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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON

8 MARGARETHE CAMMERMEYER,)
9)

10 Plaintiff,)

11 v.)

Civil Action No. C92-942Z

12 WILLIAM J. PERRY, Secretary of)
Defense, et al.,)

13 Defendants.)
14

DEFENDANTS' MOTION TO SHORTEN TIME

15 Title of Underlying Motion: Defendants' Motion for a Stay
16 Pending Appeal.

17 Moving Party: Defendants.

18 If Motion to Shorten Time is not granted, underlying motion
19 would be noted for the Court's calendar for: July 1, 1994.

20 Date and time when movant seeks to have Court rule on motion
21 to shorten time: June 16, 1994, at 4 p.m.

22 Date on which movant seeks to have Court consider merits of
23 underlying motion: June 20, 1994.

24 The grounds for this motion to shorten time are set forth in
25 the memorandum of points and authorities submitted herewith.
26
27
28

DEPARTMENT OF JUSTICE
901 E Street, N.W.
Washington, D.C. 20530
(202) 514-4469

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

KATRINA C. PFLAUMER
United States Attorney

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Attorneys for Defendants

OF COUNSEL:
CAPTAIN TARA O. HAWK
Department of the Army
Office of the Judge Advocate
General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

WILLIAM J. PERRY, Secretary of
Defense, et al.,

Defendants.

Civil Action No. C92-942Z

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO SHORTEN TIME

By order dated and filed June 1, 1994, the Court directed Defendants to restore Plaintiff to duty in the Washington National Guard and to take or refrain from taking certain other action. Defendants have appealed the Court's order to the United States Court of Appeals for the Ninth Circuit and have moved this Court for a stay pending appeal. If this were an ordinary case, the stay motion would properly be noted on the motion calendar for July 1, 1994, three Fridays after its filing. However, Plaintiff's restoration to duty is likely to have adverse effects on the ability of the military to maintain morale, efficiency and mission focus. See Mem. P. & A. Supp. Defs.' Mot. Stay Pend'g App. at 2-3. Once Plaintiff is restored to duty, these adverse

1 effects will be irrevocable. So that the military may avoid
2 these adverse effects, Defendants respectfully request that the
3 Court issue an order shortening Plaintiff's time to respond to
4 Defendants' motion for a stay pending appeal and expediting the
5 Court's consideration thereof.

6 Respectfully submitted,

7 FRANK W. HUNGER
8 Assistant Attorney General

9 KATRINA C. PFLAUMER
10 United States Attorney

11 VINCENT M. GARVEY (duy)
12 VINCENT M. GARVEY

13 OF COUNSEL:
14 CAPTAIN TARA O. HAWK
15 Department of the Army
16 Office of the Judge Advocate
17 General

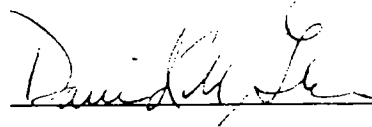
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25 Attorneys for Defendants
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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 1994, a copy of
Defendants' Motion To Shorten Time and of the memorandum of
points and authorities in support thereof was sent by overnight
express to:

Michael Himes, Esq.
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

WILLIAM J. PERRY, Secretary of
Defense, et al.,

Defendants.

Civil Action No. C92-942Z

DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

NOTE ON MOTION CALENDAR: July 1, 1994

Defendants hereby move for a stay of all provisions of the order dated and filed June 1, 1994, until 20 days after the United States Court of Appeals for the Ninth Circuit issues its decision in Meinhold v. United States Department of Defense, No. 93-55242 (9th Cir.), or until 20 days after the Ninth Circuit issues its decision in this case, whichever happens first. The grounds for Defendants' motion are set forth in the memorandum of points and authorities submitted herewith.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

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CAPTAIN TARA O. HAWK
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901 E Street, N.W.
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

WILLIAM J. PERRY, Secretary of
Defense, et al.,

Defendants.

Civil Action No. C92-942Z

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

STATEMENT

In this case, Plaintiff challenges on various grounds the constitutionality of the military's former policy on homosexual conduct. By order dated and filed June 1, 1994, the Court granted summary judgment to Plaintiff on her equal-protection and substantive due process causes of action. Order at 2. For relief, the Court directed Defendants to reinstate Plaintiff "to her former position in the Washington State National Guard" and to take or refrain from taking certain other actions. Id. at 50.

Defendants have appealed the order of the Court to the United States Court of Appeals for the Ninth Circuit. For the following reasons, the Court should stay its order until 20 days

1 after the Ninth Circuit issues its decision in Meinhold v. United
2 States Department of Defense, No. 93-55242 (9th Cir.), another
3 case challenging the constitutionality of the military's former
4 policy on homosexual conduct, or until 20 days after the Ninth
5 Circuit issues its decision in this case, whichever happens
6 first.¹

7 DISCUSSION

8 The standards governing motions for stays pending appeal are
9 set forth in Hilton v. Braunskill, 481 U.S. 770 (1987). As the
10 Court there said:

11 Different Rules of Procedure govern the power of
12 district courts and courts of appeal to stay an order
13 pending appeal. See Fed. Rule Civ. Proc. 62(c); Fed.
14 Rule App. Proc. 8(a). Under both Rules, however, the
15 factors regulating the issuance of a stay are generally
16 the same: (1) whether the stay applicant has made a
17 strong showing that he is likely to succeed on the
18 merits; (2) whether the applicant will be irreparably
19 injured absent a stay; (3) whether issuance of the stay
20 will substantially injure the other parties interested
21 in the proceeding; and (4) where the public interest
22 lies.

23 481 U.S. at 776.

24 In this case, the balance of equities strongly favors the
25 entry of a stay pending appeal or pending a decision in Meinhold.
26 If the recent order of the Court is not stayed, the restoration
27 of Plaintiff to duty will have adverse effects on the Armed
28 Forces beyond the harm to unit cohesion and readiness identified
in Defendants' earlier briefs. The Court's recent order
restrains Defendants from "taking any adverse action against

¹ Meinhold has been fully briefed in the Ninth Circuit.
Oral argument was heard on December 16, 1993.

1 plaintiff * * * on account of statements of her homosexual
2 orientation." Order at 50. By so providing, the order appears
3 to immunize Plaintiff from adverse action based on any new
4 statements that she may make about her homosexuality after she is
5 reinstated. Accordingly, the order frees Plaintiff to disregard
6 a military policy to which all other servicemembers are subject.
7 Such disregard for military policy will not only have a
8 detrimental effect on the cohesion and readiness of Plaintiff's
9 unit but -- in view of the enormous public attention that this
10 case has received and will continue to receive after Plaintiff's
11 reinstatement -- will undermine respect for military authority
12 throughout the Armed Forces. The problems that occur will be
13 exacerbated by the fact that Plaintiff holds the rank of colonel.
14 Disobedience of military regulations by a senior officer
15 substantially harms the Armed Forces, in which complete obedience
16 to orders and regulations is essential to accomplishment of the
17 military mission. See Dorn Decl. ¶ 5.

18 If Plaintiff is restored to duty and the Court's order is
19 then reversed, the military will have been injured unnecessarily
20 and irreparably. To prevent such a result, the Court should stay
21 its recent order until 20 days after the Ninth Circuit issues its
22 decision in this case or -- if the Ninth Circuit decides Meinhold
23 first -- until 20 days after the Ninth Circuit issues its
24 decision in that case.

25 Nor will the entry of such a stay be likely to cause
26 Plaintiff significant harm. Plaintiff was discharged from the
27 Washington Army National Guard in June 1992. At no time in the
28

1 intervening two years has she moved for a preliminary injunction
2 or otherwise claimed that her discharge was causing her
3 irreparable injury. In view of this fact, a stay of her
4 restoration to duty until the Ninth Circuit issues its decision
5 in this case -- or until the Ninth Circuit issues its decision in
6 Meinhold -- is unlikely to cause her serious injury.

7 Furthermore, the court heard oral argument in Meinhold more
8 than five months ago. As a result, the stay Defendants seek is
9 likely to be limited in duration, thereby minimizing any harm
10 that the stay might cause Plaintiff. If, by contrast, Plaintiff
11 is restored to duty and the Ninth Circuit then upholds the former
12 policy of the military on homosexual conduct, Plaintiff will
13 likely be discharged again. The restoration of Plaintiff to duty
14 -- followed by her prompt discharge -- would be disruptive to the
15 military, as well as to Plaintiff.

16 Defendants' likelihood of success on appeal further
17 militates in favor of the entry of a stay pending appeal.
18 Several aspects of the Court's recent order contribute to the
19 likelihood that Defendants will prevail on appeal. First, the
20 order fails to distinguish Ben-Shalom v. Marsh, 881 F.2d 454 (7th
21 Cir. 1989), cert. denied, 494 U.S. 1004 (1990). Instead, the
22 order merely notes that Ben-Shalom relied on Bowers v. Hardwick,
23 478 U.S. 186 (1986), and claims that Pruitt v. Cheney, 963 F.2d
24 1160 (9th Cir.), cert. denied, 113 S. Ct. 655 (1992),
25 distinguished "Bowers and other cases relying on Bowers, as cases
26 'relating to conduct, not orientation.'" Order at 20 (quoting
27 Pruitt, 963 F.2d at 1166 n.5). However, the plaintiff in Ben-
28

1 Shalom was not discharged from the military for engaging in
2 homosexual acts. Instead, like Plaintiff in this case, she was
3 discharged for making statements indicating a propensity to do
4 so. See Ben-Shalom, 881 F.2d at 464. Accordingly, Ben-Shalom is
5 indistinguishable from this case and persuasive authority for
6 reversal of the Court's recent order.

7 A second aspect of the Court's order that renders it
8 vulnerable is its treatment of Heller v. Doe, 113 S. Ct. 2637
9 (1993). As the order recognizes, the former policy of the
10 military on homosexual conduct is supported by the "professional
11 military judgment of this country's military leaders that the
12 presence of homosexuals in the military will adversely affect the
13 morale, good order and discipline of the military." Order at 27.
14 Rejecting the judgment of the country's military leaders, the
15 order deems it critical that Defendants have no "statistics,
16 scientific studies, [or] reports" supporting the policy. Id. at
17 37 n.22. However, Heller makes it clear that the expert opinion
18 and historical experience upon which Defendants rely is more than
19 sufficient to satisfy the rational basis test. As the Court
20 stated in Heller: "A State * * * has no obligation to produce
21 evidence to sustain the rationality of a statutory
22 classification." 113 S. Ct. 2643. As the Court further stated:
23 "'[A] legislative choice is not subject to courtroom factfinding
24 and may be based on rational speculation unsupported by evidence
25 or empirical data.'" Id. (quoting FCC v. Beach Communications,
26 113 S. Ct. 2096, 2098 (1993)) (emphasis supplied). In a case
27 like this one -- one that involves military personnel decisions
28

1 and the readiness of the Nation's armed forces -- the authority
2 that Heller gives to the government to rely on the professional
3 judgment of senior officials is surely at its most expansive.
4 See Rostker v. Goldberg, 453 U.S. 57, 65-66 (1981) ("The
5 complex, subtle, and professional decisions as to the
6 composition, training, and control of a military force are
7 essentially military judgments, subject always to civilian
8 control of the Legislative and Executive Branches'") (quoting
9 Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

10 A third aspect of the Court's recent order that renders it
11 vulnerable on appeal is its conclusion that the former policy of
12 the military is invalid because "its justifications are based on
13 * * * prejudice." Order at 35. Two aspects of this conclusion
14 are particularly problematical. First, the policy does not seek
15 to accommodate irrational prejudice, as was fatal to the zoning
16 ordinance in City of Cleburne v. Cleburne Living Center, 473 U.S.
17 432 (1985). Instead, the sole purpose of the policy is to ensure
18 combat readiness by maintaining good order, discipline and
19 morale. Second, the views of servicemembers about homosexual
20 acts reflect a number of different considerations -- including
21 religious doctrines, moral precepts, ethical values, and privacy
22 concerns -- about an extraordinarily complex issue. Rationality
23 review does not require that military officials attempt to
24 determine the basis for attitudes involving the complex issue of
25 homosexuality. If rational basis review and deference to the
26 military mean anything, it is that the Armed Forces must be
27 allowed sufficient latitude to deal with practical problems that

1 may arise due to the attitudes of servicemembers that affect
2 military preparedness, unit cohesion, discipline, and morale.

3 Nor is it improper for the military to rely on a rebuttable
4 presumption that servicemembers who declare themselves to be
5 homosexuals engage in or are likely to engage in homosexual acts.
6 See order at 24. If the presumption is incorrect in a particular
7 case, it may be rebutted without adverse effect to the military
8 careers of the servicemembers in question. In this case, of
9 course, the fact that Plaintiff refused to answer when asked at
10 her administrative hearing whether she had ever engaged in
11 homosexual acts renders problematical any efforts on her part to
12 rebut the presumption. See Pl.'s Summarized Test. (Glass Decl.
13 (Feb. 2, 1994) ex. N) at 3; Baxter v. Palmigiano, 425 U.S. 308,
14 318 (1976) ("[T]he Fifth Amendment does not forbid adverse
15 inferences against parties to civil actions when they refuse to
16 testify in response to probative evidence offered against them").
17 Equally important, the fact that Plaintiff refused to answer when
18 asked whether she had engaged in homosexual acts supports the
19 rationality of the military's presumption that a person who
20 states that she is a homosexual engages in or is likely to engage
21 in homosexual acts. Defendants therefore are likely to prevail
22 on appeal and the entry of a stay pending appeal is appropriate.

1 CONCLUSION

2 For the foregoing reasons, Defendants' motion for a stay
3 pending appeal should be granted.²

4 Respectfully submitted,

5 FRANK W. HUNGER
6 Assistant Attorney General

7 KATRINA C. PFLAUMER
8 United States Attorney

9 VINCENT M. GARVEY / day
10 VINCENT M. GARVEY

11 OF COUNSEL:
12 CAPTAIN TARA O. HAWK
13 Department of the Army
14 Office of the Judge Advocate
15 General

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23 Attorneys for Defendants

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29 ² In addition to directing that Plaintiff be restored to
30 duty, the Court's recent order directs Defendants to "expunge all
31 record of plaintiff's sexual orientation and her statements, if
32 any, regarding same from any and all records in defendants'
33 possession." Order at 50. By its very nature, any expunction of
34 records is irrevocable. Accordingly, if Defendants conduct the
35 expunction of records that Court has ordered and then prevail on
36 appeal, they will have suffered irreparable injury.

37 To solve this problem, Defendants have proposed to Plaintiff
38 that any material subject to expunction under the Court's order
39 be removed from the files and held by Defendants' undersigned
40 counsel or a mutually-acceptable third party until Defendants'
41 appeal in this case has been adjudicated. Plaintiff has agreed
42 to consider the idea. If Defendants' motion for a stay pending
43 appeal is not granted -- and if the parties cannot reach
44 agreement on the expunction-of-records issue -- Defendants
45 reserve the right to seek appropriate relief from the Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

WILLIAM J. PERRY, Secretary of
Defense, et al.,

Defendants.

Civil Action No. C92-942Z

ORDER

Upon Defendants' Motion for a Stay Pending Appeal, the materials submitted in support thereof and in opposition thereto, and good cause having been shown, it is hereby ordered as follows:

1. Defendants' aforesaid motion is hereby granted.

2. All provisions of the order of the Court dated and filed June 1, 1994, are hereby stayed until 20 days after the United States Court of Appeals for the Ninth Circuit issues its decision in Meinhold v. United States Department of Defense, No. 93-55242 (9th Cir.), or its decision in this case, whichever happens first.

Dated this ____ day of _____ 1994.

UNITED STATES DISTRICT JUDGE

DEPARTMENT OF JUSTICE
901 E Street, N.W.
Washington, D.C. 20530
(202) 514-4469

1 PRESENTED BY:

2 FRANK W. HUNGER
Assistant Attorney General

3 KATRINA C. PFLAUMER
4 United States Attorney

5 VINCENT M. GARVEY *idg*
6 VINCENT M. GARVEY

7 David M. Glass
8 DAVID M. GLASS
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11 Attorneys for Defendants
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DEPARTMENT OF JUSTICE
901 E Street, N.W.
Washington, D.C. 20530
(202) 514-4469

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 1994, a copy of
Defendants' Motion for a Stay Pending Appeal, the memorandum of
points and authorities in support thereof and the Declaration of
Edwin Dorn was sent by overnight express to:

Michael Himes, Esq.
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099

David M. Lu

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

MARGARETHE CAMMERMEYER

Plaintiff

v.

**WILLIAM J. PERRY, Secretary of
Defense, et al.,**

Defendants

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)
)

Civil Action No. C92-942Z

DECLARATION

I, Edwin Dorn, make the following declaration in accordance with 28 U.S.C. § 1746. I am aware that this declaration may be filed in the above-captioned case and that it is the legal equivalent of a statement under oath.

1. I am the Under Secretary of Defense for Personnel and Readiness. In that capacity, I am responsible for all matters involving civilian and military personnel policy (Active and Reserve); health policies, programs, and activities; development of programs and procedures for the detection of drug and alcohol dependency; civilian and military equal opportunity programs; family policy and support; and mobilization planning and requirements, including coordination of Department of Defense efforts for mobilization of conventional forces. Among the duties of both my current position and my previous position as Assistant Secretary of Defense (Personnel and Readiness), are the development and implementation of the Department of Defense's policy on homosexual conduct in the Armed Forces.

2. Department of Defense policy on homosexual conduct is clear and unambiguous.

Homosexual conduct is grounds for separation from the military Services. The policy is based on the unique nature of the mission of the Armed Forces, and the special demands, without parallel in civilian society, that this mission places on military personnel. The military's homosexual conduct policy is expressed in Department of Defense Directives 1332.14 and 1332.30 as follows:

Homosexual conduct is grounds for separation from the Military Services ... Homosexual conduct includes homosexual acts, statements by a servicemember that demonstrate 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.

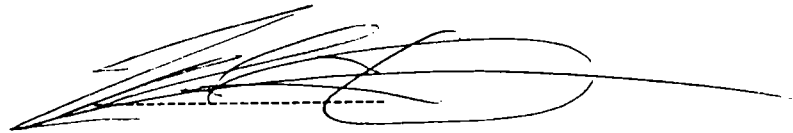
3. The presence in the military of those who violate this policy has a direct, adverse impact on morale, good order, discipline, and unit cohesion. To my knowledge, this view is shared by the majority of military personnel as a product of their own experience, practical knowledge, and considered judgment. The effectiveness of military units critically depends on the existence of supportive interpersonal relationships and small group cohesion. Homosexual conduct in the Armed Forces adversely affects the ability of military leaders to sustain these relationships and instill vital unit cohesion. It is the considered judgment of most military leaders that, because it conflicts with the value systems of many Armed Forces personnel, homosexual conduct polarizes units and undermines the ability of a unit to sustain high morale and maintain effective rank and command.

4. The adverse impact on morale, good order, discipline, and unit cohesion when the homosexual conduct policy is not adhered to increases significantly in cases where the member involved is a senior leader in the Armed Forces. While all military members are expected to comply with Department of Defense policies, a traditional prerequisite for appointment as a senior leader in the Armed Forces is the ability to comply with and enforce all policies. When a leader does not meet this standard, the leader loses the necessary respect and trust of subordinates and peers.

5. Reinstatement of Colonel Cammermeyer would directly conflict with one of our most important leadership standards and have an immediate and irreparable adverse impact well beyond her unit. Her prior statements of her homosexual orientation and the Court's order permitting future public statements are totally at odds with Department of Defense and Army policy. Permitting open defiance of the rules by a senior officer substantially harms the military establishment in which complete obedience to orders and regulations is required as an essential ingredient to mission accomplishment. Subordinates cannot be expected to follow a leader who is unable to lead by example. Accordingly, it is reasonable to expect that the plaintiff's open disobedience of the policy on homosexual conduct may encourage other military members throughout the Armed Forces to violate that policy, or other policies which they do not individually believe should apply to them. Additionally, in light of the widespread publicity accompanying this case, the deleterious effect is greatly magnified both within and outside her unit. In looking at this effect, it is important to consider that Colonel Cammermeyer's unit is part of the National Guard of the United States and, as such, is, at any time, subject to Federal service anywhere in the world, possibly as an integral part of a larger force composed of regular and reserve elements from all of the Armed Forces. Therefore, the morale, good order, discipline, and unit cohesion of any unit to which she were assigned would likely be adversely affected.

6. For the foregoing reasons, it is my considered judgment that reinstatement of Colonel Cammermeyer would cause immediate and irreparable harm to morale, good order, discipline, and unit cohesion in the Armed Forces.

7. I hereby declare under the penalty of perjury that the foregoing is true and correct. Executed on 7 June, 1994 at Arlington, Virginia.

A handwritten signature in black ink, appearing to read 'EDWIN DORN', written over a horizontal dashed line.

EDWIN DORN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

WILLIAM J. PERRY, Secretary of
Defense, TOGO D. WEST, JR.,
Secretary of the Army, and the
UNITED STATES,

Defendants.¹

Civil Action No. C92-942Z

NOTICE OF APPEAL

Defendants hereby appeal to the United States Court of
Appeals for the Ninth Circuit from the order dated and filed June
1, 1994.

¹ In the order from which Defendants appeal, the Court noted that William J. Perry, the current Secretary of Defense, "has not yet been formally substituted as a named defendant." Order at 1 n.1. However, formal substitution is unnecessary. In cases where a public officer who has been sued in his or her official capacity resigns or otherwise ceases to hold office, the official's successor "is automatically named as a party" and the failure of the court to enter an order of substitution does not effect the substitution. Fed. R. Civ. P. 25(d)(1).

In view of the foregoing, Secretary Perry is properly named in this notice as a Defendant herein, as is Togo D. West, Jr., the current Secretary of the Army.

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Respectfully submitted,

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Assistant Attorney General

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Attorneys for Defendants

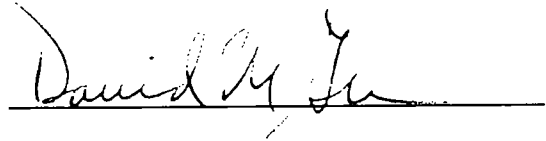
OF COUNSEL:
CAPTAIN TARA O. HAWK
Department of the Army
Office of the Judge Advocate
General

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 1994, a copy of the
within Notice of Appeal was sent by overnight express to:

Michael Himes, Esq.
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099



Gay - in the military Cammermeyer

FILED ENTERED
LODGED RECEIVED

JUN 01 1994

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGARETHE CAMMERMEYER,
Plaintiff,

NO. C92-9422

v.

ORDER

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

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

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

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

5 The parties have now filed cross-motions for summary
6 judgment. Plaintiff moves for summary judgment on her equal
7 protection claim (docket no. 50). Defendants move for
8 judgment on the pleadings or, in the alternative, summary
9 judgment on all of plaintiff's claims (docket no. 59). The
10 Court heard oral argument on these cross-motions on April 20,
11 1994, and took the matter under advisement. The Court has
12 reviewed all of the materials submitted by the parties and now
13 GRANTS plaintiff's motion for summary judgment as to her equal
14 protection and substantive due process claims under the Fifth
15 Amendment, and GRANTS defendants' motion for summary judgment
16 as to the remainder of plaintiff's claims.

17 I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

9 II. DISCUSSION

10 A. Summary Judgment Standard

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

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

11 **B. Equal Protection Challenge**

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

16 **1. Equal Protection Standard**

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

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

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

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

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

13 2. Rational Basis Review

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

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

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

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

1 a. Deference to the Military

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

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

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

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

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

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

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

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

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

22 b. Scope of Rational Basis Review

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Id. at 284.

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

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

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

20 Id. at 1327.

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

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

⁹ Dahl is currently on appeal.

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

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

17 (c) Orientation v. Conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Korb. Decl., ¶ 5.

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

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

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

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

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

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

20 The regulation, at 32 C.F.R. Part 41.13, provides that
21 homosexuality is incompatible with military service. The
22 regulation provides that the presence of homosexuals in the
23 military environment: (1) seriously impairs the accomplishment
24 of the military mission; (2) adversely affects the ability of
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26 _____
acts. 46 Fed. Reg. 9571, 9578 (January 29, 1981).

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

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

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

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

21
22
23 ¹⁷ The Court may consider relevant factfinding by
24 Congress as evidence in determining whether the Army's
25 regulations possess a rational basis. See generally EEOC v.
26 Boeing Co., 843 F.2d 1213, 1217 (9th Cir.), cert. denied, 488
U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 212 (1988). Both parties
rely on the Congressional findings in the new policy, and
neither party has filed a formal objection to the other
party's use of this factfinding as evidence.

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

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

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

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

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

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

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

16 The Government's evidence offers justifications for the
17 policy of excluding homosexuals from military service. Under
18 Heller, 125 L.Ed.2d at 271, the burden is on the plaintiff "to
19 negative every conceivable basis which might support" the
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21
22 recommending to the President a new policy on homosexuals in
23 the military that would "compl[y] with the President's
24 direction to end discrimination while maintaining high
standards of combat effectiveness and unit cohesion." See
Memorandum for the Secretary of Defense, Attached to MWG
Report, Otjen Dep., at Ex. 10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 (6) Recruitment and Retention of Military Personnel.

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

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

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

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

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

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

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

26 ²⁰ Defendants would appear to concede this, as the new
"don't ask, don't tell" policy, as codified in 10 U.S.C. §
654(a), d not include this rationale.

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

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

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

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

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

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

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

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

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

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

6 Defendants' argument that the Army regulation banning
7 homosexuals from service is based on rational, nonprejudicial
8 reasons is unpersuasive. Defendants' military experts have
9 conceded that their justifications for the policy are based on
10 heterosexual servicemembers' fear and dislike of homosexuals.
11 Mere negative attitudes, or fear, are constitutionally
12 impermissible bases for discriminatory governmental policies.
13 Cleburne, 473 U.S. at 448, 87 L.Ed.2d at 326. Unsubstantiated
14 presumptions concerning a particular group also constitute
15 prejudice and cannot serve as the rational basis for a
16 discriminatory governmental policy. Thus, to the extent the
17 Government's policy is based on the unfounded presumption that
18 servicemembers with a homosexual orientation will engage in
19 proscribed homosexual conduct,²³ the policy is not rationally
20 based. This Court cannot defer to military decisions based
21 solely on prejudice against a particular group. Id. The
22 defendants have not submitted any evidence that supports any
23 other basis for the policy.
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²³ This Court has already concluded that the Government's presumption has no foundation in law or fact.

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

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

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

19 **B. Substantive Due Process Claim**

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

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

7 **1. Standard of Review**

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

1 Plaintiff's challenge to Army Regulation 135-175 is based on
2 the substantive component of the due process clause.

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

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

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

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

3 **3. Due Process Analysis**

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

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

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

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

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

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

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

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

19 The Court holds that plaintiff's Fifth Amendment
20 substantive due process rights were violated by her discharge
21

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

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

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

8 C. First Amendment Claim

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

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

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

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

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

D. Other Claims

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

E. Conclusion

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

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

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

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

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

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

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

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

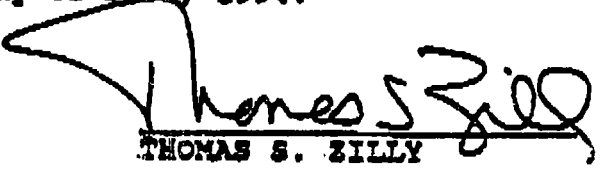
13 g. Costs of suit.

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

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

18 IT IS SO ORDERED.

19
20 DATED this 1st day of June, 1994.

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

THE WHITE HOUSE
WASHINGTON

bag-in-the-
mily

June 9, 1994

MEMORANDUM FOR GEORGE STEPHANOPOULOS

CC: ALEXIS HERMAN
CLIFF SLOAN

FROM: KEITH BOYKIN *KB*
PAUL RICHARD *PR*

RE: CAMMERMEYER APPEAL DECISION

The Justice Department has apparently decided to appeal the Cammermeyer decision. We think this would be a terrible mistake.

Cammermeyer, you will recall, is the distinguished former head nurse of the Washington State Army National Guard and recipient of the Bronze Star award for her service in Vietnam. During a routine security investigation in 1989, she was asked if she was homosexual. She answered honestly that she is, and because of her response she was discharged from the military under the old policy banning homosexuals. On June 1 of this year, U.S. District Court Judge Thomas Zilly in Seattle ordered Cammermeyer re-instated in the military.

To appeal this case would be worse than appealing the Steffan case that caused so much debate in the Administration. We list below five reasons why an appeal would be the wrong decision. First, President Clinton has been personally involved in this case, to the point that he even called Cammermeyer during the presidential campaign to commiserate. US News & World Report reported that Clinton said at the time, "It's outrageous and unbelievable what happened to her." Of all the possible gays in the military cases, Bill Clinton singled this one out.

Second, Cammermeyer is more distinguished than Steffan, having served for 26 years and having receiving a medal for service, whereas Steffan's achievement came due to his academy performance. Cammermeyer is also a colonel in the military, which would make her the highest ranking, high-profile officer ever to be discharged by the government for homosexuality.

Third, unlike Steffan, there is no question about whether Cammermeyer engaged in any proscribed conduct. She did nothing but answer a question she was required to answer for a security interview.

In fact, Cammermeyer is a poster child against the old policy. She is not an activist by nature and has described herself as a member of the "silent, middle-class majority" that "didn't realize there was such a thing as social causes." Her case has already garnered so much media attention that Barbara Streisand and Glenn Close have teamed up as executive producers for an NBC movie this fall based on the true story of Col. Cammermeyer. If the Clinton Administration fails even to protect Greta Cammermeyer, then who will it protect?

Fourth, Cammermeyer would still be permitted to serve if this case arose under the current policy, for three reasons. First, Cammermeyer never voluntarily disclosed her sexual orientation until she was compelled to do so. The new policy would have prohibited the military from asking about her sexual orientation. Second, even if she had been asked, Cammermeyer would not have been required to answer any questions about her sexual orientation. Third, any information obtained from security clearance interviews could not be used against Cammermeyer. According to the Defense Department's own regulations, "the new policy makes clear that information about homosexual orientation or conduct obtained during a security clearance investigation will not be used by the Military Department in separation proceedings."

Fifth, coming a week before hundreds of thousands of gays and lesbians converge on New York for the observance of Stonewall 25, the timing of this decision has the potential to destroy the credibility the Administration has already built up on gay and lesbian issues.

For these reasons, we think an appeal of the Cammermeyer decision would have disastrous consequences.



GEORGETOWN UNIVERSITY LAW CENTER

Federal Legislation Clinic

Judith C. Areen
DeanChai R. Feldblum
Associate Professor of Law
Director
R. Scott Foster
Teaching FellowFederal Legislation Clinic
111 F Street, N.W.
Washington, DC 20001
Telefax No.: 202-662-9682

Gays - In -

The -

Military

TELEFAX COVER MEMORANDUM

DATE:

6-13-94

NUMBER OF PAGES, INCLUDING THIS SHEET:

4

TO:

Cliff Sloan

Country:

Fax Number:

456-1647

FROM:

Chai Feldblum

of:

If this document is illegible or incomplete, please call:
(202) 662-9595

COMMENT:

Ah, the joys of the military cases. Here's
my memo on the latest set of them. What I
really want to talk to you about is: (1) Pt. #4 of
this memo; and (2) the ballot initiative cases. Can
we get together sometime soon? Thx!

*GEORGETOWN UNIVERSITY LAW CENTER**Federal Legislation Clinic*

Judith C. Areen
Dean

Chai R. Feldblum
Associate Professor of Law
Director

R. Scott Foster
Teaching Fellow

TO: George Stephanopolous
FROM: Chai Feldblum
DATE: June 13, 1994
RE: Cammemeyer case etc.

Attached is a copy of the memo I sent this morning to Mark Levy and John Rogovan at DOJ.

The four main points are:

1. Try to explore a creative way to appeal only part of the Cammemeyer decision -- so you reach a result analogous to the one reached in Steffan. (I'm not sure this is possible while still meeting everyone's needs.)

2. If it is not possible to avoid an appeal on the merits, at a minimum, do not ask for a stay of the Cammemeyer ruling.

3. At all costs, do not appeal the latest **injunction** in the Able case. Unlike appealing Cammemeyer (where the 9th Circuit already has Meinhold before it), appealing the injunction in Able would bring a new circuit court, the 2nd Circuit, into the picture. It is also unnecessary to appeal this injunction which applies only to 6 people.

4. Tell DOJ you would like them to make a concerted effort to reduce offensive comments about gay people in their briefs in these cases -- although, obviously, consistent with their need to defend the policy.

*GEORGETOWN UNIVERSITY LAW CENTER**Federal Legislation Clinic*

Judith C. Areen
Dean

Chai R. Feldblum
Associate Professor of Law
Director

R. Scott Foster
Teaching Fellow

TO: Mark Levy
John Rogovan

FROM: Chai Feldblum

DATE: June 10, 1994

RE: Gays in the Military Cases

This memo is a follow-up to my conversation with Mark earlier this week and lays out some of the basic points I made on that call.

1) I don't think you should appeal the constitutional issue in the case -- just as you did not appeal the constitutional issue in Steffan. A lot of time and energy went into DOJ's final decision not to appeal Steffan in its entirety. At the very least, you should explore whether there are creative ways to appeal only part of the Cammemeyer decision, arriving at a result analogous to the one reached in Steffan. I understand you don't have the easy "out" of a commission, as you did in Steffan -- but perhaps there's something else that can be appealed. (I'm not sure I know what that is, though.)

2) Regardless of what you do on the merits of the case, you certainly should not ask for a **stay** of Cammemeyer's reinstatement. I'm sure DOD wants that -- but they're getting a lot already with the appeal. They do not need the stay. (To be honest, I think if you ask for a stay, the press will make you look incredibly mean-spirited.) Allowing Greta to go back in while her case is pending will not undermine the entire military structure nor will it undermine your case. You should not ask for a stay.

3) I feel **really** strongly about DOJ not appealing the **latest injunction in Able** (the new policy case). I understand why you feel the need to appeal Cammemeyer as a way of upholding your "deal" -- even though I feel you could perhaps be more creative in how you approach that deal. But there is no reason, based on any "deal" or based on any vigorous defense of the new policy -- for you to appeal an injunction that simply protects six people from discharge while their case is proceeding. I know both you and Jamie mentioned the concern that letting the injunction stand could mean that other servicemembers would make out-of-court statements that they were gay and then file suit -- and then you couldn't discharge

those people. But that is so speculative. This is exactly where you should have some legitimate leeway with DOD to say: "Fine, if that happens, we'll deal with that then. But let's not appeal the Able injunction to foreclose something that may not even happen." There is no good reason for you to take the Able injunction up to the Second Circuit -- bringing yet one more circuit court into the picture. It seems like poor politics -- without any good legal reason.

4) I continue to believe there are ways you could reframe your arguments in these briefs so they sound less offensive about, and to, gay people. This is something we should probably discuss during a meeting -- if you are amenable to that.

Cheers.

P.S. I can't wait till I'm on the same side of a case with you guys ...

No. 94-35600

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGARETHE CAMMERMEYER,

Plaintiff-Appellee,

v.

WILLIAM J. PERRY, Secretary of
Defense, TOGO D. WEST, JR.,
Secretary of the Army, and the
UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
CIVIL ACTION NO. C92-942

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR STAY OF INJUNCTION PENDING APPEAL
OR UNTIL 20 DAYS AFTER DISPOSITION OF THE APPEALS IN
MEINHOLD V. DEPARTMENT OF DEFENSE, AND FOR A STAY OF BRIEFING

OF COUNSEL:
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Department of the Army
Office of the Judge Advocate
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Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

No. 94-35600

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGARETHE CAMMERMEYER,

Plaintiff-Appellee,

v.

WILLIAM J. PERRY, Secretary of
Defense, TOGO D. WEST, JR.,
Secretary of the Army, and the
UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
CIVIL ACTION NO. C92-942

CIRCUIT RULE 27-3 CERTIFICATE

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

Defendants-Appellants,
William J. Perry, Secretary
of Defense, Togo D. West, Jr.
Secretary of the Army, and the
United States

Robert V. Zener
(202) 514-1597
Edward Himmelfarb
(202) 514-3547
Civil Division
Appellate Staff, Rm. 3617
Department of Justice
10th & Penn. Ave., N.W.
Washington, D.C. 20530

Plaintiff-Appellee,
Margarethe Cammermeyer

Mary Newcombe
(213) 629-9040
Hedges & Caldwell
606 South Olive Street
Suite 500
Los Angeles, CA 90014

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

On June 11, 1992, Col. Margarethe Cammermeyer was separated from the Army National Guard and Army Reserve under the military's former policy on homosexuality. That same day, she brought this action to declare the former policy invalid and enjoin her discharge. (Attachment A, Complaint.) She did not, however, seek preliminary relief; nor did she seek reinstatement on an interim basis at any time during the two years that the litigation proceeded in the district court. On June 1, 1994, the district court granted summary judgment in her favor, holding that the former policy violated her equal protection and substantive due process rights. (Attachment B, Order.) The court ordered that she be reinstated and barred the defendants from taking any action against her based on her homosexual status or statements of homosexual orientation. Id., Slip op. 50-51. On June 13, 1994, the defendants filed a notice of appeal (Attachment C) and filed a motion in the district court seeking a stay of the court's order. The district court denied the government's motion for a stay on Friday, June 24, 1994 (Attachment D, Order denying stay), and we were notified of the denial of the stay on Monday, June 27, 1994.

Our present motion for a stay seeks merely to preserve the status quo pending this Court's decision in Meinhold v. Department of Defense, Nos. 93-55242, 93-56354 (9th Cir.) (argued Dec. 16, 1993), which, like this case, involves a challenge to the

constitutionality of the military's former policy. The requested stay will not cause any irreparable injury to Col. Cammermeyer, who has been out of the National Guard for the last two years and never sought preliminary relief returning her to service while the case was being adjudicated. By contrast, failure to stay the district court's order will risk a serious and disruptive impact on the military by placing in a position of senior leadership an officer who has not occupied that position for two years, and who may then have to be replaced if the government prevails in Meinhold.

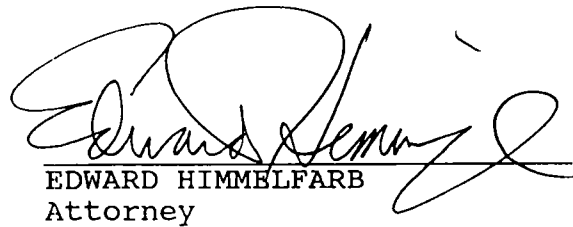
Moreover, as we demonstrate in our motion, there are serious questions about the correctness of the district court's decision. First, the court misapplied the "rational basis" test governing equal protection review by engaging in its own de novo assessment of the evidence. Second, it insisted, contrary to the record and common sense, that it is "irrational" even to presume, subject to a contrary showing by the officer, that an officer who identifies herself as a homosexual has a desire or propensity to engage in proscribed homosexual acts. Finally, it rejected the considered judgment of the nation's military leaders, including General Colin Powell, concerning the complex and difficult issue of the relationship of homosexuality to military needs -- a judgment that Congress has now ratified.

An emergency exists because a decision on reinstatement is needed no later than Thursday, July 7, 1994, in view of the lead time that would be needed for reinstatement of Col. Cammermeyer

by her next scheduled weekend of duty on Saturday to Sunday, July 9-10, 1994.

3. Counsel for Col. Cammermeyer (Mary Newcombe) was notified of this motion by telephone. As reflected in the certificate of service for this motion, service was effected by fax and overnight mail.

4. All grounds advanced for a stay of the district court's injunction in this motion were advanced in, and rejected by, the district court.



EDWARD HIMMELFARB
Attorney

No. 94-35600

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGARETHE CAMMERMEYER,

Plaintiff-Appellee,

v.

WILLIAM J. PERRY, Secretary of
Defense, TOGO D. WEST, JR.,
Secretary of the Army, and the
UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
CIVIL ACTION NO. C92-942

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR STAY OF INJUNCTION PENDING APPEAL
OR UNTIL 20 DAYS AFTER DISPOSITION OF THE APPEALS IN
MEINHOLD V. DEPARTMENT OF DEFENSE, AND FOR A STAY OF BRIEFING

Defendants-Appellants, the Secretary of Defense, et al.,
move for a stay of the district court's injunction of June 1,
1994, pending appeal or until 20 days after disposition of the
appeals pending in this Court in Meinhold v. Department of
Defense, Nos. 93-55242, 93-56354 (argued Dec. 16, 1993). Defen-
dants-Appellants also move for a stay of any briefing schedule in
the present appeal until disposition of the appeals in Meinhold.

At issue in this case and in Meinhold is the constitutional-

ity of the military's former policy regarding service by homosexuals.¹ On June 11, 1992, Col. Margarethe Cammermeyer was separated from the Washington Army National Guard under the old policy. That same day, she brought this action to declare the old policy invalid and enjoin her discharge. She did not, however, seek preliminary relief. (The military's action did not affect her civilian job.) Nor did she seek reinstatement on an interim basis at any time during the two years that the litigation proceeded in the district court. Thus, at the time the district court issued its order on June 1, 1994, declaring the old policy unconstitutional and directing Col. Cammermeyer's reinstatement, the status quo was that she had been out of the Washington Army National Guard for two years.

In order to preserve the status quo and to prevent a reinstatement that may be only temporary, this Court should stay the district court's order until the underlying legal issues are resolved. This Court heard argument in Meinhold on December 16, 1993, and thus the case has been under submission to the Court for more than six months. The same issues are also before the D.C. Circuit in banc in Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993) (panel decision), 8 F.3d 70 (D.C. Cir. 1994) (order grant-

¹ On November 30, 1993, new legislation was enacted concerning homosexuality in the Armed Forces. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1670, codified as 10 U.S.C. § 654. The Department of Defense promulgated new regulations on December 22, 1993, which became effective February 28, 1994. DoD Directive 1332.14 and 1332.30. The military's "new policy" is not at issue in this case or in Meinhold. The differences between the new and old policies are described in note 7, infra.

ing rehearing in banc and vacating judgment) (argued in banc May 11, 1994). Absent a brief stay, Col. Cammermeyer will be reinstated to a position of senior leadership that she herself did not seek to regain during the two-year pendency of this litigation, only to be separated again if the constitutional issues are decided favorably to the government in Meinhold.²

Until there is a final appellate resolution of the serious legal issues involved in this case, this Court should preserve the status quo. The status quo does not impose irreparable injury on Col. Cammermeyer, while a possibly short-lived reinstatement would be disruptive to the military. The seriousness of the issues and the balance of hardships weigh in favor of a stay preserving the status quo.

STATEMENT

1. Col. Cammermeyer was discharged under the military's old policy regarding service by homosexuals. The former policy was directed to service members "who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct." DOD Directive 1332.14 ¶ H(1)(a). In particular, the policy provided for the separation of any member who has (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts"; (2) "married or

² We respectfully suggest that since the issues in this case are also presented in Meinhold, this motion for a stay should be considered by the same panel that is considering Meinhold (Judges Rymer, Skopil and Thompson). In addition, for the convenience of the Court, we are filing herewith a motion to lodge copies of the briefs of all parties filed in Meinhold.

attempted to marry a person known to be of the same biological sex"; or, as relevant here, (3) "stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual." DOD Dir. 1332.14 pt. 1, ¶ H(1)(c)(1), (2) (Jan. 28, 1982), published at 32 C.F.R. pt. 41, app. A (enlisted personnel); DOD Dir. 1332.30 encl. 2, ¶ B(4)(a), (b) (Feb. 12, 1986) (officers); Army Regulation AR 135-175. A "[h]omosexual" is defined as a person who "engages in, desires to engage in, or intends to engage in homosexual acts" Id. H(1)(b)(1). Under the policy, therefore, separation is prescribed for any person who, inter alia, "state[s] that . . . [he or she] is a homosexual" and thus "demonstrate[s] a propensity to engage in homosexual conduct," "unless there is a further finding" that he or she does not "engage[] in, desire[] to engage in, or intend[] to engage in homosexual acts." DOD Directive 1332.30 encl. 1, ¶ 7, encl. 2 ¶ B(4)(a), (b). Thus, a person's statement of homosexuality gives rise to a presumption that he or she engages in or is likely to engage in homosexual acts ("propensity"), but he or she can rebut the presumption and hence remain in the service by showing that he or she does not and is not likely to engage in such acts.

The rationale of the former policy was that service in the military by persons who engage in or demonstrate a propensity to engage in homosexual acts "seriously impairs the accomplishment of the military mission," DOD Directive 1332.14 ¶ H(1)(a), and "adversely affects the ability of the armed forces to maintain

discipline, good order, and morale." Army Regulation AR 135-75, § 2-37(a). Similarly, the former policy was designed "to foster mutual trust and confidence among servicemembers" and "to ensure the integrity of the system of rank and command." Army Regulation AR 135-75, § 2-37(a). In addition, the policy served to "facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy," and to facilitate recruitment and maintain the public acceptability of military service. Ibid.

2. In February 1988, Col. Cammermeyer joined the Washington Army National Guard with the rank of colonel, having previously served in the Regular Army and Army Reserve.³ In early 1989, Col. Cammermeyer applied for a top-secret security clearance. In the course of the security investigation, Col. Cammermeyer executed a signed, sworn statement in which she said: "I am a Lesbian. Lesbianism is an orientation I have, emotional in nature, towards women. It does not imply sexual activity." Slip op. 5 n.4.

As a result of this statement, a board was convened in April 1991 to determine Col. Cammermeyer's "suitability for continued Federal recognition."⁴ On July 14 and 15, 1991, the board con-

³ The complaint and the district court's opinion are apparently in error in stating that she joined the National Guard in 1986 rather than 1988. Glass Decl., February 2, 1994, Exh. F.

⁴ An officer of a State National Guard must also be an officer of the National Guard of the United States. 32 U.S.C. § 101(4), (5). Officers of the Army National Guard of the United States must be federally recognized. 10 U.S.C. § 591(a).

(continued...)

ducted a hearing, at which Col. Cammermeyer confirmed that she is a homosexual but invoked her right against self-incrimination when asked whether she had ever engaged in homosexual acts. At the end of the hearing, the board found that Col. Cammermeyer was a homosexual as defined in the former policy, and recommended that her federal recognition be withdrawn. After a final decision of the Adjutant General, Col. Cammermeyer was separated effective June 11, 1992.

3. On the same day that her separation became effective, Col. Cammermeyer commenced this action, challenging the constitutionality of her discharge. She did not, however, seek preliminary relief, and thus has remained out of the National Guard for the past two years.

On June 1, 1994, the district court granted summary judgment to Col. Cammermeyer on her equal protection and substantive due process claims. The court recognized that, in the military context, "classifications based on homosexuality are entitled only to rational basis review." Slip op. 9, citing High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990). The court also recognized the parties' acknowledgement that it was rational for the government to "exclude individuals from military service on the basis of homosexual conduct." Slip op. 19.

⁴(...continued)

"Federal recognition" is acknowledgment by the Federal Government that an officer meets federal standards. National Guard Regulation NGR 600-100 ¶ 1-3b.

Nevertheless, the court concluded that the former policy did not satisfy the rational basis test. The court rejected the government's argument that under Heller v. Doe, 113 S. Ct. 2637, 2642, 2643 (1993), the policy was valid because it was supported by a "reasonably conceivable state of facts" and that "evidence or empirical data" was not needed. Rather, the court read this Court's decision in Pruitt v. Cheney, 963 F.2d 1160 (9th Cir.), cert. denied, 113 S. Ct. 655 (1992), to require it to "review the entire record," including evidence submitted by both parties, to "determine whether the proffered bases for the Government's policy are rational or motivated solely by prejudice against homosexuals." Slip op. 29. Accepting the evidence introduced by plaintiffs, the court concluded that "plaintiff's acknowledgment of her lesbian orientation itself is not reliable evidence of her desire or propensity to engage in homosexual conduct." Slip op. 24. Finally, having rejected the rational bases for the policy advanced by the government, the court concluded that the military's judgment -- recently confirmed by Congress in legislative findings supporting the new legislation -- was based on "prejudice" rather than "empirical proof" and "scientific evidence," and thus was a violation of equal protection under City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), and Palmore v. Sidoti, 466 U.S. 429 (1984). Slip op. 26-27, 30-42.

Accordingly, the court entered an order that Col. Cammermeyer be reinstated and that the defendants be enjoined from taking any action against her based on her homosexual status or

statements of homosexual orientation. Slip op. 50-51. On June 24, 1994, the district court denied the government's motion for a stay pending appeal.⁵

ARGUMENT

I. THIS COURT SHOULD STAY THE INJUNCTIVE ORDER PENDING APPEAL OR UNTIL 20 DAYS FOLLOWING DISPOSITION OF THE APPEALS IN MEINHOLD V. DEPARTMENT OF DEFENSE.

To obtain a stay, a party must show "either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in its favor." Briggs v. Sullivan, 886 F.2d 1132, 1143 (9th Cir. 1989); Beltran v. Meyers, 677 F.2d 1317, 1320 (9th Cir. 1982). A consideration of the merits and the balance of hardships compels the conclusion that a stay preserving the status quo is warranted here.

The balance of hardships decisively favors a stay. Preservation of the status quo pending resolution of the validity of the old policy will not cause any irreparable injury to Col. Cammermeyer, who has been out of the National Guard for the last two

⁵ In its order denying the government's motion for a stay, the district court "clarified" its prior order by limiting it to adverse action against Col. Cammermeyer based on "statements concerning her homosexual orientation made prior to the date she is reinstated to her former position in the Washington State National Guard." Order of June 24, 1994 at 2.

The district court's order of June 1, 1994 also ordered defendants to expunge all its records of reference to plaintiff's sexual orientation and her statements concerning it. In its order of June 24, 1994, pursuant to the parties' agreement, the district court directed defendants to deposit such records with the court or an agreed-upon third party pending final resolution of the case.

years and never sought preliminary relief returning her to service pendente lite. By contrast, failure to stay the district court's order will risk a serious and disruptive impact on the military by placing in a position of senior leadership an officer who has not occupied that position for two years, and who may then occupy the position on only a temporary basis. In addition, particularly in view of Col Cammermeyer's status as a senior officer, her reinstatement would impair unit cohesion, discipline and morale. To avoid what may prove to be unnecessary disruption and adverse effects on the armed forces, a stay at least pending the decision in Meinhold is warranted.

Moreover, there are, at the very least, serious questions about the correctness of the district court's decision. First, the court misapplied the "rational basis" test for equal protection review. In addition, it insisted, contrary to the record and common sense, that it is "irrational" even to presume, subject to a contrary showing by the officer, that an officer who identifies herself as a homosexual has a desire or propensity to engage in proscribed homosexual acts. Finally, it summarily brushed aside the considered judgment of the nation's military leaders, including the then-Chairman of the Joint Chiefs of Staff, General Colin Powell, concerning the complex and difficult issue of the relationship of homosexuality to military needs -- a judgment that Congress has now ratified.

A. The Balance Of Hardships Sharply Favors A Stay.

The balance of hardships here tips sharply in favor of a

stay. A stay will not cause Col. Cammermeyer any irreparable injury. Denial of a stay, in contrast, will cause irreparable injury to the government.

A stay will merely preserve the state of affairs that has obtained for the past two years. Col. Cammermeyer has been out of the National Guard for two years (since she filed her complaint). At no time during this period did she seek a preliminary injunction (or a TRO) requiring her reinstatement. She therefore cannot claim that a further, brief delay in reinstatement would cause her any harm. In particular, she cannot claim any irreparable injury related to pursuing her livelihood, since her civilian job as a VA nurse has not been affected.

By contrast, the military will suffer irreparable injury if a stay is denied. The district court's order requires the military to reinstate Col. Cammermeyer to her former position as Chief Nurse of the Washington Army National Guard. The Chief Nurse is responsible for coordinating all nurse training, education and administration for the Washington Army National Guard. Cammermeyer Decl., Feb. 3, 1994, Exh. D. To bring an officer back into such a senior leadership position for what will be a short period of time, if the government prevails on the constitutional issues in Meinhold, would interfere with the continuity of command. Moreover, it would result in the temporary displacement of the incumbent Chief Nurse from that senior position.

Col. Cammermeyer's reinstatement would also impair unit cohesion, discipline and morale. Because of her status as a senior

officer, she is among the personnel upon whom the military relies most heavily to mold unit cohesion, provide discipline and build morale. Her reinstatement therefore would be especially likely to cause the type of injury that the military policy was designed to avoid. See pages 4-5 supra.⁶

B. The Government's Appeal Raises Serious Questions.

As we have already demonstrated to this Court in our briefs in Meinhold, the government's position on this appeal presents serious legal issues. That is confirmed by the Seventh Circuit's decision in Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 452 U.S. 1004 (1990), which upheld the military

⁶ In opposing our application for a stay in the district court, plaintiff argued that her reinstatement pending appeal is supported by four other cases in which, notwithstanding the military's judgment underlying the old policy, declared homosexuals are serving in the military pursuant to judicial order. Selland v. Aspin, 832 F. Supp. 12 (D.D.C. 1993); Elzie v. Aspin, 841 F. Supp. 439 (D.D.C. 1993); Thorne v. United States, No. 93-2389 (D.D.C.); and Meinhold. However, none of these four cases involved a senior officer of Col. Cammermeyer's rank. Moreover, they involved significantly different circumstances. In Selland the service member was still in the military when the preliminary injunction was entered, so that preliminary relief simply preserved the status quo. In Thorne, the reinstatement was stipulated by both sides solely to permit reprocessing under the new policy -- a far different situation from a reinstatement with immunity from further proceedings. In Elzie, the service member was in the standby reserve prior to his reinstatement (after only seven weeks) to active duty. The Elzie reinstatement order was issued just days before the subsequently-vacated D.C. Circuit panel decision which temporarily established, as controlling Circuit law, that the old policy was invalid. Steffan v. Aspin, 8 F.2d 57 (D.C. Cir. 1993), vacated and rehearing in banc granted, 8 F.2d 70 (D.C. Cir. 1994). In Meinhold, the service member was on active duty (pursuant to a preliminary injunction) at the time the district court entered the permanent injunction that the government appealed. Thus, in none of these cases was the plaintiff ordered returned to active duty in a senior position after being out of the service for a lengthy period.

policy invalidated by the district court, and by the D.C. Circuit's action in vacating and setting for in banc rehearing a panel decision striking down the old policy. Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993) (panel decision), 8 F.3d 70 (D.C. Cir. 1994) (order granting rehearing in banc and vacating judgment). Without repeating the arguments presented in Meinhold, several of the district court's most fundamental errors bear mention here.

1. The Supreme Court has made it clear that rational-basis review under the equal protection clause does not involve "courtroom factfinding," since governmental classifications subject to such review "may be based on rational speculation unsupported by evidence or empirical data." Heller v. Doe, 113 S. Ct. 2637, 2643 (1993), quoting F.C.C. v. Beach Communications, Inc., 113 S. Ct. 2096, 2098 (1993). Nevertheless, the district court undertook a de novo assessment of the factual bases for the military policy, accepting the evidence relied on by plaintiffs and rejecting evidence in support of the policy on the ground that it was not "scientific" or "empirical." Slip op. 34, 35. This was plainly in error under Heller.

The district court relied on Pruitt v. Cheney, supra, to justify its de novo review of the evidence. Yet Pruitt's requirement of a "supporting factual record," if taken to justify the district court's acceptance of plaintiff's evidence, does not survive the Supreme Court's subsequent decision in Heller.

The basic presumption in the old policy -- that a person who states that he or she is a homosexual is likely to engage in

homosexual acts -- plainly is rational. As Judge Reinhardt has explained, "[t]o pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd." Watkins v. United States Army, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (1989) (en banc), cert. denied, 498 U.S. 957 (1990). Accord, Ben-Shalom v. Marsh, supra, 881 F.2d at 464 ("[A] person's statement that he is a homosexual is compelling evidence that [he] has in the past and is likely to again engage in [homosexual] conduct. To this extent, therefore, the regulation * * * [rests] upon reasonable inference about * * * probable [homosexual] conduct in the past and in the future"). The rationality of the presumption is underscored in this case, where the record shows that Col. Cammermeyer invoked the military privilege against self-incrimination when asked about homosexual acts. Glass Decl. dated Feb. 2, 1994, Exh. N. p. 3. See Baxter v. Palmigiano, 425 U.S. 308, 316-20 (1976) (upholding adverse inference from invocation of the privilege in civil context).

The rationality of the former policy, as a general matter, is reinforced by the fact that the underlying presumption is rebuttable: a statement of homosexuality is only presumed to indicate a desire or propensity for homosexual acts, and that presumption is subject to rebuttal by the service member. See pp. 3-4 supra. Because the former policy is directed to the likelihood of homosexual acts and allows the service member who states that he or she is a homosexual to rebut the presumption of

such acts, the district court clearly erred in concluding that the military policy required separation of service members based solely on "status" rather than acts or the likelihood of acts. Slip op. 20-22.

The district court's counter-intuitive conclusion that the presumption was irrational was based on the declarations of two psychologists that "a person's public identification of his or her sexual orientation does not necessarily imply sexual conduct, past or present, or a future desire for sexual behavior," slip op. 22. See also id. at 23. Those declarations are manifestly at odds with the military judgment underlying the former policy. The district court's acceptance of such disputed testimony is precisely the kind of "courtroom factfinding" that the Supreme Court has condemned in equal protection cases. Heller v. Doe, 113 S. Ct. 2637, 2643 (1993).

2. To compound its error on rational-basis review, the district court improperly second-guessed the judgment of this nation's military leaders concerning military homosexual policy -- a judgment that Congress has now ratified and made the basis of the new legislation.⁷ It is well-settled that "courts must

⁷ Although the new policy, as embodied in the new legislation and implementing Directives, is not before the Court, we note that it differs from the old policy in that it: (1) expressly states that a person's sexual orientation is a personal and private matter, and that only homosexual acts, marriages, and statements that reveal a propensity or intent to engage in acts are grounds for separation; (2) eliminates questions regarding sexual orientation during the accession process; (3) clarifies the definition of "homosexual" and the nature of the rebuttable presumption by eliminating "desires"; (4) limits the circum-

(continued...)

give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). Because courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have" (*ibid.*), they must be "particularly careful not to substitute their judgment of what is desirable for that of [the Political Branches] or their own evaluation of evidence for a reasonable evaluation by the [Political Branches]." Rostker v. Goldberg, 453 U.S. 57, 68 (1981). The district court therefore erred in "second-guess[ing the] military decision[]." United States v. Shearer, 473 U.S. 52, 57 (1985).

In this case, the deference which must be given to the military judgment is reinforced by the deference due to the determinations of Congress. In recently enacted legislation, Congress carefully examined and reaffirmed the rationales underlying the policy under which Col. Cammermeyer was discharged. 10 U.S.C. § 654. Although the new legislative policy is not at issue in this case, and although these legislative developments are not essential to the validity of the former policy under which Col. Cammermeyer was discharged, the legislative findings are properly considered and confirm the rationality of the former policy. See Rostker v. Goldberg, 453 U.S. 57, 74-75 (1981); Schlesinger v.

⁷(...continued)
stances in which investigations into homosexual conduct will be commenced; and (5) 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.

Ballard, 419 U.S. 498, 510 n.13 (1975). Given Congress' constitutional responsibility and expertise regarding military affairs, and its institutional competence to "amass and evaluate the vast amounts of data bearing on such an issue," its legislative "findings are of course entitled to a great deal of deference."

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985).

In connection with the new legislation, Congress made findings regarding the "forced intimacy" of life in the military, reaffirmed the necessity of the "prohibition against homosexual conduct" in "the unique circumstances of military service," and concluded that service in the military by "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." 10 U.S.C. § 654(a)(12), (13), (15). These congressional determinations were based on testimony from a broad range of witnesses, including the nation's top military leaders. For example, General Colin Powell, then-Chairman of the Joint Chiefs of Staff, explained that open homosexuality in military units "would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." Quoted in S. Rep. No. 103-112, 103d Cong. 1st Sess. 278 (1993). The Senate Armed Services Committee thus found that there is "broad agreement," based on the "unique conditions that characterize military life," that service by those who engage in or are

likely to engage in homosexual acts "would be detrimental to the best interests of the armed forces." Ibid. Accordingly, it adhered to the longstanding policy that military personnel should not be required "to accept shared living arrangements with persons who, by their acts or statements, demonstrate a propensity or intent to engage in sexual conduct with persons of the same sex." Id. at 281.

In the circumstances presented here, it was certainly "rational" for the military to conclude that individuals who stated they were homosexuals had a propensity to engage in homosexual acts -- acts that the district court conceded are proscribable by the military -- unless they show otherwise.

3. Finally, the district court erred in relying on City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), to conclude that the military and congressional judgments were based on "prejudice." Slip op. 41. First, Cleburne did not arise in the special context of the military. But beyond that, the Court's holding in Cleburne is inapposite by its terms. The Court there held that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." 473 U.S. at 448 (emphasis added). Thus, the negative societal attitudes toward retarded persons in Cleburne were not "properly cognizable" or relevant to legitimate governmental interests in the zoning proceedings, because it was

not the responsibility of the Cleburne zoning board to make sure that neighbors could get along and live together in harmony. Quite the opposite is true in the Armed Forces, where one of the most important military objectives is to ensure close cooperation and unit cohesion.

Nor is the district court's "prejudice" rationale supported by Palmore v. Sidoti, 466 U.S. 429 (1984). In Palmore, the challenged policy occurred in the civilian context and involved a racial classification. Unlike race, which occupies a unique position in our legal system and in our history, the likelihood of a service member engaging in homosexual acts is a legitimate consideration for the military to take into account.

* * * * *

In sum, the issues presented by the government's appeal -- which are already before this Court in Meinhold and the in banc D.C. Circuit in Steffan -- pose serious questions. Plaintiff seeks to change the status quo that has existed for a period of two years by assuming a position of senior leadership in the military. This Court should grant a stay to preserve the status quo until Meinhold is decided.

II. THIS COURT SHOULD STAY BRIEFING IN THIS APPEAL PENDING DISPOSITION OF THE APPEALS IN MEINHOLD V. DEPARTMENT OF DEFENSE.

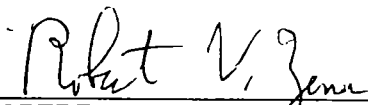
Because the issues involved in this case are before the Court in Meinhold, a briefing schedule here should be deferred pending the decision in Meinhold. In Dahl v. Dalton, Nos. 93-16844, 93-16898 (9th Cir.), a pending appeal also involving the

constitutionality of the military's former policy on homosexuality, the government moved to stay briefing pending disposition of Meinhold. By order of January 21, 1994, this Court granted the motion and stayed the briefing schedule in Dahl until after the decision in Meinhold. A deferral of the briefing schedule is equally warranted in this case.

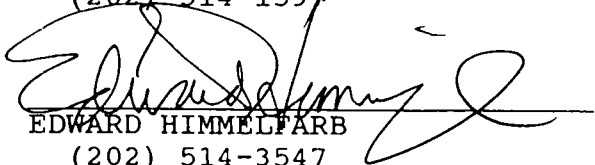
CONCLUSION

The district court's order should be stayed pending appeal or until 20 days following disposition of the appeals in Meinhold v. Department of Defense, Nos. 93-55242, 93-56354 (9th Cir.). In addition, briefing in this case should be deferred pending the decision in Meinhold.

Respectfully submitted,



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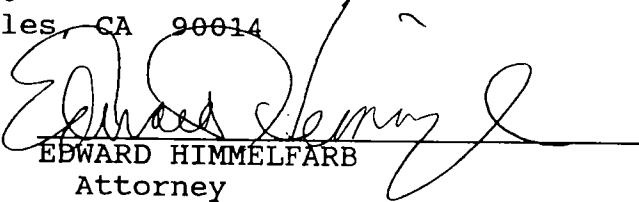
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OF COUNSEL:
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Department of the Army
Office of the Judge Advocate
General

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 1994, I served the foregoing "EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY OF INJUNCTION PENDING APPEAL OR UNTIL 20 DAYS AFTER DISPOSITION OF THE APPEALS IN MEINHOLD V. DEPARTMENT OF DEFENSE, AND FOR A STAY OF BRIEFING" upon the following by causing a copy to be sent by fax (without attachments) and an additional copy to be sent by overnight mail (with attachments) to:

Mary Newcombe, Esquire
Hedges & Caldwell
606 South Olive Street
Suite 500
Los Angeles, CA 90014


EDWARD HIMMELFARB
Attorney

A T T A C H M E N T S

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Clinton Presidential Records Digital Records Marker

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A

Divider Title: _____

United States District Court

FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLONEL MARGARETHE CAMMERMEYER,

Plaintiff

v.

RICHARD CHENEY, Secretary of
Defense; MICHAEL P. W. STONE,
Secretary of the Army; THE
UNITED STATES OF AMERICA; and
BOOTH GARDNER, Governor of the
State of Washington,

Defendants.

TO: (Name and Address of Defendant)

Mike McKay
United States Attorney
3600 Sea-First Plaza Bldg.
800 Fifth Avenue
Seattle, WA 98104

CASE NUMBER:

C92-942

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Jeffrey I. Tilden
Michael Himes
PERKINS COIE
1201 Third Avenue, 40th Floor
Seattle, WA 98101

Mary Newcombe
Lambda Legal Defense and Education
Fund, Inc.
606 S. Olive Street
Suite 580
Los Angeles, CA 90014

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

BRUCE RIFKIN

CLERK

DATE

JUN 11 1992

BY DEPUTY CLERK

FILED ENTERED
LODGED RECEIVED

★ JUN 11 1992 ★

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLONEL MARGARETHE CAMMERMEYER,

Plaintiff,

v.

RICHARD CHENEY, Secretary of
Defense; MICHAEL P. W. STONE,
Secretary of the Army; THE
UNITED STATES OF AMERICA; and
BOOTH GARDNER, Governor of the
State of Washington,

Defendants.

NO. **C92-942**
COMPLAINT

I. INTRODUCTION

1.1 Summary This is a civil action for declaratory judgment and for injunctive relief requiring various officials of the United States to restore Colonel Margarethe Cammermeyer's federal recognition as an officer in good standing in the Washington National Guard and requiring the Governor of the State of Washington to restore Colonel Cammermeyer to her position in the Washington National Guard.

COPY

1 1.2 The Military's Anti-Gay Policy. The policy of the
2 United States Armed Forces prohibiting lesbians and gay men
3 from serving in the Armed Forces was first adopted during
4 World War II. No limitation existed prior to that time.
5
6

7 Since that time, tens of thousands of lesbians and gay
8 men have been discharged from the Armed Forces based solely on
9 their sexual orientation. During the past ten years alone,
10 more than 13,200 members of the Armed Forces have been
11 discharged on the basis of homosexuality. Despite this policy
12 barring homosexuals, hundreds of thousands of lesbian and gay
13 individuals have served their country honorably and well,
14 having successfully performed their duties and, in some cases,
15 having died for their country. Colonel Cammermeyer seeks here
16 to demonstrate that the military's discriminatory policy
17 banning the service of lesbians and gay men is
18 unconstitutional and cannot bar the successful completion of
19 her military career.
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35 II. JURISDICTION AND VENUE

36 2.1 Subject-Matter Jurisdiction. Jurisdiction is
37 invoked under 28 U.S.C. §§ 1331 and 2201. Plaintiff's claims
38 for relief arise under the First, Fourth, Fifth and Ninth
39 Amendments to the United States Constitution.
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45 2.2 Personal Jurisdiction. This Court has personal
46 jurisdiction over all defendants.
47

1 2.3 Venue. Venue is proper under 28 U.S.C. § 1391(e).
2
3

4 **III. PARTIES**

5 3.1 Plaintiff. Margarethe Cammermeyer is a Colonel in
6 the Washington National Guard. Colonel Cammermeyer's federal
7 recognition as an officer in good standing in the Washington
8 National Guard was withdrawn for the sole reason that she
9 truthfully informed various officials that she is a lesbian.
10 Consequently, she was discharged from the Washington National
11 Guard effective June 11, 1992. Colonel Cammermeyer is a
12 citizen of Washington, residing in King County, Washington.
13
14

15 3.2 Defendant U.S.A. The United States of America,
16 through its agents, is responsible for withdrawing Colonel
17 Cammermeyer's federal recognition as a member in good standing
18 with the Washington National Guard.
19
20

21 3.3 Defendant Secretary of Defense. Richard Cheney,
22 Secretary of Defense, is sued in his official capacity. In
23 that capacity, he is charged with the supervision of the
24 plaintiff and has promulgated regulations for all of the armed
25 forces of the United States of America. He has promulgated
26 regulations pertaining to the elimination of officers for
27 substandard performance of duty, misconduct, or moral or
28 professional dereliction, which includes discharge for
29 homosexuality. The regulations he has promulgated relating to
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1 discharge for homosexuality violate the Constitution of the
2 United States.
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4
5 3.4 Defendant Secretary of the Army. Michael P. W.
6 Stone, Secretary of the Army, is sued in his official
7 capacity. In that capacity, he is charged with the
8 supervision of the plaintiff and has promulgated regulations
9 for the Army. He has promulgated regulations pertaining to
10 the elimination of officers for substandard performance of
11 duty, misconduct, or moral or professional dereliction, which
12 includes discharge for homosexuality. The regulations he has
13 promulgated which deal with discharge for homosexuality
14 violate the Constitution of the United States.
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25 3.5 Defendant Governor. Booth Gardner, Governor of the
26 State of Washington, is sued in his official capacity.
27 Governor Gardner, who opposed the withdrawal of Colonel
28 Cammermeyer's federal recognition, was required under 32
29 U.S.C. § 324 to discharge Colonel Cammermeyer from the
30 Washington National Guard, due to the withdrawal of Colonel
31 Cammermeyer's federal recognition. Colonel Cammermeyer seeks
32 only prospective injunctive relief against Governor Gardner.
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41 **IV. COLONEL CAMMERMEYERS BACKGROUND AND MILITARY**
42 **CAREER**
43

44 4.1 Colonel Cammermeyer's Citizenship. Colonel
45 Cammermeyer is a naturalized citizen of the United States who
46
47

1 was born in Oslo, Norway in 1942 and immigrated to the United
2 States at the age of nine.

3
4
5 4.2 Early Education/Assignment. On July 14, 1961,
6 Colonel Cammermeyer entered the Army Student Nurse Corps. She
7 was commissioned as a Second Lieutenant in the United States
8 Army Nurse Corps in 1962, and received her Bachelor of Science
9 degree in Nursing from the University of Maryland in 1963.
10 Subsequently, after basic training at Fort San Houston, Texas,
11 she was stationed at Fort Benning, Georgia.

12
13 4.3 German Tour of Duty and Promotion. In 1964, Colonel
14 Cammermeyer began a tour of duty in Nurnberg, Germany, where
15 she served as medical-surgical staff nurse, Education
16 Coordinator, and Nursing Supervisor. In May 1966, she was
17 promoted to the rank of Captain.

18
19 4.4 Colonel Cammermeyer's Marriage. While stationed in
20 Nurnberg, she married another Army officer and assumed the
21 name of Margarethe Hawken.

22
23 4.5 Vietnam War Service. In 1966, Colonel Cammermeyer
24 was stationed for a short period at Fort Lee, Virginia, while
25 she awaited assignment to Vietnam. In February 1967, she
26 began service at the 24th Evacuation Hospital, located at Long
27 Binh Post in Vietnam. For six months she served as Head Nurse
28 of the Medical Intensive Care Unit and, in August 1967, was

1 reassigned as Head Nurse of the Neurosurgical Intensive Care
2 Unit. She served in this position until April 1968.

3
4
5 4.6 Bronze Star. In 1968, upon completion of her tour
6 of duty in Vietnam, Colonel Cammermeyer was awarded the Bronze
7 Star Medal for "distinguishing herself by outstanding
8 meritorious service" The recommendation that resulted
9 in this award states in part:
10
11
12
13

14
15 In a field hospital which had been operational
16 little more than 30 days, she was faced with
17 large influxes of patients, and the tedium and
18 frustrations of working long hours with limited
19 staff, supplies and physical facilities. Such
20 a situation gave rise to unusually complex
21 professional and administrative problems, but
22 this exceptional young officer, with great
23 versatility, found ways and means to overcome
24 all obstacles CPT Hawken exhibited a
25 competency and steadfastness of purpose which
26 were reflected in nursing care commensurate
27 with that given in the most sophisticated of
28 facilities. Her own performance as a bedside
29 nurse, especially during frequent emergency
30 situations, was inspirational to personnel and
31 profoundly valuable to surgeons; they relied
32 heavily upon her judgment and commended her
33 actions which many times resulted in the saving
34 of lives. In addition, her organizational and
35 teaching skills, her ability to motivate her
36 staff by her own meticulous standards, and
37 genuine love for her work resulted in an
38 expert, loyal team of nursing personnel. . . .
39 The requirements inherent in planning and
40 supervising total care on this unit were
41 prodigious, particularly the psychological,
42 viewed in the light of the grievous prognosis
43 of many of these patients and the cumulative
44 impact of this factor on personnel. This alone
45 might have exhausted the inner resources of a
46 lesser person, but CPT Hawken, recognizing the
47 great need of both patients and personnel,

1 managed day after day to give a full measure of
2 support to patients, counsel and guidance to
3 her staff. She never failed to appropriately
4 acknowledge and commend the efforts and
5 achievements of the personnel CPT
6 Hawken offered her services to the staff of a
7 large Vietnamese hospital in an adjacent
8 community, to help in any way possible with the
9 neurosurgical aspect of their student training
10 program. She spent many of her limited free
11 hours, often an entire day with long travel
12 involved, working in wards with students and
13 instructors, teaching and demonstrating nursing
14 techniques This voluntary activity on
15 her part generated a good will which will
16 undoubtedly have far reaching affects. The
17 contributions made by this exceptional nurse
18 will remain in established standards of nursing
19 care practice, a staff imbued with her
20 philosophy of service and many very grateful
21 patients, a tribute to her sense of duty to her
22 country and fellowman. Her departure from this
23 command will be keenly felt, a loss not only of
24 an unusually capable and devoted nurse, but of
25 a warm and genuine person as well, one in whom
26 the Corps may well take pride. Her
27 professional and personal conduct merit the
28 highest praise and reflect great credit upon
29 herself and the United States Army Medical
30 Service

31 4.7 Pregnancy and Resignation. Upon her return to the
32 United States, Colonel Cammermeyer was stationed for six
33 months at Fort Lewis, Washington. Due to the regulations then
34 in force forbidding service by women with dependents under the
35 age of 16, she was forced to resign from the Army upon her
36 first pregnancy. Her discharge became effective on
37 September 30, 1968, following more than seven years and two
38 months of active duty.
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1 4.8 Re-enlistment and Masters Degree. Due to a change
2
3 in the regulations banning service by women with dependents
4
5 under the age of sixteen, Colonel Cammermeyer reenlisted in
6
7 the United States Army Reserve in 1972. She was assigned to
8
9 the 50th General Hospital in Fort Lawton, Washington, as
10
11 medical-surgical supervisor. In 1973, Colonel Cammermeyer
12
13 began studies at the University of Washington in Seattle for a
14
15 Masters Degree in Nursing, which she received in 1976.

16
17 4.9 Promotion to Major. In 1975, Colonel Cammermeyer
18
19 was promoted to the rank of Major and became Assistant Chief
20
21 Nurse of the 50th General Hospital.

22
23 4.10 Four Children. Colonel Cammermeyer and her husband
24
25 had four sons together.

26
27 4.11 Divorce. In 1980, Colonel Cammermeyer was divorced
28
29 from her husband and resumed her maiden name.

30
31 4.12 Transfer to California. In 1981, Colonel
32
33 Cammermeyer moved to California and transferred to the 347th
34
35 General Hospital, where she was appointed Officer in Charge of
36
37 the Medical-Surgical Unit. She simultaneously accepted a
38
39 position with the Veterans Administration Medical Center as
40
41 the Clinical Nurse Specialist with a specialty in
42
43 Neurooncology.

44
45 4.13 Promotion to Lieutenant Colonel/Chief Nurse.
46
47 Colonel Cammermeyer was promoted to Lieutenant Colonel, USAR,

1 in 1982, and was transferred to the 352nd Evacuation Hospital,
2
3 USAR, in Oakland, California, where she became the Chief Nurse
4
5 in 1985.
6

7 4.14 Publications. During her tenure with the Veterans
8
9 Administration Medical Center, Colonel Cammermeyer became
10
11 nationally recognized for her presentations, publications, and
12
13 research in neurological nursing. She also served on the
14
15 Clinical Faculty of the University of San Francisco School of
16
17 Nursing and co-authored four research articles that were
18
19 published in the journal "Military Medicine."
20

21 4.15 Nurse of the Year. In 1985, Colonel Cammermeyer was
22
23 selected from among 34,500 Veterans Administration nurses
24
25 nationwide to receive the first annual Administrator's Award
26
27 for Excellence in Nursing. The award was given in recognition
28
29 of her "dedication, commitment, and outstanding performance in
30
31 the nursing care of veteran patients" and commended her
32
33 "skill, compassion, and adherence to the highest standards of
34
35 nursing practice."
36

37 4.16 "A" Professional Designation. In 1986, Colonel
38
39 Cammermeyer received an "A" professional designation from the
40
41 United States Army Surgeon General, which is the highest award
42
43 that can be made in recognition of professional accomplishment
44
45 within the Army Medical Department.
46
47

1 4.17 Washington National Guard. In 1986, Colonel
2
3 Cammermeyer returned to Seattle and transferred to the
4
5 Washington National Guard. She was assigned to be State Chief
6
7 Nurse and consultant to the State Chief Surgeon. As Chief
8
9 Nurse, her duties included developing staff and policy for a
10
11 newly authorized field hospital. She also assumed and is
12
13 currently employed in the position of Neuroscience Clinical
14
15 Nurse Specialist with the American Lake Veterans Affairs
16
17 Medical Center in Tacoma, Washington. Colonel Cammermeyer's
18
19 current duties include primary care for veterans with seizure
20
21 disorders. She is also the Coordinator of the Sleep
22
23 Evaluation and Treatment Program.

24
25 4.18 Promotion to Colonel. In 1987, Colonel Cammermeyer
26
27 was promoted to full Colonel. She continued her graduate
28
29 studies at the University of Washington and sought admission
30
31 to the Army War College where she hoped to receive training
32
33 she considered essential for her application to become Chief
34
35 Nurse of the National Guard.

36
37 4.19 Security Clearance Application. To obtain admission
38
39 to the War College, Colonel Cammermeyer, who already held a
40
41 Secret level security clearance, applied for a Top Secret
42
43 clearance. During an interview with an investigator for the
44
45 Defense Investigative Services on April 29, 1989, Colonel
46
47

1 Cammermeyer was asked about her sexual orientation. She
2 answered truthfully that she is a lesbian.
3

4 4.20 Discharge Proceedings. Colonel Cammermeyer's
5 statement was forwarded to the Sixth Army, and, in October
6 1989, she was informed that discharge proceedings had been
7 commenced against her.
8

9 4.21 Decision to Fight Discharge. Colonel Cammermeyer
10 was informed that the Washington National Guard would permit
11 her to continue to serve as Chief Nurse and would not pursue
12 her discharge unless forced to do so by the Department of the
13 Army. Colonel Cammermeyer decided to continue to serve and to
14 fight her discharge.
15

16 4.22 Ph.D in Nursing. In June 1991, Colonel Cammermeyer
17 was awarded her doctorate in Nursing from the University of
18 Washington and was selected for Who's Who in American Women.
19

20 4.23 Board Hearing. On July 14, 1991, more than two
21 years after her statement to the investigator for the Defense
22 Investigative Services, an administrative discharge board
23 consisting of four colonels was convened at Camp Murray in
24 Tacoma, Washington, to review the charges against Colonel
25 Cammermeyer. As a result of that hearing at which the sole
26 evidence against Colonel Cammermeyer was her own statements
27 identifying herself as a lesbian, the Board reluctantly
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1 recommended that Colonel Cammermeyer's federal recognition be
2 withdrawn and that she be discharged.
3

4
5 The President of the Board stated:
6

7
8 Would you stand, Margarethe. I truly believe
9 that you are one of the great Americans,
10 Margarethe, and I've admired you for a long
11 time and the work that you've done and all that
12 you've done for the Army National Guard. When
13 I was NGB chief nurse, I said many time, "I'm
14 really glad that we have Margarethe Cammermeyer
15 or Greta Cammermeyer in the Guard. She's doing
16 such an outstanding job. We're really
17 fortunate that she came to us." And I really
18 meant that. And I still do mean that. . . .

19 It's my sad duty to read what I'm going to read
20 for you at this time, so I will proceed with
21 that. Col. Cammermeyer has proven to be a
22 great asset to both active and reserve
23 component, the medical profession as a whole.
24 She has consistently provided superb leadership
25 and has many outstanding accomplishments to her
26 credit, both military and civilian.
27

28 4.24 Discharge. In June 1992, Colonel Cammermeyer was
29 informed that her federal recognition had been withdrawn and
30 received orders that she would be discharged from the
31 Washington National Guard effective June 11, 1992.
32
33
34
35

36 V. THE MILITARY POLICY 37

38 5.1 The Regulation. The current policy governing
39 officers is set forth in Department of Defense Directive
40 1332.30 and that governing enlisted personnel is set forth in
41 DoD Directive 1332.14. Pursuant to these directives, each
42 service, including the United States Army, has issued a
43
44
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1 regulation barring service by lesbian and gay personnel. The
2 particular regulation at issue is Army Regulation 135-175.
3

4 It provides, in part:
5

6 CHAPTER 2 7

8
9 **Involuntary Separation--ARNGUS [Army National**
10 **Guard of the United States] and USAR [United**
11 **States Army Reserve] Officers**
12

13 2-12. Moral or Professional Dereliction 14

15 While not all-inclusive, existence of one of
16 the following or similar conditions, unless
17 successfully rebutted, authorizes involuntary
18 separation of an officer due to moral or
19 professional dereliction. Officers discharged
20 for any of the following reasons may be
21 furnished an Honorable or General Discharge
22 Certificate, or Other Than Honorable Conditions
23 Discharge:
24

25 . . .
26

27 g. Homosexuality. (See sec. VII.)
28

29 Section VII 30 Separation for Homosexuality 31

32 2-37. Policy 33

34 a. Homosexuality is incompatible with
35 military service. The presence in the military
36 environment of persons who engage in homosexual
37 conduct or who, by their statements,
38 demonstrate a propensity to engage in
39 homosexual conduct, seriously impairs the
40 accomplishment of the military mission. The
41 presence of such members adversely affects the
42 ability of the armed forces to maintain
43 discipline, good order, and morale, to foster
44 mutual trust and confidence among members who
45 frequently must live and work under close
46 conditions affording minimal privacy; to
47 recruit and retain members of Armed Forces; to

maintain the public acceptability of military service; and to prevent breaches of security.

2-38. Definitions

For the purpose of this section the following apply:

a. Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.

2-39. Criteria

The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under the provisions of this section if one or more of the following approved findings is made:

. . .

b. The member has stated that he/she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

5.2 Differential Treatment. Army Regulation 135-175, like comparable regulations of the Navy, Air Force, and Marines, requires the Army to treat lesbian and gay servicemembers differently than heterosexual servicemembers.

5.3 Applies to Status Only. Pursuant to Army Regulation 135-175, lesbians and gay men are barred from service in the Army based solely on their sexual orientation.

5.4 Conduct Irrelevant. Persons serving in the Armed Forces who state that they are homosexual must be discharged, regardless of whether that individual has engaged in sexual

1 conduct with a member of the same sex. Heterosexual
2
3 servicemembers, on the other hand, are not subject to
4
5 discharge or other discipline on account of their sexual
6
7 orientation, unless they engage in specific acts of sexual
8
9 misconduct.

10
11 5.5 Prejudicial Stereotypes. The military's
12
13 justification for the policy set forth in Army Regulation 135-
14
15 175 is premised solely on prejudicial stereotypes about
16
17 lesbians and gay men.

18
19 5.6 Irrebuttable Presumption. The policy is not
20
21 premised upon any nexus between a person's sexual orientation
22
23 and that individual's ability to perform the duties of a
24
25 member of the Armed Forces. Rather, in the military's
26
27 "considered professional judgment" all lesbian and gay persons
28
29 are irrebuttably presumed to be unfit for military service.
30

31 5.7 Same Argument Used to Justify Racial Discrimination.
32
33 The military's "considered professional judgment" is not
34
35 infallible. History shows that the military's past judgment
36
37 has been tainted at times with prejudicial stereotypes and
38
39 unfounded fears. Prior to President Harry S. Truman's
40
41 Executive Order in 1948, the Armed Forces were racially
42
43 segregated.
44
45
46
47

1 5.8 Justification for Racial Discrimination. The Army's
2 public justification of its "considered professional judgment"
3 regarding racial segregation was as follows:
4
5

6 Now the Army's duty is to fight battles and win
7 wars. Therefore, the Army must maintain morale
8 in the ranks and use its manpower with maximum
9 efficiency. Integration would lower morale and
10 impair efficiency. Whites just will not serve
11 with blacks, and even if they would, it is not
12 possible to train and use Negroes in highly
13 skilled jobs. The Army must take the country
14 as it is. It must accept social patterns and
15 keep abreast of changes, but it is not an
16 instrument for social experimentation.
17

18 5.9 Statement by Secretary Cheney. Army Regulation 135-
19 175 is explicitly premised, in part, on the need "to prevent
20 breaches of security." In 1991, Secretary Cheney publicly
21 stated that this rationale is "a bit of an old chestnut."
22

23 5.10 DoD's Research: Homosexuals Present No Greater
24 Risk. Research conducted by the Department of Defense has
25 similarly concluded that homosexuals present no greater
26 security risk than heterosexuals. Plainly, stereotypical
27 notions and prejudice underlie the military's "considered
28 professional judgment" that lesbians and gay men are unfit for
29 military service due solely to their sexual orientation.
30

31 5.11 Separation of Powers. Congress has not barred gays
32 and lesbians from service in the Armed Forces. Congress is
33 charged with the constitutional mandate of determining who may
34 serve in the Armed Forces. U.S. Const., art. I, § 8.
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1 Congress, despite barring specific persons, such as "insane"
2 persons, 10 U.S.C. § 504, has not barred gays and lesbians.
3
4

5 5.12 Federalism. The power to appoint officers in the
6 National Guard is reserved to the states. U.S. Const. art. I,
7 § 8, 4.16.
8
9

10 VI. CLAIMS 11

12 6.1 Equal Protection. Army Regulation 135-175 deprives
13 Colonel Cammermeyer of the equal protection of law guaranteed
14 under the Fifth Amendment to the United States Constitution.
15
16

17 6.2 Freedom of Speech. Army Regulation 135-175 violates
18 Colonel Cammermeyer's constitutional right to freedom of
19 speech and association guaranteed under the First Amendment to
20 the United States Constitution.
21
22

23 6.3 Due Process. Army Regulation 135-175 violates the
24 due process clause of the Fifth Amendment to the United States
25 Constitution, as it mandates discharge solely upon an
26 admission of homosexuality, without any nexus between
27 homosexual status and the ability to perform the work duties
28 and responsibilities of members of the Armed Forces.
29
30

31 6.4 Right to Privacy. Army Regulation 135-175 violates
32 Colonel Cammermeyer's right to privacy, as secured under the
33 First, Fourth, Fifth and Ninth Amendments to the United States
34 Constitution.
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1 6.5 Separation of Powers. Army Regulation 135-175 is an
2 invalid exercise of executive power violative of the
3 constitutional separation of powers.
4
5

6 6.6 Federalism. Army Regulation 135-175 violates the
7 principles of federalism, as United States Constitution,
8 art. I, § 8, cl. 16, provides that the appointment of officers
9 in the Washington National Guard is reserved to the states.
10
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15 **VII. RELIEF**

16 Colonel Cammermeyer prays for the following relief:
17

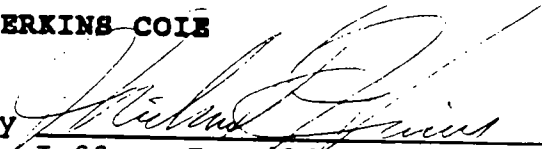
18 7.1 Declaratory Relief. A declaration that the Armed
19 Force's policy of discharging homosexuals, solely on account
20 of that status, is unconstitutional;
21
22
23
24

25 7.2 Injunctive Relief. Injunctive relief restoring
26 Colonel Cammermeyer to her position in the Washington National
27 Guard; and
28
29
30

31 7.3 Other Relief. Such other legal and equitable relief
32 as is just and proper, including the award of costs and
33 reasonable attorneys' fees.
34
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36

37 DATED: June 11, 1992.
38
39
40

41 **PERKINS COLE**

42 By 
43
44

45 Jeffrey I. Tilden

46 Michael Himes

47 Cooperating Attorneys for the
Northwest Women's Law Center

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**LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.**

By _____
Mary Newcombe
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Of Counsel:

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JUN 01 1994

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

LES ASPIN, Secretary of
Defense,¹ et al.,

Defendants.

NO. C92-942Z

ORDER

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

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

1 Cammermeyer further claims that Army Regulation 135-175 is an
2 invalid exercise of executive power violative of the
3 constitutional separation of powers, and that the regulation
4 violates principles of federalism.

5 The parties have now filed cross-motions for summary
6 judgment. Plaintiff moves for summary judgment on her equal
7 protection claim (docket no. 50). Defendants move for
8 judgment on the pleadings or, in the alternative, summary
9 judgment on all of plaintiff's claims (docket no. 59). The
10 Court heard oral argument on these cross-motions on April 20,
11 1994, and took the matter under advisement. The Court has
12 reviewed all of the materials submitted by the parties and now
13 GRANTS plaintiff's motion for summary judgment as to her equal
14 protection and substantive due process claims under the Fifth
15 Amendment, and GRANTS defendants' motion for summary judgment
16 as to the remainder of plaintiff's claims.

17 I. BACKGROUND

18 Margarethe Cammermeyer is a former Colonel of the
19 Washington State National Guard. She entered the Army Student
20 Nurse Corps in 1961, and with the exception of a four year
21 period when she was ineligible for service,² Cammermeyer
22 served in the Army until 1986. In that year, Cammermeyer
23

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

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

3 Cammermeyer's expertise as an Army Nurse is remarkable.
4 She has earned bachelor's, master's and doctorate degrees in
5 Nursing. She was a member of the Clinical Faculty of the
6 University of San Francisco School of Nursing where she co-
7 authored four research articles published in the Journal of
8 Military Medicine. Cammermeyer Decl. at ¶¶ 3, 8, 12, 19. In
9 addition, she has received numerous awards and distinctions,
10 including the Bronze Star for distinguished service in
11 Vietnam.³ Id. at ¶ 6. She volunteered and served in Vietnam
12 for fifteen months with distinction. Id. at ¶¶ 5-6.

13 Cammermeyer has served in numerous other capacities in the
14 Army and Washington State National Guard, including medical-
15 surgical supervisor and Assistant Chief Nurse of the 50th
16 General Hospital in Fort Lawton, Washington, Chief Nurse of
17 the 352nd Evacuation Hospital in Oakland, California, and
18 State Chief Nurse and consultant to the State Chief Surgeon at
19 Camp Murray, Washington. Id. at ¶¶ 8, 11, 15.

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

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

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

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

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

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

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

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

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

9 II. DISCUSSION

10 A. Summary Judgment Standard

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

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

11 **B. Equal Protection Challenge**

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

16 **1. Equal Protection Standard**

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

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

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

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

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

13 2. Rational Basis Review

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

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

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

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

1 a. Deference to the Military

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

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

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

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

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

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

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

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

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

25 **b. Scope of Rational Basis Review**

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Id. at 284.

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

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

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

18 Id. at 1327.

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

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

⁹ Dahl is currently on appeal.

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

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

17 (c) Orientation v. Conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Korb. Decl., ¶ 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 The Government's evidence offers justifications for the
17 policy of excluding homosexuals from military service. Under
18 Heller, 125 L.Ed.2d at 271, the burden is on the plaintiff "to
19 negative every conceivable basis which might support" the
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21
22 recommending to the President a new policy on homosexuals in
23 the military that would "compl[y] with the President's
24 direction to end discrimination while maintaining high
standards of combat effectiveness and unit cohesion." See
Memorandum for the Secretary of Defense, Attached to MWG
Report, Otjen Dep., at Ex. 10.

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

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

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

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

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

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

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

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

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

13 Plaintiff also notes that this rationale, as well as virtually
14 every other justification used today to exclude homosexuals
15 from military service, was also used to justify the military's
16 discrimination against African-Americans in World War II.
17 Herek Decl. at ¶¶ 19-22, Ex. I. There is no dispute that the
18 exclusion of African-Americans from military service was based
19 solely on prejudice.

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

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

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

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

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

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

7 (6) Recruitment and Retention of Military Personnel.

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

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

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

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

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

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

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

26 ²⁰ Defendants would appear to concede this, as the new
"don't ask, don't tell" policy, as codified in 10 U.S.C. ¶
654(a), does not include this rationale.

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

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

21 Korb Decl. ¶ 6. The uncontroverted evidence establishes that
22 many homosexuals have served, and currently serve, in the
23 military, and that the majority of them do so without incident
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25
26 ²¹ Assistant Secretary of Defense Dorn testified that
President Clinton's statements reflect the views of the
Department of Defense. Dorn Dep. at 31:1-9.

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

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

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

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

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

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

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

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

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

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

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

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

19 **B. Substantive Due Process Claim**

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

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

7 **1. Standard of Review**

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

1 Plaintiff's challenge to Army Regulation 135-175 is based on
2 the substantive component of the due process clause.

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

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

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

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

3 **2. Due Process Analysis**

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

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

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

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

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

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

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

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

19 The Court holds that plaintiff's Fifth Amendment
20 substantive due process rights were violated by her discharge
21

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

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

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

8 C. First Amendment Claim

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

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

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

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

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

D. Other Claims

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

E. Conclusion

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

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

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

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

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

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

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

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

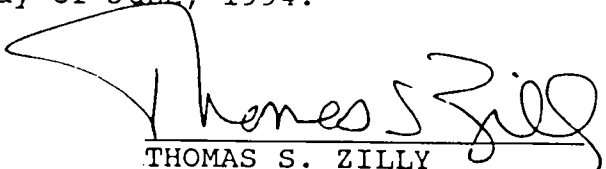
13 g. Costs of suit.

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

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

18 IT IS SO ORDERED.

19 DATED this 1st day of June, 1994.

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

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Judge Zilly

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JUN 13 1994

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

WILLIAM J. PERRY, Secretary of
Defense, TOGO D. WEST, JR.,
Secretary of the Army, and the
UNITED STATES,

Defendants.¹

Civil Action No. C92-942Z

NOTICE OF APPEAL

Defendants hereby appeal to the United States Court of
Appeals for the Ninth Circuit from the order dated and filed June
1, 1994.

¹ In the order from which Defendants appeal, the Court noted that William J. Perry, the current Secretary of Defense, "has not yet been formally substituted as a named defendant." Order at 1 n.1. However, formal substitution is unnecessary. In cases where a public officer who has been sued in his or her official capacity resigns or otherwise ceases to hold office, the official's successor "is automatically named as a party" and the failure of the court to enter an order of substitution does not effect the substitution. Fed. R. Civ. P. 25(d)(1).

In view of the foregoing, Secretary Perry is properly named in this notice as a Defendant herein, as is Togo D. West, Jr., the current Secretary of the Army.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

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United States Attorney

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Attorneys for Defendants

OF COUNSEL:
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Department of the Army
Office of the Judge Advocate
General

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 1994, a copy of the
within Notice of Appeal was sent by overnight express to:

Michael Himes, Esq.
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099

David M. Smith

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JUN 24 1994

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

LES ASPIN, Secretary of
Defense,¹ et al.,

Defendants.

NO. C92-9422

ORDER

THIS MATTER comes before the Court on the defendants' motion for a stay pending appeal. The Court, having considered the defendants' motion and the plaintiff's opposition thereto, hereby DENIES the government's motion. The Court also clarifies its Order entered June 1, 1994 (docket no. 95) in response to questions raised by the defendants concerning the scope of the Order.

I. Preliminary Matters

The government contends that this Court's Order enjoining the defendants from "taking any adverse action against plaintiff . . . on account of statements of her homosexual

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

W. J. Perry read
M.D. 6/27/94
c. 251, 752

1 orientation" immunizes plaintiff from compliance with, and
2 disciplinary action under, the military's new policy
3 concerning homosexuals in military service. See Order (docket
4 no. 95) at 50. The defendants have misconstrued the Court's
5 Order. The Court clarifies that its Order enjoins defendants
6 from taking any adverse action against plaintiff on account of
7 any of plaintiff's statements concerning her homosexual
8 orientation made prior to the date she is reinstated to her
9 former position in the Washington State National Guard in
10 accordance with this Court's Order mandating reinstatement.

11 The government has also expressed concern about this
12 Court's Order requiring defendants "to expunge all record of
13 plaintiff's sexual orientation and her statements, if any,
14 regarding same from any and all records in defendants'
15 possession." See Order at 50. The government contends that
16 any expunction of records, by its very nature, is irrevocable.
17 The plaintiff has agreed, however, to have such records
18 deposited with the Court or with a mutually agreeable third
19 party pending final resolution of this action. See
20 Plaintiff's Opposition Brief (docket no. 105) at 7 fn. 5.
21 Accordingly, the Court directs defendants to deposit such
22 records with the Court or with a third party agreed upon by
23 the parties pending final resolution of this action.

24 II. Motion to Stay

25 In determining whether a stay pending appeal is
26 appropriate the Court should consider: (1) whether the stay

1 applicant has made a strong showing that he is likely to
2 succeed on the merits; (2) whether the applicant will be
3 irreparably injured absent a stay; (3) whether issuance of the
4 stay will substantially injure the other parties interested in
5 the proceeding; and (4) where the public interest lies.

6 Hilton v. Bravnskill, 481 U.S. 770, 776 (1987). Having
7 considered these factors, the Court concludes a stay is
8 inappropriate in this case.

9 The government has failed to make a strong showing that
10 it is likely to succeed on the merits. Each of the issues
11 identified by the government for appeal was considered
12 carefully and rejected for the reasons explained in the
13 Court's Order. Moreover, the Court fails to see how the
14 defendants will be irreparably harmed as a result of
15 Margarethe Cammermeyer's reinstatement. Cammermeyer was a
16 highly trained, decorated and dedicated officer who served in
17 the Army and Washington State National Guard with distinction
18 for more than twenty years. After disclosing her homosexual
19 orientation, she continued to perform her military duties in
20 exemplary fashion for over three years. Prior to her
21 discharge, Governor Booth Gardner, Commander-in-Chief of the
22 Washington State National Guard, appealed to then Secretary of
23 Defense Cheney to retain Cammermeyer, maintaining that her
24 discharge would be "a significant loss." That plaintiff has
25 performed in exemplary fashion for over twenty years, three of
26 those years as an acknowledged lesbian servicemember, negates

1 defendants' assertion that Cammermeyer's return to military
2 service will injure the military unnecessarily and
3 irreparably.

4 In contrast to defendants' position, Cammermeyer is
5 likely to suffer substantial injury if her reinstatement to
6 military service is further delayed. Cammermeyer's goal is to
7 become Chief Nurse of the National Guard Bureau. She is
8 currently fifty-two years of age and requires further training
9 to become eligible for that position. The defendants'
10 exclusion of Cammermeyer from military service over the last
11 two years has substantially diminished her prospects for
12 promotion and advancement in the military. Any further delay
13 in reinstatement may effectively deny her the opportunity to
14 achieve her long-time goal.

15 Finally, the government has failed to show that the
16 public interest in the efficient operation of the armed forces
17 would be promoted by further excluding Cammermeyer from
18 service. This Court has previously rejected the government's
19 position that the presence in the armed forces of
20 servicemembers who acknowledge their homosexual status
21 compromises the military mission. Indeed, in this case, the
22 public interest is likely promoted by permitting such an
23 ---
24 ---
25 ---
26 ---

1
2 extraordinarily talented and dedicated officer to serve her
3 country.

4 Defendants' motion for stay pending appeal is DENIED.

5 IT IS SO ORDERED.

6 The Clerk of this Court is directed to send uncertified
7 copies of this Order to all counsel of record.

8 DATED this 24th day of June, 1994.

9
10 Thomas S Zilly
11 THOMAS S. ZILLY
12 UNITED STATES DISTRICT JUDGE
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No. 94-35600

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGARETHE CAMMERMEYER,

Plaintiff-Appellee,

v.

WILLIAM J. PERRY, Secretary of
Defense, TOGO D. WEST, JR.,
Secretary of the Army, and the
UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
CIVIL ACTION NO. C92-942

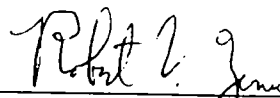
MOTION TO LODGE APPELLATE BRIEFS SUBMITTED IN
MEINHOLD V. DEPARTMENT OF DEFENSE

Defendants-Appellants, the Secretary of Defense, et al., move to lodge in this case the appellate briefs of all parties submitted in the pending appeals in Meinhold v. Department of Defense, Nos. 93-55242, 93-56354 (9th Cir.) (argued December 16, 1993).

Concurrently with this motion, we are filing an Emergency Motion for Stay of Injunction Pending Appeal Or Until 20 Days After Disposition of the Appeals in Meinhold v. Department of Defense, and for a Stay of Briefing. One of the grounds advanced in that Motion is that the pending appeals to this Court in

Meinhold involve the same legal issues concerning the constitutionality of the "old policy" on homosexuals in the military as are involved in the present case. While the Meinhold briefs are, of course, already on file with this Court as part of the Court's records in Nos. 93-55242 and 93-56354, we are submitting the briefs of all parties to the Meinhold litigation as a convenience to the Court.

Respectfully submitted,



ROBERT V. ZENER
(202) 514-1597



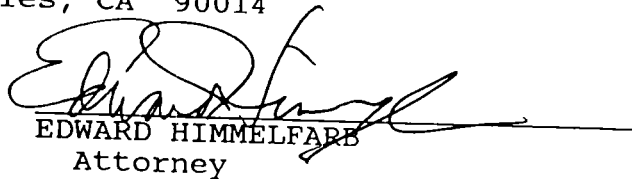
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Civil Division, Room 3617
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Washington, D.C. 20530

OF COUNSEL:
CAPTAIN TARA O. HAWK
Department of the Army
Office of the Judge Advocate
General

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 1994, I served the foregoing "MOTION TO LODGE APPELLATE BRIEFS SUBMITTED IN MEINHOLD V. DEPARTMENT OF DEFENSE" upon the following by causing a copy to be sent by fax (without attached briefs) and an additional copy to be sent by overnight mail (with attached briefs) to:

Mary Newcombe, Esquire
Hedges & Caldwell
606 South Olive Street
Suite 500
Los Angeles, CA 90014


EDWARD HIMMELSTARK
Attorney