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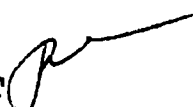
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THE WHITE HOUSE
WASHINGTON

Gayden, MD

June 29, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM
COUNSEL TO THE PRESIDENT 

SUBJECT: Department of Justice brief in Meinhold case

The current plan is that no briefs will be filed on the constitutional merits of the gays-in-the-military issue until the new policy has been determined. After that determination is reached, we will work to ensure that the Administration's policy is vigorously defended.

In the Meinhold case, DOJ has asked for an extension to July 19, 1993 for the filing of the government's brief. Meinhold has agreed to the extension. DOJ expects to receive the extension and will not file a brief in the meantime.

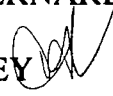
You should also be aware that, in another gays-in-the-military case pending in the U.S. Court of Appeals for the District of Columbia Circuit (Steffan v. Aspin), the government's brief is likewise due on July 19, 1993.

THE WHITE HOUSE
WASHINGTON

June 28, 1993

MEMORANDUM FOR THE HONORABLE WEBSTER HUBBELL, AND
THE HONORABLE BERNARD NUSSBAUM

FROM:

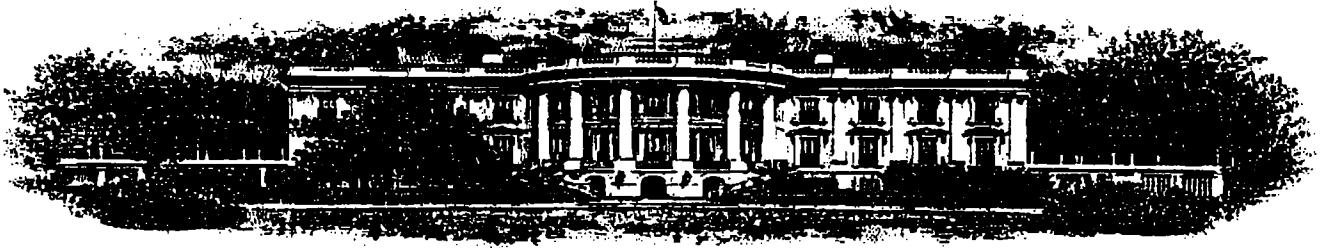
CHRISTINE A. VARNEY 
Secretary to the Cabinet

In the Department of Justice Weekly Cabinet Report for the week of June 27th through July 3rd, the Meinhold case was discussed. In my summary of the weekly reports to the President, the Meinhold case was discussed. The President has requested a written summary of our arguments prior to our submission of the appellate brief.

Please provide me with a one page memorandum to the President summarizing the Department of Justice position in the Meinhold case by the close of business on June 28th.

cc: Steve Neuwirth

The White House



COUNSEL'S OFFICE

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FROM: Bernard Nussbaum

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COMMENTS: Steve

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to Christine and let me see it?

- Bernie

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June 23, 1993

VIA TELECOPIER

Bernard W. Nussbaum, Esquire
Assistant to the President and
Counsel
The White House
Washington, D.C. 20500

Re: Gays in the Military

Dear Bernie:

I understand that the Justice Department's draft brief to the Ninth Circuit in the Mainhold case, which might address the merits of the pre-Clinton military ban, is being reviewed through normal governmental channels and that, therefore, my services on this and related matters are no longer needed.

If this information is incorrect and you would like me to review the draft, please let me and the Justice Department know immediately. The brief is due to be filed very shortly.

It has been an honor for me to serve on this project. As you know, I continue to be interested in serving the Administration if a suitable opportunity arises.

Sincerely,



Jerome I. Chapman

1 - Bwn
2 - File

THE WHITE HOUSE
WASHINGTON

File

March 29, 1993

MEMORANDUM TO ALL SENIOR STAFF

FROM: George Stephanopoulos

SUBJECT: Four steps to communicate Administration policy on
gays in the military

To manage the news coverage of the Administration's policy on gays in the military, the following steps should be taken immediately:

(1) All Administration officials and spokespeople should refrain from speculating about hypothetical policy developments. Comments should be limited to: "The President is committed to ending discrimination in the military. He is waiting for the report from the Secretary of Defense."

(2) When asked by the press for the Administration's position on the Senate hearings, please refrain from characterizing the hearings positively or negatively.

(3) When asked by the press to clarify the President's meaning of status versus conduct, refer reporters to President-elect Clinton's comments in the past. He has defined conduct as inappropriate behavior rather than the mere declaration of one's status. [In a post-election press conference last November, President-elect Clinton said, "I don't think status alone, in the absence of some destructive behavior, should disqualify people" (emphasis added).]

(4) I will ask public relations officials at DoD and Justice to maintain regular and clear lines of communication between their agencies and the White House to communicate any departmental developments (e.g., court appeals, military studies) concerning the issue of gays in the military.

cc: Walter Dellinger - 3/30/93



Office of the Attorney General
Washington, D. C. 20530

July 19, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: THE ATTORNEY GENERAL

RE: DEFENSIBILITY OF THE NEW POLICY ON HOMOSEXUAL
CONDUCT IN THE ARMED FORCES

The Supreme Court has repeatedly stated that the courts must review decisions by the President and by military commanders deferentially, taking into account the separate nature and special needs of military society. As a consequence, it is possible to justify in the military setting constraints on individual liberty and choice that might be invalid in civilian society. Because of the extraordinary deference paid by the courts to military service, we are confident that the new policy proposed by the Secretary of Defense will be upheld against constitutional challenge. Moreover, the proposed policy (hereafter, "the policy") that the Secretary of Defense has submitted changes earlier policy in three respects that should improve the ability of the Department of Justice to defend the policy in court.

First, the policy changes the premises on the basis of which questions involving the service of homosexuals in the military are to be resolved. The policy reiterates the prior Defense Department view that "homosexuality is incompatible with military service because it interferes with the factors critical to combat effectiveness." However, the policy adopts a new position that sexual orientation is a private matter and is not a bar to service "unless manifested by homosexual conduct." Under the policy, therefore, the military would be directed to judge an individual's suitability for service on the basis of conduct, and homosexual conduct (but not an unmanifested orientation) would be grounds for separation from service. We can be confident that the prohibition on acts that everyone would regard as explicitly sexual would be sustained under existing case law.

Second, the policy implements the distinction between "status" and "conduct" that you drew in your January 29 directive. Most important in this regard is the treatment of statements of homosexuality or bisexuality as creating "a rebuttable presumption that the service member is engaging in homosexual acts or has a propensity or intent to do so." First Amendment problems would

arise if the policy proscribed certain speech, in and of itself, because of disapproval of the content or the viewpoint expressed. This approach provides much clearer authority than did the pre-January policy for the argument that the Department of Justice has been making persuasively to the courts up to this point that a member who credibly disproved any intent or propensity to commit physical acts would not be subject to separation. The new policy suggests a meaningful opportunity to rebut the presumption flowing from statements of homosexuality. As a consequence, the Department of Justice will be better able to argue that the policy is not directed at speech or expression itself, and that any burdens in those respects are incidental to the achievement of an important governmental interest.

Third, the policy would substantially change pre-January investigative policies. Applicants for military service would not be questioned about their sexual orientation or behavior. Investigations would no longer be conducted for the sole purpose of determining an individual's sexual orientation. Commanders will initiate investigations only where there is credible evidence of "homosexual conduct." This change will make decisions made under the policy appear fairer, more even-handed, and conduct-based, and therefore easier to defend.

WACHTELL, LIPTON, ROSEN & KATZ**FACSIMILE TRANSMITTAL**

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TO: Bernard W. Nussbaum**FROM:** Marc Wolinsky**COMPANY:** Counsel to the President**DATE:** June 23, 1993**FAX NO.:** 202-456-6279**TIME:****MAIN NO.:** 202-456-2632**DIRECT FAX LINE:** (212) 371-1658

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Gays in The Military

The President's options have effectively been reduced to two. His choice carries significant consequences: for the issue itself and for his long-term political position.

Description

A. The "Minimal Acceptable Progress" option (MAP) represents the following:

1. Discrimination based on status alone is prohibited.
2. Significant constraints will be placed on public conduct and public speech.

Most issues will be managed by unit commanders in the normal course of responsibilities.

3. Public sexual conduct and misconduct remain proscribed by the UCMJ and will be enforced equally for heterosexuals and homosexuals.
4. Private, consensual adult conduct will remain proscribed under the UCMJ and will be enforced equally for heterosexuals and homosexuals.
5. There will be clearly established thresholds for initiating investigations of conduct, which will apply equally to all service members.
6. Private speech will be permitted. Individuals will be allowed to acknowledge their sexual orientation. Speech which is intended to be intrusive or to disrupt the unit may be disciplined.

The extensive data developed by the Rand study supports the proposition that this minimalist approach is both acceptable to the military rank and file and progress for gays. The examination of unit cohesiveness is particularly important.

MAP is a significant compromise from full "open" and equal status, yet it retains the principle of non-discrimination based on status.

The Air Force would support this option.

B. The Military Working Group (MWG) proposal is different.

1. It does not permit homosexuals to serve in the military if found out to be gay (i.e. discrimination based on status remains.)
2. It declares homosexuality, per se, incompatible with military service.
3. It establishes a different standard for punishment for private consensual homosexual conduct, albeit with a higher threshold for initiating investigations.
4. It prohibits both public and private speech. No private declarations of homosexuality are allowed at any time or place.

This option puts the military in the internally contradictory position of not investigating circumstances that are likely to indicate a violation of military rules or law. This dilemma is particularly offensive to the military culture which relies on integrity and a strict code of conduct.

This option also tells homosexuals to lie about themselves on the one hand while living within the military's tradition of integrity on the other.

The Army supports this option. Chief of Staff Sullivan has been threatened by the "Four-Star Council." The MWG proposal is supported by the religious right and Nunn.

Cost/Benefit

The chances of winning MAP in the House are reasonable if General Powell endorses it.

It is not necessary to foresee a victory for MAP in Congress to justify Presidential support for it. Whatever the Congressional outcome, such support is preferable politically to the President.

Win or lose, this option provides the President with the following:

1. A cautious and thoughtful decision.
2. A good fight for what he believes in, campaigned on, and is right on.

3. A position which preserves his support by the social moderates and left. This broad constituency is an important component of the President's base. Maintaining his commitment to social moderation will be seen as a constructive contrast to moving to the center on economic and redistribution issues. Political economics is the traditional arena for compromise.
4. An important signal to the military that the Presidency remains the final decision authority, discouraging even greater attempts to undercut his plans and programs.
5. An opportunity for the Clinton Department of Justice (DOJ) and the courts to use the President's position of no military basis for discrimination to prevail in overruling the Congress in a constitutional challenge.
6. The only vehicle to avoid forcing DOJ to defend MWG in a way that adversely affects all future gay civil rights challenges in a range of areas (e.g. employment, housing, etc.).

Adopting the MWG position will mean the codification of discrimination based on status and the unequal enforcement of private conduct.

1. MWG may be defeated in the Congress. The left, acting on behalf of gays and the civil rights movement, will prefer codification of the current ban to MWG. They can forge a majority by joining the right who will want to defeat any Presidential initiative.
2. MWG will offend Americans of a socially moderate bent.
3. MWG will not be enough to gain the support of social conservatives.
3. MWG will be a set-back to the discrimination battle in the long-term because it will undercut future legal battles. It will be worse for the discrimination issue.
4. MWG will define the President as "caving" for short-term political reasons despite expert analysis supported by the Rand study.

Supporting MAP is Better for America

1. Codification of the present 50 year-old policy represents less of a burden on future progress than MWC. MWC is a specious assertion of modest immediate improvement based on a false proposition regarding the threshold of investigations.
2. A false perception of progress permits Congress to delay revisiting the issue when political pressure builds again.
3. White House/Congressional concurrence to an outcome that represents no real progress will trigger a set-back in self-esteem among homosexuals, particularly gay youth, while sending a false signal of political consensus that homosexuality is unacceptable.

Next Steps

In the event Aspin fails to gain the support of either Powell or Nunn, the President implements the MAP option by Executive Order making points listed in Appendix A.

In the event Congress passes legislation overruling the Executive Order, the President makes a second statement with points listed in Appendix B.

6/23/93
11:00 am

APPENDIX A

**POINTS TO BE MADE BY THE PRESIDENT IN ANNOUNCING THE
EXECUTIVE ORDER**

1. There will be no discrimination based on status.
2. There will be significant constraints on public conduct and public speech (to be described).
3. There will be equal enforcement of sexual conduct and misconduct.
4. MAP is preferable to MWC because MWC undermines the military culture and its reliance on integrity and a strict code of conduct.
5. MAP is also preferable for individuals who will not be asked to live a lie which is contrary to military integrity.
6. Implementation will be careful and deliberate.
 - a. It will focus on unit commanders.
 - b. Its focus will be acceptance, not endorsement.
7. Practical implications of a change in policy will actually be minimal. (Use Rand material).

APPENDIX B

**POINTS TO BE MADE BY THE PRESIDENT IN THE EVENT OF
ADOPTION BY CONGRESS OF MWG OPTION**

1. Congress has acted out of fear, rather than engaging in thorough deliberations.
2. I will continue to pursue MAP because the military rank and file and society are ready for this.
3. I will take certain steps despite Congressional action.
 - a. Change investigation system
 - b. Legal strategy in tandem with Department of Justice.
4. The principle of MAP is morally correct.

7/A
GEORGE L. BARNETT, P.C.

ATTORNEY AT LAW

BREWSTER BUSINESS PARK

ROUTE 22, BREWSTER, N.Y. 10509

TELEPHONE: (914) 279-6111 FACSIMILE: (914) 279-7410

March 25, 1993

Bernard Nussbaum, Esq.
Counsel to the President
White House
1600 Pennsylvania Avenue
Washington, D.C.

Dear Bernie:

I was troubled by one of the news stories that I saw the other day which quoted the President saying that he would consider compromising his position regarding gays in the military. According to the story, the President might consider segregated units, in order to obtain a peaceful resolution of the dispute.

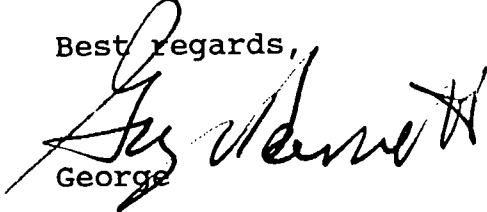
I hope that you will discourage him from accepting such a compromise. In my mind, the Constitution guarantees gays the same rights to serve as everyone else. It is one thing to prohibit conduct and another to punish status. Segregating gays because of their beliefs or their emotions is no different from segregating people based upon race or any other invalid human condition. I realize that the President may be concerned about the opposition posed by high ranking officers in the service and from various members of Congress, but I honestly feel that this issue is one of conscience and must be fought for.

President Truman realized that compromise on issues of this kind was wrong and I am sure that President Clinton will also, as he spends more time grappling with the issue. I recognize that it is possible that Congress may enact legislation that will maintain the status quo, but I believe that such legislation would be unconstitutional. It would be better to go down with guns blazing so to speak, fight against the adoption of such legislation and continue the fight in the Supreme Court, if necessary, even if that meant that the status quo would be maintained for a few years or even longer, rather than have the President accept a compromise which he would ultimately be ashamed of.

For the first time in 30 years I feel that we have a

President to fight for and I care too much for his image, his reputation and his place in history not to express myself.

Best regards,


George

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JEROME I. CHAPMAN

DIRECT LINE: (202) 872-8750

March 16, 1993

VIA TELECOPIER

Honorable Janet Reno
Attorney General
United States Department of Justice
Washington, D.C. 20530

Re: Gays in the Military

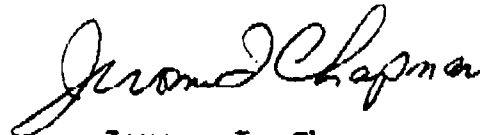
Dear Attorney General Reno:

At Bernie Nussbaum's request, I have been acting since mid-January as a consultant on the Justice Department cases involving gays in the military. I have worked with lawyers in the Civil Division, Webb Hubbell, Vince Foster and Mort Halperin (who is supervising the litigation at the Defense Department) to ensure that the Justice Department's position in the various cases comports with the President's policies, announced on January 29.

At present, there is one pressing significant issue in one of the pending cases, in which the Department's brief is due on March 24. The attached memorandum discusses the issue and reviews the Department's options.

I would be happy to discuss this matter with you or anyone you designate, if you think it would be helpful. I will be travelling this week, but my secretary, Daphne Washington, will know how to reach me. Her number is 872-6751. I expect to be in Washington next week.

Sincerely,



Jerome I. Chapman

cc: Vincent Foster (w/encl.)

March 16, 1993

MEMORANDUM

TO: The Attorney General
FROM: Jerome Chapman *je*
RE: Required Action in the Walmer Case

I. The Issue:

Since homosexual "orientation" necessarily implies engaging in homosexual "conduct," is it appropriate for the Justice Department -- in carrying out the President's policy that it no longer defend Defense Department regulations requiring discharge based on homosexual "orientation" -- to defend a discharge based solely on private, off-base, adult consensual homosexual acts?

II. BackgroundA. Presidential Policy

On January 29, 1993, as part of a compromise interim agreement with Senator Nunn, the President directed the Secretary of Defense to submit, prior to July 15, 1993, "a draft of an Executive order ending discrimination on the basis of sexual orientation" in the military. Since then:

1. The Department of Justice has carefully avoided defending the policy of discharging military personnel based on sexual orientation.

2. The interim Defense Department policy in "cases involving acknowledged homosexual status being contested by the individual" is to process the discharge under existing policies, except that if the final DOD authority decides that separation is warranted "in a case involving only homosexual status, the case shall be referred to the Attorney General," who then may direct that the individual be placed in the standby reserve to await the results of the President's Executive Order. (DOD Memorandum, Feb. 3, 1993.) (Emphasis supplied.)

- 2 -

3. The interim DOD policy also provides, however, that "cases involving homosexual conduct will be processed through actual separation and discharge in accordance with current policy." (Emphasis supplied.)

B. Status/Conduct Distinction

In his statement on January 29, the President announced that DOD would make a distinction between "status" cases and "conduct" cases. Referring to himself, the Joint Chiefs and Senator Nunn, the President said, "We also all agree that a very high standard of conduct can and must be applied."

The President did not define the "status/conduct" distinction. It could have several meanings:

(i) The narrowest reading would be that sexual conduct -- such as assault, harassment, and abuse of minors -- that would be grounds for discharging a heterosexual would also justify discharging a homosexual.

(ii) In addition, certain homosexual conduct might be deemed so destructive of military discipline or unit cohesion as to warrant discharge, even if analogous heterosexual conduct would not. This category might include public displays of affection on base during duty hours.

(iii) The most far-reaching reading would be that discharge can be based on the kind of private homosexual conduct that is inherent in homosexual status.

C. Walmer case

Ms. Walmer has served in the Army for 13 years and had successfully completed her studies at the Army Command and General Staff College when she acknowledged her homosexuality. Thereupon she was denied graduation from the College and was processed through the system for honorable discharge on the grounds of homosexual conduct. Vince Garvey in Federal Programs is familiar with the record, but as I understand it, Walmer's conduct was nothing more than that inherent in her homosexual orientation. It was private, off-base, with a consenting adult who is not in the military.

- 3 -

Walmer's discharge has not yet become effective. Her motion for a preliminary injunction is scheduled for a hearing in the U.S. District Court for Kansas on April 19, and the Army has agreed not to discharge her prior to the hearing. The Government's brief in opposition to the preliminary injunction is due on March 24.

III. Options

A. Defend solely on procedural grounds -- Vince Garvey has discussed with me the idea of defending on the ground that Walmer has failed to exhaust all her remedies -- a defense that was successful in two other recent cases involving gays who had not yet been discharged. Those cases, however, involved persons at the very beginning of the administrative process. Walmer, by contrast, has gone through all the process the Army normally has -- except for the post-discharge remedy of review by the Board for Correction of Military Records. I doubt the strength of the exhaustion argument in this context, and I am not confident that it will allow the Department to avoid dealing with the merits of Walmer's scheduled discharge.

B. Seek a Stay until after July 15 -- The stay would be predicated on the ground that the military's policy regarding homosexuals is under review and that the change in policy contemplated by the President's directive to the Secretary of Defense could affect the disposition of Walmer's case. The brief continuance would be a prudent means of avoiding what might turn out to be unnecessary litigation.

I believe this is the best approach.¹ However, it would require DOD to alter its present position -- i.e., that persons found to have engaged in homosexual conduct shall be discharged -- and adopt either of the following compromises:

(i) DOD would have to agree not to discharge Walmer so long as the stay is in effect; or

¹ This approach is also the most consistent with the President's directive to the Justice Department on January 29 to seek "continuances in pending court cases"
[Footnote continued on next page]

- 4 -

(ii) DOD would have to agree that Walmer is eligible for transfer to the standby reserve, just like personnel discharged solely because of orientation.

In order to accomplish either result, DOD would have to be persuaded, by Justice Department or White House officials, that this change in approach -- at least where minimal "conduct" is involved -- is desirable to facilitate the smooth execution of the interim process.

C. Defend the discharge on the merits -- Given the razor-thin distinction (if one exists at all) between Walmer's "orientation" -- which DOJ would not defend as a legitimate basis for discharge -- and her "conduct," I do not believe the Department can defend this discharge. Such a defense would not only be inconsistent with the Department's restraint from defending the old policy since January 29, it might also complicate the process now underway of drafting and seeking to sustain a reasonable Executive order ending sexual orientation discrimination.²

IV. Recommendation

I recommend that discussions be held through Morton Halperin at DOD (703) 697-8101 to persuade the Army to agree either to defer Walmer's discharge pending a stay of her case or to transfer her to the standby reserve. Based on this undertaking by the Army, DOJ should seek a stay of further proceedings.

[Footnote continued from previous page]
in order to "freeze those cases pending the completion of the [DOD] review directed by the President."

² Mort Halperin would also argue that discharging Walmer based on minimal, private "conduct" might violate Judge Hatter's order in the Meinhold case enjoining DOD "from discharging . . . any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces"

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Law
Center

VIA FAX (202) 456-6420

March 12, 1993

Eli Segal
National Service
The White House
OEOB, Room 145
Washington, DC 20500

Bernie

① I've told Dees
about press conference.

② Thought potential law
suit would be of inter-
est to you after Justice.
Morris is close friend. cc.

Dear Eli:

The enclosed memorandum was sent to the primary civil rights groups in the nation asking their assistance helping the Center cause the creation of a Civilian Hate Crimes Review Board dealing with the military.

① I would very much appreciate your passing a copy of the memo and the accompanying press advisory on to the White House Press Secretary so that President Clinton will be informed.

It would be a big boost if the White House could offer encouragement in what we are doing.

② I understand that President Clinton has expressed concern to the family of Dr. David Gunn who was murdered in Pensacola, Florida at his abortion clinic. This is off the record, but the Center represents Dr. Gunn's family in a possible lawsuit against the anti-abortion group whose member committed the murder. I tell you this to indicate that our attack on hate crimes with civil litigation goes further than suing white supremacy groups.

Please call me if you have any questions or advice.

Sincerely,



Morris Dees

MD/jb
Enclosure

93 MAR 18 P 3:16

**The
Southern
Poverty
Law
Center**

For Release March 15, 1993
(11:00 a.m.)

Contact: Richard Cohen
Morris Dees
(205) 264-0286

**LAWSUIT AGAINST MILITARY PERSONNEL AND DEMAND ON
SECRETARY OF DEFENSE REGARDING GAY VIOLENCE**

WHAT: News Conference

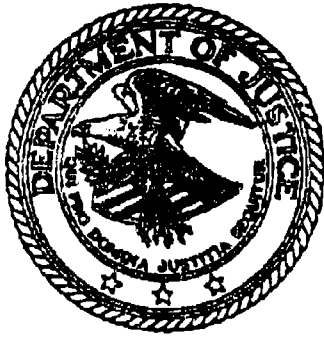
WHO: Morris Dees, Chief Trial Counsel, Southern Poverty Law Center
Richard Cohen, Legal Director, Southern Poverty Law Center
Plaintiff, Gay Victim of Hate Crime (name withheld at this time)

WHEN: Monday, March 15, 1993, 11:00 a.m.

WHERE: National Press Club, Murrow Room

WHY: Announce a civil lawsuit against military personnel who attacked and beat a gay man to express opposition to President Clinton's commitment to lift the ban on gays and lesbians serving in the military. Copies of the complaint will be available at the news conference. The Law Center, which specializes in using civil suits to bankrupt violent Klan and Neo-Nazi organizations, has taken this case to help develop strategies to combat those who commit hate crimes against gays and lesbians.

Announce a demand on the Secretary of Defense to create a Civilian Hate Crimes Review Board with authority to investigate complaints, both from military personnel and civilians, of hate crimes committed by members of the armed services. Other demands will include the initiation of effective in-service education programs to reduce the rising tide of violence and harassment of gays and lesbians by military personnel.



U. S. Department of Justice

Civil Division

BWM

March 3, 1993
5:27 pm
23 Page(s)

To : ~~Vince Foster~~
White House Press Office

Fax No : 9-456-6279

From : Tony Steinmeyer, Civ. Div. DOJ

Subject : Stay Motion in Navy Homosexual Case

Comments:

Here is the motion that we are filing today in the Court of Appeals for the Ninth Circuit in California seeking an emergency stay of the district court's order in the Navy homosexual case. This is now a public document.

*3/4
gave CC to Dellinger
via hand
AM*

93 MAR 3 15:51

No. 93-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. CV 92-6044-TJH (JRX)

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR A STAY PENDING APPEAL OF THE INJUNCTIVE ORDER
TO THE EXTENT IT CONFERS RELIEF ON PERSONS OTHER THAN PLAINTIFF

OF COUNSEL:
LCDR MARK D. LAWTON
Office of the JAG
Dep't of the Navy

ANTHONY J. STEINMEYER
(202) 514-3388
E. ROY HAWKENS
(202) 514-5714
Attorneys, Appellate Staff
Civil Division, Room 3127
Department of Justice
Washington, D.C. 20530-0001

CIRCUIT RULE 27-3 CERTIFICATE

1. The telephone numbers and office addresses of the attorneys for the parties are as follows:

Defendants-Appellants,
the United States Department
of Defense and the United States
Department of the Navy

Anthony J. Steinmeyer
(202) 514-3388
E. Roy Hawken
(202) 514-5714
Civil Division
Appellate Staff, Rm 3127
Dep't of Justice
10th & Penn. Ave., N.W.
Washington, D.C. 20530

Plaintiff-Appellee
Volker K. Meinhold

Harry G. Melkonian
Christopher L. Rudd
John I. McGuire
(213) 620-7700
633 West Fifth Street
19th Floor
Los Angeles, CA 90071

2. The facts showing the existence and nature of the emergency are as follows:

This suit was brought in 1992 by a single plaintiff, Keith Meinhold, who was discharged from the Navy due to homosexuality. Meinhold asked the district court to order his reinstatement, declare the military's policy on homosexuality unconstitutional, and enjoin the Navy from separating him due to homosexuality. See Attachment I (Amended Complaint) at 17.

By order entered January 29, 1993, the district court held that the military's policy was unconstitutional and rescinded Meinhold's discharge. Moreover, although the suit was not a class action, the court permanently enjoined the Department of Defense "from discharging or denying enlistment to **any person** based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of

the United States." Attachment II (Final Judgment and Amended Opinion) at 2 (emphasis added).

Meanwhile, the same day, President Clinton issued a Presidential Directive that instructed the Secretary of Defense to review the military's policy on homosexuality. After full consultation with military and Congressional leaders and concerned individuals outside the government, the Secretary is to submit by July 15, 1993 a draft of an executive order ending discrimination on the basis of sexual orientation, and the draft would be accompanied by the results of a study "on how this revision in policy would be carried out in a manner that is practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain." Attachment III (Presidential Directive, Statement & Transcript) at 5. The President established an interim policy whereby cases involving acknowledged homosexual status would continue to be administratively processed but, if directed by the Attorney General, a final discharge would be suspended and the individual placed in the standby reserve. Id. at 1-3.

In light of this Presidential action, the Government filed a timely motion pursuant to Federal Rule of Civil Procedure 59(e) requesting the district court to: (1) amend its order to clarify that defendants are authorized to implement the President's interim policy as to service members other than Meinhold; or (2) alter the judgment to make it applicable solely to Meinhold. Alternatively, the Government requested a stay pending appeal to

the extent that the order granted relief extending beyond Meinhold. By order entered February 19, 1993, the district court denied the Government's motion. See Attachment IV (Order Denying Rule 59(e) Motion).¹

The court's decision merits an immediate stay to the extent it grants relief to persons other than Meinhold. The broad wording of the court's order significantly limits the Department of Defense's ability to implement President Clinton's interim policy with respect to homosexuals in the Armed Forces. Not only did the court substitute its judgment for that of the Commander In Chief regarding the composition of the armed services, its order has created confusion over the extent to which the Department of Defense is free to carry out the President's order to conduct an in-depth study of the military's homosexual policy during the next six months and determine what changes may be consistent with maintaining an effective fighting force. The district court -- as a matter of equitable discretion and respect for separation of powers -- should not have interfered with the political review process and imposed its own policy on the military. See Rostker v. Goldberg, 453 U.S. 57, 70-71 (1981); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).²

¹ Government counsel did not become aware of this order until February 24, 1993.

² Although these same concerns apply to the injunctive relief granted to Meinhold, it is the extension of injunctive relief **beyond** Meinhold that renders this emergency motion necessary. The overbroad order warrants an immediate stay because it not only arrogates authority to the judiciary that the

(continued...)

Moreover, the injunctive order warrants an immediate stay to the extent it confers relief on persons other than Meinhold because the district court lacked authority, in the circumstances of this case, to issue such broad relief. Meinhold did not bring a class action. He sought injunctive relief solely on his own behalf. Because the district court could have provided Meinhold with a complete remedy by making the injunction applicable only to him, it erred in extending injunctive remedies to others. See Zepeda v. United States, 753 F.2d 719, 727-30 & n.1 (9th Cir. 1983).

4. Opposing counsel (Harry G. Melkonian) was notified of this motion by telephone. As reflected on the service page accompanying this motion, service was effected by telefax and overnight mail.

5. The reasons advanced in this emergency motion for narrowing the injunction were advanced in, and rejected by, the district court. The district court also denied the Government's request to stay the injunctive order pending appeal to the extent

2(...continued)

Constitution explicitly vests in the political branches and was clear error as a matter of remedial authority, it also improperly threatens federal officers with the prospect of being summoned into district court and facing contempt sanctions for executing their lawful duties (i.e., implementing the President's interim policy) as to persons other than Meinhold.

it conferred relief on persons other than Meinhold. See Attachment IV (Order Denying Rule 59(e) Motion).

E. ROY HAWKENS
Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VOLKER KEITH MEINHOLD,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	No. 93-_____
UNITED STATES DEPARTMENT OF	)	
DEFENSE, ET AL.,	)	Civ. No. CV-92-
	)	6044-TJH (JRX),
Defendants-Appellants.	)	(C.D. Cal.)
	)	
	)	

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR A STAY PENDING APPEAL OF THE INJUNCTIVE ORDER
TO THE EXTENT IT CONFERS RELIEF ON PERSONS OTHER THAN PLAINTIFF**

On January 29, 1993, President Clinton, in consultation with members of Congress, directed a review of the Department of Defense's policy regarding homosexuals in the Armed Forces and instituted an interim policy until that review is completed. Although this suit was brought prior to President Clinton's directive and concerned only one serviceman seeking injunctive relief regarding his discharge, the district court issued a broad nation-wide order. When it was brought to the district court's attention that its order was susceptible of an interpretation that bars implementation of the President's interim policy, the court refused to modify its order so as to avoid such an interpretation. The order is clearly overbroad, restricts the authority of the President in consultation with Congress to make rules governing the Armed Forces, and should be stayed pending appeal to the extent applicable to persons other than Meinhold.

1. Plaintiff, Volker Keith Meinhold, served in the Navy for about twelve years when, in May 1992, he appeared on television and acknowledged that he was gay. Because military regulations bar service to "persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct," see Department of Defense Directive 1332.14, the Navy convened a board to determine whether Meinhold should be retained. The board concluded that Meinhold was homosexual within the meaning of the regulations and, accordingly, recommended that he be discharged. On August 12, 1992, Meinhold received an honorable discharge. See Attachment I (Amended Complaint) at 9, 12.

On October 6, 1992, without having pursued his administrative remedies before the Board for Correction of Naval Records, Meinhold brought this suit alleging that his discharge violated regulatory, statutory, and constitutional provisions. The suit was **not** a class action. Meinhold sought injunctive relief solely on his own behalf in the form of reinstatement and an injunction barring the Navy from discharging him based on his homosexuality. See Attachment I (Amended Complaint) at 1, 17.

On November 6, 1992, the district court granted Meinhold's motion for a preliminary injunction reinstating Meinhold to active duty. The Government appealed, but the appeals were rendered moot by the district court's issuance of the permanent injunction which is the subject of this emergency motion. See Meinhold v. DOD, No. 92-56439 (9th Cir. Feb. 3, 1993) (order

dismissing appeal as moot); Meinhold v. DOD, No. 93-1077 (Fed. Cir. Mar. 1, 1993) (order vacating preliminary injunction as moot).

2. On January 28, 1993, on the parties' cross motions for summary judgment, the court held that the military's homosexual policy violated equal protection. See Attachment II (Final Judgment and Amended Opinion) at 6. At the outset, the court ruled that the futility doctrine excused Meinhold from exhausting his military remedies. Id. at 2. The court then stated that it would not defer to the military's judgment regarding the proper composition of the armed forces "in the absence of a factual basis for such judgment," id. at 5, which it found lacking by reviewing "scientific and sociological analyses" in the record critical of the military's policy. Id. at 3-5.

The court therefore entered an order rescinding Meinhold's discharge. Moreover, the order permanently enjoins the Department of Defense "from discharging or denying enlistment to **any person** based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." Attachment II (Final Judgment and Amended Opinion) at 6 (emphasis added).

3. The same day that the court entered its order, President Clinton directed the Secretary of Defense to submit to him by July 15, 1993, a draft of an Executive Order "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces." Attachment III (Presidential

Directive, Statement & Transcript) at 1. The draft Executive Order will "be accompanied by the results of a study to be conducted over the next six months on how this revision in policy would be carried out in a manner that is practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain." Id. at 1, 5.

The President simultaneously issued a Statement which provides that while the Department of Defense is conducting the review, current Department of Defense personnel policies related to this issue would remain in effect and that service members will be processed for separation under "the current cases and regulations related to homosexuality," but that "questions regarding sexual orientation will be removed from future versions of the induction application and will not be asked in the interim." Attachment III (Presidential Directive, Statement & Transcript) at 2.

The Presidential Statement provides special guidance for cases in which the military seeks to separate service members on the basis of their "acknowledged homosexual status." Attachment III (Presidential Directive, Statement & Transcript) at 3. In such cases, the Statement requires the military to "process" the matter "through all applicable [administrative] stages, including notice of the basis for separation, hearing before a board of officers, review of the board's recommendations by the separation authority, and action by the separation authority to discharge the person." Id. However, the Attorney General is authorized to

"suspend" the "final discharge" of such members "until the President acts on the recommendations of the Secretary of Defense with respect to current policy." Id. A service member whose discharge is suspended by the Attorney General is to be "separated from active duty and placed in the standby reserve." Id.

The President stated that these actions followed "a long conversation, and a very good one with the Joint Chiefs of Staff, and discussions with several members of Congress." Attachment III (Presidential Directive, Statement, & Transcript) at 4. The President emphasized his belief that "men and women who can and have served with real distinction should [not] be excluded from military service solely on the basis of their status." Id. He also agreed with the Joint Chiefs that "the highest standards of conduct must be required. The change cannot and should not be accomplished overnight. It does require extensive consultation with the Joint Chiefs, experts in the Congress and in the legal community, joined by my administration and others. . . . During that process, interim measures will be placed into effect, which I hope again sharpen the focus of this debate." Id. at 5.

4. On February 12, 1993, the Government served a timely Rule 59(e) motion requesting that the district court's order be altered to specify that the Department of Defense could implement the Presidential Statement as to persons other than Meinhold, or that it be altered so as to be applicable solely to Meinhold. Alternatively, the Government moved for a stay pending appeal to the extent that the order granted relief extending beyond

Meinhold. By order entered February 19, 1993, the district court denied the motion. See Attachment IV (Order Denying Rule 59(e) Motion).

On March 3, 1993, the Government noticed an appeal, see Attachment V (Notice of Appeal & Docket Sheet), and filed this emergency motion. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

ARGUMENT

THIS COURT SHOULD STAY THE INJUNCTIVE ORDER TO THE EXTENT IT APPLIES TO PERSONS OTHER THAN MEINHOLD.

To obtain a stay, a party must show "either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in its favor." Briggs v. Sullivan, 886 F.2d 1132, 1143 (9th Cir. 1989); Beltran v. Meyers, 677 F.2d 1317, 1320 (9th Cir. 1982). In other words, as the probability of success increases, the need to show irreparable harm decreases, and vice versa. See Benda v. Grand Lodge of International Association of Machinists, 584 F.2d 308, 314 (9th Cir. 1978). In the instant case, the Government has a strong probability of establishing that the district court erred in entering an overbroad order, which goes beyond the relief sought or required by the plaintiff and which impinges on the President's interim policy with respect to homosexuals serving in the Armed Forces. There is great injury to the public interest in an order that limits implementation of the President's deliberate policy, worked out in consultation with members of Congress. In

contrast, Meinhold will suffer no injury at all if a stay is granted, because the Government does not seek a stay with respect to him.

A. The District Court Erroneously Issued A Broad Injunctive Order Extending Relief To Persons Other Than Meinhold.

If the district court had conferred injunctive relief only on Meinhold, the Government would not be appearing before this Court on an emergency basis. However, the court improperly ordered injunctive relief that extended beyond Meinhold, and this aspect of the court's order warrants an immediate stay. As we show, the broad injunction limiting implementation of the President's interim policy, entered in a suit brought by a single individual, is a plainly improper exercise of the court's equitable authority and contrary to comity among the branches and separation of power principles.

1. The district court's injunction enjoins the Department of Defense from "discharging . . . any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." Attachment II (Final Judgment and Amended Opinion) at 6. The Presidential Statement provides for the transfer of service members who acknowledge their homosexuality from active duty to the standby reserve. Attachment III (Presidential Directive, Statement & Transcript) at 3. As established military terms of art, a "transfer to the standby reserve" is not a "discharge." Nevertheless, such a transfer removes the service

member from active duty and terminates his entitlement to military pay. A civilian might well consider such a transfer to be a discharge. Thus, any Department of Defense official who implements that portion of the President's interim policy by transferring any homosexual service member anywhere to the standby reserve does so at the peril of having contempt sanctions imposed against him. That chilling prospect inhibits the implementation of the President's interim policy all the more now that the district court has refused to clarify or modify its injunction to state plainly what it prohibits, *i.e.*, whether or not a transfer to the standby reserve is a "discharge" within the meaning of its order.

2. "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters." Orloff v. Willoughby, 345 U.S. 83, 94 (1953). It is improper for courts to order injunctive relief that unnecessarily "intrudes into the conduct of . . . military affairs." De Arel-lano v. Weinberger, 738 F.2d 762, 764 (D.C. Cir. 1986) (en banc) (per curiam). Moreover, "where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury." Hurley v. Kincaid, 285 U.S. 95, 104 n.3 (1932). Accord Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

Here, a narrower injunctive order limited solely to Meinhold would have provided Meinhold with a complete remedy, and thereby avoided unwarranted judicial "intru[sion] into the conduct of . . . military affairs." See De Arellano, 788 F.2d at 764. Moreover, the "injunction [will] seriously embarrass the accomplishment of important governmental ends," because it interferes with the political branches' evaluation of the military's homosexual policy -- as they agreed to do and are in the process of doing -- between now and July 15th. See Hurley, 285 U.S. at 104 n.3. President Clinton has instituted an ongoing review of the military's policy with respect to homosexuals serving in the armed forces, but he has also concluded that "change cannot and should not be accomplished overnight." Attachment III (Presidential Directive, Statement & Transcript) at 5. The district court's order, however, could cut short the on-going review process and impose change overnight without any consideration of "the real, practical problems" that are the subject of the on-going Department of Defense study. Id.

In Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), this Court remanded for a determination by the district court of whether the military could produce a rational basis in the record to justify its previous policy with respect to homosexuals. Consistent with Pruitt, the political branches, which are vested by the Constitution with "plenary" authority to make decisions regarding the "composition" of the military, Chappell v. Wallace, 462 U.S. 296, 301 (1983);

Rostker v. Goldberg, 453 U.S. 57, 65 (1981), have now determined that they will themselves explore the rational basis for that policy. The President, in consultation with Congress, will be reevaluating the military's homosexual policy in an effort to develop a "practical, realistic approach consistent with the high standards of combat effectiveness and unit cohesion that our armed forces must maintain." Attachment III (Presidential Directive, Statement & Transcript) at 5. Separation of powers principles clearly require that the courts defer to this interim decision by the political branches and permit them to make in the first instance their own determination of the appropriate policy concerning homosexuals.

In short, as a carefully crafted interim solution by the Commander in Chief in consultation with Congress, the President's interim policy is not irrational and should not be barred from taking effect.³ Where, as here, the political branches are in the process of exercising their plenary constitutional prerogative regarding the composition of the military, the judiciary

³ Indeed, every court that has reached the merits of the previous, harsher policy has upheld it against constitutional attack as being within the discretion of the military. See Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 454 U.S. 855 (1981). See also Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991) (appeal pending).

should refrain from preempting that process by imposing its own policy.⁴

3. Moreover, the broad injunctive order presents an additional error with respect to the court's remedial authority. Under controlling Ninth Circuit precedent, the court exceeded its authority in conferring injunctive relief on persons other than Meinhold.

This Court has squarely held that district courts may **not** extend injunctive relief to non-parties where no class action has been sought or certified, except in the narrow circumstance where such relief is incidentally necessary to give the named parties relief. See Zepeda v. United States, 753 F.2d 719, 727-30 & n.1 (9th Cir. 1983) (holding that, in the absence of class certification, preliminary injunctive relief may cover only the named plaintiffs); National Center for Immigrants Rights, Inc. v. INS, 743 F.2d 1365, 1371 (9th Cir. 1984) (same). Although Zepeda and National Center for Immigrant Rights, Inc. involved preliminary injunctions, the same principles are applicable to permanent injunctions. See Bresgal v. Brock, 843 F.2d 1163 (9th Cir.

⁴ Although this Court need not address the issue at this juncture, we note that the district court applied an improper standard of review to the constitutional issue. In Pruitt, this Court held that the military must offer a rational basis in the record to support its homosexual policy, and the district court must then apply a deferential standard in determining whether the "reasons put forth on the record . . . are rationally related to [the military's] permissible goals." 963 F.2d at 1166. Instead of examining with deference the reasons put forth by the military in several declarations to determine whether the policy was rational, the court invalidated the policy solely on the basis of criticism in the record of that policy.

1987). Cf. Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs").

In the instant case, Meinhold was the only plaintiff, and he sought injunctive relief only on his own behalf. See Attachment I (Amended Complaint) at 1, 17. An order reinstating Meinhold and enjoining the Navy from applying its policy to him would have provided him with complete relief. The district court, however, fashioned comprehensive injunctive relief applicable to "any person" in the Nation who seeks enlistment or retention in the military. This remedy, which extended well beyond what Meinhold requested or what was necessary to accord him complete relief, was overbroad and exceeded the court's remedial authority.

If district courts were empowered, in the absence of class certification, to grant injunctive relief to persons other than the named plaintiffs, there would be no need for class actions. As this Court explained in Zepeda:

Whenever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases. But such broad authority has never been granted to individual plaintiffs absent certification of a class.

* * * * *

[O]ur legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated. A person who desires to be a "self-chosen representative" and "volunteer champion" must qualify under [Fed. R. Civ. P.] 23. To be sure, failure to grant class relief may leave a government official -- temporarily -- in a position to continue treating nonparties in a manner that would be

prohibited with respect to named plaintiffs. But that is the nature of the relief.

753 F.2d at 730 n.1 (citation omitted). Accord Bresgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987) ("Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown. . . . [Breadth of injunction should not extend beyond] giv[ing] prevailing parties the relief to which they are entitled.").⁵

B. The Balance Of Hardships Tips Sharply In The Government's Favor.

That the balance of hardships tips sharply in the Government's favor does not require extended discussion. If the Government's request for a stay is granted, Meinhold will remain on active duty and be neither disadvantaged nor prejudiced. He will continue to receive not only complete relief, he will have obtained the entire injunctive remedy that he sought in his complaint. On the other hand, if the district court's order is not stayed, it will remain as a substantial impediment to the implementation of action of the Commander in Chief, taken in consultation with Congress, to regulate the Armed Forces based upon consideration of the "real, practical problems" which the

⁵ Also buttressing the conclusion that the district court's order is fatally overbroad is the well-established principle that the Government, when making decisions regarding whether to appeal an adverse judgment, is entitled to rely on the fact that the judgment applies only vis a vis the particular plaintiff. If this were not so, the Government would have a strong incentive to appeal every adverse decision, which would create an overwhelming burden for the courts of appeals. See United States v. Mendoza, 464 U.S. 154 (1984).

President determined justified a six-month study. Attachment III (Presidential Directive, Statement & Transcript) at 5.

In sum, the Supreme Court's admonition in Chappell v. Wallace, 462 U.S. 296 (1983), is fully applicable to the present case:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible -- as the Judicial Branch is not -- to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject **always** to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

Id. at 302 (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

CONCLUSION

For the foregoing reasons, this Court should stay the injunctive order to the extent it confers relief on persons other than Meinhold.⁶

Respectfully submitted,

ANTHONY J. STEINMEYER
(202) 514-3388

E. ROY HAWKENS
(202) 514-5714
Attorneys, Appellate Staff
Civil Division, Room 3127
Department of Justice
Washington, D.C. 20530

MARCH 1993

⁶ Assuming this Court grants the Government's emergency request for a stay of the injunctive order to the extent it extends beyond Meinhold, this Court may also wish to hold this case in abeyance until after July 15, 1993, at which time the parties could file motions governing further proceedings. Such action would promote judicial economy, and Meinhold would remain on active duty and would not, therefore, be prejudiced. See Attachment III (Presidential Directive, Statement & Transcript) at 2 ("the Department of Justice [shall] seek continuances in pending court-cases involving former service members who have been discharged on the basis of homosexuality and who are seeking reinstatement . . . [to] freeze those cases pending the completion of the review directed by the President").

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VOLKER KEITH MEINHOLD,	>	
	>	
Plaintiff-Appellee,	>	
	>	
v.	>	No. 93-_____
	>	
UNITED STATES DEPARTMENT OF	>	Civ. No. CV-92-
DEFENSE and UNITED STATES	>	6044-TJH (JRX)
DEPARTMENT OF THE NAVY,	>	(C.D. Cal.)
	>	
Defendants-Appellants.	>	
	>	

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March 1993, I served copies of the Government's EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL OF THE INJUNCTIVE ORDER TO THE EXTENT IT CONFERS RELIEF ON PERSONS OTHER THAN PLAINTIFF, with attachments, on opposing counsel by causing copies to be telefaxed to 213-687-0758, and by causing copies to be delivered by overnight express mail to:

Harry G. Melkonian, Esquire
Christopher L. Rudd, Esquire
John I. McGuire, Esquire
White and Case
633 West Fifth Street, Suite 1900
Los Angeles, California 90071-2002

E. ROY HAWKENS
Attorney

cc: Marcus M. Kerner, Esquire
Ass't U.S. Attorney, C.D. Cal.
300 North Los Angeles St.
Room 7516
Los Angeles, California 90012

Mark D. Lawton, Esquire
LCDR, JAGC, USN
Dep't of the Navy
200 Stovall St.
Alexandria, Virginia 22332

U.S. Department of Justice



93 MAR 3 5:55

Washington, D.C. 20530

CIVIL DIVISION/APPELLATE STAFF
FAX TRANSMITTAL COVER SHEET**NOTICE: OFFICIAL GOVERNMENT BUSINESS**

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DATE:

3-3-93

TIME:

5:30

TO:

VINCE FOSTER

ATTN: SHERI

FAX NO.:

456-6279

FROM:

TONY STEINMEYER

Civil Division, Appellate Staff
Room 3617United States Department of Justice
Washington, D.C. 20530

PHONE NO.:

(202) 514-3388

(FTS) 368-

FAX NOS.:

(202) 514-8151/FTS 368-8151 (Room 3631)

(202) 514-7964/FTS 368-7964 (7400 Corridor)

THERE ARE A TOTAL OF

6

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1987). Cf. Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs").

In the instant case, Meinhold was the only plaintiff, and he sought injunctive relief only on his own behalf. See Attachment I (Amended Complaint) at 1, 17. An order reinstating Meinhold and enjoining the Navy from applying its policy to him would have provided him with complete relief. The district court, however, fashioned comprehensive injunctive relief applicable to "any person" in the Nation who seeks enlistment or retention in the military. This remedy, which extended well beyond what Meinhold requested or what was necessary to accord him complete relief, was overbroad and exceeded the court's remedial authority.

If district courts were empowered, in the absence of class certification, to grant injunctive relief to persons other than the named plaintiffs, there would be no need for class actions.

As this Court explained in Zepeda:

Whenever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases. But such broad authority has never been granted to individual plaintiffs absent certification of a class.

* * * * *

[O]ur legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated. A person who desires to be a "self-chosen representative" and "volunteer champion" must qualify under [Fed. R. Civ. P.] 23. To be sure, failure to grant class relief may leave a government official -- temporarily -- in a position to continue treating nonparties in a manner that would be

prohibited with respect to named plaintiffs. But that is the nature of the relief.

753 F.2d at 730 n.1 (citation omitted). Accord Bresgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987) ("Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown. . . . [Breadth of injunction should not extend beyond] giv[ing] prevailing parties the relief to which they are entitled.").⁵

B. The Balance Of Hardships Tips Sharply In The Government's Favor.

That the balance of hardships tips sharply in the Government's favor does not require extended discussion. If the Government's request for a stay is granted, Meinhold will remain on active duty and be neither disadvantaged nor prejudiced. He will continue to receive not only complete relief, he will have obtained the entire injunctive remedy that he sought in his complaint. On the other hand, if the district court's order is not stayed, it will remain as a substantial impediment to the implementation of action of the Commander in Chief, taken in consultation with Congress, to regulate the Armed Forces based upon consideration of the "real, practical problems" which the

⁵ Also buttressing the conclusion that the district court's order is fatally overbroad is the well-established principle that the Government, when making decisions regarding whether to appeal an adverse judgment, is entitled to rely on the fact that the judgment applies only vis a vis the particular plaintiff. If this were not so, the Government would have a strong incentive to appeal every adverse decision, which would create an overwhelming burden for the courts of appeals. See United States v. Mendoza, 464 U.S. 154 (1984).

President determined justified a six-month study. Attachment III (Presidential Directive, Statement & Transcript) at 5.

In sum, the Supreme Court's admonition in Chappell v. Wallace, 462 U.S. 296 (1983), is fully applicable to the present case:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible -- as the Judicial Branch is not -- to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

Id. at 302 (quoting Gilligan v. Morgan, 413 U.S. 1. 10 (1973)).

CONCLUSION

For the foregoing reasons, this Court should stay the injunctive order to the extent it confers relief on persons other than Meinhold.⁶

Respectfully submitted,

Anthony J. Steinmeyer
ANTHONY J. STEINMEYER
(202) 514-3388

E. Roy Hawkens
E. ROY HAWKENS
(202) 514-5714
Attorneys, Appellate Staff
Civil Division, Room 3127
Department of Justice
Washington, D.C. 20530

MARCH 1993

⁶ Assuming this Court grants the Government's emergency request for a stay of the injunctive order to the extent it extends beyond Meinhold, this Court may also wish to hold this case in abeyance until after July 15, 1993, at which time the parties could file motions governing further proceedings. Such action would promote judicial economy, and Meinhold would remain on active duty and would not, therefore, be prejudiced. See Attachment III (Presidential Directive, Statement & Transcript) at 2 ("the Department of Justice [shall] seek continuances in pending court-cases involving former service members who have been discharged on the basis of homosexuality and who are seeking reinstatement . . . [to] freeze those cases pending the completion of the review directed by the President").

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VOLKER KEITE MEINHOLD,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 93-_____
	)	
UNITED STATES DEPARTMENT OF	)	Civ. No. CV-92-
DEFENSE and UNITED STATES	)	6044-TJH (JRX)
DEPARTMENT OF THE NAVY,	)	(C.D. Cal.)
	)	
Defendants-Appellants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March 1993, I served copies of the Government's EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL OF THE INJUNCTIVE ORDER TO THE EXTENT IT CONFERS RELIEF ON PERSONS OTHER THAN PLAINTIFF, with attachments, on opposing counsel by causing copies to be telefaxed to 213-687-0758, and by causing copies to be delivered by overnight express mail to:

Harry G. Melkonian, Esquire
Christopher L. Rudd, Esquire
John I. McGuire, Esquire
White and Case
633 West Fifth Street, Suite 1900
Los Angeles, California 90071-2002


E. ROY HAWKENS
Attorney

cc: Marcus M. Kerner, Esquire
Ass't U.S. Attorney, C.D. Cal.
300 North Los Angeles St.
Room 7516
Los Angeles, California 90012

Mark D. Lawton, Esquire
LCDR, JAGC, USN
Dep't of the Navy
200 Stovall St.
Alexandria, Virginia 22332



Page

PRESIDENT STEPHEN JOEL TRACHTENBERG
THE GEORGE WASHINGTON UNIVERSITY

*Bernard
Nussbaum, Esq.
at
white House*

2121 EYE STREET, N.W., WASHINGTON, D.C. 20052



NEWS

OFFICE OF UNIVERSITY RELATIONS • WASHINGTON, D.C. 20052 • (202)994-6460

FOR IMMEDIATE RELEASE

Feb. 9, 1993

CONTACT: Nora Kelley

(202)994-3087

-- MEDIA ADVISORY --

GW HOSTS MOOT COURT COMPETITION ON GAYS IN THE MILITARY

Feb. 13 - 14 event to feature Judges from the Department of Defense, the Department of Justice, the CIA, and the ACLU.

WHAT: The 2nd Annual Harold H. Greene and Joyce Hens Green National Security Law Moot Court Competition.

WHERE: First and Second Rounds
U.S. District Court for the District of Columbia
3rd and Constitution Streets, N.W.
Washington, DC 20001

Final Round
Moot Court Room
The GW National Law Center
720 20th Street, N.W.

WHEN: The first two rounds of arguments will be held on Saturday, Feb. 13 at the U.S. District Court. The first round will be held at 10:00 a.m. and the second round will be held at 1:30 p.m.

The final round will be held on Sunday at 10:00 a.m. in the Moot Court Room of the GW National Law Center. Stuart Gerson, acting attorney general of the U.S., will serve as one of the presiding judges.

Members of the media interested in attending should contact Nora Kelley at (202)994-3087.

BACKGROUND:

Hosted by The George Washington University National Law Center Moot Court Board, this high profile competition allows participants to argue national security law issues before a distinguished panel of judges.

The competition is named after Federal District Court Judges Harold H. Greene and Joyce Hens Green. George Washington University law students developed the competition as a forum to research and argue national security law issues.

-- more --

19:10 678836

This year's topic is whether the United States Armed Forces may deny or revoke a civilian employee's security clearance because the employee is homosexual.

Among this year's 16 participating law schools are Brigham Young University, Duke University, Emory University, Georgetown University, Howard University, New York University, and Yeshiva University.

The weekend long competition includes a welcoming cocktail party, a tour of Washington, D.C., and an awards banquet with prize money and trophies for the winning team, the best written brief and the best orator.

ARNOLD & PORTER
Thurman Arnold Building
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 872-6700
Telex: 892733 ARFOPO WSH
TELEFAX: (202) 872-6720

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1.	<u>Vince Foster</u>	<u>456-6279</u>	<u>456-6611</u>
2.	<u>Webb Hubbell</u>	<u>514-0468</u>	<u>514-3892</u>
3.	<u>Bernie Nussbaum</u>	<u>456-6279</u>	<u>456-2632</u>

FROM: Jerome I. Chapman

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February 4, 1993

MEMORANDUM

TO: Vince Foster
Webb Hubbell
Bernie Nussbaum

FROM: Jerome Chapman *jc*

RE: Disposing of Previous Appeals in Meinhold

As I noted in my memorandum dated January 29, 1993, DOJ had filed two appeals from Judge Hatter's preliminary injunction in November 1992 -- to the 9th Circuit and the Federal Circuit.

I learned today that the 9th Circuit sua sponte dismissed the appeal pending there on February 3, 1993.

I attach a draft motion that the Civil Division would like to file to dismiss its appeal in the Federal Circuit on the ground that the issuance of the permanent injunction renders the appeal from the preliminary injunction moot. I have no problem with the motion although I see no reason why it must be filed this week.

Please let me have your views.

DRAFT**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

v.

No. 93-1077

UNITED STATES DEPARTMENT OF
DEFENSE and UNITED STATES
DEPARTMENT OF THE NAVY,
Defendants-Appellants.**APPELLANTS' MOTION TO DISMISS APPEAL AS MOOT**

The defendants-appellants, the United States Department of Defense and the United States Department of the Navy, hereby move to dismiss their appeal as moot. This appeal is from the district court's preliminary injunction entered on November 6, 1992, and re-entered upon reconsideration on November 10, 1992. On January 29, 1993, the district court entered its final injunctive order and judgment in this action. Copies of this Order and Judgment and the court's Amended Opinion are attached.

On December 18, 1992, this Court stayed further proceedings in this appeal pending action by the Ninth Circuit in our appeal taken from the district court's November 6th order. On February 3, 1993, the Ninth Circuit dismissed that appeal as moot. A copy of that order is also attached. This Court should similarly dismiss this appeal as moot.

A preliminary injunction merges into the final injunction, thereby mooting a pending appeal from the preliminary injunction. Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles, 979 F.2d 1338, 1340, n.1 (9th Cir. 1992). See Fundicao Tupy S.A. v. United States, 841 F.2d 1101 (Fed. Cir. 1988). As it did in

Fundicao, this Court's dismissal order should specify that "in view of the dismissal of this interlocutory appeal, [the district court's order of November 10, 1992], having been timely appealed but now unreviewable, has no precedential value." 841 F.2d at 1104. No costs should be awarded against either party.

For these reasons, this appeal should be dismissed as moot.

Respectfully submitted,

ANTHONY J. STEINMEYER (202-514-3388)

E. ROY HAWKENS (202-514-5714)

OF COUNSEL:
LT KIRK A. FOSTER, USNR
Office of the JAG
Dept of the Navy

Attorneys, Appellate Staff
Civil Division, Room 3127
Department of Justice
Washington, D.C. 20530-0001

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MULTI-ADDRESS TELEFAX TRANSMISSION SHEET

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3.	<u>Bernie Nussbaum</u>	456-6279	456-2632

PLEASE
COPY

FROM: Jerome I. Chapman

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February 1, 1993

PRIVILEGED AND CONFIDENTIALMEMORANDUM

TO: Vince Foster
Webb Hubbell
Bernie Nussbaum

FROM: Jerome Chapman 

RE: Meinhold Update

1. The Justice Department lawyers are not currently preparing any papers in Meinhold, and they will not do so without first consulting one of us.

2. There may not be any immediate need either to stay Judge Hatter's order or to modify DOD conduct to avoid conflict:

(a) Enlistment -- Morton Halperin, who is advising Secretary Aspin on the gays issue, told me this morning that there is no current DOD requirement to refuse enlistment based solely on homosexual status. If this is so, contrary to the assumption in my memorandum of January 31, current DOD regulations do not conflict with Judge Hatter's order regarding enlistment. Mort has agreed to provide me with documentation for the current DOD enlistment policy later today.

(b) Discharge -- Under Friday's directive, no one may be discharged or put on standby reserve based solely on status until the proposed discharge is reviewed by the Attorney General. There is no specified time within which the Attorney General must act. Therefore, no discharges that might arguably conflict with Judge Hatter's order may occur without prior involvement of the Attorney General.

3. Other pending cases still need to be dealt with, including two cases in which the plaintiff is still in the service and seeking to avoid discharge.

- 2 -

(a) Walmer (D. Kan.) -- DOJ agreed to a 15-day extension of the TRO, until February 13. The case involves allegations that plaintiff engaged in homosexual conduct. DOJ will need guidance on how to proceed.

(b) Lopez (N.D. Tex.) -- An administrative board of review is scheduled to convene on March 4 to consider discharging Lopez based on her admitted homosexual conduct with a female subordinate. Lopez is seeking a preliminary injunction to stop the board of review meeting from taking place. DOJ's brief on the motion is due February 12, and guidance will be needed.

(c) In all other cases, the plaintiff has already been discharged. Under the directive issued Friday, DOJ is planning to seek continuances until the completion of the review process and adoption of the Executive order. DOJ has not yet done anything to seek these continuances. The earliest deadline is probably the February 8 status conference in Pruitt before another judge in Judge Hatter's district.

THE WHITE HOUSE
WASHINGTON

DATE: 2/1/93

NOTE FOR:

CHRISTINE VARNEY
BERNIE NUSSBAUM ✓

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

Information ☒

Action ☐

Thank you.

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

cc:

THE WHITE HOUSE

WASHINGTON

February 1, 1993

The Honorable Stuart Gearson
Acting Attorney General
Washington, D.C. 20530

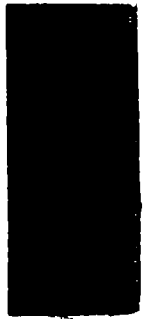
Dear Stuart,

Thank you for your letter of January 29.

I sincerely appreciate the thoughts which
you expressed.

Sincerely,

Bill Clinton





Office of the Attorney General
Washington, D.C.

January 29, 1993

The President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

In the wake of your perserverence in a controversial position as to the military, there are those critics who, for the sake of sensationalism, look to foment unnecessary tension within the Executive Branch. For example, I saw one purported constitutional expert on television last night suggest the possibility that the Acting Attorney General might take it upon himself to pursue an independent legal course in the Meinhold case.

While my occupying this office is accidental and of short duration, and while we are of different parties, it should be understood that you have my loyalty not just because you are the President, though that should be enough, but because, at least for now, I am your Attorney General, not some unconnected lawyer without a client. The independence you must demand is that of judgment, and you shall have that here, but the President, the unitary executive, has the absolute right to have his subordinates implement his policies.

President Bush, with whom I spoke yesterday, conveys his good wishes. And you have mine as well.

Sincerely,

Stuart Gerson

January 31, 1993

MEMORANDUM

BWN
TO: ~~Vince Foster~~
Webb Hubbell
FROM: Jerome J. Chapman *je*
RE: Action Required In Meinhold

Friday afternoon, Justice Department attorneys received the attached Order and Judgment, which was dated January 28. The two important points to note are:

1. The permanent injunction broadly bars the Department of Defense from discriminating on the basis of sexual orientation. Its scope is not confined to the Central District of California.

2. The compromise interim directive announced on Friday potentially conflicts with the Order in two respects:

(i) the Order prohibits DOD from "denying enlistment to any person based on sexual orientation" alone. While DOD will no longer ask enlistees whether they are gay, if they nevertheless declare themselves to be homosexuals, under the Order -- but not the interim directive -- DOD may not refuse them enlistment solely because of that declaration; and

(ii) the Order prohibits DOD from "discharging . . . any person based on sexual orientation" alone. Although the interim directive calls for the suspension or final discharges, it is likely that reassignment to the standby reserves accompanied by suspension of pay and benefits would be found to be inconsistent with the Order.

Recommendation: I believe the best way to eliminate the conflicts between the Court Order and the President's directive would be to ask Judge Hatter to stay the entry of his Judgment pending the completion of the process announced on Friday. In the meantime the preliminary injunction requiring Meinhold's reinstatement would continue in effect. If Judge Hatter

- 2 -

refuses, we should appeal to and seek a stay from the 9th Circuit.

Actions Taken: I spoke today with the Civil Division lawyers handling Meinhold and Dan Koffsky, Acting Assistant Attorney General in the Office of Legal Counsel, who has prepared a memo for Stuart Gerson on the options available to the Department. I told them that I would recommend requesting a stay, as outlined above.

Next Steps: The Civil Division attorneys, in consultation with Gerson, will draft a motion for a stay on Monday. It is possible that the motion would alternatively ask Judge Hatter to drop his broad Order against DOD on the ground that, the case not being a class action, the Order goes beyond what is necessary to grant plaintiff's relief. When the motion is drafted, the Civil Division lawyers will send it to me. I will then review it and undertake to clear it with you and DOD counsel. The goal is to file the motion Monday afternoon, California time.

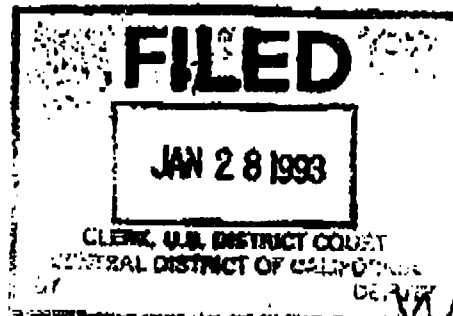
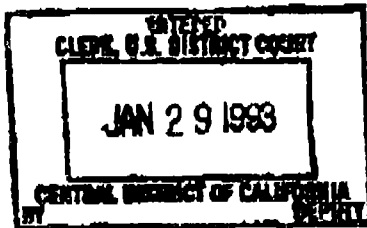
JAN-29-93 FRI 10:30

JAN 29 '93 14:27

P. 02

PAGE. 002

75-6



THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

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

VOLKER KEITH MEINHOLD,
Plaintiff,

v.

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

CV 92-6044 TJH (JRX)

**Order
and
Judgment**

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

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

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

P. 03

PAGE . 203

Terry J. Hatter, Jr.
Hatter, Jr.
United States District Judge

Lays -

January 31, 1993

Bernard Nussbaum, Counsel to the President
The White House
Washington, D.C.

Dear Mr. Nussbaum:

You may recall me from Columbia College and Harvard Law School. What you may not recall is that I am a gay person who, before my legal career, served in the military, and, despite the fact that I had no problem with fellow troops or commanders, was given a "General Discharge" because I happened to mention my sexuality.

The next six months are crucial not only for President Clinton's image but for the movement of civil rights. It is critical that the proper image of gay people and their concerns be presented to the American people during this time. If the only image of blacks were that of a highly sexual people who transmitted sexual diseases, Black Panthers and Al Sharpton, integration would never have occurred. Unfortunately, virtually the only images of gay people in the past decade have been AIDS, Act-Up, Queer Nation and drag parades in San Francisco. They are part of our culture, but so are all the bankers, lawyers, Congressmen and lieutenants. They must be presented to the American people, along with the very real and constant discriminations we suffer, just like the American people learned of Martin Luther King, Malcolm X, the Mayor of Los Angeles and the Governor of Virginia to balance the other also very real images of black culture.

Gays in the military may not seem a critical issue when, for the first time in over half a century, we do not seem to have a significant enemy. In fact, however, we still have the same significant enemy that has faced America since its birth, whether expressed in the anti-Catholic parties of the 1840's, the Chinese Exclusion Acts of the 1880's or the refusal to liberate the concentration camps in the 1940's: prejudice. Every American viscerally realizes this, whatever side they may take on the current issue, which is why it has so quickly become so central.

I would like to assist the President however I can in pursuing the course he obviously knows is right and is laden with minefields. This includes any liaison efforts between the different communities (for which, in any event, the President must immediately create a special office). Please feel free to contact me.

Sincerely,

Bradley B. Davis
Bradley B. Davis

Rec'd
FEB 5 1993

BRADLEY B. DAVIS

ATTORNEY-AT-LAW

1235 PARK AVENUE, NEW YORK 10128

212-410-2023

FAX# 212-369-9645

1/30

Bernie -

I've lost

my place on the status
of these policy decisions

January 29, 1993

so you should review

DETERMINED TO BE AN
ADMINISTRATIVE MARKINGINITIALS: AAB DATE: 8/3/16

2015-0017-F

PRIVILEGED AND CONFIDENTIAL

✓-

MEMORANDUM

TO: Vince Foster and Webb Hubbell

FROM: Jerome Chapman

RE: DOJ Issues Arising from Meinhold Decision

Earlier today, I sent you a copy of Judge Hatter's decision of January 28, permanently enjoining the Department of Defense "from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States."

1. DOJ No Comment -- I spoke this morning to Robert Kopp and Vince Garvey in the Civil Division. I urged them to take all necessary steps to ensure that no Justice Department lawyer makes any comment on the decision. In particular, there should be no comment on DOJ's intentions regarding an appeal.

Webb: I recommended that you suggest to Stuart Gerson, in any way you feel appropriate, the desirability of no comment from DOJ on this matter -- either to the press or, to the extent it can be avoided, to the Congress.

2. Effect of the Order -- DOD was a party to the Meinhold case. The Court's order prohibiting DOD from discriminating on the basis of sexual orientation in both discharges and enlistments is applicable throughout the DOD -- not just in the Central District of California -- unless the order is stayed.

I understand that DOD had proposed immediately to suspend any discharges of gays pending the Executive order. Judge Hatter's opinion also forces an interim decision on enlistments. The choices are:

- 2 -

(i) Immediately end the practice, not only of asking enlistees about their sexual orientation, but also of refusing enlistment to persons declaring themselves as gay, even if not asked; or

(ii) Continue for the time being not to enlist declared gays. If this option -- which is inconsistent with the President's policy -- were adopted as a compromise with Congress, DOJ would have to appeal and seek a stay of Judge Hatter's order.

3. Issues relating to appeal of the order -- DOJ would have 60 days from the entry of a "judgment" (which Judge Hatter may not yet have entered) to file a notice of appeal. Obviously, DOJ would only do so if necessary to carry out any interim compromise with Congress. Even if a notice of appeal were filed, DOJ should try to stay further proceedings pending the Executive order.

Note that some appeals are already pending in Meinhold:

1. After Judge Hatter's preliminary injunction in November 1992, DOJ appealed to the 9th Circuit.

2. Later, based on the understanding that Meinhold was also seeking back pay, DOJ appealed to the Federal Circuit, asking for a stay and reversal of the preliminary injunction.

3. DOJ then moved to dismiss its own appeal in the 9th Circuit, which the plaintiff opposed.

4. The Federal Circuit ordered a stay of DOJ's appeal there until the 9th Circuit ruled on DOJ's motion to dismiss its appeal. To date, the 9th Circuit has not ruled on the motion.

Robert Kopp is checking to see whether back pay is still an issue in the case. He thinks Meinhold may have waived this claim to avoid going to the Federal Circuit. Regardless of whether back pay is still in the case, Kopp's intention is to notify both the 9th and Federal Circuits that DOJ's prior appeals from the preliminary injunction are moot and should be withdrawn, since that order has now been superseded by the district court's final judgment on the merits. I believe this action is appropriate.

- 3 -

4. Role of Congress -- Attachment A is a statute that requires DOJ to notify Congress within 30 days whenever DOJ determines not to defend the constitutionality of "any provision of law enacted by the Congress." I do not believe this provision applies here, where DOJ would be refusing to defend the constitutionality of DOD regulations authorized, but not "enacted", by Congress. If you think it appropriate, I can have an associate research the issue. Another option would be to ask for an opinion from OLC. Possibly OLC already had opined on the scope of this provision. I will await your advice before asking anyone to do anything on this issue.

ATTACHMENT A

28 USCS § 518, n 5

DEPARTMENT OF JUSTICE

THE AT

later proceeding (ED Pa) 526 F Supp 414, later proceeding (ED Pa) 533 F Supp 631, later proceeding (ED Pa) 533 F Supp 641 and affd (CA3 Pa) 673 F2d 628, 33 FR Serv 2d 1178, cert den 465 US 1038, 79 L Ed 2d 712, 104 S Ct 1315 and (disagreed with *Alcorn County v U.S. Interstate Supplies, Inc.* (CA5 Miss) 731 F2d 1160, 39 FR Serv 2d 171, 76 ALR Fed 181 (disagreed with by multiple cases as stated in *Standard Equipment, Inc. v Boeing Co.* (DC Wash) 16 ELR 20246) and (disagreed with *Robinson v Tanner* (CA11 Ala) 798 F2d 1378, 5 FR Serv 3d 1376, cert den (US) 95 L Ed 2d 819, 107 S Ct 1979) and revd on other grounds 451 US 1, 67 L Ed 2d 694, 101 S Ct 1531, on remand, en banc (CA3 Pa) 673 F2d 647, later proceeding (ED Pa) 555 F Supp 1144, later proceeding (CA3 Pa) 707 F2d 702, on remand (ED Pa) 567 F Supp 1504, affd without op (CA3 Pa) 723 F2d 897 and affd without op (CA3 Pa) 723 F2d 898 and revd on other grounds 465 US 89, 79 L Ed 2d 67, 104 S Ct 900, later proceeding (ED Pa) 610 F Supp 1221, later proceeding (ED Pa) 633 F Supp 919.

Where state agencies are guilty of discriminatory hiring practices, Attorney General may

bring suit to ban such practices: "interest" of United States is enforcement of terms and conditions of grant of federal funds. *United States v Clark v Frazer* (1968, MD Ala) 297 F Supp 319, 1 BNA FEP Cas 792, 71 BNA LRRM 2633, 2 CCH EPD ¶ 10020, 60 CCH LC ¶ 9262

It is settled that Attorney General by virtue of his office may sue to protect federal interest in quality of air and water in their ambient or interstate aspects. *United States v Ira S. Bushey & Sons, Inc.* (1972, DC Vt) 346 F Supp 145, 2CLR 20557.

28 USCS § 518 does not authorize Attorney General to bring civil action against city to restrain alleged pattern of police abuse against private citizens in violation of civil rights laws. *United States v Philadelphia* (1979, ED Pa) 482 F Supp 1248, later op (ED Pa) 482 F Supp 1274, affd (CA3 Pa) 644 F2d 187, later proceeding (ED Pa) 595 F Supp 178, affd without op (CA3 Pa) 774 F2d 1150 and affd without op (CA3 Pa) 774 F2d 1150 and affd without op (CA3 Pa) 774 F2d 1150.

§ 519. Supervision of litigation

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title [28 USCS § 543] in the discharge of their respective duties. (Sept. 6, 1966, P. L. 89-554, § 4(c), 80 Stat. 614.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	28 U.S.C. 507(b).	[None].

The words "Except as otherwise authorized by law," are added to provide for existing and future exceptions (e.g., section 1037 of title 10).

The words "or officer" are added for clarity and to align this section with section 516 which is of similar import.

The words "special attorneys appointed under section 543" are substituted for "attorneys appointed under section 543" to reflect the revision of this title.

Other provisions:

Study of the percentage of prosecution of complaints of Federal criminal law violations. Act Nov. 9, 1978, P. L. 95-624, § 17, 92 Stat.

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THE ATTORNEY GENERAL

28 USCS § 519

3465, provided: "The Attorney General shall undertake a study of the extent to which complaints of violations of federal criminal laws are not prosecuted and shall make recommendations for improving the percentage of such complaints which are prosecuted by the Department. The study shall also analyze the cases that have not been prosecuted and make recommendations to assure that the decisions not to prosecute are in accordance with national policy. The study and recommendations shall be provided to the Committees on the Judiciary of the Senate and House of Representatives not later than October 1, 1979."

Report to Congress regarding provisions of law considered unconstitutional by the Department of Justice; declaration of such position. Act Nov. 30, 1979, P. L. 96-132, § 21, 93 Stat. 1049, provided:

"(a) The Attorney General shall, during the fiscal year for which appropriations are authorized by this Act, transmit a report to each House of the Congress in any case in which the Attorney General—

"(1) establishes a policy to refrain from the enforcement of any provision of law enacted by the Congress, the enforcement of which is the responsibility of the Department of Justice, because of the position of the Department of Justice that such provision of law is not constitutional; or

"(2) determines that the Department of Justice will contest, or will refrain from defending, any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional.

"(b) Any report required in subsection (a) shall be transmitted not later than thirty days after the Attorney General establishes the policy specified in subsection (a)(1) or makes the determination specified in subsection (a)(2). Each such report shall—

"(1) specify the provision of law involved;

"(2) include a detailed statement of the reasons for the position of the Department of Justice that such provision of law is not constitutional; and

"(3) in the case of a determination specified in subsection (a)(2), indicate the nature of the judicial, administrative, or other proceeding involved.

"(c) If, during the fiscal year for which appropriations are authorized by this Act, the Attorney General determines that the Department of Justice will contest, or will refrain from defending, any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional, then the representative of the Department of Justice participating in such proceeding shall make a declaration in such proceeding that such position of the Department of Justice regarding the constitutionality of the provision of law involved constitutes the position of the executive branch of the United States with respect to such matter."

28 USCS § 519**DEPARTMENT OF JUSTICE**

Similar provisions are contained in Act Nov. 9, 1978, P. L. 95-624, § 13, 92 Stat. 3464.

Case management information and tracking systems for Federal judicial districts and divisions of department; preparation, submission, etc., of plan. Act Nov. 30, 1979, P. L. 96-132, § 11, 93 Stat. 1047, provided:

"(a) Not later than April 15, 1980, the Attorney General, after consultation with the Director of the Executive Office of United States Attorneys and such Assistant Attorneys General as he shall deem appropriate, shall prepare and submit to the Committees on the Judiciary of the Senate and House of Representatives a plan for the activation and coordination, within the Department, of compatible, comprehensive case management information and tracking systems for each of the judicial districts of the United States, as described in chapter 5 of title 28 of the United States Code [28 USCS §§ 81 et seq.] and for each of the divisions of the Department.

"(b) Such plan shall—

"(1) incorporate into the design of such systems all matters and cases involving the United States Attorneys and, where relevant, other departmental resources;

"(2) make provision for identifying and retrieving all relevant data, including—

"(A) complete individual case information from intake or commencement of investigation to final disposition, including identification of the division or office primarily responsible for the case;

"(B) complete information on decisions not to prosecute or litigate alleged violations of the laws of the United States, the stage of the proceedings at which such decisions are made, and the reasons for such decisions; and

"(C) identification of the local, State, or Federal governmental organization, including any organization within the Department of Justice, referring each case for prosecution or litigation;

"(3) take into account the importance of identifying investigations, prosecutions, and litigation in areas which the Attorney General may from time to time designate as high priority;

"(4) consider the application of a case weighting system for evaluating prosecutorial and litigation decisions, dedication of resources, and case management and disposition by all departmental personnel involved;

"(5) emphasize as a goal maximum data retrieval and utilization; and

"(6) include a timetable for implementation of the plan and the costs for implementation."

CROSS REFERENCES

This section referred to in 7 USCS § 943; 19 USCS § 1920; 38 USCS § 3110; 42 USCS § 8412.

RESEARCH GUIDE

Am Jur:

7 Am Jur 2d, Attorney General § 31.

THE WHITE HOUSE
WASHINGTON

DATE: 1/29

NOTE FOR: *Sandy, Bernie*

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

Information



Action



Thank you.

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

cc:

THE WHITE HOUSE

WASHINGTON

January 29, 1993

MEMORANDUM FOR THE SECRETARY OF DEFENSE

SUBJECT: Ending Discrimination on the Basis of
Sexual Orientation in the Armed Forces

I hereby direct you to submit to me prior to July 15, 1993, a draft of an Executive order ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States. The draft of the Executive order should be accompanied by the results of a study to be conducted over the next six months on how this revision in policy would be carried out in a manner that is practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain.

In preparing the draft, I direct you to consult fully with the Joint Chiefs of Staff and the military services, with other Departments affected by the order, with the Congress, and with concerned individuals and organizations outside the executive branch.

William Clinton



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

FACSIMILE TRANSMISSION

Fax Number: (202) 514-8071

Voice Number: (202) 514-3301

FROM:

Stuart Gerson
(Name)

DATE/TIME:

1-29-93

TELEPHONE NUMBER:

514 3301

TO:

Bernie Neusbaum
(Name)

DESTINATION'S FAX NUMBER:

456 6279

DESTINATION'S VOICE VERIFICATION NUMBER:

456 2632

NUMBER OF PAGES (EXCLUDING COVER SHEET):

2

Message/comments:

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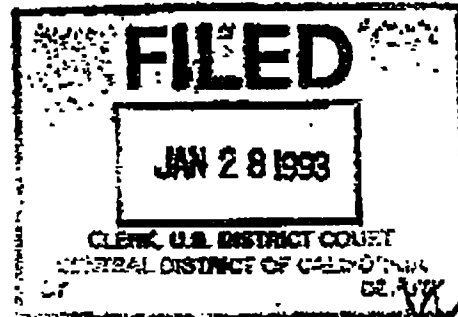
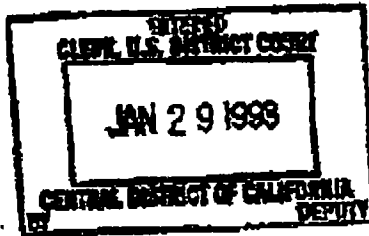
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P.02

JAN 29 '93 14:27

PAGE.002

95-6



THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

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

VOLKER KEITH MEINHOLD,
Plaintiff,

CV 92-6044 TJH (JRx)

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

**Order
and
Judgment**

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

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

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

WHITE & CASE**633 WEST FIFTH STREET
LOS ANGELES, CALIFORNIA 90071-2007****(213) 620-7700****FACSIMILE: (213) 667-0758****TELEX: 277623****UNITED STATES
NEW YORK
WASHINGTON, D.C.
MIAMI****LATIN AMERICA
MEXICO CITY****ASIA/PACIFIC
TOKYO
HONG KONG
JAKARTA
SINGAPORE****EUROPE
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PARIS
BRUSSELS
FRANKFURT
STOCKHOLM
MOSCOW
BUDAPEST
PRAGUE
WARSAW
ISTANBUL
ANKARA****MIDDLE EAST
JEDDAH****SENT VIA FACSIMILE**

49

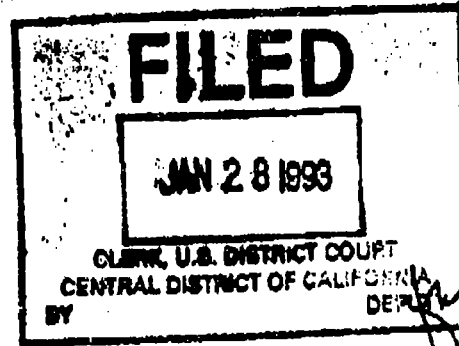
DATE: January 29, 1993 NO. OF PAGES INCLUDING THIS COVER SHEET: 8**TO: PRESIDENT BILL CLINTON****COMPANY: THE WHITE HOUSE****SENDER: John McGuire SENDER'S NO.: (213) 620-7749**

PLEASE NOTE: The information contained in this facsimile message is privileged and confidential, and is intended only for the use of the individual named above and others who have been specifically authorized to receive it. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, or if any problems occur with transmission, please contact Sender or call (213) 620-7710. Thank you.

THIS SPACE MAY BE USED FOR SUPPLEMENTAL MESSAGE

Per your comments today, attached please find a copy of the Opinion rendered in Los Angeles yesterday. If I can be of any service, please do not hesitate to call. Thank you!!

John I. McGuire**KEITH MEINHOLD OPINION ATTACHED***Copy in the Military**Rec'd.
9:58am
ashm*



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

VOLKER KEITH MEINHOLD,

Plaintiff,

v.

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

Defendants.

CV 92-6044 TJH (JRx)

Opinion

BACKGROUND

In 1980, at the age of 17, Volker Keith Meinhold enlisted in the United States Navy. Over the last twelve years, Meinhold has established a reputation for being a dedicated and disciplined sailor. As such, he earned his position as a Naval airborne sonar analyst and instructor. He has consistently received outstanding evaluations and has never been the subject of disciplinary action.

In 1992, Meinhold was discharged from the Navy and deprived of his career after he announced on an ABC television news program that he was gay. Meinhold

1 was discharged not because he engaged in prohibited conduct, but because he labeled
2 himself as gay. Meinhold filed this action in response to his discharge. Previously,
3 this Court issued a preliminary injunction ordering the Navy to reinstate Meinhold
4 pending a final resolution of this case.

5 The Court, now, decides this case on the merits based on the cross motions for
6 summary judgment. The parties are in agreement on the relevant facts, and the Court
7 finds that there are no genuine issues of material fact to preclude the rendering of a
8 decision based on the law of the land. Fed. R. Civ. P. 56(c). While Meinhold, also,
9 attacks the administrative discharge procedures used by the Navy, the key issue
10 presented to the Court is whether the United States Department of Defense may ban,
11 from the armed forces of the United States, gays and lesbians who do not engage in
12 prohibited conduct.

13 DISCUSSION

14 Exhaustion of Administrative Remedies

15 While it is clear to this Court that there were numerous procedural errors
16 committed by the board of Naval officers convened for Meinhold's administrative
17 discharge hearing, it is also undisputed that a new hearing would result in the same
18 decision. Namely, Meinhold would, again, be discharged based on his status as a
19 homosexual. Thus, requiring Meinhold to exhaust his intraservice remedies would
20 be futile. *See, Watkins v. U.S. Army*, 875 F.2d 699, 705 (9th Cir. 1989) (*en banc*),
21 *cert. denied*, ___ U.S. ___, 111 S. Ct. 384 (1990). Therefore, this Court will proceed
22 to the merits of Meinhold's claims.

23 Equal Protection

24 To survive Meinhold's claim that the Department of Defense's policy banning
25 gays and lesbians based merely on status, and not conduct, violates the Equal
26 Protection clause of the Fifth Amendment, the Department of Defense must establish,

1 through a factual record, that its policy is rationally related to its permissible goals.
2 *Pruitt v. Cheney*, 963 F.2d 1160, 1166-67 (9th Cir. 1991), *cert. denied*, ___ U.S. ___,
3 113 S. Ct. 655 (1992). In determining whether the policy is rationally related, the
4 Court cannot merely defer to the "military judgment" as the rationale for the policy
5 -- the Court must consider the factual basis underlying the "military judgment."
6 *Pruitt*, 963 F.2d at 1166-67.

7 The Navy contends that its ban against gays and lesbians is rationally related
8 to its goals of maintaining discipline, good order and morale; fostering mutual trust
9 and confidence among servicemembers; the need to recruit and retain
10 servicemembers; and maintaining public acceptability of the Navy. Navy Military
11 Personal Manual 3630400(1). Security concerns, once generally raised by supporters
12 of the ban, however, are no longer a rationale, since gays and lesbians are not a
13 security risk to the military, according to former Secretary of Defense Richard
14 Cheney. *Meet the Press* (NBC television broadcast, Dec. 6, 1992).

15 The factual record placed before the Court by the Department of Defense is
16 sparse. The Navy rests solely on a report produced by the United States General
17 Accounting Office in June of 1992. General Accounting Office, *Defense Force*
18 *Management: Statistics Related to DoD's Policy on Homosexuality* (1992).
19 However, that report concludes nothing more than what the Department of Justice has
20 already told the Court -- the rationale for the policy banning gays and lesbians from
21 the military is "not capable of being determined authoritatively by scientific means
22 or proven studies." *Defense Force Management*, p.69. The GAO reached the
23 conclusion that the policy is based on "military judgment [which is] inherently
24 subjective in nature [and not susceptible to] scientific or sociological analysis.
25 *Defense Force Management*, p.56. However, the military has, indeed, obtained
26 scientific and sociological analyses upon which to base its decisions regarding gays

1 and lesbians in the military.

2 In 1957, the Secretary of the Navy commissioned a report regarding the
3 revision of its policies, procedures and directives dealing with homosexuals. *Report*
4 *of the Board Appointed to Prepare and Submit Recommendations to the Secretary of*
5 *the Navy for the Revision of Policies, Procedures and Directives Dealing with*
6 *Homosexuality* (Mar. 15, 1957) ["Crittenden Report"]. The Crittenden Report stated
7 that there was no "visible supporting data [to support the conclusion that gays and
8 lesbians] cannot acceptably serve in the military." *Crittenden Report*, p.5. In 1976,
9 the Chief of Naval Personnel stated that "no empirical proof exists at this time [to
10 support the Navy's contention that] homosexuality has an adverse effect upon the
11 completion of the [military] mission." Memorandum from Chief of Naval Personnel
12 to Judge Advocate General (Aug. 2, 1976).

13 Moreover, in 1988, the Department of Defense commissioned a study of
14 homosexual veterans which concluded that "having a same-gender or an opposite-
15 gender orientation is unrelated to job performance in the same way as being left- or
16 right-handed." Theodore R. Sarbin & Kenneth K. Eoyang, *Nonconforming Sexual*
17 *Orientation and Military Suitability*, p.33 (1988). In 1989, another Department of
18 Defense- commissioned study investigated the suitability of gay men and lesbians for
19 military service, and found that "homosexuals more closely resemble those who
20 successfully adjust to military life than those who are discharged for unsuitability ...
21 [and that] homosexuals show pre-service suitability-related adjustment that is as good
22 or better than the average heterosexual." Michael A. McDaniel, *Preservice*
23 *Adjustment of Homosexual and Heterosexual Military Accessions*, p.19 (1989).

24 Further, Vice Admiral Joseph S. Donnell, the Commander of the Surface
25 Atlantic Fleet has stated that "[e]xperience has ... shown that the stereotypical female
26 homosexual in the Navy is hardworking, career-orientated, willing to put in long

1 hours on the job and among the command's top professionals." Administrative
2 Message from Commander, Naval Surface Fleet, Atlantic, to the Naval Surface Fleet,
3 Atlantic (July 2, 1990).

4 Additionally, of all the countries in the North Atlantic Treaty Organization
5 ["NATO"], only the United States and Great Britain ban gays and lesbians from their
6 armed forces. On October 27, 1992, Canada's military leaders rescinded Canada's
7 policy of banning gays and lesbians from the Canadian Forces, albeit as a result of a
8 court order. In explaining why the ban was rescinded, General A.J.G.D. de
9 Chastelain, Canada's Chief of the Defence Staff, reported that the military leadership
10 was "satisfied that the policy no longer serves the best interests of the CF and its
11 members." *National Defence News Release* (Oct. 27, 1992). On November 23, 1992,
12 Australia lifted its ban against gays and lesbians in the Australian Defense Force.
13 Prime Minister P.J. Keating, *Australian Defence Force Policy on Homosexuals* (Nov.
14 23, 1992). In support of lifting the ban, Australia's Prime Minister stated that "the
15 decision will not have the adverse effect on morale and cohesion predicted by some."
16 *Id.*

17 Finally, Dr. Lawrence J. Korb, the former Assistant Secretary of Defense who
18 was responsible for approving and implementing the present policy banning gays and
19 lesbians, has declared "that there is no longer any justification for the armed services'
20 current ban on homosexuals serving in the military ... [that] each of the justifications
21 offered in support of this policy is without factual foundation ... [and, therefore,] there
22 is no longer any rational basis [for it]." Meinhold's Exhibit 12, p.874, ¶¶ 4 & 7.

23 As the Ninth Circuit has held, so, too, does this Court hold that deference to
24 "military judgment," in the absence of a factual basis for such judgment, would result
25 in the denial of judicial review. *Pruitt*, 963 F.2d at 1166-67.

26 Gays and lesbians have served, and continue to serve, the United States military

1 with honor, pride, dignity and loyalty. The Department of Defense's justifications for
2 its policy banning gays and lesbians from military service are based on cultural myths
3 and false stereotypes. These justifications are baseless and very similar to the reasons
4 offered to keep the military racially segregated in the 1940's.

5 Gays and lesbians should not be banned from serving our country in the
6 absence of conduct which interferes with the military mission. Hopefully, our
7 military leaders will come to realize that "[w]e are not an assimilative, homogeneous
8 society, but a facilitative, pluralistic one, in which we must be willing to abide
9 someone else's unfamiliar or even repellant practice because the same tolerant
10 impulse protects our own idiosyncracies." *Michael H. v. Gerald D.*, 491 U.S. 110,
11 141, 109 S. Ct. 2333, 2351, 105 L. Ed. 2d 91, 117 (1989) (Brennan, J., dissenting).

12 Therefore, Meinhold's motion for summary judgment is granted, and the
13 Department of Defense's motion for summary judgment is denied. The Department
14 of Defense is permanently enjoined from discharging or denying enlistment to any
15 person based on sexual orientation in the absence of sexual conduct which interferes
16 with the military mission of the armed forces of the United States. Meinhold's
17 discharge from the United States Navy is rescinded.

18
19 It is so Ordered.

20
21 Date: January 28, 1993

22 
23 Terry J. Hatter, Jr.
24 United States District Judge
25
26

January 29, 1993

VIA TELECOPY

MEMORANDUM

TO: Webb Hubbell
Vince Foster

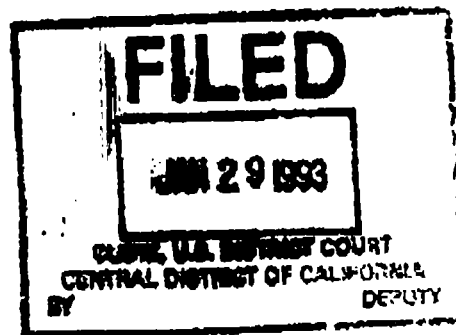
FROM: Jerome Chapman 

RE: Amended Opinion in Meinhold Case

Judge Hatter issued the attached amended opinion in Meinhold today.

It makes no significant changes. Primarily, it includes references to additional authorization supporting the judge's ruling.

Attachment



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

VOLKER KEITH MEINHOLD,

Plaintiff,

v.

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

Defendants.

CV 92-6044 TJH (JRG)

**Amended
Opinion**

BACKGROUND

In 1980, at the age of 17, Volker Keith Meinhold enlisted in the United States Navy. Over the last twelve years, Meinhold has established a reputation for being a dedicated and disciplined sailor. As such, he earned his position as a Naval airborne sonar analyst and instructor. He has consistently received outstanding evaluations and has never been the subject of disciplinary action.

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1 was discharged not because he engaged in prohibited conduct, but because he labeled
2 himself as gay. Meinhold filed this action in response to his discharge. Previously,
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5 The Court, now, decides this case on the merits based on the cross motions for
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7 finds that there are no genuine issues of material fact to preclude the rendering of a
8 decision based on the law of the land. Fed. R. Civ. P. 56(e). While Meinhold, also,
9 attacks the administrative discharge procedures used by the Navy, the key issue
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12 prohibited conduct.

13 **DISCUSSION**
14 **Exhaustion of Administrative Remedies**

15 While it is clear to this Court that there were numerous procedural errors
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23 **Equal Protection**

24 To survive Meinhold's claim that the Department of Defense's policy banning
25 gays and lesbians based merely on status, and not conduct, violates the Equal
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21 [and that] homosexuals show pre-service suitability-related adjustment that is as good
22 or better than the average heterosexual." Michael A. McDaniel, *Preservice*
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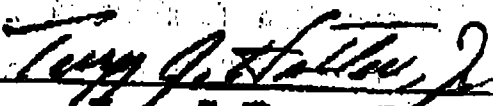
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2 its policy banning gays and lesbians from military service are based on cultural myths
3 and false stereotypes. These justifications are baseless and very similar to the reasons
4 offered to keep the military racially segregated in the 1940's.*

5 Gays and lesbians should not be banned from serving our country in the
6 absence of conduct which interferes with the military mission. Hopefully, our
7 military leaders will come to realize that "[w]e are not an assimilative, homogeneous
8 society, but a facilitative, pluralistic one, in which we must be willing to abide
9 someone else's unfamiliar or even repellant practice because the same tolerant
10 impulse protects our own idiosyncracies." *Michael H. v. Gerald D.*, 491 U.S. 110,
11 141, 109 S. Ct. 2333, 2351, 105 L. Ed. 2d 91, 117 (1989) (Brennan, J., dissenting).

12 Therefore, Meinhold's motion for summary judgment is granted, and the
13 Department of Defense's motion for summary judgment is denied. The Department
14 of Defense is permanently enjoined from discharging or denying enlistment to any
15 person based on sexual orientation in the absence of sexual conduct which interferes
16 with the military mission of the armed forces of the United States. Meinhold's
17 discharge from the United States Navy is rescinded.

18 It is so Ordered.

19
20 Date: January 29, 1993

21 
22 Terry J. Haller, Jr.
23 United States District Judge
24

25 * For a particularly insightful and thorough analysis of the Department of Defense's ban against
26 gays and lesbians, see Kurt D. Hermansen, Comment, *Analyzing the Military's Justification for its
Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 Loy. L.A. L. Rev. 151 (1992).

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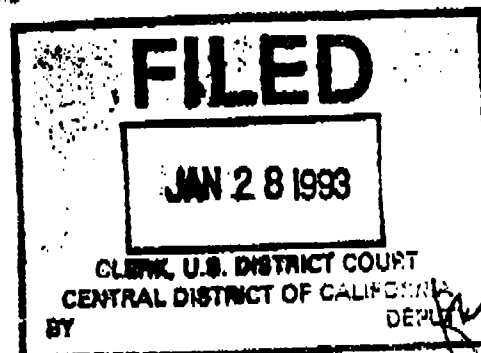
1 hours on the job and among the command's top professionals." Administrative
2 Message from Commander, Naval Surface Fleet, Atlantic, to the Naval Surface Fleet,
3 Atlantic (July 2, 1990).

4 Additionally, of all the countries in the North Atlantic Treaty Organization
5 ["NATO"], only the United States and Great Britain ban gays and lesbians from their
6 armed forces. On October 27, 1992, Canada's military leaders rescinded Canada's
7 policy of banning gays and lesbians from the Canadian Forces, albeit as a result of a
8 court order. In explaining why the ban was rescinded, General A.J.G.D. de
9 Chastelain, Canada's Chief of the Defence Staff, reported that the military leadership
10 was "satisfied that the policy no longer serves the best interests of the CF and its
11 members." *National Defence News Release* (Oct. 27, 1992). On November 23, 1992,
12 Australia lifted its ban against gays and lesbians in the Australian Defence Force.
13 Prime Minister P.J. Keating, *Australian Defence Force Policy on Homosexuals* (Nov.
14 23, 1992). In support of lifting the ban, Australia's Prime Minister stated that "the
15 decision will not have the adverse effect on morale and cohesion predicted by some."
16 *Id.*

17 Finally, Dr. Lawrence J. Korb, the former Assistant Secretary of Defense who
18 was responsible for approving and implementing the present policy banning gays and
19 lesbians, has declared "that there is no longer any justification for the armed services'
20 current ban on homosexuals serving in the military ... [that] each of the justifications
21 offered in support of this policy is without factual foundation ... [and, therefore,] there
22 is no longer any rational basis [for it]." Meinhold's Exhibit 12, p.874, ¶ 4 & 7.

23 As the Ninth Circuit has held, so, too, does this Court hold that deference to
24 "military judgment," in the absence of a factual basis for such judgment, would result
25 in the denial of judicial review. *Pruitt*, 963 F.2d at 1166-67.

26 Gays and lesbians have served, and continue to serve, the United States military



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

VOLKER KEITH MEINHOLD,

Plaintiff,

v.

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

Defendants.

CV 92-6044 TJH (JRx)

Opinion

8
B. Wasserman

BACKGROUND

In 1980, at the age of 17, Volker Keith Meinhold enlisted in the United States Navy. Over the last twelve years, Meinhold has established a reputation for being a dedicated and disciplined sailor. As such, he earned his position as a Naval airborne sonar analyst and instructor. He has consistently received outstanding evaluations and has never been the subject of disciplinary action.

In 1992, Meinhold was discharged from the Navy and deprived of his career after he announced on an ABC television news program that he was gay. Meinhold

1 was discharged not because he engaged in prohibited conduct, but because he labeled
2 himself as gay. Meinhold filed this action in response to his discharge. Previously,
3 this Court issued a preliminary injunction ordering the Navy to reinstate Meinhold
4 pending a final resolution of this case.

5 The Court, now, decides this case on the merits based on the cross motions for
6 summary judgment. The parties are in agreement on the relevant facts, and the Court
7 finds that there are no genuine issues of material fact to preclude the rendering of a
8 decision based on the law of the land. Fed. R. Civ. P. 56(c). While Meinhold, also,
9 attacks the administrative discharge procedures used by the Navy, the key issue
10 presented to the Court is whether the United States Department of Defense may ban,
11 from the armed forces of the United States, gays and lesbians who do not engage in
12 prohibited conduct.

13 DISCUSSION

14 Exhaustion of Administrative Remedies

15 While it is clear to this Court that there were numerous procedural errors
16 committed by the board of Naval officers convened for Meinhold's administrative
17 discharge hearing, it is also undisputed that a new hearing would result in the same
18 decision. Namely, Meinhold would, again, be discharged based on his status as a
19 homosexual. Thus, requiring Meinhold to exhaust his intraservice remedies would
20 be futile. *See, Watkins v. U.S. Army*, 875 F.2d 699, 705 (9th Cir. 1989) (*en banc*),
21 *cert. denied*, ___ U.S. ___, 111 S. Ct. 384 (1990). Therefore, this Court will proceed
22 to the merits of Meinhold's claims.

23 Equal Protection

24 To survive Meinhold's claim that the Department of Defense's policy banning
25 gays and lesbians based merely on status, and not conduct, violates the Equal
26 Protection clause of the Fifth Amendment, the Department of Defense must establish,

1 through a factual record, that its policy is rationally related to its permissible goals.
2 *Pruitt v. Cheney*, 963 F.2d 1160, 1166-67 (9th Cir. 1991), *cert. denied*, ___ U.S. ___,
3 113 S. Ct. 655 (1992). In determining whether the policy is rationally related, the
4 Court cannot merely defer to the "military judgment" as the rationale for the policy
5 -- the Court must consider the factual basis underlying the "military judgment."
6 *Pruitt*, 963 F.2d at 1166-67.

7 The Navy contends that its ban against gays and lesbians is rationally related
8 to its goals of maintaining discipline, good order and morale; fostering mutual trust
9 and confidence among servicemembers; the need to recruit and retain
10 servicemembers; and maintaining public acceptability of the Navy. Navy Military
11 Personal Manual 3630400(1). Security concerns, once generally raised by supporters
12 of the ban, however, are no longer a rationale, since gays and lesbians are not a
13 security risk to the military, according to former Secretary of Defense Richard
14 Cheney. *Meet the Press* (NBC television broadcast, Dec. 6, 1992).

15 The factual record placed before the Court by the Department of Defense is
16 sparse. The Navy rests solely on a report produced by the United States General
17 Accounting Office in June of 1992. General Accounting Office, *Defense Force*
18 *Management: Statistics Related to DoD's Policy on Homosexuality* (1992).
19 However, that report concludes nothing more than what the Department of Justice has
20 already told the Court -- the rationale for the policy banning gays and lesbians from
21 the military is "not capable of being determined authoritatively by scientific means
22 or proven studies." *Defense Force Management*, p.69. The GAO reached the
23 conclusion that the policy is based on "military judgment [which is] inherently
24 subjective in nature [and not susceptible to] scientific or sociological analysis.
25 *Defense Force Management*, p.56. However, the military has, indeed, obtained
26 scientific and sociological analyses upon which to base its decisions regarding gays

1 and lesbians in the military.

2 In 1957, the Secretary of the Navy commissioned a report regarding the
3 revision of its policies, procedures and directives dealing with homosexuals. *Report*
4 *of the Board Appointed to Prepare and Submit Recommendations to the Secretary of*
5 *the Navy for the Revision of Policies, Procedures and Directives Dealing with*
6 *Homosexuality* (Mar. 15, 1957) ["Crittenden Report"]. The Crittenden Report stated
7 that there was no "visible supporting data [to support the conclusion that gays and
8 lesbians] cannot acceptably serve in the military." *Crittenden Report*, p.5. In 1976,
9 the Chief of Naval Personnel stated that "no empirical proof exists at this time [to
10 support the Navy's contention that] homosexuality has an adverse effect upon the
11 completion of the [military] mission." Memorandum from Chief of Naval Personnel
12 to Judge Advocate General (Aug. 2, 1976).

13 Moreover, in 1988, the Department of Defense commissioned a study of
14 homosexual veterans which concluded that "having a same-gender or an opposite-
15 gender orientation is unrelated to job performance in the same way as being left- or
16 right-handed." Theodore R. Sarbin & Kenneth K. Eoyang, *Nonconforming Sexual*
17 *Orientation and Military Suitability*, p.33 (1988). In 1989, another Department of
18 Defense- commissioned study investigated the suitability of gay men and lesbians for
19 military service, and found that "homosexuals more closely resemble those who
20 successfully adjust to military life than those who are discharged for unsuitability ...
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26 homosexual in the Navy is hardworking, career-orientated, willing to put in long

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5 ["NATO"], only the United States and Great Britain ban gays and lesbians from their
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14 23, 1992). In support of lifting the ban, Australia's Prime Minister stated that "the
15 decision will not have the adverse effect on morale and cohesion predicted by some."
16 *Id.*

17 Finally, Dr. Lawrence J. Korb, the former Assistant Secretary of Defense who
18 was responsible for approving and implementing the present policy banning gays and
19 lesbians, has declared "that there is no longer any justification for the armed services'
20 current ban on homosexuals serving in the military ... [that] each of the justifications
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22 is no longer any rational basis [for it]." Meinhold's Exhibit 12, p.874, ¶¶ 4 & 7.

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24 "military judgment," in the absence of a factual basis for such judgment, would result
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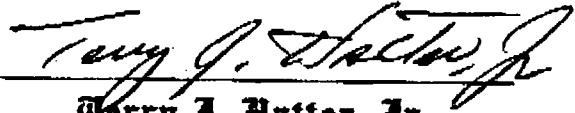
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15 person based on sexual orientation in the absence of sexual conduct which interferes
16 with the military mission of the armed forces of the United States. Meinhold's
17 discharge from the United States Navy is rescinded.

18
19 It is so Ordered.

20
21 Date: January 28, 1993

22
23 
24 Terry J. Hatter, Jr.
25 United States District Judge
26

Days on Military

FEB 1 1993

THE WHITE HOUSE
WASHINGTON

January 29, 1993

MEMORANDUM FOR THE SECRETARY OF DEFENSE

SUBJECT: Ending Discrimination on the Basis of
Sexual Orientation in the Armed Forces

I hereby direct you to submit to me prior to July 15, 1993, a draft of an Executive order ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States. The draft of the Executive order should be accompanied by the results of a study to be conducted over the next six months on how this revision in policy would be carried out in a manner that is practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain.

In preparing the draft, I direct you to consult fully with the Joint Chiefs of Staff and the military services, with other Departments affected by the order, with the Congress, and with concerned individuals and organizations outside the executive branch.

William Clinton

1/28/93

The President has directed the Secretary of Defense to conduct a review of the current Department of Defense policy that excludes homosexuals from military service and prepare a draft executive order based upon that review by July 15, 1993.

Current Department of Defense personnel policies related to this issue will remain in effect at least through July 15, 1993 while the Department of Defense is conducting the review directed by the President, subject to the following guidance:

First, questions regarding sexual orientation will be removed from future versions of the enlistment application, and will not be asked in the interim. The briefings on military justice which all recruits are required to receive upon entry to military service and periodically thereafter under Article 137 of the Uniform Code of Military Justice will include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces.

Second, the Department of Justice will seek continuances in pending court-cases involving former servicemembers who have been discharged on the basis of homosexuality and who are seeking reinstatement into military service. The continuances would freeze those cases pending the completion of the review directed by the President.

Third, commanding officers will continue to process cases under the current laws and regulations related to homosexuality.

- Cases involving homosexual conduct will be processed through actual separation and discharge in accordance with current policy.
- When a case involves only homosexual status and the person involved requests a discharge, the person will be released from active duty *per memo 8-82*
- Cases involving homosexual status being contested by the individual will be processed through all applicable stages, including notice of the basis for separation, hearing before a board of officers, review of the board's recommendations by the separation authority, and action by the separation authority to discharge the person. If directed by the Attorney General, the final discharge in cases based only on status will be suspended until the President acts on the recommendations of the Secretary of Defense with respect to current policy. A member whose discharge has been suspended by the Attorney General will be separated from active duty and placed in the standby reserve. Individuals in the standby reserve would have

the option to return, upon request, to active duty should the current policy be changed. Those personnel whose cases have not been suspended will be discharged.

- Commanding officers may, in the interests of the individual or the unit concerned, direct changes in the assignment of personnel during the course of separation proceedings.



U.S. Department of Justice

Washington, D.C. 20530

MEMORANDUM

To: Bernard Nussbaum
White Counsel
Stuart M. Gerson
Acting Attorney General

From: David M. Glass
Trial Attorney
Civil Division
Federal Programs Branch

Re: Judicial Decisions Relevant to the Military's Policy on
Homosexuality

January 29, 1993

That the military's policy on homosexuality possesses a rational basis is the conclusion of a long series of decisions. These decisions have upheld the rationality of the policy insofar as the policy applies to servicemembers who are found to have engaged in homosexual conduct, Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (Bork, J.); Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980) (Anthony Kennedy, J.), cert. denied, 452 U.S. 905 & 454 U.S. 855 (1981); Secora v. Fox, No. C-3-83-799, slip op. at 17 & 17-18 n.9 (S.D. Ohio Sept. 30, 1992) (op. of mag. j.); see Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382 (9th Cir.), cert. denied, 454 U.S. 864 (1981); and insofar as the policy applies to servicemembers who are found to have stated that they are homosexuals. Ben-Shalom v. Marsh, 881 F.2d 454, 463-66 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1071, 1076-77 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1991); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); Steffan v. Cheney, 780 F. Supp. 1, 12-13 (D.D.C. 1991) (app. pend'g); see Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992). Certain of these cases involved due-process challenges to the military's policy; others involved equal-protection challenges. Ben-Shalom is particularly well-reasoned.

In Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), the court of appeals stated that the military's policy on homosexuality could not be deemed

"rational as a matter of law without any justification in the record at all." 963 F.2d at 1166. Holding that the plaintiff's equal-protection challenge to the policy ought not to have been dismissed for failure to state a claim, the court of appeals remanded the case for "further appropriate proceedings," including "those directed toward determining" whether the policy "is rationally related to a permissible governmental purpose." Id. at 1167. In Meinhold v. United States Department of Defense, No. CV 92-6044 TJH (JRx) (C.D. Cal. Jan. 28, 1993), the court placed exclusive reliance on Pruitt in holding that the military's policy was invalid on equal-protection grounds. Slip op. at 3. In doing so, however, the court did not address the defendants' argument that Pruitt had been overruled sub silentio by United States v. Harding, 971 F.2d 410 (9th Cir. 1992).

Also relevant to the constitutionality of the military's policy on homosexuality are Bowers v. Hardwick, 478 U.S. 186 (1986), and Goldman v. Weinberger, 475 U.S. 503 (1986). In Bowers, the Supreme Court upheld the criminalization of sodomy against constitutional challenge. 478 U.S. at 190-91. In Goldman, the Supreme Court held the "considered professional judgment" of the military to be a sufficient basis for upholding against First Amendment challenge the Air Force policy forbidding the wearing of nonstandard headgear, i.e., yarmulkes, by servicemembers. 475 U.S. at 509.

If you would like a more extensive discussion of the above cases, please contact me at (202) 514-4469.



U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER STREET



DATE: _____

TO: Bernard Nussbaum

FAX NUMBER: _____

FROM: David M. Glass

FAX NUMBER(S) ROOM 1000
COMMERCIAL: 202-616-8470
CONFIRMATION NO.: 202-616-8474

THERE ARE A TOTAL OF _____ PAGES INCLUDING THIS COVER PAGE IN
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AUTOMATIC COVER SHEET

DATE: JAN-29-93 FRI 0:18

TO:

FAX #: 94566279

FROM:

FAX #:

04 PAGES WERE SENT

(INCLUDING THIS COVER PAGE)

January 26, 1993

MEMORANDUM

TO: John Podesta
FROM: Jerome Chapman *je*
RE: Gays in the Military

I attach the following:

1. The Presidential Memorandum for the Secretary of Defense in proper final form, acceptable to DOD and White House Counsel; and
2. A cover memorandum from Vince Foster summarizing the Presidential Memorandum.

Attachments

cc: Vince Foster
Todd Stern

MEMORANDUM FOR THE SECRETARY OF DEFENSE

SUBJECT: Ending Discrimination on the Basis of
Sexual Orientation in the Armed Forces

I hereby direct you to submit to me prior to July 15, 1993 a draft for my approval of an Executive order ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States.

In preparing the draft, I direct you to consult fully with the Joints Chiefs of Staff and the Military Services, with other Departments affected by the order, and with concerned individuals and organizations outside the Executive Branch.

THE WHITE HOUSE.

MEMORANDUM FOR THE PRESIDENT

From: Vince Foster
Date: January 26, 1993
Subject: Gays in the Military

By the attached Presidential Memorandum, you direct the Secretary of Defense to submit to you prior to July 15, 1993 a draft Executive order ending discrimination in the military on the basis of sexual orientation.

The memorandum also directs the Secretary, in preparing the draft, to consult fully with the Joint Chiefs of Staff and other concerned governmental and private interests.

Attachment

PRESIDENTIAL ANNOUNCEMENT

I today have asked Secretary of Defense Les Aspin to submit for my review and signature by July 15, 1993, after full consultation with military and congressional leaders and concerned individuals outside of government, an executive order that would end discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces and that would mandate rigorous new standards regarding sexual behavior to be applied to all military personnel.

The draft executive order should be accompanied by a report on how this revision in policy would be carried out in a manner that is practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain.

In our meeting on Monday, the Joint Chiefs of Staff expressed their concerns about changing current policy. I take their considerations very seriously. I assured them that they will have a full opportunity to participate in this process. While I believe it is wrong to exclude from the military, solely on the basis of sexual orientation, individuals who wish to serve their nation, I also believe that it is appropriate to continue the strict restrictions on sexual behavior in the military that exist today, applied uniformly, to assure the essential maintenance of military discipline and morale.

This action is grounded in several principles. The first is that America has -- and continues to require -- the best, strongest, and most ready armed forces in the world. The second is that we cannot afford -- and I do not intend -- to make our Armed Forces the vanguard for social change in this country. Therefore the action under development here is limited in scope, and must be implemented carefully to avoid preventable impacts on combat effectiveness. Any broader agenda properly belongs first in the Congress, the courts, and in state legislatures and city councils across the country.

The third principle, however, is that we should not, anywhere in our society, presume wrongdoing solely on the basis of personal characteristics. It is right to discipline and where necessary separate those whose behavior violates the law and disrupts the military mission. But it is wrong to exclude from the military, solely on the basis of their sexual orientation, individuals who are prepared to accept all necessary restrictions on behavior -- many of which would be intolerable in civilian society -- and to serve their country honorably and well.

With a procedure that invites appropriate consultation, we will develop a policy that protects both our military preparedness and the rights of patriotic Americans to serve their country without unjust discrimination.

MEMORANDUM FOR THE PRESIDENT

From: Vince Foster
Date: January 26, 1993
Subject: Gays in the Military

By the attached Presidential Memorandum, you direct the Secretary of Defense to submit to you prior to July 15, 1993 a draft Executive order ending discrimination in the military on the basis of sexual orientation.

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In preparing the draft, I direct you to consult fully with the Joint Chiefs of Staff and the Military Services, with other Departments affected by the order, and with concerned individuals and organizations outside the Executive Branch.

THE WHITE HOUSE.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

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

94 CV 0974

Plaintiffs,

MEMORANDUM
AND
ORDER

-against-

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

Defendants.

-----X

SULLIVAN & CROMWELL

(David H. Braff, Michael Lacovara, Penny Shane,
Ellen Bresler, Edward A. Harris, Ann T. Kenny, of
counsel)

125 Broad Street
New York, New York - 10004
for plaintiffs.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

(Ruth E. Harlow, Marc E. Elovitz, Matthew Coles,
of counsel)

132 West 43rd Street
New York, New York 10036
for plaintiffs.

LAMBDA LEGAL DEFENSE & EDUCATION FUND

(Beatrice Dohrn, Evan Wolfson, of counsel)

666 Broadway
New York, New York 10012
for plaintiffs.

DEPARTMENT OF JUSTICE

(Frank W. Hunger, Zachary W. Carter, John A. Rogovin, Charles S. Kleinberg, David J. Anderson, Vincent M. Garvey, Margaret H. Plank, Robert A. Van Kirk, Kevin W. Simpson, Mark T. Quinlivan, of counsel)
901 E Street, N.W., Room 1022
Washington, D.C. 20530
for defendants.

DEPARTMENT OF THE ARMY

(Major Douglas K. Mickle, Captain Tara O. Hawk,
Office of the Judge Advocate General, of counsel)
for defendants.

NICKERSON, District Judge:

Plaintiffs, six members of the United States Armed Services (the Services) who have stated that they are homosexual, brought this action for an order (1) declaring invalid under the First and Fifth Amendments Section 571 of the National Defense Authorization Act for the Fiscal Year 1994, 10 U.S.C. § 654 (the Act), concerning a new policy as to homosexuals, and the directives issued under the Act (the Directives), and (2) enjoining the government from enforcing the Act and the Directives.

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

On April 4 and May 9, 1994, this court on plaintiffs' motions preliminarily enjoined defendants from enforcing the Act and the Directives against

plaintiffs based on their statements of sexual orientation. Able v. U.S., 847 F. Supp. 1038 (E.D.N.Y. 1994); Able v. U.S., No. 94 CV 0974 (E.D.N.Y. May 9, 1994).

On September 14, 1994, this court granted defendants' motion to dismiss the complaint as to plaintiffs' intimate association, vagueness and overbreadth claims, but denied defendants' motion to dismiss the first amendment and equal protection claims. Able v. U.S., 863 F. Supp. 112 (E.D.N.Y. 1994).

While the motion to dismiss was pending, defendants appealed the court's preliminary injunction orders pursuant to 28 U.S.C. § 1292(a)(1). On January 3, 1995, the Court of Appeals for the Second Circuit remanded the case, holding that this court had not applied the proper preliminary injunction standard and ordering consolidation of a preliminary injunction hearing with a trial on the merits of the permanent injunction. The Court of Appeals directed that "[t]he preliminary injunction orders shall remain in effect until March 31, 1995 upon which date they shall expire unless reentered by the district court following a

trial on the merits. . . ." Able v. U.S., 44 F.3d 128, 133 (2d Cir. 1995) (per curiam).

On March 6, 1995, this court held that under the pleadings plaintiffs lacked standing to claim that (1) the Act violates their right to expressive association, (2) subsection 654(b)(1) violates their rights to free expression and equal protection, and (3) subsection 654(b)(3) violates their right to equal protection. Able v. U.S., No. 94 CV 0974 (E.D.N.Y. Mar. 6, 1995).

From March 13 to March 16, 1995 the court tried the merits of plaintiffs' remaining claims.

THE GENESIS OF THE ACT

On January 29, 1993 President Clinton directed then Secretary of Defense Les Aspin to submit a draft executive order "ending discrimination on the basis of sexual orientation in determining who may serve" in the Services, in a manner "consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain." Memorandum from President Clinton to the Secretary of Defense (Jan. 29, 1993), Ex. PX-21.

On July 19, 1993, Secretary Aspin announced a new policy as to the service of gay men and lesbians in the

Services, stating that "sexual orientation is considered a personal and private matter . . . and is not a bar to service entry or continued service unless manifested by homosexual conduct." Memorandum from Secretary Aspin to the Secretaries of the Army, Navy and Air Force and the Chairman of the Joint Chiefs of Staff (Jul. 19, 1993), Ex. PX-180.

From March through late July 1993 the Armed Services Committees of the House and Senate held public hearings on the matter. Secretary Aspin presented the administration's new policy to the Senate Armed Services Committee on July 20, 1993.

Both Committees issued reports recommending legislation practically identical to what is now the Act, which became effective November 30, 1993. The Directives became effective February 28, 1994. On March 15, 1994, the United States Coast Guard announced its policy on homosexual conduct "in lock step" with that of the other military services. Memorandum from Secretary Of Transportation Federico Peña to the Commandant, United States Coast Guard (Mar. 15, 1993), Ex. JX-13 at p. B301327.

THE ACT AND THE DIRECTIVES

Section 654, entitled Policy Concerning Homosexuality in the Armed Forces, contains in subsection (a) "fifteen findings" that say, among other things:

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces 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.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Subsection (b), setting forth the Act's policy, states, in substance, that a member "shall be separated" from the Services 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 "such conduct" departs from the member's usual behavior and 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 "there is a further finding" made in accordance with regulations that "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 does not define the word "propensity."

On December 21, 1993 Secretary Aspin issued a memorandum and Directives concerning the implementation of the new policy. Memorandum from Secretary Aspin to the Secretaries of the Military Departments et al. (Dec. 21, 1993), Ex. JX-4. They provided that an applicant to become a member will not be asked about his or her sexual orientation, that "homosexual orientation is not a bar" to "service entry or continued service," but that "homosexual conduct" is. Such "conduct" includes not only homosexual "acts" but also a statement by a member or applicant that "demonstrates a propensity or intent to engage" in such acts. A statement that demonstrates the "propensity" will thus require separation unless the member rebuts a presumption that he or she engages or intends to engage in "homosexual acts" or has a "propensity" to do so. Directives 1332.14, 1332.30, & 1304.26, Exs. JX-6, JX-7, & JX-9.

As examples of statements giving rise to the presumption the Directives include "I am a homosexual," "I am gay," "I am a lesbian," and "I have a homosexual orientation." Id. The Directives purport to distinguish homosexual "orientation" from homosexual "propensity," defining homosexual "orientation" as "an

abstract sexual preference for persons of a particular sex," and homosexual "propensity" as evidencing "a likelihood that a person engages in or will engage in" homosexual acts. Id.

The Directives go on to say that "a statement . . . demonstrat[ing] a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." Id.

The Directives do not explain how an "orientation" means an "abstract preference" if not revealed but if admitted becomes evidence of a "likelihood" to commit acts, a likelihood that requires discharge.

THE ISSUE BEFORE THE COURT

The six plaintiffs have "stated" in their complaint that they are "homosexuals." That is the only thing that they have done that is now before the court. Under the state of the pleadings the court thus does not consider the case to draw into question the validity of any subsection of the Act other than (b) (2).

Subsection (b) (2) has two aspects pertinent to this case. It provides for the discharge of a member because he or she (1) has made a "statement" and (2) the statement is of his or her status, that is, his or her "propensity."

Plaintiffs urge that subsection (b) (2) is invalid both under the First Amendment and the equal protection component of the due process clause of the Fifth Amendment.

THE LEGISLATIVE PURPOSE

Before addressing the constitutional validity of subsection (b) (2) the court looks to the text of the entire Act to determine the end to which the Act is directed.

The Act says that its objective is to reach "homosexual conduct," that is, "homosexual acts" as they are defined in the Act. Thus finding (13) in subsection (a) says that the "prohibition against homosexual conduct" in the military is "necessary." Finding (15) indicates that the prohibition against such conduct is so necessary that even those who have a mere "propensity" to engage in that conduct must be discharged from the military because their status as

homosexuals makes it likely that they will commit homosexual acts.

The statement "I am a homosexual" or "I have a homosexual propensity" is thus prohibited by the terms of the Act not because the statement itself causes harm but because one can infer from it that the speaker will do harmful things, namely, commit "homosexual acts" injurious to "morale, good order and discipline, and unit cohesion."

THE FIRST AMENDMENT

The free speech clause of the First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech."

The first question for the court is whether the government may under the First Amendment prohibit a member of the Services from stating that he or she is a homosexual, that is, that he or she has an innate feeling within that indicates the status of a homosexual.

Plaintiffs' statements that they are homosexual constitute "speech," and important, not trivial, speech. The First Amendment recognizes the value of speech not only as an instrument, that is, a mechanism

by which ideas may be exchanged, but also as an expression of personal dignity and integrity. Speech is worthy of First Amendment protection not only when it contributes to the "marketplace of ideas" or assists in the search for "truth," but also when it articulates "the premise of individual dignity and choice upon which our political system rests." Cohen v.

California, 403 U.S. 15, 24, 91 S. Ct. 1780, 1788 (1971). "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means." Whitney v. California, 274 U.S. 357, 375, 47 S. Ct. 641, 648 (1927) (Brandeis, J., joined by Holmes, J., concurring).

Plaintiffs have done no more than acknowledge who they are, that is, their status. The speech at issue in this case implicates the First Amendment value of promoting individual dignity and integrity, and thus is protected by the First Amendment from efforts to prohibit it because of its content.

Regulation of the content of speech that involves First Amendment concerns is presumed invalid. See R.A.V. v. City of St. Paul, --- U.S. ---, ---, 112 S. Ct. 2538, 2542 (1992); Simon & Schuster, Inc. v. New

York Crime Victims Bd., 502 U.S. 105, 116, 112 S. Ct. 501, 508 (1991). The government may regulate its content only upon a showing that such regulation promotes a "compelling interest" and that the government has chosen "the least restrictive means" to further the interest. Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989).

The court recognizes that the judgments of Congress and the military with regard to military affairs are entitled to substantial deference, and that courts "lack the competence" to make policy decisions in the military context. See Goldman v. Weinberger, 475 U.S. 503, 507, 106 S. Ct. 1310, 1313 (1986), Rostker v. Goldberg, 453 U.S. 57, 65, 101 S. Ct. 2646, 2652 (1981). But that does not mean that courts are not competent or should abdicate their responsibility to review the constitutionality of military decisions. "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is [the courts'] 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated."

United States v. Robel, 389 U.S. 258, 264, 88 S. Ct. 419, 424 (1967) (citations omitted).

A court need not determine the wisdom of a particular military policy in order to determine whether that policy conflicts with the Constitution. Even in the military context, regulation of speech based on content survives constitutional scrutiny only if it is "no more than [what is] reasonably necessary to protect [a] substantial government interest." Brown v. Glines, 444 U.S. 348, 355, 100 S. Ct. 594, 600 (1980).

A

Defendants argue that subsection (b) (2) does not offend the First Amendment because the subsection is ultimately directed solely at the prohibition of acts and gives members who reveal their homosexual "orientation" an opportunity to rebut the presumption that a member with such an "orientation" will either commit undesirable acts or has a "propensity" to commit such acts.

In advancing this argument, defendants reject old myths previously offered to justify a ban on service by homosexuals.

From the early 1920's through the 1970's, homosexuals were deemed unfit for service because homosexuality was considered a "mental illness" or a "personality disorder." See Prepared Statement of Dr. David F. Burrelli, S. Hrg. 103-845, Ex. JX-1 at pp. 13-14. In 1982, the Department of Defense issued a policy mandating dismissal of homosexuals in part "to prevent breaches of security" that presumably would arise if a closeted homosexual were blackmailed. See id. at p. 15. Even as recently as 1993, some proponents of retaining the complete ban testified that such a policy was necessary because homosexuals are more likely, as a group, "to spread infectious diseases such as hepatitis and syphilis." See Statement of Col. John Ripley, H.A.S.C. Hrg. 103-18, Ex. JX-2 at pp. 89-90.

The legislative record shows that the Act and the Directives are not premised on these beliefs. Defendants do not contend that the new policy was enacted in response to a finding that gay men and lesbians have physical or psychological defects rendering them unfit to serve, pose security risks, or are more likely than heterosexuals to violate a code of conduct or other rules generally. See Defendants' Responses to Plaintiffs' Requests for Admission, Ex.

PX-13 at pp. 5-8. Indeed, defendants admit that Congress "clarified that the proscription on service has nothing to do with unjustified assumptions that homosexuals are not just as capable physically, mentally and psychologically to serve in the United States military as heterosexuals." Transcript of Defendants' Closing Statement at p. 256.

High-ranking administration officials and military officers certified the demonstrated ability of homosexuals to serve competently and conscientiously. Secretary Aspin, in presenting the administration's new policy, testified to the Department of Defense's recognition "that homosexuals have served with distinction in the Armed Forces." S. Hrg. 103-845, Ex. JX-1 at p. 702. General Norman Schwartzkopf noted that "homosexuals have served in the past and have done a great job serving their country." S. Hrg. 103-845, Ex. JX-1 at p. 612. Major Kathleen Bergeron affirmed that in her experience, homosexuals who eventually had been separated "had an honorable record and served with distinction." S. Hrg. 103-845, Ex. JX-1 at p. 612. General Colin Powell, discussing the arguments of those who believe that homosexuals should be allowed openly to serve, stated that "[t]hey note correctly that

homosexuals have privately served well in the past and are continuing to serve well today." S. Hrg. 103-845, Ex. JX-1 at p. 707.

Thus, the government, including Congress, believed that the admission of homosexuals into the Services did not pose an uncontrollable risk that they would commit acts inherently dangerous to morale, good order and discipline, and unit cohesion, and manifested that belief by allowing homosexuals to enter the Services.

The government's confidence was justified by the fact that over the years thousands of homosexuals have served in the Services ably and honorably before the Act became law. By the time the Act was passed, the old myths had finally been abandoned.

But despite its recognition that homosexuals do not by their nature pose a risk to the military mission or lack competence as soldiers, the government elected to allow them to join and remain in the Services only on the condition that they remain silent regarding their status. The government justified this condition by saying that it needed to use a statement of orientation as evidence of a likelihood to engage in prohibited acts in order to forestall the commission of such acts.

To presume from a person's status that he or she will commit undesirable acts is an extreme measure. Hitler taught the world what could happen when the government began to target people not for what they had done but because of their status.

Thirty three years ago the Supreme Court held it was cruel and unusual punishment prohibited by the Eighth Amendment to subject an admitted narcotics addict to a misdemeanor prosecution on the theory that his addiction justified an inference that he had possessed or in the future would possess drugs.

Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417 (1962). See also Powell v. Texas, 392 U.S. 514, 543, 88 S. Ct. 2145, 2159 (1968) (Black, J., concurring) ("Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it.")

Robinson's status as a narcotics addict was self-acquired. How much worse it is to infer the commission of acts from one's homosexual status, which may well be acquired at birth or in early childhood. See John C.

Gonsiorek and James D. Weinrich, eds., Homosexuality: Research Implications for Public Policy 2 (1991).

Defendants recognized that a policy mandating discharge of homosexuals merely because they have a homosexual orientation or status could not withstand judicial scrutiny. As Jamie Gorelick, Counsel to the Department of Defense, stated at the Senate hearing: "The reason we do not discharge people because we believe them to have a homosexual orientation is because in 1981 it was recognized that if we did have a status-based as opposed to a conduct-based rule, that it would be vulnerable to the courts." S. Hrg. 103-845, Ex. JX-1 at p. 777.

Defendants therefore designed a policy that purportedly directs discharge based on "conduct," and craftily sought to avoid the First Amendment by defining "conduct" to include statements revealing one's homosexual status. To say "I have a homosexual orientation," a mere acknowledgment of status, is thus transmogrified into an admission of misconduct, and misconduct that the speaker has the practically insurmountable burden of disproving.

As noted above, the Directives purport to distinguish between homosexual "orientation" and

homosexual "propensity," defining the former as the quality of having an "abstract sexual preference for members of the same sex" and the latter as the quality of having such a preference that presumably is sufficiently concrete to indicate a "likelihood" that the preference will be acted upon.

The court regards the definition and treatment of these terms to be nothing less than Orwellian. Although the Act and the Directives are written in such a manner as to give the impression that there is a principled distinction between the two characteristics, only a brief critique will demonstrate that in practice no such distinction exists.

Neither the Act nor the Directives explain how to differentiate an "orientation" from a "propensity," although the Act's avowed policy to insure that "homosexual orientation" not be treated as a "bar" to service would seem to make such differentiation crucial. Those who formulated the policy testified that any distinction between the two is merely "hypothetical," Testimony of Counsel Gorelick, S. Hrg. 103-845, Ex. JX-1 at p. 800, and the Directives, as decreed by Congress, equate a statement of "orientation" with an admission of at least a

"propensity." See Directives 1332.14 & 1332.30, Exs. JX-6 & JX-7, and S. Rep. 103-112, Ex. JX-15 at p. 294.

These facts seem to the court to be powerful evidence that despite their semantic gymnastics, defendants themselves did not perceive a difference between the two. Plainly they intended that the articulation of a mere "orientation" be sufficient to initiate a discharge proceeding. Thus, one who does no more than express an "orientation" is faced with the prospect of somehow showing that he or she does not have a "propensity" to engage in prohibited acts in order to avoid discharge.

The word "propensity" is generally understood and defined to mean a "natural inclination" or an "innate or inherent tendency." Webster's Third New International Dictionary 1817 (1986); see also Random House Dictionary of the English Language 1152 (1966). "Innate" means "existing in one from birth" or "inborn." Random House at 733; see also Webster's at 1165.

Defendants make much of the opportunity to rebut the presumption of propensity. But that opportunity is an ignis fatuus. Neither the Act nor the Directives suggest how one who is born with an innate tendency, an

"orientation" or a "propensity," to commit a homosexual act can prove that he or she does not have such an orientation or propensity. Furthermore, the testimony at the Senate hearing shows that a member who admits to a homosexual orientation has only a "hypothetical" chance to escape discharge.

As stated by Ms. Gorelick, the rebuttable presumption places a "very high burden" on the member, and in a situation where "someone made the statement [of homosexuality] knowingly and was not drunk or had not lost his or her mind," it would be "very unlikely" that the burden could be overcome by the member's assertion that he or she does not engage or have a propensity to engage in prohibited acts. S. Hrg. 103-845, Ex. JX-1 at p. 772. Indeed, Ms. Gorelick testified that even if the speaker completely disclaimed his or her acknowledgement of his or her sexual orientation, asserting that "I was misunderstood, I did not mean it, it was a joke," that disclaimer would only "hypothetically suffice" to rebut the presumption. Id.

Thus, the policy treats a statement of homosexual orientation as proof of the case. Once such a statement is made, the speaker is judged guilty until

proven innocent of committing misconduct the government considers so threatening to the military mission that a member may be discharged for it. This seems to the court a rather draconian consequence of merely admitting to an orientation that Congress has determined to be innocuous.

Defendants point to three isolated instances where Navy members have been able to escape discharge despite having stated that they were homosexual as evidence that the Act does not punish expressions of homosexual orientation but merely uses them as evidence in an effort to preclude the commission of prohibited acts. See Administrative Bd. Records Nos. 13, 15, & 16, Exs. DX-1, DX-2, & DX-3.

An examination of the records (such as they are) of these proceedings shows that the results were aberrations stemming from a dysfunctional application of the policy. In one, the member had said "she thought she might be gay." In another, the member had stated "I'm kind of confused about my sexual preference." And in the third the member had said he was homosexual only in what he thought was a confidential session with a Navy counselor who tried to

make him "comfortable" and "as free as possible" so as to get to the "root" of the member's problems.

In each of these cases, the member stated at the discharge hearing that he or she was gay, but was apparently able to escape discharge by stating that he or she had not engaged and did not intend to engage in "homosexual acts." But Congress' specific intent was that "a member cannot rebut the presumption simply through a promise to adhere to military standards of conduct in the future, nor can the member rebut the presumption by a statement to the effect that he or she has a propensity towards homosexuality but has not acted on it." S. Rep. 103-112, Ex. JX-15 at p. 294.

These three atypical results are obviously aberrations that cannot be taken to show that the Act holds out any realistic opportunity to rebut the presumption.

The plain fact is that subsection (b)(2) burdens speech based solely on its content by subjecting the member to a discharge process in which the member has only at best a hypothetical chance to escape separation. The Act works to discharge or subject to discharge proceedings members who possess no more than an "orientation" regardless of whether they have

engaged in or demonstrated a likelihood of engaging in prohibited acts, and thus reaches speech that does not indicate acts.

This court concludes that under the First Amendment a mere statement of homosexual orientation is not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings.

B

In this court defendants argued something not even mentioned in the fifteen findings of the Act. In substance, they contended that a majority of the heterosexuals in the Services would not, for a variety of reasons, like to know that there were homosexuals serving with them and that this would result in a serious detriment to "unit cohesion." Defendants now say that the Services are justified in deferring to this feeling of heterosexuals by imposing silence on homosexuals.

Defendants' advancement of this alternative theory to justify the Act indicates that, once Congress decided to try to get all known homosexuals out of the Services, the chief concern was to draft legislation to insure that the enactment would survive judicial review. See also Testimony of Counsel Gorelick and

Gen. John P. Otjen, S. Hrg. 103-845, Ex. JX-1 at pp. 775-78, 812-21, 829-30. The Committee hearings show that legal counsel thought the best way to do this was to pretend that the concern was over, not the mere presence of homosexuals in the Services, but their potential acts. According to counsel, if the Act provided forthrightly that open homosexuals shall be banned because heterosexuals will not stand for them, it would be vulnerable under the Constitution of the United States. See Testimony of Counsel Gorelick, S. Hrg. 103-845, Ex. JX-1 at p. 777.

So the lawyers evolved the Byzantine and complex provisions described above. The Act was designed to say nothing about heterosexual animosity towards homosexuals. The Act's fifteen findings avoid using a single word about heterosexuals, and fail to say what, if any, effect the reactions of heterosexuals may have on unit cohesion.

Those who opposed the removal of the total ban on homosexuals and testified at the hearings were more candid. They said that the concern was with the potential reaction of heterosexuals if they knew who were the homosexuals serving with them.

Although the Act's findings are silent as to the response of heterosexuals to the presence of known homosexuals in the Services, the court will analyze the Act as if it said that a statement of homosexual status was in itself an evil because heterosexuals would not like to hear it and would react so as to damage unit cohesion. See Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16, 95 S. Ct. 1225, 1233 n.16 (1975) (courts need not "accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation").

There certainly was much testimony at the Committee hearings, particularly from generals and other high-ranking officers, opposing any lifting of the ban on homosexuals because of the expected reactions of heterosexuals. It is fair to say that the bulk of the anecdotal testimony described how heterosexuals would be prejudiced against homosexuals because their "lifestyles" or "values" differed from the "traditional" moral or religious "values" of heterosexuals. See, e.g., Testimony of Maj. Bergeron, S. Hrg. 103-845, Ex. JX-1 at pp. 630-31 (expressing concern that members' children "be exposed to that

lifestyle"), Testimony of Capt. Gordon Holder, S. Hrg. 103-845, Ex. JX-1 at p. 544 (questioning ability to lead subordinates "in an area . . . basically against [his] moral standards"); Testimony of Comm. James Pledger, S. Hrg. 103-845, Ex. JX-1 at pp. 541-42 (reporting that significant number of his crew "took exception" to lifting ban "based on moral convictions").

General John P. Otjen, a staunch opponent of any lifting of the ban and the chairman of the Military Working Group that recommended the policy that eventually became the Act, sounded a theme repeatedly stated by high-ranking officers that "when somebody identifies themselves as homosexual" "that is disruptive to unit cohesion. . . ." S. Hrg. 103-845, Ex. JX-1 at p. 780. See also id. at p. 821 ("[B]ased on my experience, [a] statement [of homosexual orientation] alone will cause disruption within the unit.").

General Schwartzkopf testified that "[t]he introduction of an open homosexual into a small unit immediately polarizes that unit." S. Hrg. 103-845, Ex. JX-1 at pp. 595-96. See also S. Rep. 103-112, Ex. JX-15 at pp. 279-80. General Powell said that

"[h]omosexuals over history who have been willing to keep their orientation private have been successful members. . . , " S. Hrg. 103-845, Ex. JX-1 at p. 708, but that "the presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale and esprit of the Armed Forces." Id. See also Sen. Rep. 103-112, Ex. JX-15 at p. 278. The Report of the Association of the United States Army stated: "Heterosexual animosity toward known homosexuals can cause latent or even overt hostility, resulting in degradation of team or unit esprit." H.A.S.C. Hrg. 103-18, Ex. JX-2 at p. 337.

This heterosexual animosity towards homosexuals is by its terms based on irrational prejudices. But the government advances two arguments to attempt to refute the fact that the policy of requiring secrecy was based on irrational stereotypes.

First, they say that the policy "seeks to accommodate the privacy interests of servicemembers."

This seems to the court the most incongruous of arguments. After passage of the Act the showers, the latrines and the barracks became no more private than they were before. As defendants say, "Privacy is extremely limited in the military."

To "accommodate" the privacy of heterosexuals presumably means, for example, to keep their naked bodies safe in the showers from the stares of homosexuals. But if indeed there are homosexuals who wish to peek at naked bodies, they might do so quite as readily when their orientation is a secret as when it is open. The only difference will be that heterosexuals will not know which of their servicemates are homosexuals, and heterosexuals will have reason to have a generalized suspicion of everyone in the showers, hardly a circumstance likely to increase "cohesion."

To suggest to heterosexuals that the secrecy policy will "accommodate" their privacy interests is to attempt to mislead them. They are not dunces or ostriches. They can hardly be unaware that because of the passage of the Act homosexuals are serving with them.

Second, defendants contend that the policy somehow addresses the concern about "sexual tension" in the unit. The argument is based on the proposition that homosexuals, following their "tendencies," will behave in improper ways that will give rise to such tension.

This was an argument advanced before the Senate Committee in support of the total ban on homosexuals. See, e.g., S. Hrg. 103-845, Ex. JX-1 at pp. 535-36 (testimony of Fleet Master Chief Ronald Carter), pp. 763-64 (statement of Gen. Gordon Sullivan), pp. 604-05 (testimony of Maj. Bergeron). It can hardly have force now when homosexuals are not banned and will be serving in units. There is no reason to believe that such improper behavior, if it occurs, would be more likely to occur because a homosexual had admitted his orientation rather than kept it a secret.

Moreover, inappropriate behavior by a homosexual, whether in the closet or not, is susceptible of control by the general regulations. The Uniform Code of Military Justice, 10 U.S.C. § 801 et seq., contains numerous provisions that target such misconduct, prohibiting rape, 10 U.S.C. § 920, sexual harassment, 10 U.S.C. § 893, and fraternization, 10 U.S.C. § 934.

There was, of course, evidence presented to Congress to the effect that the presence of individuals who acknowledged their homosexual orientation would cause no significant breakdown in cohesion. In a report commissioned by Secretary Aspin, an interdisciplinary team of researchers from the National

Defense Research Institute of the RAND Corporation (the RAND Group) concluded that "although some disruptions might result from having acknowledged homosexuals serving in the military," "the experience of analogous organizations . . . suggests that any increase is likely to be quite small." RAND National Defense Research Institute, Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment (1993) (the Rand Report), Ex. PX-1 at p. xxiv. The RAND Group noted that in Canada, Israel, the Netherlands, and Norway, "countries that have policies of complete nondiscrimination," "no serious problems were reported concerning the presence of homosexuals in the force." Rand Report, Ex. PX-1 at p. 14.

A report by the United States General Accounting Office (the GAO) in 1992 also recounted that analogous organizations that have "accepted homosexuals into their ranks . . . have generally not reported adverse impacts." GAO, Report to Congressional Requesters, Defense Force Management: DoD's Policy on Homosexuality (Jun. 1992), Ex. PX-5 at p. 43.

Furthermore, the RAND Group noted that although the military had expressed in the 1940's similar, indeed almost identical, fears about the reactions of

white members if there was racial integration of the Services, in fact integration "did not 'destroy' unit cohesion and military effectiveness." Rand Report, Ex. PX-1 at p. 189.

While the empirical evidence developed by neutral and objective organizations such as the RAND Group supports the conclusion that any disruption would probably be quite small, the court will assume arguendo that Congress could have made a finding in the Act that the reactions of heterosexuals would have a larger impact. But even if the Act had included such a finding, there are factors other than those mentioned in the hearings that cast doubt on any such conclusion.

What the court deems extraordinary is the almost total lack of concern evidenced in the Congressional hearings and the Committee reports as to the impact on unit cohesion of the attempt to enforce secrecy on homosexuals and to enlist them in the perpetration of a hoax on heterosexuals. Common sense suggests that a policy of secrecy, indeed what might be called a policy of deception or dishonesty, will call unit cohesion into question.

If there is one thing that is undisputed and seems self-evident, it is that cohesion depends on mutual

trust within the unit. The honor code for servicemembers provides that they will not lie or cheat, and for good reason. Honesty is a quality that attracts respect. Secrecy and deception invite suspicion, which in turn erodes trust, the rock on which cohesion is built.

The policy of the Act is not only inherently deceptive. It also offers powerful inducements to homosexuals to lie. An enlisted member may ask another enlisted member his or her sexual orientation. Testimony of Counsel Gorelick and Gen. Otjen, S. Hrg. 103-845, Ex. JX-1 at pp. 810-11. It is true that a homosexual may answer "no comment." But a homosexual who answers truthfully is subject to discharge proceedings. A heterosexual is not. The pressure to lie is obvious.

There are no findings, even in the Committee reports, assessing whether a policy of secrecy and deception is more or less deleterious to unit cohesion than would be a policy of openness and honesty. The court has no findings before it calculating the net effect of the policy on unit cohesion.

The task of this court is to determine the constitutionality of the policy adopted by Congress,

not its morality. But heterosexuals and homosexuals alike would be entitled to think it demeaning and unworthy of a great nation to base a policy on pretense rather than on truth. To invite someone with a homosexual orientation to join the Services, then to throw that person out solely because that orientation is revealed from something he or she said, and finally to pretend that the discharge was not because of the person's orientation, might appear to all members, heterosexual and homosexual, less than honorable, with incalculable effect on "high morale, good order and discipline, and unit cohesion."

Even if the First Amendment were to tolerate the prohibition of a truthful self-identification by a homosexual because it offends the sensibilities of some heterosexuals it surely would require a legislative finding that the consequences of disclosure would be infinitely more serious than anything revealed in the record before Congress. Even General Otjen conceded that the Services would fulfill their mission if homosexuals were permitted to reveal their orientation. See Deposition of General Otjen, Ex. PX-19 at p. 139 (confirming that subordinate members of the Services follow their orders whether or not they like them).

See also Testimony of Gen. Calvin Waller, S. Hrg. 103-845, Ex. JX-1 at p. 401 ("If the ultimate decision is to allow openly declared homosexuals to serve in the Armed Forces, I am confident that the military leadership, as well as the military personnel, will salute and make the best of that situation.")

In any event the Supreme Court has held that the First Amendment will not countenance the proscription of the expression of an idea because others find that idea repugnant.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 2545 (1989). See also Terminiello v. Chicago, 337 U.S. 1, 4, 69 S. Ct. 894, 896 (1949); Healy v. James, 408 U.S. 169, 187-88, 92 S. Ct. 2338, 2349 (1972); Simon & Schuster, supra, 502 U.S. at 118, 112 S. Ct. at 509.

This principle applies with particular force where, as here, heterosexuals find the mere idea of homosexual orientation disagreeable based largely on irrational stereotypes.

The court holds that subsection (b)(2) of the Act and its accompanying Directives are invalid under the First Amendment.

EQUAL PROTECTION

The due process clause of the Fifth Amendment makes binding upon the federal government the Fourteenth Amendment's command that no state shall "deny to any person within its jurisdiction the equal protection of the laws." See Bolling v. Sharps, 347 U.S. 497, 498-99, 74 S. Ct. 693, 694 (1954).

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, supra, 420 U.S. at 638 n.2, 95 S. Ct. at 1228 n.2.

Because the Act gives to persons of one status, heterosexual, the chance to exercise the fundamental right of free speech and prohibits it to those of another status, homosexual, defendants must at least show that the policy is "tailored to serve a substantial governmental interest." Police Department

of the City of Chicago v. Mosley, 408 U.S. 92, 99, 92 S. Ct. 2286, 2292 (1972).

For the reasons discussed above, whether the government intended that subsection (b) (2) prevent the commission of prohibited "acts" or appease heterosexual prejudices, defendants fail to make the required showing.

Even if defendants do believe that heterosexual servicemembers will be so upset by a coworker's mere statement of homosexuality as not to work cooperatively in the unit, such a belief does not justify a discriminatory policy.

"Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private [] prejudice that they assume to be both widely and deeply held." Palmore v. Sidoti, 466 U.S. 429, 433, 104 S. Ct. 1879, 1882 (1984), quoting Palmer v. Thompson, 403 U.S. 217, 260-61, 91 S. Ct. 1940, 1962-63 (1971) (White, J., dissenting). Congress may not enact discriminatory legislation because it desires to insulate heterosexual servicemembers from statements that might excite their prejudices.

The court holds that subsection (b) (2) of the Act and its accompanying Directives violate the equal protection component of the Fifth Amendment.

CONCLUSION

The court declares subsection (b) (2) of the Act, 10 U.S.C. § 654(b) (2), and the Directives implementing that subsection invalid under the First and Fifth Amendments and enjoins defendants from enforcing them against plaintiffs.

So ordered.

Dated: Brooklyn, New York
March 30, 1995

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

Date: 1/25/93**FACSIMILE COVER PAGE****TO**

Name: _____

Bernard Weissbaum

Location: _____

White House Counsel's OfficeTelephone
Number: () _____FAX Equipment
Number: () _____456-6279**FROM**

Name: _____

Mort Rosenberg

Location: _____

Congressional Research Service - American Law Div.Telephone
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Number: (202) 707-8596707-6009 707-7480

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1 of 10 pages

1/25/93

Bernie,

These two memos (NOT FOR
ATtribution) MAY ~~be~~ useful with regard
to executive action re: gay rights in
the military. The 1/15/93 memo from pages 3-4
is particularly important of what you might
want to do.

MR



See pp 3-4 particularly

U.S. GOVERNMENT PRINTING OFFICE: 1985-7000

January 15, 1993

TO : [REDACTED]

FROM : [REDACTED]

SUBJECT : Memorandum of Instructions

This memorandum is in response to your inquiry of January 8, 1993 requesting information on memoranda of instructions, specifically, the instrument's background, use, and appropriateness or suitability in suspending certain kinds of military administrative and legal proceedings.

Your interest in this matter is to some extent prompted by a report that a memorandum of instructions will be employed to direct the incoming Secretary of Defense to examine and revise the current policy which restricts the admission of gays and lesbians into the military, including the termination of unspecified pending and on going administrative and other proceedings involving such persons.

An examination of the computerized United States Code and Federal Register turned up 1 and 59 potential references, respectively. These and a number of judicial decisions in which this or a variant of the phrase appears, e.g., instruction memorandum, overwhelmingly concern the Department of the Interior or some constituent agency of the Department of Interior.

In contrast to the term memorandum of understanding which is defined for certain purposes in the United States Code, e.g., 22 U.S.C. §1641 re. international claims settlement, the term memorandum of instructions does not appear to have a statutory definition. We note in passing that while proclamations and executive orders having general applicability and legal effect have to be published in the Federal Register, neither term is more extensively defined than that. See 44 U.S.C. §1505.

The one United States Code reference to memorandum of instructions is to a Department of Interior decision summarized in a note to 30 U.S.C.S. §207 as follows: "Where Bureau of Land Management adopts, by Instruction Memorandum, agency-wide interpretation of regulation that is reasonable and consistent with law, Interior Board of Land Appeals will not hesitate to follow it and its enforcement. Atlantic Richfield Co., et al. (1991) 98 ID 429."

All of the regulatory references, the overwhelming number of which appear to relate to the Department of Interior, seem to follow the Richfield example in

using the term memorandum of instructions without defining it. Its use there suggests instructions to BLM personnel regarding a BLM regulatory interpretation universally applicable throughout the agency.

Finally, judicial decisions in which the term or a variant appear--excerpts from a sampling of these decisions are included herewith--are no more informative regarding the origins or use of memorandum of instructions. It appears in a 1959 Supreme Court opinion where it is evidence that a challenged practice was part of a naval officer's authorized duties, i.e., circulation of a report to the Massachusetts congressional delegation. *Howard v. Lyons*, 360 U.S. 593 (1959). From the context of the Court's opinion and that of the other references consulted in this regard, it seems that a memorandum of instructions is typically a written instrument from someone in higher authority to a subordinate or subordinates for the latter's guidance in interpreting language or adhering to procedures applicable to the discharge of lawfully authorized duties.

As explained when we previously discussed this matter, the label which is used to describe a writing conveying instructions, orders, or what have you to a subordinate is relatively unimportant in the absence of a statutory directive specifically mandating implementation of a policy by executive order, presidential proclamation, executive agreement, rule, regulation, order of general applicability, or the like. The form of instrument selected by the President is typically left to his discretion and generally accords with relevant past practice. Ordinarily, more important than the name of the instrument used to convey what is essentially an order from a superior to an inferior (in the constitutional sense of "inferior officer") is whether the official from whom it emanates is authorized to issue the order in question.

The Department of Defense is an executive department of the United States composed, among other things, of the Office of the Secretary of Defense. 10 U.S.C. §111. The Secretary of Defense, who is the head of the Department of Defense, is the principal assistant to the President in all matters relating to the Department of Defense. 10 U.S.C. §113. In the words of a 150 year old Supreme Court opinion: "... The power of the executive to establish rules and regulations for the government of the army, is undoubted. ... The power to establish implies, necessarily, the power to modify or repeal, or to create anew. ... The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated [archaic form of to promulgate] through him must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority." *The United States v. Eliason*, 41 U.S. 291, 302 (1842).

In matters affecting the military, presidential authorities are not limited to those conferred on him by statute but with such authorities plus those inhering in him as Commander in Chief. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 305, 319-320 (1936) ("[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an

authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations--a power which does not require as a basis for its exercise and act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.") As such, the President has the power of command and control of the military subject only to a pair of *express* constitutional restrictions, the power of Congress "to make rules for the government and regulation of the land and naval forces," and that the appointment of officers has to be "by and with the advice and consent of the Senate". U.S. Constitution, Art. I, §8, cl 14; Art. II, §2, cl. 2.

With one qualification, the sum and substance of the alleged memorandum of instructions seems to be well within the power of the President as Commander in Chief to accomplish. The restriction against admitting gays and lesbians into the military and discharging such persons when identified is policy, not statutorily, based. The Supreme Court has long held that the President has the power to issue regulations for the government of the Armed Forces. *Carter v. McClaghry*, 183 U.S. 365, 387 (1902); *United States v. Freeman*, 3 How. (44 U.S.) 556, 557 (1844). That the President may direct the Secretary of Defense to implement the order to review and recommend revisions of the current policy is virtually beyond question. As previously noted, the Secretary is statutorily designated the President's principle assistant in all matters relating to the Department of Defense. Also, as previously indicated, the President's power to issue regulations for the government of the Armed Forces includes the power to repeal or modify them. Accordingly, it does not take any stretch of the imagination to affect a suspension or termination of administrative and legal proceedings related in some manner to the enforcement of modified or superseded regulations, particularly where the enforcement proceedings have not begun. The decision to institute legal actions is an executive decision. *Buckley v. Valeo*, 424 U.S. 1, 140 (1976).

The only reservation we have relates to the effective suspension of court martial proceedings already under way for violation of an article of the Uniform Code of Military Justice, for example Article 125, dealing with sodomy, 10 U.S.C. §925. The UCMJ, including the punitive articles, is statutory law. Generally, only Congress is authorized to suspend the operation of law as distinguished from mitigating the punishment, i.e., to pardon. Although the UCMJ authorizes and implicates the President in various related matters, e.g., 10 U.S.C. §804 (Art. 4), §806 (Art. 6), §806a (Art. 6a) §815 (Art. 15), §817 (Art. 17), §818 (Art. 18), §819 (Art. 19), §820 (Art. 20), §822 (Art. 22), §823 (Art. 23), §824 (Art. 24), §836 (Art. 36), §843 (Art. 43) (suspension of statute of limitations in certain cases), §856 (Art. 56) (court martial may not impose more punishment for the commission of an offense than authorized by the President), §862 (Art. 62), §866 (Art. 66), §867 (Art. 67), §871 (Art. 71), §874 (Art. 74), §875 (Art. 75), §876 (Art. 76), §940 (Art. 140), §942 (Art. 142), §943 (Art. 143), the power to suspend court martial proceedings in the assumed circumstances does not appear to be unequivocally given. Similarly, we have not found a relevant judicial decision on the point. However, it should be noted that the practice in Article III courts,

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where separation of powers applies, affords federal prosecutors in the exercise of prosecutorial discretion, to move for dismissal at any time. Of course, the decision whether to dismiss in the federal civil courts rests with the court, but the motion to dismiss seems to be honored in the vast majority of cases. Logically, or so it seems, it is arguable that the operation of prosecutorial discretion to permit suspension of court martial proceedings in the circumstances of the memorandum of instruction under consideration here, is valid. In the assumed circumstances, the action all takes place within the Executive Branch, not between the Executive and the Judicial Branches.

2

There are no relevant court cases involving a direct conflict between the described congressional and presidential powers. Some of these powers have been judicially examined in cases brought by private persons who have suffered injury to person or property as a result of governmental action. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), (hereafter *Youngstown Co. v. Sawyer*) *Spaulding v. Douglas Aircraft Co.*, 60 Supp. 985, 986 (S.D. Cal. 1945), *affirmed* 154 F.2d 419 (9th Cir. 1946), and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 319. In these and a handful of other cases, the courts have not gone beyond some generalities about the congressional and presidential powers in question; none, to the best of our knowledge, attempts either to exhaust the range of activities comprehended by them or to draw a boundary line between them. As observed by Justices Jackson and Rehnquist in a pair of noteworthy cases separated by thirty years, "[any person as well as a] judge ... may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." *Youngstown Co. v. Sawyer*, 343 U.S. at 634 (concurring) and *Dames & Moore v. Regan*, 453 U.S. at 660.

As Commander in Chief the President has command of the army and navy and may respond to an attack upon the United States. See, e.g., *Youngstown Co. v. Sawyer*, 343 U.S. at 642 (Jackson concurring). Also there is authority for the proposition that he may act to safeguard American lives and property abroad. See *Durand v. Hollins*, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860) and *Slaughter-House Cases*, 16 Wall. 36, 79 (1872). But see the Hostage Act of 1868, 212 U.S.C. §1732, which excludes war from the President's authorized options to obtain the release of Americans unreasonably detained by a foreign government.

What more goes with the title Commander in Chief is largely a matter of advocacy rather than settled law. Again, as Justice Jackson noted, "[a] century and a half of partisan debate and scholarly speculation [re. presidential powers] yields no net result but only more or less apt quotations from respected sources on each side of the question. They largely cancel each other." *Youngstown Co. v. Sawyer*, 343 U.S. at 634-635 (concurring).

On the other hand, aside from his power "to grant Reprieves and Pardons for Offenses against the United States ..." and to "receive Ambassadors and other public Ministers", the President is totally dependent upon Congress for authority or money and usually both to implement any policy. Congress is under no legal obligation to supply either or both. For example, it has been said that "[w]hile Congress cannot deprive the President of command of the army and navy, only Congress can provide him an army or navy to command." *Youngstown Co. v. Sawyer*, 343 U.S. at 644 (concurring).

The Constitution specifies that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" This provision has been held to be a restriction upon the disbursing authority of the Executive Department, and means that no money can be paid out of the



U.S. Department of Justice, American Law Division, Washington, D.C. 20540

December 4, 1992

TO : [REDACTED]

FROM : American Law Division

SUBJECT : Interdicting Gay Executive Order

This memorandum is in response to your request of December 2, 1992 for a summary explanation of congressional legislative options intended to prevent or to forestall the implementation of the much discussed, impending executive order banning discrimination against persons of homosexual persuasion in the United States Armed Forces.

As the text of the executive order is not available, and may not be available for some time, our comments are confined to the assumed general thrust of the order, namely, that sometime after January 20, 1993 President Clinton will invoke his powers as Commander in Chief to eliminate the current restriction on the admission of gays and lesbians to the military.

As classifications based on sexual preference have not been judicially determined to be invidious and therefore per se unconstitutional, or suspect and therefore subject to heightened scrutiny in terms of equal protection analysis, we assume that the soon to be discussed congressional options do not raise a constitutional problem in that regard. See and compare *Bowers v. Hardwick*, 478 U.S. 1868 (1986) (sustaining Georgia statute criminalizing sodomy as applied to consenting adults in the privacy of the home of one of them). In the Supreme Court's view in the named case, homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." *Id.*, at 191-192.

Any clash of a constitutional dimension implicated by congressional action thwarting the executive order in question would seem to raise a separation of powers issue likely described as Congress intruding into the President's domain as Commander in Chief. In his capacity as Commander in Chief just as in his capacity as sole organ of foreign relations the President has independent powers, not simply those conferred on him by statutes. See *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981), quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 819-320 (1936). At the same time, by virtue of its power of the purse and powers to raise and support armies, to provide and maintain a navy, and to regulate both, Congress has broad powers implicating military matters. U.S. Const., Art. I, §1, cls. 1, 12, 13, and 14.

Assuming the correctness of our conclusion regarding Congress' power to accomplish the result of maintaining the current restriction on service in the military by homosexual persons notwithstanding an executive order to the contrary, it may be legislatively accomplished in a pair of ways. Following previously cited current restrictions on women air combat-related activities, Congress can write an appropriate declaratory prohibition into law. Alternatively, Congress may invoke the power of the purse to prohibit the use of public monies to carry out the President's executive order. See, e.g., Russell Amendment, providing that no appropriation can be allotted to any agency established by executive order and in existence for more than 1 year, "if the Congress has not appropriated any money specifically for such agency ... or specifically authorized the expenditure of funds by it." Independent Offices Appropriation Act, 1945, Title II, sec. 213, 58 Stat. 387 (1944), 31 U.S.C. §1347.

Treasury unless it has been appropriated by an Act of Congress. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). Accordingly, the absolute control of the moneys of the United States has been said to be in Congress, and Congress is responsible for its exercise of this great power only to the American people. *Harrington v. Bush*, 553 F. 2d 190, 194 note 7 (D.C. Cir. 19787). The power to make appropriations includes the authority not only to designate the purpose of the appropriation, "but also the terms and conditions under which the executive department of the government may expend the appropriation The purpose of the appropriations, the terms and conditions under which ... appropriations [are] made is solely in the hands of Congress and it is the plain duty of the executive branch of the government to comply with the same." *Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. at 986.

Although Congress in enacting laws has to scrupulously avoid even incidental adverse effects on fully autonomous presidential powers, such as his powers to pardon and to receive ambassadors, see *Ex parte Garland*, 71 U.S. 383 (1867), it is under no similar constraints in other areas. The fact that in the exercise of an acknowledged power, such as the power to fund or the power to regulate the Armed Forces of the United States, Congress may incidentally impinge upon a presidential authority as Commander in Chief does not render that exercise a violation of separation of powers. "There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the Country, its industries and its inhabitants. [Emphasis in original] He has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army and navy to command. It is also empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions." [Emphasis added] *Youngstown Co. v. Sawyer*, 343 U.S. at 643-644 (Jackson concurring). "The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control." *Id.* at 588 (opinion of the Court).

Congress establishes manpower requirements for the military and in the process immediately or mediately specifies who is required or eligible to serve. If retention by law of the current restriction on homosexual persons in the military is regarded as an impingement on the presidential powers it is arguably a tolerable one based on the congressional powers regarding the establishment and maintenance of the armed forces, their regulation, and their funding. In this regard, it is difficult to see any principled difference between the assumed countermanding legislation in question and the power of Congress to render an entire sex ineligible for military service or for certain kinds of combat missions as is the case at the present time. 10 U.S.C. §6015 (Navy) and §8549 (Air Force). The former was sustained in *Rostker v. Goldberg*, 453 U.S. 17 (1981), which dealt with a males only statutory registration provision notwithstanding presidential recommendations to make women eligible for a possible future military draft.