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2ND CASE of Level 1 printed in FULL format.

MEL DAHL, Plaintiff, v. SECRETARY OF THE UNITED STATES NAVY,
et al., Defendants.

CIV. NO. S-89-0351 MLS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

1993 U.S. Dist. LEXIS 12102

August 30, 1993, Decided

August 30, 1993, Filed

COUNSEL: [*1] For Plaintiff: Mel Dahl, Pro Per, 3 Mercier Avenue, Boston, MA
02124.

For Defendants: Anthony J. Coppolino, Esq., U.S. Department of Justice, Civil
Division, 901 E Street, NW, Room 844, Washington, D.C. 20530.

JUDGES: Schwartz

OPINIONBY: MILTON L. SCHWARTZ

OPINION: MEMORANDUM OF DECISION AND ORDER

This case is before the court on plaintiff's and defendants' cross-motions
for summary judgment on plaintiff's First and Fifth Amendment challenges to his
discharge from the United States Navy.

I. FACTUAL AND PROCEDURAL BACKGROUND.

The undisputed facts relevant to these summary judgment motions are as
follows. Plaintiff enlisted in the Navy on October 14, 1980. During an official
interview on March 10, 1981, plaintiff disclosed in response to questioning that
he is a homosexual, but denied engaging in any homosexual conduct subsequent to
enlisting in the Navy. Shortly thereafter, defendants advised plaintiff that he
was being considered for discharge pursuant to Secretary of the Navy Instruction
("SECNAVINST") 1900.9D n1 and convened an administrative discharge board for
that purpose. Despite extensive evidence of plaintiff's excellent service record
and affidavits of support from plaintiff's shipmates [*2] and superiors, on
December 16, 1981 the administrative board recommended that plaintiff be
discharged, based on its finding that he "is a stated homosexual." Pfeiffer
Decl., Ex. 8. Plaintiff was honorably discharged from the Navy on January 13,
1982. Plaintiff then appealed to the Board for Correction of Naval Records,
which upheld his discharge on March 19, 1986.

-----Footnotes-----

n1 SECNAVINST 1900.9D provides in pertinent part:

(b) A member [of the Navy] shall be separated under this instruction if, but only if, one or more of the following . . . approved findings is made:

(2) The member has stated that he or she is a homosexual or bisexual unless

there is a further finding that the member is not homosexual or bisexual.

Defs.' Ex. A to Ex. 1, SECNAVINST 1900.9D @ 7(b)(2). This portion of SECNAVINST 1900.9D is referred to herein as the "homosexual exclusion policy."

"Homosexual" is defined by SECNAVINST 1900.9D as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." Id. @ 5(a). "Bisexual" is defined as "a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts." Id. @ 5(b). Any reference in this opinion to homosexuals should be construed to refer to bisexuals as well.

-----End Footnotes-----

[*3]

Plaintiff filed the instant action on March 13, 1989 challenging his discharge on grounds that it violated the First, Fourth, Fifth and Fourteenth Amendments and Title X of the United States Code. Among other things, plaintiff seeks reinstatement, an order prohibiting defendants from taking any further action against him pursuant to the homosexual exclusion policy, a declaration that the policy is unconstitutional, and costs of suit. On July 5, 1990, the court granted defendants' motion to dismiss the complaint in its entirety. Plaintiff appealed, and the Ninth Circuit reversed and remanded in light of *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992). At a pretrial scheduling conference, plaintiff abandoned all but his Fifth Amendment equal protection claim n2 and First Amendment free speech claim. Plaintiff now moves for summary judgment on both of his claims and defendants move for summary judgment solely on plaintiff's equal protection claim.

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n2 The court notes that plaintiff's complaint alleges only that defendants violated his Fourteenth Amendment equal protection rights, although it is well-established that equal protection claims are applicable to the federal government only via the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563, 570 (9th Cir. 1990). However, the court does not view this as fatal error, since the complaint also alleges a violation of plaintiff's Fifth Amendment due process rights, an allegation which can be read to encompass a Fifth Amendment equal protection claim.

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[*4]

II. STANDARD OF REVIEW FOR SUMMARY JUDGMENT.

Federal Rule of Civil Procedure 56(c) provides that summary judgment is

appropriate when the court is satisfied "that there is no genuine issue as to any material fact n3 and that the moving party is entitled to judgment as a matter of law." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., Ltd.*, 475 U.S. 574, 587 (1986), quoting Adv. Comm. Note on 1963 Amends. to Fed. R. Civ. P. 56(e).

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n3 A fact is material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

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[*5]

In summary judgment practice, the moving party:

always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), quoting *Fed. R. Civ. P.* 56(c). However, a summary judgment motion "may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file," without any affidavits, if the nonmoving party will bear the burden of proof at trial on a dispositive issue. *Id.* at 324.

If the moving party meets its initial responsibility, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact. *Fed. R. Civ. P.* 56(e); *Matsushita*, 475 U.S. at 585-86. The nonmoving party may not simply rely upon its pleading denials, but must tender evidence of specific facts in the form of [*6] affidavits or admissible discovery material, or both, in support of its contention that a genuine issue of material fact exists. *Fed. R. Civ. P.* 56(e); *Celotex*, 477 U.S. at 324. The nonmoving party's evidence must be believed and all reasonable inferences that can be drawn from that evidence must be drawn in favor of the nonmoving party. *Anderson*, 477 U.S. at 255. However, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," otherwise there is no genuine issue for trial. *Matsushita*, 475 U.S. at 586.

On the other hand, the nonmoving party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968). In other words, the nonmoving party's evidence is sufficient to withstand summary judgment if a reasonable trier of fact could return a verdict in favor of the nonmoving [*7] party based on that evidence. *Anderson*, 477 U.S. at 248; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987). But if the nonmoving party fails to make a showing sufficient to establish an essential element of his case, and on which he will bear the

burden of proof at trial, summary judgment may appropriately be granted. Celotex, 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

III. ANALYSIS

A. Equal Protection Claim.

Both parties move for summary judgment on plaintiff's claim that the homosexual exclusion policy violates his Fifth Amendment right to equal protection because it is based on prejudice and bias against homosexuals. Fifth Amendment equal protection claims are treated the same as equal protection claims brought under the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). The threshold question in equal protection analysis is whether [*8] the policy at issue is discriminatory. See *Watkins v. United States Army*, 847 F.2d 1329, 1336 (9th Cir. 1988), op'n vacated on other gds., 875 F.2d 699 (9th Cir. 1989). Defendants do not dispute that the homosexual exclusion policy discriminates against persons on the basis of their sexual orientation. See *id.* at 1337 (concluding that the Army's similar homosexual exclusion policy was discriminatory on its face).

1. Standard of review.

Given that defendants' policy is discriminatory, the court's next task is to ascertain what standard of equal protection review should apply. See *id.* at 1345.

a. Applicability of strict scrutiny.

Plaintiff argues that the homosexual exclusion policy should be subject to strict scrutiny, while defendants contend that the policy is subject only to rational basis review. If strict scrutiny is applied, the policy will be struck down unless the classification drawn by the policy is "suitably tailored to serve a compelling [government] interest." See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). [*9] If, on the other hand, the rational basis standard is applied, the policy is presumed constitutional and will be upheld so long as the classification drawn is rationally related to a legitimate government interest. See *id.*

Strict scrutiny is applied when a legislative classification rests on an inherently suspect characteristic, such as race, religion or alienage, or "trammels fundamental personal rights." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), the Ninth Circuit squarely addressed the question whether laws and policies classifying individuals based on their sexual orientation are subject to strict scrutiny.

The *High Tech Gays* court first analyzed whether homosexuality is an inherently suspect characteristic (i.e. whether homosexuals are a "suspect class"). The court stated that to be considered a suspect class, "homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that [*10] they are a minority or politically powerless."

Id. at 573. Although the court agreed that homosexuals had suffered a history of discrimination, it did not agree that they satisfied the other two criteria. Id. Rather, it concluded that "homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race . . . or alienage." Id. Moreover, the court said, "homosexuals are not without political power; they have the ability to and do 'attract the attention of lawmakers,' as evidenced by [several state statutes and local ordinances]." n4 Id. at 574, quoting *Cleburne*, 473 U.S. at 445.

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n4 For the same reasons, the court also held that homosexuals did not constitute a "quasi-suspect" class for purposes of the heightened, intermediate level of scrutiny currently applied to gender and illegitimacy classifications. *Id.* at 573. Plaintiff does not contend that homosexuals are a quasi-suspect class.

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[*11]

Second, relying on *Bowers v. Hardwick*, 478 U.S. 186, 194-196 (1986), the court rejected the argument that homosexual activity is a fundamental right. *High Tech Gays*, 895 F.2d at 571-74; see also *Watkins*, 847 F.2d at 1345. Accordingly, the court concluded that legislation or policies classifying individuals based on their sexual orientation are subject only to rational basis review. *High Tech Gays*, 895 F.2d at 574.

Plaintiff argues, however, that despite the holding in *High Tech Gays*, homosexuals nevertheless should be deemed a suspect class because "two important events have changed the landscape," rendering the holding in *High Tech Gays* suspect. Pl.'s Mem. in Supp. of Mot. for Summ. J. at 6:22-23. First, plaintiff asserts, "it has now been conclusively and authoritatively established that sexual orientation is biological, genetic and innate." *Id.* at 6:23-25. In support of this argument, plaintiff proffers a December 1988 study conducted by the Defense Personnel Security Research and Education Center, which concluded, *inter alia*, that "complex combinations of genetic, hormonal, neurological and environmental factors operating prior to birth largely determines what an individual's sexual orientation will be." n5 Pl.'s Ex. C at 4. Second, plaintiff asserts, because it is "clear that Congress has no intention of allowing the President to lift the ban [on homosexuals in the military] . . . gays obviously do not have political clout with the relevant legislative body, and the Ninth Circuit's finding that gays do have such clout has now been shown to be incorrect." n6 Pl.'s Mem. in Supp. of Mot. for Summ. J. at 7:8-13.

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n5 Plaintiff also notes in his brief that a number of recent studies have concluded that sexual orientation is determined, at least partially, by biological and/or genetic factors. See, e.g., Simon LeVay, "A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men," 253 *Sci.* 1034, 1035 (1991); and Michael Bailey and Richard C. Pillard, "A Genetic Study of Male Sexual Orientation," 40 *Archives Gen. Psychiatry*, 1089, 1092 (1991), cited in "Analyzing the Military's Justifications for Its Exclusionary Policy: Fifty Years Without a Rational Basis," 26 *Loyola Law Rev.* 151, 173 n.192 (1992); see

also "The Jurisprudence of Genetics," 45 Vand. Law Rev. 313 (1992). [*13]

n6 As further support for this argument, plaintiff alleges that, since the ruling in *High Tech Gays*, legislation designed to foreclose homosexuals' participation in the democratic process has been or will be enacted in more than twenty states and "the incidence of violent crime directed at gay people has risen astronomically." Pl.'s Reply at 4:11-12. While this may be true, unlike the recent Congressional debate regarding the military's homosexual exclusion

policy, the above occurrences have not been widely publicized enough for the court to take judicial notice that these events have in fact occurred. Therefore, the court does not consider the above allegations in its analysis.

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Although plaintiff may have submitted sufficient evidence to create a triable issue of material fact as to whether homosexuality is an "immutable" characteristic, he has failed to submit any pertinent evidence tending to establish that homosexuals lack legislative power. Plaintiff's reference to Congress' recent refusal to allow homosexuals to serve openly in the military is irrelevant to the legal standard for [*14] determining whether a particular minority group lacks political power. The standard is not whether a certain group is "powerless to assert direct control over the legislature," for "if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect." *Cleburne*, 473 U.S. at 445. Rather, the test is whether the particular group at issue has "no ability to attract the attention of lawmakers." *Id.* The recent Congressional and executive dialogue concerning homosexuals' ability to serve in the military demonstrates that, despite their apparent inability to assert direct control over Congress, homosexuals have a significant ability to attract Congress' attention. n7 Accordingly, the court rejects plaintiff's argument that homosexuals constitute a suspect class for purposes of strict scrutiny analysis.

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n7 Plaintiff also argues that because homosexuals have been subjected to a history of discriminatory treatment, they must also lack political power. However, this argument confuses the history of discrimination prong with the lack of political power prong of the suspect class test. It is undisputed that homosexuals have historically been discriminated against, but this does not necessarily mean that they therefore lack political power, as *High Tech Gays* made clear. See 895 F.2d at 573.

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[*15]

In the alternative, plaintiff contends that defendants' policy should be subject to strict scrutiny because it impinges on the "fundamental . . . right to one's thoughts, feelings and emotions." Pl.'s Opp'n at 9:9-11. However, because plaintiff cites no authority for this argument, it must be rejected. n8 Plaintiff also urges the court to adopt the reasoning of the Colorado Supreme Court in *Evans v. Romer*, 854 P.2d 1270 (1993), in which the court held that an amendment to the Colorado Constitution that denied homosexuals any type of protected status was subject to strict scrutiny because it impinged on their fundamental right to engage in the political process. The court declines plaintiff's invitation. This case is distinguishable from *Evans* because the

homosexual exclusion policy does not deny homosexuals their right to participate in the political process. n9

- - - - -Footnotes- - - - -

n8 It is true that *Stanley v. Georgia*, 394 U.S. 557, 564-66 (1969), *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67, 93 (1973) and *Jacobson v. United States*, U.S. , 112 S. Ct. 1535, 1542 (1992), cited in connection with

plaintiff's First Amendment argument, do contain language supporting the proposition that a person's thoughts, beliefs, and emotions are protected under the First Amendment. However, it would be a novel extension of this language to hold that homosexual thoughts, desires and emotions are fundamental rights for purposes of strict scrutiny analysis in the context of equal protection. [*16]

n9 Alternatively, plaintiff may have intended to offer Evans as support for his argument that homosexuals lack political power, since this case establishes that the State of Colorado enacted "anti-gay" legislation subsequent to the ruling in High Tech Gays. However, even assuming plaintiff did intend to use Evans in this fashion, evidence that one state has enacted legislation preventing homosexuals from participating in its political process is insufficient to support the conclusion that homosexuals generally lack political power as a class. See Anderson, 477 U.S. at 252 (on a motion for summary judgment, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff").

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In sum, absent sufficient, relevant evidence supporting the conclusion that homosexuals do not have political power or pertinent authority supporting the argument that defendants' policy trammels a fundamental right, this court is bound by Ninth [*17] Circuit law holding that the rational basis standard applies to equal protection challenges to legislation or policies classifying individuals based on their sexual orientation.

b. Applicability of "active" rational basis review.

The above conclusion, however, does not end the court's analysis, for the parties disagree as to what type of rational basis review should be applied in this case. Plaintiff argues that, assuming strict scrutiny is inapplicable, then the court should apply the so-called "active" rational basis approach enunciated in *Pruitt*, 963 F.2d at 1165-1166. In *Pruitt*, the plaintiff challenged the Army's similar homosexual exclusion policy on equal protection and other grounds. The district court dismissed the plaintiff's claim, holding the Army's policy rational as a matter of law.

On appeal, the Army argued that the district court's decision should be affirmed because "its right to discharge homosexual servicepersons is so firmly supported in the law that any equal protection claim that *Pruitt* has asserted . . . is legally insufficient on its face." *Id.* at 1164. The Ninth Circuit rejected [*18] this argument, holding that the Army's policy could not be held rational as a pure matter of law. *Id.* at 1166. Rather, the court stated, a court must actively review the record "to see whether the government [has] established on the record a rational basis for the challenged discrimination."

Id. at 1166 (emphasis in original). Relying on *Cleburne*, 473 U.S. at 450, and a preceding Supreme Court case, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), the court further stated that, even under rational basis review, a court may not simply accept the government's proffered justifications for its policy as presumptively valid, but must determine whether these justifications are motivated by constitutionally impermissible prejudice or bias against the class at issue. *Pruitt*, 963 F.2d at 1165-66. In light of these principles, the Ninth Circuit reversed and remanded the district court's judgment of dismissal as to

✓ the plaintiff's equal protection claim, requiring the Army to establish a factual record in support of its contention [*19] that its homosexual exclusion policy was rationally related to a permissible government purpose. Id. at 1166-67.

Defendants argue, however, that the active rational basis standard applied in *Pruitt* is either no longer good law or must be read consistently with subsequent United States Supreme Court and Ninth Circuit pronouncements regarding the permissible scope of rational basis review. Defendants cite *Heller v. Doe* by Doe, U.S. , 113 S. Ct. 2637 (1993) and *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992), cert. denied, 113 S. Ct. 1025 (1993), for the proposition that the government need not create an evidentiary record to show that a legislative or policy classification at issue is rationally related to a legitimate government interest.

Heller involved a class of mentally retarded individuals who challenged a statutory distinction between the mentally retarded and the mentally ill for purposes of involuntary commitment proceedings. The statute provided that the burden of proof for involuntary commitment of the mentally [*20] retarded was "clear and convincing evidence," while the burden of proof for the mentally ill was "beyond a reasonable doubt." 113 S. Ct. at 2641. The *Heller* plaintiffs argued that these distinctions were irrational and violated the equal protection clause of the Fourteenth Amendment. The district court granted summary judgment for the plaintiffs, and the Sixth Circuit affirmed.

In reversing the lower courts and rejecting the plaintiffs' argument, the Supreme Court stated that a challenged classification:

"must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" [citations omitted]. A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data" [citations omitted]. A statute is presumed constitutional . . . and "the burden is on the one attacking the legislative arrangement to negative [sic] every conceivable basis which might support it," [citation [*21] omitted] whether or not the basis has a foundation in the record.

Id. at 2642-43 (emphasis added); accord, *Harding*, 971 F.2d at 413-14 (holding that a legislative distinction between "crack" and powder cocaine was rational and stating that "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker" [citation omitted]).

Defendants argue that, in light of *Heller* and *Harding*, the active rational

basis standard, to the extent it purports to require defendants to provide more than a "presentation of the basis of the policy on the record," is no longer valid law. Defs.' Mem. in Supp. of Mot. for. Summ. J. at 11:14-15. What defendants seem to say is that, as long as they present any justification at all for their policy, the court may not question this justification but rather must deem it rational as matter of law.

Defendants read too much into *Heller* and *Harding*. They are correct that these cases appear to have overruled [*22] *Pruitt* inasmuch as *Pruitt* implied that the burden was on the policymaker to persuade the court that the policy at issue possesses a rational basis. After *Heller* and *Harding*, there can be no question that the burden is on the person challenging the policy to negate every conceivable rational basis for the legislative justification. n10 See *Heller*, 113 S. Ct. at 2643; *Harding*, 971 F.2d at 413. In addition, *Heller* and *Harding* are also inconsistent with *Pruitt* to the extent that *Pruitt* may have required the government policymaker to submit evidence in support of its policy on remand. See *Heller*, 113 S. Ct. at 2643 ("a State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification"); *Harding*, 971 F.2d at 412 ("in establishing a statutory classification, one need not . . . supply empirical evidence to support a rational relationship").

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n10 In fact, contrary to the Ninth Circuit's conclusion in *Pruitt*, this has always been true of the rational basis standard. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

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[*23]

However, defendants incorrectly conclude that the question whether a challenged policy is rationally related to a legitimate governmental interest is therefore always a question of law. Although both the *Heller* and *Harding* courts did state that evidence need not necessarily be proffered in support of the rationality of a given policy, this proposition cannot reasonably be construed to mean that, once evidence is proffered, the court has no responsibility under Rule 56 to analyze whether there is a triable issue of material fact as to the policy's rationality. Compare *High Tech Gays*, 895 F.2d at 574-578 (analyzing evidence offered regarding the rationality of the Army's homosexual security clearance policy in light of the parties' respective burdens under Rule 56) and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876-884 (1985) (holding a domestic tax preference statute irrational as a matter of law after the parties had explicitly waived their right to an evidentiary hearing in the state trial and appellate courts).

Indeed, the *Heller* Court itself closely examined the record to determine [*24] whether the defendants' justifications for the legislation at issue in that case were in fact rationally based. The Court stated that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." 113 S. Ct. at 2643. "That requirement is satisfied here," the Court said, because "Kentucky has proffered more than adequate justifications for the differences in treatment between the mentally retarded and the mentally ill." *Id.* Those justifications

were supported by evidence that: (1) mental retardation is easier to diagnose than mental illness; (2) it is easier to determine whether the mentally retarded pose a physical threat to themselves or others than to determine whether the mentally ill pose the same threat; and (3) the prevailing methods of treatment for the mentally retarded are much less invasive than those for the mentally ill. *Id.* at 2643-46 (citing numerous scientific treatises and studies).

In addition, for two reasons, *Heller* and *Harding* do not disturb *Pruitt's* holding that a court must examine the record [*25] to determine whether the policymaker's proffered justifications for its policy are based on impermissible prejudice. First, the Court in *Heller* made clear that the rational basis standard enunciated in that case was the same standard used in *Cleburne* (the primary case relied upon by the Ninth Circuit in *Pruitt* as support for the active rational basis standard). *Heller*, 113 S. Ct. at 2643. In applying this traditional rational basis standard, the *Cleburne* Court explicitly rejected the defendant's proffered justifications for a local ordinance requiring group homes for the mentally retarded to obtain special use permits, on the ground that the justifications, which were unsupported by any evidence in the record, were based on "an irrational prejudice against the mentally retarded." 473 U.S. at 450.

Second, unlike the instant case, neither *Heller* nor *Harding* involved allegations that the discriminatory laws at issue were irrational because they were based upon prejudice or bias against a particular class of individuals. Rather, the plaintiffs in those cases merely alleged that [*26] the legislative classifications (between the mentally ill and the mentally retarded in *Heller* and between crack and powder cocaine in *Harding*) were irrational in and of themselves.

In sum, there is no support for defendants' argument that the court must accept without question defendants' proffered bases for the homosexual exclusion policy without analyzing the relevant evidence and determining whether the policy is motivated by prejudice against homosexuals. Because the parties are cross-moving for summary judgment and both have offered evidence in support of their respective motions, the court must analyze whether each party has met its respective burdens of production under Rule 56 as to the policy's rationality or irrationality under the *Heller/Harding* standard. If the evidence, construed in the light most favorable to defendants, shows that there is no reasonably conceivable rational basis for the homosexual exclusion policy, and the court cannot conceive of a rational basis (i.e. because it is based solely on illegitimate prejudice), then plaintiff is entitled to summary judgment. Alternatively, if the evidence, construed in the light most favorable to [*27] plaintiff, shows that there is any reasonably conceivable rational basis for the policy, then defendants are entitled to summary judgment. Finally, if the evidence creates a disputed issue of material fact as to the policy's rationality, then neither party is entitled to summary judgment.

c. The role of the principle of "military deference" in rational basis analysis.

Before the court turns to the rational basis analysis described above, it must address defendants' remaining argument regarding the permissible scope of rational basis review of laws and policies involving the military. Defendants contend that, in analyzing the rationality of the homosexual exclusion policy, the court should accord significant if not complete deference to the

"'considered professional judgment' of 'appropriate military officials' regarding the proper composition of the Armed Forces." Defs.' Mem. in Supp. of Mot. for Summ. J. at 5:14-16, quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986). Defendants note that deference to the military's judgment is particularly important in this case because the homosexual exclusion policy "is based upon a series of carefully [*28] considered, professional military judgments and almost 50 years of experience by a succession of civilian and military leaders." Defs.' Ex. 2 at 56, letter to Ass't Comptroller Gen'l from

Ass't Sect'y of Defense re Dep't of Defense ("DOD") response to Gen'l Acct'g Ofc. Rept. on DOD's homosexual exclusion policy.

✓ The court agrees that judicial review of military regulations "is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman*, 475 U.S. at 507. However, as plaintiff points out, although individual autonomy is not as great within the military community as it is within the larger civilian community, the essence of individual constitutional rights nevertheless remain intact. See *id.* (the "aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment"); see also *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("when [Congress'] decision [to register only males for potential conscription] is challenged on equal protection grounds, the question a court must decide is not which alternative [*29] it would have chosen, had it been the primary decisionmaker, but whether that chosen by Congress denies equal protection of the laws"). Thus, "simply labeling the legislative decision 'military' . . . does not automatically guide a court to the correct constitutional result." *Id.* at 70. In other words, the concept of deference to the military does not relieve the court of its obligation to examine the underlying bases for defendants' policy to determine whether they indeed withstand rational basis scrutiny. See, e.g., *Dubbs v. Central Intell. Agency*, 769 F. Supp. 1113, 1116 n.3 (N.D. Cal. 1990) ("deference to Executive Branch decisions does not require the judiciary to abdicate its authority under Article III to decide whether or not an individual's right to equal protection under the Federal Constitution has been violated") (emphasis in original); *Meinhold v. U.S. Department of Defense*, 808 F. Supp. 1455, 1457 (C.D. Cal. 1993), on appeal ("the court cannot merely defer to the 'military judgment' as the rationale for the policy - the court must consider the factual basis underlying [*30] the 'military judgment'"). With these general principles in mind, the court now turns to the question whether defendants' policy possesses a rational basis.

2. The existence of a rational basis.

"Application of the rational basis standard requires a two-step analysis." *Jackson Water Works v. Public Util. Comm'n*, 793 F.2d 1090, 1094 (9th Cir. 1986), cert. denied, 479 U.S. 1102 (1987). The court's first task is to determine whether the policy in question serves a legitimate governmental interest. *Id.* If this question is answered in the affirmative, the court must then proceed to determine whether the discriminatory policy is rationaly related to the achievement of that legitimate interest. *Id.*

In support of their summary judgment motion and in opposition to plaintiff's motion, defendants argue that their reasons for discharging declared homosexuals from Navy service, as enunciated in SECNAVINST 1900.9D, are legitimate as a matter of law. SECNAVINST 1900.9D states as follows:

4. Policy. Homosexuality is incompatible with military service. The presence in

the military environment of persons who engage [*31] in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission by adversely affecting the ability of the Navy and the Marine Corps to maintain discipline, good order and morale, to foster mutual trust and confidence among servicemembers, to insure the integrity of the system of rank and command, to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy, to

recruit and maintain members of the naval service, to maintain the public acceptability of service in the Navy and Marine Corps and to prevent breaches of security.

Defs.' Ex. A to Ex. 1, SECNAVINST 1900.9D, @ 4. Defendants argue that the legitimacy of their interest is apparent from the face of this policy and that no further judicial inquiry is required to determine rationality.

Nevertheless, as additional support for the legitimacy of their governmental interest, defendants also offer the declaration of Vice Admiral Ronald Joseph Zlatoper, Chief of Naval Personnel and Deputy Chief of Naval Operations, n11 who states that the [*32] Navy's considerations of maintaining discipline, good order and morale and fostering mutual trust and confidence among servicemembers "all pertain to a critical factor in military effectiveness: unit cohesion." Defs.' Ex. 1, Zlatoper Decl. at P 5. According to Zlatoper, the presence of homosexuals in the Navy has:

a direct[,] adverse impact on the ability of military leaders to sustain [interpersonal] relationships, instill camaraderie, and maintain the cohesion necessary for a unit to remain a highly effective fighting force. The presence in units of individuals who engage in, desire to engage in, or intend to engage in homosexual acts, polarizes units and undermines the ability of a commanding officer to foster good morale and maintain an effective chain of command.

Id. He also states that homosexuals are "unable to maintain the necessary respect and trust of subordinates and peers, thereby degrading the individual's ability to perform supervisory duties successfully" and jeopardizing the military's system of rank and command. Id. at P 6.

-----Footnotes-----

n11 Defendants also offer, inter alia, a number of studies conducted by various entities and the transcripts of testimony before the Senate Committee on Armed Services on March 31, 1993 and May 11, 1993. However, much if not all of this evidence is more harmful to defendants than it is helpful to them, as discussed below.

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[*33]

Zlatoper further declares that allowing homosexuals in the military threatens the privacy rights of other servicemembers because:

military personnel of the same sex are forced to share confined sleeping and dressing areas and shower and toilet facilities on board ships and submarines and in barracks under circumstances allowing minimal privacy. As with society in general, servicemembers would regard such exposure to members who might be

sexually attracted to them to be an infringement on the privacy rights of the majority of our personnel. The effect of this on morale and unit cohesion would be negative.

Id. at P 7; see also Defs.' Ex. 12, National Defense Authorization Act for Fiscal Year 1994, Senate Committee on Armed Services Report [To Accompany S. 1298] at 278-84. Finally, Zlatoper claims that "if the military does not maintain professional standards of discipline which preclude homosexual

conduct, young men and women will be more reluctant to consider service in the military If the public views the military as tolerating homosexual conduct in the ranks, they may hesitate to recommend or approve military service by those who look to them for guidance." [*34] Defs.' Ex. 1, Zlatoper Decl. at P 8.

Defendants argue that this evidence, particularly when considered in light of the principle of judicial deference to "professional military judgments," establishes that defendants' purposes are legitimate as a matter of law. Defs.' Mem. in Supp. of Mot. for Summ. J. at 12:12.

Plaintiff, on the other hand, argues in support of his summary judgment motion and in opposition to defendants' motion that defendants' interests must be deemed illegitimate as a matter of law because each of the proffered reasons for the policy are based on prejudice and bias against homosexuals.

In support of this argument, plaintiff offers, inter alia, the following evidence:

1. Selected portions of the "Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing With Homosexuals, 21 December, 1956 - 15 March, 1957" [the Crittenden report];
2. Selected portions of a report prepared by the Defense Personnel Security Research and Education Center ("PERSEREC") entitled "Nonconforming Sexual Orientations and Military Suitability," December 1988 [1988 PERSEREC report]; [*35] and
3. Selected portions of a report prepared by PERSEREC entitled "Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability," January 1989 [1989 PERSEREC report].

The Crittenden report, a study commissioned by DOD itself, states in pertinent part as follows:

one concept which persists without visible supporting data, but which cannot be disproved at this time because of the absence of data, is the idea that homosexual individuals and those who have indulged in homosexual behavior cannot acceptably serve in the military. As has been mentioned above, there have been many known instances of individuals who have served honorably and well, despite being exclusively homosexual

[Another] concept which persists without sound basis in fact is the idea that homosexuals necessarily pose a security risk. It is difficult to determine just how this idea developed, but it seems that it first appeared in . . . the report of the Hoey Committee. This Committee, however, based its recommendation on "the

opinions of those best qualified to know, namely, the intelligence agencies of the Government." However, no intelligence [*36] agency, as far as can be learned, adduced any factual data before that Committee with which to support these opinions Some intelligence officers consider a senior officer having illicit heterosexual relations with the wife of a junior officer or enlisted man much more of a security risk than the ordinary homosexual.

Pl.'s Ex. B (emphasis in original).

The 1988 PERSEREC report, another study commissioned by DOD, indicates that "the available data all point to the conclusion that preservice background characterization and subsequent job performance of homosexuals in the military is satisfactory." Pl.'s Ex. C at 8. The report goes on to state that:

it has commonly been assumed that the existence of a deep-seated prejudice against homosexuals as a class would be a barrier to the creation and development of attitudes that would foster effective cohesive relations

The intensity of prejudice against homosexuals may be of the same order as the prejudice against blacks in 1948, when the military was ordered to integrate.

The order to integrate was first met with stout resistance by traditionalists in the military establishment. Dire consequences were predicted [*37] for maintaining discipline, building group morale, and achieving military organizational goals. None of these predictions of doom has come true. Social science specialists helped develop programs for combating racial discrimination, so that now the military services are leaders in providing equal opportunity for black men and women. It would be wise to consider applying the experience of the past 40 years to the integration of homosexuals

Most of the issues raised [regarding the effect that admitting declared homosexuals would have on unit cohesion] reflect traditional anti-homosexual arguments, [and] are reminiscent of the issues raised when black athletes . . . were first allowed to participate in professional baseball. [These] concerns are also reminiscent of the arguments advanced against the 1948 order to desegregate military establishments, and the later arguments that sought to minimize the role of women in the Armed Forces

Those who resist changing the traditional policies support their position with statements of the negative effects on discipline, morale, and other abstract values of military life. Buried deep in the supporting conceptual structure is [*38] the fearful imagery of homosexuals polluting the social environment with unrestrained and wanton expressions of deviant sexuality. It is as if persons with nonconforming sexual orientations were always indiscriminately and aggressively seeking sexual outlets. All the studies conducted on the psychological adjustment of homosexuals that we have seen lead to contrary inferences.

Id. at 8-10 (emphasis added).

Finally, the 1989 PERSEREC report, also commissioned by DOD, states that: (1) in general, homosexuals show "better levels of preservice adjustment than heterosexuals in areas relating to school behavior"; (2) homosexuals display "greater [levels of] cognitive ability than heterosexuals"; and (3) "with the exception of drug and alcohol use, homosexuals resemble those who successfully adjust to military life more so than those who are discharged for

unsuitability." Pl.'s Ex. D at 2.

As the above discussion indicates, both parties have met their initial burdens under Rule 56 of coming forward with some evidence in support of their respective motions. n12 Therefore, the only remaining question is whether, construing each party's evidence in the light most favorable to it, either [*39] party has demonstrated that there is a disputed issue of material fact sufficient to withstand summary judgment in the opposing party's favor.

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n12 Although both parties offer evidence that postdates plaintiff's discharge, the evidence proffered concerns the same or nearly the same homosexual exclusion policy at issue in this case. In addition, neither party has filed formal objections to the opposing party's evidence.

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At the outset, the court notes that, under the Supreme Court's decisions in *Palmore*, 466 U.S. 429, and *Cleburne*, 473 U.S. 432, followed by the Ninth Circuit in *Pruitt*, 963 F.2d 1160, policies based on or motivated by the prejudice of one group towards another do not further any conceivable legitimate government interest and must be deemed irrational as a matter of law. In *Palmore*, the Court addressed the question whether a state court's order divesting a mother of the custody of her infant, [*40] based on social disapproval of her marriage to a person of another race, violated equal protection. In striking down the order, the Court stated: "the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. at 433.

One year later, in *Cleburne*, the Court struck down as violative of equal protection a local zoning ordinance requiring special use permits for group homes for the mentally retarded. The Court rejected each of the defendant's asserted purposes for the ordinance, including an alleged concern with the negative attitudes of neighboring property owners, as based on mere "irrational prejudice against the mentally retarded." 473 U.S. at 450. Relying on *Palmore*, the Court stated that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings and the like." *Id.* at 448. [*41] The Court also rejected the defendant's argument that the ordinance was designed to protect the mentally retarded from junior high school students across the street who might harass them. The Court stated that "denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation." *Id.* at 449.

Defendants argue, however, that unlike defendants in *Palmore* and *Cleburne*, they "do not rely on prejudice or bias as a basis for the policy"; rather, defendants say, the record "sets forth several bases for the military's policy, including the promotion of such goals as cohesion within military units and the protection of the privacy interests of service-members." *Defs.' Opp'n* at 6:6-10. Defendants further contend that "plaintiff's motion sets forth little more than conclusory criticisms of the policy and fails to demonstrate that [there is] no rational basis for the policy." *Id.* at 5:21-6:1.

✓ The court is not persuaded by defendants' argument. Plaintiff's evidence at the very least raises an inference that the homosexual exclusion policy [*42] is based solely on prejudice and bias against homosexuals. Defendants' evidence fails to controvert the inferences of prejudice and bias that must be drawn from plaintiff's evidence. To the contrary, for the reasons explained in detail below, defendants' evidence supports if not confirms the conclusion that the policy both effectuates and is solely motivated by prejudice against homosexuals. Moreover, for reasons also explained below, the court cannot

conceive of any legitimate basis for the policy.

First, with the possible exception of the security risk rationale (see *infra*), all of the reasons asserted by defendants as the bases for their policy are prejudicial on their face. Even assuming that homosexuals threaten "unit cohesion," the integrity of the system of rank and command, recruiting of Navy servicemembers, protection of heterosexual servicemembers' privacy rights and "public acceptability" of Navy service, such threats can only conceivably arise from: (1) heterosexual dislike of homosexuals for moral or other reasons; (2) heterosexuals' apparent fear that they will be victimized, threatened or harassed by homosexuals; and/or (3) the notion that homosexuals are uniquely [*43] incapable of controlling their sexual desires. These rationales are directly analogous to the state court's concern with social disapproval of interracial marriages in *Palmore* and the city's concern with the "negative attitudes" of property owners towards the mentally retarded in *Cleburne*, both of which were invalidated as based on illegitimate prejudice.

Furthermore, even assuming the rationales are not based on patently prejudicial notions regarding homosexuals as a class, the fact that the notions are unsupported by defendants' own evidence mandates an inference that they have no legitimate basis in fact and are therefore based on prejudice. See *Cleburne*, 473 U.S. at 449-50 (rejecting the city's proffered bases for its ordinance as prejudicial after concluding that they had no legitimate factual basis). For example, the 1988 *PERSEREC* report (Defs.' Ex. 8 at 31) states that "it is as if persons with nonconforming sexual orientations were always indiscriminately and aggressively seeking sexual outlets. All the studies conducted . . . lead to contrary inferences In one carefully conducted study, homosexuals actually demonstrated [*44] a lower level of sexual interest than heterosexuals. . . . In fact, the manifold criteria that govern sexual interest are identical for homosexuals and heterosexuals, save for only one criterion: the gender of the sexual partner"). n13

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n13 Not only does defendants' evidence fail to support the underlying reasons why homosexuals allegedly pose a threat to military effectiveness, but it also does not support the existence of the threat itself. For example, section 10 of SECNAVINST 1900.9D provides that "nothing in this instruction precludes retention of a member . . . for a limited period of time in the interests of national security when authorized by the Secretary of the Navy." Defs.' Ex. A to Ex. 1, SECNAVINST 1900.9D at @ 10. The provision supports only one inference: that the threats homosexuals pose to unit cohesion, recruiting, privacy, etc. are hypothetical, for if such threats actually existed, defendants would not seek to retain homosexuals "in the interests of national security" (for example, in time of war) when unit cohesion and other similar concerns would presumably be most critical, but rather would more actively seek to discharge them.

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[*45]

Defendants' proffered bases for the homosexual exclusion policy are undermined in other respects by SECNAVINST 1900.9D itself. For example, defendants concede that, under this instruction, homosexuals may serve in the Navy provided that they do not reveal their sexual orientation to others.

Apparently, as long as heterosexual servicemembers or recruits know only that some servicemembers might be homosexual, but do not know exactly who is homosexual, they do not object to working, showering and living with homosexuals. However, once heterosexual servicemembers or recruits learn that a particular member is homosexual (or that homosexuals are generally permitted to serve openly in the Navy), unit cohesion, recruiting, and privacy are suddenly threatened. The only inference to be drawn from the instruction's failure to reach undeclared homosexuals is that the threats to military effectiveness posed by homosexuals, assuming such threats actually exist, arise solely from heterosexuals' adverse reactions to the presence of known homosexuals in the Navy, and not from the behavior of homosexuals themselves. Given this, the court cannot conceive how the policy cannot be motivated by prejudice. [*46]

Defendants' security risk rationale likewise cannot stand, for two reasons. First, defendants fail to offer any evidence contradicting plaintiff's evidence that homosexuals do not present a security risk to the Navy. n14 Second, the rationale cannot conceivably be legitimate, because the only possible threat homosexuals could pose to military security (i.e. that undeclared homosexuals might be "discovered" and blackmailed) could be obviated by repealing the very policy that the threat allegedly justifies (i.e. by allowing homosexuals to serve openly in the military). In the absence of any conceivable legitimate basis for the security risk rationale, the court can only infer that this, too, is based on prejudice.

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n14 As previously indicated, it is true that under *Heller* a policymaker need not offer evidence that its policy is rational. Nevertheless, a policymaker's failure to offer evidence is relevant to the court's analysis, for if: (1) the opposing party produces evidence tending to establish that the policy is irrational; (2) the policymaker offers no evidence tending to negate the opposing party's claim; and (3) the court cannot conceive of any set of facts which would support a finding that the policy is rational, then summary judgment must be granted in the opposing party's favor. See *Celotex*, 477 U.S. at 323-24; *Heller*, 113 S. Ct. at 2642-43.

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[*47]

In fact, portions of defendants' evidence can only be construed as providing direct support for the conclusion that the policy is based on prejudice. In particular, in his testimony before the Senate Armed Services Committee during a hearing held May 11, 1993 to discuss whether to amend the military's homosexual exclusion policy, retired General Norman Schwarzkopf nearly admitted that the basis for the policy is prejudice against homosexuals. He stated:

whether we like it or not, in my years of military service, I have experienced

the fact that introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war. For whatever reason, the organization is divided into a majority who oppose, a small minority who approve, and other groups who either do not care or just wish the problem would go away, and I do not find this surprising, given the divisiveness that I have encountered in our Nation in the past year. The attitudes of our servicemen and women simply reflect, in my opinion, the attitudes that I have encountered in the American people.

Defs.' Ex. 3 at 13:16-14:3. [*48] General Schwartzkopf further testified that:

many who advocate lifting the ban on homosexuals in the military blithely say we can overcome all of the problems . . . by ordering . . . military leaders at all levels to "institute training for all personnel on the acceptance of homosexuals . . . ," even when a large number of the leaders and troops have clearly stated that "they oppose allowing homosexuals in the military" and "believe gays serving openly in the military would be very disruptive to discipline."

The military establishment is not fragile, but in my mind such actions would be seriously overloading their plate. They will faithfully try [to] execute the orders of their civilian leaders, but their hearts simply will not be in it. To me, they will be just like many of the Iraqi troops who sat in the deserts of Kuwait forced to execute orders they did not believe in.

What about our troops' rights? Are we really ready to do this to the men and women of our armed forces and to risk a possible decrease in our Nation's ability to defend itself simply to force our servicemen and women to accept a lifestyle of a very well-organized, well-financed, and very vocal, but what [*49] turns out to be a very small minority of our society? I personally sincerely hope not.

Id. at 16:21-17:18 (emphasis added). n15

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n15 Although defendants' evidence doubtless speaks for itself, the court also takes judicial notice of the fact of President Clinton's July 19, 1993 speech made in support of the recently revised homosexual exclusion policy. President Clinton stated:

clearly the American people are deeply divided on this issue, with most military people opposed to lifting the ban because of the feared impact on unit cohesion, rooted in disapproval of homosexual lifestyles, and a fear of invasion of privacy of heterosexual soldiers

Those who oppose lifting the ban are clearly focused not on the conduct of individual gay service members but on how non-gay service members feel about gays in general and, in particular, those in military service.

"Clinton: Policy on Gays in Military 'Sensible Balance'," The Washington Post, July 20, 1993 (emphasis added).

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Under the Supreme Court's [*50] rulings in *Palmore* and *Cleburne*, the court may not, consistent with the Constitution's guarantee of equal protection of the laws to all citizens, give effect to such illegitimate fears and biases reflected in government policy, whether military or civilian. *Palmore*, 466 U.S. at 433; *Cleburne*, 473 U.S. at 450; U.S. Const. amends. V, XIV.

Taking a slightly different tack, however, defendants also argue that their policy is not based on unconstitutional prejudice because it is exclusively

designed to further the Navy's interest in preventing homosexual conduct, which plaintiff concedes is a legitimate government interest under current decisional law. "In determining the composition of the Armed Forces," say defendants, the Navy "does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission." Defs.' Mem. in Supp. of Mot. for Summ. J. at 14:16-19, quoting *Ben-Shalom v. Marsh*, 881 F.2d 454, 460-61 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). By equating [*51] persons who have declared that they are homosexual with persons who have a "propensity" to engage in prohibited homosexual conduct, see Defs.' Ex. A to Ex. 1, SECNAVINST 1900.9D, @@ 4 and 5(a), defendants contend, they are simply acting to prevent the risk that such conduct will occur.

Again, defendants' own evidence does not support their argument. For example, during a March 31, 1993 hearing before the Senate Armed Services Committee on whether Congress should alter the military's homosexual exclusion policy, the following exchange occurred between Senator Levin and Dr. David H. Marlowe, Chief of the Department of Military Psychiatry:

Senator Levin: . . . do you believe a large amount of antipathy among the troops against homosexuals serving is based on rational grounds of the likelihood of homosexual behavior or is based on prejudice?

Dr. Marlowe: I believe a significant part of it is based on prejudice.

Defs.' Ex. 6, Senate Committee on Armed Services, "Hearing to Receive Testimony on the Military Policy Concerning the Service of Gay Men and Lesbians in the Armed Forces: the Role of Unit Cohesion in Developing Combat Effectiveness," March 31, 1993, at 184:3-8.

Defendants' [*52] argument that their policy is designed to prevent impermissible homosexual conduct is also undermined by the failure of SECNAVINST 1900.9D to reach undeclared homosexuals. This failure leaves defendants in the untenable position of asserting that an undetected homosexual has no propensity to engage in homosexual acts and presents no risk of undermining the military mission by engaging in prohibited homosexual conduct, while a declared homosexual does have such a propensity and does present such a risk. The distinction is not only facially illogical, but also unsupported by any evidence. n16

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n16 Indeed, as previously indicated, defendants' evidence shows that homosexuals, whether declared or undeclared, do not present an unusual risk of engaging in prohibited conduct. See, e.g., Defs.' Ex. 8, 1988 PERSEREC report at 31; see also "Clinton: Policy on Gays in Military 'Sensible Balance,'" *Washington Post*, July 20, 1993, quoting President Clinton's July 19, 1993 speech on homosexuals in the military ("there is no study showing [homosexuals] to be

less capable or more prone to misconduct than heterosexual soldiers. Indeed, all the information we have indicates that they are not less capable or more prone to misbehavior'").

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[*53]

SECNAVINST 1900.9D makes other patently illogical distinctions that weaken defendants' position. For example, section 7(b)(1) provides that a servicemember will not be discharged even if he or she has engaged in prohibited homosexual conduct, if a finding is made, among others, that such conduct "is a departure from the member's usual and customary behavior" and "is unlikely to recur." Defs.' Ex. A to Ex. 1, SECNAVINST 1900.9D, @ 7(b)(1). This tends to show that the homosexual exclusion policy is not aimed solely at preventing prohibited conduct, for if homosexual conduct were as significant a concern as defendants contend, they certainly would not take the risk that someone who has proven his or her inability to comply with the Navy's code of conduct would not do so again. Section 7(b)(1) of the instruction also illustrates that a declared homosexual who has not engaged in any prohibited conduct is deemed to present an intolerable risk of disruption, but someone who has violated the code of conduct, yet insists he or she is not homosexual, is deemed not to present such a risk.

Even under the rational basis standard, the court cannot give effect to such illogical and factually unsupported [*54] distinctions made by legislative classifications. See *Cleburne*, 473 U.S. at 449-50. In *Cleburne*, the city attempted to justify its ordinance requiring a special use permit for a group home for the mentally retarded by arguing that: (1) the home would be located on a flood plain and would present a fire hazard; (2) the mentally retarded might take actions for which the city would have legal responsibility; (3) the mentally retarded would be unable to live in crowded conditions; and (4) the home would lead to overcrowding in the area. The Court rejected all of these proffered rationales for the ordinance on grounds that they made invidious and illogical distinctions which were unsupported by any evidence in the record between group homes for the mentally retarded and other similar high density land uses allowed without permit, such as fraternity, sorority, apartment and boarding houses, dormitories, nursing homes, and hospitals. *Id.* Because of these anomalies and inconsistencies, the Court concluded that "requiring a permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450. [*55] Likewise, here, the unsupported distinction between declared and undeclared homosexuals leads to the inescapable inference that the homosexual exclusion policy rests solely on prejudice against homosexuals.

Moreover, even assuming that defendants' policy is logically designed to prevent prohibited conduct, it still draws an impermissible classification, for it singles out homosexuals for discharge absent any evidence of prohibited conduct, while heterosexuals are not discharged until prohibited conduct has occurred and been proven. This, too, is compelling evidence that defendants' policy is motivated by prejudice. n17 Cf. *Robinson v. California*, 370 U.S. 660, 665-66 (1962) (holding that a California statute that made the status of narcotic addiction a criminal offense, even absent proof of actual use, possession, purchase or sale of narcotics, violated the Eighth Amendment).

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n17 In fact, the homosexual exclusion policy is indistinguishable from a patently unconstitutional hypothetical policy providing that ethnic minorities must be excluded from military service because they have a "propensity" to engage in theft, although nonminority service members are not excluded unless and until they engage in theft. Surely defendants would not attempt to defend the constitutionality of such a policy; likewise, they cannot defend the

policy at issue in this case. Cf. *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (holding that the Fourth Amendment prohibits immigration officials from stopping a vehicle near the Mexican border to question its occupants about their immigration status when the only ground for suspicion is their apparent Hispanic ancestry).

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In sum, defendants' rationales for the homosexual exclusion policy and the evidence offered in support of those rationales supports, rather than undermines, plaintiff's argument and evidence that the policy is not based on any legitimate government interest.

In addition, the record does not establish, and the court cannot conceive of, any other legitimate basis for the policy. Both plaintiff's and defendants' evidence shows that the policy is not based on a perception that homosexuals are incapable of performing adequately in the military. Indeed, defendants' evidence tends to show that homosexuals are more than capable of acceptable military performance. For example, a June 1992 General Accounting Office report entitled "Defense Force Management: DOD's Policy on Homosexuality" ("the GAO report") declares that "DOD officials do not contend that homosexuals cannot or do not perform as well on the job as heterosexuals; in fact, in some cases commanders have noted that homosexuals are extremely good performers." n18 Defs.' Ex. 2 at 27. In addition, a July 1990 memorandum issued by the Navy to all commanders, commanding officers, and officers in charge stated that: "experience has .

[*57] . . . shown that the stereotypical homosexual female in the Navy is hardworking, career-oriented, willing to put in long hours on the job and among the command's top professionals." Defs.' Ex. 10 at 3. Defendants point out that this statement was made in an attempt to explain why female homosexuals are not as easily detected as male homosexuals. Nevertheless, the statement also serves as an admission that homosexuals may serve ably in the military, which further undermines defendants' position that the policy is not based, in whole or in part, on prejudice against homosexuals.

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n18 Although this report is no doubt offered to establish on the record DOD's comments on those aspects of the report with which it did not agree (see Defs.' Ex. 2, GAO report at 56-77), DOD did not object to that portion of the report discussed herein.

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Defendants' lengthy attempt to demonstrate the unreliability of plaintiff's evidence also fails to provide any support for the policy. For example, defendants note that passages in the Crittenden [*58] report quoted by

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plaintiff are taken out of context and that the report's basic objective was to
"rid the Navy of habitual homosexuals" and as "provide a deterrent to homosexual
activity." Defs.' Opp'n at 9:1-2. However, the fact that the report's overall
purpose was to examine how homosexuals should be discharged from the Navy (not
whether they should be discharged) does not render the statements made in the
report any less probative.

Defendants make similar comments with regard to plaintiff's use of the 1988 PERSEREC report. For instance, defendants say that plaintiff fails to quote a passage from the report stating that job performance of homosexuals may not be as important to military organization as "the effects of homosexuals . . . on that important but ephemeral quality: group cohesion" and that future studies would have to be conducted on the latter subject. Defs.' Opp'n at 10:8-10, quoting Defs.' Ex. 8 at 33. But the fact that the study concluded that homosexuals may have an adverse impact on group cohesion is inconsequential: even if it were proven that the presence of homosexuals adversely affects military life or performance, that fact would not obviate the central [*59] constitutional problem that the cause of the adverse impact is prejudice against homosexuals.

Defendants also note that the 1988 PERSEREC report was rejected by DOD because its authors exceeded the scope of their assigned study (i.e. "the nexus, if any, between homosexuality and security clearances for DOD civilian employees and government contractors"). Defs.' Opp'n at 10 n.9 (emphasis in original). This argument is also unpersuasive: the fact that the report's authors exceeded their mission does not undermine their conclusions. A similar analysis defeats defendants' remaining objections to the other evidence in the record.

Finally, none of the authorities cited by defendants enable the court to uphold the policy, for none involve the same legal issues and factual circumstances present here. *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cited repeatedly by defendants, is distinguishable from this case on several grounds. First, *Beller* involved a substantive due process challenge to the Navy's homosexual exclusion policy, and therefore "did not deal with discrimination as such, or with the requisite level of justification for discrimination." [*60] *Pruitt*, 963 F.2d at 1165. Second, unlike the instant case, the servicepersons in *Beller* were discharged for having engaged in homosexual conduct, not simply for having declared their status as homosexuals. Finally, "to the degree that *Beller* . . . rested on prejudice of others against homosexuals themselves, n19 rather than on disapproval of specific acts of criminal conduct, its reasoning is undercut by the Supreme Court's decisions in *Palmore* [and] *Cleburne*." n20 *Pruitt*, 963 F.2d at 1165.

- - - - -Footnotes- - - - -

n19 See *Beller*, 632 F.2d at 811-812 ("the Navy could conclude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties").

n20 "Similar weaknesses inhere in *Hathaway v. Sect'y of the Army*, 641 F.2d 1376 (9th Cir. 1981)," cert. denied, 454 U.S. 864 (1981), another case involving

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homosexual conduct. Pruitt, 963 F.2d 1165 n.4. Plaintiff in Hathaway challenged his court martial conviction for sodomy under Article 125 of the Uniform Code of Military Justice on several constitutional grounds, including Fifth Amendment equal protection. As the Ninth Circuit in Pruitt observed:

in rejecting the equal protection argument, [the] Hathaway [court] relied on the same justifications accepted in Beller, including those arising from prejudice of other servicemembers or potential recruits against homosexuals Much

of the same can be said of the other cases . . . that rely on *Beller* to support the rationality of blanket discrimination by the armed forces against homosexuals. See *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. [Cir.] 1984); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984). These cases involved homosexual conduct, and essentially adopted *Beller* in finding the discrimination justified.

Pruitt, 963 F.2d at 1165 n.4.

-----End Footnotes-----

[*61]

Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992), the only other Ninth Circuit case relied on by defendants, is also distinguishable. In that case, the plaintiff was discharged from the Navy Reserve after an office search revealed evidence indicating that he was bisexual. The plaintiff then challenged the Navy's discharge policy on Fifth Amendment due process and other grounds. The district court granted summary judgment in favor of defendants on all of plaintiff's claims, and the Ninth Circuit affirmed. However, in so doing, the Ninth Circuit explicitly stated that it was not addressing the question whether the Navy's policy violated equal protection, noting that "an equal protection objection to the Navy's discharge policy is not the same as a substantive due process objection." n21 *Id.* at 490 n.8.

-----Footnotes-----

n21 The court is also not persuaded by the reasoning of the Seventh Circuit in *Ben-Shalom*, 881 F.2d 454 and the Federal Circuit in *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990), both of which upheld the military's homosexual exclusion policy against an equal protection challenge even absent any prohibited homosexual conduct. Both courts indiscriminately equated homosexual status with conduct and neither court considered the prejudice argument raised by plaintiff herein.

-----End Footnotes-----

[*62]

Nor does the principle of deference to the military require a finding that defendants' policy is constitutional. Defendants' "considered professional judgment," no matter how important, cannot outweigh the Fifth Amendment's guarantee of equal protection of the laws to all citizens. See *Goldman*, 475 U.S. at 507 (the "aspects of military life do not render entirely nugatory in the military context" the guarantees of the Constitution). No governmental entity, even the military, can enact and enforce prejudicial policies without doing violence to this guarantee. As the court in *Palmore* stated, the "Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases

THE WHITE HOUSE
may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. at 433. To ~~devalue~~ ^{demean} this position in this case would be to unconstitutionally give effect to the "private biases," prejudices and fears of those who support the homosexual exclusion policy. See *id.*; *Cleburne*, 473 U.S. at 450.

For the foregoing reasons, the court concludes that, even drawing [*63]
all reasonable inferences from the evidence in defendants' favor, plaintiff

has met his burden of demonstrating that the homosexual exclusion policy cannot conceivably be based on any government interest other than illegitimate prejudice and that it is therefore irrational as a matter of law. Accordingly, defendants' summary judgment motion must be denied and plaintiff's motion must be granted as to the equal protection claim.

B. First Amendment Claim.

Plaintiff also moves for summary judgment on his one remaining claim, which rests on the free speech clause of the First Amendment. n22 Although plaintiff acknowledges that under *Pruitt* a servicemember's admission that he or she is homosexual is simply "evidence of status" and does not constitute protected speech, he argues that "status qua status" is protected by the First Amendment's free speech clause. Pl.'s Mem. in Supp. of Mot. for Summ. J. at 13:3-4. Plaintiff contends that defendants' policy punishes homosexuals for their status by punishing them for their homosexual thoughts, feelings, emotions and desires.

-----Footnotes-----

n22 Defendants did not move for summary judgment on plaintiff's First Amendment claim because they concluded that this claim was no longer viable in light of the Ninth Circuit's remand order in this case. That order provides in pertinent part: "the order dismissing Dahl's complaint is reversed and remanded. *Pruitt v. Cheney*, No. 87-5914, slip op. at 11295 (9th Cir. Aug. 19, 1991)." While the court is also doubtful that plaintiff's First Amendment claim remains viable given the Ninth Circuit's citation to *Pruitt*, which rejected a similar free speech claim, it nevertheless reaches the merits of plaintiff's claim in an exercise of caution.

-----End Footnotes-----

[*64]

Although plaintiff cites five cases for the proposition that status is protected by the First Amendment, none provide adequate support for plaintiff's position. Three of the cases concern freedom of religion rather than of speech. See *Reynolds v. United States*, 98 U.S. 145 (1978); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *McDaniel v. Paty*, 435 U.S. 618 (1978). The other three cases, *Stanley*, 394 U.S. at 565-66, *Paris Adult Theatre I*, 413 U.S. at 67, 93 and *Jacobson*, 112 S. Ct. at 1542, although providing authority for the general proposition that a person's thoughts, feelings and desires are protected under the First Amendment, do not support the specific proposition that homosexual status is protected by the free speech clause of the First Amendment. While plaintiff's argument is intriguing, without further direction from the higher courts, this court is unwilling to expand the reach of First Amendment jurisprudence so far. Accordingly, plaintiff's summary judgment motion must [*65] be denied as to the First Amendment claim.

IV. CONCLUSION.

THE WHITE HOUSE

WASHINGTON

For the foregoing reasons, IT IS ORDERED:

1. That defendants' motion for summary judgment is DENIED;
2. That plaintiff's motion for summary judgment is GRANTED as to plaintiff's seventh claim for relief (equal protection) and is in all other respects

DENIED;

3. That plaintiff is entitled to judgment against defendants, as follows:

a. For an order requiring defendants to reinstate him into the United States Navy and to restore to him all rights, honors and privileges of that status;

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

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

d. For an order enjoining defendants from taking any action against plaintiff based on the purported authority of directives or regulations mandating separation from Navy service by reason of homosexual status or on account of statements of homosexual [*66] orientation;

e. For a declaration that defendants' action in separating plaintiff from Navy service based solely on his declaration of homosexual orientation is unconstitutional;

f. For a declaration that SECNAVINST 1900.9D or any other directive or regulation mandating separation from service by reason of homosexual status or on account of statements of homosexual orientation is unconstitutional; and

g. For costs of suit;

4. That the final pretrial conference and trial dates currently set in this case are VACATED.

IT IS SO ORDERED.

DATED: August 30, 1993

Milton L. Schwartz

UNITED STATES DISTRICT JUDGE

****_-----THE WHITE HOUSE_****

WASHINGTON

* 26 PAGES 1,225 LINES *

* 4:46 P.M. STARTED 4:49 P.M. ENDED *

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SEND TO: LINDSEY, BRUCE
WHO - PRESIDENTIAL PERSONNEL
OLD EXECUTIVE OFFICE BUILDING
WASHINGTON DISTRICT OF COLUMBIA 20500

100 → Gays in the
Military
THE WHITE HOUSE
WASHINGTON

Bruce --

After you left the gays-in-the-military meeting, we discussed the hypotheticals. I mentioned the point to Jamie about not including the sentence re: calling in somebody to discuss gay bars, etc. She said that the last sentence in those hypotheticals is essential to get the JCS concurrence in the hypos, but that, if any hypothetical bothers us, she'd be happy to delete the whole hypothetical.

I don't think that any of the hypos should be deleted, but I wanted to flag the issue for you. The two hypos that have gratuitous "advice" are #3 and #5. Also, it seems to me that #2 doesn't leave enough discretion for the commander not to take any action (because it says that the commander "should" follow up). Still, it's probably better to include these than to delete them. Let me know if you disagree.

The other hypos are in tab 15 of the notebook that you have.

-- Cliff

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

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

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

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

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

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

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

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

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

Proposed Resolution: The commander should not initiate any inquiry based on the article. The article purports to identify the two soldiers as homosexuals, but does not allege any criminal or otherwise proscribed homosexual conduct. A commander should begin an inquiry only if he has credible information indicating proscribed homosexual conduct.

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

file: Garp in
the Military ✓BRC

THE WHITE HOUSE
WASHINGTON

September 20, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM *BN*
COUNSEL TO THE PRESIDENT

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

SUBJECT: New York Times editorial and op/ed
piece re: Nunn legislation on gays-
in-the-military

At George Stephanopoulos' request, we have analyzed each of the criticisms in the New York Times editorial and op/ed piece.

Despite the criticisms raised in these articles, nothing in the Nunn legislation will prevent implementation of any aspect of the July 19 policy.

I. The New York Times editorial

A copy of the September 19, 1993 editorial is attached.

Here are the specific points discussed in the editorial:

1. "[T]he Senate tepidly endorsed Mr. Clinton's order to stop asking all recruits about homosexuality, but stressed that the Secretary of Defense could reinstate the questioning at any time."

* The Nunn legislation includes a sense of Congress resolution specifying that the "don't ask" policy should be continued. It also specifies that the Secretary of Defense may reinstate questioning if he determines it necessary to do so. Under our July 19 policy, the questioning could be resumed as a matter of Executive Branch action. The Nunn legislation thus does not change the situation with regard to the "don't ask" policy.

2. "The Senate report also expressed concern that the Administration's plan to tamp down overzealous investigations might go too far; it emphasized that commanders still retain discretion to initiate investigations as they deem necessary."

* The Senate legislation is silent on investigations. Although the Senate Report expresses some concern about issues raised by application of the guidelines, the Report's bottom line

is that "[t]he committee . . . received assurances from the Department of Defense that the investigative guidance would be implemented in a manner that would provide commanders with the discretion they need to maintain good order and discipline." DOD intends to exercise its discretion in a manner that is completely consistent with the July 19 policy.

3. "The Administration has told commanders to investigate sexual conduct violations in 'an even-handed manner,' but the Senate made no mention of equal treatment and focused instead on homosexual conduct."

* The legislative silence on even-handedness will not affect DOD's implementation of the July 19 policy. DOD plans to investigate sexual conduct violations in an even-handed manner.

4. "The whole purpose of the Senate bill is to exclude homosexuals because that would create an 'unacceptable risk' to morale, discipline, and unit cohesion."

* The Nunn legislation includes a legislative finding about "unacceptable risk." ("The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the armed forces' high standards of morale, good order, and discipline, and unit cohesion that are the essence of military capability.") Although the "unacceptable risk" language is not found in the July 19 policy, the legislative finding is restricted to individuals with "a propensity or intent to engage in homosexual acts" -- which is a basis for exclusion under the July 19 policy. (DOD advises that the legislative finding is consistent with DOD testimony explaining the new policy).

5. "[T]he Administration, eager to get beyond a losing fight, has capitulated with a false statement that Mr. Nunn's language is 'fully consistent' with its own July 19 policy."

* Nothing in the Nunn legislation will prevent implementation of any aspect of the July 19 policy. The statement about the consistency of the Nunn legislation, moreover, is not a new development or "capitulation," but rather a contemporaneous assessment given on July 23.

6. "The senators want to codify into law the most repressive parts while inviting an overturn of the more liberal parts."

* Unfortunately, the Nunn legislation does codify certain restrictions in the new policy, while either maintaining silence on or leaving discretionary some improvements in the new policy. But neither legislative silence nor explicit discretion will prevent implementation of anything in the July 19 policy.

II. The Tom Stoddard op/ed piece

A copy of Stoddard's September 20, 1993 op/ed piece is attached.

Here are the specific points discussed in the piece:

1. "The proposal, drafted by Senator Sam Nunn, obliterates even the small protections contained in July's directive."

* This statement is incorrect. Nothing in the Nunn legislation will prevent implementation of a single aspect of the July 19 policy.

2. "The directive, at least, barred 'inquiries or investigations solely to determine a member's sexual orientation.' Senator Nunn's proposal wipes out any such limitation."

* This statement is incorrect. The Nunn legislation is silent on investigations. DOD plans to proceed with the investigative guidelines outlined in the July 19 policy.

3. "Indeed, the Nunn language encourages probes and purges. It contains a long list of Congressional 'findings' designed to insure the complete exclusion of gays."

* The only specific finding pointed to by Stoddard is the one about "unacceptable risk" described in #4 above. As noted, that finding refers to "a propensity or intent to engage in homosexual acts." Stoddard himself recognizes that the July 19 policy similarly addresses a propensity or intent to engage in homosexual acts (and Stoddard goes on to criticize "the President's so-called compromise" on that ground). Only one of the 14 other findings specifically addresses homosexuality. (It says: "The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.")

In sum, the most important point is that the Nunn legislation will not prevent implementation of any aspect of the July 19 policy. DOD reports that it is busily drafting directives to effectuate the July 19 policy, and that nothing in the Nunn legislation will require the Department to change its efforts to implement faithfully the July 19 policy.

A Retreat on Gay Soldiers

By the time Senator Sam Nunn and his wrecking crew got through with it, President Clinton's much-battered effort to allow homosexuals to serve openly in the military had been damaged even further. The Senate was not content to accept the weak compromise already agreed to by the Clinton Administration and Joint Chiefs. Rather, Mr. Nunn has pushed through a bill designed to make certain that homosexuals are kept out of the military — and that any further changes in policy head toward exclusion rather than inclusion.

This benighted retreat from principle is driven by prejudice and politics. That became inescapably clear with the release of a previously suppressed study by the Rand Corporation, the Pentagon's favorite think tank. Rand's analysis concludes that homosexuals can serve openly and effectively — provided the policy gets strong leadership from above. But leadership, alas, has been sadly missing in this whole rancorous debate.

President Clinton was on the right track when he pledged during the campaign to lift the ban on gay service members. But once in office, Mr. Clinton erred by not lifting it with the stroke of a pen. Instead, after months of wrangling, the Administration issued a half-hearted policy on July 19 that left the ban in place but curbed the screening and investigations designed to ferret out homosexuals.

Now the Senate is trying to dilute even this watered-down policy. The senators want to codify into law the most repressive parts while inviting an overturn of the more liberal parts. For example, the Senate tepidly endorsed Mr. Clinton's order to stop asking all recruits about homosexuality, but stressed that the Secretary of Defense could reinstate the questioning at any time. The Senate report also expressed concern that the Administration's plan to tamp down overzealous investigations might go too far; it emphasized that commanders still retain discretion to initiate investigations as they deem necessary.

The malicious unfairness of the Senate's approach was most blatant with respect to enforcing

the Uniform Code of Military Justice. The Administration has told commanders to investigate sexual-conduct violations in "an even-handed manner," but the Senate made no mention of equal treatment and focused instead on homosexual conduct.

The whole purpose of the Senate bill is to exclude homosexuals because their presence would create an "unacceptable risk" to morale, discipline and unit cohesion. But it is shocking how little evidence supports that assertion. When challenged on the floor, Senator Nunn cited the predictable testimony of top generals. Their seasoned judgments deserve to be weighed — but they may simply be reluctant to tackle a tough social issue.

The Rand report offers voluminous evidence that homosexuals and heterosexuals could indeed work together effectively. Its researchers visited foreign military establishments that welcome or tolerate homosexuals, including such capable armies as those of Israel, France and Canada; none thought their effectiveness had been reduced. The researchers visited police and fire departments where gay and heterosexual members put their lives at risk together; none reported a loss of effectiveness.

They also reviewed the military's own historical experience with racial integration, finding there was no loss of combat effectiveness. Finally, they reviewed research on combat effectiveness and "unit cohesion," reaching the common-sense conclusion that it is not necessary to like somebody to work with him or her.

Unfortunately, the Administration, eager to get beyond a losing fight, has capitulated with a false statement that Mr. Nunn's language is "fully consistent" with its own July 19 policy. So now the last hope for fairness and reason is the House.

A pending defense bill has language identical to the Senate's, but more progressive members hope the Rules Committee will allow debate on an amendment that would leave policy on homosexuals in the military to the Administration. That is the best way to go. Cementing the Senate language into law will just make it harder to ease the ban as social attitudes become more enlightened.

New York Times, Sept. 20, 1993

✓ Nunn 2, Clinton 0

By Tom Stoddard

After nine months of debate in Congress, at the Pentagon and across the country, President Clinton's promise to end discrimination against gay men and lesbians in the military is about to yield an ignominious defeat. Remarkably, the President seems not to care at all.

In January, he pledged to issue an executive order "which would end the present policy ... of exclusion from military service solely on the basis of sexual orientation." He publicly reaffirmed that pledge at least five times.

In July, to much fanfare, Mr. Clinton unveiled not an executive order overturning the policy, but a directive signed by Secretary of Defense Les Aspin that merely reformulated the current ban, limiting the scope of official investigations. He characterized it as an "honorable compromise."

Earlier this month, the Senate approved a proposal to supersede this meager compromise and imposed, as a part of its defense reauthorization bill, an updated version of the old discrimination policy. The House is likely to follow suit this week. And the White House says the President does not oppose the bill. George Stephanopoulos, the aide who handles this is-

Tom Stoddard directed the Campaign for Military Service

sue, said the proposal was "consistent" with the President's wishes.

The proposal, drafted by Senator Sam Nunn, obliterates even the small protections contained in July's directive. The directive, at least, barred "inquiries or investigations solely to determine a member's sexual orientation." Senator Nunn's proposal wipes out any such limitation.

Indeed, the Nunn language encourages probes and purges. It contains a long list of Congressional "findings" designed to insure the complete exclusion of gays. "The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts," goes one of the findings, "would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."

The proposal, like the President's so-called compromise, requires the discharge of any lesbian or gay man who does or says anything that implies a "propensity or intent" to engage in homosexual acts, a definition as sweeping as any earlier formulation of the ban.

Regardless of what the spin doctors in the White House claim, the Nunn proposal is not consistent with Mr. Clinton's earlier stands. It is an utter capitulation to Mr. Nunn, and the White House lacks the honesty to admit it.

The Administration made defeat inevitable. It largely refused to lobby Congress. It resisted explaining or

promoting the President's position to the public. And it declined to oversee the Pentagon's drafting of a directive. Until June, the White House had no one in charge of the issue. In May, in an apparent attempt to convince the public that he had only a peripheral interest in the subject, Mr. Clinton boasted that he had devoted only two and a half hours to it.

Why this embarrassment over an issue the President himself had brought to center stage? These self-described New Democrats were afraid of looking like "old" Democrats, who were supposedly too con-

Another cave-in on gay rights.

cerned with so-called special interest groups. And they worried about the President's standing with the Pentagon leadership, who appeared suspicious of him.

As a result of his failure of leadership — and the political cover provided him by Congressman Barney Frank, among others — lesbians and gay men in the military are about to confront the worst of all possibilities: an unprecedented declaration by Congress that they pose an "unacceptable risk" to our national security. What's "honorable" about that? □

THE WHITE HOUSE

WASHINGTON

September 20, 1993

MEMORANDUM FOR GEORGE STEPHANOPOULOS

FROM: CLIFF SLOAN

SUBJECT: Nunn legislation on gays-in-the military

I have had an extensive discussion with Jamie Gorelick and reviewed the Nunn legislation.

The following points should be noted:

* DOD is preparing implementing directives based on the July 19 policy. The new directives will effectuate every element of the July 19 policy. There is not a single aspect of the July 19 policy that cannot be effectuated with the Nunn legislation.

* Our position that the Nunn legislation is "consistent" with the new policy applies only to the statute, not the report language. (The report contains some very troubling language. We may want to try to affect the conference report, but this has not been decided yet).

* The discharge criteria are the same under the Nunn legislation and the July 19 policy. Both the legislation and the July 19 directive include the rebuttable presumption and eliminate "desire" as a basis for discharge.

* Critics of our statement on the Nunn legislation claim that there is a difference regarding the investigative policy. The legislation itself is silent on investigations and will not conflict with implementation of the July 19 policy on investigations.

* Critics of our statement on the Nunn legislation claim that there is a difference regarding the "don't ask" part of the investigative policy. In fact, the Nunn legislation approves the "don't ask" policy as a sense of the Congress resolution, but emphasizes that the policy can be changed by the Secretary of Defense. The Nunn legislation thus does not affect the July 19 policy on this point.

* The Nunn legislation contains a finding that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." The Nunn legislation also does not

include the statement about "homosexual orientation" that the July 19 policy included ("homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.") Nothing in the Nunn legislation, however, prohibits implementation of the specifics of the July 19 policy.

* Critics of our statement on the Nunn legislation object that the legislation does not include the July 19 policy's statement on "even-handed enforcement" of the military code. But DOD fully intends to effectuate the principle of even-handedness in the implementation of the policy.

* There has been no recent change in Administration policy on this matter. The Administration's statement that the Nunn legislation was consistent with the July 19 policy was made public on July 23. This is an old story that is being misunderstood as a recent development.

THE WHITE HOUSE
WASHINGTON

Bruce --

FYI -- as we discussed. Let me know if
you want to see the DOJ papers.

-- Cliff

THE WHITE HOUSE

WASHINGTON

September 7, 1993

MEMORANDUM FOR GEORGE STEPHANOPOULOS

FROM CLIFF SLOAN *CMS*

Subject: Gays-in-the-military litigation

I wanted to bring you up to date on a couple of developments in the gays-in-the-military litigation.

In the Meinhold case, DOJ is preparing to file an emergency motion to vacate the part of the injunction that applies to anybody besides Meinhold himself. (The trial court entered a nation-wide injunction preventing the discharge of any military individual for homosexuality in the absence of proof of sexual conduct which would impair the mission of the military). DOJ's motion states that it is essential to vacate the injunction (except as it applies to Meinhold) so that the new policy can be implemented on October 1.

I have reviewed DOJ's draft motion. The legal basis for the motion is quite strong -- the trial court had no business entering a nation-wide injunction, and it makes sense to try to straighten this out before October 1.

Some of the statements in DOJ's draft, however, are troublesome. For instance, DOJ says that, with respect to the policy on discharges, the new policy is "substantially identical" to the old policy. I will make sure that such descriptions -- which are not accurate -- are not included in the motion as filed.

In the Steffan case, the D.C. Circuit (a panel of Mikva, Wald, and Edwards) is scheduled to hear argument on September 13. I plan to attend a moot court for the DOJ lawyer on September 9 and try to make sure that any references to the new policy, in the context of litigating the old policy, do not minimize the significance of the changes in the new policy.

Let me know if you have any comments on either of these developments.

FILED

SEP 30 1993

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

**United States District Court
Central District of California**

VOLKER KEITH MEINHOLD,

Plaintiff,

v.

**UNITED STATES DEPARTMENT
OF DEFENSE, et al.**

Defendants.

CV 92-6044 TJH (JRx)

**Amended
Order
and
Judgment**

The Court, having considered the cross motions for summary judgment, with the moving and opposing papers,

It is Ordered, Adjudged and Decreed, that Meinhold's motion for summary judgment be, and hereby is Granted.

It is further Ordered, Adjudged and Decreed, that the defendants' motion for summary judgment be, and hereby is, Denied.

1 It is further Ordered, Adjudged and Decreed, that the Department of
2 Defense and its agents, servants, employees and those persons in active
3 participation and concert with it, be, and hereby are, Permanently Enjoined
4 from discharging, changing enlistment status or denying enlistment to any person
5 based on sexual orientation in the absence of proven sexual conduct -- if such
6 conduct is proven to interfere with the military mission of the armed forces of the
7 United States.

8
9 It is further Ordered, Adjudged and Decreed, that the Department of
10 Defense and its agents, servants, employees and those persons in active
11 participation and concert with it, be, and hereby are, Permanently Enjoined
12 from creating or maintaining, or permitting any person or entity to create or
13 maintain, any record or file, including, but not limited to, lists, evaluations,
14 reports, classifications, and designations, whether official or unofficial, at any level
15 of command, of any member of the armed forces of the United States, which is
16 based on sexual orientation in the absence of proven sexual conduct -- if such
17 conduct is proven to interfere with the military mission of the armed forces of the
18 United States.

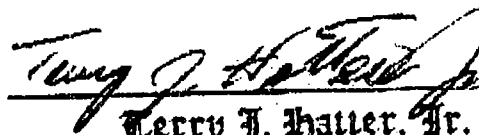
19
20 It is further Ordered, Adjudged and Decreed, that the Department of
21 Defense and its agents, servants, employees and those persons in active
22 participation and concert with it, be, and hereby are, Permanently Enjoined
23 from taking any actions whatsoever, or permitting any person or entity to take any
24 action whatsoever, against gay or lesbian service members, or prospective service
25 members, that in any way affects, impedes, interferes with, or influences their
26 military status, advancement, evaluation, duty assignment, duty location,

1 promotion, enlistment or reenlistment based upon their sexual orientation in the
2 absence of proven sexual conduct -- if such conduct is proven to interfere with the
3 military mission of the armed forces of the United States.

4
5 It is further Ordered, Adjudged and Decreed, that sexual status alone
6 is not sufficient to establish sexual conduct.

7
8 It is further Ordered, Adjudged and Decreed, that Meinhold's discharge
9 from the United States Navy be, and hereby is, Rescinded.

10
11 Date: September 30, 1993

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13 
14 Terry J. Haller, Jr.
15 United States District Judge
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File: Gays in the Military

THE WHITE HOUSE
WASHINGTON

September 15, 1993

MEMORANDUM FOR MARK GEARAN
BRUCE LINDSEY ✓
GEORGE STEPHANOPOULOS

FROM: CLIFF SLOAN

SUBJECT: Possible Washington Post Gays-in-the-military
editorial

I received a call tonight from an aide to Jamie Gorelick. Somebody from the Post editorial staff called Jamie about the Steffan oral argument in the D.C. Circuit on Monday (in which DOJ defended the constitutionality of the old gays-in-the-military policy before a very liberal panel). The Post seems to be leaning toward an editorial criticizing the Administration because (1) the Steffan argument supposedly reveals that the new policy is not very different from the old policy, in contrast to how it was portrayed at the time it was announced, and (2) the new policy is supposedly being used to hurt people under the old policy.

Jamie is scheduled to talk to the person from the editorial staff tomorrow morning. It may be that one of you will want to touch base with Jamie.

Jamie's aide and I discussed various points that could be made. Among other points, the Steffan case does not even address two of the most significant changes in the new policy -- the significant reforms in the investigative and accession policies (the "don't ask" and "don't pursue" parts).

The Post may be motivated by the fact that DOJ argued that a "celibate homosexual" was not prohibited under the old policy and we have emphasized that a statement of homosexuality under the new policy is a "rebuttable presumption." (This point was emphasized in some press accounts of the Steffan argument). But it is a mistake to conclude that the old policy and the new policy are thus identical in this respect. The rebuttable presumption in the new policy is far more explicit than anything in the old policy. Although some questions remain about the practical operation of the rebuttable presumption (and the new policy has not even been implemented yet), the explicit opportunity to rebut a presumption will undoubtedly have great practical significance. The new policy also states for the first time that "[s]exual orientation is considered a personal and private matter" and that "homosexual orientation is not a bar to

service entry or continued service unless manifested by homosexual conduct." These very important statements should play a significant role in the operation of the rebuttable presumption.

Attorney General Reno's July 19 evaluation of the constitutionality of the new policy is quite helpful on this point. In her analysis, the rebuttable presumption is one of three "changes" in the new policy "that should improve the ability of the Department of Justice to defend the policy in court." She noted that, although DOJ had been making certain arguments in the past about the ability of service members to disprove intent or propensity under the old policy, the rebuttable presumption provides "much clearer authority" and "a meaningful opportunity to rebut the presumption flowing from statements of homosexuality."

Incidentally, Bruce and George will recall that our position was that DOD should reprocess all pending cases under the new policy to avoid continuing to litigate the old policy. We were clearly right -- our position would have avoided the difficulties currently being caused by Steffan and similar cases.

THE WHITE HOUSE

WASHINGTON

April 4, 1994

MEMORANDUM FOR BRUCE LINDSEY ✓
GEORGE STEPHANOPOULOS

FROM: CLIFF SLOAN CS

SUBJECT: Gays-in-the-military decision on new policy

In a significant development, a federal judge has issued an opinion granting a preliminary injunction barring implementation of the new gays-in-the-military policy with respect to six plaintiffs while their cases proceed. The judge held that the plaintiffs had raised "substantial questions" regarding their First Amendment and equal protection rights, and that they faced irreparable harm from application of the new policy to them while their cases proceed. None of the six plaintiffs has been separated.

A copy of the opinion is attached. Particular points of interest:

1. The court was critical of the "propensity" language in the new policy. The decision points out that "propensity" is defined in the dictionary as an "innate or inherent tendency," and that "'[i]nnate' means 'existing in one from birth' or 'inborn.'" (p.6) The decision then notes, "To invite someone to prove that he or she does not have an inborn tendency seems like a hollow offer." (p. 7)

2. The court was critical of "don't ask, don't tell": "The fact that the officials implementing the policy are directed not to ask service members 'to reveal their sexual orientation' shows that the Act is really concerned not so much with 'conduct' but with the attitudes of others when they learn of statements of homosexual orientation. The message to those with such an orientation appears to be not to avoid private homosexual acts but to stay in the closet and to hide their orientation." (p. 8)

3. The court emphasized that, in its view, the "don't ask" policy inhibits the plaintiffs from being able to press their claims freely in court. (In the court's view, plaintiffs can reasonably fear that elaboration of their orientation, through briefs or affidavits, could be used against them). The court concluded that "there is a serious question as to whether a regulation goes beyond what is reasonably necessary to protect any possible government interest when it inhibits six service

members from continuing to speak in court to make a constitutional challenge." (p. 13)

4. With regard to equal protection, the court found "a split of authority" about the validity of the military's former policy. The court determined that "the allegedly new policy makes the same distinction between homosexuals and heterosexuals as did the prior policy." As a result, "[t]he conflict of authority [regarding the old policy] signifies the seriousness of the questions going to the merits of plaintiffs' equal protection claim." (p. 15)

DOJ and DOD will be reviewing the decision and considering next steps. One possible option under review is an immediate appeal to the U.S. Court of Appeals for the Second Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LIEUTENANT COLONEL JANE ABLE,
PETTY OFFICER ROBERT HEIGL,
FIRST LIEUTENANT KENNETH OSBORN,
SERGEANT STEVEN SPENCER,
LIEUTENANT RICHARD von WOHL, and
SEAMAN WERNER ZEHR,

Plaintiffs,

-against-

UNITED STATES OF AMERICA, and
WILLIAM J. PERRY, SECRETARY OF
DEFENSE, in his official capacity,

Defendants.

CV 94 0974

MEMORANDUM
AND
ORDER

SULLIVAN & CROMWELL

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Julie B. Crockett, Eulalia Mack, of counsel)
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DEPARTMENT OF JUSTICE

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DEPARTMENT OF THE ARMY
(Captain Tara O. Hawk, Office of the Judge
Advocate General, of counsel)
for defendants.

ZACHARY W. CARTER, United States Attorney
(Charles S. Kleinberg, of counsel)
Brooklyn, New York
for defendants.

NICKERSON, District Judge:

Six plaintiffs, alleging they are lesbian and gay members of the United States Armed Services (the Services), brought this action against the United States and William J. Perry, Secretary of Defense, for (a) a declaration that Section 571 of the National Defense Authorization Act for the Fiscal Year 1994 (the Act), 10 U.S.C. § 654, concerning a new policy as to homosexuals, and Regulations issued under the Act, are invalid under the First and Fifth Amendments, and (b) an order enjoining the defendants from enforcing the Act and the Regulations.

This action appears to be the first to challenge the new policy, which became effective February 28, 1994.

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This court has jurisdiction under 28 U.S.C. §§ 1331 and 1346. Venue lies in this district under 28 U.S.C. § 1391.

Moving pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs ask the court to enjoin defendants pending resolution of the case from investigating, discharging, or taking other adverse action against plaintiffs because they have identified themselves as gay or lesbian.

THE COMPLAINT

The complaint states, in substance, the following.

Each plaintiff is a lesbian or gay member of the Services who has served honorably for years. The Act and the Regulations violate plaintiffs' equal protection and free speech rights and impose on lesbians and gays punitive rules unrelated to fitness and ability to serve, rules promoting no legitimate military interest and based on presumed prejudices of heterosexual service members and civilians.

THE ACT AND THE REGULATIONS

The Act, 10 U.S.C. § 654, entitled Policy Concerning Homosexuality in the Armed Forces, contains

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in subsection (a) "findings" that, among other things, the prohibition against homosexual "conduct" is a long-standing and still necessary element of military law, and that the presence in the services of persons who demonstrate a propensity or intent to engage in homosexual "acts" would create an unacceptable risk to the standards of "good order" and "unit cohesion" essential to military capability.

Subsection (b), setting forth the Act's policy, recites, in substance, that a member of the Services "shall be separated" from them if one or more of the following three findings is made:

(1) The member is found to have engaged, attempted to engage, or solicited another to engage, in homosexual acts, unless the member has demonstrated, among other things, that he or she "does not have a propensity or intent to engage in homosexual acts."

(2) The member "has stated that he or she is a homosexual or bisexual or words to that effect," unless "the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."

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(3) The member has married or attempted to marry someone of the same sex.

Subsection (f) contains definitions. "Homosexual" includes "the terms 'gay' and 'lesbian'" and means a person who engages, attempts to engage, has a "propensity" to engage, or "intends" to engage, in homosexual acts. The term "homosexual act" means any bodily contact between members of the same sex to satisfy sexual desires or any such contact that a reasonable person would understand to "demonstrate a propensity" or "intent" to engage in such an act.

The Act has no definition of the word "propensity."

On December 21, 1993 the Secretary of Defense issued a memorandum concerning the implementation of the new policy stating that no one applying to become a member "will be asked about his or her sexual orientation," that "homosexual conduct may be a basis for rejection," and that the suitability of persons to serve will be based not on "sexual orientation" but on "homosexual acts" and "statements that reflect on intent or propensity to engage" in such acts.

The Directives, 1332.14 and 1332.30, issued with the memorandum confirm that while "homosexual

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orientation is not a bar" to continued service, "homosexual conduct" is. Such conduct includes not merely homosexual "acts" but also "a statement by a member that demonstrates a propensity or intent to engage" in such acts. A member who "has made a statement" that he or she is a homosexual shall be separated unless the member demonstrates that he or she does not engage, or intend to engage, or have a "propensity" to engage in homosexual acts.

Thus, as the Guidelines annexed to the Directive put it, a statement by a service member that he or she is a homosexual "creates a rebuttable presumption" that the member "engages in homosexual acts or has a propensity or intent to do so."

While the word "propensity" is distinguished in the Act from "intent," it is not defined. The word is generally understood and defined to mean a "natural inclination" or an "innate or inherent tendency." Webster's Third New International Dictionary 1817 (1986): see also Random House Dictionary of the English Language 1152 (1966). "Innate" means "existing in one from birth" or "inborn." Random House at 733: see also Webster's at 1165.

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Neither the Act nor the Directives suggest how one who is born with an innate tendency, a "propensity," to commit a homosexual act can prove that he or she does not have such a propensity. To invite someone to prove that he or she does not have an inborn tendency seems like a hollow offer.

The Directives state that "propensity" to engage homosexual conduct "means more than an abstract preference or desire to engage" in homosexual acts and "indicates a likelihood that a person engages in or will engage in" them. But the Guidelines make clear that the very statement of homosexual orientation establishes such a likelihood. The Guidelines treat as "homosexual conduct" not merely statements that in context may reasonably be considered as revelations of intent to or as invitations to engage in homosexual acts. The Guidelines go so far as to make any statement of homosexual orientation, wherever and whenever made in the past and to whatever person, even a statement to this court, as proof of an intent to engage in homosexual acts.

Thus, "statements such as 'I am a homosexual,' 'I am gay,' 'I am a lesbian,' 'I have a homosexual orientation,' and the like" constitute "homosexual

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conduct." This is hardly consistent with the avowed policy of the Act that not "homosexual orientation" but only homosexual "conduct" is a "bar" to service.

To treat a statement as to homosexual orientation made to a court to test the law as itself "homosexual conduct" is to call into question the Act's assurance that it deals only with homosexual acts. The fact that the officials implementing the policy are directed not to ask service members "to reveal their sexual orientation" shows that the Act is really concerned not so much with "conduct" but with the attitudes of others when they learn of statements of homosexual orientation. The message to those with such an orientation appears to be not to avoid private homosexual acts but to stay in the closet and to hide their orientation.

THE CONSTITUTIONAL CLAIMS

Plaintiffs raise on the present motion claims that the Act and the Regulations violate their equal protection rights under the Fifth Amendment to the United State Constitution and their right to free speech under the First Amendment.

Free Speech

Plaintiffs say that the Act inhibits their right to free speech because they face retaliation for statements they must make in this action to test the Act's constitutionality.

The fact that the complaint identifies plaintiffs as having a homosexual orientation has caused the Services to take action against some of them. For example, on March 10, 1994 the commanding officer of plaintiff Robert S. Heigl sent a notice to him entitled "Notification of Administrative Discharge by Reason of Unsuitability Due to Homosexuality." The notice says that the officer is recommending that Heigl be discharged on the basis of his declaration in this case that he is a homosexual. The notice makes no mention of homosexual "acts."

The First Amendment guarantees the right "to petition the Government for a redress of grievances," and that includes the right of access to the courts. Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 741, 103 S. Ct. 2161, 2169 (1983). Indeed, "[t]he Supreme Court has described the right to petition government for redress of grievances as 'among the most precious of the liberties safeguarded by the Bill of

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Rights.'" Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988) (quoting United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222, 88 S. Ct. 353, 356 (1967)).

The statement "I am a homosexual" or "I am gay" or "I am a lesbian" contains both "speech" and "nonspeech" elements. The verbalization is clearly speech. As the Supreme Court has held, a person's "inclinations" are "his own and beyond the reach of government." Jacobson v. United States, ___ U.S. ___, 112 S. Ct. 1535, 1542 (1992) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67, 93 S. Ct. 2628, 2641 (1973)); see also R.A.V. v. City of St. Paul, 505 U.S. ___, 112 S. Ct. 2538, 2542 (1992) ("[c]ontent-based regulations are presumptively invalid" and "hate speech" statute facially invalid under the First Amendment) (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 505 U.S. ___, 112 S. Ct. 501, 508 (1992)).

But the statement is also an act of identification, a "nonspeech" element. The Supreme court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental

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limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678 (1968). That case set forth the criteria for determining whether a limitation is sufficiently justified.

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id., 391 U.S. at 377, 88 S. Ct. at 1679.

To say that plaintiffs may not even petition this court and litigate this case without incurring the disabilities that defendants seek to visit upon them seems to this court at least to raise a serious First Amendment question.

This court is aware that a review of military regulations challenged on First Amendment grounds is "far more deferential" than a review of similar regulations designed for civilian society. Goldman v. Weinberger, 475 U.S. 503, 507, 106 S. Ct. 1310, 1313 (1986). That case, while recognizing that certain "aspects of military life do not, of course, render entirely nugatory in the military context the

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guarantees of the First Amendment," id., 475 U.S. at 507, 106 S. Ct. at 1313, upheld against a First Amendment challenge an Air Force regulation preventing the plaintiff from wearing a yarmulke while on duty and in uniform. See also Brown v. Glines, 444 U.S. 348, 100 S. Ct. 594 (1980) (upholding Air Force regulation requiring Air Force members to obtain command approval before circulating petitions on base); Greer v. Spock, 424 U.S. 828, 96 S. Ct. 1211 (1976) (upholding Army regulation that prohibited political speeches and demonstrations on base).

But here plaintiffs face wider and more constant restraints. The Act and Regulations restrict their speech not only while they are in uniform and on duty, or on base, but in every conceivable aspect of their lives, including the prosecution of this lawsuit.

The Supreme Court in Brown v. Glines, supra, said that a military regulation may "restrict speech no more than is reasonably necessary to protect the substantial governmental interest." 444 U.S. at 355, 100 S. Ct. at 600. This court holds that there is a serious question as to whether a regulation goes beyond what is reasonably necessary to protect any possible government interest when it inhibits six service members from

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continuing to speak in court to make a constitutional challenge.

Equal Protection

Plaintiffs assert that the Act and Regulations violate their right to equal protection, serve no rational, legitimate government interest, and reflect only the actual or perceived private prejudices of those who are not lesbian or gay.

The court analyzes Fifth Amendment equal protection challenges by the same standards as those applicable to claims of violation of the equal protection clause of the Fourteenth Amendment. See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 95 S. Ct. 1225, 1228 n.2 (1975).

The court assumes for the purposes of the motion that the Act and Regulations are subject to only minimal equal protection scrutiny. Under that standard they are valid if the distinction they make is "rationally related to a legitimate governmental purpose," City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446, 105 S. Ct. 3249, 3258 (1985), and plaintiffs must negate "every conceivable basis

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which might support" the challenged rules. Heller v. Doe, ___ U.S. ___, 113 S. Ct. 2637, 2643 (1993).

There is a split of authority as to whether the military's prior policy, making the status of being a homosexual "incompatible with military service," denied homosexuals equal protection because no similar policy obtained as to heterosexuals.

Some courts have flatly held that the distinction has no rational basis. See, e.g., Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993) (finding no rational basis for homosexual ban and granting plaintiff summary judgment); Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993) (same), stay denied, CV-92-6044, 1993 WESTLAW 195368 (9th Cir. Mar. 5, 1993) (per curiam), stay granted in part, stay denied in part, 114 S. Ct. 374 (1993) (staying injunction, pending appeal, except as applicable to named plaintiff); Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993) (finding ban unconstitutional), vacated for rehearing in banc, Jan. 7, 1994.

Others have found that a ban on homosexuals at least raises a serious equal protection question. See, e.g., Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992)

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(raising equal protection question sua sponte and remanding to district court), cert. denied, 113 S. Ct. 655 (1992); Elzie v. Aspin, 841 F. Supp. 439 (D.D.C. 1993) (finding, on motion for preliminary injunction, that plaintiff "presents a strong case that he will probably succeed" on equal protection claim).

Other cases have held the ban rational. See, e.g., Woodward v. United States, 871 F.2d 1068, 1076-77 (Fed. Cir. 1989) (raising sua sponte equal protection claim and finding ban on homosexual conduct constitutional), reh'g denied, No. 86-1283, 1989 U.S. App. LEXIS 6149 (Fed. Cir. May 2, 1989). cert. denied, 494 U.S. 1003, 110 S. Ct. 1295 (1990); Rich v. Secretary of Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (finding ban constitutional).

This court does not now undertake to assess the relative merits of these divergent holdings. It is enough to say that the allegedly new policy makes the same distinction between homosexuals and heterosexuals as did the prior policy. The conflict of authority signifies the seriousness of the questions going to the merits of plaintiffs' equal protection claim.

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STANDARDS FOR ENTRY OF A
PRELIMINARY INJUNCTION

The standards for issuing a preliminary injunction in this circuit are clear. A party seeking a preliminary injunction must show

- ✓: "(1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief."

Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1338 (2d Cir. 1992), vacated as moot, 113 S. Ct. 3028 (1993) (quoting Resolution Trust Corp. v. Elman, 949 F.2d 624, 626 (2d Cir. 1991)); see also Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).

The plaintiffs have satisfied the first element, irreparable harm, as to their claims under both the Fifth Amendment and the First Amendment. A showing of a possible violation of constitutional rights constitutes irreparable harm justifying a preliminary injunction. Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984).

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There is no merit to the government's assertion, citing Sampson v. Murray, 415 U.S. 61, 90-92, 94 S. Ct. 937, 952-53 (1974), that this court can never preliminarily enjoin a discharge from federal employment. In that case the court held that a probationary government employee about to be discharged, allegedly in violation of United States Civil Service Regulations, could not have a preliminary injunction. No constitutional issue was at stake, and the employee could be made whole with money damages. Money damages cannot recompense the six plaintiffs here for violations of their rights to free speech and equal protection.

The government also says plaintiffs must exhaust their administrative remedies in the Services before coming to court. Exhaustion is not required when, as here, plaintiffs raise constitutional questions and irreparable injury will occur without preliminary judicial relief. See Guitard v. United States Secretary of Navy, 967 F.2d 737, 741 (2d Cir. 1992).

Plaintiffs make a substantial claim that to subject them to the Act and Regulations will deny them equal protection every day. The court holds that this constitutes irreparable harm.

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With respect to the free speech claim, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976); see also Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991). Mr. Justice Brennan's opinion in the Burns case said that public employees threatened with discharge from their positions because they were exercising their First Amendment rights of association in a political party had shown irreparable injury.

Defendants say that whatever chill there may have been of plaintiffs' right to speak must have come from the threat of permanent discharge, that this threat did not serve to prevent plaintiffs from speaking through their complaint, and that a preliminary injunction would not now retroactively thaw the supposed chill. Defendants cite American Postal Workers Union v. United States Postal Service, 766 F.2d 715, 722 (2d Cir. 1985), cert. denied, 475 U.S. 1046, 106 S. Ct. 1262 (1986), and Savage v. Gorski, 850 F.2d 64 (2d Cir. 1988).

Defendants' contention embodies an erroneous premise. Plaintiffs' free speech claim is not based

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merely on their statements in the complaint. They are faced with a continuing inhibition on speech throughout of the litigation. The Act and Regulations provide that a statement of homosexual orientation creates a "rebuttable" presumption that the speaker engages in or intends to engage in homosexual acts, or has a propensity to do so. For reasons stated above, that presumption is virtually irrebuttable. But at least in theory there is a slim chance that a plaintiff might be able to rebut it.

Section H(b)(2) of the Standards and Procedures accompanying the Directives provides that the nature and circumstances of a statement that a member is a homosexual may be considered by the officer determining whether the member has rebutted the presumption of intent to or propensity to engage in homosexual acts. Yet for plaintiffs to litigate the issue they must make repeated assertions of their homosexuality in affidavits and in testimony. Unlike Savage and American Postal Workers Union, where the plaintiffs had concluded the exercise of their First Amendment rights before the litigation had commenced, plaintiffs here must, to pursue their case, continue speaking about their homosexuality.

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Under the Act and Regulations for a plaintiff to persist in this lawsuit, filing affidavits and presenting testimony, is to make it less likely that he or she will have any chance of rebutting the presumption. The reiteration of homosexual orientation may be used by the Services to find a strengthening of any inference of an intent to commit homosexual acts. In short, the more vigorous plaintiffs' prosecution of their claims, the greater is their risk of the ultimate punishment of discharge. Their First Amendment right to seek redress in the court and to speak freely is under a constant and ever-increasing chill.

Just as in Elrod v. Burns, supra, where the plaintiffs had a continuing First Amendment right to associate during the course of the litigation, here plaintiffs have a continuing right to exercise their right to speak in order to persevere in the case. By preliminarily enjoining defendants the court can thereby protect this right.

For reasons already discussed, the court holds that plaintiffs have established serious questions going to the merits. The court holds that this showing is adequate to satisfy a part of the second half of the criteria for issuance of a preliminary injunction.

In the Haitian Centers case, supra, the Court of Appeals for the Second Circuit approved a preliminary injunction against the United States Immigration Service and various United States government officials, enjoining them from repatriating certain Haitians. The court held that plaintiffs, who would be irreparably damaged without the injunction, needed to show only sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward them. The court rejected the United States government officials' contention that because they were asserting a "public interest" they could not be enjoined from taking action in fulfillment of their statutory duties unless the movant showed nothing less than a likelihood of success on the merits.

As the Second Circuit held, the government may not assume that the public interest lies solely with it. Haitian Centers, 969 F.2d at 1339. "[T]he public interest also requires obedience to the Constitution." Carey v. Kintznick, 637 F.2d 834, 839 (2d Cir. 1980). As in the Haitian Centers case so here, "no party has an exclusive claim on the public interest," and the "likelihood of success" standard "need not always be

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FROM U S ATTORNEY E D N Y

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followed merely because a movant seeks to enjoin government action." 969 F.2d at 1339.

In the present case the military asserts a public interest in the maintenance of "good order" and "unit cohesion." The plaintiffs invoke the public interest in protecting rights granted by the First and Fifth Amendments. The preservation of rights of free speech and equal protection seems to this court quite as much in the public interest as a claim that the pursuit of this lawsuit by six plaintiffs constitutes a serious threat to the military integrity of the armed forces.

On the authority of the Haitian Centers case this court holds that plaintiffs may have a preliminary injunction if they show irreparable damage and sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in their favor.

Those decisions said by the government to require plaintiffs to show a likelihood of success are, as the Haitian Centers opinion said, distinguishable. Plainly not in point are cases where the movant relies not on the Constitution but on statutory language to obtain a preliminary injunction. See, e.g., Medical Soc'y of the State of New York v. Toia, 560 F.2d 535 (2d Cir.

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1977). In Sweeney v. Rahn, 996 F.2d 1384 (2d Cir. 1993), and Union Carbide Agric. Prods. Co. v. Gostle, 632 F.2d 1014 (2d Cir. 1980), the court found no substantial constitutional claim at issue. In Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577 (2d Cir. 1989), a plaintiff dumping hazardous medical wastes into the Hudson River sought preliminarily to enjoin its suspension by New York State as a Medicaid provider. The court held that plaintiff had no ex post facto claim and a speculative at best due process claim. The public interest lay heavily on the side of the state.

In addition to the other preconditions to a preliminary injunction plaintiffs must, as already noted, show a balance of hardships tipping decidedly in their favor. Haitian Centers, 969 F.2d at 1338.

Only the six plaintiffs can obtain preliminary relief in this case. Were this a class action affecting all homosexuals in the Services the balance of hardship analysis might be different.

If plaintiffs obtain a preliminary injunction the current regulations will remain in force against all other service members. The potentially adverse effect on "good order" and "unit cohesion" of allowing these

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six plaintiffs to remain on duty and not subject to investigation while the case is pending can be minimal at most.

In any event there seems to be little reason to believe that the presence in the Services of these six members during the litigation will cause any acute actual disruption. The court does not prejudge the merits. But the evidence presented in other courts casts doubt on the extent of any harm to be anticipated from the presence of homosexuals in the military. See, e.g., Meinhold, 808 F. Supp. at 1457-58 (granting permanent injunction against discharging homosexuals absent conduct interfering with the military mission); see also National Defense Research Institute, "Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment" (RAND, 1993) (report prepared at the direction of the Secretary of Defense).

The hardship to the six plaintiffs is evident and immediate. As explained above, their free speech rights to pursue this case will be chilled. They will be subjected to adverse action, including likely discharge from their chosen profession, on the basis of what substantial judicial authority has deemed unconstitutional discrimination. To deprive someone of

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constitutional rights is to inflict a hardship, and an especially heavy one where the rights are to free speech and equal protection.

The court finds that the balance of hardships tips decidedly in favor of the six plaintiffs.

CONCLUSION

Plaintiffs' motion is granted preliminarily enjoining the defendants pending resolution of the case from investigating or discharging or taking other adverse or punitive action against plaintiffs based on their self-identification as gay or lesbian in connection with legal proceedings challenging the constitutionality of the Act and the Regulations.

So ordered.

Dated: Brooklyn, New York
April 4, 1994

Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.