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Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: James Castello

Subseries:

OA/ID Number: 6727

FolderID:

Folder Title:

Gays in the Military

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S

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Section:

7

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3

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To: Yandura_P; From: Charles V. Davidson; Re: Situation [partial] (2 pages)	11/29/1995	b(6)
002. letter	To: Ms. Marsha Scott; From: Mr. Richard P. Watson; Re: [Oregon NROTC midshipman] [partial] (2 pages)	12/09/1995	b(6)
003. letter	To: Edward Dorn; From: Teresa Barnes; Re: RMSN Amy Barnes [PII] [partial] (1 page)	12/13/1995	b(6)
004. letter	Copy of 003 [partial] (1 page)	12/13/1995	b(6)
005. letter	To: Sheila Widnall; From: Servicemembers Legal Defense Network; Re: Air Force Captain Warren Dinges [partial] (3 pages)	11/30/1995	b(6)
006. letter	To: Marsha Scott; From: Servicemembers Legal Defense network; Re: Air Force Captain Warren Dinges [partial] (1 page)	11/30/1995	b(6)
007. letter	Copy of 005 [partial] (3 pages)	11/30/1995	b(6)
008. letter	Copy of 005 [partial] (3 pages)	11/30/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Castello, James
OA/Box Number: 6727

FOLDER TITLE:

Gays in the Military

2015-0017-F
sb1237

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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THE WHITE HOUSE
WASHINGTON

DATE: 1/4/96

TO: James Costello

FROM: White House Counsel Marvin Krislov
Room 130, OEOB, x6-7903

- ☒ FYI "yet another on this
issue."....
- ☐ Appropriate Action
- ☐ Let's Discuss
- ☐ Per Our Conversation
- ☐ Per Your Request
- ☐ Please Return
- ☐ Other

Withdrawal/Redaction Marker

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WATSON, RICHARD

EXECUTIVE OFFICE OF THE PRESIDENT

29-Nov-1995 02:41am

file: gays in military

TO: yandura_p
FROM: Charles V. Davidson
SUBJECT: situation

COPY

28 November 1995

Mr. Paul Yandura
Assistant to Marsha Scott
Gay and Lesbian Liaison to the President of the United States

Dear Paul,

I have decided to contact your office again and provide you with an update of my current situation. As you may recall we met at the SLDN fundraiser in October and I provided you with a few details of my case. Please feel free to contact me or my attorney (Mr. Chris Bakes) <spoken bake S> if you require additional information. My attorney can be reached at (415)393-0899.

I am a United States Naval Officer with over 14 years of service and in October of 1994 I provided a single page document to my commanding officer at Oregon State University (OSU) which stated that I had a homosexual orientation. Discharge proceedings were initiated against me due to my statement and in March of 1995 a Naval Board of Inquiry was convened in Bremerton Washington. The board voted to separate me with an honorable discharge. I requested a waiver for full separation pay but have not received any information on the status of that request, with the exception of a letter from the Chief of Naval Personnel that explained how they were sorry for losing my request and that it is being considered. This occurred over two months ago and I am still waiting for a decision. I provided Vice President Gore with a detailed press package outlining my case during his visit to Portland Oregon in June of 1995.

What is ironic about the separation Pay issue is that the current Secretary of the Navy instruction governing separation pay for involuntarily separated officers predates President Clinton's executive order and the law which implements "Don't Ask Don't Tell". This new policy was suppose to change the discriminatory procedures that were purely punitive. It has not. I would like to know the status of the DON's response to my separation pay request. Again, Chris Bakes can provide you with any and all copies of my requests.

A serious matter has arisen that could require your immediate attention (especially in the wake of Admiral Mack's insensitive comments regarding the rape in Japan). I feel the following event which comes on the heels of an already bad Navy publicity day could be devastating. My attorney's have learned, through reliable sources, that Major (b)(6) 001 USMC has made direct, public, disparaging, and discriminatory comment about my homosexuality and, by implication, my fitness as a naval officer. Major (b)(6) 001 is an NROTC instructor at OSU, my prior command.

According to witnesses, (b)(6) 001 in the course of his official capacity as a university professor and military officer, in the course of directing a cardio pulmonary resuscitation (CPR) class consisting of NROTC midshipmen,

made the following comment as CPR was being demonstrated (paraphrased):
"You're lucky that LT Watson is no longer here. He's a homosexual and one of you would have to be doing this with him." (At least one midshipman reported this incident immediately to his division officer, one LT James Thomas, USN. This witness has since been harassed by staff and fellow student alike. It is ironic that this WITCH-HUNT MENTALITY is allowed, (and fostered) at an institution of higher learning.

This shocking comment is a blatant violation of the United States District Court's order (Western District Washington State) of August 9, 1995, which "ENJOINS Defendants, pending resolution of this action, from:...taking any adverse action against LT Watson on the basis of his statement that he has a homosexual orientation or on the basis of his homosexual status." Major (b)(6) comment, which has now been reported to the local NROTC chain of Command, violates the injunction and is in contempt of court.

Major (b)(6) comment is clearly a discriminatory slur and a hateful remark that has no place, especially coming from the mouth of an officer and a gentleman. It is clearly in violation of the Uniform Code of Military Justice, Article 133: Conduct unbecoming of an officer; Article 134: The general article; US Navy Regulations; and local state and institution laws.

Paul, it is a situation such as this that needs your expert assistance to ensure the US Navy does not sweep this investigation aside. Any assistance you can provide would be greatly appreciated. In addition, I am truly concerned for the brave students that came forward to voice their displeasure with the hateful remark. I would request that your office try to ensure their well being as well. They stood up for what they believe in.

Please contact me at home or via email at this alias address. This situation has gone public in the local media and I do not anticipate national coverage. Thank you for your help and understanding. Please acknowledge receipt of this message as soon as possible.

Yours in service,
Richard P. Watson

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Mr. Richard P. Watson
804 James Street, Apt #C-101
Seattle, WA 98104
206.622.6821

9 December 1995

Ms. Marsha Scott
Gay and Lesbian Liaison Office
White House
Room 115 OEOB
Washington, DC 20500
Attn: Mr. Paul Yandura

This letter has been sent to confirm the receipt of my ^{email} ~~facsimile~~ sent to your office last week. I also wanted to provide your office with a hard copy of the facsimile and additional information. As I relay my concerns regarding my case to your office I also have detailed and specific resolutions in mind, that may be used to resolve this issue.

First and foremost is my concern for the safety and well-being of the courageous Oregon State University (OSU) NROTC midshipman. This brave individual stood up and denounced the bigoted and hateful remarks made by an active duty United States Marine Corps Officer (a cadre member of the OSU NROTC program) and is now facing harassment and pressure from the entire NROTC organization. The midshipman reported the discriminatory remarks and slurs to his class advisor and also advised me of the bigoted comments.

In a public institution, especially a facility of higher learning, this event is totally counter to the ideals of diversity and understanding. Let me provide you with an explanation of the entire event. It has been reported to me by the student who was present during the discriminatory remarks.

Major (b)(6) 002 USMC was presiding over a CPR class during the fall semester and made the following comment. "You are lucky that Lieutenant Watson is no longer here, he's a homosexual and you may have had to perform CPR with him!"

I can not begin to imagine the results of this Marine Corps Officer slanderous and inflammatory remarks. His remarks clearly violate the Uniform Code of Military Justice (UCMJ), articles 133 (Conduct Unbecoming of an Officer), Article 134 (General Article), and Article 138 (Redress). I am afraid the investigation being conducted by the Commanding Officer, Captain Marvin Rice will be cursory and incomplete. I fear that without your office pursuing the truth behind this event, the Officer may go unpunished. I have been in the United States navy for over fourteen years and I know how the good old boy

network operates. Without government intervention the military will not reprimand this officer. I would expect your office to conduct an independent investigation and make recommendations to the Secretary of the Navy.

In addition to informing my attorney, I have made two telephone calls to the United States Navy Inspector General's Office. Each have gone unanswered to. This typical response adds credence to my claims that no such action, based upon my request will occur. I would like your office to contact the Navy's Inspector General's Office, relay the information to them and request an independent investigation from their office. I have spoken to LCDR Wiley in the past and he may be able to provide you with some assistance.

Lastly, I am concerned about my own safety. I do not believe I am in any immediate threat since I am over 250 miles away from Major (b)(6) 603. However, after working with the Major for more than a year I have witnessed a hateful and vengeful individual. I do not know what actions he would take against me if his career was threatened because of his illegal and insensitive comments.

I hope your office can assist me in this very important issue. In June of this year I personally asked Vice President Gore for his assistance, during a fund raising event in Portland Oregon. He acknowledged, and said he would look into the matter. I need his assistance now. Thank you for taking the time to investigate this issue. It is important that we keep hate and discrimination out of our public institutions. When a professor issues discriminatory comments in front of a class, it is a violation on several levels: ethics, professionalism, morality, and human kindness. It also taints or future by creeping into the impressionable minds of our students, the future leaders of America. I hope we can correct this before it envelops our future.

Yours in Service and Democracy,



Richard P. Watson

*Paul,
The comments
are also in violation
of the court order, the
preliminary injunction
issued by Judge Zilly,
which states in part, "...
enjoins the Navy from
taking any adverse
action against me on
the basis of my statement
on the issue of
homosexuality."*

EXECUTIVE OFFICE OF THE PRESIDENT

18-Dec-1995 01:52pm

TO: yandura_p
FROM: Charles V. Davidson
SUBJECT: Update

Paul,

I just wanted to provide you with additional information that has been brought to my attention since we last spoke. First would you please confirm with an email or letter to me regarding your receipt of a letter I sent to you. You should have it by now. In addition, did you receive my email?

Second, I have been told by a very close friend of the student who provided me the information regarding the USMC Major, that the student is really being harassed in the form of verbal abuse, peer abuse, and mental or mind games. This young man is living in fear right now because of his valiant stand against discrimination. I would expect this treatment by military persons toward gay and lesbian servicemembers but not heterosexual members. This is why the policy is so flawed.

Please help protect this sailor before we read about him in the papers. I am not worried about my safety, I can take care of myself. But I cannot help this young man, only your office can ensure this harassment stops.

I have contacted the Navy's Inspector General's Office. I spoke with a LCDR Wiley. (202) 433-3277. He said he will file the complaint. I hope that means an investigation. Please use your office to force an investigation into this matter.

I have not corresponded with the commanding officer of the NROTC Unit, Capt marvin Rice, (541) 737-6289. I believe him to be a caring and compassionate man, but this is a tough issue. I would expect him to ask for outside assistance for his investigation, since he may be too close to the issue.

Finally, you are the last hope for this student. The affirmative action office has told him they cannot help him if the navy attempts any retribution against him because they are outside their sphere of influence. So we have a lone, brave student facing severe harassment without any support.

Thanks Paul for assisting in this very important case. If you need to reach me over the holiday please call (516) 968-4388, I will be there till 25 Dec 1995.

Sincerely, Rich Watson 804 James St, Apt #C-101, Seattle, WA 98104
(206) 622-6821

THE WHITE HOUSE
WASHINGTON

DATE: 12/15/95

TO:

FROM:

White House Counsel
Room 130, OEOB, x6-7903

☒ FYI

☐ Appropriate Action

☐ Let's Discuss

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

Servicemembers Legal Defense Network

*file: gays in the military**Kirk Childress
202/328 3244***COPY**
FAX COVER SHEET**TO:** Marsha Scott (or Paul Yandura)
FAX: 202/456-5558**FROM:** Michelle M. Benecke, Esq.**DATE:** June 19, 1995
PHONE: (202) 328-3244**Number of Pages To Follow:** 3**COMMENTS:**

Enclosed are letters I have just received from Mrs. Teresa Barnes, the mother of a young sailor on Board the USS Simon Lake (Sardinia, Italy), who alleges that her daughter is the victim of a witch hunt started in retaliation for her report of physical battery and sexual harassment by a Navy man senior to her. Mrs. Barnes has not yet received a reply to her letters from either the White House or Undersecretary Dorn at DoD. This is of grave concern, since her daughter's discharge board is evidently scheduled for tomorrow, Friday, the 15th of December.

The allegations here are very serious and merit putting a hold on tomorrow's discharge board until they can be thoroughly investigated. (Note that the time in Italy is six hours ahead of the United States.) The Navy should be concerned, especially in light of the negative publicity surrounding its most recent sexual harassment scandal and the resulting stand down. Is there anything you can do?

WARNING:

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return this original message to us at the above address. Thank you.

12-13-1995 07:52PM

TAYLOR DRUG #062

012 282 8497

P.02

December 8, 1995

Dear Mr. President,

There is a terrible problem on a Navy vessel stationed in Italy, which I feel you should be aware of.

I really don't know where to begin. My daughter, RMSN Amy L. Barnes became active duty in the Navy in April of 1993 and has never been a problem until this incident.

On or about November 17, 1995, my daughter and some other navy people were in a bar having a drink in Sardinia, Italy, when a Petty Officer Third Class who was very intoxicated, came up to her and asked her if she wanted to join him and his friends. She replied, "I am with my friends right now." He became very insistent. She then said, "Excuse me, I am with my friends." At that point, he threw his drink on her. She jumped up and said, "What the hell?" At that, he grabbed her and threw her across the bar. She hit her head on something and split her finger. In the meantime, her friends jumped the guy. Then they helped my daughter up and they all left the bar.

My daughter would not have reported anything except she couldn't get her finger to stop bleeding. So when they asked her what happened, she told them the whole story. The MA's came. They went and got the guy and questioned him. They're stories of course did not match. My daughter was told to wait outside in the cold while they questioned him, at which time she said, "This is bullshit!" They let the guy go and tell his wife that he was in trouble and then confined the two to the ship until further notice.

A few days after this incident, a rumor was started by the wife of a Petty Officer 3rd class, that my daughter and her friends, were gay. The next thing you know, they took one of my daughters' friends in a room and interrogated her for 13 hours. They told her she would either say that my daughter was gay or they would send her to Rota Spain for psychiatric evaluation then discharge her. Finally, she said ok, maybe she is gay. Then everybody they questioned added more names to the list until it turned into a witchhunt. After two weeks of questioning people, they called my daughter in and asked her if she is gay. I don't think they are allowed to ask that. But, she told them she has never slept with a man or woman. They said as long as two people say you are that is proof enough. They said she would be discharged for being gay. To my knowledge, she is not gay. But unless she has done some lued act, this should not be going on. They questioned people until the name of Chief ~~Barnes~~ came up. According to my daughter, it is a known fact, that she is gay. When Chief ~~Barnes~~' name came up the investigation was stopped. But there are about six people who are scheduled to be discharged for being gay because this girl and her friend say they are gay. I have read the White House briefings on this subject and without a lot of proof and not a witch hunt, this kind of thing can not happen.

Until yesterday, December 7, 1995, she has not been able to talk to anyone about this incident. Yesterday, they came and got her and she had to go in front of the Captain Eugene Wilson who asked if the incident was alcohol related, she replied, "yes sir." He asked if she offended the MA, she replied, "If my remark offended her, I guess I am guilty of that." He asked if she hit this Petty Officer Third Class, she replied, "No Sir, I did not!". At that point, he pulled out a piece of paper

signed by someone she had never seen or met, who said she picked him up out of his seat, threw him on the ground and threatened to kill him. My daughter replied, "NO sir, I did not. This is the first time I have heard of this." At that, the Captain told her she was a liar and that she is no longer a RM and will be courtmarshalled!

They brought her witnesses in and questioned her. After her statement, the Captain told her she is no longer a RM. Something is very wrong here. There was no council present, no hearing, only 2 men. The man who pushed my daughter has been in two other alcohol-related incidences. My daughter has never been in trouble in her life. She is 5'9" and weighs 140 lbs. I can't see her being a brawler in a bar.

Apparently, Captain Eugene Wilson, was aware of the other problem going on. That is why he was the way he was with my daughter.

My daughter is devastated. She went in the Navy for a future and has received promotions and is a good RM. This is not fair. Furthermore, it is illegal to do all of this without a hearing.

I went to the navy recruit office in Clarksville, IN and spoke to Petty Officer 1st Class Tribbey, who said this was illegal and maybe the whole ship needs investigated. He said this is not the way the navy is.

I contacted Congressman Lee Hamilton's Office and was told this is illegal. They said for my daughter to write all of this down and he would start an investigation. In the meantime, my daughter and her witnesses are stripped of their titles and their top secret clearance and my daughter is still confined to the ship waiting to be courtmarshalled because she didn't want to talk to this man.

I need help! My daughter was ordered by the Captain not to talk to anyone about this or she would go to prison for disobeying a direct order. I have been told this is illegal. What is she supposed to do? Sit there and be discriminated against. I am an American Citizen and don't where to go except to my President. My daughter wants off that ship. She fears for her safety. An investigation by Mr. Hamilton would take time. She need help now. You are a parent yourself. If it could happen to my daughter, it could happen to anyone.

What is happening to our military. These kids risk their lives, for what? Sexual harassment! Sexual discrimination! This is wrong! But this is what is happening. Especially, on the USS Simon Lake. Please contact me when you read this and let me know what I can do as a parent to get my daughter off this ship. We are scared and desperate. My daughter wants out of the Navy. She says if this is what the Navy stands for, she wants no part of it. Without proof of anything or any prior problems, I don't feel it is right to give her a dishonorable discharge because of one man's bigotry. These are things that lawsuits are made of. These are things that ruin peoples' lives and lead possible to suicide. Please help my daughter and the other girls before it ends up worse.

Thank you,

Teresa Barnes 3104 Holman Lane, Jeffersonville, IN 47130, (812)282-3656

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December 13, 1995

Undersecretary of Defense for Personnel
4000 Defense Pentagon
Washington DC 20301

Dear Honorable Edward Dorn,

I am writing as a last resort. My daughter RMSN Amy L. Barnes (SSN (b)(6) 003) is currently on board the USS Simon Lake, based in Sardinia, Italy.

Amy is facing a discharge board this Friday, December 15, 1995, as a result of a reputory report that she is a lesbian which were made when she reported being sexually harassed by a superior officer and threatened by his repeated sexual advances, which ended with him assaulting her. I have had limited conversations with her this last month, since she has been confined to the ship and denied access to outside communication. As her mother, I am concerned for both her safety and her career.

In light of what happened in the navy following Tail Hook, I believed that my daughter would be safe from sexual harassment. Instead I am outraged to learn that the navy is punishing her for fending off and reporting her unwanted and threatening sexual assault rather than punishing a man who assaulted her. Because of this I feel that the navy's system does not work and will not fairly resolve this issue.

I ask you to explain why this is happening and to delay any administrative action to discharge my daughter before she is railroaded out of the navy on unjust charges.

Sincerely,

Linda Barnes

Linda Barnes
3104 Holmans Lane #6
Jeffersonville, IN 47130
(812)282-3656

Servicemembers Legal Defense Network

★ ★ ★ ★ ★

Kirk Childress
*202/328 3244***FAX COVER SHEET****TO:** Marsha Scott (or Paul Yandura)
FAX: 202/456-5558**FROM:** Michelle M. Benecke, Esq.**DATE:** June 19, 1995
PHONE: (202) 328-3244**Number of Pages To Follow:** 3**COMMENTS:**

Enclosed are letters I have just received from Mrs. Teresa Barnes, the mother of a young sailor on Board the USS Simon Lake (Sardinia, Italy), who alleges that her daughter is the victim of a witch hunt started in retaliation for her report of physical battery and sexual harassment by a Navy man senior to her. Mrs. Barnes has not yet received a reply to her letters from either the White House or Undersecretary Dorn at DoD. This is of grave concern, since her daughter's discharge board is evidently scheduled for tomorrow, Friday, the 15th of December.

The allegations here are very serious and merit putting a hold on tomorrow's discharge board until they can be thoroughly investigated. (Note that the time in Italy is six hours ahead of the United States.) The Navy should be concerned, especially in light of the negative publicity surrounding its most recent sexual harassment scandal and the resulting stand down. Is there anything you can do?

WARNING:

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12-13-1995 07:52PM

TAYLOR DRUG #062

812 282 8497

P.02

December 8, 1995

Dear Mr. President,

There is a terrible problem on a Navy vessel stationed in Italy, which I feel you should be aware of.

I really don't know where to begin. My daughter, RMSN Amy L. Barnes became active duty in the Navy in April of 1993 and has never been a problem until this incident.

On or about November 17, 1995, my daughter and some other navy people were in a bar having a drink in Bardonia, Italy, when a Petty Officer Third Class who was very intoxicated, came up to her and asked her if she wanted to join him and his friends. She replied, "I am with my friends right now." He became very insistent. She then said, "Excuse me, I am with my friends." At that point, he threw his drink on her. She jumped up and said, "What the hell?" At that, he grabbed her and threw her across the bar. She hit her head on something and split her finger. In the meantime, her friends jumped the guy. Then they helped my daughter up and they all left the bar.

My daughter would not have reported anything except she couldn't get her finger to stop bleeding. So when they asked her what happened, she told them the whole story. The MA's came. They went and got the guy and questioned him. They're stories of course did not match. My daughter was told to wait outside in the cold while they questioned him, at which time she said, "This is bullshit!" They let the guy go and tell his wife that he was in trouble and then confined the two to the ship until further notice.

A few days after this incident, a rumor was started by the wife of a Petty Officer 3rd class, that my daughter and her friends, were gay. The next thing you know, they took one of my daughters' friends in a room and interrogated her for 13 hours. They told her she would either say that my daughter was gay or they would send her to Roda Spain for psychiatric evaluation then discharge her. Finally, she said ok, maybe she is gay. Then everybody they questioned added more names to the list until it turned into a witchhunt. After two weeks of questioning people, they called my daughter in and asked her if she is gay. I don't think they are allowed to ask that. But, she told them she has never slept with a man or woman. They said as long as two people say you are that is proof enough. They said she would be discharged for being gay. To my knowledge, she is not gay. But unless she has done some lued act, this should not be going on. They questioned people until the name of Chief ~~Barnes~~ came up. According to my daughter, it is a known fact, that she is gay. When Chief ~~Barnes~~' name came up the investigation was stopped. But there are about six people who are scheduled to be discharged for being gay because this girl and her friend say they are gay. I have read the White House briefings on this subject and without a lot of proof and not a witch hunt, this kind of thing can not happen.

Until yesterday, December 7, 1995, she has not been able to talk to anyone about this incident. Yesterday, they came and got her and she had to go in front of the Captain Eugene Wilson who asked if the incident was alcohol related, she replied, "yes sir." He asked if she offended the MA, she replied, "If my remark offended her, I guess I am guilty of that." He asked if she hit this Petty Officer Third Class, she replied, "No Sir, I did not!". At that point, he pulled out a piece of paper

signed by someone she had never seen or met, who said she picked him up out of his seat, threw him on the ground and threatened to kill him. My daughter replied, "NO sir, I did not. This is the first time I have heard of this." At that, the Captain told her she was a liar and that she is no longer a RM and will be courtmarshalled!

They brought her witnesses in and questioned her. After her statement, the Captain told her she is no longer a RM. Something is very wrong here. There was no council present, no hearing, only 2 men. The man who pushed my daughter has been in two other alcohol-related incidences. My daughter has never been in trouble in her life. She is 5'9" and weighs 140 lbs. I can't see her being a bruiser in a bar.

Apparently, Captain Eugene Wilson, was aware of the other problem going on. That is why he was the way he was with my daughter.

My daughter is devastated. She went in the Navy for a future and has received promotions and is a good RM. This is not fair. Furthermore, it is illegal to do all of this without a hearing.

I went to the navy recruit office in Clarksville, IN and spoke to Petty Officer 1st Class Tribbey, who said this was illegal and maybe the whole ship needs investigated. He said this is not the way the navy is.

I contacted Congressman Lee Hamilton's Office and was told this is illegal. They said for my daughter to write all of this down and he would start an investigation. In the meantime, my daughter and her witnesses are stripped of their titles and their top secret clearance and my daughter is still confined to the ship waiting to be courtmarshalled because she didn't want to talk to this man.

I need help! My daughter was ordered by the Captain not to talk to anyone about this or she would go to prison for disobeying a direct order. I have been told this is illegal. What is she supposed to do? Sit there and be discriminated against. I am an American Citizen and don't where to go except to my President. My daughter wants off that ship. She fears for her safety. An investigation by Mr. Hamilton would take time. She need help now. You are a parent yourself. If it could happen to my daughter, it could happen to anyone.

What is happening to our military. These kids risk their lives, for what? Sexual harassment! Sexual discrimination! This is wrong! But this is what is happening. Especially, on the USS Simon Lake. Please contact me when you read this and let me know what I can do as a parent to get my daughter off this ship. We are scared and desperate. My daughter wants out of the Navy. She says if this is what the Navy stands for, she wants no part of it. Without proof of anything or any prior problems, I don't feel it is right to give her a dishonorable discharge because of one man's bigotry. These are things that lawsuits are made of. These are things that ruin peoples' lives and lead possible to suicide. Please help my daughter and the other girls before it ends up worse.

Thank you,

Terena Barnes 3104 Holman Lane, Jeffersonville, IN 47130, (812)282-3656

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. letter	Copy of 003 [partial] (1 page)	12/13/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Castello, James
OA/Box Number: 6727

FOLDER TITLE:

Gays in the Military

2015-0017-F
sb1237

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

December 13, 1995

Undersecretary of Defense for Personnel
4000 Defense Pentagon
Washington DC 20301

Dear Honorable Edward Dorn,

I am writing as a last resort. My daughter RMSN Amy L. Barnes (SSN (b)(6) 0004) is currently on board the USS Simon Lake, based in Sardinia, Italy.

Amy is facing a discharge board this Friday, December 15, 1995; as a result of a reputory report that she is a lesbian which were made when she reported being sexually harassed by a superior officer and threatened by his repeated sexual advances, which ended with him assaulting her. I have had limited conversations with her this last month, since she has been confined to the ship and denied access to outside communication. As her mother, I am concerned for both her safety and her career.

In light of what happened in the navy following Tail Hook, I believed that my daughter would be safe from sexual harassment. Instead I am outraged to learn that the navy is punishing her for fending off and reporting her unwanted and threatening sexual assault rather than punishing a man who assaulted her. Because of this I feel that the navy's system does not work and will not fairly resolve this issue.

I ask you to explain why this is happening and to delay any administrative action to discharge my daughter before she is railroaded out of the navy on unjust charges.

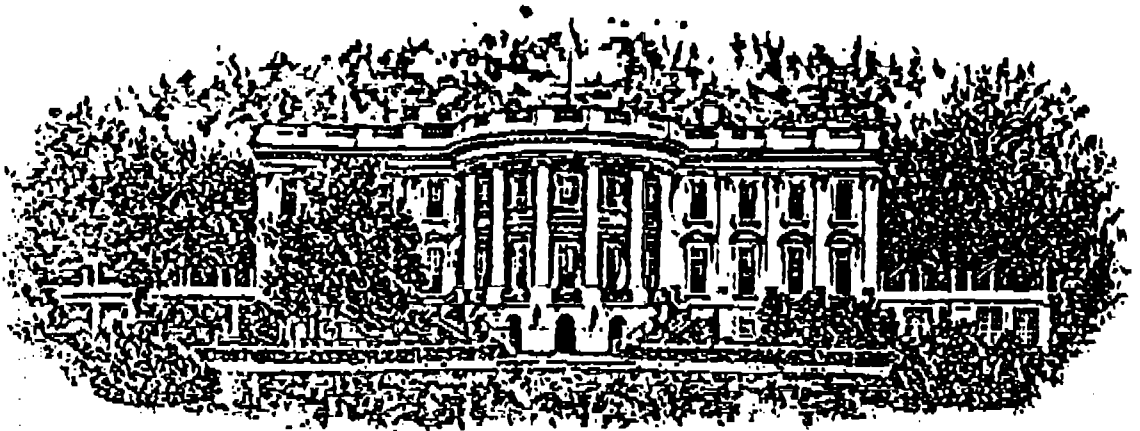
Sincerely,

Teresa Barnes

Teresa Barnes
3104 Holmes Lane #6
Jeffersonville, IN 47130
(812)282-3656

The White House

file: gays in the military



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE:

12/12/95

TO:

Jack Quinn (copy to James Costello please)

FACSIMILE NUMBER:

6-5279

TELEPHONE NUMBER:

6-6611

FROM:

Marvin Krislov

TELEPHONE NUMBER:

6-7903

PAGES (WITH COVER):

5

COMMENTS:

Marsha Scott is very concerned about this matter which you or James were going to speak with Jamie G. about at last Thursday's DOJ meeting. Any news? Thanks much.

Marvin

PLEASE DELIVER AS SOON AS POSSIBLE

The document(s) accompanying this facsimile transmittal sheet is intended only for the use of the individual or entity to whom it is addressed. This message contains information which may be privileged, confidential or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any disclosure, dissemination, copying or distribution, or the taking of any action in reliance on the contents of this communication is strictly prohibited. If you have received this information in error, please immediately notify the sender at their telephone number stated above.

U.S. DEPARTMENT OF LABOR

White House Liaison
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Tel: 202-219-7464
Fax: 202-219-7971

Date:

Dec 12, 1995

To:

Martin Kislak

Fax Number:

456-1647

From:

Richard Acemides

Number of Pages: 4
(including cover sheet)

☐ Action
☐ Approval
☐ Note and Return
☐ Comment
☐ Investigate
☐ For Clearance
☐ For Correction

☒ As Discussed
☐ As Requested
☐ Circulate
☐ Prepare Reply
☐ See Me
☐ Signature
☐ Information

COMMENTS:

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. letter	To: Sheila Widnall; From: Servicemembers Legal Defense Network; Re: Air Force Captain Warren Dinges [partial] (3 pages)	11/30/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Castello, James
OA/Box Number: 6727

FOLDER TITLE:

Gays in the Military

2015-0017-F
sb1237

RESTRICTION CODES

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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Servicemembers Legal Defense Network, Inc.

November 30, 1995

The Honorable Sheila E. Widnall
Secretary of the Air Force
1670 Air Force Pentagon
Washington, DC 20330-1670

Dear Ms. Widnall:

I write to you regarding the case of Air Force Captain Warren Dinges, SSN (b)(6) 005. Captain Dinges graduated 35th in his class at the United States Air Force Academy, is twelve hours from completing his PhD in chemistry at the University of Oklahoma, and has received numerous commendations for service in the Air Force.

On November 15, 1995 Captain Dinges was convicted and sentenced by general court-martial to five months imprisonment for consensual, private sex with an adult civilian male.

Captain Dinges' conviction was fueled in part by one of the most hurtful and pernicious stereotypes of gay people: pedophilia. Captain Dinges was in his mid-twenties and his lover was seventeen. The age of consent in the military and the state of Oklahoma is sixteen. A civilian female instigated false allegations about Captain Dinges which Air Force personnel at Tinker Air Force Base pursued without any critical review of the evidence or regulations governing how they should have handled the case.

Indeed, the OSI investigative report concluded that the only possible evidence was that Captain Dinges might have engaged in consensual, sexual conduct with an adult, civilian male, absent aggravating circumstances. The transcript of the trial at court-martial will also show that the only evidence is Captain Dinges' stipulation of fact of consensual sodomy, a stipulation he made only after the government threatened to hold Captain Dinges' lover, (b)(6) 005 in contempt of court and held in jail for six months for refusing to testify.

Captain Dinges' prosecution and conviction represent an overzealous, biased and improper application of current regulations governing consensual, private, adult sexual activities.

Department of Defense Directive 1332.30, Attachment 8-1 (D), "Guidelines for Fact-Finding Inquiries Into Homosexual Conduct," states: "Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct."

Further, Department of Defense Instruction 5505.6 (A), states: "as a matter of investigative priorities and resource limitations, Defense Criminal Investigative Organizations (DCIOs) and other DoD law enforcement organizations will normally refer allegations involving only adult private consensual sexual misconduct to the Servicemember's commander for appropriate disposition."

R.O. Box 53013 • Washington, D.C. 20009 • Voice: 202.328.3244 • Facsimile: 202.797.1635

The Honorable Sheila E. Widnall
November 30, 1995
Page Two of Three

Read together, these two provisions were clearly intended to prevent incarceration of servicemembers for consensual, private, adult sexual conduct. At the very least, the military's historical practice has been not to pursue criminal charges when the only cause of action is consensual, private, adult sexual conduct. Indeed, the Department of Defense does not prosecute heterosexual servicemembers for similar allegations. And the Department of Defense should not prosecute homosexual servicemembers for similar allegations given the mandate of Department of Defense Instruction 5505 that requires even-handed enforcement of regulations governing consensual, private, adult sexual conduct.

Once OSI determined that the only substantive allegations were of consensual, private, adult sexual conduct, however, the matter should have been handled administratively. Despite a request from Captain Dinges' civilian counsel for an administrative hearing, Colonel Pratt with the Staff Judge Advocate's office, refused to consider an administrative board despite regulatory guidance to the contrary.

Both the actions of the OSI special agent and the Air Force prosecutor in this case raise serious concerns. The OSI special agent in charge of the investigation attempted on numerous occasions to coerce (b)(6) 2025 into making a statement against Captain Dinges. The OSI special agent failed to read (b)(6) 2025 his legal rights and failed, in violation of Oklahoma law, to interrogate him in the presence of a parent or an attorney. On two occasions, the special agent attempted to coerce (b)(6) 2025 into signing a prepared written statement against Captain Dinges that was filled with factual inaccuracies. Under duress, (b)(6) 2025 agreed to sign the second statement to end the harassment he faced, but he later submitted a written affidavit repudiating the statement he had been forced to sign.

At the general court-martial, the Air Force prosecutor, Captain Bernstein, subpoenaed Mr. (b)(6) 2025 to again attempt to force his testimony. (b)(6) 2025 invoked his right against self-incrimination. In order to induce his testimony, Captain Bernstein then secured a waiver of immunity from John C. Kinney and Mary Lee Warren of the Department of Justice Criminal Division to assure the civilian that he would not be prosecuted in civilian courts. The civilian refused to testify, at which point Captain Bernstein threatened to have a court hold the civilian in contempt and imprison him for six months. Only at this point, to avoid further embarrassment to his former lover, did Captain Dinges agree to stipulate to the fact that they had engaged in adult, private consensual sexual acts.

(b)(6) 2025 is understandably shocked that the military would harass American civilians about their private, sexual conduct and threaten them with imprisonment in civilian courts.

The Honorable Sheila E. Widnall
November 30, 1995
Page Three of Three

Captain Dinges is currently serving five months in jail at Ft. Leavenworth. I understand that his civilian attorney, E.V. Spadafora will seek injunctive relief in federal court before Christmas to suspend the sentence while the case is on appeal. I ask that you intercede immediately to secure Captain Dinges' release from Ft. Leavenworth. If we wait for the normal channels to resolve the situation, Captain Dinges will have served his five months in prison. This is obviously an unacceptable situation. No one should be in prison for consensual, private, adult, sexual conduct.

Further, I ask that you instruct all appropriate military personnel regarding the evenhanded enforcement of the regulations regarding consensual, private, adult, sexual conduct cited above.

Sincerely,

C. Dixon Osburn

C. Dixon Osburn, Esq.
Co-Executive Director

cc:

Secretary of Defense William Perry
Attorney General Janet Reno
Amnesty International

THE WHITE HOUSE
WASHINGTON

DoJ meeting
file: gays in the military

MEMORANDUM TO MARVIN KRISLOV

FROM: *MS* MARSHA SCOTT
DATE: DECEMBER 4, 1995

SUBJECT: AF Captain Warren Dinges

I'm enclosing the recent letter from Dixon Osborne and the Servicemembers Legal Defense Network informing me of this case. If any of this is true it is shocking. This guy is in jail now. What can we do? Please let me know ASAP. Thanks

THE WHITE HOUSE
WASHINGTON

DATE: 12/4/95

TO: Jack Quinn

FROM: White House Counsel Marvin
Room 128, OEOB, x7900

- ☒ FYI Please call---shall I
contact Judy Miller and/or
- ☐ Appropriate Action Sheila Cheston
to find out facts?
- ☐ Let's Discuss
- ☐ Per Our Conversation Please advise
- ☐ Per Your Request Thanks
- ☐ Please Return
- ☐ Other

Servicemembers Legal Defense Network
★ ★ ★ ★ ★

FAX COVER SHEET

TO: Paul Yandura
FAX: 202/456-5558
FROM: C. Dixon Osburn
DATE: November 30, 1995

Number of Pages To Follow: 1

COMMENTS:

I know your swamped, but I thought you would be concerned to know that an Air Force officer was recently convicted and sentenced to five months in prison for consensual sex with another man. Any advice you or Marsha could provide would be most helpful.

★ Dixon asked if you would call:
Secretary of Air Force, or Perry
Just let them know you
are aware of the case and
are following it.

— Should be send copies to Counsel.

*Civilian was
threatened to
testify (if not
testify would
be put in
jail)
in cooperation
with DOJ*

WARNING:

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P.O. Box 53013 ★ Washington, DC 20009 ★ 202.328-3244 ★ 202.797.1635

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. letter	To: Marsha Scott; From: Servicemembers Legal Defense network; Re: Air Force Captain Warren Dinges [partial] (1 page)	11/30/1995	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Castello, James
OA/Box Number: 6727

FOLDER TITLE:

Gays in the Military

2015-0017-F
sb1237

RESTRICTION CODES

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Servicemembers Legal Defense Network

★ ★ ★ ★ ★

November 30, 1995

Marsha Scott
Deputy Assistant to the President
149 Old Executive Office Building
Washington, D.C. 20500

Dear Ms. Scott:

I am forwarding to you a letter that I sent to Secretary of Air Force Sheila Widnall because it involves a matter that concerns your office as well.

The letter details the criminal prosecution of Air Force Captain, Warren Dinges, SSN (b)(6) 206 for consensual, private sex with an adult civilian male. On November 15, 1995, Captain Dinges was convicted and sentenced to five months imprisonment at Ft. Leavenworth.

Captain Dinges' conviction was obtained in violation of the spirit, if not the letter, of Department of Defense regulations, and it was obtained with the help of the Department of Justice.

Having no concrete evidence that Captain Dinges had violated any military regulations, the Air Force prosecutor subpoenaed a civilian male to attempt to compel testimony. The witness invoked his right against self-incrimination.

In order to induce the testimony, the Air Force prosecutor obtained a waiver of immunity from John C. Kinney and Mary Lee Warren of the Department of Justice Criminal Division to assure the civilian that he would not be prosecuted in civilian courts. The civilian again refused to testify, at which point the Air Force prosecutor threatened to have a court hold the civilian in contempt and imprison him for six months. Only at this point, to avoid further embarrassment, did Captain Dinges agree to stipulate to the fact that he and the civilian had engaged in adult, private consensual sexual acts.

The civilian is understandably shocked that the Clinton Administration would harass American civilians about their private, sexual conduct and threaten them with imprisonment in civilian courts. The Department of Air Force's and Department of Justice's roles in this action are both of grave concern.

I understand that Captain Dinges' civilian attorney will seek injunctive relief in federal court before Christmas to suspend the sentence while the case is on appeal. If there is anything that your office can do, I ask that you intercede immediately to secure Captain Dinges' release from Ft. Leavenworth. No one should be in jail for consensual, private, adult, sexual conduct.

Sincerely,

C. Dixon Osburn

C. Dixon Osburn, Esq.
Co-Executive Director

P.O. Box 53013 • Washington, D.C. 20009 • Voice: 202.328.3244 • Facsimile: 202.797.1635

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007. letter	Copy of 005 [partial] (3 pages)	11/30/1995	b(6)

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Counsel Office
Castello, James
OA/Box Number: 6727

FOLDER TITLE:

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2015-0017-F
sb1237

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Servicemembers Legal Defense Network

★ ★ ★ ★ ★

November 30, 1995

The Honorable Sheila E. Widnall
Secretary of the Air Force
1670 Air Force Pentagon
Washington, DC 20330-1670

Dear Ms. Widnall:

I write to you regarding the case of Air Force Captain Warren Dinges, SSN (b)(6) 0007. Captain Dinges graduated 35th in his class at the United States Air Force Academy, is twelve hours from completing his PhD in chemistry at the University of Oklahoma, and has received numerous commendations for service in the Air Force.

On November 15, 1995 Captain Dinges was convicted and sentenced by general court-martial to five months imprisonment for consensual, private sex with an adult civilian male.

Captain Dinges' conviction was fueled in part by one of the most hurtful and pernicious stereotypes of gay people: pedophilia. Captain Dinges was in his mid-twenties and his lover was seventeen. The age of consent in the military and the state of Oklahoma is sixteen. A civilian female insinuated false allegations about Captain Dinges which Air Force personnel at Tinker Air Force Base pursued without any critical review of the evidence or regulations governing how they should have handled the case.

Indeed, the OSI investigative report concluded that the only possible evidence was that Captain Dinges might have engaged in consensual, sexual conduct with an adult, civilian male, absent aggravating circumstances. The transcript of the trial at court-martial will also show that the only evidence is Captain Dinges' stipulation of fact of consensual sodomy, a stipulation he made only after the government threatened to hold Captain Dinges' lover (b)(6) 0007 in contempt of court and held in jail for six months for refusing to testify.

Captain Dinges' prosecution and conviction represent an overzealous, biased and improper application of current regulations governing consensual, private, adult sexual activities.

Department of Defense Directive 1332.30, Attachment 8-1 (D), "Guidelines for Fact-Finding Inquiries Into Homosexual Conduct," states: "Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct."

Further, Department of Defense Instruction 5505.8 (A), states: "as a matter of investigative priorities and resource limitations, Defense Criminal Investigative Organizations (DCIOs) and other DoD law enforcement organizations will normally refer allegations involving only adult private consensual sexual misconduct to the Servicemember's commander for appropriate disposition."

P.O. Box 53013 • Washington, D.C. 20009 • Voice: 202.328.3244 • Facsimile: 202.797.1635

The Honorable Sheila E. Widnall
November 30, 1995
Page Two of Three

Read together, these two provisions were clearly intended to prevent incarceration of servicemembers for consensual, private, adult sexual conduct. At the very least, the military's historical practice has been not to pursue criminal charges when the only cause of action is consensual, private, adult sexual conduct. Indeed, the Department of Defense does not prosecute heterosexual servicemembers for similar allegations. And the Department of Defense should not prosecute homosexual servicemembers for similar allegations given the mandate of Department of Defense Instruction 5505 that requires even-handed enforcement of regulations governing consensual, private, adult sexual conduct.

Once OSI determined that the only substantive allegations were of consensual, private, adult sexual conduct, however, the matter should have been handled administratively. Despite a request from Captain Dinges' civilian counsel for an administrative hearing, Colonel Pratt with the Staff Judge Advocate's office, refused to consider an administrative board despite regulatory guidance to the contrary.

Both the actions of the OSI special agent and the Air Force prosecutor in this case raise serious concerns. The OSI special agent in charge of the investigation attempted on numerous occasions to coerce (b)(6) 007 into making a statement against Captain Dinges. The OSI special agent failed to respect (b)(6) 007's legal rights and failed, in violation of Oklahoma law, to interrogate him in the presence of a parent or an attorney. On two occasions, the special agent attempted to coerce (b)(6) 007 into signing a prepared written statement against Captain Dinges that was filled with factual inaccuracies. Under duress, (b)(6) 007 agreed to sign the second statement to end the harassment he faced, but he later submitted a written affidavit repudiating the statement he had been forced to sign.

At the general court-martial, the Air Force prosecutor, Captain Bernstein, subpoenaed Mr. (b)(6) 007 to again attempt to force his testimony. (b)(6) 007 invoked his right against self-incrimination. In order to induce his testimony, Captain Bernstein then secured a waiver of immunity from John C. Kinney and Mary Lee Warren of the Department of Justice Criminal Division to assure the civilian that he would not be prosecuted in civilian courts. The civilian refused to testify, at which point Captain Bernstein threatened to have a court hold the civilian in contempt and imprison him for six months. Only at this point, to avoid further embarrassment to his former lover, did Captain Dinges agree to stipulate to the fact that they had engaged in adult, private consensual sexual acts.

(b)(6) 007 is understandably shocked that the military would harass American civilians about their private, sexual conduct and threaten them with imprisonment in civilian courts.

The Honorable Sheila E. Widnall

November 30, 1995

Page Three of Three

Captain Dinges is currently serving five months in jail at Ft. Leavenworth. I understand that his civilian attorney, E.V. Spadafora will seek injunctive relief in federal court before Christmas to suspend the sentence while the case is on appeal. I ask that you intercede immediately to secure Captain Dinges' release from Ft. Leavenworth. If we wait for the normal channels to resolve the situation, Captain Dinges will have served his five months in prison. This is obviously an unacceptable situation. No one should be in prison for consensual, private, adult, sexual conduct.

Further, I ask that you instruct all appropriate military personnel regarding the evenhanded enforcement of the regulations regarding consensual, private, adult, sexual conduct cited above.

Sincerely,

C. Dixon Osburn

C. Dixon Osburn, Esq.

Co-Executive Director

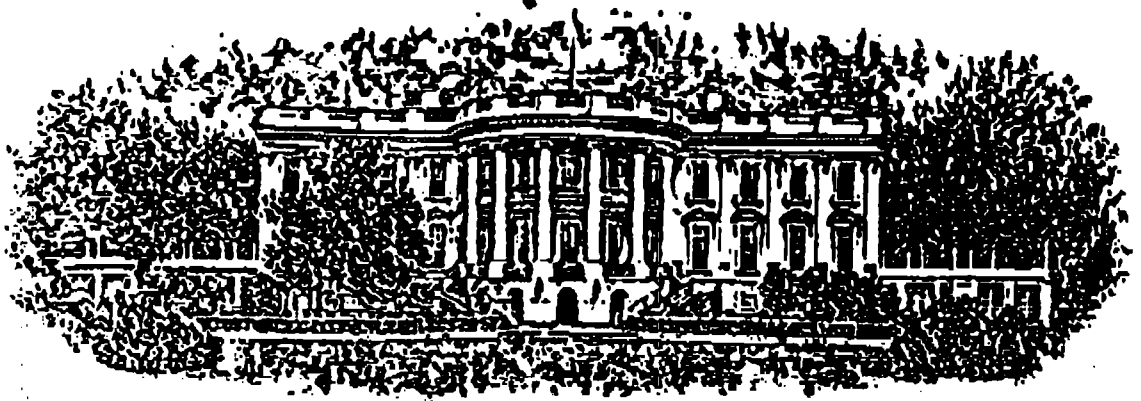
cc:

Secretary of Defense William Perry

Attorney General Janet Reno

Amnesty International

The White House



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: 12/12/95

TO: Jack Quinn (copy to James Costello please)

FACSIMILE NUMBER: 6-5279

TELEPHONE NUMBER: 6-6611

FROM: Marvin Krislov

TELEPHONE NUMBER: 6-7903

PAGES (WITH COVER): 5

COMMENTS: Marsha Scott is very concerned about this matter (which you or James were going to speak with Jamie G. about at last Thursday's DOJ meeting. Any news? Thanks much.

Marvin

PLEASE DELIVER AS SOON AS POSSIBLE

The document(s) accompanying this facsimile transmittal sheet is intended only for the use of the individual or entity to whom it is addressed. This message contains information which may be privileged, confidential or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any disclosure, dissemination, copying or distribution, or the taking of any action in reliance on the contents of this communication is strictly prohibited. If you have received this information in error, please immediately notify the sender at their telephone number stated above.

U.S. DEPARTMENT OF LABOR

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300 Constitution Avenue, N.W.
Washington, D.C. 20210
Tel: 202-219-7464
Fax: 202-219-7971

Date:

Dec 12, 1995

To:

Maria Hixon

Fax Number:

456-1647

From:

Richard Acunides

Number of Pages: 4
(including cover sheet)

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☐ Approval
☐ Note and Return
☐ Comment
☐ Investigate
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☐ For Correction

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FOLDER TITLE:

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2015-0017-F
sb1237

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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Service members Legal Defense Network, Inc.

November 30, 1995

The Honorable Sheila E. Widnall
Secretary of the Air Force
1670 Air Force Pentagon
Washington, DC 20330-1670

Dear Ms. Widnall:

I write to you regarding the case of Air Force Captain Warren Dinges, SSN (b)(6) 0069. Captain Dinges graduated 35th in his class at the United States Air Force Academy, is twelve hours from completing his PhD in chemistry at the University of Oklahoma, and has received numerous commendations for service in the Air Force.

On November 15, 1995 Captain Dinges was convicted and sentenced by general court-martial to five months imprisonment for consensual, private sex with an adult civilian male.

Captain Dinges' conviction was fueled in part by one of the most hurtful and pernicious stereotypes of gay people: pedophilia. Captain Dinges was in his mid-twenties and his lover was seventeen. The age of consent in the military and the state of Oklahoma is sixteen. A civilian female insinuated false allegations about Captain Dinges which Air Force personnel at Tinker Air Force Base pursued without any critical review of the evidence or regulations governing how they should have handled the case.

Indeed, the OSI investigative report concluded that the only possible evidence was that Captain Dinges might have engaged in consensual, sexual conduct with an adult, civilian male, absent aggravating circumstances. The transcript of the trial at court-martial will also show that the only evidence is Captain Dinges' stipulation of fact of consensual sodomy, a stipulation he made only after the government threatened to hold Captain Dinges' lover, (b)(6) 0068, in contempt of court and hold in jail for six months for refusing to testify.

Captain Dinges' prosecution and conviction represent an overzealous, biased and improper application of current regulations governing consensual, private, adult sexual activities.

Department of Defense Directive 1332.30, Attachment 8-1 (D), "Guidelines for Fact-Finding Inquiries Into Homosexual Conduct," states: "Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct."

Further, Department of Defense Instruction 5505.8 (A), states: "as a matter of investigative priorities and resource limitations, Defense Criminal Investigative Organizations (DCIOs) and other DoD law enforcement organizations will normally refer allegations involving only adult private consensual sexual misconduct to the Servicemember's commander for appropriate disposition."

RO. Box 53012 • Washington, D.C. 20009 • Voice: 202.328.3244 • Facsimile: 202.797.1635

The Honorable Sheila E. Widnall
November 30, 1995
Page Two of Three

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Once OSI determined that the only substantive allegations were of consensual, private, adult sexual conduct, however, the matter should have been handled administratively. Despite a request from Captain Dinges' civilian counsel for an administrative hearing, Colonel Pratt with the Staff Judge Advocate's office, refused to consider an administrative board despite regulatory guidance to the contrary.

Both the actions of the OSI special agent and the Air Force prosecutor in this case raise serious concerns. The OSI special agent in charge of the investigation attempted on numerous occasions to coerce (b)(6) to making a statement against Captain Dinges. The OSI special agent failed to respect (b)(6)'s legal rights and failed, in violation of Oklahoma law, to interrogate him in the presence of a parent or an attorney. On two occasions, the special agent attempted to coerce (b)(6) into signing a prepared written statement against Captain Dinges that was filled with factual inaccuracies. Under duress, (b)(6) agreed to sign the second statement to end the harassment he faced, but he later submitted a written affidavit repudiating the statement he had been forced to sign.

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(b)(6) is understandably shocked that the military would harass American civilians about their private, sexual conduct and threaten them with imprisonment in civilian courts.

The Honorable Sheila E. Widnall
November 30, 1995
Page Three of Three

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Further, I ask that you instruct all appropriate military personnel regarding the evenhanded enforcement of the regulations regarding consensual, private, adult, sexual conduct cited above.

Sincerely,

C. Dixon Osburn

C. Dixon Osburn, Esq.
Co-Executive Director

cc:

Secretary of Defense William Perry
Attorney General Janet Reno
Amnesty International

THE WHITE HOUSE
WASHINGTON

DATE: 12/4

TO: James Costello

FROM: White House Counsel Marvin
Room 128, OEOB, x7900

☒ FYI

☐ Appropriate Action

☐ Let's Discuss

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

file: gays in military

December 4, 1995

CLOSE HOLD -- PRIVILEGED AND CONFIDENTIAL

MEMORANDUM FOR JACK QUINN
JAMES CASTELLO

FROM: MARVIN KRISLOV

RE: Thomasson v. Perry Appeal

On Tuesday, Dec. 5, the U.S. Court of Appeals for the Fourth Circuit, en banc, hears oral arguments in the appeal of Thomasson v. Perry, which challenges the "Don't Ask, Don't Tell" policy.¹ The court will allow the Family Research Council to argue orally against Thomasson's claims. This memorandum provides a short history of the case and sets out the three arguments. A law clerk, John Stanley, will attend the arguments in Richmond and will provide any additional updates.

I. Case Facts

On Mar. 2, 1994, Lt. Paul Thomasson, USN, announced in a letter to the Navy that he was a homosexual. A Navy Board of Review recommended Thomasson's discharge for failing to rebut the presumption that he engaged in, or was likely to engage in, homosexual acts. Thomasson sued to prevent his discharge. He challenged the constitutionality of Section 571 of the National Defense Authorization Act of 1994, 10 U.S.C. §654 ("Policy concerning homosexuality in the armed forces") and DoD Directive No. 1332.30 ("Separation of Regular Commissioned Officers"), which together comprise the current policy concerning homosexuality in the armed forces. On June 8, 1995, the U.S. District Court for the Eastern District of Virginia held that the statute and regulations were valid and did not violate

¹ Four other cases have challenged the policy at the district court level: (1) Able v. U.S., 880 F.Supp. 968 (E.D.N.Y., 1995) (both the act and directives allowing discharge of service member who states he or she is homosexual violates First Amendment and equal protection rights); (2) Elzie v. Aspin, 897 F.Supp. 1 (D.D.C., 1995) (discharge of service member and denial of retirement benefits for stating that he was homosexual under old policy remanded to be considered under new policy); (3) Philips v. Perry, 883 F.Supp. 539 (W.D. Wash., 1995) (discharge of service member for stating that he was homosexual did not violate First Amendment or equal protection rights); (4) Selland v. Perry, 1995 WL 643998 (D.Md.) (discharge of service member for stating he was homosexual and was in relationship did not violate First Amendment or equal protection rights).

Thomasson's freedom of speech, equal protection rights, freedom of association, due process rights, or the Administrative Procedure Act.² Thomasson appealed.

II. Statute and Directive

The statute in question represents the compromise struck between the Clinton Administration and Congressional opponents of relaxing the ban on homosexuals in the military. Legislative history reflects that Congress intended to implement this compromise as articulated in the final version of the Clinton Administration policy. The Clinton Administration Executive Order on "Don't ask, Don't tell" was issued in the summer of 1993; the legislation passed in the winter of 1993. DoD issued its directive shortly thereafter, and the current version was issued in February, 1994.

Section 571 of the National Defense Authorization Act of 1994 requires discharge for a service member who: (1) engages in homosexual conduct,³ (2) attempts same-sex marriage,⁴ or, as is relevant in the Thomasson case, (3) has stated that he is a homosexual.⁵ A service member who has stated that he is a homosexual may be retained, however, if he can demonstrate that he does not engage in, intend to engage in, or have the propensity to engage in, homosexual conduct.⁶ Therefore, a statement that one is a homosexual creates a rebuttable presumption that one engages in or is likely to engage in homosexual conduct. If the service member does not rebut this presumption, his statement is used as evidence against him.

² 895 F.Supp. 820 (E.D.Va., 1995).

³ 10 U.S.C. §654(b)1.

⁴ 10 U.S.C. §654(b)3.

⁵ 10 U.S.C. §654(b)2.

⁶ Id. Under both the statute and Directive 1332.30, which implements the statute, a declaration that one is a homosexual raises a presumption that one engages in or is likely to engage in homosexual conduct. The declaration is grounds for discharge not because it reflects sexual orientation, which the directive provides is not a bar to continued service, but because it indicates a likelihood that one will engage in homosexual acts.

While the statute does not define "propensity," the directive defines it as "more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts." DoD Directive 1332.30, para. B.5.d.

Rebutting the presumption, while difficult, has not proved impossible. In 1994, several armed forces members who had admitted to being homosexuals successfully demonstrated that they had no propensity or intent to commit homosexual acts.⁷

III. Arguments

A. Thomasson

Lt. Thomasson argues both that the statute and the DoD directive (1) violate his equal protection rights because he was discharged, not for proscribed conduct, but as a result of his sexual orientation and his mere speech regarding his sexual orientation; and (2) violate his free speech rights because he was discharged solely as a result of publicly acknowledging his sexual orientation.⁸

B. Government

The Government argues that its "Don't Ask, Don't Tell" policy does not violate equal protection rights. It argues that the discharge of service members who publicly acknowledge their homosexuality but fail to demonstrate the unlikelihood that they will engage in homosexual acts meets the rational-basis test because the Government has a legitimate interest in prohibiting homosexual conduct in the military to protect military effectiveness.

The Government also argues that its policy does not violate a service member's freedom of speech. The policy treats a member's statement of homosexuality as a basis from which to presume, if there is no rebuttal, that the member engages in or is likely to engage in homosexual acts. The First Amendment does not prohibit such evidentiary use of a member's statements.⁹ Therefore, one's statement regarding sexual orientation may be used as evidence of homosexual conduct. The ability to rebut the

⁷ Dept. Of the Army Pamphlet 27-50-268; 1995-Mar Army Law. 39.

⁸ Thomasson, additionally, claims that the policy violates freedom of association, due process rights, and the Administrative Procedure Act. Neither party devotes much discussion to these issues, and they should not be the major issue on appeal.

⁹ This reasoning is based on several Supreme Court decisions, particularly Wayte v. United States, 470 U.S. 598 (1985) (Citizen's letter announcing refusal to register for selective service can be used as evidence without violating free speech rights).

presumption, the Government argues, demonstrates that the policy is not directed at speech per se.

C. Family Research Council (FRC)

The FRC argues that the court should not reach Thomasson's constitutional claims because the statute does not distinguish between homosexual conduct and homosexual orientation. As such, the FRC claims that a service member's public acknowledgment of his or her homosexuality in and of itself requires discharge. The FRC argues that Thomasson bases his claim solely on a provision in the directive that says that "sexual orientation is not a bar to service." FRC suggests that this provision cannot overcome what it calls the "clear legislative history" that "homosexuality is incompatible with military service" and that Congress did not distinguish between conduct and orientation.¹⁰ Since the court must interpret the statute before the regulation, the FRC argues that Thomasson's free speech and equal protection claims are moot.¹¹

¹⁰ The Government responds that the fact that the presumption of homosexual conduct can be rebutted proves a distinction in the statute between conduct and orientation. Additionally, the Government argues that the legislative history supports its assertion.

¹¹ The FRC claims that the "Don't Ask, Don't Tell" policy is substantively identical to its predecessor, which deemed homosexuals unqualified to serve in the armed forces. Therefore, it argues that this court may decide Thomasson's free speech and equal protection claims in the same manner as previous courts interpreting the homosexual exclusion policy in effect prior to the National Defense Authorization Act of 1994.

THE WHITE HOUSE
WASHINGTON

DATE: 12/7/95

TO: James Costello

FROM: White House Counsel Marvin Krislov
Room 128, OEOB, x7900

☒ FYI Thought you may find this
of interest.

☐ Appropriate Action

☐ Let's Discuss

Thanks

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

file: gays in military

CLOSE HOLD -- FOR INFORMATION ONLY
PRIVILEGED AND ~~CONFIDENTIAL~~

COPY

December 6, 1995

MEMORANDUM FOR MARVIN KRISLOV

FROM: JOHN STANLEY

RE: Thomasson v. Perry Oral Argument

This memo sets out a few general observations regarding the oral argument in the Thomasson case on December 5, and discussions I had with Justice Department attorneys after the arguments.

Summary. The informal consensus among several Justice Department and JAG corps attorneys present at the arguments was that the 4th Circuit will issue a divided opinion, but that it will probably decide in favor of the government. It appeared to me that Thomasson's attorney (Moore) was pressed harder and by more judges than Kneedler was. Several judges (e.g. Ervin, CJ) were conspicuously silent during questioning and therefore tough to read. Most of us predicted that the decision will not likely be a speedy one, because the case was heard en banc and will probably foster dissent(s). Ed Kneedler said he believed that there was no chance that the case could reach the Supreme Court this session -- unless the 4th Circuit finds the statute or directive unconstitutional.

Appellant's argument. Moore relied heavily on Judge Nickerson's opinion in the Able case, currently on appeal to the 2nd Circuit. He argued, as held in Able, that Congress never truly intended to create a rebuttable presumption (never intended to allow a person to announce he or she is gay, but rebut this statement by convincing the administrative panel that he or she would not engage in homosexual acts in the future). He quoted the Abel opinion, calling the instances in which servicemen have been found to carry the burden of rebutting the presumption "dysfunctional aberrations." (NB: there are now 7 individuals who have successfully rebutted the presumption). This was one of the keys underlying this First Amendment argument: that the mere statement "I am gay" that has effectively been made actionable by the directive.

Moore asserted that, by offering evidence and testimonials reflecting exemplary military service, Thomasson had offered evidence to the administrative board to rebut the presumption that he was likely to engage in homosexual acts. Judge Murnaghan became noticeably frustrated with this assertion, repeatedly asking Moore how this evidence was directed at rebutting the presumption. Murnaghan's questioning may evidence a belief that the presumption is not a sham and, therefore, is rebuttable -- undercutting Moore's First Amendment argument.

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2015-0017-F

Appellee's argument. Kneedler was pressed most vigorously by Judge Motz (a Clinton appointee). He was questioned hard on whether a member of the armed forces may admit that he or she is gay, but rebut the presumption simply by stating that he or she has refrained, and will refrain, from committing homosexual acts (i.e. a "simple assertion" of celibacy). Kneedler would not agree to give a categorical answer; instead, he reminded the judges that the administrative panels are free to consider whatever facts are presented and determine whether such facts are sufficient to rebut. Thus, a simple assertion of celibacy would be weighed as the panel sees fit.¹

The directive provides that, in order to rebut the presumption, a service member must disprove that there is a "likelihood" that he or she engages in or will engage in homosexual acts. Judge Luttig pressed Kneedler on the definition of the term "likelihood." He asked whether "a likelihood" means a possibility (e.g. a 10% chance), a probability (e.g. more than a 50% chance), or some other number. Kneedler did not give a definitive answer.

Family Research Council's argument. Professor Woodford appeared for the Family Research Council. He did not seem to generate an enthusiastic reception from the judges -- except possibly for Judge Luttig. Judge Motz, Williams and one other judge all pressed him hard. Motz challenged him to point to the words in the statute which were inconsistent with the DoD directive, and he could not. Instead, his argument that the directive goes beyond the bounds set up by the statute relies on the practice under the *old* policy, which he contends was essentially codified by Congress. There was some question whether the court could strike down the directive -- could they reach the issue if the appellant hadn't directly raised this issue?

Judge Luttig's position is difficult to anticipate: while he may support overturning the directive, it is difficult to envision him supporting a decision which would reinstate Thomasson.

¹ According to a Justice Department attorney after the argument, Kneedler probably did not want to be pinned down on this question because he was aware that Jamie Gorelick had testified to Congress that a simple promise of celibacy would *not* suffice to rebut the presumption.

Sey
del
Rule

PROPOSED NEW REVISIONS TO DOD DIRECTIVES

I. ACCESSION POLICY

Existing provisions:

"8. Provisions Related to Homosexual Conduct

a. **Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct (as defined in subsection b., below).** Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

b. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

Proposed revision:

"8. Provisions Related to Homosexual Conduct

a. **A person's sexual orientation is considered a personal and private matter and is not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described in subsection b.** Applicants for enlistment, appointment, or induction shall not be asked or required to state whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to state whether they have engaged in homosexual conduct (as defined in subsection b, below), unless credible independent information is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

b. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

II. SEPARATION POLICY

Existing provisions:

"H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subsection b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. **Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct, as defined above.**

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

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

Proposed revisions:

"H. Homosexual Conduct

1. Basis

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

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

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

III. DEFINITION OF "SEXUAL ORIENTATION"

Existing definition:

"A sexual attraction to individuals of a particular sex."

Proposed Revision:

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

1

ALL REVISIONS TO DOD DIRECTIVE SINCE DECEMBER 22

I. ACCESSION POLICY

Existing provisions:

"8. Provisions Related to Homosexual Conduct

a. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct. Applicants for enlistment, appointment, or induction shall not be asked or required to reveal their sexual orientation. Applicants also will not be asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect. Applicants will be informed of separation policy. (Section 654 of reference (a)).

b. Homosexual conduct may be grounds for barring entry into the Armed Forces. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

Revisions:

"8. Provisions Related to Homosexual Conduct

a. **A person's sexual orientation is considered a personal and private matter and is not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described in subsection b.** Applicants for enlistment, appointment, or induction shall not be asked or required to **state whether they are heterosexual, homosexual, or bisexual.** Applicants also will not be asked or required to **state** whether they have engaged in homosexual conduct **(as defined in subsection b, below), unless credible independent information** is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

b. Homosexual conduct **is** grounds for barring entry into the Armed Forces, **except as otherwise provided in this section.** Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

c. Applicants will be informed of separation policy. (Section 654 of reference (a)). Failure to receive such information shall not constitute a defense in any administrative or disciplinary proceeding.

II. SEPARATION POLICY

Existing provisions:

"H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.

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

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

Proposed revisions:

"H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services **under the terms set forth in subsection b.** Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. **A member's sexual orientation is considered a personal and private matter and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in subsection b.**

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

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

III. DEFINITION OF "SEXUAL ORIENTATION"

Existing definition:

"A sexual attraction to individuals of a particular sex."

Proposed Revision:

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

file:
gays in
the
military

'Don't ask, don't tell' to go before full panel

Review last stop before Supreme Court

By Rowan Scarborough
THE WASHINGTON TIMES

An unusual decision by three appeals court judges has put "don't ask, don't tell" — President Clinton's regulation for homosexuals in the military — in the fast lane toward an up-or-down Supreme Court decision.

After hearing oral arguments earlier this month, three members of the U.S. 4th Circuit Court of Appeals in Richmond signed an order saying they decided to have the full court rehear the case the first week in December.

The decision by Judges J. Michael Luttig, M. Blane Michael and Diana Motz was unusual on two counts: Three-judge panels normally issue an opinion first and let the losing side request a full hearing, known as "in banc."

Competing sides in the case of Paul Thomasson, an avowed homosexual Navy lieutenant who was discharged in June, drew different conclusions about the judges' non-traditional behavior.

"Based on having been at the hearing, it was pretty clear the judges had grave concern about 'don't ask, don't tell,'" said Michelle Benecke, who heads Servicemembers Legal Defense Network, which aids military homosexuals targeted under the 1½-year-old policy.

"I am encouraged by the fact they seem to be questioning this policy," she said. "It also seems they are aware of the momentous nature of this case. I find both of those encouraging."

But Melissa Wells-Petry, a former Army major and lawyer who supports an outright ban on homosexuals wearing the uniform, said the three judges expressed problems with both arguments.

"I don't necessarily draw that as a good sign for Lt. Thomasson," she said.

Both sides agreed that an accelerated hearing schedule puts the Thomasson case first in line be-

fore the Supreme Court, if the losing party in the 4th Circuit's opinion decides to appeal.

"The impact of this could well mean that this case will end up at the Supreme Court within a year," Ms. Benecke said.

At the center of the dispute is a policy created by the Pentagon and White House in a compromise with Congress, which thwarted Mr. Clinton's bid to completely lift a 50-year-old ban on homosexuals in the military.

The new regulation allows homosexuals to serve as long as they keep their status private.

Ms. Benecke said she believes the court has a problem with that key tenet.

"This is a circuit that has very strong opinions on the books protecting freedom of speech," she said. "I think they found it troubling the government is trying to regulate Lt. Thomasson's honest admission of who he is, when similar restrictions are not placed on heterosexuals."

Ms. Wells-Petry, who has filed a written argument on behalf of the Family Research Council, said she wants the court to strike down "don't ask, don't tell" but leave in place the 1993 law that spawned it. She contends the White House did not heed Congress' intent in writing the policy.

"It's our view that the law enacts the military's long-standing policy," she said. "And that long-standing ban has survived constitutional challenges every which way. We don't need to reinvent the wheel here."

The Thomasson case is not the first time the politically charged issue has caused unusual maneuvering by a high federal court.

Last year, conservative judges on the U.S. Court of Appeals for the District overruled the Justice Department and decided to conduct an "in banc" hearing in a case disputing the regulation that was replaced by "don't ask, don't tell."

Gay-rights unit joins VMI fight

Many puzzled by group's role in Supreme Court case

By Frank J. Murray
THE WASHINGTON TIMES

Virtually every organized women's group from lesbians to labor unionists has given the Supreme Court its opinion of efforts to end the all-male rule at Virginia Military Institute.

While "friend of the court" filings by interest groups are routine, the National Gay and Lesbian Task Force's involvement in a case with no homosexuality issue puzzles even the most avid legal rights activists within the community.

In a search for the first Supreme Court victory on the merits of a major case directly involving homosexuality, the activist community is focusing more on the Colorado Amendment 2 case to be argued Oct. 10. The agenda the community is pushing includes including single-sex marriage, employment benefits for unmarried spouses, and adoption of children by homosexuals.

Robin Kane, media director for the National Gay and Lesbian Task Force, said her organization was invited to join the VMI case and did so because of concerns about military discrimination against homosexuals, even though that issue has not emerged in the VMI or the related Citadel case.

Beatrice Dohrn, legal director for Lambda, an active litigator in other cases, said her group was not asked to join the VMI case. While Lambda opposes all discrimination, Miss Dohrn said, "the question is whether we have an organizational mandate to advance the rights of women, apart from the struggle of lesbians and gay men."

David M. Smith, communications director for the Human Rights Campaign Fund, which describes itself as the "the largest national lesbian and gay political organization," said his organization is aiming its efforts elsewhere.

"We don't have enough resources," he said.

He denies his organization participated in the lower courts on the VMI and Citadel cases and says court records listing the Human Rights Campaign Fund as an amicus curiae in those appeals are wrong.

"According to everybody here, we have not filed in either one of those cases, but, stepping away from our lack of official involvement in this case, we do believe there are unfortunate commonalities in discrimination whether it's based on race, sexual orientation or gender, and we oppose all forms

of discrimination," Mr. Smith said.

VMI spokesman Mike Strickler said the school has no organized homosexual groups among its 75 or so clubs and organizations in a student body of 1,300 young men studying to be "citizen-soldiers."

Taking the unusual step of joining a Supreme Court case with no homosexuality angle, the National Gay and Lesbian Task Force signed onto a friend-of-the-court brief along with Jewish women, black women, working women's groups and a raft of feminist organizations.

Other groups involved in this case include the National Women's Law Center, the American Association of University Women, the Center for Women Policy Studies and the National Organization for Women.

The high court is expected to decide by Oct. 2 whether to hear the case, in which it is being asked to decide if "substantively comparable" goals and benefits of an all-female program at Mary Baldwin College remedy VMI's exclusion of women from its tax-assisted training regimen.

The justices could postpone a decision for a few weeks to incorporate similar petitions involving The Citadel and its companion school, Converse College.

The Washington Times
TUESDAY, SEPTEMBER 26, 1995

Roberts regroup on farm-reform bill

House, Senate agriculture panels face deadlines soon

By David R. Sands
THE WASHINGTON TIMES

Out on the back 40, they're stuck on square 1.

The House and Senate agriculture committees face tight deadlines this week as they struggle to find billions of dollars in cuts to farm programs to meet GOP balanced-budget goals.

Having been rebuked last week, House Agriculture Committee Chairman Pat Roberts of Kansas met yesterday with dissident fellow Republicans on his panel and with farm lobby groups who helped scuttle his proposed rewrite of farm-support programs dating back to the Great Depression.

"The ball's in the chairman's court. It's his committee," said a spokesman for Rep. Larry Combest of Texas, one of four Republicans on the panel who joined Democrats to defeat the Roberts bill.

Mr. Roberts met with Mr. Combest and committee Vice Chairman Bill Emerson, Missouri Republican, yesterday for more than an hour seeking a compromise that all committee Republicans can support. Democrats, joining the Clinton administration in objecting to the extent of the cuts in farm programs, have unanimously rejected the Roberts bill.

If the panel cannot produce by Friday the \$13.4 billion in savings through 2002 required by the balanced-budget blueprint, the job could be done for them by the budget and rules panels.

Senate Agriculture Committee Chairman Richard G. Lugar, Indi-



Sen. Richard Lugar.

ana Republican, will try to do tomorrow what Mr. Roberts could not do last week. Mr. Lugar has embraced Mr. Roberts' "Freedom to Farm" reform bill but faces staunch opposition from Sen. Thad Cochran, Mississippi Republican.

Mr. Roberts' bill would offer farmers guaranteed but gradually shrinking payments over the next seven years while boosting their ability to grow whatever the market demands. The bill would end the long-criticized practice of paying farmers not to plant but also calls for a set amount of government subsidies even in boom years, a major point of criticism.

Mr. Roberts has pitched the deal as the best farmers will get in the current Congress, with guaranteed money in the bank to help

them in transition to a more market-oriented system.

Mr. Combest and Mr. Emerson produced a rival bill that leaves most farm subsidies in place but produces savings by increasing the amount of acreage not covered by federal supports from 15 percent to 30 percent.

Cotton and rice growers, who fear new planting-flexibility guidelines in Mr. Roberts' bill will swamp markets and cut profits, have lobbied hard against the bill. Whether Mr. Lugar will have more success is not clear, with the Senate drafting already having been delayed once.

Two of the most vocal farm program opponents in the House — Rep. Dick Zimmer, New Jersey Republican, and Rep. Charles E. Schumer, New York Democrat — urged just that course in a Sept. 21 letter to House Speaker Newt Gingrich, Georgia Republican. Last week's "inaction makes clear that the Agriculture Committee will not report sweeping reform in farm programs," they wrote.

Keith Heard, senior vice president for policy at the National Corn Growers, responded: "We knew Representative Schumer didn't know anything about farm programs. We didn't know he didn't understand the legislative process as well. You can't take a snapshot of what happened one night and condemn the whole industry."

House Agriculture Committee Republicans aim to keep trying. Mr. Roberts has set a GOP-members-only private caucus for tomorrow with the full committee reconvening Thursday or Friday.

Crime, immigration feel Wilson's venom

California governor on N.H. swing

By Joseph Daniel McCool
SPECIAL TO THE WASHINGTON TIMES

BEDFORD, N.H. — Taxpayers should be empowered to force the government to spend more money fighting crime and prosecuting as adults juveniles as young as 14 who commit serious crimes, Republican presidential hopeful Pete Wilson said during weekend campaign stops.

The California governor, who was the first governor to sign a "three strikes" law against violent criminals, proposes placing a checkoff box on federal tax returns so taxpayers may decide to return more federal revenues to their states to put more police on the streets.

Mr. Wilson said he would not block such funding if a community wanted to use it to establish a midnight basketball league, a component of President Clinton's crime bill that was criticized by Republicans.

"I would rather have the [local] chief making that decision than some distant committee chairman" in Washington, he said.

For Mr. Wilson, one of nine GOP presidential candidates to open a campaign office in this first-in-the-nation primary state, now is the time to bring his ideas on crime, illegal immigration, and the need for welfare and health care reform to New Hampshire voters.

"The most precious resource that a campaign has, I'd say even more precious than money, is the time of the candidate. So we intend

to spend a lot of time here and not in Iowa," Mr. Wilson said after a breakfast meeting with state legislators and business leaders.

"The Iowa caucus occurs in a state with 2½ times New Hampshire's population, but only 80,000 people actually vote," Mr. Wilson said.

"Here, because there is a geographically small state and because of the tradition of its being the first-in-the-nation primary, there's a very high level of interest. ... My themes seem to resonate with the people in this state."

A steadfast opponent of affirmative action and the illegal immigration that saps nearly 9 percent of California's general fund, Mr. Wilson has pledged to end all race-based hiring and to strengthen border patrols.

On the issue of economic policy, Mr. Wilson said: "We need to both cut taxes and cut spending. That is what will provide the boost for investment in private-sector job creation."

To bring those views to voters, the Wilson camp is moving campaign workers from California to the "forward battle areas" of New Hampshire, Florida, Arizona and New York.

"We are restructuring, as several of the campaigns have done already," Mr. Wilson said. "We're doing what a good company does — they downsize to be effective. We will mostly be moving people east, but we will be reducing the size of our Sacramento operation."

The Washington Times
TUESDAY, SEPTEMBER 26, 1995

file: gays in the military

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

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

Defendants.

-----X

SULLIVAN & CROMWELL

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

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

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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

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

LAMBDA LEGAL DEFENSE & EDUCATION FUND

(Beatrice Dohrn, Evan Wolfson, of counsel)

666 Broadway
New York, New York 10012
for plaintiffs.

94 CV 0974

MEMORANDUM
AND
ORDER

DEPARTMENT OF JUSTICE

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

DEPARTMENT OF THE ARMY

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

NICKERSON, District Judge:

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

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

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

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

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

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

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

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

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

THE GENESIS OF THE ACT

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

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

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

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

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

THE ACT AND THE DIRECTIVES

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

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

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

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

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

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

(1) The member is found to have engaged, attempted to engage, or solicited another to engage, in homosexual acts, unless the member has demonstrated,

among other things, that "such conduct" departs from the member's usual behavior and he or she "does not have a propensity or intent to engage in homosexual acts."

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

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

Subsection (f) contains definitions. "Homosexual" includes "the terms 'gay' and 'lesbian'" and means a person who engages, attempts to engage, has a "propensity" to engage, or "intends" to engage, in homosexual acts. The term "homosexual act" means any bodily contact between members of the same sex to satisfy sexual desires or any such contact that a reasonable person would understand to "demonstrate a propensity" or "intent" to engage in such an act. The Act does not define the word "propensity."

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

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

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

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

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

THE ISSUE BEFORE THE COURT

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

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

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

THE LEGISLATIVE PURPOSE

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

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

homosexuals makes it likely that they will commit homosexual acts.

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

THE FIRST AMENDMENT

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

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

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

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

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

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

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

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

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

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

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EQUAL PROTECTION

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

The court analyzes Fifth Amendment equal protection challenges by the same standards as those applicable to claims of violation of the equal protection clause of the Fourteenth Amendment. See Weinberger, supra, 420 U.S. at 638 n.2; 95 S. Ct. at 1228 n.2.

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

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

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

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

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

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

CONCLUSION

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

So ordered.

Dated: Brooklyn, New York
March 30, 1995

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

File: gays in the military



11/10/85

THE DEPUTY ATTORNEY GENERAL

Lech -

You had asked me about
DoD compliance with the policy on
gays in the military. From time to
time, I get information on that issue.
The enclosed is encouraging.

Jennie



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

NOV 10 1995

MEMORANDUM FOR LEON E. PANETTA, THE WHITE HOUSE

CC: JACK QUINN, COUNSEL TO THE PRESIDENT

FROM: THE DEPUTY ATTORNEY GENERAL *Py*

SUBJECT: **Information** -- Defense Department Efforts to Enforce Directives Restricting Overzealous Investigation of Gay and Lesbian Service Members.

Summary: In August, 1995, the Defense Department released a Navy General Counsel report concluding that in the first months under the new policy, Marine investigators on Okinawa committed numerous violations of Defense and Navy Department regulations in connection with an investigation of homosexual conduct. The Navy and the Marines took specific steps to prevent repetition of such violations. The attorney representing several of the Marines who were the victims of the violations has recently written to praise the Defense Department and the Navy for their efforts.

Background: The Administration's policy on military service by homosexuals went into effect on February 28, 1994. The new policy includes provisions limiting the circumstances in which service members may be investigated for homosexual conduct and the way such investigations may be conducted. No investigation may be initiated without credible information of a violation of the policy prohibiting homosexual conduct; investigations must not extend to issues as to which, or persons as to whom, credible information is lacking; and criminal investigations of consensual, adult homosexual conduct are disfavored (the preferred course is administrative separation), and may be authorized only by the subject's commander.

The advocacy organization, Servicemembers Legal Defense Network (SLDN), has charged that the Defense Department has not taken adequate steps to ensure that these rules are followed or to investigate alleged violations.

The Okinawa Matter: Charges surfaced in the late Spring of 1994 that Marine Corps investigators were engaged in a "witch hunt," triggered by the case of Sgt. Robert Nadel, at Camp Hansen on Okinawa. Sgt. Nadel was eventually court-martialed and convicted of indecent assault on a young Marine lance corporal. His conviction is on appeal. Jonathan M. Bowie of the prominent New York law firm of Skadden, Arps, Slate, Meagher & Flom was retained, through SLDN, to defend Sgt. Nadel. Mr. Bowie soon

charged that a criminal investigation had been improperly initiated by officials other than Sgt. Nadel's commander, and that many Marines had been improperly questioned during that investigation without credible information. Mr. Bowie's allegations were reported in the press, and in early summer, Senator Wofford wrote to Secretary Perry asking him to look into the allegations.

Secretary Perry referred the matter to DoD's Acting General Counsel, Stephen W. Preston. Mr. Preston in turn tasked Navy General Counsel Steven S. Honigman to investigate and report back to him. Mr. Honigman assigned the project to Navy Assistant General Counsel Joseph T. Lynch, a senior career attorney.

Mr. Lynch's report concluded that the criminal investigation of Sgt. Nadel had been improperly initiated, because it had not been authorized by Sgt. Nadel's commander. The report also concluded that many Marines had been improperly questioned, including some who had been asked, without credible information, whether they were homosexuals. The report listed each improper question.

Mr. Honigman adopted Mr. Lynch's detailed report, and in his transmittal letter to DoD General Counsel Judith A. Miller announced a number of measures to prevent recurrence of such violations. These measures included informing Navy and Marine Corps judge advocates about the central legal conclusions of the report; directing a review of all outstanding Marine Corps criminal investigations into allegations of homosexual conduct to ensure those investigations are in compliance with the Administration's new policy on homosexual conduct; and directing a review of Marine Corps investigative policies to ensure they are consistent with the new policy.

This report was transmitted by Ms. Miller to Rep. Coyne of Pennsylvania, who has monitored the matter since Senator Wofford's defeat last Fall, and to Mr. Bowie.

Mr. Bowie has recently written to Ms. Miller, in part to express his appreciation for the Department's efforts in ensuring compliance with the new policy. In light of the criticism sometimes leveled at the Defense Department by advocates for gay service members, I thought Mr. Bowie's letter was worth calling to your attention. Although he asks a number of follow-up questions, and expresses mild disappointment about certain aspects of the report, Mr. Bowie writes:

"We believe that Mr. Lynch's report is a great step forward: it is honest, thoughtful, objective and effective. [W]e believe that the report shows a strong effort by the Department to examine and correct abuses in the policy on gays in the military where they occur. . . . We believe that Mr. Lynch's report is admirable, honest

and forthright: our desire is to ensure that the promise of progress that it represents does not go unfulfilled for lack of an advocate."

Mr. Bowie's letter is attached at Tab A.

It is troubling -- but perhaps not surprising -- that violations like those the Navy has documented could occur at a remote facility like Camp Hansen. I am sure the Defense Department would not contend that even now it has achieved complete compliance with the investigative rules established in the new policy. I am also certain that some violations will occur, and advocates will continue to criticize the services for failing to observe the limitations in the new rules. But it is very encouraging that in this Okinawa case, the Department has looked critically at its performance and taken steps that even a strong critic and advocate for gay interests has characterized as "a great step forward."

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October 18, 1995

Ms. Judith A. Miller
General Counsel
Department of Defense
1600 Defense
The Pentagon
Washington, D.C. 20301-1600

Re: Report of Violations of Regulations
in Okinawa in Spring of 1994

Dear Ms. Miller:

I am in glad receipt of your letter of August 29, 1995 from Congressman William J. Coyne, enclosing the memorandum from the General Counsel of the Navy, Steven S. Honigman, in turn enclosing a memorandum to the Staff Judge Advocate General of the Navy and a memorandum from the General Counsel of the Navy dated 17 May 1995 regarding a report by Mr. Joseph T. Lynch, Assistant General Counsel (Manpower and Reserve Affairs).

As you know, the report grew out of questions raised in cases in Okinawa in which my firm has been involved. We believe that Mr. Lynch's report is a great step forward: it is honest, thoughtful, objective and effective. While we might not agree with all of his conclusions, and might have wished him to examine certain of the issues which he chose not to, we believe that the report shows a strong effort by the Department to examine and correct abuses in the policy on gays in the military where they occur.

This letter is written to inquire about the results of the report, and specifically the follow-through that has occurred on the recommendations of the report and the orders of General Counsel Honigman. For

Ms. Judith A. Miller
October 18, 1995
Page 2

simplicity we are writing to you directly, but I believe you will receive an official request from the office of Congressman Coyne to respond similarly.

Specifically:

(1) General Counsel Honigman's memorandum to the Staff Judge Advocate requires that solicitation to engage in private adult consensual sexual misconduct be treated in the same manner as sexual misconduct defined in paragraph C of DoD Instruction 5505.8. Please advise whether this interpretation has been formalized and carried through, and how that interpretation has been documented.

(2) Similarly General Counsel Honigman's memorandum requires a redefinition of the term "fraternization", and we would inquire as to how that definition has been implemented.

(3) General Counsel Honigman's memorandum requires a review of Marine Corps CID investigative policies with respect to the scope of investigations into allegations of homosexual conduct, and requires the Staff Judge Advocate to bring to the attention of the appropriate officials of HQ Marine Corps such actions as may be necessary to assure compliance with DoD instruction 5505.8 and enclosure 4. We wish to know the results of that review, as does General Counsel Honigman.

(4) The report in General Counsel Honigman's memorandum requires that the Staff Judge Advocate advise him concerning the feasibility of requiring CID detachments to obtain the opinion of the responsible Staff Judge Advocate of whether proposed investigations comply with DoD instruction 5505.8. We would inquire as to the status of the Staff Judge Advocate's response.

(5) General Counsel Honigman's memorandum requires a review of all outstanding Marine Corps CID investigations involving homosexual conduct to insure that they comply with the provisions of DoD instruction 5505.8 and enclosure 4, concerning the permissible scope

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October 18, 1995
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of such investigations and to provide guidance if necessary to assure compliance. We would inquire, as does the memorandum, as to the results of that review, how it was conducted and what documentation exists to ensure the review of each case.

We note that we are aware of other cases in the Marine Corps in which no such review appears to have occurred.

(6) General Counsel Honigman's memoranda, and the report itself, are properly related directly to incidents in the Marine Corps, and resulting responses required by the Marine Corps. We are pleased to understand that the types of incidents described in the report are not widespread and systemic in the military: but it is still true that in individual cases in each of the services, abuses have been shown to occur. We believe that the recommendations of the report apply equally to each of the services, and certainly it would make little sense for the different services to have different standards apply on military-wide regulations. We request confirmation that each of the other services have been informed of the recommendations of the report, and instructed to respond appropriately.

(7) As you know, the incidents described in Mr. Lynch's report stem from an actual case, that of Sgt. Robert Nadel, in Okinawa, who we have and are continuing to defend. In a separate letter, I wish to raise with you the issues for the continued prosecution of Sgt. Nadel prompted by the report; but as this is not a policy matter, but one relating to a specific case, we address it separately.

* * *

I wish to emphasize to you that neither I nor my firm views ourselves as adversaries of the Department in its efforts to properly implement the new regulations (except in those specific circumstances where we represent clients in adverse situations with the military).

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We have great respect both for the institution, and its efforts to carry out its mission and maintain an effective justice system for its members.

As David Ogden may have mentioned to you, for my own part I am largely retired at this point because of my health. I am too old and tired to want to make enemies and indeed, I believe that we have very much common interests in trying to ensure the proper implementation of the new policies. We are, in effect, asking both for your help and to help in this effort. We believe that Mr. Lynch's report is admirable, honest and forthright: our desire is to ensure that the promise of progress that it represents does not go unfulfilled for lack of an advocate.

Separately, we are addressing you on the issue that had been raised with White House Counsel Abner Mikva, concerning a policy of the denial of assistance of counsel to servicemembers. Though there is some overlap with the issues raised in the report, we believe that this issue is much more of a policy matter and better addressed separately. (4)

Very truly yours,

Jonathan M. Bowie
Jonathan M. Bowie *per: jon*

cc: General Counsel Steven S. Honigman
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Associate Deputy Attorney General
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Servicemembers Legal Defense Network

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: Gays in the Military: Message & Legal Issues

President Clinton promised that the new regulations on gays in the military would at the very least stop witch hunts, harassment and investigative excesses. To date witch hunts continue, investigative abuses continue and harassment has skyrocketed. These violations have been fueled by actions and omissions at the top levels of the Department of Defense, including:

- ♦ instructing investigators, for the first time ever, to question parents about their kids to gather evidence for discharge;
- ♦ failing to establish a means, despite numerous requests, whereby gay servicemembers can report death threats and harassment without fear of being investigated and discharged themselves; and
- ♦ allowing the Departments of Defense, Air Force and Navy to issue memoranda, without White House input, that gut the regulatory limits on investigations into the lives of suspected gay servicemembers.

If President Clinton does not take steps --and they do not have to be public steps-- to ensure that even the most basic and uncontroversial requirements of "Don't Ask, Don't Tell, Don't Pursue" are implemented, the Administration threatens to reinforce the perception among many Americans that the President has difficulty standing by his word.

A recent poll done by Celinda Lake for the Human Rights Campaign asked 800 registered voters what bothered them most about President Clinton's "Don't Ask, Don't Tell, Don't Pursue" policy: the priority he gave the issue, that he flip-flopped on the issue, that he left gays in the military, or that he did not give gays their rights. Thirty-three percent, the largest response, said that they were most disturbed by President Clinton's flip-flopping, his unwillingness to take a stand. Only 8% criticized President Clinton for taking a stand in support of gays in the military.

By failing to implement the few promises in the new policy, the Administration further risks needless, embarrassing media and litigation for lack of good faith implementation of the

new policy. When the system utterly fails them, servicemembers have nowhere else to turn but federal court and the court of public opinion.

We will be issuing our Second Annual Report on "Don't Ask, Don't Tell, Don't Pursue" in February and would welcome the opportunity to say that, as promised by the new policy, witch hunts, harassment and other investigative abuses have stopped. Today, we cannot. A proposal submitted previously to the White House and the Department of Defense that would address many of the concerns raised here is attached.

which reports (The Administration's public statements that the new policy is working as intended are wrong and only make the situation worse. Reports by *The New York Times*, *The New Republic*, *Newsweek*, *The Los Angeles Times*, CNN, CBS, NBC and CNN, among others, reveal to the public that the "Don't Ask, Don't Tell, Don't Pursue" policy is being flaunted by the Department of Defense. The statements send a harmful message to those who believe they can continue to witch hunt and harass with impunity, make matters worse for servicemembers caught in the trap of an intransigent commander, and erode public confidence in the President's willingness to stand by his word. !1

If President Clinton addressed the abuses of the new policy that continue to happen, he could develop a cohesive message and deflect much of the anticipated criticism. The message would not only be supportive of those who wanted to see the President implement an evenhanded policy, but would help to defuse the perception that Clinton is unwilling to take a stand or stick by his decisions. The elements of such a message should include the following:

- ♦ No American tolerates death threats and harassment against any person, for any reason. Nor can we. No American supports government investigators questioning parents about their kids to have them discharged from the military. Nor can we.
- ♦ I am deeply disturbed by reports that some military commanders are disregarding the mandate to stop witch hunts, asking questions about sexual orientation and harassment. If I catch anyone going on witch hunt, or find out about other command abuses, it will mean the end of their career.
- ♦ This policy is not a perfect solution. It is not identical with some of my own goals. Americans should be treated equally for saying and doing the same things.

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EXHIBITS

1. SLDN Memorandum: Department of Defense Violations of Current Regulations
2. SLDN Memorandum: First Steps to Bring DoD Into Compliance With Current Regulations
3. SLDN Memorandum: A Few Examples of Administration's Public Misstatements

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: Department of Defense Violations of Current Regulations

Death Threats/Harassment/Hate Crimes. The new regulations state "harassment will not be tolerated against any servicemember for any reason." Gay servicemembers, however, cannot report death threats, harassment and hate crimes and their basis (because they are gay). Nor can they cooperate in police investigations -- civilian or military -- where their sexual orientation may be revealed. Straight women cannot report sexual harassment or rape without risking retaliatory, false accusations and investigation.

One SLDN client was threatened with rape and death based on her perceived sexual orientation in a letter delivered to her home and addressed to her by name, rank and social security number. She was afraid to inform military officials because of the threat of investigation. Civilian police said they would turn the letter over to the military. This woman learned of SLDN only by chance, two terrifying weeks later. We resolved this dilemma only after negotiating with top Pentagon officials to ensure the source of the threats, and not her life, would be investigated. This is not satisfactory and it is not excusable under current regulations. DoD must enforce its zero-tolerance policy against harassment, permit all servicemembers to report death threats, harassment and hate crimes without retribution, and investigate those who harass.

Witch Hunts and Fishing Expeditions. In Okinawa, Japan, more than twenty marines were asked about their own and others' sexual orientation from April - June 1994. Agents searched the room of Corporal Craig Haack based merely on the "suspicion of homosexuality," seizing his personal diary, letters from home, word processor, disks and photo album to fish for "evidence" that he might be gay. SLDN cooperating attorneys documented over 50 command violations. More recently, in Korea, PFC Shannon Emery was targeted in a witch hunt that began immediately after she reported an attempted rape. Emery was held for six months beyond her transfer date and pressured to accuse coworkers as lesbians in exchange for leniency. The witch hunt, subsequently confirmed by the IG, as stopped only after intensive intervention by SLDN with top Administration officials.

Pentagon guidance is fueling these abuses. Air Force officers have been encouraged to pursue suspected homosexuals "discovered" during inquiries against other servicemembers. Air Force, Navy and DoD memos have instructed officers to expand the scope of inquiries in statements cases beyond permissible limits by fishing for additional statements and any homosexual acts.

Questions to Parents. The same Air Force memo directs inquiry officers to question parents about the sexual orientation and private lives of their children for purposes of discharge. This memo conflicts with and exploits traditional security clearance guidance not to conceal one's private life from family members. Parents have been shocked that military officials would intrude into private family relationships and attempt to turn family members against one another, which they assumed was forbidden under the new policy.

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: First Steps to Bring DoD Into Compliance With Current Regulations

We are concerned that the Administration is not taking the necessary steps to prevent and rectify improper implementation of the "don't ask, don't tell, don't pursue" policy. The following are first steps that we believe would stop many of the abuses we have documented under the new policy.

Take Disciplinary Actions. Discipline commanders and investigative agents who violate the new policy, as provided for in the regulations, beginning with those responsible for the Okinawa and Korea witch hunts. Commanders who tolerate harassment, hate crimes and death threats should also be disciplined. To date, no military official has been disciplined for violating the policy, despite numerous substantiated complaints. This lack of action tells commanders they can violate the policy with impunity and fosters a climate resistant to its implementation.

Conduct Training. Train all military members on the intent and letter of the new regulations, including all levels of command, all unit levels and all schools. Formalize the training once or twice every year. Ensure that servicemembers understand what they can and cannot do under the policy and what their legal rights are. We understand that no training has been conducted in the field since the regulations were implemented; new troops are told only that homosexual conduct is against regulations.

Issue Additional Guidance. Issue additional guidance to the field in an appropriate form such as a Letter of Instruction based on a first year review of the new policy. Clarify that (1) servicemembers will not be investigated for reporting death threats, hate crimes and harassment and their underlying basis; (2) inquiry officers do not have the authority to conduct fishing expeditions, but must limit their inquiries to the specific allegations; and (3) commanders cannot launch inquiries without credible information and credible information does not include all information.

Rescind Memoranda. Rescind the Air Force memorandum dated November 4, 1994, the Navy memorandum issued in June 1994 and the Department of Defense memo dated August 18, 1995 that gut the prohibitions against fishing expeditions into the lives of suspected gay personnel.

Appoint Troubleshooters. For the next year, as a pilot project, assign troubleshooters, perhaps one from the DoD General Counsel's office and one from the staff of the Assistant Secretary of Defense for Manpower and Readiness, to advise attorneys, commanders and others about appropriate actions and interpretations under the new policy to clear up ambiguity and misunderstanding.

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MEMORANDUM

TO: George Stephanopoulos, Senior Advisor to the President
Marsha Scott, Deputy Assistant to the President
FROM: C. Dixon Osburn, Esq., Michelle M. Benecke, Esq.
DATE: October 23, 1995
RE: Gays in the Military: A Few Examples of Administration's Public Misstatements

1. "Is Clinton happy with implementation of the policy over the past year? 'He is,' White House spokesman Michael McCurry said at a March 13 briefing. 'Military commanders in the field are satisfied with it, and the number of expulsions clearly is declining.'" *National Journal* March 25, 1995. **[Inaccurate. The rate of expulsion of gays is exactly the same. Clinton should not say that he is happy with the new policy as it puts into law exactly the same differential standards as the policy he attempted to repeal.]**
2. "[A]sked how Reserve Officer Training Corps can operate on campuses that have anti-discrimination policies [, Mr. Clinton said,] 'If the policy were implemented in spirit and in letter the way it was written, ... I don't think it would be a conflict'." *Washington Times*, March 24, 1995. **[Wrong. The new policy, even if implemented as intended, treats gay and straight soldiers differently for saying and doing the same things, and thus in no way meets the standards of an anti-discrimination policy.]**
3. "Senior military officials, however, insist that the policy has been successfully implemented. 'My sense is ... in the absence of different information, the force has adapted to the new policy and is doing a good job with it,' says Gen. John Shalikashvili, chairman of the Joint Chiefs of Staff. *Christian Science Monitor*, March 17, 1995. **[Misleading and disingenuous. The Department of Defense has established no means of monitoring abuses of the new policy or allowing soldiers to report abuses without fear of being discharged. SLDN, Members of Congress and private attorneys have, however, presented DOD with different information. Secretary Perry and others have made similar misleading comments.]**
4. "DOD spokesman Doug Hart insists the rules are applied in an 'evenhanded' manner and that no abuses occur. When I recounted specific incidents, he said they were 'impossible.' What about servicemembers asked to turn in others? 'You can't ask about other people. It's explicit in the new directives,' Hart said. 'It doesn't happen'." *The New Republic*, May 2, 1994. **[Wrong. Denial of reported and documented abuses of the new policy creates a perception of hypocrisy and erodes public confidence in the President's ability to take a principled stand and control his own military.]**

5TH CASE of Level 1 printed in FULL format.

LIEUTENANT COLONEL JANE ABLE, PETTY OFFICER ROBERT HEIGL,
FIRST LIEUTENANT KENNETH OSBORN, SERGEANT STEVEN SPENCER,
LIEUTENANT RICHARD von WOHL, and SEAMAN WERNER ZEHR,
Plaintiffs, -against- UNITED STATES OF AMERICA, WILLIAM J.
PERRY, SECRETARY OF DEFENSE, in his official capacity, and
FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, in his
official capacity, Defendants.

94 CV 0074

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW
YORK

1995 U.S. Dist. LEXIS 4438

March 30, 1995, Decided
March 30, 1995, FILED

COUNSEL: [*1] SULLIVAN & CROMWELL, (David H. Braff, Michael Lacovara, Penny
Shane, Ellen Bresler, Edward A. Harris, Ann T. Kenny, of counsel), New York, New
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AMERICAN CIVIL LIBERTIES UNION FOUNDATION, (Ruth E. Harlow, Marc E. Elovitz,
Matthew Coles, of counsel), New York, New York, for plaintiffs.

LAMBDA LEGAL DEFENSE & EDUCATION FUND, (Beatrice Dohrn, Evan Wolfson, of
counsel), New York, New York, for plaintiffs.

DEPARTMENT OF JUSTICE, (Frank W. Hunger, Zachary W. Carter, John A. Rogovin,
Charles S. Kleinberg, David J. Anderson, Vincent M. Garvey, Margaret H. Plank,
Robert A. Van Kirk, Kevin W. Simpson, Mark T. Quinlivan, of counsel),
Washington, D.C., for defendants.

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

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

OPINIONBY: Eugene H. Nickerson

OPINION: MEMORANDUM AND ORDER

NICKERSON, District Judge:

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

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

On April 4 and May 9, 1994, this court on plaintiffs' motions preliminarily enjoined defendants from enforcing the Act and the Directives against plaintiffs based on their statements of sexual orientation. *Able v. U.S.*, 847 F. Supp. 1038 (E.D.N.Y. 1994); *Able v. U.S.*, No. 94 CV 0974 (E.D.N.Y. May 9, 1994).

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

While the motion to dismiss was pending, defendants appealed the court's preliminary injunction orders pursuant to 28 U.S.C. @ 1292(a)(1). On January 3, 1995, the Court of Appeals for the Second Circuit remanded the [*3] case, holding that this court had not applied the proper preliminary injunction standard and ordering consolidation of a preliminary injunction hearing with a trial on the merits of the permanent injunction. The Court of Appeals directed that "the preliminary injunction orders shall remain in effect until March 31, 1995 upon which date they shall expire unless reentered by the district court following a trial on the merits. . . ." *Able v. U.S.*, 44 F.3d 128, 133 (2d Cir. 1995) (per curiam).

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

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

THE GENESIS OF THE ACT

On January 29, 1993 President Clinton directed then Secretary of Defense Les Aspin to submit a draft executive order "ending discrimination on the basis of sexual orientation in determining who [*4] may serve" in the Services, in a manner "consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain." Memorandum from President Clinton to the Secretary of Defense (Jan. 29, 1993), Ex. PX-21.

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

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

Both Committees issued reports recommending legislation practically identical to what is now the Act, which became effective November 30, 1993. The Directives became effective February 28, 1994. On March 15, 1994, the United States Coast Guard announced its policy [*5] on homosexual conduct "in lock step" with

that of the other military services. Memorandum from Secretary Of Transportation Federico Pena to the Commandant, United States Coast Guard (Mar. 15, 1993), Ex. JX-13 at p. B301327.

THE ACT AND THE DIRECTIVES

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

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

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

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good [*6] order and discipline, and unit cohesion that are the essence of military capability.

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

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

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

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

Subsection (f) contains definitions. "Homosexual" includes "the terms 'gay' and 'lesbian'" and means a person who engages, attempts to engage, has a "propensity" to engage, or "intends" to engage, [*7] in homosexual acts. The term "homosexual act" means any bodily contact between members of the same sex to satisfy sexual desires or any such contact that a reasonable person would understand to "demonstrate a propensity" or "intent" to engage in such an act. The Act does not define the word "propensity."

On December 21, 1993 Secretary Aspin issued a memorandum and Directives concerning the implementation of the new policy. Memorandum from Secretary Aspin to the Secretaries of the Military Departments et al. (Dec. 21, 1993), Ex. JX-4. They provided that an applicant to become a member will not be asked about his

or her sexual orientation, that "homosexual orientation is not a bar" to "service entry or continued service," but that "homosexual conduct" is. Such "conduct" includes not only homosexual "acts" but also a statement by a member or applicant that "demonstrates a propensity or intent to engage" in such acts. A statement that demonstrates the "propensity" will thus require separation unless the member rebuts a presumption that he or she engages or intends to engage in "homosexual acts" or has a "propensity" to do so. Directives 1332.14, 1332.30, & 1304.26, Exs. JX-6, JX-7, [*8] & JX-9.

As examples of statements giving rise to the presumption the Directives include "I am a homosexual," "I am gay," "I am a lesbian," and "I have a homosexual orientation." Id. The Directives purport to distinguish homosexual "orientation" from homosexual "propensity," defining homosexual "orientation" as "an abstract sexual preference for persons of a particular sex," and homosexual "propensity" as evidencing "a likelihood that a person engages in or will engage in" homosexual acts. Id.

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

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

THE ISSUE BEFORE THE COURT

The six plaintiffs have "stated" in their complaint that they are "homosexuals." That is the only thing that they have done that is now [*9] before the court. Under the state of the pleadings the court thus does not consider the case to draw into question the validity of any subsection of the Act other than (b)(2).

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

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

THE LEGISLATIVE PURPOSE

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

The Act says that its objective is to reach "homosexual conduct," that is, "homosexual acts" as they are defined in the Act. Thus finding (13) in subsection (a) says that the "prohibition against homosexual conduct" in the military is "necessary." Finding (15) indicates that the prohibition against such conduct is so necessary that even those who have a mere "propensity" to engage in that conduct must be discharged from the military [*10] because

their status as homosexuals makes it likely that they will commit homosexual acts.

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

THE FIRST AMENDMENT

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

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

Plaintiffs' statements that they are homosexual constitute "speech," and important, not trivial, speech. The First Amendment recognizes the value of speech not only as an instrument, that is, a mechanism by which ideas may be exchanged, but also as an expression of personal dignity and integrity. Speech is worthy of First Amendment protection not only when it [*11] contributes to the "marketplace of ideas" or assists in the search for "truth," but also when it articulates "the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24, 91 S. Ct. 1780, 1788, 29 L. Ed. 2d 284 (1971). "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means." *Whitney v. California*, 274 U.S. 357, 375, 47 S. Ct. 641, 648, 71 L. Ed. 1095 (1927) (Brandeis, J., joined by Holmes, J., concurring).

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

Regulation of the content of speech that involves First Amendment concerns is presumed invalid. See *R.A.V. v. City of St. Paul*, U.S. , , 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 116, 112 [*12] S. Ct. 501, 508, 116 L. Ed. 2d 476 (1991). The government may regulate its content only upon a showing that such regulation promotes a "compelling interest" and that the government has chosen "the least restrictive means" to further the interest. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836, 106 L. Ed. 2d 93 (1989).

The court recognizes that the judgments of Congress and the military with regard to military affairs are entitled to substantial deference, and that courts "lack the competence" to make policy decisions in the military context. See *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S. Ct. 1310, 1313, 89 L. Ed. 2d 478 (1986), *Rostker v. Goldberg*, 453 U.S. 57, 65, 101 S. Ct. 2646, 2652, 69 L. Ed. 2d 478 (1981). But that does not mean that courts are not competent or should abdicate their responsibility to review the constitutionality of

military decisions. "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is [the courts'] 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." [*13] United States v. Robel, 389 U.S. 258, 264, 88 S. Ct. 419, 424, 19 L. Ed. 2d 508 (1967) (citations omitted).

A court need not determine the wisdom of a particular military policy in order to determine whether that policy conflicts with the Constitution. Even in the military context, regulation of speech based on content survives constitutional scrutiny only if it is "no more than [what is] reasonably necessary to protect [a] substantial government interest." Brown v. Glines, 444 U.S. 348, 355, 100 S. Ct. 594, 600, 62 L. Ed. 2d 540 (1980).

A

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

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

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

The legislative record shows that the Act and the Directives are not premised on these beliefs. Defendants do not contend that the new policy was enacted in response to a finding that gay men and lesbians have physical or psychological defects rendering them unfit to serve, pose security risks, or are more likely than heterosexuals to violate a code of conduct or other rules generally. See Defendants' Responses to Plaintiffs' Requests for Admission, Ex. PX-13 at pp. 5-8. Indeed, defendants admit that Congress "clarified that the proscription [*15] on service has nothing to do with unjustified assumptions that homosexuals are not just as capable physically, mentally and psychologically to serve in the United States military as heterosexuals." Transcript of Defendants' Closing Statement at p. 256.

High-ranking administration officials and military officers certified the demonstrated ability of homosexuals to serve competently and conscientiously. Secretary Aspin, in presenting the administration's new policy, testified to the Department of Defense's recognition "that homosexuals have served with distinction in the Armed Forces." S. Hrg. 103-845, Ex. JX-1 at p. 702. General Norman Schwarzkopf noted that "homosexuals have served in the past and have done a great job serving their country." S. Hrg. 103-845, Ex. JX-1 at p. 612.

Major Kathleen Bergeron affirmed that in her experience, homosexuals who eventually had been separated "had an honorable record and served with distinction." S. Hrg. 103-845, Ex. JX-1 at p. 612. General Colin Powell, discussing the arguments of those who believe that homosexuals should be allowed openly to serve, stated that "they note correctly that homosexuals have privately served well in the past and [*16] are continuing to serve well today." S. Hrg. 103-845, Ex. JX-1 at p. 707.

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

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

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

To presume from a person's status that he or she will commit undesirable [*17] acts is an extreme measure. Hitler taught the world what could happen when the government began to target people not for what they had done but because of their status.

Thirty three years ago the Supreme Court held it was cruel and unusual punishment prohibited by the Eighth Amendment to subject an admitted narcotics addict to a misdemeanor prosecution on the theory that his addiction justified an inference that he had possessed or in the future would possess drugs. *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). See also *Powell v. Texas*, 392 U.S. 514, 543, 88 S. Ct. 2145, 2159, 20 L. Ed. 2d 1254 (1968) (Black, J., concurring) ("Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it.")

Robinson's status as a narcotics addict was self acquired. How much worse it is to infer the commission of acts from one's homosexual status, which may well be acquired at birth or in early childhood. See John C. Gonsiorek [*18] and James D. Weinrich, eds., *Homosexuality: Research Implications for Public Policy* 2 (1991).

Defendants recognized that a policy mandating discharge of homosexuals merely because they have a homosexual orientation or status could not withstand judicial scrutiny. As Jamie Gorelick, Counsel to the Department of Defense, stated at the Senate hearing: "The reason we do not discharge people because we believe them to have a homosexual orientation is because in 1981 it was

recognized that if we did have a status-based as opposed to a conduct-based rule, that it would be vulnerable to the courts." S. Hrg. 103 845, Ex. JX-1 at p. 777.

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

As noted above, the Directives purport to distinguish between homosexual "orientation" and homosexual "propensity," [*19] defining the former as the quality of having an "abstract sexual preference for members of the same sex" and the latter as the quality of having such a preference that presumably is sufficiently concrete to indicate a "likelihood" that the preference will be acted upon.

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

Neither the Act nor the Directives explain how to differentiate an "orientation" from a "propensity," although the Act's avowed policy to insure that "homosexual orientation" not be treated as a "bar" to service would seem to make such differentiation crucial. Those who formulated the policy testified that any distinction between the two is merely "hypothetical," Testimony of Counsel Gorelick, S. Hrg. 103-845, Ex. JX-1 at p. 800, and the Directives, as decreed by Congress, equate a statement of "orientation" with an admission of at least a "propensity." See Directives 1332.14 [*20] & 1332.30, Exs. JX-6 & JX-7, and S. Rep. 103-112, Ex. JX-15 at p. 294.

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

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

Defendants make much of the opportunity to rebut the presumption of propensity. But that opportunity is an ignis fatuus. Neither the Act nor the Directives suggest how one who is born with an innate tendency, an "orientation" or a "propensity," to commit a homosexual [*21] act can prove that he or she does not have such an orientation or propensity. Furthermore, the testimony at the Senate hearing shows that a member who admits to a homosexual orientation has only a "hypothetical" chance to escape discharge.

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

Thus, the policy treats a statement of homosexual orientation as proof of the case. Once such a statement is made, the speaker is judged guilty until proven innocent of committing misconduct the government considers so threatening [*22] to the military mission that a member may be discharged for it. This seems to the court a rather draconian consequence of merely admitting to an orientation that Congress has determined to be innocuous.

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

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

In each of these cases, the member stated [*23] at the discharge hearing that he or she was gay, but was apparently able to escape discharge by stating that he or she had not engaged and did not intend to engage in "homosexual acts." But Congress' specific intent was that "a member cannot rebut the presumption simply through a promise to adhere to military standards of conduct in the future, nor can the member rebut the presumption by a statement to the effect that he or she has a propensity towards homosexuality but has not acted on it." S. Rep. 103-112, Ex. JX-15 at p. 294.

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

The plain fact is that subsection (b)(2) burdens speech based solely on its content by subjecting the member to a discharge process in which the member has only at best a hypothetical chance to escape separation. The Act works to discharge or subject to discharge proceedings members who possess no more than an "orientation" regardless of whether they have engaged in or demonstrated a likelihood of engaging in prohibited acts, and thus reaches speech that does not indicate acts.

This court concludes [*24] that under the First Amendment a mere statement of homosexual orientation is not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings.

B

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

Defendants' advancement of this alternative theory to justify the Act indicates that, once Congress decided to try to get all known homosexuals out of the Services, the chief concern was to draft legislation to insure that the enactment would survive judicial review. See also Testimony of Counsel Gorelick and Gen. John P. Otjen, S. Hrg. 103-845, Ex. JX-1 at pp. 775-78, 812-21, 829-30. The Committee hearings show that legal counsel thought the best way to do this was to pretend that the concern was over, not the mere presence of homosexuals [*25] in the Services, but their potential acts. According to counsel, if the Act provided forthrightly that open homosexuals shall be banned because heterosexuals will not stand for them, it would be vulnerable under the Constitution of the United States. See Testimony of Counsel Gorelick, S. Hrg. 103-845, Ex. JX-1 at p. 777.

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

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

Although the Act's findings are silent as to the response of heterosexuals to the presence of known homosexuals in the Services, the court will analyze the Act as if it said that a statement of homosexual status was in itself an evil because heterosexuals would not like to hear it and would react [*26] so as to damage unit cohesion. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16, 95 S. Ct. 1225, 1233 n.16, 43 L. Ed. 2d 514 (1975) (courts need not "accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation").

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

(expressing concern that members' children "be exposed to that lifestyle"), Testimony of Capt. Gordon Holder, S. Hrg. 103-845, Ex. JX-1 at p. 544 (questioning ability to lead subordinates "in an area . . . basically against [his] moral standards"); Testimony of Comm. James Pledger, [*27] S. Hrg. 103-845, Ex. JX-1 at pp. 541-42 (reporting that significant number of his crew "took exception" to lifting ban "based on moral convictions").

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

General Schwartzkopf testified that "the introduction of an open homosexual into a small unit immediately polarizes that unit." S. Hrg. 103-845, Ex. JX-1 at pp. 595-96. See also S. Rep. 103-112, Ex. JX 15 at pp. 279-80. General Powell said that "homosexuals over history who have been willing to keep their orientation private have been successful members. . . ." S. Hrg. 103-845, Ex. JX-1 at p. 708, but that "the presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale [*28] and esprit of the Armed Forces." Id. See also Sen. Rep. 103-112, Ex. JX-15 at p. 278. The Report of the Association of the United States Army stated: "Heterosexual animosity toward known homosexuals can cause latent or even overt hostility, resulting in degradation of team or unit esprit." H.A.S.C. Hrg. 103-18, Ex. JX-2 at p. 337.

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

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

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

To "accommodate" the privacy of heterosexuals presumably means, for example, to keep their naked bodies safe in the showers from the stares of homosexuals. But if indeed there are homosexuals who wish to peek at naked bodies, they might do so quite as readily when their orientation [*29] is a secret as when it is open. The only difference will be that heterosexuals will not know which of their servicemates are homosexuals, and heterosexuals will have reason to have a generalized suspicion of everyone in the showers, hardly a circumstance likely to increase "cohesion."

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

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

This was an argument advanced before the Senate Committee in support of the total ban on homosexuals. See, e.g., S. Hrg. 103-845, Ex. JX-1 at pp. 535-36 (testimony of Fleet Master Chief Ronald Carter), pp. 763-64 (statement of Gen. Gordon Sullivan), pp. 604-05 (testimony of Maj. Bergeron). It can hardly have force now when homosexuals are not banned and will be serving in units. [*30] There is no reason to believe that such improper behavior, if it occurs, would be more likely to occur because a homosexual had admitted his orientation rather than kept it a secret.

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

There was, of course, evidence presented to Congress to the effect that the presence of individuals who acknowledged their homosexual orientation would cause no significant breakdown in cohesion. In a report commissioned by Secretary Aspin, an interdisciplinary team of researchers from the National Defense Research Institute of the RAND Corporation (the RAND Group) concluded that "although some disruptions might result from having acknowledged homosexuals serving in the military," "the experience of analogous organizations . . . suggests that any increase is likely to be quite small." RAND National Defense Research Institute, Sexual Orientation [*31] and U.S. Military Personnel Policy: Options and Assessment (1993) (the Rand Report), Ex. PX-1 at p. xxiv. The RAND Group noted that in Canada, Israel, the Netherlands, and Norway, "countries that have policies of complete nondiscrimination," "no serious problems were reported concerning the presence of homosexuals in the force." Rand Report, Ex. PX-1 at p. 14.

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

Furthermore, the RAND Group noted that although the military had expressed in the 1940's similar, indeed almost identical, fears about the reactions of white members if there was racial integration of the Services, in fact integration "did not 'destroy' unit cohesion and military effectiveness." Rand Report, Ex. PX-1 at p. 189.

While the empirical evidence developed by neutral and objective organizations such as the RAND Group supports the conclusion that any disruption would [*32] probably be quite small, the court will assume arguendo that Congress could have made a finding in the Act that the reactions of heterosexuals would have a larger impact. But even if the Act had included such a finding, there are factors other than those mentioned in the hearings that cast doubt on any such conclusion.

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

If there is one thing that is undisputed and seems self-evident, it is that cohesion depends on mutual trust within the unit. The honor code for servicemembers provides that they will not lie or cheat, and for good reason. Honesty is a quality that attracts respect. Secrecy and deception invite suspicion, which in turn erodes trust, the rock on which cohesion is built.

The policy of the Act is not only inherently deceptive. It also [*33] offers powerful inducements to homosexuals to lie. An enlisted member may ask another enlisted member his or her sexual orientation. Testimony of Counsel Gorelick and Gen. Otjen, S. Hrg. 103-845, Ex. JX-1 at pp. 810-11. It is true that a homosexual may answer "no comment." But a homosexual who answers truthfully is subject to discharge proceedings. A heterosexual is not. The pressure to lie is obvious.

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

The task of this court is to determine the constitutionality of the policy adopted by Congress, not its morality. But heterosexuals and homosexuals alike would be entitled to think it demeaning and unworthy of a great nation to base a policy on pretense rather than on truth. To invite someone with a homosexual orientation to join the Services, then to throw that person out solely because that orientation is revealed from something he or she said, and finally to pretend that the discharge was not [*34] because of the person's orientation, might appear to all members, heterosexual and homosexual, less than honorable, with incalculable effect on "high morale, good order and discipline, and unit cohesion."

Even if the First Amendment were to tolerate the prohibition of a truthful self-identification by a homosexual because it offends the sensibilities of some heterosexuals it surely would require a legislative finding that the consequences of disclosure would be infinitely more serious than anything revealed in the record before Congress. Even General Otjen conceded that the Services would fulfill their mission if homosexuals were permitted to reveal their orientation. See Deposition of General Otjen, Ex. PX-19 at p. 139 (confirming that subordinate members of the Services follow their orders whether or not they like them). See also Testimony of Gen. Calvin Waller, S. Hrg. 103 845, Ex. JX-1 at p. 401 ("If the ultimate decision is to allow openly declared homosexuals to serve in the Armed Forces, I am confident that the military leadership, as well as the military personnel, will salute and make the best of that situation.")

In any event the Supreme Court has held that the [*35] First Amendment will not countenance the proscription of the expression of an idea because others find that idea repugnant.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 2545, 105 L. Ed. 2d 342 (1989). See also *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 896, 93 L. Ed. 1131 (1949); *Healy v. James*, 408 U.S. 169, 187-88, 92 S. Ct. 2338, 2349, 33 L. Ed. 2d 266 (1972); *Simon & Schuster*, *supra*, 502 U.S. at 118, 112 S. Ct. at 509.

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

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

EQUAL PROTECTION

The due process clause of the Fifth Amendment makes binding upon the federal government the Fourteenth Amendment's command that no state shall "deny to any person within its jurisdiction the equal [*36] protection of the laws." See *Bolling v. Sharpe*, 347 U.S. 497, 498-99, 74 S. Ct. 693, 694, 98 L. Ed. 884 (1954).

The court analyzes Fifth Amendment equal protection challenges by the same standards as those applicable to claims of violation of the equal protection clause of the Fourteenth Amendment. See *Weinberger*, *supra*, 420 U.S. at 638 n.2, 95 S. Ct. at 1228 n.2.

Because the Act gives to persons of one status, heterosexual, the chance to exercise the fundamental right of free speech and prohibits it to those of another status, homosexual, defendants must at least show that the policy is "tailored to serve a substantial governmental interest." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 99, 92 S. Ct. 2286, 2292, 33 L. Ed. 2d 212 (1972).

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

Even if defendants do believe that heterosexual servicemembers will be so upset by a coworker's mere statement of homosexuality as not to work cooperatively in the unit, such a belief does not justify [*37] a discriminatory policy.

"Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private [] prejudice that they assume to be both widely and deeply held." *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 1882, 80 L. Ed. 2d 421 (1984), quoting *Palmer v. Thompson*, 403 U.S. 217, 260 61, 91 S. Ct. 1940, 1962-63, 29 L. Ed. 2d 438 (1971) (White, J., dissenting). Congress may not enact discriminatory legislation because it desires to insulate heterosexual servicemembers from statements that might excite their prejudices.

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

CONCLUSION

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

So ordered.

Dated: Brooklyn, New York
March 30, 1995

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

*Days in the
Military*

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September 5, 1995

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, New York 10022-3897

Dear Mr. Bowie:

I am in receipt of your recent letter. I understand that you have contacted Judy Miller, General Counsel at the Department of Defense and David Ogden at the Department of Justice. They are the appropriate officials and I am sure we will keep informed from them.

Very truly yours,

Abner J. Mikva
Counsel to the President

cc: Judy Miller
David Ogden

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August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Mikva:

One of the issues discussed at your meeting in June with representatives of the Servicemembers Legal Defense Network was the military's policy of denying assistance of counsel to military suspects prior to their being charged. Enclosed is a letter that describes this policy and its unconstitutional effects in greater detail.

In essence, several branches of the military have adopted an official policy of denying assistance of counsel to criminal suspects prior to and during custodial interrogation. This policy appears to be a blatant violation of the Supreme Court's Miranda decision as well as a fundamental unfairness in the system. In addition, the policy appears to raise an untenable ethical dilemma for defense counsel in that they are permitted to "consult" with, but not represent, or even enter into, an attorney-client relationship with the suspect.

We became aware of this issue in the context of an actual court-martial in Okinawa, which will shortly go up on appeal. The issues presented will be heard in the courts, but we believe these issues could be better dealt with in a systemic way at the administrative level.

The particular case in which the issue arose occurred in the context of an investigation into the sexual orientation of a Marine, but this issue has no

The Honorable Abner J. Mikva
August 21, 1995
Page 2

less meaning for all servicemembers. We do not believe there are any political aspects to this issue.

We respectfully request that an attorney in your office coordinate a review of this issue with lawyers from the Justice Department and the Department of Defense.

We have discussed this issue at length with other firms and lawyers active in the military area, a number of whom will send supporting letters separately.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Very truly yours,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom

cc w/ enclosures:

Judith Miller, General Counsel, Department of Defense
David W. Ogden, Associate Deputy Attorney General,
Department of Justice
Marsha Scott, Deputy Assistant to the President for
Political Affairs

(1) Andy -

Follow upon this.

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August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Official Military Policy
Of Denying Criminal Suspects
Their Right To Counsel

Dear Mr. Mikva:

As a follow-up to your meeting in June with the directors of the Servicemembers Legal Defense Network, we are writing to apprise you of an official policy of the United States Marine Corps which we believe conflicts with the requirements of the Fifth Amendment and Miranda and results in the widespread denial of the right to counsel to Marines in Okinawa who are suspects in criminal investigations. Similar policies are in effect elsewhere in the Marine Corps and in other branches of the service.

We request that your office designate officials in each of the Justice Department and the Department of Defense to examine and respond to this issue.

The Policy is contained in Legal Service Support Section ("LSSS") Memorandum 2-93 issued by the Officer in Charge of LSSS, 3rd Force Service Support Group, FMPAC on August 24, 1993 to all LSSS offices and Judge Advocates on Okinawa (the "Memorandum"). A copy of the Memorandum is enclosed herewith. The Memorandum is intended to promulgate policies and procedures for, among other things, the provision of advice by defense counsel. Memorandum, § 1. In pertinent part, the Memorandum instructs Senior Defense Counsel ("SDC") as to the circumstances in which defense counsel may be assigned to represent a Marine who is under criminal investigation. Section 5 of the Memorandum provides:

The Honorable Abner J. Mikva
August 21, 1995
Page 2

Counsel should normally be detailed:

- a. As soon as practicable after preferral of charges against the accused....
- b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer.

Memorandum, § 5. Additionally, section 7 of the Memorandum states:

Reference (c) [JAGINST 5803.1] provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships [with criminal suspects] unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS.

Memorandum, § 7.

The effect of these provisions is to prohibit defense counsel from representing Marines who are subjected to custodial interrogation by military investigative authorities unless one of the limited circumstances under section 5 applies, or the OIC, LSSS authorizes assignment of counsel in a specific case.

The consequence of the policy is to effectively preclude Marines on Okinawa who are subjected to custodial interrogation by military criminal investigators from obtaining the advice of counsel until after they have been charged. It is here that the Memorandum -- and the policy it embodies -- conflicts with the Fifth Amendment to the United States Constitution and the cases interpreting it. Specifically, Miranda v. Arizona, 384

The Honorable Abner J. Mikva
August 21, 1995
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U.S. 436 (1966), requires that every criminal suspect who is subjected to custodial interrogation by law enforcement agents be advised of the right to be represented by counsel, appointed, if necessary, and to have that counsel present during interrogation. This right applies both before and after formal charges are lodged, see Patterson v. Illinois, 487 U.S. 285, 294 (1988), and is fully applicable to servicemembers subject to military criminal investigations. United States v. Tempia, 37 C.M.R. 249 (1967).

Marine Corps criminal investigators on Okinawa purport to comply with Miranda and Tempia by administering the Miranda warnings and having suspects read and sign the Navy's standard Military Suspect's Acknowledgment and Waiver of Rights Form before commencing interrogations. That form states, in pertinent part:

I have ... been advised that:

- (3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me or both;
- (4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview.

OPNAV 5527/3 (12-82).

These warnings do not satisfy the mandates of Miranda and Tempia, however, because the policy set forth in the Memorandum effectively precludes Marines subjected to custodial interrogation from consulting in any meaningful way with a military attorney. The additional fact, that there are no non-military American lawyers practicing criminal law on the island of Okinawa, obviously prevents Marines from retaining such a lawyer prior to or during questioning. At the same time, the availability of retainable civilian counsel would not remedy the policy's unconstitutional restraints on the appointment of military counsel.

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In short, the effect of the policy is to render the above-cited Miranda warnings untruthful and deceptive. Under Miranda and Tempia, Marines under custodial interrogation have the right to be represented by an attorney prior to and during questioning. Under the policy set forth in the Memorandum, they do not.

In their attempt to sidestep the unconstitutionality of the policy, military law enforcement authorities have contended that, in situations in which the suspect has confessed after signing the Acknowledgment of Rights and Waiver Form, there is no illegal denial of counsel since the suspect has "waived" that right. The flaw in this argument is clear: While Miranda recognizes that suspects might waive their right to counsel, for such a waiver to be effective, it must be knowing and voluntary. 384 U.S. at 444. No such waiver is possible, however, where the statement of "rights" is false due to an official policy which denies counsel.

The impact of the policy is perhaps best depicted in the recent testimony of the Senior Defense Counsel on Okinawa. The SDC admitted that, notwithstanding the statement of rights administered to Marine Corps suspects prior to custodial interrogation, the military, under the auspices of the Memorandum, routinely denies such suspects appointed counsel prior to and during interrogations. As the SDC also testified, the results of this official policy are astounding: During a recent eight-month period, military suspects made incriminating statements to criminal investigators in 90% of the cases in which formal charges were ultimately preferred. In 95% of those cases, the military suspects eventually entered guilty pleas. Thus, in practice, the policy ensures that a suspect will not be provided with counsel until after he or she has made an incriminating statement. While the policy may be explained by a desire for prosecutorial efficiency, this affords no excuse for wholesale constitutional violations.

It is unthinkable that Marines suspected of crimes on Okinawa cannot obtain representation by defense counsel until after they are charged or have languished in the brig for up to 10 days, regardless of whether charges have been preferred. See Memorandum, § 7(a) &

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(b). Many Marines on Okinawa are young enlisted personnel, unsophisticated in legal matters. They serve in a closed community, thousands of miles from home and without the support of family, friends and counsellors. In the military context, where the refusal to obey a lawful order is itself grounds for criminal charges, a suspect who has been ordered to appear before criminal investigators may well believe that, notwithstanding the Miranda warnings, he has been ordered to make a statement in response to investigators' inquiries. See Tempia, 37 C.M.R. at 256.

While the most serious impact of the Memorandum is upon the constitutional rights of Marine suspects, the policy also leaves Judge Advocates assigned to defense counsel details with an unacceptable dilemma. This dilemma arises from the interpretation of the policy that would permit defense counsel to consult with a suspect prior to the preferral of charges, but without forming an attorney-client relationship. See Memorandum, §§ 5, 7; Enclosure 2 to the Memorandum. Such "consultation" would clearly require defense counsel to advise the suspect that, there is no attorney-client relationship between them, and that therefore, the suspect should not discuss any aspect of the case with counsel. Worse, absent an attorney-client relationship, a consulting attorney may be compelled to testify as to any admissions made by the suspect during the consultation. In this situation, the attorney would be forced to violate his sworn duty as a lawyer in order to uphold his sworn duty as an officer. In this context it is doubtful whether any meaningful advice could be conveyed during a consultation other than a reiteration of the Miranda rights.

The glaring problems presented by the policy set forth in the Memorandum constitute a gross violation of servicemembers' constitutional rights and a fundamental injustice. Moreover, the existence of such a policy threatens to undermine the validity of hundreds, perhaps thousands, of criminal convictions where incriminating statements made by the accused servicemembers during custodial interrogations have been admitted into evidence or used to obtain guilty pleas.

The Honorable Abner J. Mikva
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We respectfully suggest that this serious situation warrants further investigation and intervention to (i) eliminate all offending denial-of-counsel policies wherever they may exist, and (ii) provide explicit guidance to the services on the proper implementation of military suspect's Fifth Amendment rights.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Respectfully,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom



UNITED STATES MARINE CORPS
LEGAL SERVICE SUPPORT SECTION
3D FORCE SERVICE SUPPORT GROUP, FMFFAC
UNIT 38477
FPO AP 96604-6477

5800
17:LAO
24 Aug 93

LEGAL SERVICE SUPPORT SECTION POLICY MEMORANDUM 2-93

From: Officer in Charge, Legal Service Support Section

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

Ref: (a) JAGMAN
(b) MARCORSEPMAN
(c) JAGINST 5803.1

Encl: (1) Request for IMC format
(2) Services provided by Defense Counsel

1. PURPOSE. To promulgate policies and procedures for the detailing of trial and defense counsel for courts-martial, acting on requests for IMC, assigning counsel to represent respondents before administrative discharge board proceedings, and providing legal advice by defense counsel per the references.
2. CANCELLATION. Officer in Charge, Legal Service Support Section, memorandum 5800 LSSS:A.01 of 15 February 1991.
3. BACKGROUND. Section 0130b(1) of reference (a) provides authority for the Officer in Charge, Legal Service Support Section (OIC, LSSS), to detail trial and defense counsel for courts-martial conducted by LSSS personnel.
4. DELEGATION OF AUTHORITY.
 - a. Trial Counsel. Per section 0130b(1) of reference (a), the Officers in Charge of each Legal Service Support Team (LSST), are delegated the authority to detail trial counsel in courts-martial tried by that LSST.
 - b. Defense Counsel. Per section 0130b(1) of reference (a), the Senior Defense Counsel (SDC) is delegated the authority to detail defense counsel in courts-martial and other proceedings where defense counsel are required to be detailed. Counsel will not be detailed to summary courts-martial.
5. DETAILING DEFENSE COUNSEL. The SDC will detail defense counsel to accused/respondents after consideration of the accused's assigned unit, complexity of the case, possible conflicts of interest, prior establishment of an attorney-client relationship or other factors deemed appropriate to the SDC. Counsel should normally be detailed:

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

a. As soon as practicable after preferral of charges against an accused. The SDC should also be given the pretrial package from the trial counsel at the same time.

b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer;

c. After a respondent has exercised his right to have the case presented before an administrative discharge board and receipt of the administrative discharge package.

6. REQUESTS FOR INDIVIDUAL MILITARY COUNSEL. Requests for Individual Military Counsel (IMC) will be submitted in writing by the accused or the detailed defense counsel utilizing the format of enclosure (1). Action on all IMC requests will be made in accordance with section 0131 of reference (a).

7. DEFENSE COUNSEL PROVIDING LEGAL ADVICE. Reference (c) provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS. Other than in cases of regularly scheduled counseling sessions (e.g. providing legal advice on nonjudicial punishment, involuntary administrative discharges or Article 31, Uniform Code of Military Justice counseling), defense counsel will provide legal advice not requiring an attorney-client relationship to individuals only when authorized to do so at the request of the individual's unit or other competent authority and with approval of either the SDC, OIC, LSST or OIC, LSSS. Enclosure (2) provides information with regard to advice and assistance normally provided by defense counsel.

8. ACTION.

a. Team OIC's. Ensure that the pretrial package is provided to the SDC and that trial counsel are detailed to courts-martial.

b. Military Justice Officer/AOIC, LSSS. Ensure that trial counsel are appointed as recorders for administrative discharge boards as soon as practicable after receipt of the board package from the Administrative Law Officer.

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

c. Administrative Law Officer. Ensure that copies of all administrative discharge packages that require a board are provided to the SDC and Military Justice Officer.

d. SDC.

(1) Detail defense counsel, counsel for the respondent, and process requests for IMC according to the policy established herein.

(2) Ensure that the necessary counseling required by the policies established herein is accomplished.

(3) Ensure that legal advice provided by defense counsel is accomplished per the policies established herein and as provided in enclosure (2).


W. F. WARRINER

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OIC, LSST Foster

OIC, LSST Kinser

~~SDC~~

All judge advocates of the LSSS
AdminLawO

5810
17:SDC

(date)

From: (Accused)
To: (Convening Authority)
Via: (Trial Counsel)

Subj: REQUEST FOR INDIVIDUAL MILITARY COUNSEL

Ref: (a) MCM, 1984, R.C.M. 506(b)
(b) JAGMAN 0131a

1. In accordance with references (a) and (b), I hereby request that _____ be appointed my individual military counsel for my pending _____ court-martial/article 32 pretrial investigation. I do/do not request that my detailed defense counsel remain on the case.
2. This request is submitted in accordance with the advice I received concerning my rights to counsel as explained to me by detailed defense counsel, _____.
3. I have a/have no prior attorney-client relationship with the requested attorney.
4. Trial is presently scheduled for _____.
5. The charge(s) are:

6. Special qualifications of requested counsel, if any, that are relevant to particular case _____.
7. If this request is denied, it is requested that I be informed of the reasons for denial.

(SIGNATURE OF ACCUSED)

Copy to:
Trial Counsel

SERVICES PROVIDED BY DEFENSE COUNSEL

<u>FUNCTION</u>	<u>REPRESENTATION</u>	<u>CONSULTATION ONLY</u>	<u>SPECIAL INSTRUCTIONS</u>
-GCM	Yes	NA	Note 1
-Art 32 Inves	Yes	NA	Note 1
-SPCM	Yes	NA	Note 1
-SCM	No	Yes	Note 3
-Pretrial Cnft	Yes	NA	Note 2
-Advice prior to NJP	No	Yes	See JAG- MAN 0109(a)
-NJP Personal Rep	No	No	
-Interrogation pursuant to MRE 305	No	Yes	Note 3 limitation unless counsel has been assigned to represent the individ- ual at a SPCM or GCM
-NC&PB Documents	No	Yes	
-Polygraph Exam	No	Yes	Note 3 limitation unless coun- sel has been assigned to represent the individual at a SPCM or GCM
-Vacation Proceedings	Yes	NA	
-AdminDischg Advice	No	Yes	Note 3
-AdminDisch Bd Rep	Yes	NA	Note 1
-Board of Inquiry	Yes	N/A	Note 1
-Art 138, UCMJ			
complaints	No	No	
-Request Mast	No	No	
-Turnover to civilian authorities	No	No	
-Admin determinations regarding loss/damage/ destruction of Govt property	No	Yes	Note 3 See MCO P4400.150

-Field Flt Perf Bd	No	No	
-BCNR/BCNR/DisReviewBd petition	No	Yes	Note 4
-Special Selection Bds	No	No	
-Medical Bd	No	Yes	
-Admin Reduction Bd	No	Yes	Note 3

-Traffic Court	No	No
-Eviction Hearings	No	No
-Civilian Civil and Criminal Matters	No	No
-Federal Employees	No	No
-Legal Assistance conflicts	No	Yes
-Requests for legal advice	NA	No

Note 1: Formation of attorney-client relationships and representation is authorized only after the request for legal service has been received and assignment has been made by SDC.

Note 2: Prisoners will be informed representation is limited only to pretrial confinement proceedings before charges are preferred R.C.M. 305(f) of reference (c).

Note 3: Clients will be informed scope of services is limited to consultation on authorized matters only.

Note 4: Defense counsel will not be assigned to assist Marines, officer or enlisted, in preparing or drafting petitions. Once the Marine has drafted the petition, defense counsel may be consulted to review the petition prior to submission.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

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TORONTO

August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Mikva:

One of the issues discussed at your meeting in June with representatives of the Servicemembers Legal Defense Network was the military's policy of denying assistance of counsel to military suspects prior to their being charged. Enclosed is a letter that describes this policy and its unconstitutional effects in greater detail.

In essence, several branches of the military have adopted an official policy of denying assistance of counsel to criminal suspects prior to and during custodial interrogation. This policy appears to be a blatant violation of the Supreme Court's Miranda decision as well as a fundamental unfairness in the system. In addition, the policy appears to raise an untenable ethical dilemma for defense counsel in that they are permitted to "consult" with, but not represent, or even enter into, an attorney-client relationship with the suspect.

We became aware of this issue in the context of an actual court-martial in Okinawa, which will shortly go up on appeal. The issues presented will be heard in the courts, but we believe these issues could be better dealt with in a systemic way at the administrative level.

The particular case in which the issue arose occurred in the context of an investigation into the sexual orientation of a Marine, but this issue has no

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August 21, 1995
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less meaning for all servicemembers. We do not believe there are any political aspects to this issue.

We respectfully request that an attorney in your office coordinate a review of this issue with lawyers from the Justice Department and the Department of Defense.

We have discussed this issue at length with other firms and lawyers active in the military area, a number of whom will send supporting letters separately.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Very truly yours,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom

cc w/ enclosures:

Judith Miller, General Counsel, Department of Defense
David W. Ogden, Associate Deputy Attorney General,
Department of Justice
Marsha Scott, Deputy Assistant to the President for
Political Affairs

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August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Official Military Policy
Of Denying Criminal Suspects
Their Right To Counsel

Dear Mr. Mikva:

As a follow-up to your meeting in June with the directors of the Servicemembers Legal Defense Network, we are writing to apprise you of an official policy of the United States Marine Corps which we believe conflicts with the requirements of the Fifth Amendment and Miranda and results in the widespread denial of the right to counsel to Marines in Okinawa who are suspects in criminal investigations. Similar policies are in effect elsewhere in the Marine Corps and in other branches of the service.

We request that your office designate officials in each of the Justice Department and the Department of Defense to examine and respond to this issue.

The Policy is contained in Legal Service Support Section ("LSSS") Memorandum 2-93 issued by the Officer in Charge of LSSS, 3rd Force Service Support Group, FMPAC on August 24, 1993 to all LSSS offices and Judge Advocates on Okinawa (the "Memorandum"). A copy of the Memorandum is enclosed herewith. The Memorandum is intended to promulgate policies and procedures for, among other things, the provision of advice by defense counsel. Memorandum, § 1. In pertinent part, the Memorandum instructs Senior Defense Counsel ("SDC") as to the circumstances in which defense counsel may be assigned to represent a Marine who is under criminal investigation. Section 5 of the Memorandum provides:

The Honorable Abner J. Mikva
August 21, 1995
Page 2

Counsel should normally be detailed:

- a. As soon as practicable after preferral of charges against the accused....
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Memorandum, § 5. Additionally, section 7 of the Memorandum states:

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The effect of these provisions is to prohibit defense counsel from representing Marines who are subjected to custodial interrogation by military investigative authorities unless one of the limited circumstances under section 5 applies, or the OIC, LSSS authorizes assignment of counsel in a specific case.

The consequence of the policy is to effectively preclude Marines on Okinawa who are subjected to custodial interrogation by military criminal investigators from obtaining the advice of counsel until after they have been charged. It is here that the Memorandum -- and the policy it embodies -- conflicts with the Fifth Amendment to the United States Constitution and the cases interpreting it. Specifically, Miranda v. Arizona, 384

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The Honorable Abner J. Mikva
August 21, 1995
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In their attempt to sidestep the unconstitutionality of the policy, military law enforcement authorities have contended that, in situations in which the suspect has confessed after signing the Acknowledgment of Rights and Waiver Form, there is no illegal denial of counsel since the suspect has "waived" that right. The flaw in this argument is clear: While Miranda recognizes that suspects might waive their right to counsel, for such a waiver to be effective, it must be knowing and voluntary. 384 U.S. at 444. No such waiver is possible, however, where the statement of "rights" is false due to an official policy which denies counsel.

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UNITED STATES MARINE CORPS
LEGAL SERVICE SUPPORT SECTION
3D FORCE SERVICE SUPPORT GROUP, FMFPAC
UNIT 38477
FPO AP 96604-6477

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24 Aug 93

LEGAL SERVICE SUPPORT SECTION POLICY MEMORANDUM 2-93

From: Officer in Charge, Legal Service Support Section

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c. After a respondent has exercised his right to have the case presented before an administrative discharge board and receipt of the administrative discharge package.

6. REQUESTS FOR INDIVIDUAL MILITARY COUNSEL. Requests for Individual Military Counsel (IMC) will be submitted in writing by the accused or the detailed defense counsel utilizing the format of enclosure (1). Action on all IMC requests will be made in accordance with section 0131 of reference (a).

7. DEFENSE COUNSEL PROVIDING LEGAL ADVICE. Reference (c) provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS. Other than in cases of regularly scheduled counseling sessions (e.g. providing legal advice on nonjudicial punishment, involuntary administrative discharges or Article 31, Uniform Code of Military Justice counseling), defense counsel will provide legal advice not requiring an attorney-client relationship to individuals only when authorized to do so at the request of the individual's unit or other competent authority and with approval of either the SDC, OIC, LSST or OIC, LSSS. Enclosure (2) provides information with regard to advice and assistance normally provided by defense counsel.

8. ACTION.

a. Team OIC's. Ensure that the pretrial package is provided to the SDC and that trial counsel are detailed to courts-martial.

b. Military Justice Officer/AOIC, LSSS. Ensure that trial counsel are appointed as recorders for administrative discharge boards as soon as practicable after receipt of the board package from the Administrative Law Officer.

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

c. Administrative Law Officer. Ensure that copies of all administrative discharge packages that require a board are provided to the SDC and Military Justice Officer.

d. SDC.

(1) Detail defense counsel, counsel for the respondent, and process requests for IMC according to the policy established herein.

(2) Ensure that the necessary counseling required by the policies established herein is accomplished.

(3) Ensure that legal advice provided by defense counsel is accomplished per the policies established herein and as provided in enclosure (2).


W. F. WARRINER

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OIC, LSST Foster

OIC, LSST Kinser

~~SDC~~

All judge advocates of the LSSS
AdminLawO

5810
17:SDC

(date)

From: (Accused)
To: (Convening Authority)
Via: (Trial Counsel)

Subj: REQUEST FOR INDIVIDUAL MILITARY COUNSEL

Ref: (a) MCM, 1984, R.C.M. 506(b)
(b) JAGMAN 0131a

1. In accordance with references (a) and (b), I hereby request that _____ be appointed my individual military counsel for my pending _____ court-martial/article 32 pretrial investigation. I do/do not request that my detailed defense counsel remain on the case.

2. This request is submitted in accordance with the advice I received concerning my rights to counsel as explained to me by detailed defense counsel, _____.

3. I have a/have no prior attorney-client relationship with the requested attorney.

4. Trial is presently scheduled for _____.

5. The charge(s) are:

6. Special qualifications of requested counsel, if any, that are relevant to particular case _____.

7. If this request is denied, it is requested that I be informed of the reasons for denial.

(SIGNATURE OF ACCUSED)

Copy to:
Trial Counsel

SERVICES PROVIDED BY DEFENSE COUNSEL

<u>FUNCTION</u>	<u>REPRESENTATION</u>	<u>CONSULTATION ONLY</u>	<u>SPECIAL INSTRUCTIONS</u>
-GCM	Yes	NA	Note 1
-Art 32 Inves	Yes	NA	Note 1
-SPCM	Yes	NA	Note 1
-SCM	No	Yes	Note 3
-Pretrial Cnft	Yes	NA	Note 2
-Advice prior to NJP	No	Yes	See JAG- MAN 0109(a)
-NJP Personal Rep	No	No	
-Interrogation pursuant to MRE 305	No	Yes	Note 3 limitation unless counsel has been assigned to represent the individ- ual at a SPCM or GCM
-NC&PB Documents	No	Yes	
-Polygraph Exam	No	Yes	Note 3 limitation unless coun- sel has been assigned to represent the individual at a SPCM or GCM
-Vacation Proceedings	Yes	NA	
-AdminDischg Advice	No	Yes	Note 3
-AdminDisch Bd Rep	Yes	NA	Note 1
-Board of Inquiry	Yes	N/A	Note 1
-Art 138, UCMJ			
complaints	No	No	
-Request Mast	No	No	
-Turnover to civilian authorities	No	No	
-Admin determinations regarding loss/damage/ destruction of Govt property	No	Yes	Note 3 See MCO P4400.150

-Field Flt Perf Bd	No	No	
-BCNR/BCNR/DisReviewBd petition	No	Yes	Note 4
-Special Selection Bds	No	No	
-Medical Bd	No	Yes	
-Admin Reduction Bd	No	Yes	Note 3

-Traffic Court	No	No
-Eviction Hearings	No	No
-Civilian Civil and Criminal Matters	No	No
-Federal Employees	No	No
-Legal Assistance conflicts	No	Yes
-Requests for legal advice	NA	No

Note 1: Formation of attorney-client relationships and representation is authorized only after the request for legal service has been received and assignment has been made by SDC.

Note 2: Prisoners will be informed representation is limited only to pretrial confinement proceedings before charges are preferred R.C.M. 305(f) of reference (c).

Note 3: Clients will be informed scope of services is limited to consultation on authorized matters only.

Note 4: Defense counsel will not be assigned to assist Marines, officer or enlisted, in preparing or drafting petitions. Once the Marine has drafted the petition, defense counsel may be consulted to review the petition prior to submission.

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August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Mikva:

One of the issues discussed at your meeting in June with representatives of the Servicemembers Legal Defense Network was the military's policy of denying assistance of counsel to military suspects prior to their being charged. Enclosed is a letter that describes this policy and its unconstitutional effects in greater detail.

In essence, several branches of the military have adopted an official policy of denying assistance of counsel to criminal suspects prior to and during custodial interrogation. This policy appears to be a blatant violation of the Supreme Court's Miranda decision as well as a fundamental unfairness in the system. In addition, the policy appears to raise an untenable ethical dilemma for defense counsel in that they are permitted to "consult" with, but not represent, or even enter into, an attorney-client relationship with the suspect.

We became aware of this issue in the context of an actual court-martial in Okinawa, which will shortly go up on appeal. The issues presented will be heard in the courts, but we believe these issues could be better dealt with in a systemic way at the administrative level.

The particular case in which the issue arose occurred in the context of an investigation into the sexual orientation of a Marine, but this issue has no

The Honorable Abner J. Mikva
August 21, 1995
Page 2

less meaning for all servicemembers. We do not believe there are any political aspects to this issue.

We respectfully request that an attorney in your office coordinate a review of this issue with lawyers from the Justice Department and the Department of Defense.

We have discussed this issue at length with other firms and lawyers active in the military area, a number of whom will send supporting letters separately.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Very truly yours,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom

cc w/ enclosures:

Judith Miller, General Counsel, Department of Defense
David W. Ogden, Associate Deputy Attorney General,
Department of Justice
Marsha Scott, Deputy Assistant to the President for
Political Affairs

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August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Official Military Policy
Of Denying Criminal Suspects
Their Right To Counsel

Dear Mr. Mikva:

As a follow-up to your meeting in June with the directors of the Servicemembers Legal Defense Network, we are writing to apprise you of an official policy of the United States Marine Corps which we believe conflicts with the requirements of the Fifth Amendment and Miranda and results in the widespread denial of the right to counsel to Marines in Okinawa who are suspects in criminal investigations. Similar policies are in effect elsewhere in the Marine Corps and in other branches of the service.

We request that your office designate officials in each of the Justice Department and the Department of Defense to examine and respond to this issue.

The Policy is contained in Legal Service Support Section ("LSSS") Memorandum 2-93 issued by the Officer in Charge of LSSS, 3rd Force Service Support Group, FMPAC on August 24, 1993 to all LSSS offices and Judge Advocates on Okinawa (the "Memorandum"). A copy of the Memorandum is enclosed herewith. The Memorandum is intended to promulgate policies and procedures for, among other things, the provision of advice by defense counsel. Memorandum, § 1. In pertinent part, the Memorandum instructs Senior Defense Counsel ("SDC") as to the circumstances in which defense counsel may be assigned to represent a Marine who is under criminal investigation. Section 5 of the Memorandum provides:

The Honorable Abner J. Mikva
August 21, 1995
Page 2

Counsel should normally be detailed:

- a. As soon as practicable after preferral of charges against the accused....
- b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer.

Memorandum, § 5. Additionally, section 7 of the Memorandum states:

Reference (c) [JAGINST 5803.1] provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships [with criminal suspects] unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS.

Memorandum, § 7.

The effect of these provisions is to prohibit defense counsel from representing Marines who are subjected to custodial interrogation by military investigative authorities unless one of the limited circumstances under section 5 applies, or the OIC, LSSS authorizes assignment of counsel in a specific case.

The consequence of the policy is to effectively preclude Marines on Okinawa who are subjected to custodial interrogation by military criminal investigators from obtaining the advice of counsel until after they have been charged. It is here that the Memorandum -- and the policy it embodies -- conflicts with the Fifth Amendment to the United States Constitution and the cases interpreting it. Specifically, Miranda v. Arizona, 384

The Honorable Abner J. Mikva
August 21, 1995
Page 3

U.S. 436 (1966), requires that every criminal suspect who is subjected to custodial interrogation by law enforcement agents be advised of the right to be represented by counsel, appointed, if necessary, and to have that counsel present during interrogation. This right applies both before and after formal charges are lodged, see Patterson v. Illinois, 487 U.S. 285, 294 (1988), and is fully applicable to servicemembers subject to military criminal investigations. United States v. Tempia, 37 C.M.R. 249 (1967).

Marine Corps criminal investigators on Okinawa purport to comply with Miranda and Tempia by administering the Miranda warnings and having suspects read and sign the Navy's standard Military Suspect's Acknowledgment and Waiver of Rights Form before commencing interrogations. That form states, in pertinent part:

I have ... been advised that:

- (3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me or both;
- (4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview.

OPNAV 5527/3 (12-82).

These warnings do not satisfy the mandates of Miranda and Tempia, however, because the policy set forth in the Memorandum effectively precludes Marines subjected to custodial interrogation from consulting in any meaningful way with a military attorney. The additional fact, that there are no non-military American lawyers practicing criminal law on the island of Okinawa, obviously prevents Marines from retaining such a lawyer prior to or during questioning. At the same time, the availability of retainable civilian counsel would not remedy the policy's unconstitutional restraints on the appointment of military counsel.

The Honorable Abner J. Mikva
August 21, 1995
Page 4

In short, the effect of the policy is to render the above-cited Miranda warnings untruthful and deceptive. Under Miranda and Tempia, Marines under custodial interrogation have the right to be represented by an attorney prior to and during questioning. Under the policy set forth in the Memorandum, they do not.

In their attempt to sidestep the unconstitutionality of the policy, military law enforcement authorities have contended that, in situations in which the suspect has confessed after signing the Acknowledgment of Rights and Waiver Form, there is no illegal denial of counsel since the suspect has "waived" that right. The flaw in this argument is clear: While Miranda recognizes that suspects might waive their right to counsel, for such a waiver to be effective, it must be knowing and voluntary. 384 U.S. at 444. No such waiver is possible, however, where the statement of "rights" is false due to an official policy which denies counsel.

The impact of the policy is perhaps best depicted in the recent testimony of the Senior Defense Counsel on Okinawa. The SDC admitted that, notwithstanding the statement of rights administered to Marine Corps suspects prior to custodial interrogation, the military, under the auspices of the Memorandum, routinely denies such suspects appointed counsel prior to and during interrogations. As the SDC also testified, the results of this official policy are astounding: During a recent eight-month period, military suspects made incriminating statements to criminal investigators in 90% of the cases in which formal charges were ultimately preferred. In 95% of those cases, the military suspects eventually entered guilty pleas. Thus, in practice, the policy ensures that a suspect will not be provided with counsel until after he or she has made an incriminating statement. While the policy may be explained by a desire for prosecutorial efficiency, this affords no excuse for wholesale constitutional violations.

It is unthinkable that Marines suspected of crimes on Okinawa cannot obtain representation by defense counsel until after they are charged or have languished in the brig for up to 10 days, regardless of whether charges have been preferred. See Memorandum, § 7(a) &

The Honorable Abner J. Mikva
August 21, 1995
Page 5

(b). Many Marines on Okinawa are young enlisted personnel, unsophisticated in legal matters. They serve in a closed community, thousands of miles from home and without the support of family, friends and counsellors. In the military context, where the refusal to obey a lawful order is itself grounds for criminal charges, a suspect who has been ordered to appear before criminal investigators may well believe that, notwithstanding the Miranda warnings, he has been ordered to make a statement in response to investigators' inquiries. See Tempia, 37 C.M.R. at 256.

While the most serious impact of the Memorandum is upon the constitutional rights of Marine suspects, the policy also leaves Judge Advocates assigned to defense counsel details with an unacceptable dilemma. This dilemma arises from the interpretation of the policy that would permit defense counsel to consult with a suspect prior to the preferral of charges, but without forming an attorney-client relationship. See Memorandum, §§ 5, 7; Enclosure 2 to the Memorandum. Such "consultation" would clearly require defense counsel to advise the suspect that, there is no attorney-client relationship between them, and that therefore, the suspect should not discuss any aspect of the case with counsel. Worse, absent an attorney-client relationship, a consulting attorney may be compelled to testify as to any admissions made by the suspect during the consultation. In this situation, the attorney would be forced to violate his sworn duty as a lawyer in order to uphold his sworn duty as an officer. In this context it is doubtful whether any meaningful advice could be conveyed during a consultation other than a reiteration of the Miranda rights.

The glaring problems presented by the policy set forth in the Memorandum constitute a gross violation of servicemembers' constitutional rights and a fundamental injustice. Moreover, the existence of such a policy threatens to undermine the validity of hundreds, perhaps thousands, of criminal convictions where incriminating statements made by the accused servicemembers during custodial interrogations have been admitted into evidence or used to obtain guilty pleas.

The Honorable Abner J. Mikva
August 21, 1995
Page 6

We respectfully suggest that this serious situation warrants further investigation and intervention to (i) eliminate all offending denial-of-counsel policies wherever they may exist, and (ii) provide explicit guidance to the services on the proper implementation of military suspect's Fifth Amendment rights.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Respectfully,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom



UNITED STATES MARINE CORPS
LEGAL SERVICE SUPPORT SECTION
3D FORCE SERVICE SUPPORT GROUP, FMFPAC
UNIT 38477
FPO AP 96804-8477

5800
17:LAO
24 Aug 93

LEGAL SERVICE SUPPORT SECTION POLICY MEMORANDUM 2-93

From: Officer in Charge, Legal Service Support Section

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

Ref: (a) JAGMAN
(b) MARCORSEPMAN
(c) JAGINST 5803.1

Encl: (1) Request for IMC format
(2) Services provided by Defense Counsel

1. PURPOSE. To promulgate policies and procedures for the detailing of trial and defense counsel for courts-martial, acting on requests for IMC, assigning counsel to represent respondents before administrative discharge board proceedings, and providing legal advice by defense counsel per the references.

2. CANCELLATION. Officer in Charge, Legal Service Support Section, memorandum 5800 LSSS:A.01 of 15 February 1991.

3. BACKGROUND. Section 0130b(1) of reference (a) provides authority for the Officer in Charge, Legal Service Support Section (OIC, LSSS), to detail trial and defense counsel for courts-martial conducted by LSSS personnel.

4. DELEGATION OF AUTHORITY.

a. Trial Counsel. Per section 0130b(1) of reference (a), the officers in charge of each Legal Service Support Team (LSST), are delegated the authority to detail trial counsel in courts-martial tried by that LSST.

b. Defense Counsel. Per section 0130b(1) of reference (a), the Senior Defense Counsel (SDC) is delegated the authority to detail defense counsel in courts-martial and other proceedings where defense counsel are required to be detailed. Counsel will not be detailed to summary courts-martial.

5. DETAILING DEFENSE COUNSEL. The SDC will detail defense counsel to accused/respondents after consideration of the accused's assigned unit, complexity of the case, possible conflicts of interest, prior establishment of an attorney-client relationship or other factors deemed appropriate to the SDC. Counsel should normally be detailed:

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

a. As soon as practicable after preferral of charges against an accused. The SDC should also be given the pretrial package from the trial counsel at the same time.

b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer;

c. After a respondent has exercised his right to have the case presented before an administrative discharge board and receipt of the administrative discharge package.

6. REQUESTS FOR INDIVIDUAL MILITARY COUNSEL. Requests for Individual Military Counsel (IMC) will be submitted in writing by the accused or the detailed defense counsel utilizing the format of enclosure (1). Action on all IMC requests will be made in accordance with section 0131 of reference (a).

7. DEFENSE COUNSEL PROVIDING LEGAL ADVICE. Reference (c) provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS. Other than in cases of regularly scheduled counseling sessions (e.g. providing legal advice on nonjudicial punishment, involuntary administrative discharges or Article 31, Uniform Code of Military Justice counseling), defense counsel will provide legal advice not requiring an attorney-client relationship to individuals only when authorized to do so at the request of the individual's unit or other competent authority and with approval of either the SDC, OIC, LSST or OIC, LSSS. Enclosure (2) provides information with regard to advice and assistance normally provided by defense counsel.

8. ACTION.

a. Team OIC's. Ensure that the pretrial package is provided to the SDC and that trial counsel are detailed to courts-martial.

b. Military Justice Officer/AOIC, LSSS. Ensure that trial counsel are appointed as recorders for administrative discharge boards as soon as practicable after receipt of the board package from the Administrative Law Officer.

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

c. Administrative Law Officer. Ensure that copies of all administrative discharge packages that require a board are provided to the SDC and Military Justice Officer.

d. SDC.

(1) Detail defense counsel, counsel for the respondent, and process requests for IMC according to the policy established herein.

(2) Ensure that the necessary counseling required by the policies established herein is accomplished.

(3) Ensure that legal advice provided by defense counsel is accomplished per the policies established herein and as provided in enclosure (2).


W. F. WARRINER

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OIC, LSST Hansen

OIC, LSST Foster

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~~SDC~~

All judge advocates of the LSSS
AdminLawO

5810
17:SDC

(date)

From: (Accused)
To: (Convening Authority)
Via: (Trial Counsel)

Subj: REQUEST FOR INDIVIDUAL MILITARY COUNSEL

Ref: (a) MCM, 1984, R.C.M. 506(b)
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1. In accordance with references (a) and (b), I hereby request that _____ be appointed my individual military counsel for my pending _____ court-martial/article 32 pretrial investigation. I do/do not request that my detailed defense counsel remain on the case.
2. This request is submitted in accordance with the advice I received concerning my rights to counsel as explained to me by detailed defense counsel, _____.
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6. Special qualifications of requested counsel, if any, that are relevant to particular case _____.
7. If this request is denied, it is requested that I be informed of the reasons for denial.

Copy to:
Trial Counsel

(SIGNATURE OF ACCUSED)

SERVICES PROVIDED BY DEFENSE COUNSEL

<u>FUNCTION</u>	<u>REPRESENTATION</u>	<u>CONSULTATION ONLY</u>	<u>SPECIAL INSTRUCTIONS</u>
-GCM	Yes	NA	Note 1
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