

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: General Files

Subseries:

OA/ID Number: 12203

FolderID:

Folder Title:

Counsel 1993-95 Gays in the Military [3]

Stack:

S

Row:

117

Section:

3

Shelf:

9

Position:

2

Guys - in the military: Cammermeyer

FILED ENTERED
LODGED RECEIVED

JUN 01 1994

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGARETHE CAMMERMEYER,
Plaintiff,

v.

LES ASPIN, Secretary of
Defense, et al.,
Defendants.

NO. C92-942Z

ORDER

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

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

1 Cammermeyer further claims that Army Regulation 135-178 is an
2 invalid exercise of executive power violative of the
3 constitutional separation of powers, and that the regulation
4 violates principles of federalism.

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

17 I. BACKGROUND

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

23
24
25 ² Cammermeyer was married from 1966 until 1980 and she
26 and her husband had four sons. She was forced to resign upon
her first pregnancy in 1968 following more than seven years of
active duty as a result of then-applicable Army regulations.
Due to a change in Army regulations, she was able to reenlist
in the Army Reserve in 1972.

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

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

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

25 ³ The recommendation for her Bronze Star provided, in
26 part, that "[h]er professional and personal conduct merit the
highest praise and reflect great credit upon herself and the
United States Army Medical Service" Complaint
(docket no. 1) at ¶ 4.6.

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

16
17
18 ⁴ Her formal statement, written by the DIS Investigator
19 based upon their conversation but edited and initialed by Col.
20 Cammermeyer, states: "I am a lesbian. Lesbianism is an
orientation I have, emotional in nature, towards women. It
does not imply sexual activity" Cammermeyer Decl.,
Ex. G.

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

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

15 On June 11, 1992, Cammermeyer was discharged based upon
16 the Board's recommendation and received an honorable
17 discharge.⁶ Cammermeyer's final evaluation, dated July 31,
18 1992, describing her contributions to the Army and noting her
19 discharge, concluded that "[t]his officer has the potential to
20 serve as Chief Nurse, NGB; and to represent her profession in
21 major research projects in military medicine anywhere in the
22 world." Cammermeyer Decl., Exhibit D, Officer Evaluation
23 Report (OER) dated July 31, 1992. Prior to her discharge,
24 Washington Governor Booth Gardner, Commander-in-Chief of the
25

26 ⁶ Cammermeyer is believed to be the highest ranking officer in any service of the U.S. Armed Forces to have been discharged because of homosexual status.

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

9 II. DISCUSSION

10 A. Summary Judgment Standard

11 Summary judgment is appropriate if the record shows
12 "that there is no genuine issue as to any material fact and
13 that the moving party is entitled to a judgment as a matter of
14 law." Williams v. I.B. Fischer Nev., 999 F.2d 445, 447 (9th
15 Cir. 1993) (quoting Fed. R. Civ. P. 56(c)). In determining
16 whether there are any genuine issues of material fact for
17 trial, the court must view all of the evidence in the light
18 most favorable to the nonmoving party. Abuan v. General
19 Electric Co., 3 F.3d 329, 332 (5th Cir. 1993), cert. denied,
20 114 S.Ct. 1064, 127 L.Ed.2d 383 (1994). This is true even
21 when the court is presented with cross-motions for summary
22 judgment. High Tech Gays v. Defense Indus. Sec. Clearance
23 Office, 895 F.2d 563, 574 (9th Cir. 1990). "Summary judgment
24 must be entered 'against a party who fails to make a showing
25 sufficient to establish the existence of an element essential
26 to that party's case, and on which that party will bear the

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

11 **B. Equal Protection Challenge**

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

16 **1. Equal Protection Standard**

17 "The Equal Protection Clause of the Fourteenth Amendment
18 commands that no State shall 'deny to any person within its
19 jurisdiction the equal protection of the laws,' which is
20 essentially a direction that all persons similarly situated
21 should be treated alike." City of Cleburne v. Cleburne Living
22 Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87
23 L.Ed.2d 313, 320 (1985) (quoting Plyler v. Doe, 457 U.S. 202,
24 216 (1982)). While the Fifth Amendment does not contain an
25 equal protection clause, the due process clause of the Fifth
26 Amendment has an equal protection component that applies to

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

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

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

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

13 2. Rational Basis Review

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

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

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

15 Before proceeding with this analysis, however, the Court
16 must resolve three preliminary issues: (a) the appropriate
17 level of deference to accord to military decisions; (b) the
18 viability of the standard of review applied in Pruitt v.
19 Cheney, 963 F.2d 1160 (9th Cir.), cert. denied, 113 S.Ct. 635,
20 121 L.Ed.2d 581 (1992), following Heller v. Doe, 509 U.S. ___,
21 113 S.Ct. 2637, 125 L.Ed.2d 257, 270 (1993); and (c) whether,
22 for purposes of equal protection analysis, there is a
23 meaningful distinction between homosexual orientation and
24 homosexual conduct.

25
26

1 a. Deference to the Military

2 The Constitution confers broad powers on the President
3 and Congress to raise and support armies, provide and maintain
4 a naval force, and promulgate rules governing and regulating
5 both land and naval forces. Traditionally, courts have
6 recognized the Constitution's mandate by according significant
7 deference to the "considered professional judgment" of
8 military officials regarding the composition of the armed
9 forces. Goldman v. Weinberger, 475 U.S. 503, 508, 106 S.Ct.
10 1310, 1313, 89 L.Ed.2d 478 (1985). "While it is clear that
11 one does not surrender his or her constitutional rights upon
12 entering the military, the Supreme Court has repeatedly held
13 that constitutional rights must be viewed in light of the
14 special circumstances and needs of the armed forces." Baller
15 v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980). As the
16 Supreme Court has reflected:

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

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

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

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

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

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

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

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

25 b. Scope of Rational Basis Review

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Id. at 284.

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

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

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

18 Id. at 1327.

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

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

Dahl is currently on appeal.

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

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

17 (c) Orientation v. Conduct

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

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

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

21
22
23 ¹⁰ Hardwick involved a due process challenge to a
24 Georgia statute which criminalized sodomy. Hardwick
25 challenged the statute after being discovered engaging in
26 sodomy with another consenting adult while in the privacy of
his own home. The Supreme Court held that the Constitution
confers no fundamental right upon homosexuals to engage in
sodomy.

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

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

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

24
25 ¹² In the present case, the Government also relies on
26 Dronenburg v. Zach, 741 F.2d 1388 (D.C. Cir. 1984), to support
its argument that homosexual orientation equals homosexual
conduct. However, whether any agency of the federal
government can discriminate against individuals merely because
of sexual orientation remains an open question in the D.C.

1 Supreme Court precedents have also recognized a status-
2 conduct distinction in other contexts. In Robinson v.
3 California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962),
4 the Court struck down a statute criminalizing "status" as a
5 drug addict, absent evidence of drug use, as a violation of
6 the Eighth Amendment prohibition against cruel and unusual
7 punishment. Similarly, in Powell v. Texas, 392 U.S. 514, 532,
8 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), the Court upheld a
9 conviction for drinking in public but disapproved of arrests
10 based solely on status as a chronic alcoholic. Furthermore,
11 Supreme Court precedents prohibit presumptions of criminal
12 conduct based on orientation. See Jacobson v. United States,
13 503 U.S. ___, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992) (prior
14 conduct does not demonstrate a propensity to engage in
15 identical conduct later made illegal); Antheker v. Secretary
16 of State, 378 U.S. 500, 501-02, 84 S.Ct. 1659, 12 L.Ed.2d 992,
17 995 (1964) (government may not deny member of Communist Party
18 right to travel based on statutory presumption the individual
19 will compromise national security). These cases stand for the
20 proposition that status and conduct are distinct, and that it
21 is inherently unreasonable to presume that a certain class of

22
23
24 Circuit. See Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir.
25 1986), aff'd in part and rev'd in part sub. nom., Webster v.
26 Doe, 486 U.S. 592 (1988); Steffan v. Aspin, 8 F.3d 57, 62
(D.C. Cir. 1993), vacated for reh'g en banc, 1994 U.S. App.
LEXIS 9977 (D.C. Cir. January 7, 1994). Moreover, the Ninth
Circuit distinguished Dronenburg in Pruitt, 963 F.2d at 1165
n. 4.

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

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

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

21
22
23 ¹³ The military does not discharge servicemembers who
24 identify themselves as alcoholics or drug addicts. See
25 OPNAVINST 5350.4B (titled "Alcohol and Drug Abuse Prevention
26 and Control"), Hines Decl., Ex. 7. Rather, the military
requires actual evidence of substance abuse or that the
individual's status impairs his or her ability to function in
the military. Id.

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

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

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

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

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

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

1 Korb. Decl., ¶ 5.

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

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

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

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

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

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

20 The regulation, at 32 C.F.R. Part 41.13, provides that
21 homosexuality is incompatible with military service. The
22 regulation provides that the presence of homosexuals in the
23 military environment: (1) seriously impairs the accomplishment
24 of the military mission; (2) adversely affects the ability of
25

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

15 Recently, Congress made fifteen express findings in
16 support of its new policy concerning homosexuals in the armed
17 forces. See 10 U.S.C. § 654(a)(1)-(15). The Government
18 argues that these findings also support the exclusion from
19 military service of "persons who demonstrate a propensity or
20 intent to engage in homosexual acts" under the policy at issue
21
22
23
24
25
26

1 in this case.¹⁷ One such finding, cited by the Government, is
2 that the presence of such persons in the military "would
3 create an unacceptable risk to the high standards of morale,
4 good order and discipline, and unit cohesion that are the
5 essence of military capability." 10 U.S.C. § 654(a)(15).

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

17 The Government relies heavily upon the professional
18 military judgment of this country's military leaders that the
19 presence of homosexuals in the military will adversely affect
20 the morale, good order and discipline of the military. The
21

22
23 ¹⁷ The Court may consider relevant factfinding by
24 Congress as evidence in determining whether the Army's
25 regulations possess a rational basis. See generally EEOC v.
26 Boeing Co., 843 F.2d 1213, 1217 (9th Cir.), cert. denied, 488
U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 212 (1988). Both parties
rely on the Congressional findings in the new policy, and
neither party has filed a formal objection to the other
party's use of this factfinding as evidence.

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

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

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

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

22 Most notably, the defendants offer the Rule 30(b)(6)
23 deposition testimony of Major General John P. Otjen and former
24 Assistant Secretary of Defense Edwin Dorn. General Otjen was
25 a member of the Military Working Group ("MWG") that studied
26 the issue of homosexuals in the military and reported its
findings to the Secretary of Defense in June, 1993.¹⁸ See

¹⁸ The MWG Report made findings as to each of the
rationales stated in the Army regulation, with the exception
of the security risk rationale, for the purpose of

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

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

20
21
22 recommending to the President a new policy on homosexuals in
23 the military that would "compl[y] with the President's
24 direction to end discrimination while maintaining high
standards of combat effectiveness and unit cohesion." See
Memorandum for the Secretary of Defense, Attached to MWG
Report, Otjen Dep., at Ex. 10.

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

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

7 (1) Incompatibility with Military Service and
8 Interference with Military Mission. Plaintiff offers evidence
9 that homosexuality is compatible with military service, and in
10 fact, a large number of homosexuals have served and continue
11 to serve in the military with distinction. Plaintiff cites
12 the statements of President Clinton that, "there have been and
13 are homosexuals in the military who serve with distinction,"
14 and "there is no study showing them to be less capable or more
15 prone to misconduct." Himes Dec., Ex. 4. Plaintiff also
16 offers the statement of Vice Admiral Joseph S. Donnell, the
17 Commander of the Navy's surface Atlantic Fleet, describing his
18 experience with lesbian servicemembers as follows:

19 "Experience has ... shown that the stereotypical female
20 homosexual in the Navy is hardworking, career-oriented,
21 willing to put in long hours on the job and among the
22 command's top professionals." Foote Decl., Ex. A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 (6) Recruitment and Retention of Military Personnel.

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

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

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

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

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

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

20 An examination of the record demonstrates that the sole
21 motivation for the exclusion of acknowledged homosexuals from
22 military service is prejudice. President Clinton has admitted
23 that opposition to lifting the ban on homosexual service is
24 "rooted in disapproval of homosexual lifestyles," and based on
25

26

Defendants would appear to concede this, as the new
"don't ask, don't tell" policy, as codified in 10 U. S.C. §
2415, does not include this rationale.

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

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

21 Korb Decl. ¶ 6. The uncontroverted evidence establishes that
22 many homosexuals have served, and currently serve, in the
23 military, and that the majority of them do so without incident
24

25
26 ²¹ Assistant Secretary of Defense Dorn testified that
President Clinton's statements reflect the views of the
Department of Defense. Dorn Dep. at 31:1-9.

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

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

18 General Otjen was asked hypothetically whether, if
19 everyone in the military had no fear or prejudice against
20 homosexuals and did not morally disapprove of the homosexual
21 lifestyle, there would be any problem with unit cohesion in
22 the military as a result of permitting open homosexuals to
23 serve. See Otjen Dep., at 226:2-10. While General Otjen had
24 difficulty accepting this assumption, he agreed that if
25

26 ²² Defining "facts" as statistics, scientific studies,
and reports rather than opinions and anecdotes.

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

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

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

6 Defendants' argument that the Army regulation banning
7 homosexuals from service is based on rational, nonprejudicial
8 reasons is unpersuasive. Defendants' military experts have
9 conceded that their justifications for the policy are based on
10 heterosexual servicemembers' fear and dislike of homosexuals.
11 Mere negative attitudes, or fear, are constitutionally
12 impermissible bases for discriminatory governmental policies.
13 Cleburne, 473 U.S. at 448, 87 L.Ed.2d at 126. Unsubstantiated
14 presumptions concerning a particular group also constitute
15 prejudice and cannot serve as the rational basis for a
16 discriminatory governmental policy. Thus, to the extent the
17 Government's policy is based on the unfounded presumption that
18 servicemembers with a homosexual orientation will engage in
19 proscribed homosexual conduct,²³ the policy is not rationally
20 based. This Court cannot defer to military decisions based
21 solely on prejudice against a particular group. Id. The
22 defendants have not submitted any evidence that supports any
23 other basis for the policy.

24
25
26

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

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

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

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

19 **B. Substantive Due Process Claim**

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

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

7 **1. Standard of Review**

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

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

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

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

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

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

3 **3. Due Process Analysis**

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

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

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

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

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

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

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

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

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

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

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

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

8 C. First Amendment Claim

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

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

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

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

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

D. Other Claims

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

E. Conclusion

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

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

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

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

22 c. For an order enjoining defendants from taking
23 any adverse action against plaintiff by reason of her
24 homosexual status or on account of statements of her
25 homosexual orientation;
26

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

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

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

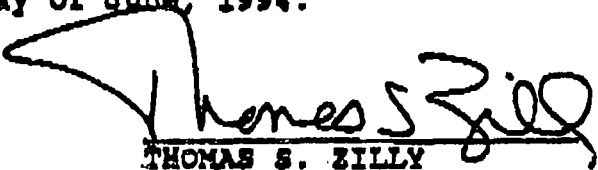
13 g. Costs of suit.

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

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

18 IT IS SO ORDERED.

19 DATED this 1st day of June, 1994.

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

*Gay in
Military*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X

LIEUTENANT COLONEL JANE ABLE,
PETTY OFFICER ROBERT REIGL,
FIRST LIEUTENANT KENNETH OSBORN,
SERGEANT STEVEN SPENCER,
LIEUTENANT RICHARD von WOHLD, and
SEAMAN WERNER KAHN.

CV 94 0976

Plaintiffs,

MEMORANDUM
AND
ORDER

against-

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

Defendants.
-----X

SULLIVAN & CROMWELL

(David H. Braff, Michael Lacovara, Penny Shane,
Julie B. Crockett, Eulalia Mack, of counsel)
125 Broad Street
New York, New York 10004
for plaintiffs.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

(Ruth E. Harlow, William M. Rubenstein, Marc B.
Elovitz, of counsel)
132 West 43rd Street
New York, New York 10036
for plaintiffs.

LAMBDA LEGAL DEFENSE & EDUCATION FUND

(Evan Wolfson, Beatrice Dobson, of counsel)
666 Broadway
New York, New York 10012
for plaintiffs.

DEPARTMENT OF JUSTICE

(Richard G. Lopley, Vincent M. Garvey, of counsel)
901 E Street, N.W., Room 1022
Washington, D.C. 20530
for defendants.

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.

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

4

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."

(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

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 1166.

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

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

Rights.'" Franco v. Kelly, 884 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

limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376, 38 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, 38 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

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, 102 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

13

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, 628 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

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); Mainhold v. United States Dep't of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993) (same), stay denied, CV-92-6044, 1993 WZSTLAW 19536R (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., Fruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992)

15

(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.

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).

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.

18

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, 650 F.2d 64 (2d Cir. 1988).

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

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.

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. Blutenick, 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

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. Tola, 560 F.2d 535 (2d Cir.

1977). In Sweeney v. Egan, 996 F.2d 1384 (2d Cir. 1993), and Union Carbide Agric. Prods. Co. v. Costle, 632 F.2d 1014 (2d Cir. 1980), the court found no substantial constitutional claim at issue. In Plaza Health Laboratories, Inc. v. Farales, 678 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 Centres, 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

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

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.

THE WHITE HOUSE
WASHINGTON

December 21, 1993

*action
officer
file
Cey*

Dear Mr. Hochberg:

The President has asked me to respond to your letter of November 2.

Your views are thoughtful and well-stated. As you know, the issue of gays-in-the-military has received sustained attention, resulting in the new policy announced on July 19.

The government's goal in the Meinhold Supreme Court motion was to allow the new policy to be implemented. The lower court's nation-wide injunction would have barred implementation of the new policy. The government's Supreme Court motion asked that the injunction be limited to Meinhold himself while his appeal was heard on the merits in the Court of Appeals. As you may know, the Supreme Court unanimously granted the application on this procedural point and limited the injunction to Meinhold himself.

Our view of the new policy and the reasons for it continue to be as stated by the President on July 19. As the President observed, the new policy "is not a perfect solution" and is "not identical with some of [his] own goals." At the same time, as the President also stated, the new policy represents "a major step forward" in many respects.

I appreciate your concern. I hope that these comments may be helpful in understanding the context of the government's motion in the Meinhold case and its relationship to the new policy.

Sincerely,



Bernard W. Nussbaum
Counsel to the President

Mr. Fred P. Hochberg
40 Fifth Avenue
Apartment 11C
New York, New York 10011--8843

WACHTELL, LIPTON, ROSEN & KATZ

file

FACSIMILE TRANSMITTAL

299 Park Avenue
New York, New York 10171
Telephone (212) 371-9200

TO: Bernard W. Nussbaum & Peter Pappas

FROM: Marc Wolinsky

COMPANY: Counsel to the President

DATE: November 11, 1993

FAX NO.: 202-456-6279

TIME:

MAIN NO.: 202-456-2632

DIRECT FAX LINE: (212) 371-1658

NO. OF PAGES:
(Including this page)

CHARGE NO.: 84168.500

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE TELEPHONE (212) 371-9200, EXTENSION 507 IMMEDIATELY.

MESSAGE:

THE INFORMATION CONTAINED IN THIS FACSIMILE TRANSMITTAL IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENT NAMED ABOVE.

This transmittal may be a confidential attorney-client communication or may otherwise be privileged and confidential. If the reader of this transmittal is not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this transmittal in error, and that any review, dissemination, distribution or copying of this transmittal is strictly prohibited. If you have received this in error, please notify us immediately by telephone (call us collect at 212-371-9200 ext. 507) and return the original transmittal to us by mail. Thank you.

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N.W.

P.O. BOX 7566

WASHINGTON, D.C. 20044-7566

(202) 662-8000

TELEFAX: (202) 662-8281

TELEX: 88-893 (COVLING WSH)

CABLE: COVLING

LANNY A. BREUER

DIRECT DIAL NUMBER

(202) 662-8538

LEONFIELD HOUSE

CURSON STREET

LONDON W1Y 8AG

ENGLAND

TELEPHONE: 071-406-8888

TELEFAX: 071-406-3061

BRUSSELS CORRESPONDENT OFFICE

44 AVENUE DES ARTS

BRUSSELS 1040 BELGIUM

TELEPHONE: 32-2-512-8800

TELEFAX 32-2-503-8808

November 11, 1993

BY FACSIMILE

Marc Wolinsky, Esq.
Wachtell, Lipton, Rosen & Katz
299 Park Avenue, 35th Floor
New York, NY 10171

Re: Sgt. Justin Elzie

Dear Marc:

Judge Sporkin issued the attached Opinion yesterday evening granting Sgt. Justin Elzie's Application for Preliminary Injunction. I thought it would interest you.

If you have any questions, please feel free to call me.

Sincerely yours,



Lanny A. Breuer

Enclosure

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUSTIN C. ELZIE,

Plaintiff,

v.

LES ASPIN, et al.,

Defendant.

Civil Action No. 93-1553
(Stanley Sporkin)

FILED

NOV 10 1993

MEMORANDUM OPINIONFILED IN DISTRICT COURT
DISTRICT OF COLUMBIA

This matter is before the Court on plaintiff's Application for Preliminary Injunction. Plaintiff, Justin Elzie, a sergeant in the United States Marine Corps ("Marine Corps"), brings this action against defendants Les Aspin, Secretary of Defense, John Dalton, Secretary of the Navy, and Carl Mundy, Jr., Commandant of the Marine Corps, seeking declaratory and injunctive relief charging that the Marine Corps improperly and unlawfully recommended him for discharge from active duty and barred him from a retirement benefits program. Plaintiff alleges that the Marine Corps took such action against him based solely on his public announcement that he is a homosexual. Defendants do not dispute that their action was based solely on plaintiff's public declaration of his sexual orientation. They assert, however, that the Marine Corps was authorized to take such action by long-standing military policy that permits service members to be separated from the armed forces on the sole ground of "homosexual admissions."

In his Application for Preliminary Injunction, plaintiff asks

this Court to 1) restore him to active duty in the Marine Corps; 2) enjoin defendants from discharging him from the Marine Corps during the pendency of this action on the basis of his status as a homosexual; 3) restore him to full participation in the Voluntary Separation Incentive and Special Separation Benefit ("VSI/SSB") program. It is plaintiff's position that if he succeeds on the merits, absent an injunction he will suffer irreparable injury because he will have been discharged from the Marine Corps.

STATEMENT OF FACTS

Plaintiff is an eleven year veteran of the Marine Corps. During his rise through the ranks from private to sergeant, he distinguished himself at every step. His service record is replete with commendations and awards and decorations. In 1982 he received a meritorious promotion to Private First Class. In 1984 he received another meritorious promotion to Corporal. In 1985 he received a citation for "outstanding service" from his commanding officer. In 1989 plaintiff was nominated for and selected "Marine of the Year" for his battalion and for his group. He successfully completed the training program at the selective Marine Corps embassy school in Quantico, Virginia and was subsequently charged with the security of some of the nation's senior government officials. He consistently received outstanding fitness reports.

In 1991, Congress established the Voluntary Separation Incentive and Special Separation Benefit ("VSI/SSB") program designed to reduce the size of the armed forces in keeping with a

perceived diminished threat to United States' interests posed by the "new world order." The VSI/SSS program provides, to those members of the armed forces who qualify, incentive payments and medical and veterans benefits as inducements to elect early retirement. 10 U.S.C. §§ 1174(a), 1175. Among the criteria disqualifying Marines' participation in the program for fiscal year 1993 is "pending administrative action which could culminate in discharge proceedings." All Marines Bulletin 349/92, Para. 5.H(2).

In 1992, plaintiff applied for acceptance into the VSI/SSS program planning to retire from the Marine Corps to pursue other career goals. At the time he applied, his service record made him eligible for the program and he was accepted into the program. On January 28, 1993, a United States district court in California enjoined the Department of Defense from "discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces." Meinhold v. United States Dept. of Defense, 808 F.Supp. 1455, 1458 (1993).¹

The day after that injunction issued, the President of the United States announced in a press conference that he opposed the military's policy on homosexual service and announced his determination to lift the ban and thereby end the policy of excluding or discharging service members "solely on the basis of

¹ The Supreme Court has since stayed the Meinhold injunction as it applies to persons other than the named plaintiff pending disposition of the appeal in the Ninth Circuit. Department of Defense v. Meinhold, 1993 U.S. Lexis 6922 (Oct. 29, 1993).

sexual orientation." The President's News Conference, 29 Weekly Comp. Pres. Doc. 108, 109 (Jan. 29, 1993). The President stated that the Department of Defense would conduct a review of the then-existing policy and draft an Executive Order reflecting the product of that review by July 15, 1993. The President also announced that while the Department of Defense reviewed the policy on homosexuals, an interim policy would obtain.

Under the interim policy, the military was barred from questioning prospective service members about their sexual orientation on induction applications. In addition, the interim policy allowed the military to process service members for separation pursuant to the existing policy, however, where the service member was subject to discharge solely because of his/her status as a homosexual the Attorney General was authorized to suspend final discharge and transfer the member to standby reserve pending completion of the policy review.

On the evening of January 29, 1993, the ABC television program World News Tonight aired an interview in which plaintiff declared that he is a homosexual. Plaintiff asserts he publicly revealed his sexual orientation in reliance on the President's announcement and the Meinhold decision. He subsequently made several public statements affirming his sexual orientation.

On February 5, 1993, plaintiff was informed that he had been accepted into the VSI/SSB program. On February 10, 1993, plaintiff was told that because of his statements regarding his sexual orientation the Marine Corps planned to remove him from the VSI/SSB

program. The Marine Corps gave plaintiff the option to agreeing to a voluntary separation, in which case he would be temporarily reaccepted into the VSI/SSB program with his benefits held in abeyance pending the final Executive Order with respect to the military ban. If the new policy allowed plaintiff to continue service in the Marine Corps, he would be given full VSI/SSB benefits. If he was not eligible for continued service under the new policy he would be denied VSI/SSB benefits. The Marine Corps advised plaintiff that if he refused a voluntary separation he would be involuntarily separated pursuant to Marine Corps regulations that authorize discharge on the grounds of homosexual "admissions." Plaintiff declined a voluntary separation with less than full VSI/SSB benefits and the Marine Corps began administrative discharge proceedings.²

On March 31, 1993, an Administrative Discharge Board recommended that plaintiff be discharged pursuant to MarCorSepMan § 6207.3b(2) which provides for discharge when a Marine "admits to being a homosexual or bisexual, unless there is a further finding that the member is not homosexual or bisexual." The discharge

² The Marine Corps' position on sexual orientation is found in Department of Defense ("DOD") Directive 1332.14 (Jan. 28, 1982), published at 32 C.F.R. part 41, app. A (1992). The policy provides for the separation of enlisted persons who have been found to have "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," or who have "stated that he or she is a homosexual." Marine Corps' regulations require the initiation of discharge proceedings where there is "probable cause" that a Marine has "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," or has "admitted to being a homosexual or bisexual, unless there is a further finding that the member is not homosexual or bisexual." Marine Corps Separation and Retirement Manual ("MarCorSepMan"), § 6207.3(b).

proceeding was based solely on plaintiff's statements regarding his sexual orientation. The Marine Corps argued that the exclusionary regulations were not limited to conduct, thus admissions of homosexual status would be sufficient grounds for discharge. Plaintiff's assertion that the regulations required a finding that he had a propensity to engage in homosexual conduct was rejected. The Administrative Discharge Board recommended discharge on the sole basis of plaintiff's "public admissions and numerous media statements."

On July 19, 1993, the President announced that the military's policy concerning homosexual service was being revised. The new policy, which took effect on October 1, 1993, removes homosexual orientation, standing alone, as a sufficient basis for discharge. In addition to an admission of homosexual orientation, there must be a finding that the service member has a propensity to engage in homosexual conduct. A service member's homosexual admission creates a rebuttable presumption of such propensity, which casts the burden on the service member to rebut the presumption. Separation is warranted under the new policy only when the service member fails to present evidence rebutting the presumption of propensity.

Plaintiff was officially removed from active duty on September 1, 1993. Defendants adopted the Administrative Discharge Board's recommendation of discharge and placed plaintiff on unpaid standby reserve. Accordingly, plaintiff's pay was terminated and he was given one half of the ordinary separation pay.

As a result of the Mainhold decision the parties agreed that plaintiff be returned to active duty and remain there pending resolution of this litigation. This agreement expired on October 29, 1993, when the Supreme Court limited the injunction in Mainhold solely to the named plaintiff. On November 2, 1993, this Court issued a temporary restraining order maintaining the status quo while it considered the issues presented in this case. The order restrained defendants for 10 days from taking any adverse action against plaintiff based solely on his status as a homosexual.

ANALYSIS

A party moving for a preliminary injunction must demonstrate: 1) a substantial likelihood of success on the merits, 2) irreparable injury absent an injunction, 3) relatively less injury to the non-moving party, and 4) that the injunction will promote the public interest. See Washington Metro. Area Transit Auth. v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). For the reasons set forth below, this Court finds that plaintiff is entitled to the preliminary injunction he seeks.

A. Likelihood of Success on the Merits.

Plaintiff has demonstrated probable success on the merits with respect to his removal from active duty. The policy applied to plaintiff must be reviewed under the rational basis test. Under the rational basis test, a government policy fails if it does not serve a legitimate governmental purpose or deprives an individual

of his constitutional or legal rights.

The cornerstone of the armed forces' homosexual ban is that homosexual's serving in the armed forces impair the ability of the military to perform its mission. According to the Marine Corps policy statement, homosexual Marines adversely affect the service's ability to "maintain discipline, good order, and morale; to foster mutual trust and confidence among Marines; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Marine Corps; to maintain public acceptance of military service; and to prevent breaches of security." MarCorSepMan § 6207.1

Defendants state that the courts should defer to the "considered professional judgment" of military officials as to who is fit to serve their country in the armed forces. Goldman v. Weinberger, 475 U.S. 503, 509 (1986). Defendants take the position that under the policy at issue here, "'appropriate military officials' concluded, as a matter of 'considered professional judgment,' . . . that 'the presence of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.'" Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction at 25, quoting Goldman supra at 509 and DOD Directive 1332. They also cite this circuit's holding in Dronenburg v. Zach, 741 F.2d 1388

(D.C. Cir. 1984) to support their assertion that the Marine Corps' discharge of plaintiff passes constitutional muster.

This court is unpersuaded by defendants' arguments. First the Drenenburg case involved sexual misconduct by a homosexual soldier. The instant case is devoid of any such allegation. This case involves adverse action against plaintiff based solely on his homosexual status. Recently, Judge Oberdorfer had the opportunity to pass on the same issue presented here, namely, whether a serviceman's homosexual status by itself can justify his discharge from active duty. See Salland v. Aspin, No. 93-1924 slip op. (D.D.C. Sept. 28, 1993). In that case Judge Oberdorfer granted a preliminary injunction to a homosexual sailor barring the United States Navy from discharging him solely on the basis of his sexual orientation. In so doing, Judge Oberdorfer distinguished between homosexual orientation and homosexual conduct in reaching the conclusion that the plaintiff, Richard Salland, would likely prevail on the merits. Neither the Court of Appeals nor the Supreme Court has yet ruled on this issue.

Defendants present no evidence that homosexual status alone adversely affects the accomplishment of the military mission. Examination of the record in this case reveals no basis, other than the Marine Corps' policy statement that supports the discharge of a service member solely because of that member's status as a homosexual. It is well established that courts cannot give "private biases" legal effect. Zalora v. Sidoti, 466 U.S. 429, 433 (1984). At this stage of the proceedings, plaintiff presents

a strong case that he will probably succeed in establishing that the policy banning homosexuals from the military solely on the basis of status serves no legitimate governmental purpose.

B. Irreparable Injury.

The Court finds that plaintiff will suffer irreparable injury if the Marine Corps is allowed to involuntarily discharge him and deprive him of his rights as a Marine. First, plaintiff will suffer the loss of constitutional rights for which money damages are inadequate, namely, the right to equal protection under the Fifth Amendment. Defendants' actions also implicate free speech concerns under the First Amendment. Second, plaintiff stands to lose his medical benefits, his opportunity to participate in the VSI/SSB program, and a portion of his retirement pay. Third, plaintiff faces the stigma of being removed from active duty as a sergeant in the Marine Corps--a position which he has performed in a sterling fashion for eleven years--and labeled as unfit for service solely on the basis of his sexual orientation, a criterion which has no bearing on his ability to perform his job. That plaintiff has performed in exemplary fashion for eleven years clearly negates defendants' assertion that homosexuality is incompatible with being a good Marine. Plaintiff did not become any less of a Marine on the day he announced his sexual orientation.

C. Relatively Less Injury to Defendants.

Granting a preliminary injunction keeping plaintiff on active duty and maintaining his eligibility for the VSI/SSB program pending the final outcome of this case will result in no discernible injury to defendants. Plaintiff served in the Marine Corps for eleven years with distinction. This Court sees no injury to defendants by having the services of a "nodal Marine" for the duration of this litigation. What is more, plaintiff is ready and willing to leave the Marine Corps voluntarily if he is permitted to participate in the VSI/SSB program. This Court is at a complete loss why the Marine Corps would not accede to this reasonable request particularly since in every respect plaintiff is entitled to be placed in the program. Indeed, prior to acknowledgement of his homosexuality he had been accepted into the VSI/SSB program. It seems to this Court that the defendants want to go beyond merely enforcing their policy on homosexuality and actually want to punish plaintiff because of his statements that he is a homosexual. This the law does not allow.

D. Injunction Would Promote the Public Interest.

The public's interest in the efficient operation of the armed forces is clear. The Court does not believe that banning homosexuals from the armed forces on the basis of status alone will adversely affect the military's mission. The issue in this case is status alone. Conduct is not involved and there is nothing in this

Court's decision which would prevent the armed forces from enforcing conduct codes.

The same arguments made today concerning homosexuals were made in the past when efforts were first made to knock down sexual and racial barriers in the armed forces. This nation was told that we could not have effective armed services unless we maintained racially and sexually segregated armed forces. We now know such statements were grossly in error. Many say this same misconception applies to the homosexual issue. The ability of homosexuals to perform in all phases of the workplace, including the armed services, has been proven beyond any question. There is simply no correlation between an individual's sexual orientation and his or her intellectual or physical capacity to perform in the workplace.

Indeed, in considering the public interest, it might well be argued that to deprive our armed forces of the intellectual and physical prowess of some extraordinarily talented individuals strictly because of their sexual orientation would be doing a great disservice to this nation. If the Court accepts defendants' position, it would create an incongruity in that the policy would preclude homosexuals from serving in the armed forces but would not extend to the Commander-in-Chief.

For the above reasons the Court enters a preliminary injunction barring defendants from taking any adverse action against plaintiff solely on the basis of his status as a homosexual. So long as plaintiff discharges his duties and responsibilities as a United States Marine Corps sergeant he shall

be allowed to remain on active duty pending this Court's determination on the merits.

CONCLUSION

Because the Court finds that plaintiff has shown a likelihood of success on the merits and the balancing of the equities favors plaintiff, plaintiff's Application for Preliminary Injunction will be granted.

DATE _____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUSTIN C. ELZIE,

Plaintiff,

v.

LES ASPIN, et al.,

Defendant.

Civil Action No. 93-1853
(Stanley Sperkin)

FILED

NOV 10 1993

CLERK OF DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

On the basis of the findings and reasons stated in the accompanying Memorandum Opinion, it is this 10 day of November, 1993 hereby

ORDERED: that for the duration of this litigation defendants, Les Aspin, Secretary of Defense, John Dalton, Secretary of the Navy, and General Carl Mundy, Jr., Commandant of the Marine Corps, their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, are enjoined from taking any adverse action against plaintiff, separating plaintiff from active duty, placing him on standby reserve, discharging him from the Marine Corps or denying him participation in the VSI/SSB program on the sole basis of his sexual orientation.


UNITED STATES DISTRICT JUDGE

File

THE WHITE HOUSE
WASHINGTON

DATE: 11/22

NOTE FOR: *CLIFF SLOW; Bernice; George*

The President has reviewed the attached, and it is forwarded to you for your:

Information ☐

Action ☒

see (P) note

Thank you.

JOHN D. PODESTA
Assistant to the President
and Staff Secretary
(x2702)

cc:

THE WHITE HOUSE

WASHINGTON

November 17, 1993

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

MEMORANDUM FOR THE PRESIDENT

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

SUBJECT: New gays-in-the-military decision

Overview

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

The Steffan Decision

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

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

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

(2) it is unreasonable to use status as a basis for predictions about conduct or a "propensity" to conduct;

(3) the perceived effect on morale, discipline, and recruitment of heterosexuals cannot be accepted because "[t]he Constitution does not allow Government to subordinate a class of persons simply because others do not like them";

and

*This is in
President
& Standard*

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

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

Effect of the Steffan decision on the new policy

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

Next steps

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

Talking points

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

THE PRESIDENT HAS SEEN ///

Days in Meinhold file

THE WHITE HOUSE

WASHINGTON

October 29, 1993 11:28 P7:

Rein-Ex-11
B

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM ^{BN}
COUNSEL TO THE PRESIDENT

CLIFFORD M. SLOAN ^{CMS}
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Meinhold gays-in-the-military decision

The Supreme Court today issued a stay of the injunction in the Meinhold case, insofar as it applies to anybody besides Meinhold. (A copy of the Supreme Court's order is attached).

Although Meinhold brought the case only on his own behalf, the district court issued a nation-wide injunction, and the Court of Appeals refused to narrow it. On Tuesday, October 26, the Solicitor General filed a request for emergency relief on the ground that the injunction was preventing implementation of the new policy and that the extension of the injunction beyond Meinhold personally was a clear legal error.

The Supreme Court's order rests on a narrow procedural ground about the scope of an injunction in a case brought by an individual. It should not be read as a ruling on the constitutional merits of Meinhold's claim. The distinction that the Court drew (applicability to Meinhold, as opposed to applicability to other people); the case that it cited (Heckler v. Lopez); and the swiftness and unanimity of the order all highlight the narrow procedural character of the order.

The Solicitor General's application to the Supreme Court also requested a stay of the injunction to the extent that it required destruction of documents relating to Meinhold. The Court refused to stay that part of the injunction, but suggested that the government could comply by filing the documents under seal with the district court.

The Meinhold case on the merits with respect to Meinhold himself remains pending in the Court of Appeals and is scheduled for argument in December.

The way is now clear for implementation of the new policy. It is possible that we will not issue the new regulations until the DOD authorization bill (with the Nunn language on gays-in-the-military as one provision) emerges from conference. Although we have not publicly stated that the regulations will wait for

the legislation, we do not want the new regulations to become a target while the legislation remains in conference.

ORDER LIST

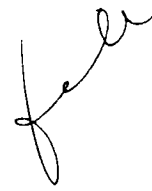
FRIDAY, OCTOBER 29, 1993

ORDER IN PENDING CASE

**A-373 UNITED STATES DEPARTMENT OF DEFENSE, ET AL.
V. VOLKER KEITH MEINHOLD**

The application of the Solicitor General for a stay, presented to Justice O'Connor and by her referred to the Court, is granted in part. It is ordered that so much of the order of the United States District Court for the Central District of California, No. CV 92-6044 TJH (JRx), filed September 30, 1993, as grants relief to persons other than Volker Keith Meinhold is stayed pending disposition of the appeal by the United States Court of Appeals for the Ninth Circuit. See *Heckler v. Lopez*, 463 U.S. 1328 (Rehnquist, J., in chambers), motion to vacate stay denied, 464 U.S. 879 (1983); *id.*, at 881 (Stevens, J., dissenting in part). The request for a stay of the portion of the injunction prohibiting the Government from maintaining records pertaining to Meinhold is denied. It is further ordered that the Government can file, under seal, any such documents pending the final outcome of this litigation.

THE WHITE HOUSE
WASHINGTON



October 12, 1993

MEMORANDUM FOR BRUCE LINDSEY
GEORGE STEPHANOPOULOS

FROM: CLIFF SLOAN

CC: BERNIE NUSSBAUM ✓

SUBJECT: Gays-in-the-Military Litigation

The Meinhold case is approaching another critical stage. Last Friday night, the Ninth Circuit denied our pending motions to narrow the scope of the injunction so that it would apply only to Meinhold. Thus the district court's nation-wide injunction remains in place.

The district court's injunction, as expanded on September 30, now prohibits any adverse actions against service members (not simply denial of enlistment and dismissals, as before) on the basis of "sexual orientation" in the absence of "proven sexual conduct" that "interfere[s] with the military mission of the armed forces of the United States." It likewise forbids creating or maintaining records or files about a service member's sexual orientation in the absence of proven sexual conduct that interferes with the military mission of the armed forces.

We must now decide whether to go to the Supreme Court with a request for an emergency order staying the injunction as it applies to anybody besides Meinhold. DOJ and DOD are currently weighing the options; no decision has been made.

We have three options. None of the options is problem-free.

(1) Immediate appeal to the Supreme Court to narrow the injunction to Meinhold

First, we could go to the Supreme Court immediately -- by Monday, at the latest. Under the Supreme Court's three-part test, we would argue (1) that the probability is overwhelming that the lower courts were in error (because there is no legal basis for a nation-wide injunction); (2) that irreparable injury would occur absent a stay (because the President and the military would be delayed from implementing their military policy, because the day-to-day operations of the military would be subject to a district court's intrusive supervision, and because the district court's order would require a massive search and destruction of existing files); and (3) that the public interest would be

injured (because the carefully crafted gays-in-the-military compromise could not be implemented). We would state that DOD is prepared to issue its regulations implementing the new policy, but that DOD cannot do so because of the injunction. (Note that the Nunn legislation is now expected not to come out of conference for several weeks. Under this immediate-appeal option, DOD would be issuing its regulations before the conference is concluded).

The advantage of this immediate-appeal option is that it would underscore the urgency of the situation. To the extent that we wait, DOD may have to start its massive search and destruction of files. ~~In addition, if we do not appeal now, it may look like we think that the injunction is livable.~~

The disadvantage is that we would be rushing to the Supreme Court on a case arising under the old policy. We also would be going up attacking an injunction that purports to rest on a distinction between actions based on orientation (which are prohibited) and actions based on conduct that interferes with the mission of the military (which are permitted). Still another disadvantage is that, under this option, the regulations will be issued before the conference report. This will give Senator Nunn and other Members of Congress a chance to disapprove any regs they dislike in the conference.

It is my understanding that DOD is currently inclined to favor this immediate-appeal option.

(2) Appeal to the Supreme Court in 3-5 weeks (after the DOD legislation is approved)

Second, we could wait to go to the Supreme Court until after the legislation is enacted -- and after the regulations are issued subsequent to the legislation. The analysis under the Supreme Court's three-part test would be essentially the same as that in the first option.

The advantage of this option is that the regulations would not be issued before the legislation. To the extent that the regulations rest in part on the legislation, they stand on firmer legal ground. Moreover, the conferees would not have a chance to express disapproval of the regulations.

The disadvantage of this option is that the injunction would remain in place for what will apparently be several weeks, which would dilute our sense of urgency. Additionally, DOD might have to begin the search and destruction of its records. Furthermore, the district court's prohibition of any disparate treatment of any individual might, in DOJ's view, give every soldier who thinks his sergeant gave him extra push-ups because of his sexual orientation a chance to go to the district court and claim contempt of court.

(3) No appeal of injunction to Supreme Court until Meinhold case is decided

Third, we could leave the injunction in place and not appeal it to the Supreme Court at this stage at all. We would continue to litigate the Meinhold case in the court of appeals. Our reply brief is due this week and the case will be argued in December. If necessary, we would go up to the Supreme Court in Meinhold or another case after a full decision on the merits.

The advantage of this option is that it would avoid going to the Supreme Court on this issue now at all. The disadvantage is that DOD would be subject to the injunction, including the search and destruction of records, for what could be a long time. (The Meinhold case might not be decided until several months after the argument). Additionally, it might be charged that the Administration had not vigorously defended the gays-in-the-military policy because we had allowed the injunction to stay in place without going to the Supreme Court.

We will need to make a decision on this issue very soon.

THE WHITE HOUSE
WASHINGTON

*Gays
in the
Military*

October 13, 1993

MEMORANDUM FOR BRUCE LINDSEY
GEORGE STEPHANOPOULOS

FROM: CLIFF SLOAN

CC: BERNIE NUSSBAUM ✓

SUBJECT: Gays-in-the-Military Litigation

As a follow-up to my memo of yesterday about the Meinhold case, I wanted to make one additional point.

In conversations with DOJ and DOD -- and in their filings to the Court of Appeals -- the Departments have stressed that the expanded injunction would require a massive search and destruction of existing DOD records. If, however, we were otherwise inclined to let the injunction stay in place until Meinhold is decided (which would probably be many months from now), we might be able to give the injunction a narrow reading to avoid this problem.

The expanded injunction prohibits DOD "from creating or maintaining, or permitting any person or entity to create or maintain, any record or file, including, but not limited to, lists, evaluations, reports, classifications, and designations, whether official or unofficial, at any level of command, which is based on sexual orientation in the absence of proven sexual conduct -- if such conduct is proven to interfere with the military mission of the armed forces of the United States." We could take the position that the "creating or maintaining" language applies prospectively to new files, and does not require the search and destruction of existing files. Because the district court has threatened severe contempt sanctions for violations of the injunction, we might want to obtain the district court's approval for such an interpretation.

In addition, based on discussions with DOJ, my earlier memo also states that the expanded injunction prohibits any adverse actions and gives DOJ's example of a sergeant ordering extra push-ups. Here, too, however, the injunction can be given a narrower reading. The expanded injunction prohibits DOD from "taking any action whatsoever . . . against gay or lesbian service members, or prospective service members, that in any way affects, impedes, interferes with, or influences their military status, advancement, evaluation, duty assignment, duty location, promotion, enlistment or reenlistment based upon their sexual orientation in the absence of proven sexual conduct -- if such

conduct is proven to interfere with the military mission of the armed forces of the United States." Contrary to DOJ's push-ups example, a natural reading of this provision is that it applies to official actions regarding formal military placements and assignments.

Provided that the destruction-of-records point can be overcome, the real issues is whether it is preferable to leave the injunction in place and delay implementation of the new policy while Meinhold is being considered and decided on the merits, or to go to the Supreme Court now in an attempt to narrow the injunction and permit the new policy to be implemented.

—
THE WHITE HOUSE
WASHINGTON

Bernie —

FYI — Defense is
trying to decide whether
to go ahead with its new
gays-in-the-military
regulations. DOT
recommends holding
up, for litigation reasons.

I've given copies of this
memo to George and Bruce.

— — Cliff



U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

September 28, 1993

TO: Jamie Gorelick
General Counsel
Department of Defense

FROM: Edwin S. Kneedler
Deputy Solicitor General

Mark I. Levy
Deputy Assistant Attorney General

John A. Rogovin
Deputy Assistant Attorney General

RE: Promulgation of Regulations Implementing
New Policy on Homosexuals in the Military

We understand that the Department of Defense is considering public issuance on October 1, 1993, of regulations implementing the new policy on homosexuals in the military announced by the President and the Secretary on July 19, 1993. The regulations would be slated to take effect on November 1, subject however to the effect of any judicial injunction then in place.

A. As we discussed yesterday evening, we believe that the proposed action would present substantial litigation risks that should be taken into account in reaching a final decision:

1. Publication before we have succeeded in narrowing the existing Meinhold injunction would almost certainly lead Judge Hatter to examine the new regulations and issue a further order finding some or all of them unconstitutional and specifically enjoining their implementation. This would cut against our goal of having the Ninth Circuit or, if necessary, the Supreme Court narrow the existing injunction to Meinhold individually. That goal is important precisely so that the new policy may be implemented, and so that Judge Hatter will not have the chance to offer the first, highly visible, and almost certainly highly unfavorable judicial reaction to it.

2. Publication of regulations would also complicate and worsen our procedural posture.

- a. At a minimum, further proceedings in our effort to have the existing injunction limited to Meinhold himself will be clouded by arguments that will be raised about the new policy, including specific objections to particular implementing regulations.
- b. If Judge Hatter asserts jurisdiction and enjoins the new regulations, we will have to take a new appeal to the Ninth Circuit, probably before it has acted on our petition to rehear en banc the panel's denial of our motion to narrow the existing injunction. That would be a very confusing procedural situation for the court of appeals to resolve.
- c. While our emergency efforts to narrow the injunction thus far have been limited to the procedural ground of overbreadth, DOD's proposed implementation would probably force us to brief and argue, for the first time, the facial validity of the new policy. That argument would have to be made before the new policy can be implemented, in highly visible emergency proceedings, and in a case that should involve (and in which the record addresses) only one individual and only the old, less favorable and somewhat less defensible policy.
- d. It would be preferable to wait until we can rely on an Act of Congress, together with implementation of the President's policy, in seeking a stay from the Supreme Court, should that be necessary. We could then argue that the political branches have spoken in unison, that their actions are presumptively constitutional, and that the way should be clear for implementation. It would be best to have no detailed implementing regulations to bog the Court down in secondary issues (let alone consideration of the new policy on the merits).

3. Publication of new regulations at this point may invite on-the-record Congressional examination before the pending legislation is passed. This could lead to Congressional objections to particular implementing regulations, or attempts to modify the legislation that would at best delay its passage. It would also weaken considerably the otherwise useful argument that, under Chevron, the courts owe deference to the regulations as legitimate administrative interpretations of whatever statutory provisions are ultimately enacted. Finally, it could lead to the inclusion in committee reports or floor statements of unfavorable language that would undercut the argument for deference.

B. We would instead propose (although the Solicitor General has not yet formally authorized this course) that our next step be a petition for en banc rehearing of the Ninth Circuit panel's September 22 order denying our motion to narrow the existing injunction to Meinhold. Such a petition would present a single, essentially procedural issue (the nationwide scope of the injunction entered in a suit brought by one plaintiff) on which Judge Hatter is certainly wrong, irrespective of the merits of Meinhold's substantive constitutional arguments. If the Ninth Circuit has not acted by the time the pending legislation is enacted, we could seek a stay from the Supreme Court -- again solely on the scope of the injunction -- in order to allow the Secretary to implement the President's policy and the legislation. Accordingly, solely from the standpoint of litigation strategy, we strongly advise awaiting passage of the legislation, and then taking the position that the regulations are ready for promulgation but will not be published until the cloud of the injunction is lifted. That strategy is designed to minimize Judge Hatter's involvement, contain any possible damage from adverse appellate resolution of the Meinhold case, and reserve all arguments concerning the validity of the new policy and regulations for later cases, before other judges, arising from the actual application of that policy.

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.

Text of Pentagon's New Policy Guidelines on Homosexuals in the Military

Special to The New York Times

WASHINGTON, July 19 — Following is the text of the Pentagon's new policy guidelines to commanders on homosexuals in the military.

Accession Policy

Applicants for military service will no longer be asked or required to reveal if they are homosexual or bisexual, but applicants will be informed of the conduct that is proscribed for members of the armed forces, including homosexual conduct.

Discharge Policy

Sexual orientation will not be a bar to service unless manifested by homosexual conduct. The military will discharge members who engage in homosexual conduct, which is defined as a homosexual act, a statement that the member is homosexual or bisexual, or a marriage or attempted marriage to someone of the same gender.

Investigations Policy

No investigations or inquiries will be conducted solely to determine a service member's sexual orientation. Commanders will initiate inquiries or investigations when there is credible information that a basis for discharge or disciplinary action exists. Sexual orientation, absent credible information that a crime has been committed, will not be the subject of a criminal investigation. An allegation or statement by another that a service member is a

homosexual, alone, is not grounds for either a criminal investigation or a commander's inquiry.

Activities

Bodily contact between service members of the same sex that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts (e.g., hand-holding or kissing in most circumstances) will be sufficient to initiate separation.

Activities such as association with known homosexuals, presence at a gay bar, possessing or reading homosexual publications or marching in a gay rights rally in civilian clothes will not, in and of themselves, constitute credible information that would provide a basis for initiating an investigation or serve as the basis for an administrative discharge under this policy.

The listing by a service member of someone of the same gender as the person to be contacted in case of emergency, as an insurance beneficiary or in a similar context, does not provide a basis for separation or further investigation.

Speech within the context of priest-penitent, husband-wife or attorney-client communications remains privileged.

Off-Base Conduct

No distinction will be made between off-base and on-base conduct.

From the time a member joins the service until discharge, the service member's duty and commitment to the unit is a 24 hour-a-day, seven-day-a-week obligation.

Military members are required to comply with both the Uniform Code of Military Justice, which is Federal law, and military regulations at all times and in all places. Unacceptable conduct, homosexual or heterosexual, is not excused because the service member is not "at work."

Investigations and Inquiries

Neither investigations nor inquiries will be conducted solely to determine an individual's sexual orientation.

Commanders can initiate investigations into alleged homosexual conduct when there is credible information of homosexual acts, prohibited statements or homosexual marriage.

Commanders will exercise sound discretion regarding when credible information exists, and will evaluate the information's source and all attendant circumstances to assess whether the information supports a reasonable belief that a service member has engaged in proscribed homosexual conduct. Commanders, not investigators, determine when sufficient credible information exists to justify a detail of investigative resources to look into allegations.

Credible Information

Credible information of homosexual conduct exists when the information, considered in light of its source and all attendant circumstances, supports a reasonable belief that a service member has engaged in such conduct. It requires a determination based on articulable facts, not just a belief of suspicion.

Security Clearances

Questions pertaining to an individual's sexual orientation are not asked on personnel security questionnaires. An individual's sexual conduct, whether homosexual or heterosexual, is a legitimate security concern only if it could make an individual susceptible to exploitation or coercion, or indicate a lack of trustworthiness, reliability, or good judgment that is required of anyone with access to classified information.

The Threat of Extortion

As long as service members continue to be separated from military service for engaging in homosexual conduct, credible information of such behavior can be a basis for extortion. Although the military cannot eliminate the potential for the victimization of homosexuals through blackmail, the policy reduces the risk to homosexuals by making certain categories of information largely immaterial to the military's initiation of investigations.

Only credible information that a service member engaged in homosexual conduct will form the basis for initiating an inquiry or investigation of a service member; suspicion of an individual's sexual orientation is not a basis, by itself, for official inquiry or action.

Extortion is a criminal offense, under both the U.C.M.J. and United States Code, and offenders will be prosecuted. A service member convicted of extortion risks dishonorable discharge and up to three years confinement. Civilians found guilty of blackmail under the U.S. Code may be

subject to a \$2,000 fine and one-year imprisonment. The risk of blackmail will be addressed by educating all service members on the policy and by emphasizing the significant criminal sanctions facing convicted extortionists.

Outing

A mere allegation or statement by another that a service member is a homosexual is not grounds for official action. Commanders will not take official action against members based on rumor, suspicion or capricious allegations.

However, if a third party provides credible information that a member has committed a crime or act that warrants discharge, e.g., engages in homosexual conduct, the commander may, based on the totality of the circumstances, conduct an investigation or inquiry, and take nonjudicial or administrative action or recommend judicial action, as appropriate.

Commanders are responsible for initiating an investigation when credible information exists that a crime or basis for discharge has been committed. The commander examines the information and decides whether an investigation by the service investigative agency or a commander inquiry is warranted, or if no action should be taken.

Harassment

Commanders are responsible for maintaining good order and discipline.

All service members will be treated with dignity and respect. Hostile treatment or violence against a service member based on a perception of his or her sexual orientation will not be tolerated.

Calculating the Rostenkowski Factor

By DAVID E. ROSENBAUM

Special to The New York Times

WASHINGTON, July 19 — If Representative Dan Rostenkowski is indicted, he will have to step aside as chairman of the House Ways and Means Committee, and President Clinton will lose his strongest ally in Congress on many of the issues that are central to his Presidency.

Lawmakers and their staff members said today that they doubted the new developments would affect the way the House-Senate conference committee deals in the next few weeks with the President's deficit-reduction program.

Prosecutors said it could be weeks before charges were filed against Mr. Rostenkowski, so he is expected to continue to lead the House conferees in the tense negotiations with the Senate this month over tax increases and spending cuts.

Unwavering Support for Clinton

But the prevailing view on Capitol Hill is that if an indictment is forthcoming it could widen the odds that the President would succeed in winning approval of his plans for health care, trade, welfare and other areas under the Ways and Means Committee's jurisdiction.

Mr. Rostenkowski, a 65-year-old Democrat from Chicago who was trained by the late Mayor Richard J. Daley, is seen by his friends and foes as a peerless legislative tactician. This year, his support for the Clinton Administration has been unwavering.

Just before his committee took up the budget package last spring, he told an interviewer: "I'm going to be as publicly engaged in the Clinton crusade as I can. I'm not the quarterback. I'm more the downfield blocker."

The budget conference is expected to be wrapped up in the next three weeks. A senior Administration official who has been working on the legislative program said he did not believe that the prospects of a Rostenkowski indictment would have any affect on this particular conference. "This is going to happen very quickly," the official said.

But what about legislation this fall and next year? "I don't want to think about it," the official replied.

Possible Successor

The rules of the Democratic Caucus in the House require a chairman under indictment to relinquish the chairman-



Associated Press

Robert V. Rota

ship until the legal situation is resolved.

In this case, Representative Sam M. Gibbons, a Democrat from Florida who is second to Mr. Rostenkowski in seniority, would become acting chairman. Over the years, Mr. Gibbons, who is 73 and is in his 16th term in Congress, has specialized in trade issues and has never been heavily involved in taxes, health policy or welfare.

In an interview today, Mr. Gibbons said he hated the thought of "moving ahead at someone else's expense," but he added: "I have prepared myself to move to take over the committee if the time arrives. I've thought about it a lot and made whatever preparations I could."

The Senate was not in session today and no votes were scheduled in the House, so few lawmakers were in their offices here. Many who could be reached declined to speak on the record about Mr. Rostenkowski and Mr. Gibbons, but their general view was that Mr. Rostenkowski's legislative skill could not be matched.

'Irreplaceable' Chairman

Former Representative Thomas J. Downey, a Democrat from Long Island who served on the Ways and Means Committee and was especially close to Mr. Rostenkowski, put the case this

If a chairman is indicted, Clinton faces up hill fight on legislation.

way: "Sam's a terrific guy, and I don't mean to denigrate him in any way. But it's not just that Rostenkowski has command of the Ways and Means Committee. His strong leadership ability forces the House and the Senate to focus on what has to be done, and his unwavering support is irreplaceable."

Mr. Rostenkowski's principal talent, said a staff assistant to another Congressman who has observed the chairman closely for years, is "an unbelievable sense of knowing how much he has to give and how much he can take and still hold a majority vote."

That was what Mr. Rostenkowski did this spring when he made just enough changes in the President's budget plan so that he could be sure of the support of all 24 Democrats on his committee. The measure was approved in May on a straight party-line vote.

Then, when the bill reached the House floor in June, the Democrats from the Ways and Means Committee, guided by the chairman, were responsible for rounding up votes from other Democrats. Eventually, the measure was approved by 219 to 213, with all the Republicans in the House in opposition.

Friends Can't Believe Charge

The one way the expectation of an indictment could directly affect the conference negotiations, lawmakers said, would be if his personal problems distracted Mr. Rostenkowski from the legislative business at hand.

So far this year, that has not been the case. "With this big cloud and all its

political weight that's been on the chairman's mind and shoulders throughout this process, it has not affected his ability to lead the committee," said Representative Charles B. Rangel of Manhattan, the fourth-ranking Democrat on the Ways and Means Committee.

Since rumors began spreading last year about the criminal investigation, Mr. Rostenkowski's friends have been

saying they could not believe that he had his hand in the petty-cash drawer. He could have retired and not run for re-election last year and kept more than \$1 million in leftover campaign money, the last year it was legally possible to do so.

Mr. Rostenkowski, who had no public comment today, has said in the past that he has done nothing wrong, has no idea what prosecutors are looking for

and is a victim of a political witch hunt begun by the Bush Administration's Justice Department.

Mr. Rangel and several others said that for the time being at least Mr. Rostenkowski's authority would not be diminished. Lawmakers continue to hope that Mr. Rostenkowski will not be indicted, Mr. Rangel said, and if he is indicted, they will prefer to believe that he will be acquitted.