

FOIA MARKER

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

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Cliff Sloan

Subseries:

OA/ID Number: 4658

FolderID:

Folder Title:

Gays in the Military - Abel [1]

Stack:

S

Row:

108

Section:

1

Shelf:

5

Position:

3

APR 4 '94 14:15 FROM U S ATTORNEY E D N Y

PAGE.002

Garvey - in the city

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 WOHLD, and
SEAMAN WERNER ZEHR.

CV 94 0974

Plaintiffs,

MEMORANDUM
AND
ORDER

-against-

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

Defendants.

-----X
SULLIVAN & CROMWELL

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

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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

LAMBDA LEGAL DEFENSE & EDUCATION FUND

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

DEPARTMENT OF JUSTICE

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

DEPARTMENT OF THE ARMY

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

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

NICKERSON, District Judge:

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

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

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

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

THE COMPLAINT

The complaint states, in substance, the following.

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

THE ACT AND THE REGULATIONS

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

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

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

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

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

5

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CONSTITUTIONAL CLAIMS

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

Free Speech

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

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

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

10

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

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

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

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

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

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

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

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

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

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

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

continuing to speak in court to make a constitutional challenge.

Equal Protection

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

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

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

14

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

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

Some courts have flatly held that the distinction has no rational basis. See, e.g., Pahl v. Secretary of the United States Navy, 832 F. Supp. 1319 (E.D. Cal. 1993) (finding no rational basis for homosexual ban and granting plaintiff summary judgment); Mainhold v. United States Dep't of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993) (same), stay denied, CV-92-6044, 1993 WZSTLAW 195368 (9th Cir. Mar. 5, 1993) (per curiam), stay granted in part, stay denied in part, 114 S. Ct. 374 (1993) (staying injunction, pending appeal, except as applicable to named plaintiff); Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993) (finding ban unconstitutional), vacated for rehearing in banc, Jan. 7, 1994.

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

APR 4 '94 14:20 FROM U S ATTORNEY E D N Y

PAGE.016

15

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

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

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

STANDARDS FOR ENTRY OF A
PRELIMINARY INJUNCTION

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

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

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

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

17

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

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

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

18

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

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

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

19

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

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

20

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

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

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

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

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

23

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

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

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

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

23

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

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

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

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

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

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

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

25

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

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

CONCLUSION

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

So ordered.

Dated: Brooklyn, New York
April 4, 1994

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

JAN-03-1995 17:50 FROM U.S. ATTY. CIVIL DIV.

TO

912025148151

P.02

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 965 -- August Term 1994

(Argued December 12, 1994)

Decided

Docket No. 94-6181

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

Plaintiffs-Appellees.

-- v. --

UNITED STATES OF AMERICA and
WILLIAM J. PERRY, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF DEFENSE,

Defendants-Appellants.

B e f o r e : FEINBERG, VAN GRAAFEILAND, and WALKER, Circuit
Judges.

Appeal by defendants from orders of the United States
District Court for the Eastern District of New York (Nickerson,
J.), issuing preliminary injunctions prohibiting defendants from
investigating or initiating proceedings against plaintiffs under
the new "Don't Ask, Don't Tell" policy embodied in 10 U.S.C. §
654 and implementing regulations pending final determination of
their lawsuit.

Remanded.

MICHAEL LACOVARA, DAVID H. BRAFF,
PENNY SHANE, Sullivan and Cromwell,

JAN-03-1995 17:52 FROM U.S. ATTY. CIVIL DIV.

TO

913025148151

P.03

1 New York, New York, WILLIAM B.
2 RUBENSTEIN, RUTH E. HARLOW, MARC E
3 ELOVITZ, American Civil Liberties
4 Union Foundation, New York, New
5 York, BEATRICE DOHRN, EVAN WOLFSON
6 Lambda Legal Defense & Education
7 Fund, New York, New York, for
8 Plaintiffs-Appellees.
9

10 MARK I. LEVY, Criminal Division,
11 U.S. Department of Justice,
12 Washington, D.C., FRANK W. HUNGER,
13 Assistant Attorney General, U.S.
14 Department of Justice, Washington,
15 D.C., ZACHARY W. CARTER, United
16 States Attorney, Brooklyn, New
17 York, ANTHONY J. STEINMEYER, JOHN
18 C. HOYLE, E. ROY HAWKENS, EDWARD
19 HIMMELFARB, Civil Division, U.S.
20 Department of Justice, Washington,
21 D.C. (Ltc. Nolon J. Benson, Jr.,
22 Cpt. Tara O. Hawk, of counsel), for
23 Defendants-Appellants.
24
25
26

27 Per Curiam:

28 BACKGROUND

29 Plaintiffs, six gay or lesbian members of the armed forces,
30 filed suit in the Eastern District of New York (Eugene H.
31 Nickerson, Judge) challenging the constitutionality of the
32 recently enacted federal law and implementing regulations
33 governing military service by homosexuals. The law, embodying
34 the new "Don't Ask, Don't Tell" policy, mandates separation of
35 any service member who states that he or she is homosexual unless
36 that person can show "that he or she is not a person who engages
37 in, attempts to engage in, has a propensity to engage in, or
38 intends to engage in homosexual acts." 10 U.S.C. § 654(b)(2).
39 Plaintiffs contend that the law and its accompanying regulations

1 violate the Equal Protection Clause of the Fourteenth Amendment,
2 applicable against the United States under the Due Process Clause
3 of the Fifth Amendment, and the First Amendment of the
4 Constitution.

5 After commencement of the suit, the Department of Defense
6 initiated an investigation of plaintiff Petty Officer Heigl based
7 on his statement that he was a homosexual that was submitted to
8 the district court in connection with this lawsuit. In response
9 to this investigation, the district court issued an order on
10 April 4, 1994 enjoining defendants "from investigating or
11 discharging or taking other adverse or punitive action against
12 plaintiffs based on their self-identification as gay or lesbian
13 in connection with [these] legal proceedings." Defendants moved
14 for an order vacating, altering, or amending the preliminary
15 injunction, but the district court denied their request.

16 Shortly thereafter, defendants informed plaintiffs that they
17 planned to initiate discharge proceedings against two other
18 plaintiffs, Sergeant Spencer and Seaman Zehr, based on their
19 statements outside of the suit identifying themselves as
20 homosexuals. Plaintiffs therefore sought a second injunction
21 prohibiting defendants from taking any such adverse action
22 against any of the plaintiffs while the litigation was pending.
23 On June 3, 1994, the district court issued a second order
24 enjoining defendants "from investigating, discharging or taking
25 other adverse or punitive action, pursuant to the Act and/or
26 Regulations, against plaintiffs based on their self-

JAN-03-1995 17:51 FROM U.S. DIST. COURT BMD.

TO

912025148151

P.05

1 identification as lesbian or gay." Defendants appealed the two
2 orders pursuant to 28 U.S.C. § 1292(a)(1).

3 DISCUSSION

4 The principal issue in this appeal is whether the district
5 court utilized the proper standard in deciding to issue the two
6 preliminary injunctions. Defendants contend that the district
7 court erred in requiring plaintiffs to demonstrate only "serious
8 questions going to the merits" rather than a likelihood of
9 success on the merits. Because we agree that the district court
10 applied an improper standard in issuing the injunctions, we
11 remand to the district court.

12 The general standard for issuing a preliminary injunction is
13 well settled. "The party seeking the injunction must demonstrate
14 (1) irreparable harm should the injunction not be granted, and
15 (2) either (a) a likelihood of success on the merits, or (b)
16 sufficiently serious questions going to the merits and a balance
17 of hardships tipping decidedly toward the party seeking
18 injunctive relief." Resolution Trust Corp. v. Elman, 949 F.2d
19 624, 626 (2d Cir. 1991). This second "serious questions" prong
20 is also frequently termed the "fair ground for litigation"
21 standard. See, e.g., Sperry Int'l Trade, Inc. v. Government of
22 Israel, 670 F.2d 8, 11 (2d Cir. 1982). Although a plaintiff who
23 demonstrates irreparable harm may usually satisfy either (a) or
24 (b), this choice is not always available.

25 [W]here the moving party seeks to stay government action
26 taken in the public interest pursuant to a statutory or
27 regulatory scheme, the district court should not apply the
28 less rigorous fair-ground-for-litigation standard and should

JAN-03-1995 17:52 FROM U.S. ATTY. CIVIL DIV.

TO

912025148151

P.06

not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim.

Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 580 (1st Cir. 1989). This exception reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.

We believe that the investigations and discharge proceedings that the plaintiffs seek to enjoin fall squarely within the confines of this exception. They plainly qualify as action taken "pursuant to a statutory or regulatory scheme." Separation due to the likelihood of a service member's homosexual conduct is mandated by 10 U.S.C. § 654(b); the procedures and standards for determining whether a service member will be separated are prescribed in Department of Defense Directive Nos. 1332.14 and 1332.30. That the narrow injunctions crafted by the district court "merely freeze[] the positions of the parties until the court can hear the case on the merits" rather than enjoining an entire statute or regulation, Heckler v. Lopez, 463 U.S. 1328, 1333 (1983) (Rehnquist, Circuit Justice), application to vacate stay denied, 464 U.S. 879 (1983), does not alter this conclusion. As long as the action to be enjoined is taken pursuant to a statutory or regulatory scheme, even government action with respect to one litigant requires application of the "likelihood of success" standard. See Plaza Health, 878 F.2d at 578

JAN-03-1995 17:51 FROM U.S. ATTY. CIVIL DIV. TO 912225148131 P.07

1 (applying the higher standard to an injunction prohibiting the
2 government from suspending one plaintiff from Medicaid participatio

3 Plaintiffs contend that the "likelihood of success" prong i
4 not required in this case because the Department of Defense's
5 actions are not "taken in the public interest." Their principal
6 support comes from Haitian Centers Council, Inc. v. McNary, 969
7 F.2d 1326 (2d Cir. 1992), vacated as moot, 113 S. Ct. 3028
8 (1993), in which we held that plaintiffs wishing to enjoin the
9 government from repatriating Haitian refugees need only meet the
10 "serious questions" standard. Id. at 1332-39. We noted that
11 "the 'likelihood of success' prong need not always be followed
12 merely because a movant seeks to enjoin government action." Id.
13 at 1339. Similarly, in Carey v. Klutznik, 637 F.2d 834, 839 (2d
14 Cir. 1980), we applied the less rigorous standard to an
15 injunction aimed at the Census Bureau's survey methods, noting
16 that a government agency may not lay sole claim to the public
17 interest. Id. at 839. Plaintiffs argue that in this case they
18 present an equal claim to the public interest and therefore need
19 not meet the higher standard.

20 We believe that in a case such as this, where the full play
21 of the democratic process involving both the legislative and
22 executive branches has produced a policy in the name of the
23 public interest embodied in a statute and implementing
24 regulations, our role in reviewing that determination for the
25 purpose of deciding whether to apply the "serious questions" or
26 "likelihood of success" standard is severely limited. Unlike in

1 Haitian Centers, in which the plaintiffs challenged action taken
2 pursuant to INS policy formulated solely by the executive branch
3 and Carey, which involved methods adopted by the Census Bureau
4 altogether outside of a regulatory framework, in this case
5 Congress and the President engaged in lengthy public debate
6 before formulating the new "Don't Ask, Don't Tell" policy and
7 enacting and signing the legislation implementing it. See
8 Haitian Centers, 969 F.2d at 1339 (distinguishing cases in which
9 the "likelihood of success" requirement applied as involving
10 action authorized by a specific statute). The statute contained
11 fifteen specific findings which Congress believed to justify the
12 new policy. 10 U.S.C. § 654(a). In such circumstances, it is
13 inappropriate for this court to substitute its own determination
14 of the public interest for that arrived at by the political
15 branches, whether or not there may be doubt regarding the wisdom
16 of their conclusion. We therefore hold that the more rigorous
17 "likelihood of success" standard applies to the injunctions
18 sought in this case.

19 Rather than applying the "likelihood of success" standard
20 ourselves, however, we believe that the wiser course is to remand
21 to allow the district court to make the determination in the
22 first instance. See 28 U.S.C. § 2106; see also 11 Wright &
23 Miller, Federal Practice and Procedure: Civil § 2962, at 638 ("In
24 general, when the appellate court determines that the trial
25 court's order denying injunctive relief was erroneous, it will
26 reverse and remand the case for further proceedings below.").

JAN-03-1995 18:02 FROM U.S. ATTORNEY, SDNY

TO 512025142151 P.02

1 Remand is appropriate where consideration of additional evidence
2 would enhance the district court's determination. See Williams
3 v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972) (remandin
4 for determination of the appropriateness of a preliminary
5 injunction where several factual and legal issues require
6 exploration), stay granted, 411 U.S. 902 (1973), cert. denied,
7 411 U.S. 931 (1973). Such consideration, while not expected to
8 be extensive, is nonetheless needed here. For example, the
9 government alleged for the first time in its reply brief on
10 appeal that several service members have identified themselves a
11 homosexual and been subjected to discharge proceedings in which
12 they were able to rebut the presumption of homosexual conduct an
13 avoid being discharged. This claim, and perhaps others, warrant
14 further exploration by the district court before a decision
15 touching on the merits is made.

16 We believe that given the circumstances of this case the
17 preliminary injunction should remain in place pending resolution
18 of the issue of the likelihood of success on remand lest
19 plaintiffs lose altogether the opportunity to litigate their
20 facial constitutional challenges in the present posture of the
21 case. We followed a similar course in Packard Instrument Co. v.
22 ANS, Inc., 416 F.2d 943 (2d Cir. 1969), where, after deciding
23 that the district court had misjudged the possibility of success
24 in granting a preliminary injunction in a patent infringement
25 case, we stated that "given the present posture of this case,
26 . . . the interests of the parties and the efficient

JAN-03-1995 18:09 FROM U.S. ATTORNEY SDNY

TO

512025148151

P.03

1 administration of justice will be best served by permitting the
2 preliminary injunction to stand" Id. at 945.

3 However, the injunctions should not remain in place for an
4 extended period with the case in its present posture since no
5 "likelihood of success" finding has been made. Fortunately,
6 Federal Rule of Civil Procedure 65(a)(2), which allows
7 consolidation of a preliminary injunction hearing with a trial on
8 the merits of a permanent injunction, provides a means of
9 ensuring prompt consideration of the full merits of plaintiffs'
10 claims rather than the "likelihood" of their success. In Packard
11 Instrument, we conditioned the continued effect of the
12 injunctions on such a consolidation. Packard Instrument, 416
13 F.2d 945. We will issue such an order here as well. Cf. Forts
14 v. Ward, 566 F.2d 849, 854 (2d Cir. 1977) (suggesting
15 consolidation under Fed. R. Civ. P. 65(a)(2) where the district
16 court failed to hold an evidentiary hearing before granting a
17 preliminary injunction that barred male corrections officers from
18 female prison wards); SBC v. Spectrum, Ltd., 489 F.2d 535, 543
19 (2d Cir. 1973) ("strongly urg[ing]" consolidation where undue
20 delay seemed likely); Carter-Wallace, Inc. v. Davis-Edwards
21 Pharmaceutical Corp., 443 F.2d 867, 884 (2d Cir. 1971) (urging
22 consolidation and conditioning the decision to vacate a
23 preliminary injunction on the defendant's offer to proceed
24 quickly to trial).

25 We believe that upon consolidation under Rule 65(a)(2), the
26 district court could decide the merits of plaintiffs' claims

1 within a relatively short period of time. While we have noted
2 that there are some factual issues remaining to be explored, we
3 also note that the factual record in this case, in which legal
4 issues predominate, is largely complete. In addition, we think
5 that the important questions raised in this case should not be
6 left unanswered by the courts any longer than necessary. We will
7 therefore condition the temporary maintenance of the injunction
8 upon the occurrence of a trial on the merits within three months.

9 Accordingly, it is hereby ordered that this case be remanded
10 to the district court. The preliminary injunction orders shall
11 remain in effect until March 31, 1995 upon which date they shall
12 expire unless reentered by the district court following a trial
13 on the merits of plaintiffs' request for a permanent injunction
14 pursuant to Federal Rule of Civil Procedure 65(a)(2).

H261

RULES OF THE UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT
supplementing
Federal Rules of Appellate Procedure

Sec. 27. Motions:

(a) Form of Notice of Motion and Supporting Papers for Motions and Opposition Statements

(1) Notice of Motion: The moving party shall submit the Notice of Motion in the format approved by the court with such changes as the Chief Judge may from time to time direct.

(2) Supporting Papers for Motions and Opposition Statements:

(a) Affidavits should contain factual information only. Affidavits containing legal argument will be treated as memoranda of law.

(b) Memoranda of law shall not exceed ten typewritten double-spaced 8½" x 11" pages except by permission of the court.

(c) Copy of the lower court or agency order, judgment or decision shall be included as a separately identified exhibit by a moving party seeking substantive relief.

(d) Exhibits attached should be only those necessary for the determination of the motion.

(3) Non-compliance Sanctions: If the moving party has not complied with this rule, the motion may be dismissed by the clerk without prejudice to renew upon proper papers. If application is promptly made, the action of the clerk may be reviewed by a single judge. If the responding party fails to comply with this rule, the court may refuse to hear that party at oral argument. The court may impose costs and an appropriate fine against either party for failure to comply with this rule.

• • • • •
Federal Rules of Appellate Procedure

Rule 27(d) Form of papers; number of copies. All papers relating to motions may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Lieutenant Colonel Jane Able, Petty Officer
Robert Heigl, First Lieutenant Kenneth Osborn,
Sergeant Steven Spencer, Lieutenant Richard von
Wohld, and Seaman Werner Zehr

v.
United States of America and William J. Perry
In His Official Capacity As Secretary of Defense

NOTICE OF MOTION

Frank W. Hunger
Assistant Attorney General
Zachary W. Cater
United States Attorney
Anthony J. Steinmeyer
John C. Hoyle
E. Roy Hawkins
Edward Himmelfarb

Attorneys for Petitioner
Office & Post Office Address & Telephone Number
Civil Division, Appellate Staff
Room 3617
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 514-3469

FILE

United States Court of Appeals FOR THE SECOND CIRCUIT

Each motion must be
accompanied by a supporting
affidavit.

94-6181

Docket Number

NOTICE OF MOTION

state type of motion

for Leave to attach addendum to
Reply Brief

ABLE

v.
USA

Use short title

MOTION BY: *(Name, address and tel. no. of law firm and of
attorney in charge of case)*

John C. Hoyle (202) 514-3469
Civil Division, Appellate Staff
Room 3343

Department of Justice

10th & Penn. Ave., N.W. Wash., D.C. 20530

OPPOSING COUNSEL: *(Name, address and tel. no. of law
firm and of attorney in charge of case)*

David H. Braff
125 Broad Street
New York, NY 10004

(212) 558-4000

Has consent of opposing counsel:

A. been sought?

☒ Yes ☐ No

B. been obtained?

☐ Yes ☒ No

Has service been effected?

☒ Yes ☐ No

Is oral argument desired?

☐ Yes ☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order?

☒ Yes ☐ No

B. by firm date of argument notice?

☐ Yes ☒ No

C. If Yes, enter date: As early as week of Nov. 7, 1994

Judge or agency whose order is being appealed:

Nickerson, J.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need
for this motion?

☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the
status quo until the motion is heard?

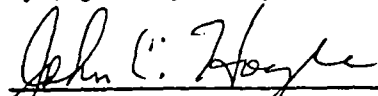
☐ Yes ☐ No

Brief statement of the relief requested:

Permission to attach three final agency orders issued by the Department of the Navy as
an addendum to Reply Brief.

Complete Page 2 of This Form

By: *(Signature of attorney)*



Signed name must be printed beneath

John C. Hoyle

Appearing for: *(Name of party)*

United States and
William J. Perry

Date

Nov. 2, 1994

Appellant or Petitioner:

☐ Plaintiff ☒ Defendant

Appellee or Respondent:

☐ Plaintiff ☐ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted denied

Date

Circuit Judge

Previous requests for similar relief and disposition:

None.

Statement of the issue(s) presented by this motion:

Whether three unpublished final orders issued by the Department of the Navy may be attached as an addendum to the Government's reply brief.

Brief statement of the facts (with page references to the moving papers):

The three documents in question are unpublished final orders issued by the Department of the Navy, directing that three service members be retained in the military (Declaration, p. 2). The three service members had been processed for discharge based on statements they made that they are homosexuals, which, under the military's new policy governing service by homosexuals, raised a rebuttable presumption that they engage in, or are likely to engage in, homosexual acts that are proscribed to service members (*id.*). The three final orders establish that the service members successfully rebutted that presumption (*id.*).

Summary of the argument (with page references to the moving papers):

The three documents that we have attached as an addendum to our reply brief are unpublished final orders issued on behalf of the Department of the Navy by the Naval Bureau of Personnel subsequent to the district court's entry of the preliminary injunctions being appealed (Declaration, p. 2). In their appellee brief, plaintiffs argue that the rebuttable presumption is "utterly illusory" (p. 10) and will lead to the discharge of all service members who are self-identified homosexuals regardless of any showing they might make in rebuttal (p. 35). As we explained in our reply brief (p. 16 & n.14), these final agency orders show, to the contrary, that service members have successfully rebutted the presumption and have been retained in the military notwithstanding their statements of homosexuality (Declaration, p. 2). Names and other identifying indicators have been redacted from the orders pursuant to the Privacy Act (*id.* at pp. 2-3). Because these orders are unpublished and thus not readily obtainable, we attached them to our brief for the convenience of this Court and opposing counsel (*id.* at p. 3).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,)

No. 94-6181

v.)

UNITED STATES OF AMERICA and WILLIAM J.)
PERRY, IN HIS OFFICIAL CAPACITY AS)
SECRETARY OF DEFENSE,)

Defendants-Appellants.)

DECLARATION OF JOHN C. HOYLE

I, John C. Hoyle, hereby declare pursuant to 28 U.S.C. 1746:

1. I am one of the attorneys for the defendants-appellants in this case. I make this declaration in support of the motion of defendants-appellants for leave of Court to attach as an addendum to appellants' Reply Brief copies of three unpublished final orders issued by the Department of the Navy.

2. In this case, plaintiffs seek injunctive and declaratory relief to bar enforcement of an Act of Congress and Department of Defense Directives (the "new policy") regarding military service by homosexuals. Under the new policy, a statement by a service member that he is a homosexual raises a rebuttable presumption that he engages in or is likely to engage in homosexual acts that are proscribed for service members; a service member who makes such a statement will be discharged unless he rebuts the presumption by showing that he does not and is not likely to

engage in homosexual acts. 10 U.S.C. 654(b); Directives, 1332.14 ¶ H (enlisted personnel); id. 1332.30 ¶ C (officers).

3. In their appellee brief, plaintiffs argue that the rebuttable presumption is "utterly illusory" (p. 10) and will lead to the discharge of all service members who are self-identified homosexuals regardless of any showing they might make in rebuttal (p. 35).

4. The three documents in question -- which were issued by the Department of the Navy subsequent to the district court's entry of the preliminary injunctions being appealed -- are unpublished final orders issued on behalf of the Department of the Navy by the Naval Bureau of Personnel, as authorized by Secretary of the Navy Instruction 1910.4A at 4 (Dec. 27, 1983), and NAVADMIN 033/94 at ¶ 7 (Mar. 1, 1994).

5. These final orders direct that three service members who made statements that they are homosexuals be retained in the military. The three service members had been processed for discharge based on their statements identifying themselves as homosexuals. As we explained in our reply brief (p. 16 & n.14), the three final orders establish that the service members (i) successfully rebutted the presumption that they engage in or are likely to engage in proscribed homosexual acts, and (ii) have been retained in the military notwithstanding their statements of homosexuality. Names and other identifying indicators have been redacted from the orders pursuant to the Privacy Act. See Government Reply Brief at 16 n.14.

6. Because these orders are unpublished and thus not readily obtainable, we attached them to our reply brief for the convenience of this Court and opposing counsel.

I declare under penalty of perjury that the foregoing is true and correct.

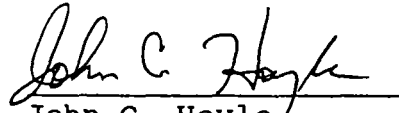

JOHN C. HOYLE

Executed on November 2, 1994.

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 1994, I have served the foregoing Motion For Leave To Attach Addendum To Reply Brief on counsel for appellees by causing a copy to be sent by overnight delivery service to:

David H. Braff, Esquire
Michael Lacovara, Esquire
Penny Shane, Esquire
125 Broad Street
New York, New York 10004



John C. Hoyle
Attorney

94-6181

United States Court of Appeals
for the
Second Circuit

LIEUTENANT COLONEL JANE ABLE, PETTY OFFICER ROBERT HEIOL,
FIRST LIEUTENANT KENNETH OSBORN, SERGEANT STEVEN SPENCER,
LIEUTENANT RICHARD VON WOLFF, AND SEAMAN WERNER ZEHR,
Plaintiffs-Appellees,

—against—

UNITED STATES OF AMERICA AND WILLIAM J. PERRY,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF FOR PLAINTIFFS-APPELLEES
IN OPPOSITION TO THE MOTION FOR LEAVE
TO ATTACH ADDENDUM TO REPLY BRIEF**

WILLIAM H. RUBENSTEIN
RUTH E. HARLOW
MARC E. ELOVITZ
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800 (ext. 545)

BEATRICE DOHERN
EVAN WOLFSON
LAMBDA LEGAL DEFENSE &
EDUCATION FUND
666 Broadway
New York, New York 10012
(212) 995-8585

—and—

DAVID H. BRAFF
MICHAEL LACOVARA
PENNY SHANE
125 Broad Street
New York, New York 10004
(212) 558-4000

TABLE OF CONTENTS

	<u>Page</u>
BACKGROUND	2
I. The "Addenda" Were Not Before the District Court and May Not Be Added to the Record On Appeal	3
II. The "Addenda" Will Not Assist the Court in Reviewing the Preliminary Injunctions, and Appellants' Characterizations of the Addenda are Unsupported Statements of Counsel and Must Therefore Be Stricken from the Reply Brief . . .	5
CONCLUSION	8

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<u>Bono v. United States</u> , 113 F.2d 724 (2d Cir. 1940)	6
<u>In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts</u> , 913 F.2d 89 (3d Cir. 1990)	4
<u>Ross v. Kemp</u> , 785 F.2d 1467 (11th Cir. 1986)	4
<u>Salinger v. Random House, Inc.</u> , 818 F.2d 252 (2d Cir. 1987)	4
<u>United States v. Aulet</u> , 618 F.2d 182 (2d Cir. 1980)	5
<u>Warner Bros. Inc. v. Dae Rim Trading, Inc.</u> , 877 F.2d 1120 (2d Cir. 1989)	6
STATUTES	
Fed. R. App. P. 10	1, 2, 3
MISCELLANEOUS	
9 James W. Moore et al., <u>Moore's Federal Practice</u> , ¶ 20.08[2] (2d ed. 1994)	4

Appellees Lieutenant Colonel Jane Able, Petty Officer Robert Heigl, First Lieutenant Kenneth Osborn, Sergeant Steven Spencer, Lieutenant Richard von Wobld and Seaman Warner Zehr ("Appellees") submit this Memorandum of Law in Opposition to the Motion for Leave to Attach Addendum to Reply Brief (the "Motion") filed by Appellants United States of America and William J. Perry ("Appellants"). Appellees oppose the mis-described Motion -- which is in fact a motion to supplement the record on appeal, not to "attach an addendum" to a brief -- on two grounds. First, as Appellants concede, the "addenda" were not part of the record before the District Court when it granted the preliminary injunctions that are the sole subject of this appeal. There is thus no basis for including the addenda in the record which the Court will use in reviewing the District Court's decision to grant the preliminary injunctions at issue. Second, the "addenda" themselves are virtually devoid of substance, let alone relevance to the issues before the Court; it is only the unsupported factual representations Appellants make about the addenda in their Reply Brief that give the addenda even arguable relevance. But these representations plainly are impermissible under Fed. R. App. P. 10.

Background

In seeking the preliminary injunctions in the District Court and in defending their appropriateness in this Court, Appellees argued, inter alia, that (under the Act and DoD Directives that underlie this suit) they would be discharged because they could not rebut the "presumption" that they have a "propensity" to engage in "homosexual acts." See Brief for the Plaintiffs-Appellees ("App. Br.") at 34-35. During the first preliminary injunction hearing before the District Court, the District Court noted that in filing the complaint the Appellees identified themselves as gay or lesbian. In light of this fact, the Court expressed substantial skepticism regarding the ability of Appellees (naturally, the only service members with whom the District Court was concerned at the time) to rebut the presumption insofar as it concerned their "propensities." See JA 764 and App. Br. at 9-10.

Now, having waited until briefing by Appellees was complete and without making a motion to supplement the record pursuant to Fed. R. App. P. 10(e), Appellants proffer three "addenda" (each of which has nothing to do with Appellees) to demonstrate that the District Court's conclusion (specifically regarding Appellees) was unfounded. Appellants describe the "addenda" as three "unpublished final orders" from the Department of the Navy, directing that three service members be retained in service, based on

a finding that each had rebutted the "presumption." Motion at 2. Appellants' characterizations in the Reply Brief notwithstanding, see infra, the addenda themselves say nothing more. Moreover, as set forth below, neither the addenda nor the characterizations of them in Appellants' Reply Brief may be considered on this appeal.

I. The "Addenda" Were Not Before the District Court and May Not Be Added to the Record on Appeal.

Neither in the Motion nor in the Reply Brief do Appellees explain how it can be that the "addenda," which postdate the preliminary injunction orders that are the subject of this appeal, are properly included in the record on appeal.

Rule 10(a) of the Federal Rules of Appellate Procedure ("Composition of the Record on Appeal") provides that the record shall include only "original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court." Fed. R. App. P. 10(a). Appellees concede that the addenda "were issued by the Department of the Navy subsequent to the [D]istrict [C]ourt's entry of the preliminary injunctions being appealed." Hoyle Declaration, ¶ 4. Thus, they are plainly outside the record.

Rule 10(e) ("Correction or Modification of the Record"), moreover, does not provide a basis for inclusion

of the addenda. The general rule is that Rule 10(e) may not be used to add to the record material not before the district court. See, e.g., In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts, 913 F.2d 89, 97 (3d Cir. 1990); Rosa v. Kemp, 785 F.2d 1467, 1474 n. 12 (11th Cir. 1986); 9 James W. Moore et al., Moore's Federal Practice, ¶ 210.08[2], at 10-61 (2d ed. 1994) ("under the guise of correcting the record (pursuant to Rule 10(e)), the court of appeals may not admit on appeal a document that is not made a part of the record in the district court").*

On two occasions, the Second Circuit appears to have recognized a limited exception to the general rule and has permitted inclusion of materials outside the record. On both occasions, the Court made clear that it was allowing the information solely because it would "clarif[y the Court's] understanding of the process by which the District Judge reached the decision challenged on appeal." Salinger v. Random House, Inc., 818 F.2d 252, 253 (2d Cir. 1987)

* This construction of Rule 10(e) is certainly consistent with its plain language. The Rule by its terms precludes the addition of information that postdates the order that is the subject of the appeal, for it allows modification of the record on appeal only in two situations: (i) instances in which there is a "difference . . . as to whether the record truly discloses what occurred in the district court," and (ii) circumstances in which something "material to either party is omitted from the record by error or accident or is misstated therein." Here, there is no difference between the parties as to "what occurred in the district court" and no claim that the "addenda" were "omitted" from the record.

(noting that material to be added would "eliminate the uncertainty" previously expressed about the district court's reasoning); United States v. Aulet, 618 F.2d 182, 187 (2d Cir. 1980) (invoking Rule 10(e) to add information to the record and thereby avoid "shielding [itself] from what transpired below"). Appellants do not argue that adding the "addenda" to the record will "clarify" the Court's understanding of what transpired in the District Court, nor could they do so credibly. Under no circumstance, therefore, does Rule 10(e) provide a basis for adding the addenda to the record.

II. The "Addenda" Will Not Assist the Court in Reviewing the Preliminary Injunctions, and Appellants' Characterizations of the Addenda are Unsupported Statements of Counsel and Must Therefore Be Stricken from the Reply Brief.

As even the most cursory review of the three "addenda" (which Appellees attach hereto) makes clear, they offer little information. They say only that an unnamed service member will be retained in the Navy, because he or she purportedly rebutted the "presumption." The addenda do not indicate whether the three service members who purportedly rebutted the presumption are, in fact, gay or lesbian. Nor do the addenda describe (i) the basis for the discharge proceeding in the first place, (ii) the nature of the evidence (if any) used to rebut the presumption, or (iii) the reasoning followed by the Navy board which

conducted the discharge proceeding. Standing alone, therefore, the addenda are wholly irrelevant to the issue presented in this appeal: the mere fact that three (unnamed) service members -- who allegedly engaged in (unspecified) conduct or made an (undefined) statement and then (maybe) presented (undefined) evidence to rebut the presumption -- will not be discharged says nothing about the appropriateness of the District Court's finding that the six Appellees could not rebut the presumption.

Indeed, to bear any conceivable relevance to the issues before the Court, the addenda would themselves have to show at least two additional facts. First, the addenda would have to demonstrate that, as Appellants simply assert in their Reply Brief (at 16), the service members at issue "were processed for statements of homosexuality." The addenda say no such thing; Appellants merely assert this "fact" in their brief. As the Court has recognized, however, "[t]he merest novice in the law knows that '[f]actual statements contained in a party's brief are not a part of the record.'" Warner Bros. Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1127-28 (2d Cir. 1989) (quoting Matter of Frank Febr Brewing Co., 268 F.2d 170, 183 (6th Cir. 1959)); see also Bong v. United States, 113 F.2d 724, 725 (2d Cir. 1940) ("Though the appellant has briefed this appeal as though facts stated in the brief, but not shown by the record, may be given effect, it is, of course, the

record alone which controls as to the facts"). The addenda provide no basis for the factual assertion in Appellants' Reply Brief, and the assertion should, therefore, be stricken.

Second, even if the addenda did indicate that the service members to whom they relate had been "processed for statements of homosexuality" (Reply Brief at 14), the addenda still would not assist the Court in deciding this appeal. The addenda do not explain the nature of the unspecified statements, the context in which they allegedly were made or the explanations of them offered by the service members in seeking to rebut the presumption.* The addenda thus provide nothing by which to compare the situations of the three service members they address with the situation of the Appellees -- each of whom stated that he or she was gay in filing the complaint.** For themselves, Appellees have

* As Appellants suggested in their opening brief, statements made "in jest," statements that were "misunderstood or taken out of context" or "statements" that the service member never made, for example, do not give rise to discharge. See Brief for the Appellants at 16.

** Accordingly, there can be no doubt that Appellees made "statements of homosexuality," and there is no possibility that such statements were made "in jest," or were "misunderstood or taken out of context." See supra n.* and App. Br. at 40. Rather, Appellees in filing the complaint truthfully and definitively acknowledged their sexual orientation.

alleged, and the District Court agreed, the opportunity to rebut the presumption is illusory. See App. Br. at 46.*

Conclusion

"Attaching" the "addenda" to Appellants' Reply Brief (and thereby supplementing the record on appeal) is both impermissible and inappropriate. The addenda were not before the District Court when it issued the preliminary injunctions and there is no basis in the Federal Rules of Appellate Procedure for including them in the record on appeal. Moreover, the addenda themselves contain no information that will assist the Court in reviewing the preliminary injunctions at issue, and the unsupported statements Appellants make about the addenda in their Reply Brief plainly are improper and should be stricken.

Accordingly, Appellees respectfully request that the Court deny Appellants' Motion and order Appellants to

* Moreover, it is appropriate for the Court to look even more unfavorably upon Appellants' request to attach the addenda to their Reply Brief, given the fact that one, and possibly two, of the three orders preceded the filing of Appellants' opening brief. Appellants' Motion does not explain why Appellants waited until Reply (after Appellees had filed their only brief) to seek inclusion of the orders.

file a corrected Reply Brief that neither attaches the
addenda nor makes reference to them.

Respectfully submitted,

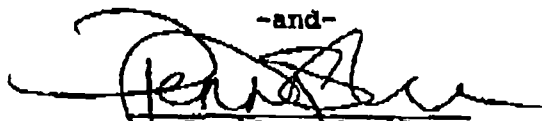
Ruth E. Harlow
William B. Rubenstein
Marc E. Elovitz

Evan Wolfson
Beatrice Dohrn

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800 (ext. 545)

LAMBDA LEGAL DEFENSE &
EDUCATION FUND
666 Broadway
New York, New York 10012
(212) 995-8585

-and-



David R. Braff
Michael Lacovara
Penny Shane

125 Broad Street
New York, NY 10004
(212) 558-4000.

Attorneys for Plaintiffs

Dated: November 9, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs/Appellees,)

v.)

No. 94-6181

UNITED STATES OF AMERICA and)
WILLIAM J. PERRY, IN HIS OFFICIAL)
CAPACITY AS SECRETARY OF DEFENSE,)

Defendants/Appellants.)

GOVERNMENT'S REPLY TO OPPOSITION TO MOTION FOR LEAVE TO
ATTACH ADDENDUM TO REPLY BRIEF

This appeal involves a facial challenge to the military's new policy governing service by homosexuals. A central argument advanced by plaintiffs in their Appellees' Brief is that -- despite the clear statutory and regulatory language to the contrary -- service members who state that they are homosexuals will always be discharged because it is impossible for them to rebut the presumption that they engage in, or likely will engage in, homosexual acts. That argument is refuted by the fact that the Department of the Navy recently issued three final orders directing the retention of service members who stated that they are homosexuals but who rebutted the presumption by demonstrating that they do not, and likely will not, commit homosexual acts. Because these final agency orders -- which were issued after the district court's entry of the preliminary injunctions -- are

unpublished and thus not readily obtainable, we appended them to our Reply Brief for this Court's convenience.¹

Plaintiffs argue that this Court should order the Government to file a corrected Reply Brief that contains neither the orders nor reference to them. Plaintiffs' argument is neither supported by precedent nor conducive to the ends of justice, and it should be rejected.

I. Contrary To Plaintiffs' Assertion, The Final Orders May Properly Be Considered By This Court.

Plaintiffs assert (Brief in Opp. 3) that we acted improperly in attaching these final agency orders to our Reply Brief. This is simply incorrect. As we showed in our Motion for Leave to Attach Addendum to Reply Brief (Hoyle Declaration 2), the three challenged documents are final orders issued by the Department of the Navy pursuant to its delegated authority. "Many cases have recognized that a Court may take judicial notice of the rules, regulations, and orders of administrative agencies issued pursuant to their delegated authority." International Brotherhood of Teamsters v. Zantop Air Transport Corp., 394 F.2d 36, 40 (6th Cir. 1968) (citing cases) (emphasis added); see 10 Moore's Fed. Prac. § 201.02[1] at II-22 & n.16 (2d ed. 1994) (citing cases for principle that federal courts will take judicial notice of decisions of federal executive departments); cf. Kramer v.

¹ Prior to appending these final orders to our Reply Brief, we consulted with the Clerk's Office and were advised that it is consistent with Circuit practice for a party to append such final agency orders to a brief. The Clerk's Office thereafter advised us, in light of plaintiffs' objection to our addendum, to file a motion for leave to attach the orders to our Reply Brief.

Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991) (discussing judicial notice of public documents and documents filed in other courts); Oneida Indian Nation of New York v. New York, 691 F.2d 1070, 1086 (2d Cir. 1982) (discussing judicial notice of legislative and historical materials).

Plaintiffs nevertheless argue (Brief in Opp. 3) that we are proscribed from referring to these orders because they constitute factual matters outside the record. This argument is based on an erroneous premise that the orders constitute factual matters. In fact, the orders constitute final agency decisions issued pursuant to delegated authority. Such orders are comparable to legal authority and, as shown above, may properly be considered by this Court regardless of whether they are part of the record. Informed appellate decision-making is furthered by -- and certainly does not preclude -- bringing these relevant new authorities to this Court's attention. See Fed. R. App. P. 28(j) (providing that parties may bring "pertinent and significant authorities" to the court's attention at any time); Fed. R. Evid. 201(f) (court may take judicial notice of appropriate matter "at any stage of the proceeding"); United States v. An Undetermined Quantity of an Article of Drug, 583 F.2d 942, 946 & n.3 (7th Cir. 1978) (court takes judicial notice of ALJ decision issued nine days before oral argument).

It was impossible for the Government to make these orders part of the record for purposes of the preliminary injunctions. The district court issued the preliminary injunctions on April 4,

1994 and June 3, 1994; the Department of the Navy issued the relevant orders on August 11, 1994, September 23, 1994, and October 1, 1994. See Gov't Reply Brief, Addendum.²

II. Contrary To Plaintiffs' Assertion, The Final Orders Will Assist This Court In Reviewing The Preliminary Injunctions.

Plaintiffs assert (Brief in Opp. 5) that this Court should strike all references to the final orders because they bear no "conceivable relevance to the issues before the Court." This assertion lacks merit. A central argument in their appellate brief is that a service member who truthfully states that he is a homosexual will never be retained because it is impossible for him to rebut the presumption that he has a propensity to engage in homosexual acts. Accordingly, argue plaintiffs, the district court properly absolved them from exhausting their administrative remedies on futility grounds. Given their "impossibility" and "futility" arguments, plaintiffs should not be heard to complain when the military shows -- based on final agency orders -- that

² Plaintiffs assert that this Court should look "unfavorably" upon the Government's request to attach the final orders to the Reply Brief "given the fact that one, and possibly two, of the three orders preceded the filing" of the Government's Opening Brief. Contrary to plaintiffs' assertion, only one of the orders preceded the filing of the Government's Opening Brief. Moreover, as explained above and in our Reply Brief, the orders were submitted in response to arguments advanced by plaintiffs in their Appellees' Brief. In any event, because this Court can take notice of final agency orders at any time, plaintiffs argument is unavailing. Cf. Barr Rubber Products Co. v. Sun Rubber Co., 425 F.2d 1114, 1123 n.14 (2d Cir.), cert. denied, 400 U.S. 878 (1970) (although litigant's motion to take judicial notice could have been submitted earlier, "we are now compelled to grant the motion in view of the gravity of the issue to which the documents related and in furtherance of the obvious interests of justice").

their substantive concerns are unfounded. It plainly is "relevant" that the military recently issued three final orders retaining service members who were processed for stating that they were homosexuals, but who rebutted the presumption that they engage, or likely will engage, in homosexual acts. These orders conclusively refute plaintiffs' assertion that the opportunity to rebut the presumption is meaningless and futile.³

Plaintiffs also contend (Brief in Opp. 7) that the orders are not relevant because plaintiffs in this case "truthfully and definitively acknowledged their sexual orientation," whereas the statements of the service members affected by the orders may have been made in "jest" or "taken out of context." This assertion reflects a fundamental misunderstanding of the policy. If a commander determines that a service member's statement of homosexuality was made in "jest" or "taken out of context," the commander will not even order the convening of an administrative board. Similarly, if an administrative board concludes that a service member's statement of homosexuality was made in jest or otherwise misunderstood and thus did not fall within the regulatory meaning of homosexual "statement" (see Addendum B to Gov't Opening Brief at 2-2), that would be the end of the matter. Only

³ Plaintiffs' argument that the presumption cannot be rebutted has no proper place in a facial challenge to a policy that, by its express language and legislative history, contemplates that the presumption may be rebutted. The final orders thus respond to an argument that is wholly lacking in merit. As explained in our Opening and Reply Briefs, this case can and should be resolved without resort to discovery or fact-finding regarding the administration of the statute and implementing directives.

after the board has concluded that a member made a statement of homosexuality as defined in the Directives does the board then determine whether the member has rebutted the presumption that is triggered by such a statement. Because the three orders attached to our Reply Brief show that the members successfully rebutted the presumption that they engage in, and likely will engage in, homosexual acts, it necessarily follows that the board concluded that those members made "truthful[]" and definitive[]" statements that they are homosexuals.

Plaintiffs' assertion (Brief in Opp. 5-6) that it is impossible to determine from the face of the final orders whether they apply to service members who made statements of homosexuality or who committed homosexual acts lacks merit. For a member who commits a homosexual act to be retained, the Navy must make five specific findings (see Addendum B to Gov't Opening Brief at 1-9) that are conspicuously absent from these final orders. On the other hand, for a member who truthfully states that he is a homosexual to be retained, the Navy must find -- as it did in these final orders -- that the member rebutted the presumption that he engages in, or likely will engage in, homosexual acts.

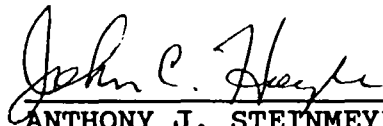
Finally, plaintiffs assert (Brief in Opp. 8) that these final orders are irrelevant because the district court specifically found that plaintiffs' "opportunity to rebut the presumption is illusory." To the contrary, plaintiffs neither alleged nor argued below that they are different from any other service member who truthfully states that he is a homosexual, and

the district court made no such finding specific to them. Rather, plaintiffs launched a broad-scale facial challenge to the military's new policy and asserted that no service member who truthfully states that he is a homosexual will be retained under that policy. The three final orders appended to our Reply Brief refute this assertion.⁴

Conclusion

For the foregoing reasons, this Court should grant the Government's motion for leave to attach the three final orders of the Department of the Navy as an addendum to the Reply Brief.

Respectfully submitted,



ANTHONY J. STEINMEYER

(202) 514-3388

JOHN C. HOYLE

(202) 514-3469

E. ROY HAWKENS

(202) 514-5714

EDWARD HIMMELFARB

(202) 514-3547

Attorneys, Department of Justice
Civil Division, Appellate Staff
Washington, D.C. 20530

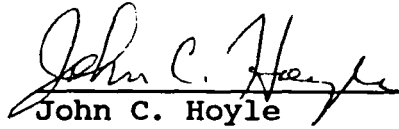
LTC NOLON J. BENSON
CAPT TARA O. HAWK
United States Army
Arlington, VA 22203

⁴ Plaintiffs' further contention (Brief in Opp. 6, 7) that they cannot determine from the face of the final orders the "nature" or "context" of the members' statements of homosexuality, or the "evidence" put forward by the members to rebut the presumption, is beside the point. These details are irrelevant to the matter for which the three challenged orders are cited: namely, that the military retained three members who "truthfully" stated that they are homosexuals and then rebutted the presumption that they engage in, or likely will engage in, homosexual acts.

CERTIFICATE OF SERVICE

I hereby certify that on 14 November 1994, I served the foregoing GOVERNMENT'S REPLY TO OPPOSITION TO MOTION FOR LEAVE TO ATTACH ADDENDUM TO REPLY BRIEF on counsel for appellees by causing a copy to be sent by overnight delivery service to:

David H. Braff, Esquire
Michael Lacovara, Esquire
Penny Shane, Esquire
125 Broad Street
New York, New York 10004


John C. Hoyle
Attorney

No. 94-6181

F.L.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA and WILLIAM J. PERRY,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

FRANK W. HUNGER
Assistant Attorney General
ZACHARY W. CARTER
United States Attorney
ANTHONY J. STEINMEYER
(202) 514-3388
JOHN C. HOYLE
(202) 514-3469
E. ROY HAWKENS
(202) 514-5714
EDWARD HIMMELFARB
(202) 514-3547
Attorneys
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530-0001

OF COUNSEL:

LTC. NOLON J. BENSON, JR.
CPT. TARA O. HAWK
United States Army
Suite 400
901 N. Stuart St.
Arlington, VA 22203

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
A. Nature of the Case	2
B. The Statute	3
C. The DoD Directives	5
D. District Court Proceedings	6
STANDARD OF REVIEW	8
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. AN ACT OF CONGRESS MAY NOT BE PRELIMINARILY ENJOINED WHERE PLAINTIFFS MERELY RAISE CONSTITUTIONAL QUESTIONS "SUFFICIENTLY SERIOUS" TO BE A "FAIR GROUND FOR LITIGATION," BUT FAIL TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS	11
II. THE DISTRICT COURT ERRED IN NOT REQUIRING PLAINTIFFS TO EXHAUST THEIR MILITARY REMEDIES	14
A. Exhaustion Is Required For The Equal Protection Claim	15
B. Exhaustion Is Required For The First Amendment Claim	18
III. EXCLUSION OF SERVICE MEMBERS WHO ENGAGE IN OR ARE LIKELY TO ENGAGE IN HOMOSEXUAL ACTS DOES NOT VIOLATE EQUAL PROTECTION	20
A. The Act Is Subject To Rational Basis Review, With Great Deference Accorded Congress And The Military	21
B. The Statute Rationally Presumes, Subject To Rebuttal, That A Member Who States That He Is A Homosexual Engages In Or Likely Will Engage In Prohibited Homosexual Acts	25

C.	The Statutory "Statements" Provision Excluding Service Members Who Engage Or Likely Will Engage In Homosexual Acts Is Rationally Related To Advancing Legitimate Military Interests	34
1.	Preventing The Commission Of Proscribed Homosexual Acts	34
2.	Promoting Unit Cohesion	37
3.	Accommodating Privacy Interests	38
4.	The Statute Is Not Grounded In Prejudice	40
IV.	SEPARATION BASED ON THE REBUTTABLE PRESUMPTION OF HOMOSEXUAL ACTS ARISING FROM A SERVICE MEMBER'S STATEMENT THAT HE IS A HOMOSEXUAL DOES NOT VIOLATE THE FIRST AMENDMENT	45
A.	The First Amendment Does Not Bar The Military's Use Of A Service Member's Statement Of Homosexuality To Establish That The Member Engages In, Or Is Likely To Engage In, Prohibited Homosexual Acts	46
B.	Statements Of Homosexuality Made In Litigation Are Not Entitled To Special First Amendment Protection	48
	CONCLUSION	50
	CERTIFICATE OF SERVICE	
	ADDENDA	

Addendum A - Statutory Provisions, 10 U.S.C. 654

Addendum B - Relevant Portions of Department of Defense
Directive, Number 1332.14

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>American-Arab Anti-Discrim. Comm'n v. Thornburgh</u> , 970 F.2d 501 (9th Cir. 1991)	18
<u>Bard v. Seamans</u> , 507 F.2d 765 (10th Cir. 1974)	16
<u>Beard v. Stahr</u> , 370 U.S. 41 (1962)	16, 17
<u>Beller v. Middendorf</u> , 632 F.2d 788 (9th Cir. 1980), <u>cert. denied</u> , 452 U.S. 905 (1981)	25, 39
<u>Ben-Shalom v. Marsh</u> , 881 F.2d 454 (7th Cir. 1989), <u>cert. denied</u> , 494 U.S. 1004 (1990)	21, 25, 30, 34, 41, 46
<u>Blameuser v. Andrews</u> , 630 F.2d 538 (7th Cir. 1980)	47
<u>Bois v. Marsh</u> , 801 F.2d 462 (D.C. Cir. 1986)	15
<u>Bowen v. Kendrick</u> , 483 U.S. 1304 (1987)	11
<u>Bowers v. Hardwick</u> , 478 U.S. 186 (1986)	21
<u>Brd. of Locomotive Firemen v. Chicago, R.I. & Pac. R.R.</u> , 393 U.S. 129 (1968)	37
<u>Brown v. Glines</u> , 444 U.S. 348 (1980)	18, 48
<u>City Council of Los Angeles v. Taxpayers for Vincent</u> , 466 U.S. 789 (1984)	20
<u>City of Cleburne v. Cleburne Living Ctr.</u> , 473 U.S. 432 (1985)	43, 44
<u>Cohen v. Cowles Media</u> , 501 U.S. 636 (1991)	49
<u>Concrete Pipe & Prods. v. Constr. Laborers Pension Trust</u> , 113 S. Ct. 2264 (1993)	27
<u>Dawson v. Delaware</u> , 112 S. Ct. 1093 (1992)	47
<u>Dep't of Agriculture v. Moreno</u> , 413 U.S. 528 (1973)	43
<u>Dep't of Navy v. Egan</u> , 484 U.S. 518 (1988)	24
<u>Disabled Am. Veterans v. Dep't of Veterans Affairs</u> , 962 F.2d 136 (2d Cir. 1992)	13
<u>Dronenburg v. Zech</u> , 741 F.2d 1388 (D.C. Cir. 1984)	21, 25, 39, 42

<u>Elrod v. Burns</u> , 427 U.S. 347 (1976)	20
<u>Falk v. Secretary of the Army</u> , 870 F.2d 941 (2d Cir. 1989)	24, 25, 34
<u>FDIC v. Mallen</u> , 486 U.S. 230 (1988)	20
<u>FTC v. Standard Oil</u> , 449 U.S. 232 (1980)	18
<u>Goldman v. Weinberger</u> , 475 U.S. 503 (1986)	23-25, 32
<u>Greer v. Spock</u> , 424 U.S. 828 (1976)	18, 23, 34
<u>Guerra v. Scruggs</u> , 942 F.2d 270 (4th Cir. 1991)	16
<u>Guitard v. Secretary of Navy</u> , 967 F.2d 737 (2d Cir. 1992)	15
<u>Haitian Centers Council v. McNary</u> , 969 F.2d 1326 (2d Cir. 1992), <u>vacated as moot</u> , 113 S. Ct. 3028 (1993)	13
<u>Hatheway v. Secretary of the Army</u> , 641 F.2d 1376 (9th Cir.), <u>cert. denied</u> , 454 U.S. 864 (1981)	25
<u>Heart of Atlanta Motel v. United States</u> , 85 S. Ct. 1 (1964)	11
<u>Heffron v. Int'l Soc'y for Krishna Consciousness</u> , 452 U.S. 640 (1981)	14
<u>Heller v. Doe</u> , 113 S. Ct. 2637 (1993)	22, 42
<u>High Tech Gays v. DISCO</u> , 895 F.2d 563 (9th Cir. 1990)	22, 46
<u>Hurwitz v. Directors Guild</u> , 364 F.2d 67 (2d Cir.), <u>cert. denied</u> , 385 U.S. 971 (1966)	21
<u>Jacobson v. United States</u> , 112 S. Ct. 1535 (1992)	35
<u>Katzenbach v. Morgan</u> , 384 U.S. 641 (1966)	37
<u>King v. Innovative Books</u> , 976 F.2d 824 (2d Cir. 1992)	8
<u>Lavine v. Milne</u> , 424 U.S. 577 (1976)	32
<u>Lehigh Valley R.R. v. Allied Mach. Co. of Am.</u> , 271 F. 900 (2d Cir.), <u>cert. denied</u> , 256 U.S. 704 (1921)	49
<u>Los Angeles v. Davis</u> , 440 U.S. 625 (1979)	13
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976)	14

<u>McCarthy v. Madigan</u> , 112 S. Ct. 1081 (1992)	14
<u>McDonald v. Smith</u> , 472 U.S. 479 (1985)	48
<u>McLucas v. DeChamplain</u> , 421 U.S. 21 (1975)	17
<u>Meinhold v. DoD</u> , Nos. 93-55242, 93-56354 (9th Cir. Aug. 31, 1994)	15, 21, 22, 26, 29, 33, 34
<u>Middendorf v. Henry</u> , 425 U.S. 25 (1976)	15
<u>Minnesota v. Clover Leaf Creamery</u> , 449 U.S. 456 (1981)	37
<u>New Orleans v. Dukes</u> , 427 U.S. 297 (1976)	42
<u>New York City Transit Auth. v. Beazer</u> , 440 U.S. 568 (1979)	35, 36, 44
<u>New York v. Lynq</u> , 829 F.2d 346 (2d Cir. 1987)	8, 21
<u>Nikon v. Ikon</u> , 987 F.2d 91 (2d Cir. 1993)	9
<u>NLRB v. Baptist Hosp.</u> , 442 U.S. 773 (1979)	30
<u>NLRB v. Curtin Matheson Scientific</u> , 494 U.S. 775 (1990)	32
<u>Nordlinger v. Hahn</u> , 112 S. Ct. 2326 (1992)	40, 42
<u>Ohio Civil Rights Comm'n v. Dayton Christian Schs.</u> , 477 U.S. 619 (1986)	18
<u>Padula v. Webster</u> , 822 F.2d 97 (D.C. Cir. 1987)	22
<u>Palmore v. Sidoti</u> , 466 U.S. 429 (1984)	44
<u>Parker v. Levy</u> , 417 U.S. 733 (1974)	18, 23
<u>Paulsen v. County of Nassau</u> , 925 F.2d 65 (2d Cir. 1991)	20
<u>Plaza Health Lab. v. Perales</u> , 878 F.2d 577 (2d Cir. 1989)	11, 12, 13
<u>Pruitt v. Cheney</u> , 963 F.2d 1160 (9th Cir. 1991), <u>cert. denied</u> , 113 S. Ct. 655 (1992)	22, 46, 47
<u>Rich v. Secretary of the Army</u> , 735 F.2d 1220 (10th Cir. 1984)	21-22, 25, 39, 46
<u>Robinson v. California</u> , 370 U.S. 660 (1962)	35
<u>Rostker v. Goldberg</u> , 453 U.S. 57 (1981)	23, 24

<u>San Filippo v. Bongiovanni</u> , No. 93-5658 (3rd Cir. July 21, 1994)	48
<u>Schlesinger v. Councilman</u> , 420 U.S. 738 (1975)	17
<u>Schowengerdt v. United States</u> , 944 F.2d 483 (9th Cir. 1991), <u>cert. denied</u> , 112 S. Ct. 1514 (1992)	25, 46
<u>Sperry Int'l Trade v. Israel</u> , 670 F.2d 8 (2d Cir. 1982)	11
<u>Steffan v. Aspin</u> , 8 F.3d 57, <u>vacated and reh'g en banc ordered</u> , 8 F.3d 70 (D.C. Cir. 1994)	25
<u>Stinson v. United States</u> , 113 S. Ct. 1913 (1993)	27
<u>Sweeney v. Bane</u> , 996 F.2d 1384 (2d Cir. 1993)	13
<u>Thornburgh v. American College of Obst. & Gyn.</u> , 476 U.S. 747 (1986)	8, 21
<u>Turner Broadcasting Sys. v. FCC</u> , 113 S. Ct. 1806 (1993)	11
<u>Turner Broadcasting Sys. v. FCC</u> , 114 S. Ct. 2445 (1994)	42
<u>Union Carbide Agric. Prod. v. Costle</u> , 632 F.2d 1014 (2d Cir. 1980), <u>cert. denied</u> , 450 U.S. 996 (1981)	12
<u>United States v. Gainey</u> , 380 U.S. 63 (1965)	30, 35
<u>United States v. O'Brien</u> , 391 U.S. 367 (1968)	48
<u>Usery v. Turner Elkhorn Mining</u> , 428 U.S. 1 (1976)	30
<u>Vance v. Bradley</u> , 440 U.S. 93 (1979)	36, 42
<u>Von Hoffburg v. Alexander</u> , 615 F.2d 633 (5th Cir. 1980)	16
<u>Walters v. Nat'l Ass'n of Radiation Survivors</u> , 468 U.S. 1323 (1984)	13
<u>Walters v. Nat'l Ass'n of Radiation Survivors</u> , 473 U.S. 305 (1985)	37
<u>Waters v. Churchill</u> , 114 S. Ct. 1878 (1994)	47
<u>Watkins v. United States Army</u> , 847 F.2d 1329 (9th Cir. 1988), <u>vacated</u> , 875 F.2d 699 (1989), <u>cert. denied</u> , 498 U.S. 957 (1990)	30

<u>Wayte v. United States</u> , 470 U.S. 598 (1985)	46, 47, 48
<u>W.E.B. DuBois Clubs of Am. v. Clark</u> , 389 U.S. 309 (1967)	18
<u>Weinberger v. Salfi</u> , 422 U.S. 749 (1975)	36
<u>Weiss v. United States</u> , 114 S. Ct. 752 (1994)	23
<u>White Plains Towing v. Patterson</u> , 991 F.2d 1049 (2d Cir.), <u>cert. denied</u> , 114 S. Ct. 185 (1993)	48
<u>Wisconsin v. Mitchell</u> , 113 S. Ct. 2194 (1993)	46-47
<u>Woodward v. United States</u> , 871 F.2d 1068 (Fed. Cir. 1989), <u>cert. denied</u> , 494 U.S. 1003 (1990)	21, 25, 30, 39, 42

Constitution:

United States Constitution:

Article III	49
First Amendment	<u>passim</u>
Fifth Amendment	7

Statutes:

National Defense Authorizations Act for Fiscal

Year 1994, P.L. No. 103-160, § 571, 107 Stat.

1670-73, codified at 10 U.S.C. 654: 3

10 U.S.C. 654(a)(7)	4, 37
10 U.S.C. 654(a)(8)	24
10 U.S.C. 654(a)(8)(A)	4
10 U.S.C. 654(a)(8)(B)	4
10 U.S.C. 654(a)(9)	4
10 U.S.C. 654(a)(10)	4
10 U.S.C. 654(a)(12)	4, 38
10 U.S.C. 654(a)(13)	4, 26
10 U.S.C. 654(a)(15)	4, 26, 36, 37
10 U.S.C. 654(b)	2, 29
10 U.S.C. 654(b)(1)	4, 26
10 U.S.C. 654(b)(2)	1, 5, 6, 9, 20, 26, 31
10 U.S.C. 654(b)(3)	5
10 U.S.C. 654(f)(3)	5, 29

10 U.S.C. 925 29

28 U.S.C. 1292(a)(1) 1

28 U.S.C. 1331 1

Regulations & Rules:

Army Regulation 635-100 14

NAVMILPERSMAN 3640350.9	14
DoD Directives	
1332.14	<u>passim</u>
1332.30	2
Fed. R. Civ. 59	1
Fed. R. Evid. 801	49

Legislative Materials:

H.R. Conf. Rep. No. 357, 103d Cong., 1st Sess. (1993), <u>reprinted in</u> 1993 U.S.C.C.A.N 2281	3
S. Rep. No. 112, 103d Cong., 1st Sess. (1993)	<u>passim</u>

Miscellaneous:

National Defense Research Inst., <u>Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment</u> (Rand 1993)	28-29
"Policy on Homosexual Conduct in the Armed Forces," 29 Weekly Comp. Pres. Doc. 1369 (July 19, 1993)	3
29 Weekly Comp. Pres. Doc. 112 (Jan. 29, 1993)	3
4 <u>Wigmore on Evidence</u> (Chadbourn rev. 1972 & 1994 Supp.)	49
9 <u>Wigmore on Evidence</u> (Chadbourn rev. 1981)	32

BRIEF FOR THE APPELLANTS

PRELIMINARY STATEMENT

This appeal is from two preliminary injunctions (Nickerson, J.). See Joint Appendix ("JA") 758 (reported at 847 F. Supp. 1038), and JA 813 (unreported).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 in this action alleging constitutional violations and seeking declaratory and injunctive relief. JA 760. By order dated April 4, 1994 (entered on April 5, 1994), the district court issued a preliminary injunction. JA 758. Pursuant to Fed. R. Civ. P. 59, the Government filed a motion to vacate, alter, or amend the injunction, which the court denied on May 10, 1994. JA 802. By order dated June 3, 1994 (entered on June 13, 1994), the court issued a second preliminary injunction. JA 813. The Government filed a timely notice of appeal on July 8, 1994. JA 818. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

10 U.S.C. 654(b)(2) requires separation from military service of a member who has "stated that he or she is a homosexual" and fails to "demonstrate[] 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." The district court preliminarily enjoined the statute. The questions presented are:

1. Whether an Act of Congress may be preliminarily enjoined on the basis that plaintiffs raise a "serious question" presenting a "fair ground for litigation" as to its constitutionality,

without a showing of a likelihood of success on the merits.

2. Whether plaintiffs must exhaust their military remedies.
3. Whether the Act violates equal protection.
4. Whether the Act violates the First Amendment.

STATEMENT OF THE CASE

A. Nature of the Case. Plaintiffs, six gay or lesbian military service members, seek declaratory and injunctive relief to bar enforcement of the Act of Congress and Department of Defense ("DoD") Directives (the "new policy") regarding military service by homosexuals. Under the new policy, service members will be discharged if they engage in homosexual acts, or state that they are homosexuals and fail to demonstrate that they do not and are not likely to engage in homosexual acts. 10 U.S.C. 654(b); Directives, 1332.14 ¶ H (enlisted personnel) *id.* 1332.30 ¶ C (officers).¹

This appeal involves two preliminary injunctions issued by the district court. The first preliminarily enjoins the military from investigating or taking any adverse action against plaintiffs based on their statements of homosexuality made in connection with litigation. JA 782. That order rests on the determination that plaintiffs raised a serious claim that such use of their litigation statements would violate the First Amendment and equal protection. The second order (JA 817) preliminarily enjoins investi-

¹ The two Directives (JA 614, 632) are substantially similar. A third Directive (JA 651), governing enlistment, appointment, and induction standards, also contains similar provisions. The Coast Guard regulation (JA 722) is similar to DoD Dir. 1332.14. For convenience, we will hereafter cite only to DoD Dir. 1332.14 (pertinent portions of which are reproduced in the Addendum to this brief).

gations or adverse action against plaintiffs based on their statements that they are homosexuals, regardless of whether such statements were made in connection with litigation. The court held (JA 816) that plaintiffs raised a serious equal protection challenge to such use of these statements.

B. The Statute. The statute governing military service by homosexuals is the result of extensive review of this controversial issue by the Political Branches. Formal review began on January 29, 1993, when President Clinton directed the Secretary of Defense to review DoD's then-current policy (the "old policy"). 29 Weekly Comp. Pres. Doc. 112 (1993). Simultaneously, Congress undertook its own review of the issue. Both the Senate and House held lengthy hearings, receiving testimony from military commanders, gay rights activists, experts in military personnel policy, and many interested civilians and service members.²

On July 19, 1993, the President announced a new "Policy on Homosexual Conduct in the Armed Forces." 29 Weekly Comp. Pres. Doc. 1369 (1993). Principal points of that policy were enacted in the National Defense Authorization Act for Fiscal Year 1994, P.L. No. 103-160, § 571, 107 Stat. 1670-73, codified at 10 U.S.C. 654 (see Addendum), which was signed by the President on November 30, 1993. DoD subsequently issued Directives pursuant to the statute.

Section 571 of the Act sets forth the "Policy concerning homosexuality in the Armed Forces" and 15 findings upon which that policy is based. In these findings, Congress recognized that

² The evolution of the statute is traced in H.R. Conf. Rep. No. 357, 103d Cong., 1st Sess. 679 (1993), reprinted in 1993 U.S.C.C.A.N. 2218, 2281; S. Rep. No. 112, 103d Cong., 1st Sess. 265-70 (1993).

"[m]ilitary life is fundamentally different from civilian life" because of "the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion." 10 U.S.C. 654(a)(8)(A). Accordingly, "military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society." § 654(a)(8)(B). These restrictions "regulate a member's life for 24 hours each day * * * whether the member is on base or off base, and whether * * * on duty or off duty." § 654(a)(9), (10).

Congress expressly determined that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." § 654(a)(13). It recognized that "[o]ne of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members." § 654(a)(7). It also found that service members are deployed in "living conditions and working conditions that are often primitive and characterized by forced intimacy with little or no privacy." § 654(a)(12). Based on these findings, Congress specifically concluded (§ 654(a)(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.

The statute provides for separation from service if a member has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act," § 654(b)(1); (2) "stated that

he or she is a homosexual or bisexual * * * unless * * * [the member] demonstrate[s] 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," § 654(b)(2); or (3) "married or attempted to marry a person known to be of the same biological sex," § 654(b)(3).³ As the language of section 654(b)(2) indicates and the legislative history confirms, a member's statement that he is a homosexual gives rise to a rebuttable presumption that the member engages in, or is likely to engage in, homosexual acts. S. Rep. No. 112, 103d Cong., 1st Sess. 290, 293-94 (1993).

C. The DoD Directives. The DoD Directives provide that "[h]omosexual conduct is grounds for separation from the Military Services." JA 621. "Homosexual conduct" is defined to include "homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." *Id.* By contrast, sexual orientation -- defined as "an abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" (JA 626) -- "is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct." JA 621. A service member's statement that he is a homosexual "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

³ "Homosexual act" is defined as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3).

will engage in homosexual acts." Id.

To implement section 654(b)(2) of the Act, the Directives provide that a statement by a service member that he is a homosexual "creates a rebuttable presumption that [he] engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." JA 622. The member is then "given the opportunity to rebut the presumption" by presenting evidence to an administrative board "demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts." Id. A "propensity to engage in homosexual acts" is defined as "more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts." Id. (emphasis added). The Directives set forth the types of evidence a service member may offer to rebut the presumption and provide illustrative examples. JA 622, 704-18.⁴

D. District Court Proceedings. Plaintiffs filed this suit on March 7, 1994, alleging that the Act and Directives violate their rights to (1) equal protection, (2) free speech and expression, (3) expressive and intimate association under the First and

⁴ The new policy differs from the old policy principally in that it: (1) expressly states that a person's sexual orientation is a personal and private matter, and that only homosexual acts, homosexual marriages, and statements of homosexuality (which give rise to a rebuttable presumption of a likelihood of engaging in homosexual acts) are grounds for separation; (2) spells out the procedures by which a member who states that he is a homosexual may rebut the presumption that he engages in or is likely to engage in homosexual acts; (3) clarifies that the policy is conduct-directed by eliminating the term "desires" from the definition of "homosexual"; (4) eliminates questions regarding sexual orientation; and (5) specifies the circumstances in which investigations will be commenced and how they will be conducted.

Fifth Amendments, and (4) "adequate notice of what speech, conduct or behavior is proscribed and/or form the basis for investigation and discharge" as guaranteed by the First and Fifth Amendments. JA 16-28. They sought declaratory and injunctive relief against the new policy on its face and as applied to them. JA 26.

On April 4, 1994, the district court issued a preliminary injunction. As to plaintiffs' First Amendment claim, the court held that "there is a serious question as to whether a regulation goes beyond what is reasonably necessary to protect any possible Government interest when it inhibits six service members from continuing to speak in court to make a constitutional challenge." JA 769-70. As to plaintiffs' equal protection claim, the district court "assume[d] for the purposes of the motion that the Act and Regulations are subject to only minimal equal protection scrutiny." JA 770. The court cited several decisions reaching different results on the constitutionality of the old policy and, without "undertak[ing] to assess the relative merits of these divergent holdings," concluded that "[t]he conflict of authority signifies the seriousness of the questions going to the merits of plaintiffs' equal protection claim." JA 772. Finally, the court rejected the Government's exhaustion defense, holding that "[e]xhaustion [of administrative remedies] is not required when, as here, plaintiffs raise constitutional questions and irreparable injury will occur without preliminary judicial relief." JA 774. Based on these rulings, the court preliminarily enjoined defendants "pending resolution of the case from investigating or discharging or taking other adverse or punitive action against plaintiffs based on their self-identification as gay or lesbian in

connection with legal proceedings challenging the constitutionality of the Act and the Regulations." JA 782 (emphasis added).

In view of this limitation, the Government informed plaintiffs' counsel that it intended to proceed with investigations or administrative proceedings involving two plaintiffs (Zehr and Spencer) who had made statements outside of the litigation that they are homosexuals. Plaintiffs then moved for a further preliminary injunction to bar these actions.

On June 3, 1994, the district court issued an additional order "preliminarily enjoining defendants pending the resolution of the case from investigating, discharging or taking other adverse or punitive action, pursuant to the Act and/or Regulations, against plaintiffs based on their self-identification as lesbian or gay." JA 817. The court held that "[t]he serious questions [it found in its April 4 order] as to a violation of plaintiffs' right to equal protection are not affected by whether their self-identification is related to court proceedings." JA 816.⁵

STANDARD OF REVIEW

Because the issues presented on appeal are questions of law, this Court's scope of review is plenary, even though questions on appeal from a preliminary injunction are ordinarily subject to review for abuse of discretion. Thornburgh v. American College of Obst. & Gyn., 476 U.S. 747, 757 (1986); New York v. Lynq, 829 F.2d 346, 349 (2d Cir. 1987). "[A]pplying an incorrect legal standard," King v. Innovation Books, 976 F.2d 824, 828 (2d Cir. 1992), or "incorrectly appl[ying] the law" constitutes an abuse of

⁵ The Government's motion to dismiss for failure to state a claim, filed March 17, 1994, is still pending.

discretion. Nikon v. Ikon, 987 F.2d 91, 94 (2d Cir. 1993).

SUMMARY OF ARGUMENT

1. The district court erred in preliminarily enjoining the new policy based upon a determination that plaintiffs had merely raised a "serious question" as to its constitutionality. That ruling directly conflicts with the controlling precedents of this Court holding that an Act of Congress cannot be preliminarily enjoined absent a determination that plaintiffs are likely to succeed on the merits. The district court did not, and could not, make such a determination here.

2. Plaintiffs failed to exhaust their administrative remedies. The exhaustion doctrine is strictly applied in military cases. Because plaintiffs have not been processed under the new policy, and because the military should be given the initial opportunity to construe and apply the policy, plaintiffs' suit is premature.

3. The legislative classification in 10 U.S.C. 654(b)(2) -- barring service by members who state that they are homosexuals and who fail to demonstrate that they do not and are not likely to engage in homosexual acts -- does not violate equal protection. This classification is reviewable under the rational basis test, with great deference given to Congress's constitutional authority over military affairs and to the considered professional judgment of military officials.

The challenged statute must be sustained under this standard. As recognized by this Court and every other appellate court to consider the issue, the Government has a legitimate interest in proscribing homosexual acts in the military. To avoid the risk to

military effectiveness posed by such acts, Congress enacted a classification that reasonably presumes -- subject to rebuttal by the service member -- that a member who states that he is a homosexual is likely to act consistently with his sexuality and engage in proscribed homosexual acts. Discharging a member who is likely to commit such acts advances the goal of military readiness by preventing the occurrence of those acts, promoting unit cohesion, and accommodating members' privacy interests. Because the Act rationally advances these goals, plaintiffs' claim that the Act is unconstitutionally grounded in prejudice is without merit.

4. Plaintiffs' claim that the statute violates the First Amendment lacks merit. Similar challenges to the old policy have been rejected by every court of appeals to consider the issue. The new policy treats a service member's statement of homosexuality as a basis from which to presume, in the absence of rebuttal by the member, that he engages in, or is likely to engage in, homosexual acts. The First Amendment does not prohibit such evidentiary use of a member's statements.

Nor, contrary to the district court's ruling, are statements of homosexuality entitled to any greater constitutional protection if they are made in connection with litigation. Statements involved in petitioning the courts for redress of grievances are subject to the same analysis as other Petition Clause and free speech claims, and they are not entitled to blanket use-immunity simply because they are made in litigation.

5. Because further proceedings in the district court are not needed to resolve the legal issues presented in this case, the Court should not only vacate the preliminary injunctions but also

order the case dismissed in its entirety.

ARGUMENT

- I. AN ACT OF CONGRESS MAY NOT BE PRELIMINARILY ENJOINED WHERE PLAINTIFFS MERELY RAISE CONSTITUTIONAL QUESTIONS "SUFFICIENTLY SERIOUS" TO BE A "FAIR GROUND FOR LITIGATION," BUT FAIL TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.

The district court preliminarily enjoined the challenged Act of Congress on the ground that plaintiffs raised "serious questions going to the merits." JA 769, 816. A "serious question" means only that plaintiffs present a "fair ground for litigation." Plaza Health Lab. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989); Sperry Int'l Trade v. Israel, 670 F.2d 8, 11 (2d Cir. 1982). The district court's injunctions barring enforcement of an Act of Congress without finding that plaintiffs have established a likelihood of success on the merits conflict with controlling precedents in this Circuit and fail to give proper consideration to the actions of co-equal branches of Government.

"[A] temporary injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect. Thus judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." Heart of Atlanta Motel v. United States, 85 S. Ct. 1, 2 (1964) (Black, Circuit Justice). An Act of Congress is "presumptively constitutional" and thus should "remain in effect pending a final decision on the merits by this Court." Turner Broadcasting Sys. v. FCC, 113 S. Ct. 1806, 1807 (1993) (Rehnquist, Circuit Justice); accord Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, Circuit Justice).

The standard used by the district court here in granting preliminary injunctive relief directly conflicts with decisions of this Court. In Union Carbide Agric. Prods. v. Costle, 632 F.2d 1014 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981), the Court, recognizing that the presumption of constitutionality is not rebutted when a plaintiff shows only that the validity of a statute is a "fair ground for litigation," held that a district court erred in using that standard rather than the "likelihood of success" standard in preliminarily enjoining enforcement of an Act of Congress against the plaintiffs: "When Congress authorizes or mandates governmental action that is in the public interest, more than a 'fair ground for litigation' must be shown before the action will be stopped in its tracks by court order." 632 F.2d at 1018-19.⁶ Thus, as this Court reaffirmed in Plaza Health, 878 F.2d at 580, "where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of

⁶ The district court incorrectly attempted (JA 780) to distinguish Union Carbide on the ground that this Court found no substantial constitutional claims at issue there. On the contrary, this Court stated that plaintiffs "raise knotty questions that are difficult to answer on the present record," 632 F.2d at 1018, and that "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." Id. Moreover, if Union Carbide had not involved substantial constitutional claims, this Court would have had no occasion to choose between the two standards and to reverse the district court for applying the lesser standard.

his claim."⁷ See also Sweeney v. Bane, 996 F.2d 1384, 1388 (2d Cir. 1993) (requiring likelihood of success to preliminarily enjoin state statute).

In adopting the "serious question" standard, the district court improperly relied on Haitian Centers Council v. McNary, 969 F.2d 1326 (2d Cir. 1992). Although that case involved challenges to a federal agency's actions, it did not involve an attack on a presumptively valid Act of Congress and hence is not applicable here. In any event, Haitian Centers lacks precedential authority because it was vacated as moot, 113 S. Ct. 3028 (1993). See Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979).

Thus, the district court erred in issuing its preliminary injunctions absent a showing by plaintiffs of a likelihood of success on the merits. The district court did not -- and, as we now show, could not -- make this necessary determination.⁸

⁷ The district court erred in seeking to distinguish Plaza Health on the ground that the due process claim there was "speculative at best." JA 780. Rather, this Court in Plaza Health held that the movant "had not shown a likelihood of success on this claim." 878 F.2d at 581.

⁸ Because the district court erred in assessing the merits of plaintiffs' claims, this Court need not review the other factors necessary for a preliminary injunction. See Disabled Am. Veterans v. Dep't of Veterans Affairs, 962 F.2d 136, 144 (2d Cir. 1992). Plaintiffs, however, also failed to meet the irreparable injury and public interest requirements. The district court's holding that plaintiffs' assertion of a constitutional violation sufficed without more to establish irreparable injury relied on precedents that are inapplicable in the military context. See infra note 12. Its public interest ruling completely disregards the congressional policy judgment embodied in the Act and simply substitutes the court's own view. See, e.g., Walters v. Nat'l Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, Circuit Justice) ("[t]he presumption of constitutionality which attaches to every Act of Congress is * * * an equity to be considered in favor of [the Government] in balancing hardships"). Nor is the congressional policy overcome, as the dis-

(continued...)

II. THE DISTRICT COURT ERRED IN NOT REQUIRING PLAINTIFFS TO EXHAUST THEIR MILITARY REMEDIES.

Plaintiffs are attempting to bypass the administrative procedures afforded them by the military. Pursuant to those procedures, a service member who states that he is a homosexual will not be discharged without notice and the opportunity to appear before a board where he may, with the assistance of counsel, present witnesses and relevant evidence to demonstrate that he should be retained. JA 622. If the board recommends separation, the member may submit a written challenge to the separation authority prior to a final decision. See Army Regulation 635-100 ¶¶ 5-21(e), 5-23(c)(2)(c)(1); NAVMILPERSMAN 3640350.9; see also JA 642 (specifying additional appeal procedures for discharge of officers).

Plaintiffs have not been processed under the new policy. None has appeared before an administrative board, none has been recommended for discharge, and most have not even been investigated. Until they exhaust their administrative remedies, their suit is premature.

The exhaustion requirement "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992). It recognizes that the agency, not the court, has the primary

⁸(...continued)
district court indicated (JA 780-81), merely because the injunction displaces the Act only as to the six plaintiffs; Congress's determination that the new policy serves important military interests is equally applicable to every service member, and there is no basis to distinguish between the first six plaintiffs (and thus to give them preferential treatment) and the next six, or 60, or a nationwide class. Cf. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 652-53 (1981); Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

responsibility for administering the program and should be given the initial opportunity to exercise its discretion and bring its expertise to bear in interpreting and applying the administrative scheme. Moreover, it protects against unnecessary judicial involvement by affording the agency an opportunity to provide redress that may obviate a constitutional claim, thereby "vindicate[ing] the fundamental doctrine that courts should avoid passing on unnecessary constitutional questions." Bois v. Marsh, 801 F.2d 462, 468 n.11 (D.C. Cir. 1986).

These principles apply with special force in the military context. As courts have repeatedly recognized, "imperatives concerning military discipline require the strict application of the exhaustion doctrine in discharge cases," Guitard v. Secretary of Navy, 967 F.2d 737, 740 (2d Cir. 1992), to "protect the military from undue interference by the federal courts." Middendorf v. Henry, 425 U.S. 25, 29 n.6 (1976). Thus, "strict application of exhaustion requirements in military discharge cases helps maintain the balance between military authority and federal court intervention." Meinhold v. DoD, Nos. 93-55242, 93-56354 (9th Cir. Aug. 31, 1994), slip op. 10124.⁹

A. Exhaustion Is Required For The Equal Protection Claim.

The purposes underlying the exhaustion doctrine require plaintiffs to exhaust their military remedies before bringing an equal protection challenge to the new policy. Exhaustion will promote judicial economy by affording the service member the opportunity

⁹ Unlike Meinhold, where the court concluded that proceedings before the Board for the Correction of Naval Records would be "futile," exhaustion of administrative remedies here cannot, for the reasons discussed infra in text, be held to be futile.

to demonstrate that he should be retained notwithstanding his alleged statement that he is a homosexual. For example, the member may be able to show that he did not make the statement, or that he made it in jest, or that it was misunderstood or taken out of context. Alternatively, he may be able to rebut the presumption arising from his statement of homosexuality by establishing that he does not and is not likely to engage in homosexual acts. In such cases, the member would be retained, thereby avoiding litigation and obviating the need for a constitutional ruling. Thus, judicial review of a member's constitutional claim prior to completion of the administrative process is premature because "[i]f the Secretary does not remove [him] it will be unnecessary to pass on the constitutional objections which have been urged." Beard v. Stahr, 370 U.S. 41, 41-42 (1962) (per curiam).¹⁰

Similarly, the purposes of exhaustion would be furthered even if the military ultimately concluded that the member should be separated. Administrative proceedings would clarify the basis for the military's decision and provide a factual record for judicial review. They also might produce evidence that a member who stated that he is a homosexual actually engaged in homosexual acts, thereby converting the case -- and the nature of the challenge -- from a "statements" case to an "acts" case. See infra p. 25.

¹⁰ See also Guerra v. Scruggs, 942 F.2d 270, 276 (4th Cir. 1991) (military remedies may eliminate the necessity to decide constitutional issues); Von Hoffburg v. Alexander, 615 F.2d 633, 639 (5th Cir. 1980) (exhaustion required for member's challenge to military's homosexual policy because there is a "viable possibility" that military remedies may eliminate need to decide constitutional issue); Bard v. Seamans, 507 F.2d 765, 770 (10th Cir. 1974) (exhaustion required before member can present a constitutional claim because military may provide an adequate remedy).

In addition, such proceedings would enable the military to construe the new policy and give it meaning through application in concrete factual circumstances. In so doing, the military would have the opportunity to address any alleged deficiencies in the policy. For example, plaintiffs asserted below (Plaintiffs' Reply Memorandum in Support of Preliminary Injunction, 16) that the opportunity to rebut the presumption is a "sham." While the language and history of the new policy dispositively refute that assertion (see infra pp. 26-27, 30-33), any argument that turns on the interpretation or application of the rebuttable presumption -- or any other aspect of the policy -- should first be addressed by the military and is not now ripe for judicial consideration.

The district court erred (JA 774) in excusing plaintiffs from exhausting their administrative remedies on the ground that "to subject [plaintiffs] to the Act and Regulations will deny them equal protection every day." As the Supreme Court has held, allegation of constitutional harm does not preclude application of the exhaustion doctrine. Beard, 370 U.S. at 41; see also cases cited supra note 10. At least absent patently unconstitutional action, any predischarge harm from being subjected to military proceedings does not constitute a cognizable injury that would justify "equitable interference" by federal courts. McLucas v. DeChamplain, 421 U.S. 21, 33 (1975); accord Schlesinger v. Councilman, 420 U.S. 738, 758 (1975).¹¹

¹¹ The district court's exhaustion ruling is especially objectionable in preliminarily enjoining not only separations, but also investigations of plaintiffs under the new policy. It is well established that commencement of an investigation does not constitute irreparable injury justifying equitable relief.

(continued...)

B. Exhaustion Is Required For The First Amendment Claim.

The foregoing principles require exhaustion as to plaintiffs' First Amendment claim as well. The Supreme Court has held that, prior to judicial resolution of a First Amendment claim challenging a statute, plaintiff must first be processed under the statute; absent exhaustion, "important and difficult constitutional issues would be decided devoid of factual context" and without a "clear [determination] that the Act would be applied to the objecting parties." W.E.B. DuBois Clubs of Am. v. Clark, 389 U.S. 309, 312 (1967) (*per curiam*). See also American-Arab Anti-Discrim. Comm. v. Thornburgh, 970 F.2d 501, 512 (9th Cir. 1991).

The requirement of exhaustion in First Amendment cases applies with special force in the military. It is well settled that the First Amendment has a more limited application to the armed forces because of "the different character of the military community and of the military mission." Parker v. Levy, 417 U.S. 733, 758 (1974); *see id.* at 757-61 (holding that First Amendment "overbreadth" doctrine does not apply in military context in the same manner as in civilian context, and upholding court martial for statements criticizing the Vietnam war and urging soldiers not to serve); Brown v. Glines, 444 U.S. 348 (1980) (upholding restrictions on on-base circulation of petitions to Congress and the Secretary of Defense); Greer v. Spock, 424 U.S. 828 (1976) (upholding prior restraint on on-base political speeches and distribution of publications). Both Glines and Greer require completion

¹¹(...continued)

See Ohio Civil Rights Comm'n v. Dayton Christian Schs., 477 U.S. 619, 628-29 (1986); FTC v. Standard Oil, 449 U.S. 232, 243-44 (1980).

of administrative procedures prior to the exercise of free speech rights. Analogous reasoning compels that plaintiffs exhaust their military remedies with respect to their First Amendment claim.

Once again, exhaustion here would serve the purposes of the exhaustion doctrine. For instance, plaintiffs argued below (see Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, 48) that the new policy is unconstitutionally vague in various respects. While the alleged imprecision in the policy does not render it unconstitutional, exhaustion would permit the military to provide any necessary interpretation or clarification.

Insofar as plaintiffs assert that separation under the new policy based on a member's statement that he is a homosexual would unconstitutionally prohibit free speech, their claim is not yet ripe for judicial review. A service member who states that he is a homosexual but rebuts the presumption will remain in the military; until the administrative process has been completed and separation ordered, no such constitutional claim is presented.

Nor can the requirement of exhaustion be defeated by plaintiffs' claim of a "chilling effect." In essence, by failing to exhaust, plaintiffs are attempting to prevent the use of their statements of homosexuality as evidence in potential military administrative proceedings to establish a presumption, subject to rebuttal, that they engage in, or are likely to engage in, homosexual acts. See infra pp. 30-33, 46-47. The mere prospect that one's speech will be used as evidence in a possible future administrative proceeding cannot justify the short-circuiting of orderly procedures. Because strict exhaustion principles apply in the military, because the First Amendment has a more limited scope

in the armed services, and because it would be undesirable to split plaintiffs' challenge into exhaustible and non-exhaustible parts, plaintiffs' "chilling effect" claim is subject to exhaustion.¹²

III. EXCLUSION OF SERVICE MEMBERS WHO ENGAGE IN OR ARE LIKELY TO ENGAGE IN HOMOSEXUAL ACTS DOES NOT VIOLATE EQUAL PROTECTION.

If, contrary to our exhaustion argument, plaintiffs may now bring this suit, they can only challenge the statute "on its face." To prevail on a facial attack, plaintiffs must show that the new Act "could never be applied in a valid manner," City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984); a statute is not facially invalid "simply because it may be applied in an arbitrary or unfair way in some hypothetical case not before the Court." FDIC v. Mallen, 486 U.S. 230, 247 (1988). Plaintiffs cannot sustain this heavy burden.

The legislative classification in 10 U.S.C. 654(b)(2) -- barring service by members who state that they are homosexuals and who fail to demonstrate that they do not and are not likely to engage in homosexual acts -- does not violate equal protection. This classification is subject to review under the rational basis test, with great deference due to Congress's authority over military affairs and to the considered judgment of military officials. Appellate courts -- including this Court -- consistently have held

¹² The district court erred in relying on Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion), and Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991), to hold that an alleged First Amendment violation suffices to excuse exhaustion. Neither of those cases arose in the special context of the military, and in neither case was there, as here, an available administrative process that would provide a factual record, bring agency expertise to bear, and sharpen -- or perhaps even moot -- plaintiffs' claims.

that homosexual acts can be validly prohibited in the military context. To avoid the risk to military effectiveness posed by such acts, the challenged statute reasonably presumes that a member who states that he is a homosexual is likely to act consistently with his sexuality and engage in proscribed homosexual acts; at the same time, it allows the member to remain in the service if he shows that he does not and is not likely to engage in such acts, thereby rebutting the concerns underlying the policy. The statute thus advances military readiness by preventing the commission of prohibited homosexual acts, promoting unit cohesion, and accommodating service members' privacy interests. Because the statute rationally serves these legitimate objectives, plaintiffs' claim that it is unconstitutionally grounded in prejudice is without merit.¹³

A. The Act Is Subject To Rational Basis Review, With Great Deference Accorded Congress And The Military.

Even under the old policy, courts recognized that the military's regulations regarding service by homosexuals were subject to rational basis review. Meinhold, slip op. 10132; Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (discussing Bowers v. Hardwick, 478 U.S. 186 (1986)); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735

¹³ This Court may decide the merits of plaintiffs' constitutional challenges on review of the district court's preliminary injunctions. See Thornburgh v. American College of Obst. & Gyn., 476 U.S. 747, 756-57 (1986); New York v. L yng, 829 F.2d 346, 349 (2d Cir. 1987); Hurwitz v. Directors Guild, 364 F.2d 67, 70 (2d Cir.), cert. denied, 385 U.S. 971 (1966).

F.2d 1220, 1229 (10th Cir. 1984); see also High Tech Gays v. DISCO, 895 F.2d 563, 570-74 (9th Cir. 1990); Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987). The same standard applies to review of the new policy, which is embodied in an Act of Congress.¹⁴

Legislative classifications subject to rational basis review are accorded "a strong presumption of validity" and must be sustained if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller v. Doe, 113 S. Ct. 2637, 2642 (1993). The Government "has no obligation to produce evidence to sustain the rationality" of the Act; "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Id. at 2643. Instead, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, * * * whether or not the basis has a foundation in the record." Id. Rational basis review "is not a license for courts to judge the wisdom, fairness, or

¹⁴ Pruitt v. Cheney, 963 F.2d 1160, 1165 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), adopted an "active" rational basis test and held that the Government must justify the military's old homosexual policy by record evidence introduced in court. Pruitt does not survive Heller v. Doe, 113 S. Ct. 2637 (1993), which, as discussed immediately below in text, held that the Government is not required to support its classification with record evidence under rational basis review. The Ninth Circuit itself recently recognized that the Heller rational basis test applies to military "classifications having to do with homosexuality." Meinhold, slip op. 10132. Indeed, application of an "active" rational basis test would be especially inappropriate in the military context. Finally, the test in Pruitt was grounded in the court's erroneous view that the old policy was directed against homosexual status rather than homosexual acts (963 F.2d at 1165 n.4); here, because the statute makes clear that the new policy is conduct-directed, the Pruitt rationale is inapposite.

logic of legislative choices." Id. at 2642. So long as the asserted rationale is "plausible," "debatable," or "find[s] some footing in the realities of the subject addressed," the classification is constitutionally permissible. Id. at 2643, 2645, 2646.

The Supreme Court has recognized that when adjudicating the "constitutionality of an Act of Congress -- 'the gravest and most delicate duty that this Court is called upon to perform' * * * -- the Court accords 'great weight to the decisions of Congress.'" Rostker v. Goldberg, 453 U.S. 57, 64 (1981). Moreover, special deference is due congressional enactments in military matters; "perhaps in no other area has the Court accorded Congress greater deference." Id. at 64-65. "Judicial deference thus is at its apogee when reviewing congressional decisionmaking in [the military context]. * * * Congress has primary responsibility for the delicate task of balancing the [constitutional] rights of servicemen against the needs of the military." Weiss v. United States, 114 S. Ct. 752, 760-61 (1994).

Likewise, great deference is to be accorded the "considered professional judgment" of military officials, Goldman v. Weinberger, 475 U.S. 503, 509 (1986), concerning "complex * * * decisions as to the composition * * * of a military force." Rostker, 453 U.S. at 65. The military's "special constitutional function * * * to fight or be ready to fight wars should the occasion arise," Greer, 424 U.S. at 837-38, renders the military a "specialized society separate from civilian society [that has,] by necessity, developed laws and traditions of its own during its long history." Parker, 417 U.S. at 743. "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian

life" to "foster instinctive obedience, unity, commitment, and esprit de corps." Goldman, 475 U.S. at 507. See also 10 U.S.C. 654(a)(8). The restrictions required to achieve "the subordination of personal preference and identities in favor of the overall group mission" are matters entrusted to the military's "considered professional judgment," Goldman, 475 U.S. at 508, and "courts have traditionally shown the utmost deference" to the "[p]redictive judgment" of the Executive Branch on such issues. Dep't of Navy v. Egan, 484 U.S. 518, 529-30 (1988).

These settled rules reflect the recognition that "it is difficult to conceive of an area of governmental activity in which the courts have less competence" than military affairs. Rostker, 453 U.S. at 65. Because courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," Goldman, 475 U.S. at 507, they must be "particularly careful not to substitute [their] judgment" (Rostker, 453 U.S. at 68) for that of the Political Branches in military matters. This is not to say that a court has no role in deciding constitutional questions in the military context; but in deciding such questions "the Constitution itself requires [great] deference to congressional choice." Rostker, 453 U.S. at 67; accord Falk v. Secretary of the Army, 870 F.2d 941, 945 (2d Cir. 1989). Here, as Congress specifically concluded, the new policy does "not violate the constitutional rights of [homosexuals]." S. Rep. 112 at 284. See Rostker, 453 U.S. at 64 ("[t]he customary deference accorded the judgments of Congress is certainly appropriate where, as here, Congress specifically considered the question of the Act's constitutionality").

B. The Statute Rationally Presumes, Subject To Rebuttal, That A Member Who States That He Is A Homosexual Engages In Or Likely Will Engage In Prohibited Homosexual Acts.

1. The starting point in analyzing the statutory classification is the well-settled principle that homosexual acts may validly be proscribed in the special context of the military. Even prior to enactment of the challenged statute, every court of appeals to decide the issue had rejected constitutional challenges to the prohibition against homosexual acts in the military's old policy. Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); Dronenburg, supra; Rich, supra; Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); see also Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981). Two other courts of appeals upheld the old policy in "statements" cases on the ground that members who state that they are homosexuals are likely to engage in homosexual acts that can validly be prohibited. Ben-Shalom, supra; Woodward, supra. And in Falk, 870 F.2d at 947, this Court recognized the military's interest "in preventing and halting [homosexual] conduct that undermines discipline and morale."¹⁵

¹⁵ Indeed, even the now-vacated decision of a panel of the D.C. Circuit (which had set aside a discharge under the old policy in a case involving a statement of homosexuality) recognized that "'homosexual acts' are forbidden to military servicemembers, and there is no dispute that laws forbidding such conduct are constitutional." Steffan v. Aspin, 8 F.3d 57, 64, vacated and reh'g en banc ordered, 8 F.3d 70 (D.C. Cir. 1994) (argued May 11, 1994).

Likewise, in another old policy case, the Ninth Circuit recently reaffirmed this proposition, holding that "we defer to the [military's] judgment that the presence of persons who engage in homosexual conduct, or who demonstrate a propensity to engage

(continued...)

Relying on this principle, see S. Rep. 112 at 285, Congress enacted a statute that, on its face, is conduct-directed. Congress specifically determined that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). The statute thus provides for the separation of any member who "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts." § 654(b)(1).

Congress also concluded that service by members "who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to [the military mission]." § 654(a)(15). As Congress determined, it is appropriate in this context to presume that members who state that they are homosexuals are, unless they show to the contrary, likely to engage in homosexual acts. See S. Rep. 112 at 281-84. Accordingly, the statute provides that a service member who "has stated that he or she is a homosexual" shall be separated "unless there is a further finding * * * 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." § 654(b)(2). In this way, the statute is directed to persons who commit or are likely to commit homosexual acts. See S. Rep. 112 at 282-83, 285, 294.

The Directives equally make clear that the new policy is conduct-directed and does not target orientation. They admonish

¹⁵(...continued)
in homosexual conduct by their statements, impairs the accomplishment of the military mission." Meinhold, slip op. 10121.

that "[a] member's sexual orientation," which is defined as "[a]n abstract sexual preference for persons of a particular sex" (JA 621), is "a personal and private matter and is not a bar to continued service * * * unless manifested by homosexual conduct."

Id. A statement by a service member that he is a homosexual 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. As the Directives elaborate, such a statement "creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." JA 622. "Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts." Id.

(emphasis added). See also JA 626 ("sexual orientation" is "distinct from a propensity * * * to engage in sexual acts").¹⁶

2. The rebuttable presumption in the new policy -- that members who state that they are homosexuals engage in or are likely

¹⁶ The district court erred in disregarding the regulatory definition of "propensity" and instead equating it with an "innate [or inborn] tendency" or "orientation." JA 764-65. The regulatory definition is reasonable and consistent with the statute and legislative history, and thus it is entitled to "controlling weight." Stinson v. United States, 113 S. Ct. 1913, 1919 (1993). The military's retention of a member who states that he is a homosexual but who demonstrates that he does not and is not likely to engage in homosexual acts confirms that the policy is not aimed at "orientation." Moreover, insofar as the district court believed its reading of "propensity" raised a serious question regarding the constitutionality of this statutory provision, it was all the more required to defer to the authoritative construction by the military that would avoid the constitutional issue. See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 113 S. Ct. 2264, 2282-83 (1993).

to engage in homosexual acts -- plainly is rational. The Senate Committee explained that, among both heterosexuals and homosexuals, "[s]exual behavior is one of the most intimate and powerful forces in society," and "experience demonstrates that few [service members] remain celibate." S. Rep. 112 at 281, 284. Congress recognized that military policies properly take into account the sexual attractions that can exist between men and women, and "[s]imilar considerations apply to the development of policies with respect to homosexuality." Id. at 284.

In particular, the Senate Armed Services Committee viewed homosexuality as "intimately connected with [homosexual] conduct" (S. Rep. 112 at 282) and recognized that statements of homosexuality, unless rebutted, "demonstrate a propensity or intent to engage in sexual conduct with persons of the same sex." Id. at 281; see also id. at 282. It would be "irrational," the Committee stated, "to develop military personnel policies on the basis that all gays and lesbians will remain celibate or that they will not be sexually attracted to others." Id. at 284. As the Committee emphasized (id. at 294), "it is reasonable for the armed forces to presume that when a person uses the term 'I am homosexual,' the individual engages in, attempts to engage in, has a propensity to engage in, or intends to engage in impermissible conduct." See also id. at 283 ("[i]t is reasonable for the armed forces to take into account the potential behavior of persons who define themselves as homosexual"). Indeed, the Committee noted, advocates of gay rights have themselves "expressly linked" homosexuality and homosexual acts. Id. Accord National Defense Research Inst., Sexual Orientation and U.S. Military Personnel Policy: Options

and Assessment 51, 64 (Rand 1993) (JA 147, 160) (a "strong correlation" exists between persons who identify themselves as homosexuals and persons who engage in homosexual acts).

Thus, Congress had ample basis to conclude that there is a rational correlation (subject to rebuttal in individual cases) between a person's statement that he is a homosexual and the inference that he engages in, or likely will engage in, homosexual acts. Congress reasonably assumed that any member, whether heterosexual or homosexual, is likely to act in a manner that is consistent with his stated sexuality, unless he demonstrates otherwise. The difference between the treatment of declared homosexuals and heterosexuals in the military is that all homosexual acts are forbidden to service members (10 U.S.C. 654(b) & (f)(3); id. 925) -- a prohibition that repeatedly has been upheld as constitutional. See supra p. 25. Congress's policy in "statement" cases therefore reflects the constitutionally permissible difference between heterosexual and homosexual acts in the unique military context.¹⁷

Courts, too, have recognized the rationality of presuming a likelihood of engaging in homosexual acts from statements of homosexuality. For example, the Seventh Circuit, in upholding DoD's old policy in a "statements" case, recognized that a person's statement that he is a homosexual:

¹⁷ The Meinhold court's concern (slip op. 10132) that the old policy improperly reflected different assumptions about the likelihood that homosexuals and heterosexuals would engage in prohibited sexual acts misses the mark. The old policy rested not on the assumption that homosexuals are more likely than heterosexuals to act in accordance with their sexuality, but rather on the fact that all homosexual acts are prohibited in the military while most heterosexual acts are not.

is compelling evidence that [he] has in the past and is likely to again engage in [homosexual] conduct. To this extent, therefore, the regulation does not classify * * * based merely upon [homosexual status], but upon reasonable inferences about * * * probable [homosexual] conduct in the past and in the future.

Ben-Shalom, 881 F.2d at 464; see also Woodward, 871 F.2d at 1076; Watkins v. United States Army, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting) ("[t]o pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd"), vacated, 875 F.2d 699 (1989) (en banc), cert. denied, 498 U.S. 957 (1990).

Congress's enactment of this statutory presumption based on the lessons of human experience comports with settled law. A presumption in a civil proceeding is valid if it rests on "a sound factual connection between the proved and inferred facts." NLRB v. Baptist Hosp., 442 U.S. 773, 787 (1979). It is "only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Usery v. Turner Elkhorn Mining, 428 U.S. 1, 28 (1976). See also United States v. Gainey, 380 U.S. 63, 66-67 (1965) (upholding presumption that defendant's unexplained presence at an illegal still indicates his involvement in unlawful liquor operation). Moreover, because the "process of making the determination of rationality is, by its nature, highly empirical, * * * significant weight should be accorded to the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." Usery, 428 U.S. at 28.

3. The statutory presumption at issue is a general supposi-

tion and not an invariable rule. Accordingly, it may be rebutted in individual cases if the service member shows that, despite his statement of homosexuality, he does not, and is not likely to, engage in prohibited homosexual acts. To rebut the presumption, the member is entitled, with assistance of counsel, to present relevant evidence and witnesses to the administrative board, which may consider: (1) whether the member has engaged in past acts; (2) the member's credibility; (3) testimony from others about the member's past conduct, character, and credibility; (4) the nature and circumstances of the member's statement; and (5) any other relevant evidence. JA 622.¹⁸

In essence, the rebuttable presumption represents an allocation of the burden of proof to the service member to demonstrate that, notwithstanding his statement, he should be retained in the military because he does not in fact fall within the category of those who do or are likely to engage in prohibited acts. As Congress and the military have concluded, a service member's statement that he is a homosexual raises a legitimate apprehension about the occurrence of homosexual acts and the resulting adverse effect on the military mission. See S. Rep. 112 at 284. By making the presumption rebuttable, the policy places on the ser-

¹⁸ The district court erroneously stated (JA 764) that neither the statute nor the Directives indicate how a member who identifies himself as a homosexual "can prove that he * * * does not have such a [homosexual] propensity." In fact, the Directives provide a detailed explanation, complete with examples, regarding how a member can rebut the presumption. See JA 622, 716-18; see also S. Rep. 112 at 290, 294 (discussing procedures for rebutting the presumption). Thus, contrary to the court's understanding, a member who states that he is a homosexual is not required to disprove his sexual orientation; rather, he must show that he does not engage in, and will not likely engage in, homosexual acts. See 10 U.S.C. 654(b)(2).

vice member -- who has identified himself as a homosexual and not maintained his sexuality as "a personal and private matter" (JA 621) -- the burden to dispel the military's concerns by showing that he will conform his behavior to the military standard of conduct that bars homosexual acts. Rebuttal of the presumption thus constitutes a recognition and acceptance by the member, in this situation as in all others in the military context, that "the essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service'" in order to "foster [the] instinctive obedience, unity, commitment and esprit de corps [necessary] to accomplish * * * [the military] mission." Goldman, 475 U.S. at 507. Under the policy's rebuttable presumption, therefore, it is not only the member's statement that he is a homosexual, but also his failure to establish that he will obey the standards of conduct designed to promote military readiness and effectiveness, that provide the basis for separation.

This rebuttable presumption is "sensible and timesaving." NLRB v. Curtin Matheson Scientific, 494 U.S. 775, 788-89 (1990). An individual who has stated that he is a homosexual has the "peculiar means of knowledge" to prove whether the general presumption applies in his particular case. 9 Wigmore on Evidence § 2486, p. 290 (Chadbourn rev. 1981). The permissibility of this approach is confirmed by Lavine v. Milne, 424 U.S. 577 (1976), which upheld a statutory presumption that a person who voluntarily leaves his job within 75 days of applying for public assistance does so to qualify for assistance. Emphasizing that "[o]utside the criminal law area, where special concerns attend, the locus of

the burden of persuasion is normally not an issue of federal constitutional moment," the Court sustained the presumption because a person's state of mind "should be best known by the [person] himself." Id. at 585. So, too, the individual service member is in the best position to demonstrate that, notwithstanding his statement, he will conform his conduct to military standards by showing he does not and is not likely to engage in homosexual acts.¹⁹

¹⁹ The Ninth Circuit's recent decision in Meinhold does not undermine the validity of the new policy and the rebuttable presumption it contains. Indeed, the court explicitly recognized that it "express[ed] no opinion as to [the new] policy or the regulations implementing it." Slip op. 10121 n.2.

Moreover, consistent with that recognition, the court's rationale does not extend to the new policy. Meinhold did not reach the constitutionality of the old policy as interpreted by the military, instead adopting a narrow construction to avoid the constitutional issue. The court expressed concern that Meinhold had been discharged solely because of his "classification," "sexual preference," "status," or "orientation" as a homosexual based on his statement "I am in fact a homosexual." Slip op. 10121, 10131, 10133, 10136. The court noted that a homosexual was defined to include a person who had homosexual "desires," and that Meinhold had not been given an opportunity to show that he would not engage in future homosexual acts (indeed, the court found that he had truthfully denied engaging in such acts in the past). Id. at 10124-25, 10126, 10130-31, 10132, 10135-36. Concluding that a discharge based on "the classification of being homosexual" clearly implicates equal protection (id. at 10132), the court construed "the 'statement' prong for separation * * * [under the old policy to require] something more than status: a concrete, expressed desire to commit homosexual acts which are * * * prohibited." Id. at 10136.

The court's reasoning is inapposite here. The new policy makes manifest that separation is not based on status (indeed, the term "desires" has been eliminated) and that service members who identify themselves as homosexuals have an opportunity to show that they do not and are not likely to engage in homosexual acts. Because it is the member's statement of homosexuality coupled with his failure to make such a showing that is the basis for discharge, and because Congress reasonably and unmistakably concluded that statements of homosexuality are (absent rebuttal) a ground for discharge, Meinhold has no application to the new policy.

C. The Statutory "Statements" Provision Excluding Service Members Who Engage Or Likely Will Engage In Homosexual Acts Is Rationally Related To Advancing Legitimate Military Interests.

1. Preventing The Commission Of Proscribed Homosexual Acts.

The challenged statute represents a rational legislative choice designed to prevent the commission of proscribed homosexual acts that Congress found impair military readiness. As shown supra p. 25, it is well settled that homosexual acts may be validly prohibited in the military context.

The Constitution does not require that the military wait until homosexual acts have occurred and been detected before taking personnel action necessary to protect military readiness. "[N]othing in the Constitution * * * disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops * * * under his command." Greer, 424 U.S. at 840. Thus, the military need not "take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission." Ben-Shalom, 881 F.2d at 460-61. See also Falk, 870 F.2d at 947 (military may "prevent[]" homosexual acts); Meinhold, slip op. 10133 n.11 (acknowledging "the force of DOD's argument that it need not take the risk [under the old policy] of a person with homosexual desire or propensity acting on it").

Consistent with these authorities, Congress recognized that the military must be able "to separate the individual from military service without waiting until the individual's propensity or intent to violate [military standards of conduct] ripens into specific conduct prejudicial to good order and discipline." S. Rep.

112 at 294; see id. at 282 ("the armed forces should not be required to take th[e] risk" that an admitted homosexual will not engage in homosexual acts). Accordingly, if a service member has a propensity to engage in homosexual acts, "the armed forces are not required to wait until the person engages in that act before taking personnel action." Id. at 284. See also Gainey, 380 U.S. at 66-67 (Congress may presume that an unexplained presence at an illegal still indicates participation in an unlawful liquor operation).²⁰

The constitutionality under the rational basis test of the statutory scheme prohibiting service by persons who are likely to engage in prohibited acts is directly supported by New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979). Beazer involved the Transit Authority's rule that barred employment to persons using narcotic drugs. The policy was alleged to violate equal protection because it denied employment to methadone users who were enrolled in a rehabilitation program and therefore able to perform the jobs. Id. at 589-90. Rejecting that challenge, the Supreme Court held that the policy was rationally "supported by the legitimate inference that * * * a degree of uncertainty [regarding future drug use while still in the program] persists" (id. at

²⁰ The statute does not involve use of plaintiffs' statements to penalize their "inclinations" contrary to Jacobson v. United States, 112 S. Ct. 1535, 1542 (1992). Under the statute, a person will be excluded from the military not because of his homosexual orientation, but because of his failure to show that he is not likely to engage in homosexual acts. Moreover, Jacobson was a criminal prosecution, which involves restrictions not applicable to military personnel decisions. For example, although the government may not criminally prosecute a person for being a drug addict, Robinson v. California, 370 U.S. 660 (1962), Congress surely may formulate non-criminal rules to preclude military service by people who are likely to use illegal drugs.

591), and that it "represent[s] a policy choice * * * [regarding employment] made by that branch of Government vested with the power to make such choices." Id. at 592. Accord Vance v. Bradley, 440 U.S. 93, 106 (1979) (in establishing mandatory retirement age, Congress validly drew a line to "avoid the risks" that otherwise might result).

Similarly, Weinberger v. Salfi, 422 U.S. 749 (1975), upheld a statutory presumption that marriages occurring less than nine months before a wage earner's death were shams entered into for the purpose of obtaining survivor benefits under the Social Security Act. Emphasizing that rationality review does not require that the statute "precisely filter[] out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute" (id. at 777), the Court sustained the "prophylactic" presumption: "Congress, its concern having been reasonably aroused by the possibility of [a risk] which it legitimately desired to avoid, could rationally have concluded * * * that a particular policy would protect against [the risk's] occurrence." Id.

Under the principle of these cases, the statutory presumption in "statements" cases is a rational means to avoid the commission of proscribed homosexual acts that pose an "unacceptable risk" to military effectiveness. 10 U.S.C. 654(a)(15). Nor is the statute rendered irrational by a claim that it is "broader than necessary." Beazer, 440 U.S. at 592. In fact, in contrast to the irrebuttable "general rule[s]" (id.) upheld in Beazer, Vance, and Salfi, the legislative classification here accords service members "individualized consideration" (id.) by affording them an oppor-

tunity to rebut the presumption.

2. Promoting Unit Cohesion. The statute also rationally furthers the vital military goal of maintaining unit cohesion. Congress made two key findings in this regard. First, it found that unit cohesion -- "the bonds of trust * * * that make combat effectiveness of a military unit greater than the sum of the individual unit members" -- is "[o]ne of the most critical elements in combat capability." 10 U.S.C. 654(a)(7). Second, Congress found that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." § 654(a)(15).

These legislative findings "are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985). Especially under the rational basis test, courts are not "to resolve conflicts in the evidence against the legislature's conclusion." Brd. of Locomotive Firemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129, 136, 138-39 (1968). Accord Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 464 (1981); Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

Abundant congressional testimony supports these legislative findings. For example, General Norman Schwarzkopf testified that unit cohesion "is the single most important factor in a unit's ability to succeed on the battlefield." S. Rep. 112 at 274. Likewise, the then-Chairman of the Joint Chiefs of Staff, General

Colin Powell, emphasized the military's concern that "[w]e cannot allow anything to happen which would disrupt * * * cohesion within the force." Id. at 275. As he explained, although service members "must get along together despite their individual preferences[,] [b]ehavior too far away from the norm undercuts the cohesion of the group." Id. at 278 (emphasis added).

In General Powell's experience, service by persons who engage in, or are likely to engage in, homosexual acts, "would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." S. Rep. 112 at 278. See also id. at 281. General Schwarzkopf similarly testified, based on his consistent experience over years of military service, that the presence of such homosexuals in a military unit "polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war." Id. at 280; see also id. (where such homosexuals served in military units, "morale broke down, and unit effectiveness suffered").

Congress thus had ample basis for reaffirming the military's longstanding judgment that service by members who engage in, or are likely to engage in, homosexual acts severely impairs unit cohesion.

3. Accommodating Privacy Interests. The statute also rationally accommodates legitimate privacy interests of service members who "routinely" and "involuntarily" must "accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy." 10 U.S.C. 654(a)(12). As General Powell testified:

[T]he majority of our young men and women are required

to live in communal settings that force intimacy and provide little privacy. It may be hard to contemplate spending 60 continuous days in the close confines of a submarine; sleeping in a foxhole with half a dozen other people; 125 people all living and sleeping in the same 40 by 50 foot, open berthing area, but this is exactly what we ask our young people to do.

S. Rep. 112 at 277. General Powell explained that "it would be prejudicial to good order and discipline" if the military required heterosexuals and persons who do or are likely to engage in homosexual acts "to share the most private facilities together, the bedroom, the barracks, latrines, and showers." Id. at 283; see id. at 280-82.

Significantly, these same concerns underlie military personnel policies that seek, where possible, to provide men and women with separate living arrangements to "accommodate sexual privacy" and avoid "increased sexual tension" that would "disrupt unit cohesion." S. Rep. 112 at 277-78. The Senate Armed Services Committee recognized that, just as "[i]t is reasonable for the armed forces to take these factors into consideration in establishing gender-based assignment policies," it also "is reasonable for the armed forces to take [them] into consideration when addressing issues concerning persons who engage in or have the propensity or intent to engage in sexual activity with persons of the same sex." Id. at 278.

This privacy concern thus provides a rational basis for sustaining the legislative classification.²¹ Moreover, the privacy

²¹ For similar reasons, Congress could rationally conclude that allowing service by those who engage in, or are likely to engage in, homosexual acts would adversely affect the ability of the military to recruit and retain members in our all-volunteer force. See Dronenburg, 741 F.2d at 1398; Woodward, 871 F.2d at 1076-77; Rich, 735 F.2d at 1227-28 n.7; Beller, 632 F.2d at 811.

rationale is not undermined by permitting the continued service of a member who states that he is a homosexual but has demonstrated that he does not and is not likely to engage in homosexual acts. In such circumstances, Congress reasonably could conclude that concerns over privacy would be reduced. Furthermore, the retention of persons who rebut the presumption reflects a balance struck by Congress between two competing interests: the privacy interest of heterosexuals and the interest of persons who state that they are homosexuals in serving in the military if they demonstrate that they will conform their conduct to military standards. See S. Rep. 112 at 274 (the Committee "carefully considered the needs of the armed forces and the rights of all persons, including those who are gay or lesbian," and the statute was "carefully crafted to maintain the delicate balance between the individual concerns and the needs of the armed forces"). A policy need not be carried to its logical limits, without regard to competing interests, to be rational. Under rational basis review, "the latitude of discretion is notably wide in * * * the granting of * * * exemptions upon grounds of policy." Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992).

4. **The Statute Is Not Grounded In Prejudice.** As shown above, the "statements" provision in the new policy is conduct-directed and rests on concerns identical to those underlying the longstanding military prohibition of homosexual acts. Thus, the unbroken line of appellate decisions sustaining that prohibition (see supra p. 25) applies with equal force here and compels rejection of plaintiffs' claim that the statute is grounded in impermissible prejudice.

Moreover, the new policy was adopted after Congress and the Executive Branch fully considered both sides of the debate over the controversial issue of service by homosexuals, including in particular the criticism that the military's policies were based on "prejudice." The Senate Armed Services Committee "emphasize[d] * * * that its position on the service of gays and lesbians is not based upon stereotypes." S. Rep. 112 at 282.²² Rather, the statute rests on Congress's judgment about "the impact in the military setting of the conduct that is an integral element of homosexuality" (*id.*) and the considered professional judgment of military authorities after a "careful, thorough, and open-minded review" as to "what is best for military effectiveness." *Id.* at 279. As General Powell explained:

[O]pen homosexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force. It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.

Id. at 281. Accordingly, Congress specifically concluded that the statute does not embody "an irrational prejudice against gays and lesbians" (*id.* at 283); it is "based on prudence, not prejudice" (*id.*) and is "carefully crafted to maintain the delicate balance between the individual concerns and the needs of the armed forces." *Id.* at 274. See Ben-Shalom, 881 F.2d at 465 ("the concerns set forth in the [old] military policy and regulation can[not] be

²² For example, Congress rejected the "stereotypical" notion that homosexuals are sexual "predators" who "find every person of the same sex to be sexually attractive." S. Rep. 112 at 284.

so easily dismissed as mere prejudice"); Woodward, 871 F.2d at 1076; Dronenburg, 741 F.2d at 1397-98.

Plaintiffs argued below, however, that notwithstanding the congressional determination, the Act is unconstitutional because it is predicated on "prejudice" against homosexuals held by some service members. Not only does that argument misapprehend the new policy, but it also reflects a fundamental misunderstanding of rational basis review. Under that standard, equal protection is satisfied if there is "a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller, 113 S. Ct. at 2642. Only a statute that lacks any rational basis can be said, for purposes of rationality review, to be the kind of "invidious discrimination" or "wholly arbitrary act" that equal protection condemns. New Orleans v. Dukes, 427 U.S. 297, 304 (1976) (per curiam). Thus, a court "will not overturn * * * a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance, 440 U.S. at 97. Under this test, it is "the rare case where the facts preclude[] any plausible inference that the reason for the" challenged classification is related to a legitimate government purpose. Nordlinger, 112 S. Ct. at 2335; see also Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2464 (1994) ("[i]t is a familiar principle of constitutional law that [courts] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive").

In cases that have invalidated action under the rational basis test, the Supreme Court has concluded that the challenged

action was arbitrary or based on prejudice only after it had ruled out every possible legitimate basis for the classification, thereby leaving either impermissible reasons or no reasons at all to support it. For example, Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), struck down a related-person requirement for household eligibility under the Food Stamp Act because "[t]he challenged statutory classification * * * is clearly irrelevant to the stated purposes of the Act" and was supported only by "a bare desire to harm a politically unpopular group [hippies]." Id. at 534

Similarly, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), overturned municipal zoning requirements that were imposed on group homes for the mentally retarded but not on any other group home or multiple-dwelling building. The Court explained that, under rational basis review, plaintiffs were protected from "invidious discrimination" by the requirement that the classification "must be rationally related to a legitimate governmental purpose," and it stressed that "'a bare * * * desire to harm a politically unpopular group' [is] not [a] legitimate state interest." Id. at 446-47. The Court thus made clear that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from [other group homes]." Id. at 448 (emphasis added). Reviewing each of the proffered rationales for the special requirements and finding none that would justify the difference in treatment, the Court held that "the record does not reveal any rational basis for believing that the [mentally-retarded group] home would pose any special threat to the city's legitimate interests." Id. at

448. Thus, the Court concluded that "requiring the permit in this case appears * * * to rest on an irrational prejudice against the mentally retarded." Id. at 450. See also Beazer, 440 U.S. at 592 (because ban on employment of drug users was rational, it was "neither unprincipled nor invidious").

Contrary to plaintiffs' argument below, Cleburne does not invalidate the new policy. Cleburne, of course, did not arise in the special military context. But beyond that, the challenged classification in Cleburne did not serve any legitimate governmental interest and could rest only on "irrational prejudice." 473 U.S. at 450. By contrast, the new policy serves goals -- the prevention of prohibited homosexual acts, the promotion of unit cohesion, and the accommodation of personal privacy -- that not only are legitimate, but that Congress has concluded are of the highest order in the military context. The policy seeks to further these goals and does not impose restrictions based "on mere negative attitudes" as ends in themselves. Id. at 448.²³

In addition, plaintiffs' argument overlooks the fact that service members' views about homosexual conduct in the unique living and working conditions found in the armed forces reflect a number of considerations -- including religious doctrines, moral precepts, ethical values, and privacy concerns -- about an extraordinarily complex question. See S. Rep. 112 at 268. Rationality

²³ The present case also differs significantly from Palmore v. Sidoti, 466 U.S. 429 (1984), where the challenged policy occurred in the civilian context and involved a racial classification. Unlike race, which occupies a unique position in our constitutional system and in our history, classifications based on the likelihood of a person engaging in homosexual conduct are not illegitimate per se; on the contrary, courts have consistently upheld the military's prohibition of homosexual acts.

review does not require that Congress and the military attempt to determine the deep-seated bases for attitudes regarding this complex and controversial issue. Rather, if rational basis review and deference to Congress and the military mean anything, the Government must have sufficient latitude to address the serious practical problems affecting military readiness that the military has long found arise from homosexual conduct.²⁴ Thus, plaintiffs' claim of "prejudice" does not undermine the rationality of the policy adopted by Congress and the military for addressing these legitimate concerns.

IV. SEPARATION BASED ON THE REBUTTABLE PRESUMPTION OF HOMOSEXUAL ACTS ARISING FROM A SERVICE MEMBER'S STATEMENT THAT HE IS A HOMOSEXUAL DOES NOT VIOLATE THE FIRST AMENDMENT.

Relying on the First Amendment, the district court enjoined (JA 766-70) the military from separating (or even investigating) service members based on their statements, made in connection with litigation challenging the validity of the new policy, that they are homosexuals. That was error as a matter of law. All statements by service members that they are homosexuals, whether made in connection with litigation or otherwise, implicate the concerns underlying the new policy and are subject to the statute and Directives. The First Amendment neither forbids the use of such statements to demonstrate that a service member engages in or is likely to engage in prohibited homosexual acts, nor provides special protection to statements made in litigation.

²⁴ The Senate Committee "carefully considered" the suggestion that problems of unit cohesion "could be overcome through training and education." S. Rep. 112 at 280. It rejected that approach, however, concluding that the new policy was most likely to promote the "effectiveness of our armed forces to carry out their mission to defend our nation." *Id.* at 269.

A. The First Amendment Does Not Bar The Military's Use Of A Service Member's Statement Of Homosexuality To Establish That The Member Engages In, Or Is Likely To Engage In, Prohibited Homosexual Acts.

Prior to enactment of the statute, every appellate court to consider the issue had held that the First Amendment is not violated by the discharge of a service member based on the member's statement that he is a homosexual. Pruitt, 963 F.2d at 1163-64; Schowengerdt, 944 F.2d at 489; Ben-Shalom, 881 F.2d at 458-62; Rich, 735 F.2d at 1228-29; see also High Tech Gays, 895 F.2d at 578-80. The reasoning of these precedents also applies to the new statute.

Significantly, the new policy does not prohibit speech about issues concerning homosexuality; nor does it forbid criticism of the policy or advocacy for its change; nor does it ban attending demonstrations in favor of homosexual rights, or reading homosexual newspapers, or patronizing homosexual clubs. See JA 630; S. Rep. 112 at 292. Rather, it merely provides for the use of a service member's statement of his homosexuality in an evidentiary way to establish a likelihood of homosexual acts -- acts that the military may validly proscribe and treat as a ground for separation. Thus, the basis for the separation is acts and the likelihood of acts, not "speech." Indeed, the retention in the service of a member who makes a statement that he is a homosexual, but shows there is not a likelihood he will engage in homosexual acts, is compelling evidence that the policy does not target speech but rather is directed to acts. See Wayte v. United States, 470 U.S. 598, 609 (1985).

Even in the criminal context, Wisconsin v. Mitchell, 113 S.

Ct. 2194, 2201 (1993), recently held that "[t]he First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." See also Dawson v. Delaware, 112 S. Ct. 1093, 1097 (1992) ("[t]he Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations * * * simply because those beliefs and associations are protected by the First Amendment"). And nothing in the First Amendment bars the use of a statement constituting an admission. See Pruitt, 963 F.2d at 1164 ("admission [of homosexuality], like most admissions, was made in speech, but that does not mean that the first amendment precludes the use of the admission as evidence of the facts admitted").

This case is closely analogous to Wayte. Wayte had written to Government officials that he had not registered for the draft and did not intend to do so. Rejecting his claim that prosecution based on his self-identification violated the First Amendment, the Supreme Court held that free speech did not bar use of Wayte's letters as "strong, perhaps conclusive evidence of the non-registrant's intent not to comply -- one of the elements of the offense." 470 U.S. at 612-13. Wayte is equally applicable here to uphold the new policy against plaintiffs' First Amendment challenge.²⁵

²⁵ In addition, the Supreme Court has repeatedly held that the First Amendment has a more narrow application in the military than in other areas. See supra pp. 18-19; see also Blameuser v. Andrews, 630 F.2d 538, 542-44 (7th Cir. 1980) (First Amendment does not prevent the military from denying enrollment in officer program based on person's racist political views). The Court also has recognized special restrictions on the free speech rights of Government employees in general. See, e.g., Waters v. Churchill, 114 S. Ct. 1878, 1888 (1994) (plurality opinion)

(continued...)

B. Statements Of Homosexuality Made In Litigation Are Not Entitled To Special First Amendment Protection.

Contrary to the district court's reasoning (JA 766-70), statements of homosexuality made in litigation are not entitled to greater constitutional protection than other statements. Although litigation has been held to be a form of petition for redress of grievances, claims under the Petition Clause are subject to the same analysis as free speech claims. McDonald v. Smith, 472 U.S. 479, 485 (1985), held there is "no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." See also Wayte, 470 U.S. at 610 n.11; Glines, 444 U.S. at 353. Relying on McDonald and Wayte, this Court held in White Plains Towing v. Patterson, 991 F.2d 1049, 1059 (2d Cir.), cert. denied, 114 S. Ct. 185 (1993), that plaintiffs' "right-to-petition claims are also governed by the interest-balancing principles" applicable to public employees' freedom of speech claims.²⁶

²⁵(...continued)

(First Amendment does not prevent discharge of employee who "begins to do or say things that detract from the agency's efficient operation"). Finally, an incidental effect on speech through Government regulation of activity that combines both speech and nonspeech elements does not violate the First Amendment. See, e.g., Wayte, 470 U.S. at 611-13; United States v. O'Brien, 391 U.S. 367 (1968). These precedents confirm the constitutionality of the new policy excluding members who engage in, or are likely to engage in, homosexual acts even if it is assumed that the policy might have an incidental effect on plaintiffs' speech.

²⁶ But cf. San Filippo v. Bongiovanni, No. 93-5658, slip op. at 29 n.19 (3rd Cir. July 21, 1994) (although recognizing that its ruling conflicts with seven other circuits, including the Second Circuit, court holds that public employee is protected under Petition Clause against retaliation for filing a law suit that would not be protected under the Free Speech Clause because it involves a matter of purely private concern).

The fact that plaintiffs are petitioning the courts, rather than Congress or the Executive, does not alter the constitutional analysis. Surely the right to petition the judiciary cannot be said to be more important to our democratic government than the right to petition the elected branches.

Moreover, it has never been suggested -- until the district court's ruling here -- that the First Amendment affords a broad immunity against the subsequent use of statements made to satisfy Article III standing requirements. On the contrary, the law is settled that statements made in connection with litigation, including statements in pleadings, may be used in subsequent proceedings against the party making the statement. See 4 Wigmore on Evidence § 1066, p. 76 (Chadbourn rev. 1972), and 1994 Supp., p. 374; Lehigh Valley R.R. v. Allied Mach. Co. of Am., 271 F. 900, 902 (2d Cir.), cert. denied, 256 U.S. 704 (1921); Fed. R. Evid. 801 (testimony given at different trial or proceeding, and admissions made by party-opponent, are not hearsay). The district court's ruling that the First Amendment precludes the evidentiary use of such statements is both unprecedented and erroneous.

We emphasize that plaintiffs are not being penalized or retaliated against for filing this litigation. Rather, they are treated no differently from other service members who state in any context that they are homosexuals. Contrary to plaintiffs' invocation of the First Amendment to support immunity for their litigation-connected statements, the First Amendment does not provide a "special immunity from the application of general laws." Cohen v. Cowles Media, 501 U.S. 663, 670 (1991).

* * * * *

In sum, plaintiffs' claims are without merit, and they cannot show the likelihood of success necessary to preliminarily enjoin an Act of Congress. Moreover, under the controlling legal principles (see supra pp. 21-24, 30, 37, 42-45, 45-49), the new policy is plainly constitutional on its face and further proceedings in the district court are not needed to resolve the issues presented. Accordingly, this Court should not only vacate the injunctions but order that the case be dismissed in its entirety. See cases cited supra note 13.

CONCLUSION

For the foregoing reasons, the preliminary injunctions issued on April 4, 1994, and June 3, 1994, should be reversed, and the case should be remanded with instructions to dismiss the complaint and enter judgment for defendants.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
ZACHARY W. CARTER
United States Attorney
ANTHONY J. STEINMEYER
(202) 514-3388
JOHN C. HOYLE
(202) 514-3469
E. ROY HAWKENS
(202) 514-5714
EDWARD HIMMELFARB
(202) 514-3547
Attorneys
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530-0001

OF COUNSEL:

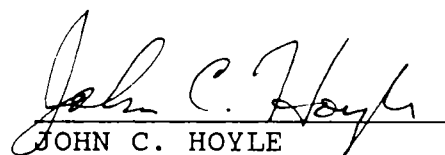
LTC. NOLON J. BENSON, JR.
CPT. TARA O. HAWK
United States Army
Suite 400
901 N. Stuart St.
Arlington, VA 22203

September 1994

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 1994, I served the foregoing Brief For The Appellants and the Joint Appendix upon opposing counsel by causing two copies of the brief and one copy of the Joint Appendix to be sent via Federal Express to:

David H. Braff, Esquire
Michael Lacovara, Esquire
Sullivan & Cromwell
125 Broad Street
New York, New York 10004


JOHN C. HOYLE

A D D E N D A

I N D E X

ADDENDUM A - Statutory Provisions, 10 U.S.C. 654

ADDENDUM B - Relevant Portions of Department of Defense
Directive, Number 1332.14

A D D E N D U M A

STATUTORY PROVISIONS
10 U.S.C. 654

10 U.S.C. § 654 provides:

§ 654. Policy concerning homosexuality in the armed forces

(a) **Findings.**--Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

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

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that--

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(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.

(b) **Policy.**--A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that--

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That 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 and approved in accordance with procedures set forth in the 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) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) **Entry standards and documents.**--(1)
The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) **Required briefings.**--The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) **Rule of construction.**--Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation

from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that--

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) **Definitions.**--In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term "homosexual act" means--

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

A D D E N D U M B

RELEVANT PORTIONS OF DEPARTMENT OF DEFENSE
DIRECTIVE, NUMBER 1332.14



Department of Defense DIRECTIVE

1332.14
NUMBER ~~1332.14~~

SUBJECT: Enlisted Administrative Separations

- References:
- (a) DoD Directive 1332.14, subject as above, January 28, 1982 (hereby canceled)
 - (b) Section 977 of title 10, United States Code (Denial of Certain Benefits to Persons Who Fail to Complete at Least Two Years of an Original Enlistment)
 - (c) Pub. L. No. 97-66, "The Veterans' Disability Compensation, Housing, and Memorial Benefits Amendments Act of 1981", October 17, 1981, (95 Stat. 1035)
 - (d) Sections 801-940 of title 10, United States Code (Uniform Code of Military Justice, Articles 1-140)
 - (e) through (z), see enclosure 1

A. REISSUANCE AND PURPOSE

This Directive reissues reference (a) and updates policy, responsibilities, and procedures governing the administrative separation of enlisted members from the Military Services.

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense and the Military Departments (including their Reserve components). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force and the Marine Corps.

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 2.

D. POLICY

1. It is DoD policy to promote the readiness of the Military Services by maintaining high standards of conduct and performance. Separation policy promotes the readiness of the Military Services by providing an orderly means to:

- a. Judge the suitability of persons to serve in the Armed Forces on the basis of their conduct and their ability to meet required standards of duty performance and discipline;
- b. Maintain standards of performance and conduct through characterization of service in a system that emphasizes the importance of honorable service;

- c. Achieve authorized force levels and grade distributions; and
- d. Provide for the orderly administrative separation of enlisted personnel in a variety of circumstances.

2. DoD separation policy is designed to strengthen the concept that military service is a calling different from any civilian occupation.

a. The acquisition of military status, whether through enlistment or induction, involves a commitment to the United States, the Service, and one's fellow citizens and Service members to complete successfully a period of obligated service. Early separation for failure to meet required standards of performance or discipline represents a failure to fulfill that commitment.

b. Millions of Americans from diverse backgrounds and with a wide variety of aptitudes and attitudes upon entering military service have served successfully in the Armed Forces. It is DoD policy to provide Service members with the training, motivation, and professional leadership that inspires the dedicated enlisted member to emulate his or her predecessors and peers in meeting required standards of performance and discipline.

c. The Military Services make a substantial investment in training, time, equipment, and related expenses when persons are enlisted or inducted into military service. Separation prior to completion of an obligated period of service is wasteful because it results in loss of this investment and generates a requirement for increased accessions. Consequently, attrition is an issue of significant concern at all levels of responsibility within the Armed Forces. Reasonable efforts should be made to identify enlisted members who exhibit a likelihood for early separation, and to improve their chances for retention through counseling, retraining, and rehabilitation before initiation of separation proceedings. Enlisted members who do not demonstrate potential for further military service should be separated to avoid the high costs in terms of pay, administrative efforts, degradation of morale, and substandard mission performance that are associated with retention of enlisted members who do not conform to required standards of discipline and performance despite efforts at counseling, retraining, or rehabilitation.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness may supplement the enclosures to this Directive, and may delegate the authority to establish reporting requirements for the reasons for separation (Part 1, enclosure 3) to a Deputy Assistant Secretary.

2. The Secretaries of the Military Departments shall prescribe implementing documents to ensure that the policies, standards, and procedures in this Directive are administered in a manner that provides consistency in separation policy to the extent practicable in a system that is based on command discretion. The implementing documents also shall address the following matters:

- a. Commander Responsibilities. The Secretary concerned, acting through his or her military commanders, shall ensure that the policies, standards and procedures of this directive are applied consistently, that fact-finding inquiries are conducted properly, that no abuse of authority occurs, and that failure to follow the provisions of this directive results in appropriate corrective action.

b. Processing Goals. The Secretary concerned shall establish processing time goals for the types of administrative separations authorized by this Directive. Such goals shall be designed to further the efficient administration of the Armed Forces and shall be measured from the date of notification to the date of separation. Normally such goals should not exceed 15 working days for the notification procedure (Part 3, section B., enclosure 3) and 50 working days for the administrative board procedure (Part 3, section C., enclosure 3). Goals for shorter processing times are encouraged, particularly for cases in which expeditious action is likely. Variations may be established for complex cases or cases in which the separation authority is not located on the same facility as the respondent. The goals, and a program for monitoring effectiveness, shall be in the implementing document of the Military Department. Failure to process an administrative separation within the prescribed goal for processing times shall not create a bar to separation or characterization.

c. Periodic Explanations. The Secretary concerned shall prescribe appropriate internal procedures for periodic explanation to enlisted members of the types of separations, the basis for their issuance, the possible effects of various actions upon reenlistment, civilian employment, veterans' benefits, and related matters, and the effects of 10 U.S.C. 977 (reference (b)) and Pub. L. No. 97-66 (1981) (reference (c)) concerning denial of certain benefits to members who fail to complete at least 2 years of an original enlistment. Such explanation may be provided in the form of a written fact sheet or similar document. The periodic explanation shall take place at least each time the provisions of the Uniform Code of Military Justice (UCMJ) are explained under Article 137 of the UCMJ (reference (d)). The requirement that the effects of the various types of separations be explained to enlisted members is a command responsibility, not a procedural entitlement. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization.

d. Provision of Information During Separation Processing. The Secretary concerned shall ensure that information concerning the purpose and authority of the Discharge Review Board and the Board for Correction of Military/Naval Records, established under 10 U.S.C. 1552 and 1553 (reference (e)) and DoD Directive 1332.28 (reference (f)) is provided during the separation processing of all members, except when the separation is for an immediate reenlistment. Specific counseling is required under 38 U.S.C. 3103(a) (reference (g)) which states that a discharge under other than honorable conditions, resulting from a period of continuous, unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Veterans Administration, notwithstanding any action by a Discharge Review Board. The information required by this paragraph should be provided in the form of a written fact sheet or similar document. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization.

F. PROCEDURES

Procedures and standards for implementing the policy in section D., above, are in enclosure 3.

1. Basis. A member may be separated when it is determined under the guidance in section A. of Part 2 that the member is unqualified for further military service by reason of unsatisfactory performance. This reason shall not be used if the member is in entry-level status (section I. of enclosure 2).

2. Counseling and Rehabilitation. Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation requirements are of particular importance with respect to this reason for separation. Because military service is a calling different from any civilian occupation, a member should not be separated when unsatisfactory performance is the sole reason unless there have been efforts at rehabilitation under standards prescribed by the Secretary concerned.

3. Characterization or Description. The service shall be characterized as Honorable or General (under honorable conditions) in accordance with section C. of Part 2.

4. Procedures. The Notification Procedure (section B. of Part 3) shall be used.

H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph H.1.b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates 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. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in paragraph H.1.b..

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that:

(a) Such acts are a departure from the member's usual and customary behavior;

(b) Such acts under all the circumstances are unlikely to recur;

(c) Such acts were not accomplished by use of force, coercion, or intimidation;

(d) Under the particular circumstances of the case, the member's continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and morale; and

(e) The member does not have a propensity or intent to engage in homosexual acts.

(2) The member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further

approved finding 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. A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, creates

- * a rebuttable presumption that the Service member engages in, attempts to
- * engage in, has a propensity to engage in, or intends to engage in homosexual
- * acts. The Service member shall be advised of this presumption and given the
- * opportunity to rebut the presumption by presenting evidence demonstrating
- * that he or she does not engage in, attempt to engage in, have a propensity to
- * engage in, or intend to engage in homosexual acts. Propensity to engage in
- * homosexual acts means more than an abstract preference or desire to engage in
- * homosexual acts; it indicates a likelihood that a person engages in or will
- * engage in homosexual acts. In determining whether a member has successfully
- * rebutted the presumption that he or she engages in, attempts to engage in, or
- * has a propensity or intent to engage in homosexual acts, some or all of the

following may be considered:

- (a) Whether the member has engaged in homosexual acts;
- (b) The member's credibility;
- (c) Testimony from others about the member's past conduct, character, and credibility;
- (d) The nature and circumstances of the member's statement;
- (e) Any other evidence relevant to whether the member is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved).

2. Burden of Proof. See paragraphs H.4.e. and f., below, for guidance as to the burden of proof and when a finding regarding retention is required.

3. Characterization or Description. Characterization of service or description of separation shall be in accordance with the guidance in section C. of Part 2. When the sole basis for separation is homosexual conduct, a characterization Under Other Than Honorable Conditions may be issued only if such a characterization is warranted under section C. of Part 2 and there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in the following circumstances:

- a. By using force, coercion, or intimidation;
- b. With a person under 16 years of age;
- c. With a subordinate in circumstances that violate customary military superior-subordinate relationships;
- d. Openly in public view;
- e. For compensation;
- f. Aboard a military vessel or aircraft; or

g. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

4. Procedures. The Administrative Board Procedure (section C. of Part 3) shall be used, subject to the following guidance:

a. Separation processing shall be initiated if there is probable cause to believe separation is warranted under paragraph H.1.b., above. Fact-finding procedures for inquiries into homosexual conduct are in enclosure 4.

b. The Administrative Board shall follow the procedures set forth in subsection C.5. of Part 3, except with respect to the following matters:

(1) If the Board finds that one or more of the circumstances authorizing separation under paragraph H.1.b., above, is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described in that paragraph.

(2) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph H.1.b. has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

c. In any case in which characterization of service Under Other Than Honorable Conditions is not authorized, the Separation Authority may be exercised by an officer designated under paragraph B.4.a. of Part 3.

d. The Separation Authority shall dispose of the case according to the following provisions:

(1) If the Board recommends retention, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary concerned with a recommendation that the Secretary separate the member under the Secretary's authority (section O. of this Part).

(2) If the Board recommends separation, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis of the following considerations:

1. There is insufficient evidence to support the finding; or

2. Retention is warranted under the limited circumstances described in paragraph H.1.b., above.

(3) If there has been a waiver of Board proceedings, the Separation Authority shall dispose of the case in accordance with the following provisions:

(a) If the Separation Authority determines that there is not sufficient evidence to support separation under paragraph H.1.b., above, the

Separation Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Separation Authority determines that one or more of the circumstances authorizing separation under paragraph H.1.b. has occurred, the member shall be separated unless retention is warranted under the limited circumstances described in that paragraph.

* e. The member shall bear the burden of proving throughout the *
* proceeding, by a preponderance of the evidence, that retention is warranted *
* under the limited circumstances described in subparagraphs H.1.b.(1) and *
* H.1.b.(2). *

f. Findings regarding whether or not retention is warranted under the limited circumstances of paragraph H.1.b. are required if the member clearly and specifically raises such limited circumstances.

g. Nothing in these procedures:

(1) Limits the authority of the Secretary concerned to take appropriate action in a case to ensure that there has been compliance with this Directive;

(2) Requires that a member be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

(a) The member engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding or terminating military service; and

(b) Separation of the member would not be in the best interest of the Armed Forces.

(3) Precludes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned;

(4) Authorizes a member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;

(5) Precludes separation in appropriate circumstances for another reason in this Directive; or

(6) Precludes trial by court-martial in appropriate cases.

I. Drug Abuse Rehabilitation Failure

1. Basis

a. A member who has been referred to a program of rehabilitation for personal drug and alcohol abuse may be separated for failure through inability or refusal to participate in, corporate in, or successfully complete such a program in the following circumstances:

(1) There is a lack of potential for continued military service;
or

(2) Long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

DEFINITIONS

- A. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.
- B. Convening Authority. (1) The Separation Authority or (2) a commanding officer who has been authorized by the Secretary concerned to process the case except for final action and who otherwise has the qualifications to act as a Separation Authority.
- C. Discharge. Complete severance from all military status gained by the enlistment or induction concerned.
- D. Entry-Level Status. Upon enlistment, a member qualifies for entry-level status during (1) the first 180 days of continuous active military service or (2) the first 180 days of continuous active service after a service break of more than 92 days of active service. A member of a Reserve component who is not on active duty or who is serving under a call or order to active duty for 180 days or less begins entry level status upon enlistment in a Reserve component. Entry level status for such a member of a Reserve component terminates as follows: (a) 180 days after beginning training if the member is ordered to active duty for training for one continuous period of 180 days or more; or (b) 90 days after the beginning of the second period of active duty training if the member is ordered to active duty for training under a program that splits the training into two or more separate periods of active duty. For the purposes of characterization of service or description of separation, the member's status is determined by the date of notification as to the initiation of separation proceedings.
- E. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
- F. Homosexual Act
1. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and
 2. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subsection F.1., above.
- G. Homosexual Conduct. A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.
- H. Member. An enlisted member of a Military Service.
- I. Military Record. An individual's overall performance while a member of a Military Service, including personal conduct and performance of duty.
- J. Propensity. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.
- K. Release from Active Duty. Termination of active duty status and transfer or revision to a Reserve component not on active duty, including transfer to the Individual Ready Reserve (IRR).

L. Respondent. A member of a Military Service who has been notified that action has been initiated to separate the member.

M. Separation. A general term that includes discharge, release from active duty, release from custody and control of the Armed Forces, transfer to the IRR, and similar changes in Active or Reserve status.

N. Separation Authority. An official authorized by the Secretary concerned to take final action with respect to a specified type of separation.

* O. Sexual Orientation. An abstract sexual preference for persons of a *
* particular sex, as distinct from a propensity or intent to engage in *
* sexual acts. *

* P. Statement that a Member Is a Homosexual or Bisexual or Words to That *
* Effect. Language or behavior that a reasonable person would believe was *
* intended to convey the statement that a person engages in, attempts to *
* engage in, or has a propensity or intent to engage in homosexual acts. *