L.Ed.2d 473 (1990). The Government contends
3 that Woodward, like the present case, is a homosexual status
4 case, and thus the Woodward court's rejection of the
5 plaintiff's substantive due process claim in that case applies
6 here. In Woodward, a Naval Reserve officer contended that
7 homosexuality was protected under the constitutional right of
8 privacy, and thus the Navy could not, consistent with the
9 Fifth Amendment, discharge him on the basis of his
10 homosexuality. In analyzing plaintiff's privacy claim, the
11 Court noted that although Woodward had not admitted to
12 homosexual conduct, he had stated that "he was attracted
13 sexually to, or desired sexual activity with, members of his
14 own sex." Id. at 1074 n.6. In view of these admissions, the
15 Woodward court distinguished plaintiff's case from cases
16 involving discharge solely on the basis of status.²⁶ Thus,
17 Woodward is not solely a homosexual status case, and the case
18 is distinguishable on those grounds.²⁷

19 The Court holds that plaintiff's Fifth Amendment
20 substantive due process rights were violated by her discharge

21
22 ²⁶ The Woodward court stated: "While acts of sodomy
23 have not been expressly admitted by Woodward, in view of [his
24 statements, his known association with gays, and his failure
25 to claim celibacy] we need not address the factual situation
where there is action based solely on 'status as a person with
a homosexual orientation.'" Woodward, 871 F.2d at 1074 n.6.

26 ²⁷ The Court notes also that the Ninth Circuit, in
Pruitt, 963 F.2d at 1165 n.4, has questioned the Woodward
court's analysis.

1 under Army Regulation 135-175. The Army's discharge of
2 Cammermeyer based solely on her admission of homosexual
3 orientation was not rationally related to the Government's
4 legitimate interest in maintaining the readiness and combat
5 effectiveness of its military forces. The defendants' motion
6 for summary judgment on this claim is denied and the plaintiff
7 is granted summary judgment on this claim.

8 **C. First Amendment Claim**

9 Defendants move for summary judgment on plaintiff's claim
10 that the policy banning homosexuals from military service
11 violates her right to freedom of speech and association. The
12 Court concludes that this claim is foreclosed by controlling
13 Ninth Circuit precedent. The Ninth Circuit has held that
14 servicemembers' challenges to military regulations requiring
15 discharge of homosexuals based on the individual's statement
16 that he or she is a homosexual do not implicate First
17 Amendment concerns; the servicemember is not being discharged
18 for his or her speech, but rather for his or her status as a
19 homosexual. See Pruitt, 963 F.2d at 1163-64; Schowengerdt v.
20 United States, 944 F.2d 483, 489 (9th Cir. 1991), cert.
21 denied, 112 S.Ct. 1514, 117 L.Ed.2d 650 (1992).

22 In Pruitt, an Army Reserve officer challenged on First
23 Amendment grounds the Army Regulations mandating her
24 involuntarily discharge for admitting she was a lesbian.
25 Plaintiff contended that her discharge was based on public
26 statements to a newspaper reporter that she was a lesbian,

1 which she argued was protected expression. Pruitt, 963 F.2d
2 at 1163. The court rejected plaintiff's First Amendment
3 arguments, holding that Pruitt was not discharged under Army
4 regulations for her speech, but rather for her status as a
5 homosexual. The court noted that "Pruitt's admission, like
6 most admissions, was made in speech, but that does not mean
7 that the first amendment precludes the use of the admission as
8 evidence of the facts admitted." Id. at 1164.

9 Similarly, in Schowengerdt, a Naval Reserve officer who
10 was also a civilian employee of the Navy, challenged on First
11 Amendment grounds his discharge from the Navy. Schowengerdt's
12 discharge was based on his admission of bisexuality, and
13 certain written materials describing his bisexual activities
14 discovered during a search of his office. Schowengerdt, 944
15 F.2d at 485. The court held that Schowengerdt's discharge did
16 not violate the First Amendment because "he was not discharged
17 for writing about bisexuality but rather for being a bisexual,
18 of which his purely private correspondence was evidence." Id.
19 at 489.

20 Plaintiff cites no precedent in support of her claim
21 under the First Amendment. Further, every court that has
22 addressed this issue has refused to grant relief on First
23 Amendment grounds. See, e.g., Ben-Shalom, 881 F.2d at 462;
24 Dahl, 830 F.Supp. at 1338. The Court therefore grants
25 defendants' motion for summary judgment on this claim.
26

D. Other Claims

Plaintiff's complaint asserts two additional claims: first, that Army Regulation 135-175 is an invalid exercise of executive power, in violation of the doctrine of separation of powers; second, that Army Regulation 135-175 violates the principles of federalism because the United States Constitution reserves to the State of Washington the power to appoint officers in the Washington State National Guard. The Court construes plaintiff's failure to respond to defendants' motion for summary judgment on these claims as a concession that these claims are without merit and therefore grants defendants' motion as to these claims.

E. Conclusion

All who had the opportunity to serve with Margarethe Cammermeyer agree that she was an outstanding officer and Army Nurse. Her care and professionalism in performing her duties earned her numerous awards and distinctions, including the Bronze Star Medal for distinguished service in Vietnam. Undoubtedly, Colonel Cammermeyer would have continued to serve in the Washington State National Guard, earning the continued respect and admiration of her peers, had she not applied for a top secret clearance to gain admission to the Army War College, and admitted in response to a direct question during her clearance interview that she is a lesbian. That admission led to her discharge from military service.

Colonel Cammermeyer was discharged from the National Guard pursuant to a governmental policy that is based solely on prejudice. Prejudice, whether founded on unsubstantiated fears, cultural myths, stereotypes or erroneous assumptions, cannot be the basis for a discriminatory classification. Gluburne, 473 U.S. at 448. As the Supreme Court stated in Palmoxa, 466 U.S. at 433, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Plaintiff is therefore entitled to judgment as a matter of law on her equal protection and substantive due process claims under the Fifth Amendment. Plaintiff is entitled to summary judgment against defendants on her first and third claims and for judgment as follows:

a. For an order requiring defendants to reinstate her to her former position in the Washington State National Guard and to restore to her all rights, honors and privileges of that status;

b. For an order requiring defendants to expunge all record of plaintiff's sexual orientation and her statements, if any, regarding same from any and all records in defendants' possession;

c. For an order enjoining defendants from taking any adverse action against plaintiff by reason of her homosexual status or on account of statements of her homosexual orientation;

1 d. For an order enjoining defendant from taking
2 any action against plaintiff based on the purported authority
3 of directives or regulations mandating separation from
4 military service by reason of homosexual status or on account
5 of statements of homosexual orientation;

6 e. For a declaration that defendants' action in
7 separating plaintiff from military service based solely on her
8 declaration of homosexual orientation was unconstitutional;

9 f. For a declaration that defendants' regulation
10 mandating separation from service by reason of homosexual
11 status or on account of statements of homosexual orientation
12 is unconstitutional; and

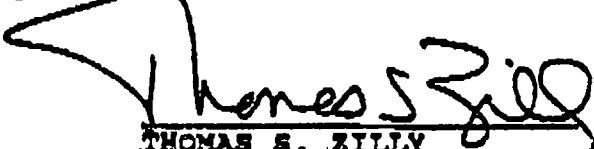
13 g. Costs of suit.

14 Defendants are entitled to judgment dismissing
15 plaintiff's second, fourth, fifth and sixth claims.

16 The Clerk of the Court is directed to enter judgment in
17 accordance with this Order.

18 IT IS SO ORDERED.

19 DATED this 1st day of June, 1994.

20
21 
22 THOMAS S. ZILLY
23 UNITED STATES DISTRICT JUDGE
24
25
26

Stepas
Gays-in-the-Military

THE WHITE HOUSE
WASHINGTON

DATE: 12/24/93

TO: DAVID GERGEN
GEORGE STEPHANOPOULOS
BRUCE LINDSEY

FROM: JOHN D. PODESTA
Assistant to the President and
Staff Secretary

The attached has been forwarded
to the President.

THE WHITE HOUSE
WASHINGTON

December 23, 1993

MR. PRESIDENT:

The enclosed memo from Cliff Sloan discusses the current status of Steffan case. The consensus of your advisors is to file a petition for rehearing en banc, limited to the issue of the court's order to grant Steffan his commission as an ensign.

You asked to be consulted before a final decision is reached. **Unless Counsel's office is notified to the contrary, DOJ will proceed according the agreement outlined in the memo on Thursday, December 30.**


R. Paul Richard

THE WHITE HOUSE

WASHINGTON

December 23, 1993 93 DEC 23 P4:22

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN ^{CS}
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Steffan gays-in-the-military case

Overview

As you know, DOJ and DOD have been considering whether to file a petition for rehearing en banc to the full U.S. Court of Appeals for the D.C. Circuit. (A copy of a prior memo on Steffan is attached). Until yesterday, DOD had been vigorously favoring a full appeal on all grounds, and DOJ had been resisting. At a DOD/DOJ/White House meeting yesterday, a tentative agreement was reached. Unless you disagree or have concerns, we will proceed based on this agreement.

The agreement

The meeting yesterday included DOD (Secretary Aspin, Shali, and the other Chiefs); DOJ (Webb Hubbell and Drew Days); and the White House (Tony Lake, George, Bruce, Joel Klein, and me). After considerable discussion, the following tentative agreement was reached:

First, DOJ will file a very limited petition for rehearing en banc, addressing only a narrow remedy issue regarding Steffan's commission. (The court ordered that Steffan receive his commission, along with his diploma and reinstatement. A commission, however, requires Presidential nomination and Senate confirmation. A court has no power to do away with these requirements or to order the President and the Senate to comply. The rehearing petition thus will ask the court to vacate the part of its decision ordering that Steffan be awarded his commission.)

Second, DOJ will not seek rehearing en banc on the fundamental point that the action taken against Steffan was unconstitutional, and will not seek to set aside the other relief awarded him. Instead, DOJ will explain that, although the government disagrees with the court of appeals' decision that the action under the old policy was unconstitutional, we have decided not to seek relief on anything besides the commission because the new policy is in place and the old policy has been formally superseded.

Both DOD and DOJ are satisfied with this approach. George, Bruce, Joel, and I agree that it is a sound strategy. The current

plan is to file the limited rehearing petition on Thursday, December 30. Let us know if you have any comments or concerns.

THE WHITE HOUSE
WASHINGTON

November 17, 1993

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.

The Steffan Decision

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.

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:

- This is in President's Standard*
- (1) the military's former policy addresses status, not conduct;
 - (2) it is unreasonable to use status as a basis for predictions about conduct or a "propensity" to conduct;
 - (3) the perceived effect on morale, discipline, and recruitment of heterosexuals cannot be accepted because "[t]he Constitution does not allow Government to subordinate a class of persons simply because others do not like them";

and

I want to be consulted before final decision on what to do is made.

(4) the "privacy" concerns are invalid -- the concerns represent either an untenable assumption that homosexuals will "stare" or an impermissible deference to "the irrational fears and stereotypes of third parties."

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.

Effect of the Steffan decision on the new policy

The court's opinion explicitly states that the new policy is "not at issue" in Steffan and that the decision applies only to the old policy. The court's view of the impermissibility of using statements of homosexuality as a ground for discharge under the old policy, however, may well have implications for the new policy. One difference, of course, is that the new policy contains the explicit rebuttable presumption. (DOJ has argued that there was an opportunity to rebut under the old policy). But it is far from clear whether the rebuttable presumption would be sufficient to overcome the decision and reasoning in Steffan.

Next steps

In consultation with DOD and DOJ, Bruce, George, and the Counsel's office will be reviewing various options. Among the possible choices are: (1) an appeal to the Supreme Court in the Steffan case; (2) a request for en banc review by the entire D.C. Circuit in the Steffan case; (3) an announcement that we will not appeal the Steffan decision because we want to focus on the new policy; and (4) possible actions to expedite judicial review of the new policy (so that the issue can be put to rest).

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.

File: Gays in the Military

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VOLKER KEITH MEINHOLD,
Plaintiff-Appellee,

v.

No. 93-55242

D.C. No.
UNITED STATES DEPARTMENT OF
CV-92-06044-TJH
DEFENSE; UNITED STATES
DEPARTMENT OF THE NAVY,
Defendants-Appellants.

VOLKER KEITH MEINHOLD,
Plaintiff-Appellee,

v.

No. 93-56354

D.C. No.
UNITED STATES DEPARTMENT OF
CV-92-06044-TJH
DEFENSE; UNITED STATES
OPINION
DEPARTMENT OF THE NAVY,
Defendants-Appellants.

Appeals from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted
December 16, 1993--San Francisco, California

Filed August 31, 1994

Before: Otto R. Skopil, Jr., David R. Thompson, and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Rymer

SUMMARY

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Government Law/Military Law

The court of appeals reversed a judgment of the district court in part, affirmed in part and vacated in part. The court held that a military service cannot discharge a servicemember solely because of a statement of sexual orientation devoid of a concrete, expressed desire or intent to act on his homosexual propensity contrary to military policy.

During a television broadcast, appellee Volker Meinhold acknowledged that he is gay. Meinhold is a United States Navy petty officer. The Navy commenced discharge proceedings against Meinhold pursuant to now-superseded Department of Defense (DOD) regulations providing that homosexuality is incompatible with military service, and that persons who by their statements demonstrate a propensity to engage in homosexual conduct impair the accomplishment of the military mission.

The regulations defined "homosexual" as one who desires or intends to engage in homosexual acts, i.e., bodily contact with persons of the same sex for the purpose of gratifying sexual desires. Separation from the service was authorized for either conduct or statements.

At the discharge hearing, the Navy took the position that Meinhold had to be discharged if he is a homosexual, and that a member of the service is a homosexual if he says he is or has engaged in homosexual conduct. Meinhold received an honorable discharge.

Meinhold filed an action for declaratory relief, alleging that the DOD policy regarding homosexuals was unconstitutional. He sought reinstatement on the grounds that his discharge was procedurally defective, the Navy was estopped from sep-

arating him on the basis of status, and the regulations were constitutionally infirm.

On cross-motions for summary judgment, the district court held that exhaustion of administrative remedies was not required under the utility doctrine because it was undisputed that a new hearing would yield the same result. On the merits, the court held that gays should not be banned from serving in the military absent conduct that interfered with the military mission. The court rescinded Meinhold's discharge and permanently enjoined DOD from discharging or denying enlistment to anybody based on sexual orientation in the absence of sexual conduct that interfered with the military's mission. DOD appealed.

While the appeal was pending, President Clinton announced the "don't ask/don't tell" policy regarding homosexuals in the military. DOD sought an emergency stay on the ground that the injunction would bar enforcement of the new policy. The district court amended the injunction to restrain DOD from creating or maintaining files based on sexual orientation and from taking any actions against gay or lesbian servicemembers based on their sexual orientation. DOD appealed the order and obtained a stay of the amended injunction from the Supreme Court to the extent that it conferred relief on anybody but Meinhold.

[1] It was error for the district court to pass over Meinhold's nonconstitutional estoppel claim. [2] However, because further factfinding was unnecessary, the court of appeals could determine as easily as the district court whether Meinhold's evidence showed the Navy's prior knowledge of homosexuality and affirmative misconduct. It did not.

[3] The Navy never asked about Meinhold's status, although it asked whether he had ever engaged in homosexual activity, which he denied; Navy personnel knew that he is gay; the Navy never told him that he would be discharged on

the basis of his orientation; and the Navy ostensibly enforced its discharge policy mainly in cases of improper conduct.

[4] There was no affirmative misconduct in the form of ongoing active misrepresentations by Navy officials. Noone vouched for Meinhold's abilities despite his homosexuality prior to the litigation and the Navy did not tell him that his orientation would not be considered in the discharge proceedings. He had no track record from which to assume that it made no difference. The Navy's conduct amounted to at most a failure to inform or assist. Standing aside or doing nothing is insufficient to create an estoppel.

[5] When the constitutional validity of a regulation is in question, courts must first determine whether a construction is possible by which the constitutional problem may be avoided. [6] Another long-settled rule is that the military's professional judgment is not lightly to be overruled by the judiciary.

[7] There was no dispute that the Navy's policy was constitutionally permissible to the extent it related to homosexual conduct. But the issue in Meinhold's case was his classification as a homosexual. [8] Construing the regulation to apply to the classification of being a homosexual implicated equal protection. [9] Equating status or propensity with conducts or prohibited acts was problematic as well. [10] Whether the regulation passed constitutional muster was a close question only because of the greater license the courts give to the military to control the military environment.

[11] DOD's policy hinged on conduct whereas the separation provisions included statements. Arguably, a statement admitting homosexuality admits "desire" and "propensity" to commit homosexual acts, so that the "statement" basis for separation might have turned on something more than status. [12] But nothing in the policy stated that the presence of persons who say they are gay impairs the military mission. The

focus was on prohibited conduct and persons likely to engage in it. Construing the regulation to reach only statements manifesting a fixed or expressed desire to commit a prohibited act coincided with the military's concern for its mission and gave content to "desire" apart from the defining characteristic of sexual orientation.

[13] The regulation under which Meinhold was processed could reasonably be construed to reach only statements that showed a concrete, fixed, or expressed desire to commit homosexual acts despite their being prohibited. The Navy's presumption that Meinhold desired or intended to engage in prohibited conduct on the basis of his statement alone went beyond what DOD's policy sought to prevent. His discharge on that basis could not stand.

[14] An injunction should be no more burdensome to the defendant than necessary to provide relief to the plaintiff. Meinhold sought only to have his discharge voided and to be reinstated. Beyond reinstatement and not separating Meinhold because of his statement that he is gay, DOD should not have been constrained from applying its regulations to him and other military personnel. The injunction therefore had to be vacated except to the extent that it enjoined DOD from discharging Meinhold due solely to his statement that he made.

COUNSEL

Mark I. Levy (argued) and E. Roy Hawkins (on the briefs),
United States Department of Justice, Washington, D.C., for
the defendants-appellants.

John I. McGuire, Kaye, Scholer, Fierman, Hays & Handler,
Los Angeles, California, for the plaintiff-appellee.

Victor J. Wolski, Pacific Legal Foundation, Sacramento, California, amicus curiae for Pacific Legal Foundation, et al.

Ruth E. Harlow, American Civil Liberties Union, New York,
New York, amicus curiae for American Civil Liberties Union.

OPINION

RYMER, Circuit Judge:

These consolidated appeals present a number of questions arising out of the Navy's discharge of Petty Officer Volker Keith Meinhold on account of his statement on ABC World News Tonight, "Yes, I am in fact gay."

Finding that the Navy's policy was to ban gays and lesbians based on status, not on conduct, and that such a policy violates the Equal Protection Clause of the Fifth Amendment, the district court granted Meinhold's motion for summary judgment and enjoined the Department of Defense (DOD) from discharging or denying enlistment based on sexual orientation.¹ It also restrained DOD from maintaining files having to do with the sexual orientation of any member of the armed forces in the absence of conduct affecting the military mission. The court did not rule on Meinhold's estoppel claim, and it declined to require exhaustion of administrative remedies despite Meinhold's failure to appeal to the Board for Correction of Naval Records (BCNR) as it found that the government had conceded that a new hearing would result in the same decision.

Meinhold's nonconstitutional claim should have been resolved before his equal protection claim was reached. Nevertheless, because the record on summary judgment was fully developed and we can decide whether it suffices to estop the Navy as a matter of law, we have reviewed it independently and conclude that the Navy engaged in no affirmative miscon-

¹ The district court's opinion is published. Meinhold v. Department of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993).

duct and so cannot be estopped to order Meinhold separated on the ground of his homosexuality. Since the Navy's position leaves no room for supposing that its regulations could be differently interpreted by the BCNR, we agree that further review would be futile.

On the merits, we defer to the Navy's judgment that the presence of persons who engage in homosexual conduct, or who demonstrate a propensity to engage in homosexual conduct by their statements, impairs the accomplishment of the military mission. However, DOD regulations² do not have to be applied as the Navy did in this case, to require separation based only on Meinhold's statement that he is gay. Rather, the regulations can be read to reach a statement of homosexuality only when the statement itself manifests a concrete, expressed desire or intent to engage in homosexual acts. Construing the regulations in this way is consistent with the military judgment that homosexual conduct is incompatible with military service, and with our obligation to construe regulations so as to avoid constitutionally problematic results. Accordingly, we hold that the regulations then in effect, reasonably and constitutionally construed, could not be applied so as to discharge Meinhold solely because of a statement of orientation devoid of any concrete, expressed desire or intent to act on his homosexual propensity contrary to military policy. Therefore, to the extent the district court's judgment enjoins the Navy from discharging Meinhold based solely on his statement of status, we affirm; beyond that, we do not agree that injunctive relief may properly extend past the Navy's treatment of Meinhold to the Department of Defense's treatment of all members of the

² DOD Directive 1332.14, 32 C.F.R. Pt. 41, App. A (1981) and Naval Military Personnel Manual 3630400(1) (1992) were in effect at the time of Meinhold's discharge. These regulations have since been changed. This appeal does not involve the so-called "don't ask/don't tell" policy, which became effective February 28, 1994. See 10 U.S.C. S 654 (Supp. 1994). We express no opinion as to that policy or the regulations implementing it.

armed services. To that extent, the judgment is overbroad and wa reverse.

I

Meinhold had served for twelve years as an enlisted member of the United States Navy. On May 19, 1992, he acknowledged on television that he was gay. The next day the United States Navy initiated discharge proceedings pursuant to Naval Military Personnel Manual 3630400(1).³

At the hearing, both the Navy Recorder and the Legal Advisor to the administrative discharge board took the position that the board must recommend discharge if it found that Meinhold is homosexual, and that a member of the service is homosexual if he says he is whether or not he has engaged in homosexual conduct. The board so found, due to Meinhold's televised statement. As a result, Meinhold was given an honorable discharge on August 12, 1992.

Meinhold brought this action for a declaration that the Department of Defense's then-existing policy regarding homosexuals was unconstitutional, and sought reinstatement in the Navy on the ground that his discharge was procedurally defective, the Navy was estopped from separating him on the basis of status, and the relevant regulations were constitutionally infirm. In ruling on cross-motions for summary judgment, the district court held that further proceedings to exhaust administrative remedies would be futile as it was undisputed that a new hearing would result in the same decision. The court then held that gays and lesbians should not be banned from serving in the military in the absence of conduct which interferes with the military mission. It therefore rescinded

³ As they read at the time of Meinhold's discharge, Naval Military Personnel Manual 3630400 was essentially identical to DOD Directive 1332.14(H). We shall refer to them together as "the regulation," and cite only to DOD Directive 1332.14.

Meinhold's discharge and 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." Meinhold, 808 F. Supp. at 1458.

DOD timely appealed and sought an emergency stay of the district court's injunction to the extent it conferred relief on persons other than Meinhold. After this relief was denied, President Clinton announced a new policy regarding homosexuals in the military, popularly identified as the "don't ask/don't tell" policy. DOD again applied for an emergency stay, this time on the ground that the injunction barred it from implementing the new policy. Meanwhile, Meinhold also asked the district court to hold DOD in contempt based on the Department's announced intention to transfer two servicemembers who had admitted their homosexuality to the standby reserves. Although the court made no finding of contempt, it did amend the previous injunction to restrain DOD from creating or maintaining files based on sexual orientation and from taking any actions against gay or lesbian servicemembers based on their sexual orientation. DOD appealed this order and sought an emergency reconsideration of this court's denial of a stay pending appeal. We declined to reconsider our earlier rulings, but on October 23, 1993, the Supreme Court granted a stay of the injunction, as amended, to the extent it conferred relief on persons other than Meinhold.

II

We first consider whether the district court's decision and order should be vacated for either of the preliminary reasons urged by the Navy: that the court erred in adjudicating Meinhold's constitutional claim before requiring him to exhaust intramilitary remedies, and that it erred in failing to resolve

the nonconstitutional claims that Meinhold contends require his reinstatement before holding the policy unconstitutional.

A

DOD argues that the exhaustion doctrine applies with particular force in cases where a discharged servicemember seeks reinstatement because separation of powers concerns and military discipline considerations are implicated. It also contends that exhaustion promotes judicial economy by producing a record for judicial review, affording the relief sought, and possibly mooted issues. We agree that strict application of exhaustion requirements in military discharge cases helps maintain the balance between military authority and federal court intervention, but exhaustion is not required where an administrative appeal would be futile. See *Watkins v. United States Army*, 875 F.2d 699, 705 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).

DOD suggests that instead of finding that it had conceded futility, the district court should have found that exhaustion was required based on Meinhold's "concession" that constitutional arguments need not be reached because his nonconstitutional arguments mandate reinstatement. It also suggests that further review could have made a difference as the parties differed over the regulatory definition of "homosexual": Meinhold took the view the regulations mandate discharge based solely on status, whereas in the Navy's view the regulations apply to those who either have engaged in past homosexual acts or who by their statements indicate a propensity to engage in future homosexual acts. Meinhold, on the other hand, contends that exhaustion has to be futile since there are no exceptions to DOD's policy that if a servicemember states that he is homosexual, discharge is mandatory unless he can prove that he is not a homosexual.

We have difficulty with the Navy's argument because it doesn't square with the official position taken in Meinhold's

discharge proceeding. There, the Navy Recorder argued, and the Legal Advisor to the administrative discharge board advised, that the board had to recommend separation if it found Meinhold is homosexual and that a servicemember is a homosexual if he makes a statement that he is. The Navy points to nothing in the record which suggests that a disposition by the BCNR could have differed. We therefore cannot say the district court erred in concluding that futility was undisputed.

B

In *Watkins*, we held that equitable estoppel may be applied against the military and should be considered as a basis for relief before constitutional claims are reached. The Navy submits that *Watkins* controls and required the district court to resolve Meinhold's equitable estoppel claim prior to reaching his equal protection issue. Meinhold responds that the government raised a triable issue of fact which precluded summary judgment on the estoppel claim. For that reason, he argues, reaching the constitutional issue was not unnecessary.

[1] It is clear that the nonconstitutional claims should have been decided first. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979); cf. *Watkins*, 875 F.2d at 705. As the Supreme Court instructed in *Jean v. Nelson*, 472 U.S. 846 (1985):

Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision. This is a fundamental rule of judicial restraint. . . . [I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.

Id. at 854 (citations and quotation marks omitted). We are not persuaded by Meinhold's argument that there should be an

exception simply because the constitutional claim could be resolved summarily whereas the nonconstitutional claim could not be. See *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105-06 (1944). In any event, the district court gave no such reason, but simply passed over the nonconstitutional claim. It was error to do so.

[2] In these circumstances, we can either remand for the district court to consider the equitable estoppel claim, or dispose of it ourselves if it is possible to do so as a matter of law.

United States v. Locke, 471 U.S. 84, 92 n.9 (1985). In this case, it appears to us that further factfinding is unnecessary and we can determine as easily as the district court whether Meinhold's evidence, viewed most favorably to him, shows the Navy's prior knowledge of homosexuality and affirmative misconduct. As a matter of law, it does not.

Under *Watkins*, "a court must find affirmative misconduct by the government and must also find that the government's conduct will cause a serious injustice and that estoppel will not cause undue harm to the public interest." *Watkins*, 875 F.2d at 706. "Affirmative misconduct" is conduct "going beyond mere negligence." *Id.* at 707 (quotation marks omitted). While "[t]here is no single test for detecting the presence of affirmative misconduct[, and] each case must be decided on its own particular facts and circumstances[, a]ffirmative misconduct does require an affirmative misrepresentation or affirmative concealment of a material fact by the government." *Id.* (citation omitted).

[3] Viewing the record in Meinhold's favor and indulging the inferences he urges, the evidence shows that the Navy never asked about his status, although it did ask whether he had ever engaged in homosexual activity, which he truthfully denied; Navy personnel knew he was gay; the Navy never specifically told him that he would be discharged solely on the basis of orientation; and the Navy appeared to enforce its

discharge policy mainly in cases of improper conduct.⁴ This does not amount to affirmative misconduct, however, as comparison with Watkins makes clear.

Watkins had been drafted into the United States Army in 1967, and had reenlisted three times before he was denied reenlistment in 1982 because he was a homosexual. Meanwhile, Watkins had acknowledged his homosexuality on a medical form prior to his initial induction; during his first tour of duty, he had signed an affidavit admitting that he had been a homosexual for years and that since his enlistment, he had engaged in sodomy with two other servicemen; he was investigated on criminal sodomy charges, but the charges were dropped; after he was honorably discharged and his reenlistment eligibility code was listed as "unknown," he requested correction and the code was changed to "eligible for reentry on active duty"; he was reenlisted, and during his second tour, discharge proceedings were brought because of his homosexual tendencies, yet the board found him "suitable for retention in the military service"; he then got a security clearance for "Secret" information, was nevertheless rejected for a position in the Nuclear Surety Personnel Reliability Program because he had admitted homosexual tendencies, but following a request by his commanding officer for reconsideration, was requalified for the position; and, after he worked for several years under the security clearance, it was revoked when he again said he was homosexual, but after still another investigation, Watkins was again reenlisted. In those circumstances we held that the Army "plainly acted affirmatively in admitting, reclassifying, reenlisting, retaining, and promoting Watkins," and its "ongoing active misrepresentations" enabled Watkins to enter, remain, and progress in the Army. Id. at 708.

4 The parties dispute whether Meinhold was asked by the doctor who performed his physicals at enlistment if he had homosexual tendencies.

However, this fact is not material. If the doctor did fail to ask, such a failure amounts to no more than negligence, which is insufficient to create estoppel.

[4] No official, affirmative misconduct of this sort appears in Meinhold's record. There were no "ongoing active misrepresentations" by Navy officials. No one vouched for Meinhold's abilities despite his homosexuality prior to this incident.⁵ Meinhold was not told his homosexuality would not be considered in a discharge proceeding, and he had no track record from which he could have assumed that his own homosexuality made no difference to his reenlistment or retention. Thus, the Navy's conduct amounts at most to "[a] mere failure to inform or assist." *Lavin v. Marsh*, 644 F.2d 1378, 1384 (9th Cir. 1981). Compare *Watkins*, 875 F.2d at 708 (applying standard; finding conduct went beyond it) with *Lavin*, 644 F.2d at 1383-84 (adopting standard; finding failure to determine pension benefits or correct misunderstanding did not amount to pervasive pattern of false promises and so fell short). As *Watkins* instructs, standing aside or doing nothing, or even providing misinformation, is insufficient to create estoppel. *Watkins*, 875 F.2d at 708. For this reason, there is no basis for finding here, as the court did in *Watkins*, that the Navy repeatedly acted so as to promise Meinhold that he would not be discharged solely because of his sexual orientation. As a matter of law, therefore, Meinhold's estoppel claim must fail.

III

On the merits of Meinhold's equal protection claim, DOD contends that since it is constitutionally permissible to conclude that homosexual conduct adversely affects the military, *Beller v. Middendorf*, 632 F.2d 788, 811-12 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981), it is equally permissible for

⁵ Meinhold submitted declarations by colleagues which said that his homosexuality was common knowledge, but they do not show that anyone knew of it before his reenlistment. Likewise, while there is evidence that his performance was well regarded, there is no evidence that any of his commanding officers commended Meinhold with knowledge of his homosexuality prior to the separation proceedings.

the regulations to target those who are likely to engage in homosexual conduct. DOD faults the district court's definition of the pertinent classification for purposes of its equal protection analysis as "gays and lesbians who do not engage in prohibited conduct," arguing instead that under the regulations, the relevant classification is persons who the military reasonably concludes either have committed or are likely to commit homosexual acts based on their admitted "desire" and "propensity" to engage in homosexual conduct. In holding to the contrary, DOD believes the district court failed to test the policy "in light of the purposes [the Navy] sought to achieve," as courts are obliged to do under *Rostker v. Goldberg*, 453 U.S. 57, 75 (1981). DOD then suggests that simply by acknowledging his homosexuality, Meinhold admitted under the regulations that he had a "desire" and "propensity" to commit homosexual acts. From this, it urges, the Navy could permissibly infer that he would probably commit such acts, if he had not done so already.

[5] We believe that both the Navy's application of its regulations and the district court's equal protection analysis start a step too far down the path. When the constitutional validity of a statute or regulation is called into question, it is a cardinal

rule that courts must first determine whether a construction is possible by which the constitutional problem may be avoided. *New York City Transit Auth.*, 440 U.S. at 582 & n.22.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Indeed, we have said that "a court must construe a statute so as to avoid raising constitutional questions." *Tashima v. Administrative Office of the United States Courts*, 967 F.2d 1264, 1269 (9th Cir. 1992) (emphasis added); see also *Northwest Hosp., Inc. v. Hospital Serv. Corp.*, 687 F.2d 985, 992 (7th Cir. 1982) (applying canon to regulation); cf. *United States v. Stansell*,

847 F.2d 609, 613-16 (9th Cir. 1988) (same). Thus, it is incumbent on us to see whether there is some way the regulation can be construed to resolve the matter on a nonconstitutional ground. See *New York City Transit Auth.*, 440 U.S. at 582 & n.22.

[6] As we consider the regulation in this case, however, we are guided by another long-settled rule: The military's "considered professional judgment," *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986), is "not lightly to be overruled by the judiciary," *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991), cert. denied, 113 S.Ct. 655 (1992).

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

Rostker, 453 U.S. at 65-66 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). Our review, therefore, is as deferential as our constitutional responsibilities permit. *Id.* at 70.

To accommodate both principles, we start with the Navy's professional judgment. It is that "[h]omosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14(H)(1)(a).

The regulation, in turn, defines "homosexual" as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directive 1332.14(H)(1)(b)(1). "A homosexual act means bodily con-

tact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." DOD Directive 1332.14(H)(1)(b)(3). Eliminating from the equation a person who has previously engaged in homosexual acts because acts were not at issue in Meinhold's proceeding, a "homosexual" according to the regulations is someone who "desires" or "intends" to engage in bodily contact with members of the same sex for the purpose of satisfying sexual desires.

Separation may be based on homosexuality due to conduct or statements. DOD Directive 1332.14(H)(1)(c). "Conduct" consists of engaging in, attempting to engage in, or soliciting another to engage in a homosexual act;⁶ a "statement" that the member is a homosexual is the basis for separation unless the board finds the member is not a homosexual. Id.

[7] There is no dispute in this case that the Navy's policy is constitutionally permissible to the extent it relates to homosexual conduct.⁷ However, the issue in Meinhold's separation proceeding was his classification as a homosexual.⁸ Thus, our task is to decide whether this application raises constitutional

6 If such conduct is found, the servicemember must be separated unless

the board finds that it was a departure from usual behavior, is unlikely to

recur, was not accomplished by force, the member's continued presence

is consistent with the interest of proper discipline, and the member does

not "desire" or "intend" to engage in homosexual acts. DOD Directive

1332.14(H)(1)(c)(1).

7 See, e.g., Schowengerdt v. United States, 944 F.2d 483, 486, 489-90

(9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); Hatheway v. Secre-

tary of the Army, 641 F.2d 1376, 1378, 1384 (9th Cir.), cert. denied, 454

U.S. 864 (1981); Beller, 632 F.2d at 792, 810.

8 The Legal Advisor counseled the discharge board: "Also, if I can just

add, there seems to be some confusion about the acts, and the classifica-

tion here. And I think that . . . you should completely disregard the acts.

There are no allegations whatsoever of act. We're talking specifically

about the classification, and not the act. So, even though there--there is

mention in that definition of the act, we're not dealing with that here. We are dealing merely with the classifications."

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concerns that can be obviated by construing the regulations differently, but still consistently with the purposes DOD sought to achieve.

[8] Construing the regulation to apply to the "classification of being homosexual" clearly implicates equal protection. We recognized that the Army's discharge of a servicemember because of her acknowledged homosexuality states an equal protection claim in *Pruitt*, 963 F.2d at 1164.9 Here, the regulation as applied to Meinhold assumes that persons who say they are gay, but who have not acted in accordance with their propensity in the past, will nevertheless act in accordance with their propensity in the future -- whether or not to do so is lawful or acceptable military behavior. Yet no similar assumption is made with respect to servicemembers who are heterosexual.¹⁰ Although courts defer to the military's judgment about homosexual conduct, and classifications having to do with homosexuality may survive challenge if there is any rational basis for them, see *Heller v. Doe*, 113 S. Ct. 2637, 2642-43 (1993); *High Tech Gays v. Defense Indus. Sec.*

9 See also *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), vacated for reh'g en banc, 8 F.3d 70 (D.C. Cir. 1994); *Cammermeyer v. Aspin*, 850 F. Supp.

910, 925 (W.D. Wash. 1994) (striking down same policy; calling "presumption that servicemembers with a homosexual orientation will

engage in proscribed homosexual conduct" "unfounded"); *Dahl v. Secretary of the Navy*, 830 F. Supp. 1319, 1334-35 & n. 17 (E.D. Cal. 1993)

(striking down same regulations; comparing policy to "patently unconstitutional" hypothetical policy excluding ethnic minorities because they have a "propensity" to engage in theft though non-minorities are not

excluded until they engage in theft). But see *Ben-Shalom v. Marsh*, 881

F.2d 454, 463-65 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990)

(rejecting equal protection challenge); *Woodward v. United States*, 871

F.2d 1068, 1075-77 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990)

(same).

¹⁰ Prohibited conduct includes adultery, indecent assault, wrongful cohabitation, fraternization, indecent language, indecent acts with another, pandering and prostitution, sodomy and bigamy. Articles 120, 125, 134,

Uniform Code of Military Justice, 10 U.S.C. SS 920, 925, 934
(Supp.
1994).

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Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990), at least a serious question is raised whether it can ever be rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not. 11

[9] Equating status or propensity with conduct or acts that are prohibited is problematic as well. The Supreme Court has long recognized the constitutional infirmity of penalizing status alone. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (ethnicity is insufficient basis to believe persons are illegal aliens); *Robinson v. California*, 370 U.S. 660, 665-67 (1962) (unconstitutional to criminalize narcotics addiction in absence of proof of use); cf. *Powell v. Texas*, 392 U.S. 514, 532-34 (1968) (recognizing *Robinson* rule that criminal penalties may be inflicted only if accused has committed act by contrast with status). While not controlling because the discharge process is not a criminal proceeding and does not impose punishment, *Garrett v. Lehman*, 751 F.2d 997, 1002-03 (9th Cir. 1985), *Robinson*, *Powell* and *Brignoni-Ponce* nevertheless point out the constitutionally significant danger of making status a surrogate for prohibited conduct. As Justice Black's concurring opinion in *Powell*, joined by Justice Harlan, observed:

11 We acknowledge the force of DOD's argument that it need not take the risk of a person with homosexual desire or propensity acting on it because of the critical nature of the military mission. See *Ben-Shalom*, 881 F.2d at 460-61 (rejecting equal protection challenge to discharge of servicemember who admitted homosexuality in part on the footing that the military does not have to take the risk that an admitted homosexual will not commit homosexual acts). But cf. *Pruitt*, 963 F.2d at 1167 (equal protection challenge withstands Rule 12(b)(6) dismissal). However, DOD is prepared to take the risk that a servicemember who has committed a homosexual act but isn't homosexual won't do so again. For that reason, its argument is not wholly rational. In any event, the risk factor alone does not eliminate equal protection difficulties.

Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. . . .

. . . Perhaps more fundamental is the difficulty of distinguishing, in the absence of any conduct, between desires of the day-dream variety and fixed intentions that may pose a real threat to society; extending the criminal law to cover both types of desire would be unthinkable, since "[t]here can hardly be anyone who has never thought evil. When a desire is inhibited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal."

Powell, 392 U.S. at 543-44 (Black, J., concurring) (quoting Glanville Williams, Criminal Law -- the General Part 2 (1961)). And as Justice Harlan wrote in Robinson :

Since addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

If the California statute reaches this type of conduct, . . . it is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law.

Robinson, 370 U.S. at 678-79 (Harlan, J., concurring). The effect of the regulation as applied in Meinhold's case is much the same. Cf. *Jacobson v. United States*, 112 S. Ct. 1535, 1542 (1992) (past conduct does not demonstrate propensity to engage in similar conduct later made illegal); *Paris Adult*

Theatre I v. Slaton, 413 U.S. 49, 67 (1973) (individual's thoughts and fantasies "are his own and beyond the reach of government").

[10] Thus, whether the regulation passes constitutional muster is a close question only because of the greater license we give the military to control the military environment. See Beller, 632 F.2d at 810 ("[C]onstitutional rights must be viewed in light of the special circumstances and needs of the armed forces."). Constitutional tensions may be avoided, however, if the regulation can reasonably be construed to mandate separation due to a statement of homosexuality only when that statement itself indicates more than the inchoate "desire" or "propensity" that inheres in status. We believe it can be.

[11] DOD's policy judgment hinges on conduct¹² -- whereas the separation provisions include "conduct or statements." DOD contends that a statement admitting homosexuality under the regulation admits "desire" and "propensity" to commit homosexual acts. Arguably it does, in the abstract, because the regulatory definition of "homosexual" is a person who "engages in, desires to engage in, or intends to engage in homosexual acts." ¹³ But as DOD's brief also acknowledges: "[A] service member's expressed 'desire' to commit homosexual [acts] evidences more than an abstract, ephemeral, or suppressible whim. Like acts themselves and like intentions, 'desire' in the relevant sense evidences a 'propensity,' or an 'often intense natural inclination,'

¹² "The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14(H)(1)(a). Our conclusion in *Pruitt* that the regulation targets homosexual status, 963 F.2d at 1163, is not to the contrary because we were concerned there with whether it targeted speech or status in *Pruitt*'s case.

¹³ There is no evidence that Meinhold "engaged" in homosexual acts and DOD doesn't argue that he "intended" to.

Webster's New Collegiate Dictionary 943 (9th ed. 1990), to commit serious regulatory violations." (Emphasis added.) Taking DOD's suggestion at face value, the "statement" prong for separation may turn on something more than status: a concrete, expressed desire to commit homosexual acts which are, in turn, prohibited.

[12] This interpretation is consistent with the military's judgment that the presence of persons who engage in homosexual conduct, or make a statement indicating their propensity for engaging in, or attempting to engage in, or soliciting someone else to engage in homosexual acts, impairs the military mission. Nothing in the policy states that the presence of persons who say they are gay impairs the military mission. Rather, the focus is on prohibited conduct and persons likely to engage in prohibited conduct. Construing the regulation to reach only statements which manifest a fixed or expressed desire to commit a prohibited act not only coincides with the military's concern for its mission, but gives content to "desire" apart from the defining characteristic of sexual orientation.

★ [13] We therefore hold that the regulation under which Meinhold was processed need not be construed so broadly as to raise constitutional concerns. It can reasonably be construed to reach only statements that show a concrete, fixed, or expressed desire to commit homosexual acts despite their being prohibited. The Navy applied its regulation to Meinhold's statement of orientation alone and based his separation solely on his classification as a homosexual. His statement -- "I am in fact gay" -- in the circumstances under which he made it manifests no concrete, expressed desire to commit homosexual acts. The Navy's presumption that Meinhold desires or intends to engage in prohibited conduct on the basis of his statement alone therefore arbitrarily goes beyond what DOD's policy seeks to prevent. Accordingly, Meinhold's discharge on that basis cannot stand.

IV

In addition to rescinding Meinhold's discharge, the district court permanently enjoined DOD from "discharging, changing [the] enlistment status of or denying enlistment to any person," from maintaining files, and from "taking any actions" against gay or lesbian servicemembers based on sexual orientation in the absence of sexual conduct which interferes with the military's mission. The Navy argues that even if the district court did not err on the constitutional issue, its nation-wide injunction cannot stand.¹⁴ We agree.

[14] 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); see also *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). This is not a class action, and Meinhold sought only to have his discharge voided and to be reinstated. Effective relief can be obtained by directing the Navy not to apply its regulation to Meinhold based only on his statement that he is gay. Beyond reinstatement, and not separating Meinhold on that basis, DOD should not be constrained from applying its regulations to Meinhold and all other military personnel. Accordingly, the injunction is vacated except to the extent it enjoins DOD from discharging Meinhold due solely to the statement that he made.

JUDGMENT AFFIRMED IN PART; REVERSED AND
VACATED IN PART.

14 DOD also contends that the district court lacked jurisdiction to issue its amended order, which broadened the scope of injunctive relief, because an appeal had already been taken from the original order. As the district court issued the amended order to clarify its original injunction and to supervise compliance in the wake of Meinhold's motion for contempt, it did not lack jurisdiction. See *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) (appeal from supervisory order does not divest district court of jurisdiction to continue supervision and modify order as necessary).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

*File. Guyon de
Military*

LTJG RICHARD DIRK SELLAND,

Plaintiff,

v.

LES ASPIN, et al.,

Defendants.

Civil Action No. 93-1924-LFO

FILED

SEP 28 1993

MEMORANDUM

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Plaintiff, Lieutenant (J.G.) Richard D. Selland, is before the Court on his motion for a preliminary injunction that would bar the Secretaries of Defense and Navy from separating him from the Navy on the basis of homosexual orientation.

I.

The essential undisputed facts are that the Chief of Naval Personnel has reported to the Secretary of the Navy that

[plaintiff] is a regular Supply Corps officer with two years commissioned service . . . [who] has been recommended for administrative separation with an Honorable discharge.

Administrative Record (A.R.) at 4. Noting plaintiff's two objections to his separation, the Chief advised the Secretary that (1) plaintiff had appropriate notice that "he was being considered for administrative separation based on homosexuality as evidenced by his admission that he is a homosexual," and (2) "[n]either [Defense Department] guidelines nor policy concerning the retention of homosexual [sic] contains any . . . provision [that] the Navy must allege misconduct, in addition to status, in

order to separate an officer based on his homosexuality." In conclusion the Chief recommended that the Secretary "separate [plaintiff] from the Naval Service with an Honorable Discharge The separation code will be GRB (homosexuality admission)." *Id.*

On May 21, 1993, an Acting Secretary of the Navy advised an Assistant Secretary of Defense that the Secretary of the Navy had approved an honorable discharge but had not yet directed separation and recommended that plaintiff's case be referred to the Attorney General for determination of whether or not the discharge should be suspended.

On July 2, 1993, the General Counsel of the Defense Department advised the Attorney General that plaintiff's case and one other

have been processed in accordance with Department of Defense policies and procedures governing administrative separation of military personnel for homosexuality. They are based only on acknowledged homosexual 'status,' as opposed to homosexual conduct

. . . . The Separation Authority has determined that separation is warranted under established policies and procedures.

A.R. at 2 (emphasis supplied). The General Counsel further reminded the Attorney General of her authority to direct that plaintiff's discharge be suspended. If she directed suspension, plaintiff would be "separated from active duty and placed in the standby reserve" with the option to return to active duty upon request should the current policy be changed. *Id.* Those individuals whose cases are not suspended would be discharged.

On August 9, 1993, the Associate Attorney General advised the

General Counsel that the Attorney General had delegated to him her authority to

suspend final discharges in 'acknowledged homosexual status' cases given to the Attorney General by the President in his January 29, 1993 directive establishing an interim policy regarding homosexuals in the military.

A.R. at 1. The Associate Attorney General reminded the General Counsel that, on July 19, 1993, the President "announced a new homosexual policy for the military and . . . the Secretary of Defense directed that the interim policy and . . . procedures remain in effect until October 1, 1993." *Id.* He concluded that "the discharge is hereby suspended until the President's policy on homosexuals in the military . . . becomes effective." *Id.* (emphasis added). That date is October 1, 1993. Thus, for ought that appears, unless restrained the defendants will automatically discharge plaintiff on, or soon after, that date, without any further administrative consideration of his case.

Plaintiff appears to be in a situation resembling that of a sparrow caught in a badminton game. Despite taunts from shipmates about their belief that he was homosexual, he creditably performed his duties as the supply officer on a nuclear submarine. As the taunts escalated when homosexuals in the armed services surfaced as an issue in the 1992 presidential campaign, plaintiff confided in his Chaplain about the discomfort the taunts were causing him. On the day after President Clinton's inauguration, apparently relying on the President's public statements about homosexuals in the military, plaintiff and the Chaplain met privately with plaintiff's

commanding officer, apparently to ask him to admonish the crew about taunting plaintiff. Instead, when the plaintiff admitted that "he was homosexual" (A.R. at 4), the commanding officer removed him from the ship forthwith.¹ Since then he has served creditably as a supply officer in a shore billet.

Separation from active duty would end plaintiff's pay, allowances, and related privileges. Moreover, one may reasonably infer from the cabinet-level correspondence in the administrative record that nothing but a few hours stands in the way of his final discharge from the Navy, complete with the unhelpful and, to many, ignominious notation on an otherwise honorable discharge: "GRB (homosexuality admission)."² A.R. at 5.

All of the foregoing is occurring or imminent without any apparent consideration or finding contemplated by Naval Regulations as to whether there are (or are not) "particular circumstances" that justify plaintiff's retention at some billet in the Navy despite his admission of homosexuality. SECNAVINST 1920.6A at 1 (b)(3)(a)(4) (Encl. 3); see Matlovich v. Secretary of the Air Force, 591 F.2d 852, 857 (D.C. Cir. 1978).

Most important, the separation and, as of October 1, 1993,

¹Defendants could cite this incident to show the burden that would be placed on commanders if they were required to police this kind of tension between homosexuals and others. But, at the merits stage, this burden must be compared, in terms of fact and law, with that borne by commanders after the armed forces included blacks and, more recently, women, in their ranks.

²Query whether the notation is intentionally unhelpful, whether it would serve any useful purpose, and whether it would comport with the spirit of the "don't ask, don't tell" policy.

discharge remain imminent despite the following order of the United States District Court for the Central District of California:

[The Department of Defense is permanently enjoined from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States.

Meinhold v. United States Department of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993), stay denied, No. CV-92-6044 (9th Cir. Mar. 5, 1993).

II.

In order to obtain a preliminary injunction a movant must establish (1) a substantial likelihood of success on the merits, (2) irreparable injury, (3) relatively less injury to defendants, and (4) promotion of, or at least no detriment to, the public interest. These burdens on a plaintiff seeking an injunction against the military are heightened by the deference properly owed to military judgment by the judiciary. On the other hand, an injunction to maintain the status quo is more accessible than a mandatory injunction that would alter it. Moreover, it is appropriate to consider these four factors in relation to one another so that a stronger showing of one factor will permit a weaker showing on the other factors.³

Here the probability of success is great. Defendants are under an injunction by a federal judge (which has survived

³Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1973).

appellate review on two stay motions) not to discharge any person from the armed forces solely because of his/her status as a homosexual. Cabinet-level documents make it clear that plaintiff is threatened with imminent discharge as of October 1. Our Court of Appeals has established in no uncertain terms the duty of a district court to enforce orders of the Court of Appeals.⁴ The same principle governs a complaint alleging a violation of a viable order of another federal district court that, on its face, applies nationwide to cabinet officers of the national government.

The likelihood of plaintiff's success is further enhanced by the Supreme Court decision that struck down a California statute that the court construed as making it a crime to be a drug addict - even absent any allegation that the addict sold or used illegal drugs. Robinson v. California, 370 U.S. 661 (1961). Of course, Robinson was a criminal case, which this is not, and a different standard applies to the military in criminal as well as civil cases. Nevertheless, the Supreme Court may well invoke the Robinson precedent to condemn inferences of conduct from an unpopular condition (if homosexuality is proved to be a condition) as distinguished from proven illegal acts or attempts to commit them. This result is likely to follow whether the defendants' actions and threatened actions are subject to strict scrutiny⁵ or

⁴See International Ladies' Garment Workers' Union v. Donovan, 733 F.2d 920, 9222 (D.C. Cir. 1984).

⁵See FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 443 (1985).

are tested for a rational basis.⁶

Defendants argue that it is reasonable to infer that a homosexual has committed or is likely to commit homosexual acts. This argument must fail for two reasons: (1) the General Counsel explicitly renounced conduct as a ground for separation; and (2) the Meinhold Court required not only a finding of homosexual conduct; it further ordered that a discharge can survive that injunction, at a minimum, if it is based on a finding that the conduct interferes with the military mission of the armed forces of the United States. That is presently, if only temporarily, the law of the land on this subject. Therefore, plaintiff is likely to prevail because defendants have made no finding in compliance with the Meinhold requirements.

In reaching these conclusions, I have carefully considered the relevant precedents in this circuit. The D.C. Circuit held in Dronenburg v. Zech, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984), a case involving sexual misconduct by a homosexual soldier, that the Constitution did not bar the Navy's policy of mandatory discharge for actual homosexual conduct. Here, however, the adverse action is "based only on acknowledged homosexual 'status,' as opposed to homosexual conduct." A.R. at 2. Moreover, our Court of Appeals has reserved judgment as to whether the Central Intelligence Agency may discharge an individual because of sexual orientation, as distinguished from conduct. Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir. 1986), modified sub nom. Webster v. Doe, 486 U.S. 592

⁶ See Cleburne, 473 U.S. at 440.

(1988).

At the district court level, my colleague Judge Gasch approved a Navy discharge based solely on sexual orientation. Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991), appeal pending. However, he based his decision in part on health considerations, a ground not urged by the government here. In any event, despite my very great respect for Judge Gasch, I am not persuaded that the other grounds for his ruling are likely to, or should, control in the unique circumstances at issue here.

The defendants contend nevertheless that plaintiff is not likely to succeed on the merits because their action is not final and plaintiff has not exhausted his administrative remedy. But the remedy they proffer would be before the Board for the Correction of Naval Records, which can consider whether plaintiff's discharge as a homosexual was correct after the discharge. In the circumstances here that is not an adequate remedy, exhaustion of which would be required before plaintiff's claim could be addressed on the merits.

The plaintiff's claim for irreparable injury if he were merely separated from active duty and placed in the standby reserve would be problematic were it not for the Certificate of Release or Discharge From Active Duty (DD Form 214). True, the separation primarily threatens pay and allowances, which can be compensated later, and emotional distress, which may not be compensable or actionable. However, the Certificate, complete with signatures of plaintiff and a Navy Personnel Officer, states: "(23) Type of Separation - Release from Active Duty" and "(28) Narrative Transfer

to Inactive-Involuntary Transfer to Inactive Reserve (Homosexuality-admission)." The document states on its face: "This is an Important Record. Safeguard it." It is. And publication of it threatens irreparable injury. Moreover, the Associate Attorney General's letter makes it more likely than not likely that on October 1, 1993, or shortly thereafter, the other shoe will automatically drop, and plaintiff will not only lose his pay, allowances, and his well-performed job, but will be finally discharged with the modern counterpart of a "bar sinister" etched upon his record: "GRB (homosexuality admission)."

Defendants have demonstrated no equity against the maintenance of this single plaintiff in status quo pending a final judgment because of its possible deleterious effect upon the Navy's mission. Moreover, the equity of any claim of injury that defendants might have is trumped by the fact that they are perilously close to being in contempt of the Meinhold order.⁷ There is also an intangible, but meaningful, equity in the fact that plaintiff made the statement about his homosexuality, not for broadcasting on television, but in the company of his Chaplain to his Commanding Officer in his stateroom apparently to gain his intervention with

⁷Defendants would distinguish the Meinhold order because, in denying a stay of it, the Ninth Circuit emphasized that the plaintiff in that case was not being discharged, but only separated from active duty and placed on reserve. But that distinction does not reach this case where, for ought that appears, discharge can be days or hours away. In any event, a Meinhold court order entered September 22, 1993, is unequivocal. It directs defendants to show cause why they should not be cited for contempt "for continuing to enforce the Department of Defense's policy regarding gays and lesbians despite this Court's determination that the policy violates the United States Constitution"

respect to taunts he was receiving, in part because of public statements by the President of the United States. Indeed, he appears to have felt free to make his admission in reliance on those presidential statements. Response of LTJG Richard Selland to the Notice of Administrative Separation (A.R. at 9). Thus, the equities favoring plaintiff outweigh any demonstrated injury or threatened injury to the Navy.

The public interest in this matter is difficult to quantify. Obviously, the public interest in the Navy's mission is paramount, and could be (indeed in the proceedings on the merits may well be) decisive. But this is an application to maintain the status quo temporarily pending a final resolution of the matter. An accompanying Order will grant the motion, tailor the Meinhold order to the posture of this case, and schedule expedited administration of it on the merits.

Date: September 28, 1993
3:30 P.M., E.S.T.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LTJG RICHARD DIRK SELLAND,

Plaintiff,

v.

LES ASPIN, et al.,

Defendants.

Civil Action No. 93-1924-LFO

FILED

SEP 28 1993

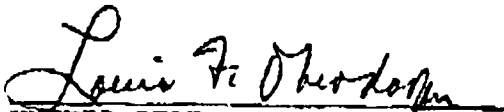
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

On the basis of the findings and for reasons stated in the accompanying Memorandum, it is this 27th day of September, 1993, hereby

ORDERED: that, pending a final judgment or other order of the Court, defendants, and all persons acting in concert with them, are ENJOINED from separating plaintiff from active duty, placing him on active reserve, or discharging plaintiff from the Navy based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the United States Navy; and it is further

ORDERED: that on or before October 8, 1993, the parties shall file a proposed schedule for the disposition, or trial, of this case on the merits.


UNITED STATES DISTRICT JUDGE

3:30 P.M., E. 4.7.