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TALKING POINTS
DOD REPORT ON THE IMPLEMENTATION OF
“DON'T ASK, DON'T TELL, DON'T PURSUE”

- **Gay Discharges Are Up 67%.** Discharges soared to 997 in 1997, a 67% increase under the policy, and the highest level of discharges since 1988.
- **DoD Misrepresents Report Findings.** The DoD report admits that the reasons for increased discharges “are not known.” Yet, officials publicly represented that increased discharges are due to gays “opting out” of the military. This unsupported and offensive generalization raises questions about DoD’s credibility and commitment to fair enforcement of the policy.
- **Commands Continue To Ask, Pursue and Harass.** SLDN documented 1379 instances in four years where commanders did not follow the rules under this policy. DoD’s report is non-responsive to these documented command violations.
- **DoD Fails To Address Limits To Investigations and Intent of Policy To Protect People's Privacy.** A major problem is that personnel do not know the rules. DoD cannot be deemed credible until it issues guidance on the limits to investigations and the intent of the policy.
- **DoD Ignores Coercive Tactics.** The DoD report fails to respond to documented instances where commanders threatened service members with prison unless they confessed to being gay or accused others as gay, as occurred on the *USS Simon Lake*. The report also ignored the practice of seizing personal diaries to find out if someone is gay, as in the case of West Point Cadet Nicole Galvan, and the practice of questioning parents and siblings per Air Force instructions. Secretary Cohen should end these practices.
- **DoD Fails To Address Issues of Accountability and Recourse.** The report omits the issues of accountability for command violations and recourse for personnel harmed by improper inquiries.
- **DoD Did Not Interview Service Members Affected by The Policy.** The Department failed to contact one of the primary sources of information on this subject for its review.
- **DoD Agrees That Health Care Providers Are Not Required To Turn In Gay People.** Providers should be informed of this important clarification, a step the DoD report fails to recommend. Secretary Cohen should further clarify that information confided in a health care provider should not be used for purposes of discharge.
- **Some Recommendations are Problematic.** Recommendations concerning training evaluations, the use of lawyers to police command actions and service Secretary approval for some investigations raise many questions and contain loopholes that could do more harm than good.
- **DoD Should Implement its Good Recommendations Now.** The Department should implement (1) guidance against anti-gay harassment, and (2) an end to pretrial agreements to solicit names of suspected gay service members, as recommended in the DoD report.

The New York Times

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The Trouble With 'Don't Ask, Don't Tell'

A new Defense Department draft report shows that the number of homosexuals being forced out of the military under the "Don't ask, don't tell, don't pursue" policy is 67 percent higher than when the policy was adopted in 1993. The report is silent on what might be causing this surprising rise. Yet the Pentagon seems resistant to examining the most disturbing and obvious possibility, which is that base and unit commanders are subverting a policy that was intended to stop witch hunts and to insure some measure of privacy for gay men and women in the ranks.

The Pentagon spin is that service members are voluntarily declaring themselves gay to get out of the military. But if that were true, wouldn't discharge numbers have stayed roughly the same from year to year?

The report should cause Defense Secretary William Cohen to worry that commanders are not being adequately trained on the purpose of the policy or the appropriate limits on investigations. At the same time, the nominal policy may be causing homosexuals to believe that they need not remain as vigilantly closeted as they were before. In any event, the promise of greater tolerance that was supposed to follow President Clinton's declaration

of this new policy is turning out to be unfounded.

Military guidelines say that investigations cannot be based on mere suspicion or rumor. Associational behavior such as going to gay bars or reading homosexual books is not to be used as evidence of homosexual conduct. Yet there continue to be cases where service members are directly asked about their sexual orientation. Reliance on anonymous reports is not uncommon.

In some egregious situations, individuals who complained about anti-gay harassment were then investigated for being gay. The decision to begin an investigation is left to the commanding officer. Yet some commanders are inadequately versed on the guidelines, according to the report.

At a minimum, better training has to be put in place. The report also recommends that commanders consult with legal officials before initiating investigations. But these improvements will not cure the injustice inherent in a military that is allowed to drum effective people out for no reason other than homosexuality. Mr. Clinton erred in 1993 when he let Gen. Colin Powell and others bully him into backing away from his original intention to ban discrimination against homosexuals in the military. This report provides a measure of that error.

Servicemembers Legal Defense Network



May 12, 1998

The Honorable William S. Cohen
(By U.S. Mail and Facsimile)

Dear Secretary Cohen:

The recent Department of Defense (DoD) report on the implementation of “Don’t Ask, Don’t Tell, Don’t Pursue” is seriously flawed. The deficiencies in the report and the misleading manner in which it was released call into question DoD’s commitment to fair enforcement of the policy.

The report provides no evidence, even anecdotal, for its central assertion that the reason gay discharges have soared to 997, the highest level since 1988, are due to “voluntary”¹ statements of sexual orientation made by service members. In fact, the report admits that the reasons for the explosion in gay discharges “are not known and would be difficult to ascertain.”²

The report ignores key issues, misstates basic regulations and is non-responsive to cases raised by SLDN in our annual reports, the reason DoD commissioned its review. The DoD review group failed to contact a single service member affected by the policy. The review was conducted in secret. Even key military leaders such as former Secretary of the Air Force Sheila Widnall have stated that they had no knowledge of the review.³

Pentagon officials have exacerbated concerns about the report’s credibility by claiming, without support, that gay people are using the policy to “opt out” of the military. This derogatory assertion raises serious concerns whether the report’s recommendations – some of which are promising – will be implemented in good faith.

The Report Ignores Limits To Investigations and Intent of Policy To Protect Privacy

The DoD report is silent on the fundamental problem that personnel do not know the limits to gay investigations or the intent of the policy to respect people’s privacy.⁴ Service members must know the rules in order to follow them or to train others. We ask that you fix this critical oversight by ensuring that guidance on the limits to investigations is issued immediately. A sample memorandum, using exact quotes from your own regulations, is attached.

The Report Ignores Coercive Tactics

The DoD report fails to address coercive tactics that violate the letter and spirit of this policy, including:

- ★ Threatening people with prison unless they confess to being gay or accuse others of being gay, as occurred on the *USS Simon Lake* (see attached);
- ★ Seizing personal diaries and private letters to find out if people are gay, as in the case of former West Point Cadet Nicole Galvan (see attached);

- ★ Questioning coworkers about a member's sexual orientation: TSgt Daryl Gandy's unit was asked "Has TSgt Gandy ever had a girlfriend?" "Would you be surprised to find out that TSgt Gandy is gay?" "Where does TSgt Gandy hang out? With whom?" (see attached);
- ★ Instructing Air Force investigators to interrogate parents and siblings of service members who have come out as gay (see attached); and
- ★ Using a "Homosexual/Bisexual Questionnaire" to solicit sailors' sexual orientation and to identify suspected gay people (see attached).

The report's assertion that the criticisms of DoD's implementation of "Don't Ask, Don't Tell, Don't Pursue" "reflect a misunderstanding of the Department's policy"⁵ is not credible when the report ignores the cases that belie this assertion. The Department needs to be honest about whether the actions described above are appropriate federal policy. We believe that they are not.

Thus, we ask that you reinforce the basic rule that "service members will not be asked, or required to reveal, their sexual orientation."⁶ Despite your prior statements that asking is wrong,⁷ some commanders, as you have said, do not seem to "get it."⁸ We also ask that you make clear that it is unacceptable to threaten service members -- with prison or other adverse action -- to elicit information about their sexual orientation or that of others. And we ask that you make clear that private confidences such as those shared with parents or contained in diaries do not constitute "statements" of orientation, as contemplated by the regulations, giving rise to inquiry or discharge.

The Report Fails To Address Issues of Accountability and Recourse

The report omits the issues of accountability for command violations and recourse for personnel harmed by improper inquiries. At most, only one commander has been held accountable in four years for the 1,369 command violations documented by SLDN. Service members who have been illegally asked about their sexual orientation, like former SS3 Kelli Sprague,⁹ or who have been falsely accused, like former Senior Airman Sonya Harden,¹⁰ have been unable to stop their discharges because the current administrative discharge system contains no checks on improper command actions.

Failure to address the issue of accountability signals a "wink and nod" attitude that is unacceptable. We ask that you implement a simple first step toward accountability: require commanders to articulate in writing the specific information they have deemed credible as the basis for their inquiries. We also ask that you review the viability of an exclusionary rule in the administrative system, as recommended by the Advisory Board on DoD Investigative Capability.¹¹

The Report Misstates Basic Regulations

The DoD report itself misstates and misrepresents basic regulations. The report, for example, finds fault with investigators who have "asked service members questions concerning their sexual orientation without credible information or without the requisite determination by a

commander that credible information was present....”¹² Under current regulations, however, questions about sexual orientation are *never* permitted.¹³ This bright line rule was reiterated by then DoD General Counsel Jamie Gorelick in testimony before Congress, where she stated that asking is inappropriate “at accession or any other point.”¹⁴ It is astounding that DoD, after a year-long review of current policy, could misstate such a fundamental principle.

The report also misrepresents current policy when it asserts that it is proper to initiate an inquiry in circumstances where “current or former partners, roommates, or unrelated third parties have sometimes come forward on their own to report information or evidence of homosexual conduct to commanders against the wishes of the service member in question.”¹⁵ Under the regulations, however, commanders may not initiate inquiries if the allegations are not credible.¹⁶ Commanders must assess whether the person making an allegation is trustworthy and reliable,¹⁷ and whether an inquiry would be consistent with the intent of the policy to respect people’s privacy.¹⁸ Credible information does not include anonymous allegations,¹⁹ or associational activities such as going to a gay bar,²⁰ which are protected under current policy. Under current regulations, and as outlined in the attached memorandum, there are many limits to investigations commanders must take into account before launching any inquiry.

Likewise, the report misrepresents the standard for criminal prosecutions when it indicates that it is appropriate to prosecute gay service members in cases involving “additional charges,” “fraternization” or “aggravating circumstances,” among others. The correct standard according to the regulations, is even-handedness: “Investigations by DCIOs and other DoD law enforcement organizations shall be conducted in an even-handed manner, without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct.”²¹ The services are not supposed to investigate or prosecute gay service members unless they would also investigate and prosecute straight service members in the same circumstances.

Lastly, the report’s claim that investigations into homosexual conduct are mandatory²² is a wholly new assertion that requires fuller discussion. The claim erodes the longstanding principle of commander discretion that applies to many command contexts, not just in gay cases. Under “Don’t Ask, Don’t Tell, Don’t Pursue,” the regulations state that commanders “shall examine the information and decide whether an inquiry is warranted or no action should be taken.”²³ That determination rests solely with the commander. Further, the practical effect of DoD’s pronouncement would be to drive commanders to investigate everything, no matter how tenuous or incredible, for fear of being out of step with the message coming from their superiors. DoD’s overreaching sends a clear signal to commanders to err on the side of pursuing suspected gay people, not on the side of respecting the limits to investigations. This is precisely the kind of climate and message that raises concerns about DoD’s commitment to fair implementation and enforcement of the policy.

DoD Recommendations That Are Problematic

The serious omissions and errors in the DoD report and the misleading manner in which it was released raise concerns about some of the report’s recommendations which, under more sanguine circumstances, could have the potential to be helpful, depending on how they are implemented. We have concerns about the recommendations regarding (1) training, (2) the advisory role of military attorneys for the command, and (3) requiring Service Secretary

approval prior to initiating inquiries or investigations in cases where service members have stated their sexual orientation.

First, training will only be useful if it conveys all the limits to investigations and the intent of the policy to respect people's privacy, which the DoD report fails to recommend, as discussed above.

Second, relying on lawyers to police command actions under this policy will be helpful only if lawyers are given specific instructions that their role is to stop improper command actions, not find ways to justify them. We note that command lawyers have been responsible for some of the worst abuses of this policy, including the use of a pretrial agreement at Hickam Air Force Base to solicit the identities of suspected gay personnel. We are further concerned that this recommendation may reinforce the harmful trend we have identified in our annual reports to treat this policy as a legal issue rather than a leadership issue.

Third, the report's recommendations regarding coming out cases and recoupment issues are confusing and problematic. It is simply not clear why the report recommends that commanders obtain Service Secretary approval prior to initiating an investigation in coming out and recoupment cases. It is also unclear under what circumstances Service Secretary approval is required.

The tone of this section of the report raises grave concerns about how these questions will be answered by DoD officials charged with implementing these recommendations. The report states without substantiation, for example, that service members state that they are gay to abuse "the public purse"²⁴ and "to avoid a deployment or service obligation."²⁵ In four years under "Don't Ask, Don't Tell, Don't Pursue," we have not seen one case that would support such a claim and the DoD report provides no such evidence for this inflammatory assertion.

Instead, in SLDN's cases, we have found that (1) widespread anti-gay harassment is forcing some members out of the closet, and (2) the way this policy has been implemented creates for many an untenable ethical dilemma by conditioning their service on lying about their sexual identity, even to their family and friends.

We are also deeply concerned that the report ignores the Air Force's practice of asking service members in recoupment and coming out cases hundreds of deeply personal questions about their private lives, as well as Air Force instructions to investigators to interrogate parents and siblings in such cases. The appropriate response would be to ensure that the Air Force drops such intrusive, offensive tactics, bringing it in line with the other services, not to accommodate the Air Force's bad practices.

In the meantime, Under Secretary of Defense Rudy DeLeon has committed to us that, at a minimum, you intend to uphold and follow the current recoupment policy as set forth in the Deutch memorandum and that there will be further conversations regarding the proper enforcement of that policy.

Good Recommendations By DoD That Should Be Implemented

We welcome the recommendations to (1) clarify and reissue the Dorn memorandum on anti-gay harassment and lesbian-baiting so that those who are victims of anti-gay hate crimes and harassment, like former Marine Lance Corporal Kevin Smith, are not, as he was, threatened with criminal investigations by their commanders solely because they are victims of hate crimes;²⁶ (2) prohibit the use of pretrial agreements to solicit accusations against others as occurred Hickam Air Force Base; (3) clarify that health care providers are not required to turn in gay personnel or those who have questions about their sexual orientation, as happened in the case of former Marine Corporal Kevin Blaesing;²⁷ and (4) ensure compliance with your order last year to replace obsolete recruiting forms that asked prospective recruits if they were gay.

We also welcome the report's enunciation of some basic principles that underlie "Don't Ask, Don't Tell, Don't Pursue," including:

- ★ "Sexual orientation is a personal and private matter;"²⁸
- ★ "Respect[] the limits that the policy imposes on investigations;"²⁹
- ★ "Fact-finding inquiries must not be unduly intrusive;"³⁰
- ★ "Ensure that the privacy rights of our service members are respected in accordance with the policy."³¹

These basic principles, however, must be conveyed to the field. They currently have not been communicated in terms that make clear their meaning and scope.

SLDN Recommendations To Shore Up DoD's Credibility

While the DoD report raises many questions that need to be addressed, there are nevertheless some steps that we request you take now to repair the damaged credibility of your review of the implementation of "Don't Ask, Don't Tell, Don't Pursue."

First, we ask that you issue guidance on the limits to gay investigations and the intent of the policy to respect people's privacy. Without this basic step, the Department will not be credible and will inevitably repeat the mistakes of the past. The Department's mistakes are costly not only in terms of troop morale, but in dollars spent by DoD and the Department of Justice defending the military's actions in federal court. As mentioned earlier, a sample memorandum on the limits to gay investigations, using exact quotes from your regulations, is attached.

Second, we ask that you make clear it is unacceptable to threaten service members with prison or other adverse action, to elicit information about their sexual orientation or that of others. And we ask that you make clear that private confidences such as those shared with parents or contained in diaries do not constitute "statements" of orientation, as contemplated by the regulations, giving rise to inquiry or discharge.

Third, we ask that you require commanders to articulate in writing the specific information they have deemed credible as a basis for initiating an inquiry. This would be a good first step toward ensuring that inquiries are properly started, and where they are not, that there is

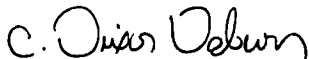
an opportunity to stop improper command actions and false allegations before they ruin people's lives.

Fourth, Pentagon officials should move forward on the good recommendations that have, in fact, emerged in this report. We welcome, for example, the Chief of Naval Operations (CNO) message on April 23, 1998 instructing commanders to ensure that "all personnel" understand and comply with the Dorn memo on anti-gay harassment and lesbian-baiting, although we note that the CNO message must be updated to cover not just crimes and threats, but all anti-gay harassment, as per DoD's instructions.

Fifth, officials should use this report as a springboard for further dialogue to address the many questions raised by the report and the outstanding details regarding some of its recommendations regarding training, reliance on lawyers to police command actions, and the requirement to obtain Service Secretary approval in coming out and recoupment cases.

We appreciate your willingness to order a review of the implementation of "Don't Ask, Don't Tell, Don't Pursue." We also appreciate your pledge to properly and fairly enforce current regulations and guidelines. There is a lot of work to be done to ensure that your words translate into effective and credible action.

Sincerely,



C. Dixon Osburn, Esq.
Co-Executive Director



Michelle M. Benecke, Esq.
Co-Executive Director

Enclosures:

Proposed Memorandum on Limits To Gay Investigations
Affidavits, *Barnes v. Perry*
Notification of Administrative Hearing, Cadet Nicole Galvan
Report of Investigation, Hickam Air Force Base, Technical Sergeant Daryl Gandy
Air Force Memorandum Dated November 3, 1994
Navy "Homosexual/Bisexual Questionnaire"

cc:

Bob Tyrer, Chief of Staff to Defense Secretary Cohen
John Podesta, Assistant to the President and Deputy Chief of Staff
Larry Stein, Assistant to the President & Director for Legislative Affairs
Karen Skelton, Deputy Assistant to the President & Deputy Director of Political Affairs
Laura Marcus, Senior Advisor to the Chief of Staff
Richard Socarides, Special Assistant to the President
Ron Klain, Chief of Staff to the Vice President
Monica Dixon, Deputy Chief of Staff to the Vice President
Maurice Daniel, Director of Political Affairs for the Vice President
Bob Dreier, Chief Domestic Policy Advisor to the Vice President

¹ DoD Report at 5.

² *Id.*

³ *Don't Ask, Don't Tell*, (ABC news broadcast, November 1997).

⁴ Exchange between then Senator William Cohen and then DoD General Counsel Jamie Gorelick -- Sen. Cohen: "[T]his small measure of privacy is to do what? Just to prevent the military from prying into private life?" Gorelick: "Yes." *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 788. See also, President William J. Clinton, "Text of Remarks Announcing the New Policy," *The Washington Post*, July 20, 1993, A12 ("There will be a decent regard to the legitimate privacy and associational rights of all service members.") See also DEP'T OF DEFENSE DIRECTIVE NO. 1304.26, Enclosure 2(8)(a) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 2-2(C) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(H)(1) (1994) ("Sexual orientation is considered a personal and private matter.")

⁵ DoD Report at 6.

⁶ DoDD 1332.30, Enclosure 8 (1994) and DoDD. 1332.14, Enclosure 4 (1994) [Hereinafter "Inquiry Guidelines"] at ¶ D(3).

⁷ *Larry King Live*, (CNN television broadcast, Transcript # 97012700V22, January 27, 1997).

⁸ *All Things Considered*, (NPR radio broadcast, April 7, 1998).

⁹ C. Dixon Osburn et al., Servicemembers Legal Defense Network, Conduct Unbecoming: The Third Annual Report on "Don't Ask, Don't Tell, Don't Pursue" (1997) at 4.

¹⁰ *Id.* at 32-3.

¹¹ CHARLES F.C. RUFF, REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE (1995).

¹² DOD REPORT at 7.

¹³ DoDD 1332.30, Enclosure 8 (1994) and DoDD. 1332.14, Enclosure 4 (1994) [Hereinafter "Inquiry Guidelines"] at ¶ D(3).

¹⁴ Comments by former DoD General Counsel Jamie Gorelick, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 789 ("...[W]e do not ask about orientation not only at accession but at any time.")

¹⁵ DOD REPORT at 6.

¹⁶ Inquiry Guidelines, ¶ C.

¹⁷ Inquiry Guidelines, ¶ F(1) (Credible information requires an accusation by "a reliable person.").

¹⁸ DoDD 1304.26, Enclosure 2(8)(a) (1994), DoDD 1332.30, Enclosure 2 ¶ (C) (1994), and DoDD 1332.14, Enclosure 1 ¶ (H)(1)(a) (1994) ("Sexual orientation is considered a personal and private matter.").

¹⁹ Inquiry Guidelines, ¶ B(3) (Credible information "requires a determination based on articulable facts, not just belief or suspicion.").

²⁰ Inquiry Guidelines, ¶ E(4) ("Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar..., associating with known homosexuals, membership or participation in gay organizations or marching in a gay rights rally in civilian clothes.").

²¹ DoDI 5505.8 ¶ D(3).

²² DoD Report at 7 ("...commanders are obliged to investigate whenever they receive credible evidence of homosexual conduct").

²³ Inquiry Guidelines, ¶ D(2).

²⁴ DoD Report at 11.

²⁵ *Id.*

²⁶ C. Dixon Osburn et al., Servicemembers Legal Defense Network, Conduct Unbecoming: The Fourth Annual Report on "Don't Ask, Don't Tell, Don't Pursue" (1998) at 50-1. The services should also address lesbian-baiting as a standard component of their training programs on leadership and sexual harassment.

²⁷ C. Dixon Osburn et al., Servicemembers Legal Defense Network, Conduct Unbecoming: The Second Annual Report on "Don't Ask, Don't Tell, Don't Pursue" (1996) at 15. The report's clarification will serve no purpose unless it is communicated to the field -- a step the report fails to recommend. We appreciate the report's mention of a current DoD proposal for a limited psychotherapist privilege which would cover service members who seek

counseling about their sexual orientation and conduct, bringing DoD closer to compliance with the Supreme Court's opinion in *Jaffee v. Redmond*, 518 U.S. 1 (1996).

²⁸ DOD REPORT at 1.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ *Id.* at 13.



**Enclosures To Cohen Letter
Regarding Report On Implementation Of
“Don’t Ask, Don’t Tell, Don’t Pursue”**

May 12, 1998

**Proposed Memorandum on
Limits To Gay Investigations**

1

**MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS,
CHAIRMAN OF THE JOINT CHIEFS OF STAFF,
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE**

**SUBJECT: Current Limits on Inquiries and Investigations Into Accusations of
Alleged Homosexual Conduct**

This memorandum restates current policy regarding command inquiries of service members accused of homosexual conduct.¹ This guidance is issued because commands have asked for clarification regarding when an inquiry into homosexual conduct is appropriate.

Under DoD policy, no one will be asked about his or her sexual orientation,² no one will undertake affirmative efforts to identify members suspected of homosexual conduct,³ the Armed Forces will not tolerate harassment against any individual for any reason,⁴ and there will be a decent regard to the legitimate privacy and associational rights of all servicemembers regardless of sexual orientation.⁵

Informal fact-finding and administrative separation procedures are the preferred method of addressing homosexual conduct.⁶ Only a service member's commander may initiate an inquiry into homosexual conduct.⁷ Commanders may initiate inquiries only upon receipt of credible information of such conduct.⁸ Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.⁹ Credible information requires a determination based on articulable facts, not just belief or suspicion.¹⁰

Commanders shall exercise sound discretion regarding when credible information exists.¹¹ They shall examine the information and decide whether an inquiry is warranted or no action should be taken.¹² Commanders will consider, in allocating scarce investigative resources,¹³ that sexual orientation is a personal and private matter, and that under current policy, there is a decent regard to the legitimate privacy and associational rights of all servicemembers.¹⁴

Not all accusations of homosexual conduct constitute credible information as a basis for inquiry or discharge.¹⁵ Credible information does not exist when the source of the accusation is not credible or reliable.¹⁶ Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar, associating with known homosexuals, [membership or participation in gay organizations,] or marching in a gay rights rally in civilian clothes.¹⁷ Credible information does not exist when the information concerns possessing or reading homosexual publications, [possessing or reading information containing homosexual references including information obtained on-line, in electronic mail messages or in personal diaries.]¹⁸ Credible information does not exist when the information concerns listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context.¹⁹

Credible information does not exist when the information concerns an allegation by another that a service member is homosexual.²⁰ Credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation.²¹ Credible information does not exist when a service member reports being threatened because he or she is said or perceived to be a homosexual.²² [Credible information does not exist when the information concerns private communications to a member's attorney,²³ chaplain,²⁴ spouse,²⁵ security clearance investigator,²⁶ psychotherapist,²⁷ doctor²⁸ or family member.²⁹] [Credible information does not exist when the accusations result from an attempt at blackmail or extortion.³⁰]

A commander may initiate an inquiry only if he or she has credible information that a basis for discharge exists.³¹ A basis for discharge exists if: (1) The member has engaged in a homosexual act; (2) The member has said that he or she is homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or (3) The member has married or attempted to marry a person of the same sex.³²

Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.³³ [For example, if a member has made a statement that he or she is a homosexual, the inquiry shall be limited to verifying whether the statement in question was made. If a member is accused of engaging in a homosexual act, the inquiry shall be limited to the specific act in question.]³⁴ [It is inappropriate during the course of an inquiry or in preparation for legal action to solicit information about additional incidents of homosexual conduct not in question or to solicit additional information about others who might be homosexual.]³⁵ [It is inappropriate during the course of an inquiry or in preparation for legal action to threaten service members with adverse action or promise them more lenient treatment in exchange for information concerning homosexual conduct.]³⁶

At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain [to the servicemember and his or her legal representation] which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.³⁷

Servicemembers must be advised of their rights under Article 31 of the Uniform Code of Military Justice.³⁸ Servicemembers subject to a command inquiry or criminal investigation cannot be prevented from exercising their right to consult with a defense attorney³⁹ and cannot be denied representation by a defense attorney during custodial interrogation.⁴⁰

Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.⁴¹

Allegations involving adult private consensual sexual conduct shall be referred to the member's commander for appropriate disposition.⁴² Criminal investigations should

not be undertaken when the allegations involve only private, consensual sexual conduct.⁴³ [Criminal investigations of other allegations will be suspended and referred to the commander for inquiry and administrative processing when it is determined during the course of the investigation that the only credible allegations are of private, consensual sexual conduct.]⁴⁴ Investigations shall be conducted in an evenhanded manner without regard to whether the alleged conduct involves homosexual or heterosexual conduct.⁴⁵

If a member is separated for homosexual conduct, the characterization of discharge shall be based on a pattern of behavior and duty performance rather than an isolated incident.⁴⁶ [Homosexual conduct does not warrant a discharge characterization of general under honorable conditions when the member's overall service record warrants an honorable discharge.⁴⁷]

¹ Note: The bracketed portions of the memorandum are supported by the letter and intent of the policy, but are not direct quotes.

² "...[W]e do not ask about orientation not only at accession but at any time." Former DoD General Counsel Jamie Gorelick, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 789. See also, DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8(D)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(D)(3) (1994) ("Commanders or appointed inquiry officials shall not ask, and members shall not be required, to reveal their sexual orientation.")

³ "We will not ask, we will not witch hunt, we will not seek to learn orientation." General Colin Powell, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 709. "This is an end to witch hunts." President William J. Clinton, "Text of Remarks Announcing the New Policy," *The Washington Post*, July 20, 1993, A12. "Should we have sex squads going out and looking for homosexual conduct that is done between adults in private? Absolutely not." Former Senator and Chairman of the Senate Armed Services Committee, Sam Nunn, *The Record*, May 31, 1993, A10. "No investigations or inquiries will be conducted solely to determine a service member's sexual orientation." DoD Policy Guidelines on Homosexual Conduct in the Armed Forces, July 19, 1993.

⁴ "The Armed Forces do not tolerate harassment or violence against any servicemember, for any reason." DEP'T OF DEFENSE DIRECTIVE NO. 1304.26 (1994). See also, Edwin Dorn, MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS, March 24, 1997 ("The fact that a servicemember reports being threatened because he or she is said or is perceived to be a homosexual shall not by itself constitute credible information justifying the initiation of an investigation of the threatened servicemember. The report of such a threat should result in the prompt investigation of the threat itself.")

⁵ Exchange between then Senator William Cohen and then DoD General Counsel Jamie Gorelick -- Sen. Cohen: "[T]his small measure of privacy is to do what? Just to prevent the military from prying into private life?" Gorelick: "Yes." *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 788. See also, President William J. Clinton, "Text of Remarks Announcing the New Policy," *The Washington Post*, July 20, 1993, A12 ("There will be a decent regard to the legitimate privacy and associational rights of all service members.") See also DEP'T OF DEFENSE DIRECTIVE NO. 1304.26, Enclosure 2(8)(a) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 2-2(C) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(H)(1) (1994) ("Sexual orientation is considered a personal and private matter.")

⁶ "Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (D)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(D)(1) (1994).

⁷ "Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (A)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(A)(1) (1994).

⁸ "A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is a basis for discharge." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (A)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(A)(1) (1994).

⁹ "Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (B)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(B)(3) (1994).

¹⁰ Credible information "requires a determination based on articulable facts, not just belief or suspicion." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1(B)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(B)(3) (1994).

¹¹ DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3(D)(2) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4-3 (D)(2) (1994). ("Commanders shall exercise sound discretion regarding when credible information exists.")

¹² *Ibid.* ("They shall examine the information and decide whether an inquiry is warranted or no action should be taken.")

¹³ DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994) ("...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 service member's commander for appropriate disposition.")

¹⁴ DEP'T OF DEFENSE DIRECTIVE NO. 1304.26, Enclosure 2(8)(a) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 2-2(C) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(H)(1) (1994) ("Sexual orientation is considered a personal and private matter.")

¹⁵ *Ibid.*

¹⁶ Credible information requires an accusation by "a reliable person." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-4 (F)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(F)(1) (1994).

¹⁷ "Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar..., associating with known homosexuals, membership or participation in gay organizations or marching in a gay rights rally in civilian clothes." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (E)(4) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(E)(4) (1994). The list of associational rights is nonexhaustive and should be understood to permit service members the right to attend churches that welcome gay congregants and other organizations. The United States Navy, however, issued a memorandum in June 1994 stating that supporting "homosexual interests may violate" the "Standards of Conduct," thus necessitating the clarification regarding membership or participation in gay organizations.

¹⁸ "Credible information does not exist when the information concerns...possessing or reading homosexual publications...." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (E)(4) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(E)(4) (1994). Documented cases suggest that commands do not understand that associational activities are not to be used as a basis for inquiry or discharge in a variety of contexts. Commands have seized personal diaries, personal letters, electronic mail and the like to look for private information about a service member's sexual orientation. Further guidance as provided that is consistent with the current regulations is needed to direct commands not to use these associational activities as a basis for discharge.

¹⁹ "The listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context, does not provide a basis for separation or further investigation." DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993.

²⁰ "Credible information does not exist when...the only information is the opinions of others that a member is homosexual...." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (E)(2) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(E)(2) (1994).

²¹ "Credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (E)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(E)(3) (1994).

²² Credible information does not exist when "a service member reports being threatened because he or she is said or perceived to be a homosexual." Edwin Dorn, MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS, March 24, 1997.

²³ While not defined in terms of credible information, the current regulations do not eviscerate privileged communications. See M.R.E. 502. See also DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993 ("Speech within the context of priest-penitent, husband-wife, or attorney-client communications remains privileged.").

²⁴ While not defined in terms of credible information, the current regulations do not eviscerate privileged communications. See M.R.E. 503. See also DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993 ("Speech within the context of priest-penitent, husband-wife, or attorney-client communications remains privileged.").

²⁵ While not defined in terms of credible information, the current regulations do not eviscerate privileged communications. See M.R.E. 504. See also DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993 ("Speech within the context of priest-penitent, husband-wife, or attorney-client communications remains privileged.").

²⁶ Exec. Order No. 12968, sec. 3.1 (c), (d), 60 Fed. Reg. 40245 (1995). See also MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS, December 22, 1993 ("Information about homosexual orientation or conduct obtained during a security clearance investigation will not be used...by the military departments in separation proceedings.")

²⁷ Recognizing conversations with psychotherapists as private conversations that will not trigger an inquiry under "Don't Ask, Don't Tell, Don't Pursue" does not require a determination that the conversations are privileged or confidential, just like the security clearance context. Not interfering with psychotherapists' ability to care for the health of service members is consistent with the policy's statement that "sexual orientation is a personal and private matter" and that the policy creates for service members a "zone of privacy." See *supra*, note 4.

²⁸ *Ibid.*

²⁹ Most Americans would agree that the armed forces should not intrude into the private conversations of family members. Indeed, security clearance regulations anticipate that gay servicemembers will tell their parents and sibling about their sexual orientation in order to diffuse national security concerns. An Air Force memorandum, dated November 3, 1994, however, specifically instructs inquiry officers to interrogate parents and siblings in homosexual conduct cases. Conversations with family members should be viewed as private, consistent with current regulations that state that sexual orientation is a "personal and private matter" and that the policy creates for service members a "zone of privacy."

³⁰ Current regulations leave open the question whether extortion or blackmail would constitute credible information for the basis of inquiry or discharge. Documented cases indicate that those who seek revenge against a service member through retaliatory accusations, blackmail or discharge, can use the current policy as a means of ending someone's career regardless of the credibility of the accusations themselves. It is now appropriate for the Department of Defense to make clear that allegations resulting from blackmail or extortion do not constitute credible information. The clarification would be consistent with current guidance that requires commanders to "consider...the character and service of the accused...[and]...possible improper motives of the accuser." See, DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994). The clarification is consistent with the statement that "extortion and blackmail are criminal offenses under military and federal law." See DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993.

³¹ DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-2 (C)(1-3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4-2(C)(1-3) (1994).

³² *Ibid.*

³³ DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (A)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4 (A)(3) (1994). ("Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.") See also DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994) ("Investigations shall be limited to the factual circumstances directly relevant to the specific allegations.") See also comments by then DoD General Counsel Jamie Gorelick ("Once you establish the elements of the offense or basis for discharge, you go no further.") *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 789.

³⁴ Documented cases indicate that commands do not understand the prohibition against expanding inquiries beyond the instant allegation. The Pentagon needs to clarify the current regulation to ensure that it is properly understood.

³⁵ *Ibid.*

³⁶ *Ibid.* Documented cases show that some commands have threatened service members with prison unless they confess to being gay or accuse others as gay. Investigative tactics such as these are inappropriate and are not authorized by current regulations or guidance.

³⁷ "At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds." DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(D)(4) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (D)(4) (1994). The additional language "to the servicemember and his or her legal representative" is added in light of documented cases where some commands have refused to disclose this information on the theory that the guidance requires only that the command be able to explain the credible determination information when ordered to do so.

³⁸ Article 31(b), Uniform Code of Military Justice, 10 U.S.C. 831 (1997). *See also* DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure, 4 (D)(3).

³⁹ *Ibid.*

⁴⁰ *Ibid.* *See also*, Letter from Judith A. Miller to Jonathan M. Bowie, March 26, 1996.

⁴¹ "Commanders are responsible for ensuring that investigations are conducted properly and that no abuse of authority occurs." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (A)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4 (A)(1) (1994).

⁴² DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994). ("...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 service member's commander for appropriate disposition.") *See also* DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (D)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(D)(1) (1994). ("Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct.")

⁴³ *Ibid.*

⁴⁴ Documented cases demonstrate that some service members are falsely accused of nonconsensual sexual conduct. When the facts demonstrate that the conduct in question is consensual, commands should suspend criminal processing and use the administrative system to resolve the matter, consistent with current regulations, not prosecute the member.

⁴⁵ "Investigations...shall be conducted in an even-handed manner without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct." DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994).

⁴⁶ "Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 7-1 (B)(1) (1994). The regulations for enlisted personnel adopt a similar "overall service record" standard. DEP'T OF DEFENSE DIRECTIVE NO. 1332.14 (H)(3).

⁴⁷ *Ibid.*

Affidavits, *Barnes v. Perry*

2

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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]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMY L. BARNES,

Plaintiff,

v.

THE HONORABLE WILLIAM J. PERRY,
and
THE HONORABLE JOHN E. DALTON

Defendants.

CIVIL ACTION NO:
96-591 (EGS)

DECLARATION OF

USN

Pursuant to 28 U.S.C. § 1746, I,

United States Navy, declare as follows:

1. I was interrogated in connection with the Navy's investigation of RMSN Amy Barnes on three separate occasions, for a total of approximately six hours. At times during the course of the interrogations, there were a number of people questioning me. I was all alone in the interview room and there was no one there to advise me of my rights or tell me whether I could refuse to answer any of their questions. No one told me that there was a formal investigation of RMSN Barnes' sexual orientation. When I told Command Investigators who interrogated me that I did not want to answer certain questions about the sexual orientation of RMSN Amy Barnes, EMFN Heather Hilbun and others, because such questions violated the Navy's "don't ask, don't tell, don't pursue" policy, I was made to feel that I had no choice other than to answer the questions. The Command Investigators

threatened and intimidated me into giving involuntary statements by telling me I would be violating Article 78 of the Uniform Code of Military Justice and would go to jail if I did not answer their questions and cooperate. As the affidavit of RMC (SS) Michael C. Beyrle states, I was told to do the right thing by cooperating. Being forced into giving statements which had the potential to be used against RMSN Barnes, who is my friend, was extremely upsetting.

2. Following the assault on RMSN Amy Barnes on or about November 17, 1995, I experienced hostility, harassment, threats and retaliation on the U.S.S. Simon Lake. Members of the chain of command as well as certain colleagues have made hostile and harassing statements to me. I have been threatened by virtue of my association with RMSN Barnes and told by members of the chain of command that if I do not choose my friends more carefully, I will become the target of an investigation. I believe I have also been retaliated against because of my statements supporting RMSN Barnes. When I provided a statement at the Captain's Mast about what I had witnessed at the bar when RMSN Barnes was assaulted, I was stripped of my top secret security clearance. When I requested annual leave in February, my request was initially denied, and I had to persuade my command to grant my request. At work, everything I did was scrutinized more closely than usual. It took an unusually long time for the chain of command to respond to other "chits" that I put in. I had difficulty obtaining a copy of my evaluation, and I was not

allowed to take my advancement exam, which is a precondition to a promotion, for the purported reason that I had not scored high enough on my physical readiness test (PRT). However, other sailors who were in the remedial program were permitted to take the exam. I never experienced any problems before on board the U.S.S. Simon Lake before the investigation of RMSN Barnes, and the hostility, harassment, threats and retaliation I have experienced all appear to relate to or arise from the investigation and recommended discharge of RMSN Barnes.

3. Due to my experiences before I left the ship on annual leave, I am genuinely afraid that if I were to return to the U.S.S. Simon Lake, I will be subjected to further hostility, harassment, threats and retaliation because of my connection to the Barnes case. Therefore, I have requested a permanent transfer from the U.S.S. Simon Lake to another post.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 27, 1996, in Washington, D.C.

**Notification of Administrative Hearing,
Cadet Nicole Galvan**

3



DEPARTMENT OF THE ARMY
UNITED STATES MILITARY ACADEMY
WEST POINT, NEW YORK 10996

REPORT TO
ATTENTION OF

MAJA-SC (15[b] 1-10)

APR 17 1996

MEMORANDUM FOR Cadet Nicole Galvan, Company H-3, Class of 1997, USCC,
West Point, New York 10997

SUBJECT: Investigation UP Paragraph 10.09, Regs USMA

1. Pursuant to the direction of the Superintendent, USMA, I have been appointed Investigating Officer under the provisions of paragraph 10.09, Regs USMA, to investigate the following allegations and any related misconduct:

MAJA-SC

SUBJECT: Investigation UP Paragraph 10.09, Regs USMA

(7) That Cadet Nicole Galvan, Company H-3, Class of 1997, did, from on or about 6 January 1995 to on or about 24 March 1996, violate paragraph 10.25, Regulations, United States Military Academy, by making various statements in her diary indicating a propensity or intent to engage in homosexual acts or conduct or indicating she had engaged in homosexual conduct, including but not limited to, the following:

6. Documentary evidence which will be considered at the hearing includes, but is not limited to, the attached written statements of:

March 1996, the memorandum by [redacted]; your memorandum dated 8 March 1996, your diary dated 8 March 1996, your diary which was seized by MSG Stoneking, the attached e-mail correspondence, and all other attached documentation. In addition, the Superintendent may consider matters from your personnel and disciplinary records without referral to you for comment; you may review these files upon request to the appropriate custodian at USCC.

Encls

KERRY PIERCE
LTC, EN
Investigating Officer

**Report of Investigation, Hickam Air Force Base,
Technical Sergeant Daryl Gandy**

4

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REPORT OF INVESTIGATION
PREPARED BY
COLONEL JOE M. MCKETHAN,
INVESTIGATION OFFICER;
MAJOR CATHY F. HEWITT,
ASSISTANT INVESTIGATION OFFICER;
AND
COLONEL CHARLES R. LUCY,
LEGAL ADVISOR
AIR FORCE INSPECTION AGENCY
CONCERNING
VIOLATIONS OF DOD POLICY
AT HICKAM AFB HI
11 SEPTEMBER 1996

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The Inspector General, SAETIG.

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(b)(6)

3. After the report of investigation was completed and during their preparation for a potential administrative discharge hearing involving [REDACTED] two assistant SJAs questioned four of [REDACTED] coworkers as potential witnesses. During the interviews, the following questions, or questions similar to them, were asked:

1. Do you have any reason to believe that [REDACTED] doesn't like girls?
2. Have you ever had the feeling that [REDACTED] is interested in men?
3. Have you ever seen [REDACTED] hug, kiss, or hold hands with another man in a way that was more than just a means of saying hello?
4. Would you be surprised to find out that [REDACTED] is gay?
5. What is it like to work in a unit with so many homosexuals?
6. Has [REDACTED] ever talked about women to you, you know, the way men talk about women?
7. Where does [REDACTED] hang out? With whom?
8. Has [REDACTED] ever had a girlfriend?
9. Do you think it is unusual for him not to have a girlfriend?
10. Does anyone in your office know that [REDACTED] is gay?

Several of these questions created confusion in the minds of [REDACTED] coworkers as to the scope of the inquiry and whether conclusions about sexual orientation were being solicited. One of the coworkers was offended by question #6 which he interpreted to imply sexual harassment and/or stereotyping. These questions were asked by assistant SJAs in preparation for board proceedings. The assistant SJAs stated that the purpose of these questions was to identify evidence to disprove any assertion [REDACTED] might make during board proceedings that he had not engaged in homosexual conduct or, if he had, that such conduct was a departure from his ordinary and customary behavior. DoD and AF regulations contain no specific guidance on the scope of questions that may be asked in preparing rebuttal evidence/argument. The base legal office attorneys also attempted to question one Navy member and a former Air Force member as potential witnesses in [REDACTED] administrative board hearing. Both refused to be interviewed and there was no further contact.

4. Approval of [REDACTED] conditional waiver of his right to a discharge board contingent upon receipt of an honorable separation was not tied to a grant of immunity and order to testify in *US v. [REDACTED]*. The timing of [REDACTED] request and the government's action to ensure his availability to testify in *US v. [REDACTED]* were coincidental. The two actions were independent and processed independently. A grant of immunity does not require acceptance and it is unrelated to the characterization of discharge. The grant of immunity could have been given any time, even if [REDACTED] had not been being processed for administrative separation. [REDACTED] perception that the immunity grant and his waiver request were interrelated

**Air Force Memorandum Dated
November 3, 1994**

5

**TIPS FOR INQUIRY OFFICERS OF CASES INVOLVING MEMBERS WHO STATE
THEY ARE HOMOSEXUAL**

1. You have been appointed to serve as an inquiry officer in a case involving a member stating he or she is homosexual or bisexual. Making such a statement is homosexual conduct that subjects the member to involuntary separation action because the statement creates a rebuttable presumption that the member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Moreover, if the member has received educational assistance, special pay, or bonuses, the member may be subject to recoupment of an amount of government benefits proportional to the amount of the member's military service obligation that has not been fulfilled.

2. The purpose of the inquiry is to determine if the commander possesses credible information upon which to initiate separation action or if other action should be taken because the member has made a false statement to avoid service. The intent of the member in making the statement also must be examined because it is highly probative to the issue of recoupment. As an inquiry officer (IO), you must look at all relevant evidence to enable you to make a finding on the truth of the statement by the member that he or she is homosexual. You also should make a finding on the member's purpose for stating he or she is homosexual or bisexual.

3. You initially should interview the subject member. Ensure you notify counsel if the member already has retained counsel. You also may interview the following persons and consider the following evidence, as appropriate in the particular case:

a. Parents and siblings. If the member does not provide this information, DD Form 398 should have this data.

b. Look at the DD Form 398 for any other possible leads for interview subjects.

c. School counselor and advisor.

d. Any other knowledgeable school officials.

e. School career development office; did the member interview for civilian jobs? Did the student apply for fellowships, internships, etc., that would have been displaced by military service?

f. Roommates and close friends, including people the subject member dated.

g. Mental health and medical records.

h. AFIT program manager. Did the member apply for deferment of military service? If the member is in medical

school, was the member assigned to intern in an area of medicine that he or she did not want?

i. Air Force career manager.

4. You should prepare a list of anticipated questions and forward them to your MAJCOM staff judge advocate for review and comment. Attached is a list of suggested questions for interviewing the subject member; many also can be used for other witnesses.

**SAMPLE QUESTIONS FOR INQUIRY CONCERNING MEMBER WHO STATES HE
IS HOMOSEXUAL AFTER RECEIVING ADVANCED EDUCATION BENEFITS**

Review AFI 90-301, Attachment 5, which contains the script for introduction of an inquiry officer. (Also review Attachment 6 to AFI 90-301, which is an inquiry officer guide.) Tell the witness/subject member if you are recording the interview.

1. Read the member the Air Force policy on homosexual conduct. (See 10 U.S.C. 654 and the attached). Remember that a member must be given a rights advisement under Article 31, UCMJ, if the discussion begins to involve acts or conduct that violate the UCMJ. As an inquiry officer in a statement-only case, you may ask questions concerning homosexual acts or attempted acts.
2. Verify the member's full name and social security number. Also verify his address and phone number.
3. Swear the member in by oath or attestation.
4. If a written statement is in question, ask if he recognizes the statement.
 - a. Is the signature on the statement that of the member?
 - b. Did the member write the statement himself or did he have assistance, such as an attorney?
 - c. Did the member understand the policy on homosexual conduct at the time he made the statement?
5. If the statement in question is not written, ask the member if he made the statement.
 - a. If so, when did he make it? To whom? Where?
 - b. Under what circumstances?
6. Had the member ever been briefed on the policy on homosexual conduct? If so, by whom and when?
7. When did the member enter the education program, such as HPSP or FLEP?
8. What status is the member, e.g., Reserves?
9. What was the member obligated to do in return for the education assistance?
10. If currently in the education program, what school is the member attending, what year of studies, when will the member graduate?

11. Who is the member's academic and/or faculty advisor? Advisor for thesis, dissertation, etc.?
12. If HPSP, what area of medicine does the member intend to pursue?
 - a. Has the member applied for any intern or residency programs?
 - b. If so, where and for when?
 - c. Has the Air Force directed the member to choose from specified specialties? If so, which ones?
13. Why did the member make the statement? If written, why did the member choose to send the letter where he did?
14. Why did the member choose this particular time to make the statement?
15. If the member used certain terms, such as "homosexual orientation" or "propensity," ask the following question: What did the member mean by "homosexual orientation" or "propensity?" (Note: If the member states he means what the regulation says, ask him to explain what he means in his own words. Further, DoD policy is that a statement of homosexual orientation will be treated the same as a statement that the member is a homosexual.)
16. Does the member have a "propensity to engage in homosexual acts?" If so, can he explain what he means?
17. How does he know he has a "homosexual orientation" and/or "propensity?"
18. When did he realize he has a "homosexual orientation" and/or "propensity?"
19. Whom has he told he is a homosexual or that he has a "homosexual orientation" and/or "propensity?" When did he tell them? Why did he tell them?
20. Has the member been dating anybody (opposite or same sex)?
 - a. How frequently has the member dated?
 - b. How recently?
 - c. How can these persons be contacted?
21. Did the member belong to any homosexual student organizations at school?
 - a. If so, which?
 - b. How can other members of the organization, who knew of his membership, be contacted?
22. Has the member told any of his family members? If so, whom? How can they be contacted?
23. Who are close friends of the member and how can they be contacted?

24. How does the member feel about the Air Force?
25. Does the member prefer to remain in the Air Force, or would he rather be discharged?
26. What is the member's understanding of the possibility of the Air Force recouping the costs of his educational assistance?
27. What, if any, influence did the recoupment policy have on making the statement?
28. Are there any other witnesses or documents that could verify the member's statement that he is homosexual?
29. Has the member engaged in or attempted to engage in any homosexual acts? (NOTE: If you ask this question, be sure to read the member his or her Article 31 rights first)
 - a. If yes, when did the member engage in or attempt to engage in homosexual acts?
 - b. If yes, where and how often did the member engage in or attempt to engage in homosexual acts?
 - c. If yes, what was the nature of the homosexual act?
30. Is there any further information, statements, or evidence concerning the matters discussed?

Navy “Homosexual/Bisexual Questionnaire”

6

DATE:

TIME:

1. Do you engage in homosexual/bisexual activity?

If so when was the last time?

If so with whom?

If so is he/she in the military?

2. have you attempted to engage in homosexual/bisexual acts?

If so, when?

If so with whom?

If so, is he/she in the military?

3. Do you have a propensity to engage in homosexual/bisexual acts?

If so, when?

If so, with whom?

If so, is he/she in the military?

4. Do you intend to engage in homosexual/bisexual acts?

If so, when?

If so, with whom?

If so, is he she in the military?

5. Are you engaged in a homosexual/bisexual marriage?

If so, when did you?

If so, with whom?

If so, is he/she in the military?



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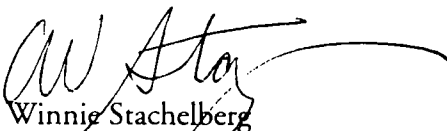
May 18, 1998

Dear Friend:

As we approach summer here at the Human Rights Campaign, and as you continue your important work in the Clinton Administration, we are sending you a copy of the latest issue of *HRC Quarterly*, our newsmagazine which reaches more than 125,000 people in our country. This issue informs fair-minded Americans of the status of James Hormel's nomination to serve as Ambassador to Luxembourg, of this November's ballot measure in Hawaii which would amend the state constitution, and of the current status and implementation of the "Don't Ask, Don't Tell, Don't Pursue" policy on gays in the military, as well as of many other important matters.

We thought that in the course of your busy schedule you would enjoy a look at the great progress being made in our nation to ensure lesbian and gay people of their basic equal rights.

Sincerely,



Winnie Stachelberg
Political Director

WORKING FOR LESBIAN AND GAY EQUAL RIGHTS.

1101 14th Street NW, Suite 200 Washington, D.C. 20005
phone (202) 628 4160 fax (202) 347 5323 e-mail hrc@hrc.org



HUMAN
RIGHTS
CAMPAIGN

March 30, 1998

The Honorable William S. Cohen
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000
via FAX: 703-695-0100

Dear Secretary Cohen:

I am writing to ask that the Department of Defense not appeal the decision in *McVeigh v. Cohen*.

As you know, on January 26, U.S. District Judge Stanley Sporkin ruled that the Navy had "violated the very essence of 'Don't Ask' and 'Don't Pursue' by launching a search and destroy mission" against Senior Chief Petty Officer Timothy R. McVeigh for allegedly using the word "gay" in an anonymous America Online user profile. Judge Sporkin also ruled that the Navy had exceeded the limits of the 1986 Electronics Communications Privacy Act in this case.

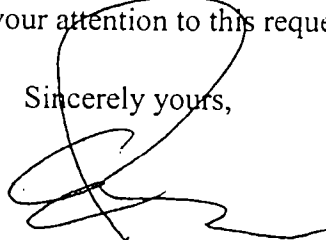
The Navy has taken a hard-line approach since Judge Sporkin's ruling and has refused to reinstate McVeigh, a senior enlisted nuclear submariner, to the position of Chief of Boat which he held prior to the Navy's "search and destroy mission." In fact, a Department of Justice (DoJ) attorney reportedly told the judge that the Navy will not reinstate McVeigh as Chief of Boat because of "confined conditions aboard a nuclear submarine." This statement, as well as continuing to pursue this case, seems out of step with the Administration's policy -- which was supposed to create a "zone of privacy" for all servicemembers.

We anxiously await the release of the results of the Pentagon review that you ordered on the implementation of "Don't Ask, Don't Tell, Don't Pursue." Continuing to pursue the discharge of McVeigh before the release of those results would be bad timing at best.

Letter to Secretary Cohen
March 30, 1998
Page 2

It is our hope that the Navy and the DoJ will comply with Judge Sporkin's ruling and let the decision stand. Thank you for your attention to this request.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'Elizabeth Birch', written over the words 'Sincerely yours,'.

Elizabeth Birch
Executive Director

cc: Seth Waxman, Solicitor General
David Ogden, Counsel to the Attorney General
Bill Lann Lee, Acting Assistant Attorney General, Civil Rights
William R. Yeomans, Chief of Staff & Senior Counsel, DoJ, Civil Rights
John Dalton, Secretary of the Navy
Bob Tyrer, Chief of Staff to Secretary Cohen, Department of Defense
John Podesta, Assistant to the President and Deputy Chief of Staff
Charles Ruff, Assistant to the President and Counsel
Larry Stein, Assistant to the President & Director for Legislative Affairs
Karen Skelton, Deputy Assistant to the President & Deputy Director of Political Affairs
Laura Marcus, Senior Advisor to the Chief of Staff
Richard Socarides, Special Assistant to the President
Ron Klain, Chief of Staff to the Vice President
Maurice Daniel, Director of Political Affairs for the Vice President
Philip DuFour, Office of the Vice President



HUMAN
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March 30, 1998

via FAX: 202-514-4371

The Honorable Janet Reno
Attorney General
U.S. Department of Justice
Constitution & 10th Street, NW
Washington, DC 20530

Dear Madam Attorney General:

I am writing to ask that the Department of Justice not appeal the decision in *McVeigh v. Cohen*. Senior Chief Petty Officer Timothy R. McVeigh is the senior enlisted nuclear submariner whom the Navy attempted to discharge for allegedly using the word "gay" in an anonymous America Online user profile.

On January 26, U.S. District Judge Stanley Sporkin ruled that the Navy had "violated the very essence of 'Don't Ask' and 'Don't Pursue' by launching a search and destroy mission" against McVeigh. Judge Sporkin also ruled that the Navy had exceeded the limits of the 1986 Electronics Communications Privacy Act in this case.

The Navy has taken a hard-line approach since Judge Sporkin's ruling and has refused to reinstate McVeigh to the position of Chief of Boat which he held prior to the Navy's "search and destroy mission." In fact, a Department of Justice (DoJ) attorney reportedly told the judge that the Navy will not reinstate McVeigh as Chief of Boat because of "confined conditions aboard a nuclear submarine." This statement, as well as continuing to pursue this case, seems out of step with the Administration's policy -- which was supposed to create a "zone of privacy" for all servicemembers.

The Department of Defense is currently reviewing its implementation of "Don't Ask, Don't Tell, Don't Pursue." Continuing to pursue the discharge of McVeigh before the release of the results of the Pentagon review of this policy would be bad timing at best.

WORKING FOR LESBIAN AND GAY EQUAL RIGHTS.

1101 14th Street NW, Suite 200 Washington, D.C. 20005
phone (202) 628 4160 fax (202) 347 5323 e-mail hrc@hrc.org

Letter to Attorney General Reno
March 30, 1998
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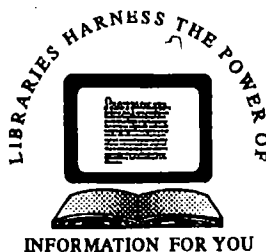
It is our hope that the Navy and the DoJ will comply with Judge Sporkin's ruling and let the decision stand. Thank you for your attention to this request.

Sincerely yours,

A handwritten signature in dark ink, appearing to be 'Elizabeth Birch', written over a large, faint circular mark.

Elizabeth Birch
Executive Director

cc: Seth Waxman, Solicitor General
David Ogden, Counsel to the Attorney General
Bill Lann Lee, Acting Assistant Attorney General, Civil Rights
William R. Yeomans, Chief of Staff & Senior Counsel, DoJ, Civil Rights
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Maurice Daniel, Director of Political Affairs for the Vice President
Philip DuFour, Office of the Vice President



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TO: Mr. Rob Weiner

ROOM: _____ DATE: 5/5

☒ Per your request

☐ FYI

COMMENTS: Sean Mack asked me to forward this to you. The JAG Library faxed me an outline; they would prefer to know exactly what sections we need, they are unwilling to fax the entire document. We can't borrow it, it's on a CD-ROM. I called every place that has it, this is the best

FROM: I could do.

EOP LIBRARIANS--YOUR INFORMATION PARTNERS

- Amy Bilyeau
x 53397

SUPERS 1430.16D CH-1

DOCUMENT SUMMARY

Title: 07/10/91 (PERS-262) ADVANCEMENT MANUAL CHG NOT 1 -
04/01/92

Document Type: Naval Instructions/Directives

Revision Level	Issue Date	Pgs	Location
BASE	10 Jul 91	209	

Purpose. To provide procedures for administering the advancement in rate system for enlisted members serving on active duty in the U.S. Navy, U.S. Naval Reserve, and inactive U.S. Naval Reserve. This instruction is a complete revision and should be reviewed in its entirety.

DOCUMENT HISTORY AND FILM REFERENCE

Revision Level	Issue Date	Pgs	Location
BASE	10 Jul 91	209	

OUTLINE

Disc	Paragraph/Title (* refer to amendment)
<DS0795>	SUPERS 1430.16D CH-1 07/10/91 (PERS-262) ADVANCEMENT MANUAL CHG NOT 1 - 04/01/92
	1. Purpose
	2. Cancellation
	3. Background
	4. Action
	5. Forms and Reports
<IP 3>	1 Enclosure: ADVANCEMENT MANUAL for the advancement of enlisted personnel of the U.S. Navy and U.S. Naval Reserve
<IP 5>	Contents:
<IP 6>	REFERENCES PERTAINING TO THE ADVANCEMENT OF ENLISTED PERSONNEL
<IP 9>	FORMS AND REPORTS USED IN THE ENLISTED ADVANCEMENT SYSTEM
<IP 12>	ADVANCEMENT MANUAL
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<IP 15>	103. Scope of the Advancement Manual
	104. Applicability
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	200.2. Commanding Officers
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<IP 24>	200.3. Examining Boards
	200.4. Naval Education and Training Program Management Support Activity (NETPMSA) Pensacola, Florida
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OR CHANGE IN RATING

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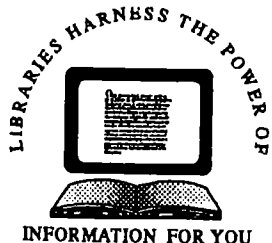
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INFORMATION FOR YOU

TO: Mr. Rob Weiner

ROOM: 128 DATE: 5/5

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☐ FYI

COMMENTS: The JAG library sent this of their own volition; let me know if you need additional sections.

FROM: Amy B.

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THE E-7 & E-8/9



ENLISTED SELECTION BOARDS

Local reproduction of this Appendix
for Selection Board Candidates is
strongly encouraged.

Appendix J

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COMPOSITION OF THE BOARD

Each selection board consists of a Captain who serves as President, a junior officer (usually from the BUPERS advancement section) who serves as a recorder and officers and master chief petty officers serving as board members. Additionally, a sufficient number of Assistant Recorders (E7/8s) are employed to ensure the smooth handling and accounting of records. The exact size of the board varies with availability of TAD funds, number of records to be reviewed, and the time available, but each usually consists of about 74 members for the active duty boards and 40 members for the reserve boards. Officer board members are generally drawn from the Washington, D.C. area. The enlisted members are, for the most part, from out of town. The ratio of in/out of town members varies from year to year.

The recorder, assistant recorders, OPNAV Enlisted Advancement Planner, and the Master Chief Petty Officer of the Navy (MCPON) may provide consultative service to the entire board in any matter concerning selections which may be referred to them. The recorder divides the board members into panels responsible for reviewing the records of individuals in one general professional area, i.e., deck, engineering, medical/dental, etc. Each panel consists of at least one officer and one master chief.

Although the Presidents of the boards are not normally assigned to any panel, they may reorganize panels as they so desire.

QUOTAS

OP-132F3 establishes a maximum select quota for each rating and gives these to the board. Commander, Naval Reserve Force (COMNAVRRESFOR) establishes quotas for drilling Naval Reserve personnel. The quotas are to be filled by the "best qualified" candidates competing for advancement. While the quota may not be exceeded, should it be determined by a panel that there is an insufficient number of "best qualified" candidates in a rating, the panel may recommend leaving part of the quota unfilled.

Advancement across the Navy is vacancy driven. That applies not only to the E-7 and E-8/9 boards, but to E4-E6 advancements as well. Several factors are taken into consideration when establishing quotas.

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a. Current Inventory. The current number of personnel onboard versus the CNO requirement for a rating. Only 3% of the Navy's total end-strength may be senior and master chief petty officers.

b. Total Projected Losses and Gains

(1) Losses reflect the personnel who will be leaving the Navy during the phasing cycle, for example, Fleet Reserve, medical discharge, LDO/CWO program, demotion, death, etc.,.

(2) Gains reflect those who will enter a paygrade during the phasing cycle such as voluntary recall to active duty, those remaining to be advanced from the previous cycle, etc.. Phasing cycles are as follows:

- E-7 September through August
- E-8/9 July through June

c. Growth. This number reflects projected growth of the Navy's authorized allowance during the phasing cycle.

d. Funding Authorized. The number of personnel the Navy may pay, as authorized, during the phasing cycle.

EARLY SELECTEE QUOTAS

DOD has established the Total Active Federal Military Service (TAFMS) requirement which is to be met prior to a member's advancement to a given paygrade. TAFMS requirements are as follows:

- E-7 - 11 years
- E-8 - 16 years
- E-9 - 19 years

DOD has made provisions for early advancements. An "early" candidate is one who does not meet the TAFMS minimum service requirements. No more than 10 percent of the total number of sailors in the E-7/8/9 paygrades may have less than the prescribed TAFMS. The number of "early" selectee quotas available to the selection board is limited to a percentage of the total selectee quota. OP-132F3 monitors this and informs the board of what percentage can be early and still allow the Navy to meet DOD restriction. The percentage is an overall board figure, not a quota by rate.

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Some panels may recommend fewer early selectees and others more because the average time in service of candidates varies from rating to rating. This percentage changes yearly.

GENERAL GUIDANCE TO THE BOARD

The selection board is convened by the Chief of Naval Personnel (CHNAVPERS). The Secretary of the Navy, CNO, BUPERS, and the OPNAV Enlisted Community Managers (ECM) all make input to the boards. Each year a precept is prepared which outlines the selection process and gives guidance and general information to the board, i.e. general selection criteria, equal opportunity, etc,. During the first day of convening, the board establishes internal ground rules and minimum selection criteria which each member uses when screening the records of candidates. The rules/criteria are applied equally to each candidate within a rating. Application may vary slightly from rating to rating for many reasons such as sea duty or lack of it, supervisory opportunities, schooling available, rotation patterns, etc,. (The board is given the freedom within the guidelines of the precept to establish its own internal working, thereby ensuring the dynamic nature of the selection process.)

Orientation briefings are given to the board which cover a wide range of subjects such as fiche errors, CWO/LDO selectees, officer reverttees, TAFMS, etc,. During the first two days, the panel members acquaint themselves with the various materials they will be using and practice evaluating test records.

Contained in the precept is the oath to be administered to the board members and recorders on convening. The precept also outlines the expected conduct and performance of individuals serving with the board. The proceedings and recommendations of the board may not be divulged except as authorized and approved by CHNAVPERS.

WHAT DOES THE BOARD CONSIDER?

Records for each rating are brought to the respective panel by the board assistant recorders. For each candidate, there is a folder that contains the microfiche record (1E and 2E fiche only), correspondence that has been received by the board before its convening, and an Enlisted Summary Record (ESR). The ESR

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contains the following information:

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NAME
SSN
EXAM RATE
TIME IN RATE
TIME IN SERVICE
HISTORY OF ASSIGNMENTS
EDUCATION
EVALUATION HISTORY
VARIOUS OTHER DATA ELEMENTS EXTRACTED
FROM THE ENLISTED MASTER FILE (EMF) AND
INACTIVE ENLISTED MASTER FILE (IEMF)

The ESR is used by the panel to note the candidate's test score, rate, and unit identification code (UIC). Each record is then reviewed by a panel member. At least 3 years of evaluations are reviewed, with five years being the norm. Depending on keenness of competition, panel members may go further back to establish trends and break ties.

Each candidate gets two reviews, from two different panel members. If there is a significant difference between the two panel members' assessments, a third member reviews the record.

Until the established deadline published in the applicable 1418 NAVADMIN, all correspondence received on a candidate is forwarded to the panel along with a microfiche record. That ensures that the panel has the most up-to-date information about the candidate. A word of caution pertains:

Special evaluations that are submitted solely to bolster a candidate's record, which do not reflect a significant event such as a transfer, personal award, superior performance of a special temporary assignment, etc., are not beneficial to the member nor are they desired.

Below are some of the factors considered by the E-7 and E-8/9 boards. The considerations change slightly from year to year and in no way should be considered the only factors influencing selection. Of course, SUSTAINED SUPERIOR PERFORMANCE is paramount:

a. Significant emphasis is placed on professional performance at sea. While it is not necessary that a candidate presently be serving in a sea duty billet, it is positive when a candidate's record reflects demonstrated evidence of professional and

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managerial excellence at sea or isolated duty assignments. It is recognized that some ratings do not offer a broad opportunity for sea duty, particularly at the senior levels, and that is taken into account. Additionally, while a variety of duty assignments, especially sea duty is highly desired, individuals having less variety but equally demanding tours may be equally "best qualified." In that connection, Navy members may be assured that their careers will not be unfavorably affected by service over extended periods in important assignments to which they have been ordered to meet the needs of the Navy.

b. Candidates presented to the board compete within their rating. It is recognized, however, that they are frequently detailed to duty outside their rating specialties. Many such types of duty require selectivity in assignment and special qualifications. Therefore, due consideration is given those candidates who serve in the demanding tours of duty as instructor, recruiter, career counselor, recruit company commander, duty in the Human Goals Program, and all other tours requiring special qualifications.

c. Consideration is given to improving educational level. That includes both academic and vocational training, whether such education is gained as a result of the individual's initiative during off-duty hours or as a participant in a Navy sponsored program.

d. Evaluations are closely reviewed for both marks and narrative. Trends are identified. Marks and narrative must correspond on the evaluation. THE SINGLE MOST IMPORTANT FACTOR INFLUENCING SELECTION IS SUSTAINED SUPERIOR PERFORMANCE OF DUTY. Peer group ranking also gives the board member an indication of how the candidate compares against members of the same paygrade within the command. Personal decorations, letters of commendation/community involvement also reflect a well rounded individual. The total man/woman concept is important.

e. Duty assignment and history of duties performed can be determined from the service record transfers and receipts page and the job description on the evaluations. Using this data, board members can tell whether or not individuals are performing duties commensurate with their rate and whether professional growth expectancies are being met.

f. Failure to meet Navy's weight/PRT standards may render candidates ineligible. Refer to OPNAVINST 6110.1D.

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g. Advancement will not be denied solely on the basis of prior alcoholism or alcohol abuse, provided the member has participated in successful treatment and recovery. Any misconduct or reduction in performance resulting from alcoholism or alcohol abuse, however, must necessarily be considered in determining fitness for advancement.

h. Individuals who have had disciplinary problems, have received letters of indebtedness or have other record entries relevant to behavioral difficulties such as drug abuse, demonstrated racial, sexual, or religious discrimination, etc., will find the path to E-7/8/9 more difficult than those with clear records. Once those problems are overcome, however, the single most important selection factor is STILL SUSTAINED SUPERIOR PERFORMANCE.

i. (E-7 only) Test scores are also taken into account since they give an individual's relative standing on the examination compared to the other candidates.

j. SUSTAINED SUPERIOR PERFORMANCE is a total man/woman concept. The board looks at how the individual performs under various circumstances, duty assignments, job assignments within the command, etc.. It is extremely important to perform well in all assignments regardless of how arduous or mundane the assignments may be.

FURTHER DEFINITION OF AREAS OF ENLISTED SELECTION CRITERIA

Performance

- | | |
|------------|--|
| OBJECTIVE | - Overall marks for a specified period (e.g. 5 years, all service in current paygrade) |
| | - Leadership/Interpersonal relations traits |
| | - Peer group standing |
| | - Disciplinary record |
| SUBJECTIVE | - Marks too high or low? |
| | - How closely do marks and narrative agree? |
| | - How well did the candidate perform in/out of rating in special assignments? |
| | - For supervisory experience, how well did the candidate perform as a supervisor? |
| | - Number of individuals supervised and under what conditions? |
| | - Working in a position above, below, or in paygrade? |

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Career History

- Sea/Shore duty mix. Any sea duty? When? If not, then overseas/isolated duty?
- Leadership position ever held?
- No opportunity yet to supervise. Is this compensated for by leadership in job or non-job related activities? (e.g. Chair or Chairperson for Navy Relief, CFC, office held in PTA, civic organizations, church organizations, etc.,)
- Special skills (e.g. SEAL, EOD, Diver, Recruiter, Recruit Company Commander, Human Goals, NECs)
- Special Qualifications (e.g. OOD, Training PO/CFO, Warfare Qualified)
- Special Duty (e.g. PEP, Embassy Duty, White House, major staff)

Potential

- Leadership/performance trend:
- Surfaces early
- Newcomer?
- Latecomer?
- Bounced back after problems resolved?
- Personal initiative as demonstrated by any:
- Command/community involvement
- Educational achievement (of any sort)
- Personal awards, commendations, beneficial suggestions, civilian awards, etc.)

THE SLATING PROCESS

Once review of the entire rating is complete, the panel arranges all the candidates from top to bottom. That is called slating. At that time, the panel makes a decision where the cut-off is for promotable candidates and recommended selectees. Once slating is completed, the entire board is briefed as to the rating's structure, its job, peculiarities, number of candidates, and the background of individuals recommended and not recommended for selection. During the briefing, no names are used and the entire board votes on the slate which must be accepted by a board majority. After all of the slatings have been approved by the board, a written report of the board's recommendations for selectees is signed by all members and the president and submitted to the CHNAVPERS for approval. The content of the report must certify that the board complied with all instructions and directions contained in the precept and that the board

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carefully considered the case of every candidate whose name was furnished for review. Upon CHNAVPERs approval of the selectees, a NAVADMIN is prepared and released to announce the selectees.

During the course of the board's deliberations, records may be encountered which clearly indicate substandard performance or, in the board's judgement, questionable advancement recommendations. In such cases, the board is directed to identify and list those candidates. This list includes the candidate's name, activity, reporting senior and concise summary of circumstances. Depending on the circumstances, such candidates will either be referred to the Quality Control Review Board or the command will be identified to senior echelon commanders for action deemed appropriate.

WHAT YOU CAN DO TO IMPROVE YOUR CHANCES FOR SELECTION

Remember that **SUSTAINED SUPERIOR PERFORMANCE** is the single most important factor influencing your advancement opportunities. Guard III wisely. You will be better off to Guard III for a demanding job assignment (assuming you do a good job) vice a geographic location where you want to go. Try to get a supervisory position or a small duty station where your potential can be recognized early on. Once it is documented, shoot for larger stations where operating tempo is greater and the number of subordinates you will be asked to supervise is larger. Look at sea duty or Type III assignments. Do your best in each job. Go that extra step for professional excellence.

Keep a personal record of your accomplishments throughout the evaluation period in anticipation of submitting input for your evaluation. Don't depend on reporting seniors to remember what you did all year because they have been busy also. Be sure your input addresses all accomplishments you feel are significant, such as improvements made, your supervisory ability, initiatives, etc,. Your input must be factual and provide enough detail so that when your rough input is translated into a smooth on the evaluation report, there is little chance that pertinent information will be omitted. The goal of the evaluation is a comprehensive and objective analysis of you and your performance. Ensure that your input appears in the final evaluation, clearly depicting specific accomplishments. Flowery generalities can weaken your evaluation.

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Ensure evaluations are typed properly and there are no misspellings or other clerical errors. Remember, you are going to sign your evaluation and clerical errors, misspellings, etc., are as much your fault as your command's. Make sure your evaluation covers the correct period of time.

VERY IMPORTANT! Get a copy of your BUPERS (official) microfiche service record and ensure it is up-to-date and in proper order. Do this at least 6 months prior to the board convening and at least once during each enlistment. The address to request a free copy of your microfiche service record is:

Bureau of Naval Personnel
PERS-313D
Navy Department
Washington, D.C. 20370-5312

In your letter request, include your full name, rate, SSN, and address where you wish the record to be mailed. Ensure you sign your full name to the letter. It should take about 6 weeks for you to receive the microfiche. When it arrives, look it over carefully, ensuring your social security number and name are correct on microfiche pages and that each service record page presented is yours.

MICROFICHE SERVICE RECORDS

The microfiche service record is broken down into three separate pages as follows:

FICHE	ROW	PROFESSIONAL SERVICE HISTORY
1E	A	Enlisted contracts/extensions
	B	Assignments/classification pages
	C-D	Page 10s/Page 13s
	E	Discharge/Fleet Reserve/Retirements
	F	Miscellaneous enlistment papers
FICHE	ROW	PERFORMANCE EVALUATIONS/TRAINING DATA
2E	A-C	Performance evaluations
	D	Page 4s/training/education
	E	Awards/medals/commendations
	F-G	Adverse information, Page 6s, Page 7s
FICHE	ROW	PERSONAL DATA
3E	A	Record of Emergency Data/Service Members Group Life Insurance information

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B	Changes to Page 2s
C	Security clearances/investigations
E	Medical data
F	Out of service inquiries/responses
G	Miscellaneous

For those members with broken service, there may be a microfiche page 4E. This fiche contains documents received after your discharge and do not appear in any particular order. Not all personnel with broken service will have a 4E fiche.

NOTE: The 3E and 4E microfiche normally are not given to the selection boards.

The following information is provided to help you put your record in order:

a. Enlisted microfiche service records are normally updated at the end of each enlistment/reenlistment. At that time, your command takes the old page 4s, 5s, and 9s, etc., from your paper record and forwards them to BUPERS for filming in the master record. Letters of commendation or appreciation are not filmable in your microfiche service record if they were issued after 1976. They should be mentioned in your evaluations.

b. Only E-5 and above evaluations are filmed in your official record. Make sure they are all there.

c. All personal decorations, unit commendations and letters for Sailor of the Month/Quarter/Year should be in your record.

d. Remember that poor quality documents cannot be filmed. Copies should be legible and of standard size (not reduced) to ensure the best imagery results.

If errors/missing documents are discovered that qualify for inclusion in your record, a correction package should be forwarded to PERS-313D. If you are selection board eligible, a duplicate package should be submitted to the board.

Review your record to determine which documents are missing or in error. Only include documents from your previous enlistments -- not your current enlistment -- that are missing. Remember, do not submit letters of commendation or appreciation dated after 1976 and no letters designating collateral duty assignments.

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Ensure that each document is legible and that your name and SSN appear on each. Outline any other errors found in your record on a letter of transmittal and mail to PERS-313D.

CORRESPONDING WITH THE SELECTION BOARD

Correspondence to the president of the selection board may be submitted **ONLY BY A CANDIDATE**. Correspondence/endorsements by superiors are not desired and will be removed from package submissions prior to presentation to the board. (That does not preclude the advisement of a specific accomplishment such as BSWS qualification or receipt of an award after the member has submitted a package (see Page J-18)). The package should contain the same documents as above plus anything else you feel is important to the board's consideration, including page 4s, 9s from your current enlistment, civilian awards, degrees, letters of commendation/appreciation, etc.,. Include a simple cover letter (see Page J-19). Short statements to explain any item of concern not covered by submission of a document may be made (see Page J-20).

Documents submitted to the board will be reviewed with your record and then discarded upon adjournment of the board. They are not forwarded to PERS-313D for microfilming. Though not required, use of registered mail is highly recommended (if your package is lost you have tracer ability and you have proof of mailing prior to the out-off date to allow resubmission). Send your package in accordance with the NAVADMIN published specific to your selection board.

PREPARING FOR THE EXAM/BOARD

Eligible for E-7? Now is the time to start studying for the examination for Chief Petty Officer, even if you don't plan on taking it for a year or so. Keep notes on the changes that occur in your rating. When you are eligible for the exam, get a bibliography and **STUDY**. Remember your exam score does count. The E-7 paygrade is considered to be the senior "technical" rate in the Navy and there are no plans to eliminate the professional test which qualifies you as a selection board eligible candidate.

A 1418 NAVADMIN announces each Navywide advancement cycle. Don't take someone else's word for its contents. Read the notice and familiarize yourself with all requirements for advancement.

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NAVOP 180/80 announced the termination of E-8/9 advancement in rating exams and directed commands to submit a "validation only" answer sheet to NETPMSA for each candidate recommended to the selection board. Ensure that your command has sent your answer sheet or NETPMSA will not know that you are board eligible and your record will not go before the board. Verify your status by reviewing the ESVR you command will receive from NETPMSA listing all board eligible candidates.

THE ENLISTED EVALUATION

THE IMPORTANCE OF THE ENLISTED EVALUATION CANNOT BE STRESSED ENOUGH. For the M/S/CPO selection boards, the evaluation is as critical to upward mobility as is the fitness report to officer promotion.

It is alarming the number of our petty officers who have not been given ample instruction/opportunity in writing enlisted evaluations. It is not at all uncommon to talk to a PO1 who has never prepared an evaluation. It is imperative for their own careers and the careers of their subordinates that ALL personnel know what constitutes a well written evaluation. We cannot expect junior personnel to become proficient in this area if we do not train them. PO3s should be directed to write evaluations on assigned non-rated personnel, PO2s should be directed to write evaluations on assigned PO3s and so on up the line. Those commands that have local petty officer academies and leadership schools should incorporate evaluation writing in the curriculum and stress the importance of evaluations to the sailor's career.

Below are the comments from past selection boards regarding evaluations and their contents:

a. Do not waste narrative about how well the ship did on deployment, inspection, "E" award, unit commendation, etc., but tell exactly what jobs the individual had and how well they were performed. Do not use acronyms.

b. Eliminate all flowery adjectives about what a great person the sailor is. Get to the point, in "plain English", about what and how the member accomplished the job.

c. More emphasis should be placed on the individual's ability, potential, and willingness to accept positions of leadership and management. Indicate why an individual should be

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advanced. If individuals are going to stay strictly in their rating and continue to be division or shop supervisors, when positions of increased responsibility are open to them, recommendations for continued advancement may not be appropriate.

d. More care should be taken to ensure that all collateral duties, awards, education, qualifications, etc., are listed.

e. If individuals are ranked lower or higher than the majority of their peers, tell exactly why in the narrative.

f. Do not recommend individuals for advancement just because time in rate requirements have been met. A recommendation for advancement indicates member is fully eligible and able to successfully fulfill the responsibilities of the higher paygrade, independent of time in rate requirements.

g. Evaluations submitted as "other", without solid justification and obviously intended to provide another set of marks for the board, are viewed with considerable skepticism. Quite simply, evaluations going from 3.6 to 4.0 between September and February does little for the member and reduces the credibility of the reporting senior.

h. Reporting seniors do little for members by evaluating all personnel 4.0 unless they are ranked and such ranking is remarked on in the text. Such ranking would eliminate the need for lengthy statements about how all members of the command are carefully selected, are ~~COMMANDER'S~~ control billets, etc. The board takes a hard look at how members are ranked amongst their peers.

i. PROOFREAD THE EVALUATION! Many blocks are left blank. Reconstruction of the member's career and performance is difficult enough without being forced to guess the period of the report or how many others were evaluated, etc.,. Ensure BUPERS and RECORD copies are typed correctly and in line, otherwise microfiche will be incorrect.

j. Don't type over any of the block labels. It may be unreadable in the microfiche.

k. The first sentence sets the tone of the whole evaluation and establishes your credibility. "Truly outstanding" for a 3.6 or 3.4 sailor diminishes credibility, as does "a typically effective Chief Petty Officer" for a overall 4.0.

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Write paragraphs. Use spaces between paragraphs. Cut out garbage, tell what member did in clear, concise, short sentences. Use underlining and short, sharp phrases to emphasize strong points. USE BULLETS. Reading time during any board is critical.

NOTE: Underlining will not help the poor performance shown in evaluation blocks and too much underlining makes the microfiche difficult to impossible to read. Use underline and bold wisely and only to EMPHASIZE.

Fill in blocks on duties completely and specifically. Don't assume all board members/BUPERS personnel know what the duties in your unit entail. It is especially important in the job description block.

Commands should consider establishing an evaluation review board or some method of ensuring complete and correct evaluations are submitted. CO, XO, Department heads, and MCPO is the minimum membership suggested.

PEARLS

Some comments, good and bad, taken from actual evaluations by the board.

- He is the tail that wags the dog.
- I would confidently send him out in the old Texas Ranger mode: one riot = one ranger.
- Did what too few chiefs do now-a-days; trained two new ensigns to be good division officers.
- He could sell sand to Saudi Arabia.
- There is no task worth less than his full energy.
- This is the man I want with me in combat - the ULTIMATE LEADER!
- He gets underway everytime, on time.
- A technical linguist.
- A guiding light to those in the dark.

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- He can nail jello to the wall.
- He has no problem juggling feathers, jello, bowling balls and flaming arrows at the same time.
- Successfully provided over 22,000 urine samples.
- Awarded numerous letters of condemnation.
- Both of the senior chiefs attached to this command were noted 1 of 2.
- appearance sets a standard his seniors would do well to emulate. (26 percent bodyfat)
- Assured the expeditious processing of 24 report chits for his department personnel.
- ...has sold the Navy in every way he could.
- His personal effort has resulted in many weak students completing qualifications as nuclear operators.
- The best the Navy has to offer (ranked 2 of 3).
- Attended 3 computer conventions.
- Normally a team player.
- A well rounded individual. (36 percent bodyfat)
- Won yard-of-the-month!
- My #1 Chief! (E8 evaluation).
- Unquestionably the most dynamic, hard charging, most talented SCPO assigned to this staff. (Ranked 4 of 9)
- Irreproachable military bearing (marked 3.8)
- This is a person whose departure will free two people to do productive work.

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10 JUL 1991

From: BM1(SW) Joe F. Class, USN, 123-45-6789
To: President FY- Selection Board (Active)

Subj: MICROFICHE RECORD REVIEW

Ref: (a) NAVOP /

Encl: (1) Package of items for review

1. Enclosure (1) is forwarded for consideration under reference (a).

JOE F. CLASS
BM1(SW), USN

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From: HT1(SW) I. M. Aghast, USN, 222-22-2222
To: President FY-____ E-7 Selection Board (Active)

Subj: MICROFICHE RECORD REVIEW

Ref: (a) NAVOP.____/____

Encl: (1) Package of items for reivev

1. Enclosure (1) is forwarded for consideration under reference (a).

2. Please be aware that upon review of my microfiche record, I discovered two letters on page 1E, last row recommending a Fireman for a BCD discharge who's SSN is one digit different from mine. These letters do not refer to me and I have sent correspondence to NMPC-312C to have them removed from my fiche.

I. M. AGAEST
HT1(SW), USN

J-18

Appendix J

BUPERS 1430.16D CH-1 ** 1186697 0013882 6T5

BUPERSINST 1430.16D

10 JUL 1991

ROUTINE
R 211247Z MAY 90 ZYB
FM ATKRON ONE SEVEN SIX
TO COMNAVMILPERSCOM WASHINGTON DC//221//

ZYUW EYXSAFF6477 1421148

UNCLAS //N01000//
PASS TO PRESIDENT, E7 SELECTION BOARD
SUBJ: AWARD NOTIFICATION ICO ASMI(AW) NAME, USN, SSN #
MSGID/GENADMIN/VA-176//
RMKS/1. SNM WAS AWARDED A NAVY COMMENDATION MEDAL FROM
COMSIXTHFLT ON 18MAY90, FOR THE PERIOD 12NOV89 ~ 1APR90. REQUEST
AWARD BE CONSIDERED DURING E7 SELECTION PROCESS.//BT

PRIORITY
P 220800Z MAY 90 ZYB
FM USS KIDD
TO COMNAVMILPERSCOM WASHINGTON DC//221//

ZYUW RULYSGG2226 1420800

UNCLAS //N00000//
SUBJ: ESWS QUALIFICATION ICO FCI NAME, USN, SSN # (NMPC-221)
MSGID/GENADMIN/KIDD//
RMKS/1. REQ PASS FOLLOWING INFO ON TO CPO SELECTION BOARD: FCI
NAME, QUALIFIED AS AN ENLISTED SURFACE WARFARE SPECIALIST ON
21 MAY 1990. ADMIN DOCUMENTATION FWDDED SEPCOR.
2. POC: CDR NAME, XO, USN PH: (AVN) # (COM) #

EXAMPLES OF TYPES OF CORRESPONDENCE FROM THE MEMBER'S
COMMANDING OFFICER TO THE BOARD THAT ARE ACCEPTED.

97 F.3d 256 printed in FULL format.

Richard F. Richenberg, Jr., Plaintiff - Appellant, v.
William J. Perry, Secretary of Defense; Sheila Widnall,
Secretary of the Air Force, Defendants - Appellees.

No. 95-4181

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

97 F.3d 256; 1996 U.S. App. LEXIS 26017; 68 Empl. Prac. Dec.
(CCH) P44,259

April 8, 1996, Submitted
October 3, 1996, Filed

SUBSEQUENT HISTORY: [**1] Rehearing and Suggestion for Rehearing En Banc
Denied January 17, 1997, Reported at: 1997 U.S. App. LEXIS 1040. Certiorari
Denied October 6, 1997, Reported at: 1997 U.S. LEXIS 4580.

PRIOR HISTORY: Appeal from the United States District Court for the District of
Nebraska. 95-CV-393. Honorable Lyle Strom.

DISPOSITION: Affirmed.

COUNSEL: Counsel who presented argument on behalf of the appellant was Thomas C.
Kayser of Minneapolis, MN. Randall Tietjen of Minneapolis appeared on the
brief.

Counsel who presented argument on behalf of the appellee was Anthony J.
Steinmeyer, DOJ, of Washington, D.C. Edward Himmelfarb of the DOJ, Washington,
D.C., and Lt. Col. Steven J. Pecinovsky, Air Force Legal Services of Arlington,
VA appeared on the brief.

JUDGES: Before RICHARD S. ARNOLD, Chief Judge, MAGILL, and LOKEN, Circuit
Judges. RICHARD S. ARNOLD, Chief Judge, dissenting.

OPINIONBY: LOKEN

OPINION:
[*258] LOKEN, Circuit Judge.

Richard F. Richenberg, Jr., appeals the district court's n1 grant of summary
judgment upholding an Air Force decision to honorably discharge him under the
military's "Don't Ask, Don't Tell" policy regarding homosexuals. The policy was
adopted to implement a 1993 statute, 10 U.S.C. @ 654. Richenberg claims that the
policy violates his due process and free speech rights and is an
unconstitutional Bill of Attainder. He also challenges the Air Force's decision
under the Administrative Procedure Act ("APA"). Like two other circuits that
have recently considered similar challenges, we find no constitutional infirmity
in the statute and military policy. We also find no APA infirmity in this
decision and therefore affirm.

- - - - -Footnotes- - - - -

CON Law
Challenge
3

n1 The HONORABLE LYLE E. STROM, United States District Judge for the District of Nebraska.

- - - - -End Footnotes- - - - -
[**2]

I. THE POLICY

Prior to 1993, Department of Defense ("DOD") Directives and regulations of the individual services excluded from military service any person "who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Dir. No. 1332.14 (1981), 32 C.F.R. Part 41, App. A (1992). Though the issue never reached this court, other circuits rejected numerous constitutional challenges to this long-standing policy. See Steffan v. Perry, 309 U.S. App. D.C. 281, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Meinhold v. Department of Defense, 34 F.3d 1469 (9th Cir. 1994); Ben-Shalom v. Marsh, 881 F.2d 454, 456 (7th Cir. 1989), cert. denied, 494 U.S. 1004, 110 S. Ct. 1296, 108 L. Ed. 2d 473 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003, 108 L. Ed. 2d 473, 110 S. Ct. 1295 (1990); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).

In early 1993, President Clinton called for a reevaluation of the policy. The Senate and House Armed Services Committees held extensive hearings which included testimony by sociologists, gay rights activists, military personnel experts, members of the armed forces in all ranks, and private citizens and organizations. n2 DOD also intensively studied the [**3] issue. See, e.g., Sen. Comm. Hr'gs at 707-08 (statement of General Colin Powell). On July 19, 1993, the Secretary of Defense published a new policy regarding homosexuals and the military. At the core of that policy was the "Don't Ask, Don't Tell" concept: "Applicants for military service will not be asked or required to reveal their sexual orientation. . . . Servicemembers will be separated for homosexual conduct." "A statement by a servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts or has a propensity or intent to do so." Policy on Homosexual Conduct in the Armed Forces, 1 Pub. Papers 1111 (July 19, 1993). General Powell deemed this policy "a choice which is in the best interests of the Armed Forces and the best interests of the American people." Sen. Comm. Hr'gs at 709.

- - - - -Footnotes- - - - -

n2 See S. Rep. No. 112, 103d Cong., 1st Sess. 268-70 (1993); Hearings on the Dept. of Defense Policy Excluding Homosexuals From Service in the Armed Forces, 139 Cong. Rec. S755-01 (daily ed. Jan. 27, 1993) (statement of Sen. Nunn); Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Sen. Comm. on Armed Services, 103d Cong., 2d Sess. (1993) ["Sen. Comm. Hr'gs"]; Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services, 103d Cong., 1st Sess. (1993).

- - - - -End Footnotes- - - - -
[**4]

On November 30, 1993, after further review and debate, Congress enacted 10 U.S.C. [*259] @ 654. n3 That statute begins by reciting essential

congressional findings, including:

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

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

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

* * * * *

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

(13) The prohibition against homosexual conduct is a long-standing element of military [**5] law that continues to be necessary in the unique circumstances of military service.

* * * * *

(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.

10 U.S.C. @ 654(a). The statute defines "homosexual" as a person of either gender "who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." "Homosexual acts" are defined as "bodily contact . . . for the purpose of gratifying sexual desires." @@ 654(f)(1) & (3)(A).

-Footnotes-

n3 National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, @ 571, 107 Stat. 1670-73.

-End Footnotes-

In the provision at issue on this appeal, the statute provides that a servicemember "shall be separated from the armed forces" if there is a finding "that the member has stated that he or she is a [**6] homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual

acts." @ 654(b)(2). In other words, to avoid discharge, a servicemember who has declared, "I am a homosexual," must prove that he or she is not a homosexual as that term is defined in the statute.

In February 1994, the military implemented @ 654. DOD Directive 1332.30 governs commissioned officers such as Richenberg. The relevant portion of this lengthy Directive provides:

C. HOMOSEXUAL CONDUCT

Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph C.1.b., below. . . . 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.

* * * * *

1.b. . . . A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage [**7] in, has a propensity to engage in, or intends to engage in homosexual acts. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

[*260] DOD Dir. 1332.30, Encl. 2, P C & C.1.b., at pp. 2-1, 2-2. The Air Force amended its Administrative Discharge Procedures, AFR 36-2, to conform with @ 654 and Directive 1332.30.

II. RICHENBERG'S DISCHARGE

Richenberg entered the Air Force in 1985. After reaching the rank of Captain and serving in the Gulf War, he began training for the Foreign Military Sales program in Saudi Arabia. In April 1993, he requested separation from the Air Force. The Air Force denied this request because his training was nearly complete. Richenberg then informed his commanding officer that he is homosexual, acknowledging that "I am forcing you to take actions [**8] which may ultimately result in my discharge." The Air Force canceled his Saudi Arabian mission, reassigned him to Offutt Air Force Base in Nebraska, and initiated discharge proceedings.

After a December 1993 hearing, a Board of Inquiry recommended Richenberg's discharge. The Secretary of the Air Force ordered reconsideration under the new "Don't Ask, Don't tell" policy. After a second hearing in June 1994, the Board of Inquiry recommended separation with an honorable discharge. An Air Force Legal Review concluded that the Board's "findings support discharge for making homosexual statements and failing to rebut the presumption that the respondent has a propensity to engage in homosexual acts." The Air Force Board of Review agreed. On August 28, 1995, the Secretary of the Air Force ordered Richenberg's honorable discharge.

Richenberg then commenced this action. The district court granted the defendants' motion for summary judgment, rejecting Richenberg's constitutional challenge and concluding that substantial evidence supports the agency's decision. *Richenberg v. Perry*, 909 F. Supp. 1303 (D. Neb. 1995). Following Richenberg's appeal, we declined to enter an injunction preventing [**9] discharge during the appeal. *Richenberg v. Perry*, 73 F.3d 172 (8th Cir. 1995). We now consider the merits of that appeal. The Fourth Circuit upheld the policy's constitutionality in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 358, 136 L. Ed. 2d 250 (U.S. 1996). The Second Circuit reversed a district court decision that the rebuttable presumption in @ 654(b)(2) is unconstitutional and remanded for consideration of the constitutionality of @ 654(b)(1) in *Able v. United States*, 88 F.3d 1280, 1996 WL 391210 (2nd Cir. 1996).

III. DUE PROCESS

Richenberg argues that 10 U.S.C. @ 654(b)(2) and DOD Directive 1332.30 violate the Fifth Amendment's Due Process Clause, and particularly its equal protection component, by adopting an irrational and "constitutionally repugnant" presumption that discriminates against homosexuals on the basis of their "status." n4 Applying rational basis review, the district court held that the exclusion of those with a propensity or intent to engage in homosexual acts furthers the legitimate government purpose of protecting "unit cohesion, morale, good order and discipline [**10] and military readiness"; that the military can rationally infer such propensity or intent from a servicemember's declaration of homosexuality; and therefore that the "rebuttable presumption is a rational means of furthering the military's legitimate purpose." 909 F. Supp. at 1312-13. Richenberg argues that we should apply heightened scrutiny because homosexuality is a suspect classification. We reject this contention for the reasons stated by the Fourth Circuit in *Thomasson*, 80 F.3d at 927-28. n5

- - - - -Footnotes- - - - -

n4 Conversely, the Family Research Council as amicus curiae argues that DOD's presumption violates the plain language of @ 654 because the statute prohibits all homosexuals from serving in the military. See *Thomasson*, 80 F.3d at 939 (Luttig, J., concurring). We agree with the Second Circuit that the word "propensity" in @ 654 is ambiguous and that DOD has permissibly construed the ambiguous statute. See *Able*, 88 F.3d 1280, 1996 WL 391210 at 19.

n5 Five other circuits declined to give heightened scrutiny to the military's prior policies regarding homosexuals. See *Steffan*, 41 F.3d at 684; *Meinhold*, 34 F.3d at 1478; *Ben-Shalom*, 881 F.2d at 464; *Woodward*, 871 F.2d at 1076; *Rich*, 735 F.2d at 1229. The Supreme Court applied rational basis review in reviewing a state constitutional amendment adversely affecting homosexuals in *Romer v. Evans*, 134 L. Ed. 2d 855, 116 S. Ct. 1620, 1627 (1996). See also *Bowers v. Hardwick*, 478 U.S. 186, 195-96, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

- - - - -End Footnotes- - - - -

[**11]

[*261] In conducting rational basis review, we presume that the statute and implementing Directive are valid, placing the burden on Richenberg to show that they are not rationally related to any legitimate government purpose. See *Heller v. Doe*, 509 U.S. 312, 319-20, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993). Our role is not "to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). Substantive due process review is especially deferential when military policy is challenged. The Constitution expressly grants responsibility for military affairs to Congress, art. I, @ 8, and the President, art. II, @ 2, not the judiciary. See *United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). When action under this authority is challenged, "judicial deference . . . is at its apogee." *Rostker v. Goldberg*, 453 U.S. 57, 70, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981). Moreover, at a more practical level, deference to the considered professional judgment of military authorities is appropriate because:

it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, [**12] and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system.

Gilligan v. Morgan, 413 U.S. 1, 12, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973) (emphasis in original). See also *Goldman v. Weinberger*, 475 U.S. 503, 508, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986). Accordingly, "policies that might not pass constitutional muster if imposed upon a civilian population will be upheld in the military setting." *Ben-Shalom*, 881 F.2d at 461. n6

- - - - -Footnotes- - - - -

n6 The military policy at issue is entitled to even more deferential review because it is the product of extensive study, debate, and compromise by Congress and the President. See *Rostker*, 453 U.S. at 71; *Thomasson*, 80 F.3d at 927.

- - - - -End Footnotes- - - - -

[**13]

Richenberg argues that the "Don't Ask, Don't Tell policy" -- by which he presumably means @ 654 as well as the DOD Directive -- cannot be justified by any rationale other than an irrational catering to prejudice against and hatred of homosexuals. The flaw in this argument is its faulty premise. Richenberg asserts that the military policy is aimed at those with homosexual orientation or status. It is not. The statute carefully defines "homosexual" for these purposes as limited to those who commit, attempt to commit, intend to commit, or have a propensity to commit unacceptable sexual acts. See @ 654(f)(1). The DOD Directive explicitly states that the military will not exclude servicemembers for their homosexual thoughts, opinions, fantasies, or orientation. Thus, we reject Richenberg's strident attack on the military for catering to prejudice against those with homosexual orientation. n7 The statute defines conduct that Congress has determined is inappropriate in the military, and we must review

it on that basis. See 10 U.S.C. @ 654(a)(13),(15), quoted at p. 4-5, supra.

- - - - -Footnotes- - - - -

n7 For example, Richenberg asserts that "this is the same disgraceful way that African-Americans were treated" by the military in World War II. General Powell testified: "Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human characteristics. Comparison of the two is a convenient but invalid argument." S. Rep. 112 at 281-82.

- - - - -End Footnotes- - - - -

[**14]

We join six other circuits in concluding that the military may exclude those who engage in homosexual acts as defined in @ 654(f)(3)(A). See Thomasson, 80 F.3d at 929 [*262] and cases cited. Military life requires servicemembers to sacrifice privacy:

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

S. Rep. 112 at 277 (statement of Gen. Powell). Military leaders have determined that excluding those with a propensity to engage in homosexual acts, like providing separate housing for men and women, reduces sexual tensions that would jeopardize unit cohesion, the cornerstone of an effective military. Id. at 275-82; see Sen. Comm. Hr'gs at 595 ("in my 40 years of army service in three different wars I have become convinced that [unit cohesion] is the single most important factor in a unit's ability to succeed on the battle field" [*15] field") (statement of Gen. H. Norman Schwarzkopf).

Given these rational concerns, Congress and the President may rationally exclude those with a propensity or intent to engage in homosexual acts. "It is appropriate for the armed forces to separate the individual from military service without waiting until the individual's propensity or intent to violate [military rules] ripens into specific conduct prejudicial to good order and discipline." S. Rep. 112 at 294; see Thomasson, 80 F.3d at 929. See also New York City Transit Auth. v. Beazer, 440 U.S. 568, 589-94, 59 L. Ed. 2d 587, 99 S. Ct. 1355 (1979) (employer may deny jobs to former drug abusers to avoid risk of likely future conduct); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314-15, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976) (State may retire police officers at age fifty to avoid dangers created by physically unprepared officers).

That brings us to Richenberg's contention that the DOD Directive's presumption fails rational basis review because it is irrational to presume that self-declared homosexuals have a propensity to commit homosexual acts. However, it is rational to assume that both homosexuals and heterosexuals "are likely to act in accordance with their sexual [*16] drives." Steffan, 41 F.3d at 692. For example, Richenberg acknowledged at the Board of Inquiry hearing that his homosexuality includes a sexual attraction to men. And the Lambda Legal

Defense and Education Fund declared in an amicus brief to the Supreme Court in *Bowers v. Hardwick*, "for gay people, sexuality and their sexual orientation play an especially central role in the definition of self. . . . [Sodomy laws] impose an added burden on gay people, blocking their sense of self as well as their sexual fulfillment." S. Rep. 112, at 283. Thus, we agree with the Fourth Circuit that "the presumption that declared homosexuals have a propensity or intent to engage in homosexual acts certainly has a rational factual basis." *Thomasson*, 80 F.3d at 930. See also *Watkins v. United States Army*, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (*Reinhardt, J., dissenting*) ("To pretend that homosexuality . . . is unrelated to sexual conduct borders on the absurd"), opinion withdrawn, 875 F.2d 699 (1989) (en banc).

Finally, *Richenberg* argues that the presumption deprives him of due process because it is effectively irrebuttable. Once again, his argument ignores the statutory language. [**17] Congress perceived that "homosexual" is a potentially ambiguous term. Therefore, some persons who declare that they are "homosexual" or have a "homosexual orientation" may not fall within the statutory definition of persons likely to engage in homosexual conduct that is inconsistent with service in the military. The presumption in @ 654(b)(2) and the DOD Directive allows an individual who has declared his or her homosexuality to prove that the statement merely reflects a permissible orientation. This is not a de facto irrebuttable presumption; indeed, the district court found that seven servicemembers have successfully rebutted it. 909 F. Supp. at 1313. Thus, even if an irrebuttable presumption would fail rational basis review (an issue we need not address), @ 654(b)(2) and the Directive do not.

IV. FREEDOM OF SPEECH

Richenberg argues that the Air Force violates First Amendment rights by [**263] targeting those who speak about their homosexuality and discharging them for "mere statements." Under the prior policy, the military asked applicants if they were homosexual and excluded those who answered affirmatively. The new policy is less restrictive -- the military now ignores [**18] the issue unless a service-member affirmatively evidences a propensity to engage in conduct inconsistent with military service.

We conclude that *Richenberg's* First Amendment argument is without merit. As discussed above, @ 654 and the DOD Directive do not target mere status or speech. The policy seeks to identify and exclude those who are likely to engage in homosexual acts, as defined in @ 654(f)(3). To this end, the policy provides that a servicemember's statement that he or she is a homosexual evidences that propensity. "The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489, 124 L. Ed. 2d 436, 113 S. Ct. 2194 (1993). See also *Wayte v. United States*, 470 U.S. 598, 610-14, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985) ("passive enforcement" of criminal draft registration law does not violate the First Amendment); *United States v. Dinwiddie*, 76 F.3d 913, 926 n.10 (8th Cir. 1996). We thus agree with the Fourth Circuit that

there is no constitutional impediment, therefore, to the use of speech as relevant evidence of facts that may furnish a permissible basis for separation from military service. No First Amendment [**19] concern would arise, for instance, from the discharge of service members for declaring that they would refuse to follow orders, or that they were addicted to controlled substances.



Thomasson, 80 F.3d at 931. Accord Able, 88 F.3d 1280, 1996 WL 391210 at 17 ("This evidentiary use substantially furthers the government's interest because . . . there is a correlation between those who state that they are homosexual and those who engage in homosexual acts."); Ben-Shalom, 881 F.2d at 462.

V. APA REVIEW

Richenberg argues that the Secretary's decision was arbitrary and capricious, contrary to law, and not supported by substantial evidence -- the standards for judicial review under the APA, 5 U.S.C. @ 706 -- because his statements of homosexuality demonstrate no "propensity or intent to engage in homosexual acts," and therefore the rebuttable presumption "was never properly triggered." He notes that, at the second Board of Inquiry hearing, he presented overwhelming evidence regarding his past conduct, character, and credibility, and the nature and circumstances of his statements, "all of which demonstrate conclusively that he has no such propensity."

Assuming that a military [*20] discharge decision is reviewable under the APA, n8 that review "must be extremely deferential because of the confluence of the narrow scope of review under the APA and the military setting." Henry v. Department of Navy, 77 F.3d 271, 272 (8th Cir. 1996). Richenberg's contention -- that his statements did not trigger the presumption -- is contrary to the plain meaning of @ 654(b)(2) as construed in the Directive. Any statement to the effect that a servicemember is a homosexual "triggers" the presumption, that is, imposes a burden to rebut the presumption if discharge proceedings are commenced.

- - - - -Footnotes- - - - -

n8 Richenberg cites no authority for the proposition that Congress has authorized APA review of decisions to discharge an officer from military service. Remarkably, the Secretary simply ignores the issue. We suspect it is a doubtful proposition. See Webster v. Doe, 486 U.S. 592, 100 L. Ed. 2d 632, 108 S. Ct. 2047 (1988); Chappell v. Wallace, 462 U.S. 296, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983). But the government has not argued the point, so we do not consider it. See Air Courier Conference v. American Postal Workers Union, AFL-CIO, 498 U.S. 517, 522-23, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991).

- - - - -End Footnotes- - - - -

[**21]

Charitably reading Richenberg's brief as also arguing that he in fact rebutted the presumption, we agree with the district court that substantial evidence supports the Secretary's decision to the contrary. At the Board of Inquiry hearing, Richenberg stated that he is homosexual but does not intend to engage in prohibited homosexual acts. However, [*264] on cross-examination, he admitted he is sexually attracted to men. When asked whether, if the right person came along, he "would not be opposed to having sex with them (sic)," he answered, "I can't say that I've entirely accepted that yet." In addition, he answered that he did not know whether he would marry a man if it were legal to do so. None of this is particularly inflammatory, and we agree that Richenberg submitted strong evidence of fine character and an excellent military career. But "substantial evidence is something less than the weight of the evidence,

and the possibility of drawing two inconsistent conclusions does not indicate that substantial evidence fails to support an agency's findings." Henry, 77 F.3d at 273. The Board of Inquiry's recommendation was based upon its assessment of Richenberg's statement that he has no [**22] intent or propensity to commit homosexual acts in light of his equivocal answers on cross examination. That type of credibility determination is normally left to the agency's discretion, see Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994), and Richenberg does not suggest we are dealing with abnormal agency fact-finding.

VI. CONCLUSION

We have considered Richenberg's bill of attainder claim and conclude it is without merit. See Selective Serv. Sys. v. Minnesota Pub. Int. Res. Group, 468 U.S. 841, 82 L. Ed. 2d 632, 104 S. Ct. 3348 (1984); Ambassador Books & Video, Inc. v. Little Rock, 20 F.3d 858, 865 (8th Cir.), cert. denied, 130 L. Ed. 2d 120, 115 S. Ct. 186 (1994). Accordingly, for the foregoing reasons, the judgment of the district court is affirmed.

DISSENTBY: RICHARD S. ARNOLD

DISSENT:

RICHARD S. ARNOLD, Chief Judge, dissenting.

The military may no longer discharge homosexual servicemembers simply because they are homosexual. Instead, federal law authorizes the dismissal of homosexual servicemembers only if they engage or intend to engage in prohibited homosexual conduct, or if they demonstrate a propensity to do so. The statute, however, blurs the line between status and conduct by making a servicemember's [**23] admission that he or she is a homosexual sufficient grounds for presuming that the servicemember is likely to or intends to engage in prohibited conduct. If this presumption were irrebuttable, the statutory scheme would raise serious First Amendment problems. Accordingly, it is our job to review the record with great care to ensure that Captain Richenberg had a proper opportunity to rebut the presumption. After reviewing the evidence submitted to the Board of Inquiry, it is my view that Captain Richenberg met his burden and should not have been discharged.

The First Amendment prohibits the government from penalizing people because of their thoughts and feelings. Indeed, "our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley v. Georgia, 394 U.S. 557, 565, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). Captain Richenberg admitted that he is a homosexual but also stated under oath that he did not intend to violate military law by acting upon those feelings. To assume automatically that he would is to disadvantage him simply for who he is and not for what he has done or will do. The First Amendment does not allow the government to make this assumption without [**24] at least affording Captain Richenberg some realistic opportunity to show that the assumption is erroneous in his particular case.

An irrebuttable presumption would also violate the First Amendment by penalizing servicemembers solely for the content of their speech. It is one thing to use a person's speech as evidence to help establish an element of some offense. It would be quite another matter, however, to presume conclusively from Captain Richenberg's expression that he intended to or was likely to violate

military regulations when he has expressly disavowed such an intent. Such a scheme would target only speech and would thus violate the First Amendment absent some compelling justification for the restriction.

The propensity presumption is supposed to be rebuttable. See Brief of Appellees 40. n9 [*265] Given that excessive deference to the presumption by the Board of Inquiry would violate the First Amendment, I would review the record de novo to ensure that the Board of Inquiry gave Captain Richenberg a fair chance to rebut the presumption. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984) (in First Amendment cases, appellate courts should review de novo questions [**25] of fact that are tried to a judge or jury).

- - - - -Footnotes- - - - -

n9 In addition to pointing out that the presumption is rebuttable, the government invokes the customary deference that courts give to military judgments on the need to restrict certain types of speech. See Brief of Appellees 43. The government, however, does not attempt to justify an irrebuttable presumption, and this dissent does not challenge the validity of a properly applied rebuttable presumption. Moreover, deference to military judgment does not extend to the application of law to fact, in an area in which a military tribunal carries no special expertise.

- - - - -End Footnotes- - - - -

It is undisputed that Captain Richenberg told several people that he was a homosexual. He swore, however, that he had no intention of acting upon his orientation in violation of military regulations and that he was "very capable" of abstaining from prohibited conduct. Appellant's App. 296-97. The record presents many reasons to believe him and insufficient reason to doubt him. Captain Richenberg appears to have [**26] been an outstanding Air Force officer. His Officer Performance Reports (OPRs) are full of praise for his professionalism, dedication, and leadership abilities, and he received many medals over the course of his Air Force career. A characteristic report described him as "the most professional and highly motivated officer I have had on my crew." Id. at 375. Another called him the reporter's "most professional officer!" Id. at 369. He flew 25 combat missions in Operation Desert Storm. Brief of Appellant 12.

Four fellow officers and friends also testified on Captain Richenberg's behalf at the Board of Inquiry, praising his abilities and performance. All four attested to his honesty, integrity, and discipline, as well as to his dedication and loyalty to the Air Force. One of these officers, Captain Yaphe, testified that he had told a fellow officer a month before the hearing that he had no reason to believe that Captain Richenberg would not abstain from homosexual conduct if he said he would. Appellant's App. 263.

The government introduced no evidence that called any of this testimony into question. Nor did the Board of Inquiry explain its finding that Captain Richenberg had [**27] failed to rebut the presumption. In fact, the Board of Inquiry devoted only a single line to the issue. ("The Board finds that the respondent does have a propensity to engage in homosexual acts.") Id. at 451. As things stand, we do not even know whether the Board found that Captain

Richenberg intended to violate military regulations, that he was likely to do so, or both. Without an explanation we are forced to rely upon those sources that are available to us, without the aid, for example, of the Board's evaluation of Captain Richenberg's demeanor at the hearing. It may be that the Board simply did not find Captain Richenberg to be credible. If so, it should say so and explain why, for it may also be that the Board impermissibly based its decision upon an assumption that homosexuals in general will not be able to abstain from prohibited conduct. Cf. *Hall v. Chater*, 62 F.3d 220 (8th Cir. 1995) (holding that ALJs who reject disability claimants' subjective complaints of pain must make express credibility finding and give reasons for disbelieving the testimony).

The Air Force Board of Review provided more explanation for the decision, but its reasoning is no more convincing. It [**28] relied upon Captain Richenberg's admission that he was physically attracted to men. Appellant's App. 458. This admission adds nothing to his admission of homosexuality. Were it enough to justify the Board's finding, the presumption would be effectively irrebuttable and, therefore, unconstitutional.

The Board of Review also discounted the testimony of Captain Richenberg's character witnesses because "none of [his] witnesses was asked about [his] behavior or to opine as to his propensity to commit homosexual acts." *Ibid*. Character witnesses in such proceedings will in general be able to testify, as Captain Yaphe did, only to a servicemember's sense of honor, duty, and discipline. Even if they cannot "opine" specifically as to his sexual propensities, they can say whether [**266] he is the kind of man who does what he promises to do. The record establishes that Captain Richenberg is that kind of man.

I would reverse the judgment of the District Court and remand with directions to grant Captain Richenberg's motion for summary judgment. In the alternative, I would remand the case to the District Court with instructions for it to remand to the Board of Inquiry for additional explanation [**29] of its decision. I express no view on the large constitutional questions discussed in this Court's opinion.

DATE: MARCH 4, 1998

CLIENT: IVEY

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CITATION: 88 F.3d 1280

88 F.3d 1280 printed in FULL format.

LIEUTENANT COLONEL JANE ABLE, PETTY OFFICER ROBERT HEIGLE,
 FIRST LIEUTENANT KENNETH OSBORN, SERGEANT STEVEN SPENCER,
 LIEUTENANT RICHARD von WOHL, and SEAMAN WERNER ZEHR,
 Plaintiffs-Appellees/Cross-Appellants, v. UNITED STATES OF
 AMERICA, WILLIAM J. PERRY, Secretary of Defense, FEDERICO F.
 PENA, Secretary of Transportation,
 Defendants-Appellants/Cross-Appellees.

Docket Nos. 95-6111, 95-6141

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

88 F.3d 1280; 1996 U.S. App. LEXIS 15737; 71 Fair Empl.
 Prac. Cas. (BNA) 419; 68 Empl. Prac. Dec. (CCH) P44,233

January 16, 1996, Argued
 July 1, 1996, Decided

Con Law
 CHALLENGE
 (4) REMANDED

PRIOR HISTORY: [**1] Plaintiffs raised various challenges to 10 U.S.C. @ 654(b) (@ 571(b) of the National Defense Authorization Act for the Fiscal Year 1994 (the "Act")), by which Congress enacted the so-called "Don't Ask, Don't Tell" policy of the Department of Defense regarding the presence of homosexuals in the military. The United States District Court for the Eastern District of New York (Nickerson, J.), in an opinion reported at 880 F. Supp. 968 (E.D.N.Y. 1995), granted judgment in favor of the plaintiffs and held that @ 654(b)(2) violates the First and Fifth Amendments to the Constitution. Defendants appeal from that judgment. They argue that the district court's holding that @ 654(b)(2) is unconstitutional was erroneous both on the merits and because plaintiffs had failed to exhaust their administrative remedies. Plaintiffs contend that the district court's holding that @ 654(b)(2) is unconstitutional is correct and should be affirmed. Plaintiffs cross-appeal from so much of an earlier district court order that dismissed their claim challenging the constitutionality of @ 654(b)(1). Plaintiffs argue that, contrary to the district court's holding, they had standing to challenge @ 654(b)(1) [**2] and that this court should reach that issue and hold that subsection unconstitutional. Defendants contend that the district court, in declining to entertain plaintiffs' challenge to @ 654(b)(1), properly exercised its discretion and that, in any event, @ 654(b)(1) is constitutional. We agree with the district court that, in this facial challenge to the Act, the plaintiffs did not have to exhaust their administrative remedies. However, we conclude that the district court erred when it dismissed plaintiffs' @ 654(b)(1) claim for lack of standing and we remand that claim to the district court. We reject the district court's reasons for holding @ 654(b)(2) unconstitutional, but, because we hold that the constitutionality of @ 654(b)(2) necessarily depends upon whether @ 654(b)(1) is constitutional, an issue we remand to the district court, we remand the @ 654(b)(2) claim for further consideration as well.

DISPOSITION: Vacated and remanded.

COUNSEL: EDWIN S. KNEEDLER, Deputy Solicitor General, Washington, DC (Zachary W. Carter, United States Attorney, Brooklyn, NY, Frank W. Hunger, Assistant Attorney General, Anthony J. Steinmeyer, John C. Hoyle, E. Roy Hawken, Edward Himmelfarb, Lowell V. Sturgill [**3] Jr., Department of Justice, Washington, DC, Maj. Douglas Mickle, United States Army, Arlington, VA, on the brief), for

Defendants-Appellants/Cross-Appellees.

MATTHEW A. COLES, New York, NY (Ruth E. Harlow, Marc E. Elovitz, American Civil Liberties Union Foundation, Beatrice Dohrn, Evan Wolfson, Lambda Legal Defense & Education Fund, David H. Braff, Michael Lacovara, Penny Shane, Edward Harris, Ann Kenny, Michael Johnson, New York, NY, on the brief), for Plaintiffs-Appellees/Cross-Appellants.

(Melissa Wells-Petry, Washington, DC, on the brief), for Amicus Curiae Family Research Council.

(Arthur A. Schulcz, Sr., Vienna, VA, on the brief), for Amici Curiae Iamoi, Inc. and The Iota Legal Defense Fund.

(Karen Honeycutt, James D. Esseks, Vladeck, Waldman, Elias & Engelhard, P.C., New York, NY, on the brief), for Amicus Curiae Servicemembers Legal Defense Network.

(Franklin Poul, Dana B. Klinges, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, PA, on the brief), for Amicus Curiae The Unitarian Universalist Association.

(Chai R. Feldblum, Washington, DC, on the brief), for Amici Curiae The Human Rights Campaign Fund, The Union of American Hebrew Congregations, [**4] The American Jewish Congress, The United Church of Christ Office for the Church in Society, The NOW Legal Defense and Education Fund, The Center for Women Policy Studies, The National Gay and Lesbian Task Force, The National Lesbian and Gay Law Association, and Gay and Lesbian Advocates and Defenders.

JUDGES: Before: FEINBERG, WALKER, and LEVAL, Circuit Judges.

OPINIONBY: WALKER

OPINION:

[*1283] WALKER, Circuit Judge:

This appeal concerns the constitutionality of 10 U.S.C. @ 654, the popularly termed "Don't Ask, Don't Tell" policy governing the participation of homosexuals in military service, and the accompanying directives issued by the Department of Defense ("DoD") and the Secretary of Transportation. The genesis of this legislation lay in a much-publicized debate, both in government and society at large, over whether homosexuals should be permitted to serve in the military and under what conditions such service should take place. Although there has been a great deal of litigation in the federal courts over the former policy, we are one of the first appellate courts to address the recent Congressional enactment, which is the first statute to address directly whether and when homosexuals may [**5] serve in the military.

Defendants United States of America, William J. Perry, and Federico F. Pena (collectively the "United States" or the "government") appeal from the judgment of the United States District Court for the Eastern District of New York (Eugene H. Nickerson, District Judge), which held that 10 U.S.C. @ 654(b)(2) (the "statements presumption") (enacted as @ 571(b)(2) of the National Defense Authorization Act for the Fiscal Year 1994 (the "Act")) violated both the Free

Speech Clause of the First Amendment to [*1284] the Constitution and the Equal Protection Clause of the Fourteenth Amendment, as applied against the United States under the Fifth Amendment. See *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995). The government contends that the district court failed to accord the judgments of Congress and the military proper deference in deciding the eligibility requirements for military service and that, under the correct standard, @ 654(b)(2) is constitutional. The government also argues that plaintiffs' action is barred by their failure to exhaust their administrative remedies.

Plaintiffs Lieutenant Colonel Jane Able, n1 Petty Officer Robert Heigle, n2 First [**6] Lieutenant Kenneth Osborn, Sergeant Steven Spencer, Lieutenant Richard von Wohld, and Seaman Werner Zehr, who are all homosexuals serving in either the armed forces or the Coast Guard, cross-appeal from so much of the district court's judgment as dismissed their claim that 10 U.S.C. @ 654(b)(1) (the "acts prohibition") (enacted as @ 571 (b)(1) of the Act) violates the First and Fifth Amendments. n3 The plaintiffs argue that they do have standing and that this court must address the constitutionality of @ 654(b)(1) because the government's argument that the statements presumption of @ 654(b)(2) is constitutional is premised on the validity of the acts prohibition of @ 654(b)(1). The government does not dispute that the plaintiffs have standing, but contends that the district court properly exercised its discretion in not reaching the challenge to @ 654(b)(1) and that, in any event, @ 654(b)(1) is constitutional.

- - - - -Footnotes- - - - -

n1 "Jane Able" is a pseudonym for a lesbian who is a Lieutenant Colonel currently serving in the United States Army Reserves.

n2 "Robert Heigle" has, at various times in this litigation, also been referred to as "Robert Heigl." For purposes of this opinion, we will refer to him by the name given in the caption. [**7]

n3 The plaintiffs' notice of appeal states that they also appeal from the district court's decision that they lacked standing to challenge the entire act as violating their right to engage in expressive association. To the extent that such a claim differs from their challenges to @ 654(b)(1) & (2), raised in their briefs on appeal, we deem it to have been waived.

- - - - -End Footnotes- - - - -

We agree with the plaintiffs that they have standing to challenge @ 654(b)(1). We also agree that the plaintiffs were not required to exhaust their administrative remedies before bringing this action. We reject, however, the district court's reasons for holding @ 654(b)(2) to be unconstitutional and, for the reasons stated below, we remand the case to the district court for further consideration of the plaintiffs' challenges to @ 654(b)(1) and (2) in accordance with this opinion.

I.

A.

In January 1993, President Clinton directed the Secretary of Defense to review the DoD's policy (the "former policy") concerning the service of homosexuals in the military. Under the former policy, promulgated by the DoD in 1982, see 47 Fed. Reg. 10,162 [**8] (1982), a service member was to be separated from the armed forces

if one or more of the following approved findings is made:

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

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

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

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

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the [**9] same [*1285] biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

32 C.F.R. pt. 41, app. A, pt. 1, at H.c (1992).

President Clinton's directive prompted not only a DoD review but extensive hearings in both houses of Congress on the question of military service by homosexuals. See, e.g., S. Rep. No. 112, 103d Cong., 1st Sess. 269-70 (1993). Several months later, President Clinton announced a new policy, which formed the basis for @ 654. In the Act, Congress grounded its decision to enact @ 654 in fifteen separate findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide

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88 F.3d 1280, *1284; 1996 U.S. App. LEXIS 15737, **7; LEXSEE
71 Fair Empl. Prac. Cas. (BNA) 419; 68 Empl. Prac. Dec. (CCH) P44,233

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if one or more of the following approved findings is made:

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

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

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

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

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the [**9] same [*1285] biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

32 C.F.R. pt. 41, app. A, pt. 1, at H.c (1992).

President Clinton's directive prompted not only a DoD review but extensive hearings in both houses of Congress on the question of military service by homosexuals. See, e.g., S. Rep. No. 112, 103d Cong., 1st Sess. 269-70 (1993). Several months later, President Clinton announced a new policy, which formed the basis for @ 654. In the Act, Congress grounded its decision to enact @ 654 in fifteen separate findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide

5654

and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

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

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, [**10] it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

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

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

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

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

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

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist [**11] as a specialized society; and

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

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

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a

military status, whether the member is on base or off base, and whether the member is on duty or off duty.

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

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

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

(14) The armed forces must maintain personnel policies that exclude persons whose [*1286] 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.

10 U.S.C. @ 654(a). Based on these findings, Congress provided that a service member would be separated from the armed forces, pursuant to regulations to be promulgated by the Secretary of Defense under @ 654(b), [**13]

if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

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

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

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

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

intimidation;

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

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

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

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. @ 654(b). On November 30, 1993, President Clinton signed the Act into law and the DoD subsequently issued new directives implementing the policy. See DoD Directive No. 1304.26 (qualification standards for enlistment, appointment, and induction); DoD Directive No. 1322.18 (military training); DoD Directive No. 1332.14 (separation of enlisted personnel); DoD Directive No. 1332.30 (separation of regular commissioned officers); DoD Instruction No. 5505.8 (investigations of sexual misconduct by DoD law enforcement organizations).

A comparison of the former policy with the Act and the new Directives (the "new policy") reveals that the grounds for separation under the two are virtually identical. Both policies require the separation of a service member when he or she (i) has engaged in a homosexual act, (ii) has stated that he or she is a homosexual or bisexual, or (iii) has married or attempted to marry a person known to be of the same biological sex. Each policy also provides for exceptions to the first and second grounds for separation if the appropriate tribunal makes certain findings.

Nevertheless, the new policy did result in substantial changes in several other areas. First, it clarifies that its purpose is to ensure that homosexual acts will not be committed by service members. It is not aimed at the separation of homosexuals based on status alone. DoD Directive No. 1332.14, encl. 3, pt. 1, at H.1.b(2). Second, the new policy sharply restricts the circumstances under which the military authorities may initiate an investigation of a service member. For instance, Instruction No. 5505.8 restricts the ability of the military to investigate its own members for homosexual conduct without some cause, stating that "no . . . DoD law enforcement organization shall conduct an investigation solely to determine whether a Service member is a heterosexual, a homosexual, or a bisexual" and that a "DoD law enforcement organization shall not initiate a criminal investigation into adult private consensual sexual misconduct where such misconduct is the only offense involved," unless (1) a "commander determines that there is credible information of adult

private consensual sexual misconduct," or (2) the commander or director of a defense criminal investigation organization determines that there is credible information of such conduct.

Finally, the new policy also requires that all applicants, as well as all service members, be informed of the existence and content of the new policy. Military authorities are restricted as to what, if anything, they may ask applicants concerning their sexual orientation:

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.

Directive No. 1304.26, encl. 1, at B.8.a. n4

- - - - -Footnotes- - - - -

n4 The Coast Guard implemented a similar policy. See Letter from Federico Pena, Secretary of Transportation, to Commandant, United States Coast Guard (Mar. 15, 1994).

- - - - -End Footnotes- - - - -

[**17]

B.

On March 7, 1994, the plaintiffs filed this action to challenge the constitutionality of @ 654. On that date they also moved for a temporary restraining order and a preliminary injunction. Soon thereafter, the government initiated an investigation of Heigle, based on his admission in the complaint in this action that he was a homosexual. The government opposed the plaintiffs' motion for preliminary relief and filed its own motion to dismiss the complaint for failure to state a claim. On April 4, 1994, the district court rejected the government's argument that the plaintiffs had failed to exhaust their administrative remedies and preliminarily enjoined the government from investigating, discharging, or taking any other adverse or punitive actions against any of the plaintiffs based on their identification of themselves as homosexuals in connection with this litigation. See *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y. 1994). Subsequently, the government informed the plaintiffs that it intended to initiate separation proceedings against two other plaintiffs, Spencer and Zehr, based on their admissions of their homosexuality prior to the initiation of this lawsuit. Thereafter, [**18] on June 3, 1994, the district court issued a second order enjoining the government from investigating, discharging, or taking any other adverse or punitive actions against the plaintiffs based on their identification of themselves as homosexuals, whether or not connected to this litigation. *Able v. United States*, No. 94 CV 0974 (E.D.N.Y. June 3, 1994).

The United States appealed from the district court's orders. In a per curiam opinion, we remanded the case to the district court. See *Able v. United*

States, 44 F.3d 128 (2d Cir. 1995) (per curiam). We determined that the district court had applied the wrong standard in deciding to issue the preliminary injunctions. Nonetheless, we stayed the lifting of the preliminary injunctions pending an expedited trial on the merits, to occur within three months of our decision. Id. at 132-33.

On September 22, 1994, while the appeal of the preliminary injunction orders was pending in this court, the district court ruled on the government's motion to dismiss. The district court again rejected the government's exhaustion argument and declined to dismiss the plaintiffs' equal protection, free speech, and expressive association claims. [**19] *Able v. United States*, 863 F. Supp. 112, 114-15 (E.D.N.Y. 1994). However, the district court did find in the government's favor that (i) the plaintiffs lacked standing to bring a claim that the Act violates their rights to intimate association and (ii) the Act was not unconstitutionally overbroad or vague. Id. at 115-16. The government sought, and was denied, certification for an immediate appeal. See *Able v. United States*, 870 F. Supp. 468 (E.D.N.Y. 1994).

Following the remand from this court, the district court set the case for trial. Before trial, the district court entered judgment dismissing the plaintiffs' challenge to [*1288] @ 654(b)(1) and (3), as well as their claim that the Act violated their rights to expressive association, on the ground that the plaintiffs lacked standing to bring those claims. n5 *Able v. United States*, No. 94 CV 0974, 1995 WL 116322 (E.D.N.Y. Mar. 14, 1995). The district court tried the case over four days beginning on March 13, 1995 and, on March 30, issued its memorandum and order holding that @ 654(b)(2) violated both the First and Fifth Amendments. This appeal and cross-appeal followed.

- - - - -Footnotes- - - - -

n5 On appeal, the plaintiffs expressly abandoned their @ 654(b)(3) claim.

- - - - -End Footnotes- - - - -

[**20]

II.

The government first argues that this action is barred because the plaintiffs failed to challenge the Act through separation proceedings.

A.

It is the general rule that "'a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.'" *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995) (quoting *Guitard v. United States Secretary of Navy*, 967 F.2d 737, 740 (2d Cir. 1992)). n6 However, we have also held that exhaustion "'may not be required when: (1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain instances a plaintiff has raised a substantial constitutional question.'" Id. (quoting *Guitard*, 967 F.2d at 741). n7 The district court found that exhaustion was not required because "the plaintiffs raise constitutional questions and irreparable injury [would] occur." *Able*, 847 F. Supp. at 1043; see also *Able*, 863 F. Supp.

at 114. The government argues that the plaintiffs have failed to show an irreparable injury [**21] that would obviate the need for exhaustion and that the exhaustion doctrine applies to the consideration of the constitutional questions raised in this case.

- - - - -Footnotes- - - - -

n6 Of course, in the present case no "adverse administrative determination" has yet occurred because the district court has enjoined all separation proceedings against the plaintiffs. But even where an adverse determination has not yet been made, a party may still be required to exhaust its administrative remedies. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 82 L. Ed. 638, 58 S. Ct. 459 (1938) (doctrine of exhaustion of remedies applied where NLRB had filed complaint against company but had not yet held hearing on complaint).

n7 The Supreme Court, in *Darby v. Cisneros*, 509 U.S. 137, 125 L. Ed. 2d 113, 113 S. Ct. 2539 (1993), held that the Administrative Procedure Act places further restrictions on the applicability of the exhaustion of administrative remedies doctrine, but none of those restrictions applies here. See *Howell*, 72 F.3d at 291.

- - - - -End Footnotes- - - - -

The Supreme Court has been inconsistent in [**22] its jurisprudence concerning the "constitutionality" exception to the exhaustion requirement. As the government notes, the Court held in *W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 312, 19 L. Ed. 2d 546, 88 S. Ct. 450 (1967) (per curiam), that the presence of constitutional issues alone does not create an automatic exception to the exhaustion requirement. On the other hand, the Court has also indicated that "constitutional questions obviously are unsuited to resolution in administrative hearing procedures" and that "when constitutional questions are in issue, the availability of judicial review is presumed." *Califano v. Sanders*, 430 U.S. 99, 109, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977). However, we need not determine whether that exception applies in this case, for it is clear to us that the exception to the exhaustion requirement for irreparable injury does apply.

The plaintiffs here are alleging violations of their First Amendment right to free speech. Both the Supreme Court and this court have held that even minimal impairments on this right create irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); [**23] *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (same). The government attempts to distinguish these precedents on the ground that the First Amendment has a "different and [*1289] substantially less stringent application in the military than it does in civilian life." Brief for the Appellants/Cross-Appellees at 15. This argument, however, places the cart before the horse. As we note herein, the First Amendment is indeed considerably less restrictive on government action in the military than in other spheres. But, in conducting our "irreparable injury" inquiry, we must assume, arguendo, unconstitutional government action and, under this assumption, the violation of the First Amendment is no less harmful to a military plaintiff than a civilian one.

Even if the irreparable injury exception did not apply, we believe that the district court would still have been required to apply the futility exception to the exhaustion requirement. The plaintiffs challenge the Act on its face. Such a challenge does not necessitate significant fact-finding for its resolution. See, e.g., *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987) (In a facial challenge, "the challenger must establish [**24] that no set of circumstances exists under which the Act would be valid."). The plaintiffs do not argue that the Act is invalid only as applied to them; instead, they admit that they are homosexual, and they do not claim that the exceptions to separation under the Act will apply to them. At trial, the government did offer into evidence information regarding three administrative proceedings in which military members had been retained by the military despite making statements identifying themselves as homosexuals. But, as the district court noted, in each one of those cases the member had stated that he or she had not engaged in and did not intend to engage in homosexual acts. *Able*, 880 F. Supp. at 976. The plaintiffs make no such contention and, because none of the administrative boards before which the plaintiffs would appear has the power to declare the Act unconstitutional, there is no realistic possibility that such proceedings would result in anything other than the plaintiffs' discharge. Accordingly, we find that the plaintiffs need not exhaust their administrative remedies because such proceedings would be futile. See *Steffan v. Cheney*, 733 F. Supp. 115, 119-20 (D.D.C. [**25] 1989). Compare *Steffan v. Perry*, 309 U.S. App. D.C. 281, 41 F.3d 677, 694-95 (D.C. Cir. 1994) (en banc) (noting that exhaustion might be required in "as-applied" challenge to former policy), with *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1477 (9th Cir. 1994) (applying futility exception in another "as-applied" challenge).

B.

Although the government styles its argument as one for the exhaustion of remedies, the government actually contends that the suit is premature because the military has not yet definitively applied the policy to the plaintiffs and they will have the opportunity to present witnesses and evidence before an administrative board. We view this as an invocation of the ripeness doctrine, the purpose of which "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreement over administrative policies, and also to protect those agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). Ripeness reflects the concerns, articulated by the government here, that courts [**26] (1) involve themselves only in "problems that are real and present or imminent" and (2) not "intrude excessively on the policymaking domains of the politically accountable Branches" by allowing judicial review "only when the government's position has crystallized to the point at which a court can identify a relatively discrete dispute." 2 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* @ 15.12, at 360 (2d ed. 1994). Thus, "at its core, the ripeness requirement is based on the jurisdictional limit in Article III." *Id.*

We have looked to a variety of factors in determining whether a case is ripe for judicial determination, including (1) whether the issue to be reviewed is more legal or factual in nature, (2) whether the agency action is likely to have an immediate and substantial impact upon the complaining party, (3) whether judicial review would delay or impede [**1290] effective enforcement of the

relevant administrative scheme, (4) whether the agency's actions are final, and (5) whether an adequate factual record has been established. See, e.g., *Occidental Chem. Corp. v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989); *Seafarers Int'l Union v. United States Coast Guard*, 736 F.2d 19, 25-27 (2d Cir. 1984); *Aquavella v. Richardson*, 437 F.2d 397, 403-04 (2d Cir. 1971). The Supreme Court has articulated the gravamen of the inquiry to be "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Lab.*, 387 U.S. at 149; see *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Env'tl. Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996).

We have no difficulty in concluding that this controversy is ripe for judicial consideration. First, because this is a facial challenge to the Act, the issues before us are primarily legal, and not factual, in nature. In a facial challenge, we need only consider whether there are any circumstances under which the prohibitions of the Act are permissible in order to uphold the Act. We are not called upon by either party to consider any facts particular to the plaintiffs' situations. Further, the government has promulgated regulations interpreting the Act, which are entitled to deference from us. See *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Resort to administrative proceedings would not result [**28] in further clarification of the Act beyond that which the government has already provided.

We also have little difficulty in finding that, if the plaintiffs' constitutional claims have merit, the plaintiffs would suffer greater hardship if judicial review is withheld than would the government if it is not. As we noted above, the plaintiffs are alleging a violation of their free speech rights and both this court and the Supreme Court have found such violations to constitute irreparable injury. The government does not point to any similar irreparable injury that it suffers by allowing this litigation to go forward.

Presumably, the government suffers some injury because at least three of the plaintiffs would have been either discharged or subject to separation proceedings had the district court not entered its preliminary injunctions. But the government has not advanced any such claim on this appeal and, in any event, such an allegation would be frivolous as to Able because the government does not know her identity. Indeed, under the government's theory, Able is presented with an impossible choice: she must either (1) come forward, publicly identify herself as a homosexual, and inevitably [**29] be discharged, or (2) stay silent, never identify herself as a homosexual, and forever be barred from asserting her alleged free speech rights. Accordingly, because this case is ready for judicial determination and because the plaintiffs necessarily would be harmed were we to withhold judicial review, we find that the ripeness requirement has been met.

III.

Section 654(b)(1) provides that a service member who "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts" will be discharged unless there is a further finding that, among other things, "the member does not have a propensity or intent to engage in homosexual acts." The plaintiffs challenge this prohibition on the ground that it violates their constitutional right to equal protection of the laws.

The district court dismissed the plaintiffs' challenge on the ground that they lacked standing. See *Able*, 1995 WL 116322 at * 3-4. The plaintiffs argue that they have standing and that, because the government's free speech argument in support of the constitutionality of @ 654(b)(2) is founded upon the premise that the prohibition on acts under subsection (b)(1) is constitutional, we [**30] must necessarily reach that issue in order to rule upon the constitutionality of subsection (b)(2). The government does not deny that the plaintiffs have standing, but posits that the district court properly exercised its discretion in refusing to reach the @ 654(b)(1) issue because the case had developed as a challenge only to @ 654(b)(2). Alternatively, the government contends that @ 654(b)(1) is constitutional.

[*1291] A.

To satisfy the constitutional requirement of standing, a plaintiff must demonstrate (1) "an injury in fact," (2) "a causal connection between the injury and the conduct complained of," and (3) that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (internal quotations omitted); see *Rockefeller v. Powers*, 74 F.3d 1367, 1375-76 (2d Cir. 1996), cert. denied, 134 L. Ed. 2d 802, 116 S. Ct. 1703, 116 S. Ct. 1704 (U.S. 1996). To show an "injury in fact," the plaintiff must have suffered "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal [**31] quotations and citations omitted).

The plaintiffs here have alleged that they are injured because, unless @ 654(b)(1) is held to be unconstitutional, they will be barred from engaging in homosexual acts. The district court found that this allegation of injury was insufficient to meet the requirements of standing because "the court cannot assume that plaintiffs would be able to find third-party participants." *Able*, 1995 WL 116322, at * 4. The district court erred, however, in its conclusion that the identification of third-party participants in homosexual acts with plaintiffs was necessary to show an injury in fact.

In a case in which the plaintiff has brought an equal protection challenge, "the injury in fact" . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Northeastern Florida Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993); see *Rockefeller*, 74 F.3d at 1376. Thus, we have held that standing has been shown where "(1) there exists a reasonable likelihood that the plaintiff is in the disadvantaged group, (2) there exists a government-erected [**32] barrier, and (3) the barrier causes members of one group to be treated differently from members of the other group." *Comer v. Cisneros*, 37 F.3d 775, 793 (2d Cir. 1994). Plaintiffs' equal protection challenge to @ 654(b)(1) is that homosexuals are being illegally discriminated against because the military punishes sexual acts differently, depending on whether they are engaged in by same sex or opposite sex partners. Under the circumstances of this case, we believe that the standing requirement is met.

First, each plaintiff states that he or she is a homosexual, and thus a member of the allegedly disadvantaged group. Second, because @ 654(b)(1)

states that a member who "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts" is to be separated unless certain other conditions are met, there is a government-imposed barrier to homosexual conduct. Finally, there is no doubt that the Act treats homosexuals and heterosexuals differently even though they have engaged in similar acts within a broad range (from handholding to intercourse). We therefore reverse the district court's finding that the plaintiffs lack standing to challenge @ 654(b)(1).
[**33]

B.

The district court also dismissed the challenge to @ 654(b)(1) on the ground that "the case has developed as a narrow challenge to" the statements presumption and that "it would be improvident to allow . . . a profound transformation of the case" by allowing the plaintiffs to challenge the acts prohibition. Able, 1995 WL 116322 at * 5. To be sure, a district court does have "broad discretion in managing a trial." HBE Leasing Corp. v. Frank, 22 F.3d 41, 45 (2d Cir. 1994). However, the district court's dismissal of what amounts to half of the plaintiffs' case on this ground was premised on a misperception of what had occurred. While it is true that the recent litigation had focused on the statements presumption, that was only because the military had instituted discharge proceedings against several of the plaintiffs on the basis of their statements; the plaintiffs responded by seeking preliminary injunctive protection from discharge based on the asserted unconstitutionality of the statements presumption. The plaintiffs' motion [*1292] for a preliminary injunction, necessarily addressed to the statements presumption, in no way relinquished their challenge to the acts prohibition, [**34] which they had asserted from the outset. The challenge to the acts prohibition remained central to the plaintiffs' case. Under the circumstances there was no valid basis for the district court's conclusion that the scope of the action had been transformed.

Beginning with the filing of the initial complaint a year prior to trial, the plaintiffs have challenged the constitutionality of @ 654(b)(1). Nothing in any of the plaintiffs' subsequent filings with either the district court or this court has evidenced an intent to relinquish that claim. Indeed, the complaint and the amended complaint plainly state that they are challenges to the Act, and not just to any particular subsections thereof: the plaintiffs explicitly noted that the "Act requires that a member of the armed forces shall be separated from service . . . if the service member . . . has engaged or attempted to engage in a 'homosexual act.'" It is difficult for us to imagine what more the plaintiffs could have done to inform the district court and the government that it was challenging subsection (b)(1) as well as subsection (b)(2).

The district court believed that our previous decision on the appeal from the preliminary [**35] injunctions somehow intended for the trial to cover only @ 654(b)(2) because of the abbreviated schedule we gave the parties and the district court. Able, 1995 WL 116322, at * 5. Nothing in our prior opinion supports this speculation, however. It is true that the only issue before us at the time of the previous appeal was the propriety of the district court's injunction of the separation proceedings on the ground that the plaintiffs had demonstrated a sufficiently serious question as to whether the statements presumption of subsection (b)(2) was constitutional. See Able, 847 F. Supp. 1038. In remanding the case, we did not limit the trial to a single claim;

rather, we specifically noted that "the district court could decide the merit of plaintiffs' claims within a short period of time." 44 F.3d at 132 (emphasis added).

The claim that @ 654(b)(1) is unconstitutional lies at the heart of the plaintiffs' challenge to the Act. As we hold in Part IV, *infra*, the district court's decision that subsection (b)(2) is unconstitutional even if the acts prohibition of subsection (b)(1) is constitutional was erroneous. The subsections rise or fall together: if Congress is permitted [**36] to require that service members be discharged if they engage in homosexual acts, then both subsections are constitutional, but if the Constitution prohibits such a requirement, then the statements presumption of subsection (b)(2) must fall as well. Therefore, we believe that the district court's dismissal of the plaintiffs' claim under subsection (b)(1) was not a proper exercise of the district court's discretion.

C.

Both parties invite us to address the merits of the challenge to @ 654(b)(1) even though the issue has not been tried in the district court. We decline the invitation. We believe that, in a case in which the district court has erroneously dismissed an essential component of a plaintiff's claim for jurisdictional reasons prior to trial, it is generally unwise for us to decide the merits of that claim on an appeal from the dismissal. This is particularly true in this case where the plaintiffs have raised important constitutional questions as to the appropriate level of scrutiny to be applied to equal protection claims made by homosexuals, see *Romer v. Evans*, 134 L. Ed. 2d 855, 116 S. Ct. 1620, 1996 WL 262293 (U.S. May 20, 1996), and how any such test should be applied in the military context. Accordingly, [**37] the case is remanded for trial on the plaintiffs' challenge to @ 654(b)(1), as well as for reconsideration of the plaintiffs' challenge to @ 654(b)(2), as will be seen below.

IV.

We now turn to the core issue of this appeal: the constitutionality of @ 654(b)(2). The district court concluded that subsection (b)(2) violated the First Amendment. It reasoned that even if the constitutionality of @ 654(b)(1) is assumed, the statements presumption of @ 654(b)(2) unconstitutionally [**1293] "burdens speech based solely on its content" and "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." *Able*, 880 F. Supp. at 976. In this appeal, the government argues that @ 654(b)(2) is not a burden on speech at all, but that the Act burdens homosexual conduct and only uses the speech as evidence that tends to prove homosexual conduct. The government argues further that, even if there is a burden on speech, any such burden easily passes constitutional muster in light of the more speech-restrictive standard that applies in the military context. [**38] We agree with the government that the district court's reasoning was erroneous but, for the reasons stated below, we remand this issue to the district court.

A.

Under the Constitution's allocation of responsibility, some functions necessarily implicating constitutional rights are largely committed to the political branches. The Supreme Court has noted that "we must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution.'" *Rostker v. Goldberg*, 453 U.S. 57, 64, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring)). This is especially true when we review congressional decisionmaking in the area of military affairs. The formulation and effectuation of military policy is entrusted by the Constitution to Congress and the Executive. *Goldman v. Weinberger*, 475 U.S. 503, 508, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986). For instance, Article I grants Congress the power to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I., [*39] @ 8. Article II similarly grants the Executive power over military affairs, stating that the President is the "Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, @ 2.

The Supreme Court has recognized that "the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974); see *Orloff v. Willoughby*, 345 U.S. 83, 94, 97 L. Ed. 842, 73 S. Ct. 534 (1953). The military's overriding duty is to prepare for and to fight our nation's battles, *Parker*, 417 U.S. at 743, a mission that requires that each individual subordinate personal desires and interests to the common goal. *Orloff*, 345 U.S. at 92. In the context of this requirement of individual self-sacrifice to collective needs, the military "must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman*, 475 U.S. at 507.

As judges, we are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." *Id.* (quoting *Chappell v. Wallace*, 462 U.S. 296, 305, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983)). Deference to Congress in military matters of course does not mean that Congress operates free of all constitutional [*40] restraint when legislating in this area. *Rostker*, 453 U.S. at 67. Nor does it mean that the courts have license to avoid deciding constitutional questions posed by litigants. *Id.* However, the Supreme Court has repeatedly reminded us that "judicial deference . . . 'is at its apogee' when reviewing congressional decisionmaking in this area." *Weiss v. United States*, 510 U.S. 163, 127 L. Ed. 2d 1, 114 S. Ct. 752, 760-61 (1994) (quoting *Rostker*, 453 U.S. at 70); see also *Solorio v. United States*, 483 U.S. 435, 447, 97 L. Ed. 2d 364, 107 S. Ct. 2924 (1987); *Goldman*, 475 U.S. at 507-08; *Chappell v. Wallace*, 462 U.S. 296, 301, 76 L. Ed. 2d 586, 103 S. Ct. 2362 (1983). Cf. *Department of the Navy v. Egan*, 484 U.S. 518, 530, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988) ("Unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military . . . [*1294] affairs."). Thus, "our review of military regulations . . . is far more deferential than constitutional review of similar laws or regulations designed for civilian society," *Goldman*, 475 U.S. at 507, and "the tests and limitations to be applied may differ because of the military context," *Rostker*, 453 U.S. at 67.

These principles have found concrete expression in the [**41] Supreme Court's treatment of free speech challenges in the military context. The Supreme Court first addressed the application of First Amendment freedoms to the armed services in *Parker v. Levy*, 417 U.S. 733, 758, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974), in which the Court denied an overbreadth challenge to several punitive provisions of the Uniform Code of Military Justice, on the basis that the overbreadth doctrine has a "different application" in the military context. Soon thereafter, the Court upheld a prohibition on speeches and political demonstrations by civilians on military bases because of the "special constitutional function of the military in our national life." *Greer v. Spock*, 424 U.S. 828, 837, 47 L. Ed. 2d 505, 96 S. Ct. 1211 (1976). Later, in *Brown v. Glines*, 444 U.S. 348, 355, 62 L. Ed. 2d 540, 100 S. Ct. 594 (1980), the Supreme Court upheld the removal from active duty of an Air Force Reserves officer who, without the permission of his base commander and in violation of Air Force regulations, circulated a petition criticizing Air Force grooming standards. The Supreme Court reasoned that the regulations "restricted speech no more than [was] reasonably necessary to protect [a] substantial governmental interest." *Id.*

It is plain to us that governmental [**42] restrictions on speech that would run afoul of the Constitution if imposed in civilian life can pass constitutional muster in the military context. With this principle in mind, we turn to the merits of the plaintiffs' challenge.

B.

Under subsection (b)(2), a service member will be terminated from the armed forces if the member states that "he or she is a homosexual or bisexual or words to that effect." 10 U.S.C. @ 654(b)(2). The member can avoid termination under this subsection only if there is a further finding made by the appropriate military tribunal 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." *Id.* The DoD has interpreted the phrase "statement that a member is a homosexual or bisexual, or words to that effect" to include statements such as "I am a homosexual," "I am gay," "I am a lesbian," and "I have a homosexual orientation." DoD Directive 1332.30, encl. 8, at B.4.b. Such a statement need not be expressed in words, however, and it can include behavior that to a reasonable person would convey the message that the member engages in or has a [**43] propensity to engage in homosexual acts. *Id.* Because they have admitted to being homosexuals, the plaintiffs must be discharged unless they can show that they meet the above-stated exception. As we noted earlier, none of the plaintiffs claim that the exception applies.

The district court concluded that the statements presumption of @ 654(b)(2) impermissibly burdens speech because it is based on the substantive content of its message. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 132 L. Ed. 2d 700, 115 S. Ct. 2510, 2516 (1995). In effect, according to the district court, subsection (b)(2) subjects service members to discharge based on their self-identification as homosexuals.

A restriction that on its face appears to be content-based, yet serves another purpose that by itself is not speech restrictive, may be constitutionally permitted. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), the Court upheld over a First

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Amendment challenge a zoning ordinance which prohibited an adult movie theater from operating within 1,000 feet of a residential zone, church or park, or within one mile of any school. The Court said that while the ordinance did not appear to fit neatly [**44] into either the content-neutral or content-based categories, the controlling factor was the purpose of the city in enacting the legislation: the ordinance was "aimed not at the content of the films shown [*1295] at [the theaters], but rather at the secondary effects of such theaters on the surrounding community." Id. at 47. Because the ordinance was "designed to serve a substantial governmental interest and allowed for reasonable alternative avenues of communication," the Court found it to be constitutional. Id. at 50. See also *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 129 L. Ed. 2d 593, 114 S. Ct. 2516, 2523 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); *Pro-Choice Network v. Schenck*, 67 F.3d 377, 386 (2d Cir. 1995) (in banc); cf. *Boos v. Barry*, 485 U.S. 312, 320, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988) (finding statute to be content-based where the alleged secondary effect was "our international law obligation to shield diplomats from speech that offends their dignity").

In this case, the government maintains that any restriction on speech is incidental and wholly subservient to the restriction that the Act places on homosexual conduct. That subsection (b)(2) may restrict speech, based even on [**45] content, does not detract from its central purpose, according to the government, which is to prevent or discover homosexual acts. See *Thomasson v. Perry*, 80 F.3d 915, 932-33 (4th Cir. 1996). The plaintiffs, on the other hand, contend that the purpose of the statements presumption, notwithstanding the government's position, is to "keep gay men and lesbians silent about their identity." Brief of Appellees/Cross-Appellants at 21.

If we accepted the government's argument that the statements presumption is a content-neutral restriction on speech, it still must pass constitutional muster under the First Amendment. Content-neutral statutes are reviewed under different standards depending upon the facts of each case. See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 47-54 (1987). In *Wayte v. United States*, 470 U.S. 598, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985), the petitioner was prosecuted for violating the Military Selective Service Act after he reported to government officials that he did not intend to register. The petitioner argued that the government's passive enforcement policy, which prosecuted only those individuals who informed the government that they were violating the [**46] act, violated the First Amendment because it had an impermissible content-based impact on the speech of non-registrants. Id. at 610-11. The Court upheld the Justice Department's policy of selecting targets for prosecution under the selective service laws based on the targets' admissions that they had not registered for the draft, reasoning that this regime met the test of *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). A content-neutral speech-restricting statute is justified

[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Wayte, 470 U.S. at 611 (quoting *O'Brien*, 391 U.S. at 376). Assuming that the

government is correct that the statements presumption is content-neutral, then the third O'Brien factor would be met and thus the crucial inquiries would be (1) whether the statements presumption furthers a substantial governmental interest, [**47] and (2) whether the statements presumption restricts the plaintiffs' speech no more than is essential. See John H. Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1483 n.10, 1484 (1975) (noting that the first O'Brien factor is essentially swallowed up by the second and that the third factor determines whether the regulation is content-neutral or content-based).

In this case, however, we need not and do not decide whether the statements presumption is content-neutral or content-based for, in either case, we believe that it passes constitutional muster. If, as the government argues, the restriction on speech is an incidental by-product of a content-neutral regulation then it "restricts speech no more [**1296] than is reasonably necessary to protect [a] substantial governmental interest." Brown v. Glines, 444 U.S. at 355.

If, as the plaintiffs contend, the restriction is a content-based effort to silence gays and lesbians, and even if, in such a circumstance, the government has a higher burden of justification in the military context, we believe that it has met its burden. We are mindful of [**48] the general rule that applies in the non-military context that "a statute is presumptively inconsistent with the First Amendment if it imposes a . . . burden on speakers because of the content of their speech." Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 115, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991). But this presumption is a rebuttable one. The Court has made clear that a content-based restriction is nevertheless constitutional if it "is a precisely drawn means of serving a compelling state interest." Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980).

In the military context, however, as noted above, free speech rights are substantially diminished and the courts' deference to the views of Congress and the military as to the need for speech restrictions based on the requirements of discipline and readiness is high. Arguably, even a content-based restriction in the military context need only pass the test of Brown v. Glines. However, if we were to assume without deciding the question, that a content-based restraint would be unconstitutional in the military context unless it passed a higher threshold -- by substantially furthering an important governmental [**49] interest, see Thorne v. United States Dep't of Defense, 916 F. Supp. 1358, 1370 (E.D. Va. 1996), and is no more restrictive than necessary -- we would find the standard to have been met in this case.

C.

The statements presumption of subsection (b)(2) substantially furthers the government's interest (which we assume for purposes of our decision today to be an important interest) in preventing the occurrence of homosexual acts in the military, and, given the rational connection between the statement "I am a homosexual" and the likelihood that the declarant will commit homosexual acts, @ 654(b)(2) is no more restrictive than necessary. Thus, if the acts prohibition of subsection (b)(1) is constitutional (the issue to be decided on remand), we believe that the statements presumption of subsection (b)(2) does not violate the First Amendment.

1.

We find that the government has demonstrated that the statements presumption substantially furthers its important interest in preventing homosexual acts in the military. n8 Section 654(b)(2) requires the discharge of a service member even when there is no proof that the person actually engages in homosexual acts if the member has a propensity [**50] to engage in those acts. Although the Act does not define "propensity," the Directives specify that it 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." See, e.g., DoD Directive No 1332.14, encl. 3, pt. 1, at H.1.b(2). If the acts prohibition is constitutional, the government has an important interest in discharging those who are likely to engage in such acts. Stated another way, in the context of employment, the government may make a decision based on the likelihood that an individual will engage in prohibited activity, so long as the underlying prohibition is constitutional. See *Steffan v. Perry*, 309 U.S. App. D.C. 281, 41 F.3d 677, 688 (D.C. Cir. 1994) (en banc).

- - - - -Footnotes- - - - -

n8 Of course, we assume but do not decide that the interest which supports the acts prohibition is sufficient to withstand constitutional scrutiny. Our holding here is limited solely to whether the statements presumption furthers the governmental interest in preventing homosexual acts.

- - - - -End Footnotes- - - - -

[**51]

Section 654(b)(2) creates an evidentiary presumption that a person who identifies himself as a homosexual will engage in or is likely to engage in homosexual acts. This evidentiary use substantially furthers the government's interest because it is plain to us that there is a correlation between those who state that they are homosexual and [*1297] those who engage in homosexual acts. n9 See, e.g., *Watkins v. United States Army*, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting) ("To pretend that homosexuality . . . is unrelated to sexual conduct borders on the absurd."); cf. *United States v. Dinwiddie*, 76 F.3d 913, 926 n.10 (8th Cir. 1996) (Arnold, C.J.) (upholding evidentiary use of defendant's advocacy of violence against doctors who perform abortions to determine whether defendant had violated Freedom of Access to Clinic Entrances Act of 1994). There is an even stronger correlation, we think, between those who state that they are homosexuals and those who are at least likely to engage in such acts. *Steffan*, 41 F.3d at 686 ("The military may reasonably assume that when a member states that he is a homosexual, that member means that he either engages or is [**52] likely to engage in homosexual conduct."); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (The statement by an individual that he is a homosexual "is compelling evidence that [he] has in the past and is likely to again engage in [homosexual] conduct."), cert. denied, 494 U.S. 1004, 110 S. Ct. 1296, 108 L. Ed. 2d 473 (1990). But see *Richenberg v. Perry*, 73 F.3d 172, 174 (8th Cir. 1995) (Arnold, C.J., dissenting) (The presumption that a statement of homosexual identity equates with a propensity to act "appears to me to be at best questionable."). Thus, we believe that the prohibition on homosexual acts, if upheld, is also sufficient to sustain the prevention of such acts through discharging those likely to commit those acts.

APPROACHING
THE
ABSURD?

-Footnotes-

n9 This evidentiary use of a member's statement is not an innovation in the Act, but was present in the former policy as well. 47 Fed. Reg. 10,162, at 10,179 (1982).

-End Footnotes-

The district court reasoned that @ 654(b)(2) "reached speech that [did] not indicate acts" (and therefore would not substantially further [**53] the government's interest here) because @ 654(b)(2) mandates the discharge of members merely for evidencing an "orientation" regardless of whether they have engaged in or demonstrated a likelihood of engaging in prohibited acts. Able, 880 F. Supp. at 976. n10 The district court held that such a prohibition on non-act related speech was unconstitutional because homosexual orientation alone did not offend a governmental interest; indeed, according to the district court, it was now the policy of the military to allow persons of homosexual orientation to join the armed forces.

-Footnotes-

n10 The district court assumed that the separation of a service member only because he has a homosexual orientation would violate the Constitution because the separation would be based on status alone. See Able, 880 F. Supp. at 975 ("Defendants recognized that a policy mandating discharge of homosexuals merely because they have a homosexual orientation or status could not withstand judicial scrutiny."). For the purposes of our analysis, we assume that this is true; although the constitutionality of a discharge based on mere orientation is an unsettled question, see Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1476-77 (9th Cir. 1994) ("Construing the [former policy] to apply to the 'classification of being homosexual' clearly implicates equal protection."); see also Romer, 1996 WL 262293 (state constitutional amendment barring all government action designed to protect those with homosexual orientation violates the Equal Protection Clause), it is not one that we need resolve today.

-End Footnotes-

[**54]

The district court acknowledged that the Directives created a difference between a homosexual orientation and a propensity or likelihood to engage in homosexual acts. Nonetheless, the district court concluded that no such distinction exists and therefore held that the Act impermissibly allowed for discharge from military service based on status.

Because plaintiffs have mounted a facial challenge to the Act, they must show that, no matter how the Act is read, it punishes status and not conduct. See United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). n11 In addition, [*1298] because this is a challenge to the constitutionality of the Act, we are required to construe it "so as to avoid constitutional difficulties whenever possible." Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992); see United States v. Monsanto, 924 F.2d 1186, 1200 (2d Cir.), cert. denied, 502 U.S. 943, 112 S. Ct. 382, 116 L. Ed. 2d 333 (1991). The plaintiffs' burden here is amplified,

because the DoD's Directives define propensity to engage in homosexual conduct to mean a likelihood, and we are required to give deference to that definition. Chevron, 467 U.S. at 842-43.

- - - - -Footnotes- - - - -

n11 There is some dispute in the courts over whether Salerno requires that the plaintiff in a facial challenge show that there is no set of circumstances under which a statute is valid or whether it is sufficient that the plaintiff show that the statute would be invalid in a large percentage of cases. Compare Janklow v. Planned Parenthood, Sioux Falls Clinic, 134 L. Ed. 2d 679, 116 S. Ct. 1582 (U.S. Apr. 29, 1996) (Stevens, J., concurring in denial of petition for certiorari), with id. at 3724 (Scalia, J., dissenting from denial of petition for certiorari). We have held, however, that there must exist "'no set of circumstances . . . under which the [statute] would be valid,'" Giusto v. INS, 9 F.3d 8, 10 (2d Cir. 1993) (quoting Salerno, 481 U.S. at 745), and neither the plaintiffs nor the government has asked us to revisit that rule here.

- - - - -End Footnotes- - - - -

[**55]

Contrary to the district court, we do not believe that, in the context of a facial challenge, we may conclude that the Act equates status with propensity. To be sure, in most cases a member who admits to a homosexual orientation will eventually be separated from the armed forces. But that is because the evidentiary value of the admission is strongly linked to what it is used to prove: a likelihood of engaging in homosexual acts. The plaintiffs cannot prove and the district court cannot credibly maintain that there are no instances in which a person will be retained, despite admitting to a homosexual status, because there is no likelihood that he will engage in such acts. The Directives promulgated by the DoD in accordance with the Act specifically contemplate that such an event may occur. See DoD Directive No. 1332.14, encl. 3, pt. 1, at H.1.b(2). Furthermore, we do not minimize the fact that, as the government represented at oral argument without contradiction, in seven cases (out of forty-three attempts), service members have been able to rebut the presumption created by their admission and have been retained. While the district court considered these cases to be mere 'aberrations,' [**56] we believe that they demonstrate that the admission of homosexual status does not inevitably equate with a finding of propensity to engage in homosexual acts.

Amicus Family Research Council ("FRC") agrees with our interpretation of the Directives, but contends that "the provision in the DoD Directives that homosexual 'orientation . . . is not a bar to service or continued service,' is nowhere to be found in [Congress's] handiwork." Brief of Amicus Curiae FRC at 11 (quoting Able, 880 F. Supp. at 973-74). The FRC argues that the government's interpretation of the statute as limited to forbidding homosexual conduct is wrong and that the statute bars all those who are known to have a homosexual orientation. See also Thomasson, 80 F.3d at 937 (Luttig, J., concurring) (Congress intended to bar all known homosexuals, not just those likely to engage in homosexual acts). We disagree.

Contrary to the FRC's argument, the Act does not bar those who have a homosexual orientation but are not likely to engage in homosexual acts. Section 654(b) requires the discharge of a service member in three circumstances:

first, when the member has engaged in homosexual acts (unless certain other [**57] findings are made); second, when the member has stated that he is a homosexual, unless there is a further finding that the member does not engage in, attempt to engage in, or have a "propensity" to engage in homosexual acts; and third, when the member has married or attempted to marry a person of the same biological sex. 10 U.S.C. @ 654(b)(1)-(3). All three grounds for discharge are anchored in the need for a homosexual act, or at least the likelihood of such an act, before the member can be discharged. The only evidence to the contrary is the use of the word "propensity" in @ 654(b)(2), which Judge Luttig, concurring in Thomasson, construed to mean an "inclination." See Thomasson, 80 F.3d at 939 (Luttig, J., concurring). The difficulty with Judge Luttig's conclusion that the use of "propensity" indicates Congress' intention to discharge all service members with a known homosexual orientation, however, is that Congress failed to define what it meant by "propensity." While there is some evidence to support Judge Luttig's view that, when it used the term "propensity," Congress meant "orientation" or "inclination," there is also substantial evidence to support the government's [**58] position [*1299] that it means likelihood to engage in acts.

First, the other two restrictions of @ 654(b), the acts prohibition of subsection (b)(1) and the prohibition on gay marriage of subsection (b)(3), are based on actions taken by service members and not on their sexual orientations. Second, the detailed findings in support of the legislation make no reference to homosexual orientation; rather they refer to the "prohibition against homosexual conduct," 10 U.S.C. @ 654(a)(13), and the need to exclude those "who demonstrate a propensity or intent to engage in homosexual acts," 10 U.S.C. @ 654(a)(15). Moreover, Congress and the executive branch were fully aware at the time of the drafting of the Act that the Ninth Circuit had held that the discharge of service members based on their sexual orientation alone might be unconstitutional, see *Pruitt v. Cheney*, 963 F.2d 1160, 1164-66 (9th Cir.), cert. denied, 506 U.S. 1020, 121 L. Ed. 2d 581, 113 S. Ct. 655 (1992), and therefore both branches had good reason to settle on a standard that would avoid a potential constitutional infirmity. Indeed, the regulation which served as the basis for @ 654(b)(2) had stated that the statements presumption could only be overcome [**59] if the service member demonstrated that he was not a homosexual or bisexual. 32 C.F.R. pt. 41, app. A, at H.1.c(2) (1993). The Act, however, provides that a service member can overcome the presumption if he "demonstrates that he . . . is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. @ 654(b)(2). This change suggests to us that Congress intended to move away from the emphasis on homosexual orientation under the former policy and to substitute an act-based policy in its place.

If Congress's intent to exclude persons solely on the basis of their homosexual orientation was clear, we would be required to construe the Act in that manner. *Chevron*, 467 U.S. at 842. Had Congress used "orientation" or "inclination" instead of "propensity," we would be faced with a statute that required the discharge of service members based on their known sexual orientation. But when, as here, the statute is ambiguous on this issue, we must ask whether the military's construction of @ 654(b)(2) is permissible. *Id.* at 843. Because we find that the government "defines [propensity] in a way that is reasonable in [**60] light of the legislature's revealed design," *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 130 L. Ed. 2d 740, 115 S. Ct. 810, 813-14 (1995), we accord that definition controlling weight, and decline

the invitation by amicus FRC to read the Act to require the discharge of service members based on their sexual orientation alone.

In sum, because the statements presumption stands on the same footing in terms of governmental interest as the acts prohibition (which for present purposes we assume to be constitutional, although that issue remains to be resolved), the substantial interest in restricting speech standard has been met.

2.

We also find that the statements presumption restricts speech no more than is reasonably necessary. The military has made the reasonable judgment that a declaration of homosexuality is a likely (but rebuttable) indicator of propensity to engage in prohibited sexual conduct. This provision plays a significant role in the military's effort to eliminate homosexual conduct from the military -- an objective that it regards as important. To deprive the military of the benefit of the statements presumption would significantly impair its accomplishment of that objective. [**61]

As we noted above, the new policy creates a balance between a service member's privacy interest and the military interest in prohibiting homosexual acts by restricting how and when military authorities may initiate an investigation into such acts while at the same time creating a rebuttable presumption in favor of the government when a member identifies himself as a homosexual. Thus, as a general matter, a service member will be investigated about private sexual activities only if he does something (either by announcing his sexuality or by engaging in conduct which is thereafter reported) that brings the individual to the attention of military authorities. The plaintiffs ask us to upset this [*1300] equilibrium by holding the statements presumption unconstitutional. However, because the new policy strikes a reasonable balance between the competing interests and because the policy is important to the military's accomplishment of its objectives, we find that it restrains speech no more than is reasonably necessary.

D.

The foregoing analysis is premised upon the same assumption that the district court made in its opinion: that the ban on homosexual acts found in @ 654(b)(1) is valid under [**62] the Constitution. The government does not contend (nor could it) that in the event that @ 654(b)(1) is held to be unconstitutional, @ 654(b)(2) may still be upheld. Plainly, a limitation on speech in support of an unconstitutional objective cannot be sustained. Accordingly, although we reject the district court's reasoning in holding @ 654(b)(2) unconstitutional, we remand the @ 654(b)(2) claim to the district court for reconsideration in light of its determination in the first instance as to @ 654(b)(1).

V.

In conclusion, we affirm the district court's orders finding that the plaintiffs need not exhaust their administrative remedies. We reverse the district court's order dismissing the @ 654(b)(1) claim. Finally, we remand the plaintiffs' claim that @ 654(b)(1) is unconstitutional for consideration by the district court in the first instance and we remand the @ 654(b)(2) claim for reconsideration in light thereof.

88 F.3d 1280, *1300; 1996 U.S. App. LEXIS 15737, **62; LEXSEE
71 Fair Empl. Prac. Cas. (BNA) 419; 68 Empl. Prac. Dec. (CCH) P44,233

We vacate the judgment and we remand this case to the district court for further proceedings consistent with this opinion. The district court, of course, may in the exercise of its discretion allow the parties to pursue whatever pretrial procedures they think [**63] appropriate and to supplement the record. In the event of any further appeal in this matter, the clerk is directed to refer the appeal to this panel if practicable.

4TH STORY of Level 1 printed in FULL format.

Copyright 1998 American Lawyer Newspapers Group, Inc.
Texas Lawyer

February 23, 1998

SECTION: Pg. 40

LENGTH: 1415 words

HEADLINE: IMPROPERLY ASKED, IMPROPERLY TOLD; GAY SAILOR'S ONLINE "OUTING" SETS
FIRST REAL LIMITS ON MILITARY POLICY.

BYLINE: Christopher Wolf

BODY:

Finding that the Navy had engaged in a "search and outing" mission, U.S. District Judge Stanley Sporkin issued an order last month barring the U.S. Navy from discharging Senior Chief Petty Officer Timothy McVeigh. Although Sporkin is not the first judge to consider the military's "don't ask, don't tell, don't pursue" policy on gay servicemembers, his decision is significant for several reasons: It is the first to set limits on military conduct under the policy. It recognizes an exclusionary rule for evidence obtained in violation of the Electronic Communications Privacy Act. And it highlights once again the wastefulness of homophobia.

McVeigh, a 17-year Navy veteran (and no relation to the Oklahoma City bomber), served aboard the nuclear submarine USS Chicago. His latest performance evaluation rated him an inspiring, "superior leader" and the "embodiment of Navy Core Values." But that record provided no protection when the Navy chose to invade his privacy last fall.

In September 1997, McVeigh sent an e-mail message to a civilian to assist in a Christmas toy drive for the children of the crew of his boat. The e-mail was sent through America Online. Curious about the sender's screen name, which was "Boysrch," the recipient looked up the AOL user profile connected to that name. The profile had several gay references. The recipient then alerted the Navy to the profile, and the Navy commenced an investigation of McVeigh on suspicion of violating the "don't ask, don't tell" policy.

A JAG officer and the legal assistant assigned to her concocted a plan to see if they could link the anonymous AOL profile to McVeigh. When the legal assistant contacted AOL, he did not identify himself as a Navy investigator and, according to AOL, misled the customer service representative into believing he was a friend of McVeigh's. Although AOL policy prohibits disclosure of personal information even to "friends," the customer service representative released information sufficient for the Navy to conclude that the profile with gay references belonged to McVeigh. (AOL has since apologized for the human error that led to the unauthorized disclosure.)

On the basis of this evidence obtained from AOL, the Navy conducted an administrative discharge hearing. A three-member board determined that McVeigh should be removed from the service because he is "openly gay."

On Jan. 15, 1998, McVeigh brought suit in the U.S. District Court for the District of Columbia challenging the proposed discharge. A hearing was held

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Jan. 21. Five days later, Judge Sporkin issued a strongly worded preliminary injunction barring the Navy from removing McVeigh. And on Jan. 29, Sporkin made that injunction permanent.

In his 15-page injunction decision, Judge Sporkin ruled that the Navy's investigation of McVeigh's AOL profile failed to follow proper procedures under the Electronic Communications Privacy Act of 1986. ECPA specifies procedures that must be followed when government attempts to access the contents of electronic communications and records concerning electronic communications - such as the identity of an e-mail user. 18 U.S.C. § 2703 (a)-(c). Depending on the type of information being sought from an online or Internet service provider, the government must have a warrant, a subpoena, or the subscriber's permission. The service provider is prohibited from releasing information in the absence of such authorization or court document.

Rejecting the government's argument that these provisions only govern the conduct of service providers, Judge Sporkin found that the ECPA imposes a "reciprocal obligation to obtain a warrant or the like before requiring disclosure." The judge went on:

It appears from the face of the statute that all of the subsections of 2703 were intended to work in tandem to protect consumer privacy. . . . [T]he government knew or should have known that by turning over the information without a warrant, AOL was breaking the law. Yet, the Navy, in this case, directly solicited the information anyway. What is most telling is that the Navy investigator did not identify himself when he made his request. While the government makes much of the fact that Section 2703(c)(1)(B) does not provide a cause of action against the government, it is elementary that information obtained improperly can be suppressed where an individual's rights have been violated.

Thus Judge Sporkin acted to protect the privacy interests of Tim McVeigh and all other online users. The government's interpretation of the ECPA would have freed the state to attempt to pry out information whose disclosure the law clearly makes illegal. In an age when more and more personal information can be found online all too easily, Judge Sporkin has served notice that the ECPA's protections must be strictly observed.

Policy Concerns

Of equal importance is Judge Sporkin's interpretation of the military's "don't ask, don't tell" policy. Sporkin noted correctly that "[t]he limits on the Navy's right to investigate sexual orientation and the restrictions on an officer's right to be a gay man or woman in the military - i.e., what it practically means not to ask, not to tell, and not to pursue - have yet to be litigated." For that reason, his decision is a milestone.

Finding that "the Navy has gone too far," Judge Sporkin drew a line. As to "telling," the judge found that "suggestions of sexual orientation in a private, anonymous e-mail account did not give the Navy a sufficient reason to investigate to determine whether to commence discharge proceedings." Without the kind of evidence that is more than suspicion or belief that a servicemember had declared his homosexuality, there was no credible information on which to trigger an investigation. "When the Navy affirmatively took steps to confirm the identity of the e-mail respondent," wrote Sporkin, "it violated the very

Texas Lawyer, February 23, 1998

essence" of the "don't ask, don't tell" policy.

Thus, an anonymous user profile on AOL - even one that through an inquiry could be linked to a servicemember - is not enough to constitute "telling" or to warrant "asking and pursuing." The policy requires some effective distinction between information about sexual orientation that is available if the military goes hunting and information that is actually made known to fellow servicemembers.

Judge Sporkin wrote that the "don't ask, don't tell" policy "was intended to bring our nation's armed forces in line with the rest of society, which finds discrimination of virtually every form intolerable," and to permit gay servicemembers to serve their country honorably "so long as they are discrete in pursuing their personal lives." The judge appeared particularly offended by the Navy's attempts to oust an officer with "an exemplary service record for some seventeen years." Moreover, Sporkin declared, "[n]othing has been produced before [the] court which would in any way suggest that [McVeigh's] sexual orientation has adversely affected his job performance."

Judge Sporkin took the opportunity presented by the Navy's misconduct, and its threatened harm to a sterling senior enlisted man, to lay down this reminder:

It is self-evident that a person's sexual orientation does not affect that individual's performance in the workplace. At this point in our history, our society should not be deprived of the many accomplishments provided by people who happen to be gay. The "Don't Ask, Don't Tell, Don't Pursue" policy was a bow to society's growing recognition of this fact.

For Tim McVeigh and other servicemembers, Judge Sporkin's decision provides the protection necessary to keep their private lives private - especially if they choose to avail themselves of the anonymity of cyberspace. For users of the Internet and online services, the decision gives some comfort that information shielded by electronic privacy law cannot be used by the government if obtained without process or permission. And for all of us, the decision is a welcome recognition that a person's sexual orientation is irrelevant to his value in the workplace. For a case that was brought and decided within two weeks, much has been accomplished.

Christopher Wolf, a partner in the D.C. office of New York's Proskauer Rose, is lead counsel for Timothy McVeigh. Wolf chairs the firm's entertainment, media and information technology practice group.

LANGUAGE: ENGLISH

LOAD-DATE: February 27, 1998

37TH STORY of Level 1 printed in FULL format.

The Associated Press

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January 30, 1998, Friday, PM cycle

SECTION: Washington Dateline

LENGTH: 648 words

HEADLINE: Judge bars Navy from ousting alleged homosexual

BYLINE: By JOHN DIAMOND, Associated Press Writer

DATELINE: WASHINGTON

BODY:

The Navy says it will appeal the first federal court finding that a military service branch wrongly enforced the Pentagon's "don't ask, don't tell" policy on gays in the military.

As government lawyers prepared a response to U.S. District Judge Stanley Sporkin's ruling, Navy officials in Hawaii are responding to new charges that the sailor involved faces retribution from his commanders and colleagues.

The lawyer representing Senior Chief Petty Officer Timothy R. McVeigh told Sporkin in a hearing Thursday that McVeigh has been given demeaning jobs such as supervising trash removal - work far below his skill level as the senior enlistee aboard a nuclear attack submarine.

In addition, attorney Christopher Wolf said, McVeigh fears for his safety based on the hostile reaction he has received since returning to his base at Pearl Harbor, Hawaii.

McVeigh faced dismissal from the Navy after 17 years as a highly decorated enlistee. Navy investigators used information obtained from America Online Inc. to link McVeigh to an anonymous on-line "profile page" that contained language suggesting a sexual interest in young men.

McVeigh, 36, said he was "very pleased" by the ruling. After the decision, he had "a highly stressful meeting" with his superiors, he said.

McVeigh would only say his superiors told him there would be job options from which he could choose. McVeigh said he has not been offered early retirement, but would consider it if it were offered.

McVeigh was the senior enlisted man aboard the USS Chicago, a nuclear-powered attack submarine based at Pearl Harbor, Hawaii. He is three years short of qualification for retirement at full pension.

Cmdr. Kevin Wensing of the U.S. Pacific Fleet disputed Wolf's allegations of hostility toward McVeigh, saying, "We haven't seen any evidence of those allegations regarding his reception."

The Associated Press, January 30, 1998

Wensing, speaking from Honolulu, said McVeigh's job will be coordinating library technical publications. Regarding Wolf's allegations that McVeigh was overseeing trash removal, Wensing said the sailor was supervising an office renovation.

Sporkin's decision made permanent a preliminary injunction he had issued Monday, effectively barring the Navy from ousting the 17-year Navy veteran for alleged homosexuality. In his written opinion issued Monday, Sporkin found that "the Navy has gone too far" in investigating McVeigh.

Sporkin found that because McVeigh's AOL profile page was anonymous, the sexually suggestive statements did not constitute a public declaration of homosexuality. Because McVeigh had not "told" of his sexual preference, the Navy had no right to "ask" about it.

The decision marks the first time since 1993, when the don't-ask, don't-tell policy was enacted, that a military service branch has been found in court to have violated the policy. Previous cases have challenged the policy's constitutionality.

McVeigh, no relation to the convicted Oklahoma City bomber, focused on whether the policy was being correctly enforced - and won.

This case is likely to reverberate far beyond the military because Sporkin also ruled that the Navy violated the 1986 Electronic Communications Privacy Act by obtaining confidential information from AOL without a warrant or court order. The Navy used the information to link McVeigh to an anonymous "profile page" posted on AOL in which a "Tim" from Honolulu expressed a sexual interest in young men.

The 1986 law was intended to protect people from government intrusion into the growing base of personal information available on computer networks.

A Navy official, who spoke on condition of anonymity, said the Navy decided there was no need for further argument in Sporkin's court but is planning an appeal.

"The Navy feels that the actions we took were within the letter of the law and of the Department of Defense policy," the Navy official said.

LANGUAGE: ENGLISH

LOAD-DATE: January 30, 1998

11TH CASE of Level 1 printed in FULL format.

JOSEPH ONCALE, PETITIONER v. SUNDOWNER OFFSHORE SERVICES,
INCORPORATED, ET AL.

No. 96-568

October Term, 1996

August 11, 1997

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

C. GREGORY STEWART, General Counsel, J. RAY TERRY, JR., Deputy General Counsel,
GWENDOLYN YOUNG REAMS, Associate General Counsel, CAROLYN L. WHEELER, Assistant
General Counsel, PAUL BOGAS, Attorney, Equal Employment Opportunity Commission,
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WALTER DELLINGER, Acting Solicitor General, ISABELLE KATZ PINZLER, Acting
Assistant Attorney General, SETH P. WAXMAN, Deputy Solicitor General, BETH S.
BRINKMANN, Assistant to the Solicitor General, Department of Justice,
Washington, D.C. 20530-0001, (202) 514-2217.

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Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993), cert. denied, 510 U.S. 1164 (1994)

Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971)

Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994), cert. denied, 513 U.S. 1082 (1995)

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)

Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982)

Waltman v. International Paper Co. , 875 F.2d 468 (5th Cir. 1989)

Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138 (4th Cir. 1996)

Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997)

Zenith Radio Corp. v. United States, 437 U.S. 443 (1978)

Statutes and regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq.

Civil Rights Act of 1964, Pub. L. No. 88-532, @ 703(a), 78 Stat. 255

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e et seq.

42 U.S.C. 2000e(b)

42 U.S.C. 2000e-2(a)(1)

42 U.S.C. 2000e-5(f)(1)

Equal Pay Act, 29 U.S.C. 206(d)(1)

38 U.S.C. 101(3)

38 U.S.C. 101(31)

29 C.F.R.:

Section 1604.11

Section 1604.11(a)

Section 1604.11(a)(1)

Section 1604.11(a)(2)

Section 1604.11(a)(3)

Section 1604.11(b) (1985)

Miscellaneous:

142 Cong. Rec. S10,129-S10,139 (daily ed. Sept. 10, 1996)

2 EEOC Compl. Man. (Oct. 1981)

EEOC Dec. No. 81-16 (Jan. 1981), reprinted in EEOC Dec. (CCH Employment Practices Guide) P 6756 (1983 ed.)

45 Fed. Reg. 25,024 (1980)

S. 2056, 104th Cong., 2d Sess. (1996)

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., prohibits discrimination in employment because of an individual's sex. The Equal Employment Opportunity Commission (EEOC) was established by Congress to interpret and enforce Title VII. The EEOC participated as amicus curiae in

this case in the court of appeals.

The Attorney General is responsible for enforcing Title VII in cases in which the employer is a government, a governmental agency, or a political subdivision. 42 U.S.C. 2000e-5(f)(1). The United States, in its capacity as employer and otherwise, has a strong interest in ensuring the fair and balanced enforcement of the federal civil rights laws. In response to the Court's order inviting the Solicitor General to express the views of the United States, the Solicitor General filed a brief on behalf of the United States and the EEOC suggesting that the petition for a writ of certiorari be granted.

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., protects employees from sexual harassment regardless of whether the employee and the harasser are of the same sex.

STATEMENT

1. Petitioner, Joseph Oncale, was employed by respondent Sundowner Offshore Services, Inc. (Sundowner), on an offshore oil rig from August to November 1991. Pet. App. 2. He filed the instant suit in the United States District Court for the Eastern District of Louisiana against Sundowner, his direct supervisor John Lyons, and two co-workers, Danny Pippen and Brandon Johnson. The complaint alleged that respondents had subjected petitioner to sexual discrimination and harassment in employment practices, and consequently had forced him to resign, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. Pet. App. 1. Petitioner alleged that he had been subjected both to a discriminatorily hostile work environment and to quid pro quo harassment because of his sex. His complaint recited three specific instances of physical sexual harassment. Ibid.

Discovery proceeded and respondents moved for summary judgment, contending that, under Fifth Circuit precedent, petitioner's claim was not actionable under Title VII because petitioner was of the same sex as the alleged harassers. J.A. 27, 33 (citing *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (1994); *Giddens v. Shell Oil Co.*, No. 92-8533 (Dec. 6, 1993) (unpublished)). Respondents acknowledged that claims of quid pro quo sexual harassment have been brought successfully in some district courts under Title VII where the employee was male and the supervisor was a male homosexual, but respondents contended that was not the case here. J.A. 35-36. Respondents also contended that, in any event, petitioner could not make out a prima facie case of hostile work environment harassment because respondent Sundowner employed only males on the platform where petitioner worked. J.A. 34. Respondents submitted evidence that Sundowner did not employ any females on its rigs. J.A. 41.

Petitioner opposed summary judgment, contending that there is no blanket prohibition to recovery under Title VII "by a male employee who is sexually harassed by other male employees who control the terms, conditions and duration of [his] employment while a fully informed [supervisor] take[s] no action." J.A. 46. Petitioner submitted his sworn testimony that, on or about October 25, 1991, his supervisor Lyons physically assaulted him by placing his exposed penis on petitioner's head while Pippen held petitioner down and Lyons told petitioner that he was going to "fuck [petitioner] in [his] behind." J.A. 76; see also J.A. 20. Immediately after the incident, he informed a supervisor about the

harassment, but the supervisor took no action. J.A. 77. The following day, Johnson held him down while Lyons placed his exposed penis on petitioner's arm. J.A. 76; see also J.A. 20. Johnson himself testified that he had picked petitioner up, grabbed him, and was holding him when Lyons told him to hold petitioner there and threatened that he was going to expose his penis and put it on petitioner. J.A. 83, 84. Johnson testified that he let petitioner go, however, so that Lyons did not carry out that threat. J.A. 83, 84. Petitioner testified that while he was taking a shower Pippin and Lyons got in with him and Pippin lifted petitioner up and folded him over while Lyons "rubbed a bar of soap between [his buttocks] and told [him], 'Yeah, we know you talked to daddy about it, but we're going to fuck you anyway.'" J.A. 67; see also J.A. 20. Petitioner testified that he believed his supervisor Lyons intended "to have sex with [him], to rape [him]." J.A. 70. When petitioner returned to work after a few days off, he was again sexually harassed by verbal sexual advances, predominately from Lyons, including threats of anal intercourse. J.A. 72-73. He again told supervisors about the advances, but nothing was done. J.A. 73. Petitioner resigned, stating on the separation form that he quit because of sexual harassment. J.A. 79-80.

2. The district court granted respondents' summary judgment motion and dismissed petitioner's claim. Pet. App. 10-15. Citing *Garcia*, supra, as binding circuit precedent, the district court ruled that petitioner, "a male, has no cause of action under Title VII for harassment by male co-workers." Id. at 14. n1

n1 The district court also found that respondents Pippin and Johnson could not be considered petitioner's employer. Pet. App. 14, 15 n.4. Although petitioner describes Pippin as his de facto supervisor (Pet. 4, 5), he has not sought this Court's review of that issue.

3. The court of appeals affirmed. Pet. App. 1-7. Although it acknowledged that the analysis in *Garcia* had been "rejected by various district courts," id. at 4 & n.2, the court concluded that the prior panel decision was binding precedent, and "barred all same-sex sexual harassment claims" under Title VII, id. at 5-6.

SUMMARY OF ARGUMENT

Title VII's coverage is sex-neutral. It protects employees from discrimination because of sex regardless of the gender of the employer or employee. Title VII affords such protection to both men and women, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983), and the Court has never suggested that protection depends on whether the harasser and the employee are of opposite sexes.

There is no exemption from Title VII's sex-neutral coverage for cases of sexual harassment. That is, Title VII's protection against discrimination in the form of sexual harassment does not depend on whether the harasser and employee are of opposite sexes, so long as the discrimination by the employer is "because of [the employee's] sex." The court of appeals' contrary ruling, categorically excluding any Title VII sexual harassment claims involving an employee and harasser of the same sex, is contrary to the plain language of the statute, the longstanding and consistent interpretation of the Equal Employment Opportunity Commission (EEOC), and the approach of the other circuits that have considered the issue.

In light of the erroneous legal standard underlying the entry of summary judgment below, the judgment should be reversed and the matter remanded for further proceedings. Neither the fact that petitioner's harassers may not have been motivated by homosexual attraction, nor the fact that petitioner worked at an all-male worksite, automatically forecloses his claim that he was subject to a discriminatorily hostile work environment or to quid pro quo harassment because of his sex.

TEXT: ARGUMENT

TITLE VII'S PROHIBITION AGAINST SEXUAL HARASSMENT THAT CONSTITUTES SEX DISCRIMINATION IN THE WORKPLACE PROTECTS ALL EMPLOYEES, REGARDLESS OF THE SEX OF THE HARASSER OR EMPLOYEE

1. The sole legal question presented in this case can, and should, be decided by reference to the plain text of the governing statute. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, @ 703(a), 78 Stat. 255, states, in relevant part, that "it shall be an unlawful employment practice for an employer"

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a)(1). On its face, this provision prohibits all who meet the statutory definition of the term "employer" (42 U.S.C. 2000e(b)) from discriminating against either male or female employees "because of" any of the statutory factors--race, color, religion, sex, or national origin.

The Court has repeatedly recognized that Title VII's coverage is sex-neutral and cannot be interpreted to protect one sex of employees, but not the other, from discrimination because of sex. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983), the Court quoted the text of Title VII and unequivocally concluded: "Male as well as female employees are protected against discrimination." *Ibid.* n2 The Court explained that, as in a case involving a female employee, an employment practice violates Title VII's "simple test" of discrimination if it treats a male employee "in a manner which but for that person's sex would be different." *Id.* at 683 (quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)). Cf. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that Title VII prohibits racial discrimination in employment against white persons as well as against nonwhites).

n2 The Court also noted that, although an amendment to Title VII had clarified its applicability to pregnancy, that amendment "did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee--male or female--which was already present in the Act," i.e., from the time of enactment. *Newport News*, 462 U.S. at 675-676 n.11.

On its face, Title VII's sex-neutral prohibition against sex discrimination is not limited to discrimination by the opposite sex. It would have been a simple matter for Congress to limit the reach of Title VII to discrimination between members of opposite sexes by use of that phrase if that had been its

intention. See, e.g., 29 U.S.C. 206(d)(1) (Equal Pay Act generally prohibits employer from paying wages to employees at rate less than rate employer pays to "employees of the opposite sex" for equal work); 38 U.S.C. 101(3) and (31) (defining surviving spouse and spouse as a member of the opposite sex).

There is no validity to respondents' suggestion (Br. in Opp. 10) that Title VII does not apply to same-sex discrimination because members of the same sex cannot discriminate against each other because of sex. As this Court recognized in the context of racial discrimination, "because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda v. Partida*, 430 U.S. 482, 499 (1977). See also *id.* at 503 (Marshall, J., concurring) ("Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.") (citations omitted); *id.* at 515-516 & n.6 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) (favoring inference that members of a group do not discriminate against themselves, but rejecting suggestion "that persons in positions of power can never be shown to have discriminated against other members of the same ethnic or racial group"). The Court thus long ago declared invalid the behavioral presumption "that human beings would not discriminate against their own kind." *Id.* at 500. n3

n3 Moreover, same-sex discrimination may be motivated by a variety of reasons other than animosity, and Title VII prohibits such discrimination regardless of the underlying motive. For example, in *Manhart*, *supra*, the Court invalidated, on Title VII grounds, a pension system that presumably had been motivated by a desire to benefit women as a group, but which treated individual women differently from men. In *International Union, United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991), the Court held that a policy that excluded women with child-bearing capacity from lead-exposed jobs violated Title VII, as amended to prohibit pregnancy discrimination, despite the ostensibly benign interests that had motivated it. Cf. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (striking down, on due process grounds, law that required women to take maternity leave).

The Court has never suggested that an employee cannot bring a Title VII sex discrimination action if the discriminator is of the same sex. To the contrary, in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), a Title VII claim was brought by a male employee who claimed he had been discriminated against because of sex when a female employee was selected for a promotion instead of him. The supervisor who made that promotion decision was male, *id.* at 624-625, as were the overwhelming majority of the employer's officials, administrators, and professionals, *id.* at 621. Although the Court ultimately ruled against the male employee because it concluded that the challenged employment decision had been made pursuant to a valid affirmative action plan, the Court analyzed the claim without any suggestion that such a same-sex discrimination claim was not cognizable under Title VII. *Id.* at 626-642.

2. Sexual harassment in the workplace constitutes employment discrimination in violation of Title VII if a supervisor makes "unwelcome sexual advances,

requests for sexual favors, and other verbal or physical conduct of a sexual nature," and submission to such conduct is made "explicitly or implicitly a term or condition of an individual's employment," or is "used as the basis for employment decisions affecting such individual." 29 C.F.R. 1604.11(a)(1) and (2) (quid pro quo harassment). Also, sexual harassment in the workplace constitutes employment discrimination under Title VII if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. 1604.11(a)(3) (hostile work environment harassment)).

There is no exemption from Title VII's sex-neutral coverage for cases in which discrimination takes the form of sexual harassment. In *Vinson*, 477 U.S. at 64, the Court unambiguously declared that, "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." In rejecting the argument that Title VII should cover sexual harassment cases only if there is economic or tangible loss, the Court analyzed the coverage of Title VII and sexual harassment claims in wholly sex-neutral terms. The Court emphasized that the fact that Title VII is phrased as a prohibition against discrimination in the "terms, conditions, or privileges of employment" evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Ibid.* (emphasis added) (citations omitted). The Court quoted with approval a lower court's conclusion that subjecting members of either sex to sexual harassment violates Title VII: "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (emphasis added). The Court also found guidance in the EEOC's sex-neutral guidelines defining sexual harassment as a form of sex discrimination prohibited by Title VII. *Id.* at 65 (quoting guidelines' definitions at 29 C.F.R. 1604.11(a)).

When the Court again addressed the definition of a discriminatorily abusive work environment under Title VII, in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), it again spoke of Title VII's coverage of sexual harassment claims in wholly sex-neutral terms. It repeated *Vinson*'s declaration that Title VII had been enacted to "strike at the entire spectrum of disparate treatment of men and women in employment." *Id.* at 21 (emphasis added) (citations omitted). Moreover, the Court recognized the serious consequences sexual harassment may have on an employee's career--without any suggestion that the existence of injury from such harassment in the workplace, or Title VII's availability to eradicate it, depends in any way upon the sex of the employee or harasser. To the contrary, the Court described the universal protection of Title VII for all employees against harassment that alters their working conditions based on any of the statutorily proscribed factors:

A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.

Id. at 22.

There are a myriad of examples of employment discrimination involving members of the same sex, in both the harassment context and otherwise, that clearly are prohibited by Title VII. Consider, for example, a male supervisor who conditions a male employee's promotion on his agreement to date the supervisor's daughter. Or, to place this example in the harassment context, assume the employee refuses to date the daughter and the supervisor launches a campaign of harassment against the employee, including unrelenting sexual taunts and innuendos in front of co-workers and a flood of sexually explicit materials at his workplace. In both instances, the supervisor discriminates against the employee with respect to terms and conditions of employment because of that employee's sex. The harm inflicted on the employee is no different, and the discrimination no less evident, than if the supervisor had been a woman with a daughter.

Consider alternatively the example of a female supervisor who believes it will advance her career if she aligns herself with the male-dominated management force rather than her female subordinates; consequently, her evaluation reports on female subordinates deliberately do not reflect the high quality of their work. Or, to place the example in the harassment context, assume she harasses the female subordinates by severe and pervasive sexually explicit intimidation and ridicule, in front of other employees, intending that it will interfere with, and lower the quality of, the female subordinates' work. Again, the discrimination based on sex in those circumstances is no less evident or damaging than if the supervisor had been a man who altered his evaluation reports of female subordinates or sexually harassed them because of his belief that women do not belong in the workplace.

The irrelevance of the sex of a harasser is most obvious when one considers that a hostile work environment claim may arise, for example, either from (a) harassment by an anonymous co-worker which the employer refuses to investigate or remedy (e.g., an unrelenting barrage of sexually denigrating graffiti on an employee's locker, daily posting of sexually explicit cartoons involving the employee), or (b) harassment that is aimed at someone other than the employee who brings the claim (e.g., against other employees or customers).ⁿ⁴ When the Vinson Court first discussed Title VII's coverage of hostile work environment claims based on sexual harassment, it quoted with approval *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), which, the Court explained, had held "that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele." *Vinson*, 477 U.S. at 66. The Court went on to quote *Rogers* as follows:

The phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Ibid. (quoting *Rogers*, 454 F.2d at 238). The Court observed that subsequent

cases had applied that principle to harassment based on race, and "nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." *Ibid.*; see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 178-181 (1989) (explaining that, in *Vinson*, the Court implicitly approved applicability of Title VII sexual harassment standards to hostile work environment claim based on racial harassment).

n4 For examples of hostile work environment cases including anonymous harassment and harassment aimed at others or at the workplace generally, see, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482, 1483-1486 (3d Cir. 1990) (reversing district court rejection of Title VII claim that work environment was "so heavily charged with sexism that it was intimidating, hostile, and offensive," in part because district court failed to give appropriate consideration to conduct other than explicit sexual advances toward the employees, including conduct such as use of terms derogatory and insulting to women generally and anonymous posting of pornographic pictures aimed both at particular plaintiffs and in common areas); *Waltman v. International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (reversing grant of summary judgment in employer's favor, based on evidence that included pervasive anonymous sexual graffiti, and noting that, "although not all the graffiti was directed at [plaintiff], it is all relevant to her claim"; other relevant evidence not aimed directly at plaintiff included posting of pornographic drawings and display of used tampons, *id.* at 471; another female worker allegedly was promoted over plaintiff "because she tolerated and, perhaps even encouraged, her fellow workers' sexual behavior," *id.* at 473); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493-1494, 1495 (M.D. Fla. 1991) (judgment for Title VII plaintiff based not only on evidence of conduct aimed directly at plaintiff, but also on evidence of pervasive posting, often surreptitiously and thus anonymously, of graffiti and nude and partially nude photographs of women in "sexually suggestive or submissive poses" throughout workplace such that it constituted "a visual assault on the sensibilities of female workers * * * that did not relent during working hours"); cf. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358-1359 (11th Cir. 1982) (Title VII claim of hostile work environment because of racial harassment based on evidence not only of racial epithet against employee but also of repeated and continuous use of term "nigger" and other racially abusive language to refer to customer and for other purposes at workplace); see also 2 EEOC Compl. Man. @ 615.3(a)(3) (Oct. 1981).

Thus, the relationship between the employee and the person creating the hostile work environment is not the focus of the cause of action. Rather, the focus of the prohibition against hostile work environment sexual harassment is on "the relationship between an employee and his working environment." *Rogers*, 454 F.2d at 238. The sex of the harasser matters not at all "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' * * * that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment,'" because of his or her sex. *Harris*, 510 U.S. at 21 (quoting *Vinson*, 477 U.S. at 65, 67).

3. The Fifth Circuit's holding is contrary to the EEOC's longstanding and consistent interpretation. The EEOC has long recognized that harassment on the basis of sex is a violation of Title VII. In 1980, it determined that there was a need for guidelines because sexual harassment "continued to be especially widespread." 45 Fed. Reg. 25,024 (1980). Shortly after promulgation of those regulations (published at 29 C.F.R. 1604.11), the EEOC was called upon to resolve a claim of same-sex sexual harassment. In January 1981, the EEOC

reaffirmed its "long standing position * * * that Title VII does not cover discrimination which occurs because of an individual's sexual preference," but it recognized that claims of same-sex harassment were not precluded where the harassment could be shown to be because of an individual's sex. EEOC Dec. No. 81-16 (Jan. 1981), reprinted in EEOC Dec. (CCH Employment Practices Guide) P 6756, at 4796 (1983 ed.). The EEOC emphasized that, under Title VII, "a discriminatory practice is unlawful when it occurs because an individual is male or female," and it concluded that, if the complaining employee, a male, had submitted sufficient evidence to support his claim that he had been laid off because he had rejected the unwanted sexual advances of his supervisor, a male, Title VII would have been violated and the employer would have been responsible for the actions of the supervisor. Id. at 4796-4797. Soon thereafter, in its Compliance Manual's directives regarding sexual harassment, the EEOC further specified:

The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.

2 EEOC Compl. Man. @ 615.2(b)(3) (Oct. 1981) (citing EEOC Dec. No. 81-16 (Jan. 1981)).

Like the EEOC's sexual harassment guidelines on which Vinson relied, the EEOC's 1981 decision and subsequent compliance directive on same-sex sexual harassment, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Vinson, 477 U.S. at 65 (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 141-142 (1976)). As a longstanding agency interpretation, the EEOC's interpretation is entitled to particular deference. See Brown v. Gardner, 513 U.S. 115, 122 (1994) (citing Zenith Radion Corp. v. United States, 437 U.S. 443, 450 (1978)); Nashville Gas Co. v. Satty, 434 U.S. 136, 142-143 n.4 (1977). See also EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991) (deference afforded EEOC guidelines depends on, inter alia, the "consistency with earlier and later pronouncements") (quoting Gilbert, 429 U.S. at 142).

4. In light of the plain, unambiguous text of Title VII, this Court's consistent interpretation of that text as sex-neutral with regard to the statute's coverage, and the EEOC's longstanding and consistent interpretation of Title VII to the same effect, n5 the Fifth Circuit erred in holding that Title VII "bar[s] all same-sex sexual harassment claims." Pet. App. 5. All other courts of appeals that have considered the issue have either explicitly rejected such a blanket prohibition, or have suggested or implied that they would. n6

n5 The Court has noted the limited legislative history surrounding enactment of Title VII. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986) (prohibition against sex discrimination added to Title VII "at the last minute on the floor of the House of Representatives" so that "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'").

n6 See *Doe v. City of Belleville*, No. 94-3699, 1997 WL 400219, at *5, *8 (7th Cir. July 17, 1997) (expressly rejecting blanket prohibition against same-sex sexual harassment claims under Title VII); *Fredette v. BVP Management Assoc.*, 112 F.3d 1503, 1510 (11th Cir. 1997) (same); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (same); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) (same); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378-1379 (8th Cir. 1996) (same); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) ("although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that both men and women * * * have viable claims against [the male supervisor] for sexual harassment"), cert. denied, 513 U.S. 1082 (1995); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) ("harassment is harassment regardless of whether it is caused by a member of the same or opposite sex"), cert. denied, 510 U.S. 1164 (1994); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192 (1st Cir. 1990) (in same-sex case, court states "there is a cause of action for sexual harassment," but concludes that employee had not shown conduct was "sufficiently severe or pervasive"); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (rejecting argument that harassment of employee by homosexual supervisor of same gender is not sex discrimination and noting that "in each instance the question is * * * would the complaining employee have suffered the harassment had he or she been of a different gender?"); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (noting the possibility of actionable sexual harassment where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender").

The Fourth Circuit, while acknowledging that Title VII is sex-neutral, and therefore that its protection may not categorically be denied to an employee of the same sex as his or her harasser, has limited same-sex harassment claims to instances in which the harasser is a homosexual, *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 141-143 (1996), and precluded same-sex harassment claims where the harasser and target of the harassment are heterosexuals, *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195, cert. denied, 117 S. Ct. 72 (1996). n7 That distinction, however, cannot be squared either with the plain text of Title VII or with the purpose underlying Title VII to provide equal employment opportunity by protecting individuals from workplace discrimination, including harassment, because of sex.

n7 Other circuits have recognized same-sex sexual harassment claims in cases where the harasser is homosexual and have reserved judgment on whether they would recognize such claims where a same-sex harasser was heterosexual. *Fredette*, 112 F.3d at 1507; *Yeary*, 107 F.3d at 447-448. Two circuits have held that same-sex sexual harassment claims are cognizable irrespective of the sexual orientation of the harasser. *City of Belleville*, 1997 WL 400219, at *18-*25; *Quick*, 90 F.3d at 1378-1379.

An employee can state a Title VII claim based on harassment by a supervisor (or harassment by a co-worker that the employer fails to remedy) without alleging that the harassment was motivated by sexual attraction. That is clear from the Court's recognition of the types of sexual harassment at issue in *Vinson and Harris*. The sexual harassment alleged in *Vinson* apparently was motivated by the harasser's desire to engage in sexual intercourse with the female employee. See 477 U.S. at 60. The sexual harassment in *Harris*, however, was motivated by the harasser's apparent desire to humiliate women. See 510 U.S. at 19 (supervisor's comments to employee included: "you're a woman, what do

you know," "we need a man as the rental manager," calling her "a dumb ass woman"; making her and other women the target of unwanted sexual innuendos about their clothing, suggesting that she obtained business deals through sex). Also, for example, in *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376 (8th Cir. 1996), the employee alleged that he had been subjected to repeated physical assaults wherein other heterosexual workers had grabbed his testicles and verbally harassed him. He did not allege that his harassers had made any sexual advances toward him based on their attraction to him or that they were attracted to him. He contended that because the physical harassment "was directed only at the area of male sexual organs, he would not have been subjected to it but for being male." *Ibid.* The court held that "evidence that members of one sex were the primary targets of the harassment is sufficient to show that the conduct was gender based," *id.* at 1378, and found that it was sufficient, for purposes of summary judgment, that the physical assaults had been "aimed at [the plaintiff's] sexual organs, his testicles * * * squeezed so hard on one occasion that he almost passed out from the pain," and he had been "verbally taunted," *id.* at 1379. As discussed above, a supervisor may also have personal or career-related motives for sexually harassing an employee of the same sex because of the employee's sex without being sexually attracted to that employee. See pp. 12-13, *supra*; cf. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 667-669 (1987) (fact that union's failure to file grievances on behalf of black workers was not motivated by animosity toward blacks, but rather by strategic decision about how to deal with employer, did not make union's differential treatment based on race any less discriminatory).

At bottom, the question under Title VII is whether the choice of the target or the manner of the sexual harassment was "because of [the employee's] sex," in that the particular employee would not have been subjected to the same harassment had he or she been of the opposite sex. Regardless of whether the underlying motive for the sexual harassment was attraction, hostility, disrespect, or benevolence, such harassment violates Title VII's "simple test" of discrimination because it would be treating that employee "in a manner which but for the person's sex would be different." *Newport News*, 462 U.S. at 683 (quoting *Manhart*, 435 U.S. at 711). n8

n8 In light of Congress's refusal to extend Title VII to claims based upon sexual orientation, see 142 Cong. Rec. S10,129-S10,139 (daily ed. Sept. 10, 1996) (S. 2056, a bill to prohibit employment discrimination on the basis of sexual orientation, not passed by Senate), it would be ironic if the availability of a Title VII remedy turned on the sexual orientation of the harasser. Such a condition would, moreover, add significant complexity to Title VII proceedings by requiring, *inter alia*, a trial as to an alleged harasser's sexual orientation.

5. The Seventh Circuit recently observed that "[a] concern that seems to have motivated a number of courts in refusing to recognize cases of same-sex sexual harassment is that courts will be deluged with complaints stemming from horseplay and rough language among men." *Doe v. City of Belleville*, No. 94-3699, 1997 WL 400219, at *26 (July 17, 1997). That court correctly noted, however, that "very similar concerns were expressed when courts rejected the first claims of sexual harassment brought by women." *Ibid.* We agree with the Seventh Circuit that, as with claims of opposite-sex sexual harassment, claims of same-sex sexual harassment based on the occasional off-color comment or trivial conduct will be easily distinguishable from actionable claims. As in opposite-sex cases,

"mere utterance of an . . . epithet which engenders offensive feelings in a employee," * * * does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

7

Harris, 510 U.S. at 21-22 (quoting in part Vinson, 477 U.S. at 67). The trier of fact "must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances,' such as the nature of the sexual advances and the context in which the alleged incidents occurred." Vinson, 477 U.S. at 69 (quoting 29 C.F.R. 1604.11(b) (1985)).

6. Because the courts below relied on an erroneous legal standard in granting respondents summary judgment, the Court should reverse the judgment and remand the case for further proceedings. That disposition would afford the courts below the opportunity to address, in the first instance, the various evidentiary and other issues that may arise in connection with petitioner's same-sex harassment claim.

Respondents have suggested (Br. in Opp. 13-17), however, that, even under the correct standard of law, petitioner's claim must fail because the oil rig on which he worked employed only males. This, however, mistakes a challenge of proof for a statement of legal principle. Title VII protection is not denied to employees in single-sex workplaces. Regardless of the demographic makeup of a workforce, an employer violates Title VII if it discriminates against an employee because of the employee's sex.

Comparative evidence is not the sole means of establishing that an employee was treated "in a manner which but for [his] sex would be different." Newport News, 462 U.S. at 683 (quoting Manhart, 435 U.S. at 711). Indeed, in Vinson and Harris, the Court did not cite any evidence that the female employees had alleged or demonstrated that the harassing supervisor did not make similar advances to, or otherwise harass, male employees.

Discrimination can be proven through direct evidence of the employer's discriminatory bias. See *County of Washington v. Gunther*, 452 U.S. 161, 179 (1981) (Congress could not have intended to insulate from Title VII redress a situation in which "an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male").ⁿ⁹ Or there may be other types of comparative evidence: suppose, for example, respondent Sundowner employed females at other locations, and it acted aggressively to stop harassment when female employees at those sites complained about sexual harassment, but it ignored petitioner's comparable complaints.

ⁿ⁹ See generally *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-125 (1985) (direct evidence used to establish that practice is discriminatory on its face under Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq.); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (prima facie case of sex discrimination is shown by evidence that officials involved in decision submitted comments that "stemmed from sex stereotypes"); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.)

(invalidating requirement that flight attendants be unmarried; "nor is the fact of discrimination negated by [airline's] claim that the female employees occupy a unique position so that there is no distinction between members of the opposite sexes within the job category"), cert. denied, 404 U.S. 991 (1971).

The current evidentiary record does not automatically preclude petitioner from prevailing on a claim of same-sex harassment in violation of Title VII. The Court should resolve the legal question presented, reverse the judgment below, and remand the case for the lower courts to address the matters of proof.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

WALTER DELLINGER, Acting Solicitor General, ISABELLE KATZ PINZLER, Acting Assistant Attorney General, SETH P. WAXMAN, Deputy Solicitor General, BETH S. BRINKMANN, Assistant to the Solicitor General

C. GREGORY STEWART, General Counsel, J. RAY TERRY, JR., Deputy General Counsel, GWENDOLYN YOUNG REAMS, Associate General Counsel, CAROLYN L. WHEELER, Assistant General Counsel, PAUL BOGAS, Attorney, Equal Employment Opportunity Commission

AUGUST 1997

1ST CASE of Level 1 printed in FULL format.

JOSEPH ONCALE, PETITIONER v. SUNDOWNER OFFSHORE SERVICES,
INCORPORATED, ET AL.

No. 96-568

SUPREME COURT OF THE UNITED STATES

1998 U.S. LEXIS 1599

December 3, 1997, Argued
March 4, 1998, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE
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the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT.

DISPOSITION: 83 F.3d 118, reversed and remanded.

SYLLABUS: Petitioner Oncale filed a complaint against his employer, respondent
Sundowner Offshore Services, Inc., claiming that sexual harassment directed
against him by respondent coworkers in their workplace constituted
"discrimination . . . because of . . . sex" prohibited by Title VII of the Civil
Rights Act of 1964, 42 U.S.C. @ 2000e-2(a)(1). Relying on Fifth Circuit
precedent, the District Court held that Oncale, a male, had no Title VII cause
of action for harassment by male coworkers. The Fifth Circuit affirmed.

Held: Sex discrimination consisting of same-sex sexual harassment is actionable
under Title VII. Title VII's prohibition [*2] of discrimination "because of .
. . . sex" protects men as well as women, *Newport News Shipbuilding & Dry Dock Co.
v. EEOC*, 462 U.S. 669, 682, and in the related context of racial discrimination
in the workplace this Court has rejected any conclusive presumption that an
employer will not discriminate against members of his own race, *Castaneda v.
Partida*, 430 U.S. 482, 499. There is no justification in Title VII's language or
the Court's precedents for a categorical rule barring a claim of discrimination
"because of . . . sex" merely because the plaintiff and the defendant (or the
person charged with acting on behalf of the defendant) are of the same sex.
Recognizing liability for same-sex harassment will not transform Title VII into
a general civility code for the American workplace, since Title VII is directed
at discrimination because of sex, not merely conduct tinged with offensive
sexual connotations; since the statute does not reach genuine but innocuous
differences in the ways men and women routinely interact with members of the
same, and the opposite, sex; and since the objective severity of harassment
should be judged from the perspective of a reasonable person [*3] in the
plaintiff's position, considering all the circumstances. Pp. 2-7.

83 F.3d 118, reversed and remanded.

JUDGES: SCALIA, J., delivered the opinion for a unanimous Court. THOMAS, J.,
filed a concurring opinion.

OPINIONBY: SCALIA

OPINION: JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether workplace harassment can violate Title VII's prohibition against "discrimination . . . because of . . . sex," 42 U.S.C. @ 2000e-2(a)(1), when the harasser and the harassed employee are of the same sex.

I

The District Court having granted summary judgment for respondent, we must assume the facts to be as alleged by petitioner Joseph Oncale. The precise details are irrelevant to the legal point we must decide, and in the interest of both brevity and dignity we shall describe them only generally. In late October 1991, Oncale was working for respondent Sundowner Offshore Services on a Chevron U.S. A., Inc., oil platform in the Gulf of Mexico. He was employed as a roustabout on an eight-man crew which included respondents John Lyons, Danny Pippen, and Brandon Johnson. Lyons, the crane operator, and Pippen, the driller, had supervisory authority, App. 41, 77, 43. On [*4] several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him by Lyons, Pippen and Johnson in the presence of the rest of the crew. Pippen and Lyons also physically assaulted Oncale in a sexual manner, and Lyons threatened him with rape.

Oncale's complaints to supervisory personnel produced no remedial action; in fact, the company's Safety Compliance Clerk, Valent Hohen, told Oncale that Lyons and Pippen "picked [on] him all the time too," and called him a name suggesting homosexuality. Id., at 77. Oncale eventually quit -- asking that his pink slip reflect that he "voluntarily left due to sexual harassment and verbal abuse." Id., at 79. When asked at his deposition why he left Sundowner, Oncale stated "I felt that if I didn't leave my job, that I would be raped or forced to have sex." Id., at 71.

Oncale filed a complaint against Sundowner in the United States District Court for the Eastern District of Louisiana, alleging that he was discriminated against in his employment because of his sex. Relying on the Fifth Circuit's decision in *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-452 (CA5 1994), the district court held [*5] that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." App. 106. On appeal, a panel of the Fifth Circuit concluded that *Garcia* was binding Circuit precedent, and affirmed. 83 F.3d 118 (1996). We granted certiorari. 520 U.S. (1997).

II

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, as amended, 42 U.S.C. @ 2000e-2(a)(1). We have held that this not only covers "terms" and "conditions" in the narrow contractual sense, but "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (citations and

internal quotation marks omitted). "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment [*6] and create an abusive working environment, Title VII is violated." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted).

Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983), and in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race. "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." *Castaneda v. Partida*, 430 U.S. 482, 499 (1977). See also *id.*, at 515-516 n. 6 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., dissenting). In *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616 (1987), a male employee claimed that his employer discriminated against him because of his sex when it preferred a female employee for promotion. Although we ultimately rejected the claim on other grounds, we did not [*7] consider it significant that the supervisor who made that decision was also a man. See *id.*, at 624-625. If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination "because of . . . sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.

Courts have had little trouble with that principle in cases like *Johnson*, where an employee claims to have been passed over for a job or promotion. But when the issue arises in the context of a "hostile environment" sexual harassment claim, the state and federal courts have taken a bewildering variety of stances. Some, like the Fifth Circuit in this case, have held that same-sex sexual harassment claims are never cognizable under Title VII. See also, e.g., *Goluszek v. H. P. Smith*, 697 F. Supp. 1452 (ND Ill. 1988). Other decisions say that such claims are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire). Compare *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (CA4 1996), with *Wrightson [*8] v. Pizza Hut of America*, 99 F.3d 138 (CA4 1996). Still others suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations. See *Doe v. Belleville*, 119 F.3d 563 (CA7 1997).

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discrimination . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Respondents and their amici contend that recognizing liability for same-sex harassment will transform Title VII into a [*9] general civility code for

the American workplace. But that risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute. Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discrimination . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Harris, *supra*, at 25 (GINSBURG, J., concurring).

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex [*10] harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimination . . . because of . . . sex."

And there is another requirement that prevents Title VII from expanding into a general civility code: As we emphasized in *Meritor* and *Harris*, the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite [*11] sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview." Harris, 510 U.S., at 21, citing *Meritor*, 477 U.S. at 67. We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace -- such as male-on-male horseplay or intersexual flirtation -- for discriminatory "conditions of employment."

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." Harris, *supra*, at 23. In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's [*12] working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and

relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

III

Because we conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII, the judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCURBY: THOMAS

CONCUR: JUSTICE THOMAS, concurring.

I concur because the Court stresses that in every sexual harassment [*13] case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination "because of . . . sex."

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ONCALE *v.* SUNDOWNER OFFSHORE
SERVICES, INC., ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 96–568. Argued December 3, 1997—Decided March 4, 1998

Petitioner Oncale filed a complaint against his employer, respondent Sundowner Offshore Services, Inc., claiming that sexual harassment directed against him by respondent coworkers in their workplace constituted “discriminat[ion] . . . because of . . . sex” prohibited by Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(a)(1). Relying on Fifth Circuit precedent, the District Court held that Oncale, a male, had no Title VII cause of action for harassment by male coworkers. The Fifth Circuit affirmed.

Held: Sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. Title VII’s prohibition of discrimination “because of . . . sex” protects men as well as women, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U. S. 669, 682, and in the related context of racial discrimination in the workplace this Court has rejected any conclusive presumption that an employer will not discriminate against members of his own race, *Castaneda v. Partida*, 430 U. S. 482, 499. There is no justification in Title VII’s language or the Court’s precedents for a categorical rule barring a claim of discrimination “because of . . . sex” merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex. Recognizing liability for same-sex harassment will not transform Title VII into a general civility code for the American workplace, since Title VII is directed at discrimination because of sex, not merely conduct tinged with offensive sexual connotations; since the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same, and the opposite, sex; and since the objective severity of harassment should be judged from the perspective of a

Syllabus

reasonable person in the plaintiff's position, considering all the circumstances. Pp. 2–7.

83 F. 3d 118, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 96-568

JOSEPH ONCALE, PETITIONER *v.* SUNDOWNER
OFFSHORE SERVICES, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[March 4, 1998]

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether workplace harassment can violate Title VII's prohibition against "discriminat[ion] . . . because of . . . sex," 42 U. S. C. §2000e-2(a)(1), when the harasser and the harassed employee are of the same sex.

I

The District Court having granted summary judgment for respondent, we must assume the facts to be as alleged by petitioner Joseph Oncale. The precise details are irrelevant to the legal point we must decide, and in the interest of both brevity and dignity we shall describe them only generally. In late October 1991, Oncale was working for respondent Sundowner Offshore Services on a Chevron U. S. A., Inc., oil platform in the Gulf of Mexico. He was employed as a roustabout on an eight-man crew which included respondents John Lyons, Danny Pippen, and Brandon Johnson. Lyons, the crane operator, and Pippen, the driller, had supervisory authority, App. 41, 77, 43. On several occasions, Oncale was forcibly subjected to sex-

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related, humiliating actions against him by Lyons, Pippen and Johnson in the presence of the rest of the crew. Pippen and Lyons also physically assaulted Oncale in a sexual manner, and Lyons threatened him with rape.

Oncale's complaints to supervisory personnel produced no remedial action; in fact, the company's Safety Compliance Clerk, Valent Hohen, told Oncale that Lyons and Pippen "picked [on] him all the time too," and called him a name suggesting homosexuality. *Id.*, at 77. Oncale eventually quit—asking that his pink slip reflect that he "voluntarily left due to sexual harassment and verbal abuse." *Id.*, at 79. When asked at his deposition why he left Sundowner, Oncale stated "I felt that if I didn't leave my job, that I would be raped or forced to have sex." *Id.*, at 71.

Oncale filed a complaint against Sundowner in the United States District Court for the Eastern District of Louisiana, alleging that he was discriminated against in his employment because of his sex. Relying on the Fifth Circuit's decision in *Garcia v. Elf Atochem North America*, 28 F. 3d 446, 451–452 (CA5 1994), the district court held that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." App. 106. On appeal, a panel of the Fifth Circuit concluded that *Garcia* was binding Circuit precedent, and affirmed. 83 F. 3d 118 (1996). We granted certiorari. 520 U. S. ____ (1997).

II

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, as amended, 42 U. S. C. §2000e–2(a)(1). We have held that this not only covers "terms" and "condi-

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tions” in the narrow contractual sense, but “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.” *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57, 64 (1986) (citations and internal quotation marks omitted). “When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.” *Harris v. Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) (citations and internal quotation marks omitted).

Title VII’s prohibition of discrimination “because of . . . sex” protects men as well as women, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U. S. 669, 682 (1983), and in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race. “Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.” *Castaneda v. Partida*, 430 U. S. 482, 499 (1977). See also *id.*, at 515–516 n. 6 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., dissenting). In *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U. S. 616 (1987), a male employee claimed that his employer discriminated against him because of his sex when it preferred a female employee for promotion. Although we ultimately rejected the claim on other grounds, we did not consider it significant that the supervisor who made that decision was also a man. See *id.*, at 624–625. If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination “because of . . . sex” merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.

Opinion of the Court

Courts have had little trouble with that principle in cases like *Johnson*, where an employee claims to have been passed over for a job or promotion. But when the issue arises in the context of a “hostile environment” sexual harassment claim, the state and federal courts have taken a bewildering variety of stances. Some, like the Fifth Circuit in this case, have held that same-sex sexual harassment claims are never cognizable under Title VII. See also, e.g., *Goluszek v. H. P. Smith*, 697 F. Supp. 1452 (ND Ill. 1988). Other decisions say that such claims are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire). Compare *McWilliams v. Fairfax County Board of Supervisors*, 72 F. 3d 1191 (CA4 1996), with *Wrightson v. Pizza Hut of America*, 99 F. 3d 138 (CA4 1996). Still others suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations. See *Doe v. Belleville*, 119 F. 3d 563 (CA7 1997).

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Respondents and their *amici* contend that recognizing liability for same-sex harassment will transform Title VII

Opinion of the Court

into a general civility code for the American workplace. But that risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute. Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at “*discriminat[ion]* . . . because of . . . sex.” We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Harris, supra*, at 25 (GINSBURG, J., concurring).

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with

Opinion of the Court

offensive sexual connotations, but actually constituted “discrimina[tion] . . . because of . . . sex.”

And there is another requirement that prevents Title VII from expanding into a general civility code: As we emphasized in *Meritor* and *Harris*, the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the “conditions” of the victim’s employment. “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” *Harris*, 510 U. S., at 21, citing *Meritor*, 477 U. S. at 67. We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory “conditions of employment.”

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering “all the circumstances.” *Harris, supra*, at 23. In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relation-

Opinion of the Court

ships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

III

Because we conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII, the judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THOMAS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 96-568

JOSEPH ONCALE, PETITIONER *v.* SUNDOWNER
OFFSHORE SERVICES, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[March 4, 1998]

JUSTICE THOMAS, concurring.

I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination "because of . . . sex."

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LOS ANGELES
WASHINGTON DC
BOCA RATON
CLIFTON NJ
PARIS

Sender
Christopher Wolf

Date
February 10, 1998

Client-Matter
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Fax Transmittal

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Main Fax Operator's Number
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To
Thurgood Marshall, Jr., Esq.

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Message

Confidentiality Note: The information contained in this facsimile message is attorney-privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us via the U.S. Postal Service.

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02/10/98 10:24 AM (1836)

THE WHITE HOUSE

WASHINGTON

February 23, 1998

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM:

SAMUEL BERGER
LARRY STEIN *LS*

SUBJECT:

Letter from Representative Frank on McVeigh Case

Purpose

To answer the letter from Representative Frank urging you to stop the Navy from discharging Chief Petty Officer Timothy McVeigh.

Background

The Navy seeks to discharge McVeigh for allegedly violating the "Don't Ask, Don't Tell" policy by including language indicating a propensity to commit homosexual acts in his profile on America On-Line (AOL), which is accessible to anyone with an AOL account. McVeigh's supporters argue that his AOL profile does not constitute a violation of the "don't tell" policy and that the Navy violated McVeigh's electronic privacy by asking AOL to confirm that the profile in question belonged to him. On January 29, U.S. District Court Judge Stanley Sporkin issued a permanent injunction against ~~discharging McVeigh for homosexuality~~ on the grounds that Navy investigators had exceeded the limits of their authority under the "don't ask" side of the policy and had violated McVeigh's right to electronic privacy. The Department of Justice has 60 days in which to file an appeal and is currently reviewing the case with the Department of Defense and the Navy to determine whether an appeal is appropriate.

~~Representative Frank~~ states that discharging McVeigh would disappoint those concerned with gay and lesbian rights. Your response notes the current status of the case and assures him that you are following it closely.

RECOMMENDATION

That you sign the letter at Tab A.

cc: Vice President
Chief of Staff

TO ROB WEINER WHT Comm
for R. Sr 6-1611

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 26 1998
Clerk, U.S. District Court
District of Columbia

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, et al.,

Defendants.

Civil Action No. 98-116
Judge Stanley SporkinMEMORANDUM OPINION

This matter comes before the Court on Plaintiff's Motion for a Preliminary Injunction. Plaintiff Timothy R. McVeigh, who bears no relation to the Oklahoma City bombing defendant, seeks to enjoin the United States Navy from discharging him under the statutory policy colloquially known as "Don't Ask, Don't Tell, Don't Pursue." See 10 U.S.C. § 654 ("new policy"). In the course of investigating his sexual orientation, the Plaintiff contends that the Defendants violated his rights under the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701 *et seq.*, the Administrative Procedure Act ("APA") 5 U.S.C. § 706, the Department's own policy, and the Fourth and Fifth Amendments of the U.S. Constitution. Absent an injunction, the Plaintiff avers that he will suffer irreparable injury from the discharge, even if he were ultimately to prevail on the merits of his claims.

STATEMENT OF FACTS

The Plaintiff, Senior Chief Timothy R. McVeigh, is a highly decorated seventeen-year

8

veteran of the United States Navy who has served honorably and continuously since he was nineteen years old. At the time of the Navy's decision to discharge him, he was the senior-most enlisted man aboard the United States nuclear submarine U.S.S. Chicago.

On September 2, 1997, Ms. Helen Hajne, a civilian Navy volunteer, received an electronic mail ("email") message through the America Online Service ("AOL") regarding the toy-drive that she was coordinating for the Chicago crew members' children. The message box stated that it came from the alias "boysrch," but the text of the email was signed by a "Tim." Administrative Record ("AR") at 110. Through an option available to AOL subscribers, the volunteer searched through the "member profile directory" to find the member profile for this sender. The directory specified that "boysrch" was an AOL subscriber named Tim who lived in Honolulu, Hawaii, worked in the military, and identified his marital status as "gay." See AR at 111. Although the profile included some telling interests such as "collecting pics of other young studs" and "boy watching," it did not include any further identifying information such as full name, address, or phone number. However, on other occasions, Hajne had communicated with the Plaintiff about his participation in the drive.

Ms. Hajne proceeded to forward the email and directory profile to her husband, who, like Plaintiff, was also a noncommissioned officer aboard the U.S.S. Chicago. The material eventually found its way to Commander John Mickey, the captain of the ship and Plaintiff's commanding officer. In turn, Lieutenant Karin S. Morean, the ship's principal legal adviser and a member of the Judge Advocate General's ("JAG") Corps was called in to investigate the matter. By this point, the Navy suspected the "Tim" who authored the email might be Senior Chief Timothy McVeigh. Before she spoke to the Plaintiff and without a warrant or court order,

Lieutenant Morean requested a Navy paralegal on her staff, Legalman First Class Joseph M. Kaiser, to contact AOL and obtain information from the service that could "connect" the screen name "boysrch" and accompanying user profile to McVeigh. See AR at 13. Legalman Kaiser called AOL's toll-free customer service number and talked to a representative at technical services. Legalman Kaiser did not identify himself as a Naval serviceman. According to his testimony at the administrative hearing, he stated that he was "a third party in receipt of a fax sheet and wanted to confirm the profile sheet, [and] who it belonged to." AR at 14. The AOL representative affirmatively identified Timothy R. McVeigh as the customer in question. See *id.* at 11-15.

Upon verification from AOL, Lieutenant Morean notified Senior Chief McVeigh that the Navy had obtained "some indication[] that he made a statement of homosexuality" in violation of § 654 (b)(2) of "Don't Ask, Don't Tell." AR at 27-28. In light of the Uniform Code of Military Justice prohibition of sodomy and indecent acts, she then advised him of his right to remain silent.¹ See *id.* at 28, 30. Shortly thereafter, in a memorandum dated September 22, 1997, the Navy advised Plaintiff that it was commencing an administrative discharge proceeding (termed by the Navy as an "administrative separation") against him. The reason stated was for "homosexual conduct, as evidenced by your statement that you are a homosexual." AR at 107.

On November 7, 1997, the Navy conducted an administrative discharge hearing before a three-member board. At the hearing, the Plaintiff made an unsworn oral statement that explained

¹ Plaintiff suggests that Lieutenant Morean acted inappropriately somehow when she advised Plaintiff of his rights at this time. The Court finds no merit to this claim. Given the state of the investigation against the Plaintiff, it was appropriate in all respects for Lieutenant Morean to have given Plaintiff a warning.

the substance of his email to Ms. Hajne, and thus by inference confirmed his authorship of the correspondence. See AR at 84. The Plaintiff presented evidence of a prior engagement to a woman and several other heterosexual relationships to rebut the presumption of homosexuality, pursuant to § 654(b)(2). See AR at 82-84. This evidence was rejected by the Board. At the conclusion of the administrative hearing, the board held that the government had sufficiently shown by a preponderance of the evidence that Senior Chief McVeigh had engaged in "homosexual conduct," a dischargeable offense.

The Navy accelerated Plaintiff's separation to take effect at 5:00 a.m. EST on Friday, January 16, 1998. On January 15, Plaintiff commenced this lawsuit and the government postponed his separation until Wednesday, January 20. This Court held a hearing on that Wednesday morning. There, the Navy initially declined to honor this Court's request for an additional amount of time to consider this matter. The Plaintiff was scheduled to be discharged on Friday, January 23. However, on January 22, the Navy extended the time for this Court to render a decision until Tuesday, January 27, when Plaintiff is now scheduled to be discharged barring relief from this Court.

ANALYSIS

STANDARD FOR PRELIMINARY INJUNCTION

To prevail on a request for preliminary injunction, the plaintiff must demonstrate 1) a substantial likelihood of success on the merits; 2) irreparable harm or injury absent an injunction; 3) less harm or injury to the other parties involved; and 4) the service of the public interest. See Dendy v. Washington Hosp. Center, 581 F.2d 990, 992 (D.C. Cir. 1978) (footnote omitted); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir.

1977). For the reasons set forth below, this Court concludes that the Plaintiff is entitled to the relief that he seeks at this time, a preliminary injunction barring his discharge.

L. Substantial Likelihood of Success on the Merits

Plaintiff in this case demonstrates a likely success to prevail on the merits. At its core, the Plaintiff's complaint is with the Navy's compliance, or lack thereof, with its new regulations under the "Don't Ask, Don't Tell, Don't Pursue" policy. Plaintiff contends that he did not "tell," as prescribed by the statute, but that nonetheless, the Navy impermissibly "asked" and zealously "pursued."

In short, this case raises the central issue of whether there is really a place for gay officers in the military under the new policy, "Don't Ask, Don't Tell, Don't Pursue." Although there have been a series of challenges to the constitutionality of the statute that codifies the policy, *see, e.g., Phillips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 358 (1996); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 118 S.Ct. 45 (1996); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996), civil courts thus far have not interpreted the requirements of the statute assuming its constitutionality. The limits on the Navy's right to investigate sexual orientation and the restrictions on an officer's right to be a gay man or woman in the military—i.e., what it practically means not to ask, not to tell, and not to pursue—have yet to be litigated in the courts.

In 1993, leaders of Congress and the President reached a compromise designed to recognize the important role that officers who happen to be gay play in the defense of our nation. *See Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Committee on Armed Services*, 103d Cong. 595 *et. seq.* (1993) (statements of General Colin

Powell, Chair of the Joint Chiefs of Staff, Admiral David Jeremiah, Navy, and General Merrill McPeak, Air Force). While the heads of the Armed Forces expressed fear that unit cohesion and military preparedness would be compromised by openly gay conduct, they acknowledged that homosexuality itself was not necessarily incompatible with military service. The statute that came to embody this position, "Don't Ask, Don't Tell, Don't Pursue," was specifically drafted to allow members of the military to live private lives as gay men and women, so long as their sexual orientation remained unspoken.

The facts as stated above clearly demonstrate that the Plaintiff did not openly express his homosexuality in a way that compromised this "Don't Ask, Don't Tell" policy. Suggestions of sexual orientation in a private, anonymous email account did not give the Navy a sufficient reason to investigate to determine whether to commence discharge proceedings. In its actions, the Navy violated its own regulations. See Guidelines for Fact-Finding Inquiries Into Homosexual Conduct, Department of Defense Directive No. 1332.14 ("Guidelines"). An investigation into sexual orientation may be initiated "only when [a commander] has received credible information that there is a basis for discharge," such as when an officer "has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts." *Id.* Yet in this case, there was no such credible information that Senior Chief McVeigh had made such a statement. Under the Guidelines, "credible information" requires more than "just a belief or suspicion" that a Service member has engaged in homosexual conduct. *Id.* In the examples provided, the Guidelines state that "credible information" would exist in this case only if "a reliable person" stated that he or she directly observed or heard a Service member make an oral or written statement that "a reasonable

person would believe was intended to convey the fact that he or she engages in or has a propensity or intent to engage in homosexual acts." *Id.*

Clearly, the facts as stated above in this case demonstrate that there was no such "credible information." All that the Navy had was an email message and user profile that it suspected was authored by Plaintiff. Under the military regulation, that information alone should not have triggered any sort of investigation. When the Navy affirmatively took steps to confirm the identity of the email respondent, it violated the very essence of "Don't Ask, Don't Pursue" by launching a search and destroy mission. Even if the Navy had a factual basis to believe that the email message and profile were written by Plaintiff, it was unreasonable to infer that they were necessarily intended to convey a propensity or intent to engage in homosexual conduct. Particularly in the context of cyberspace, a medium of "virtual reality" that invites fantasy and affords anonymity, the comments attributed to McVeigh do not by definition amount to a declaration of homosexuality. At most, they express "an abstract preference or desire to engage in homosexual acts." *See* Guidelines. Yet the regulations specify that a statement professing homosexuality so as to warrant investigation must declare "more than an abstract preference or desire"; they must indicate a likelihood actually to carry out homosexual acts. *Id.*

The subsequent steps taken by the Navy in its "pursuit" of the Plaintiff were not only unauthorized under its policy, but likely illegal under the Electronic Communications Privacy Act of 1986 ("ECPA"). The ECPA, enacted by Congress to address privacy concerns on the Internet, allows the government to obtain information from an online service provider— as the Navy did in this instance from AOL — but only if a) it obtains a warrant issued under the Federal Rules of Criminal Procedure or state equivalent; or b) it gives prior notice to the online

subscriber and then issues a subpoena or receives a court order authorizing disclosure of the information in question. See 18 U.S.C. § 2073 (b)(A)-(B), (c)(1)(B).

In soliciting and obtaining over the phone personal information about the Plaintiff from AOL, his private on-line service provider, the government in this case invoked neither of these provisions and thus failed to comply with the ECPA. From the record, it is undisputed that the Navy directly solicited by phone information from AOL. Lieutenant Karin S. Morean, the ship's principal legal counsel and a member of the JAG corp, personally requested Legalman Kaiser to contact AOL and obtain the identity of the subscriber. See AR at 13. Without this information, Plaintiff credibly contends that the Navy could not have made the necessary connection between him and the user profile which was the sole basis on which to commence discharge proceedings.

The government, in its defense, contends that the Plaintiff cannot succeed on his ECPA claim. It argues that the substantive provision of the statute that Plaintiff cites, 18 U.S.C. § 2703 (c)(1)(B), puts the obligation on the online service provider to withhold information from the government, and not vice versa. In support of its position, Defendants cite to the Fourth Circuit opinion in Tucker v. Waddell, 83 F.3d 688 (4th Cir. 1996), which held that § 2703 (c)(1)(B) only prohibits the actions of online providers, not the government. Accordingly, Defendants allege that Plaintiff has no cause of action against the government on the basis of the ECPA.

Under the circumstances of this case, it is unlikely that the government will prevail on this argument. Section 2703 (c)(1)(B) must be read in the context of the statute as a whole. In comparison, § 2703 (a) and (b) imposes on the government a reciprocal obligation to obtain a warrant or the like before requiring disclosure. It appears from the face of the statute that all of the subsections of § 2703 were intended to work in tandem to protect consumer privacy. Even if,

however, the government ultimately proves to be right in its assessment of § 2703(c)(1)(B), the Plaintiff has plead § 2703 (a) and (b) as alternative grounds for relief. In his claim that the government, at the least, solicited a violation of the ECPA by AOL, the Court finds that there is likely success on the merits with regard to this issue. The government knew, or should have known, that by turning over the information without a warrant, AOL was breaking the law. Yet the Navy, in this case, directly solicited the information anyway. What is most telling is that the Naval investigator did not identify himself when he made his request. While the government makes much of the fact that § 2703 (c)(1)(B) does not provide a cause of action against the government, it is elementary that information obtained improperly can be suppressed where an individual's rights have been violated. In these days of "big brother," where through technology and otherwise the privacy interests of individuals from all walks of life are being ignored or marginalized, it is imperative that statutes explicitly protecting these rights be strictly observed.

The government has produced no evidence that would indicate that it would have proceeded without this information from AOL affirmatively linking the email to Senior Chief McVeigh. That the Plaintiff may have made incriminating statements at the subsequent administrative hearing does not bootstrap the Navy out of its legal dilemma of not only violating its own policy, but also a federal statute in its attempt to charge the Plaintiff with homosexuality.

In Plaintiff's case, this Court finds that the Navy has gone too far. The "Don't Ask, Don't Tell, Don't Pursue" policy was clearly aimed at accommodating gay men and women in the military. In effect, it was intended to bring our nation's armed forces in line with the rest of society, which finds discrimination of virtually every form intolerable. It is self-evident that a person's sexual orientation does not affect that individual's performance in the workplace. At

this point in history, our society should not be deprived of the many accomplishments provided by people who happen to be gay. The "Don't Ask, Don't Tell, Don't Pursue" policy was a bow to society's growing recognition of this fact. For the policy to be effective, it has to be implemented in a sensitive, balanced manner. Under the policy as it stands today, gay service members must be permitted to serve their country honorably, so long as they are discrete in pursuing their personal lives.

In this case, the Plaintiff has had an exemplary service record for some seventeen years. Indeed, he has risen in the ranks to become the most senior non-commissioned officer on his ship. His evaluations have been of the highest order. Nothing has been produced before this Court which would in any way suggest that his sexual orientation has adversely affected his job performance. Senior Chief McVeigh's place in the Navy might even be characterized by some to be the very essence of what was hoped to be achieved by those who conceived the policy. The Plaintiff is no less an officer today than he was on January 5, 1998, the day before he was told of his imminent discharge from the Navy because of his sexual orientation.

As this Court stated in Elzie v. Aspin, 897 F. Supp 1, 3 (1995), it cannot understand why the Navy would seek to discharge an officer who has served his country in a distinguished manner just because he might be gay. Plaintiff's case "vividly underscores the folly . . . of a policy that systematically excludes a whole class of persons who have served this country proudly and in the highest tradition of excellence." *Id.* at 4. Although this case specifically does not reach any of the constitutional issues underscoring the "Don't Ask, Don't Tell, Don't Pursue" policy, see Able v. United States, 968 F. Supp. 850 (1997), the Court must note that the defenses mounted against gays in the military have been tried before in our nation's history — against

blacks and women. See Elzie v. Aspin, 841 F. Supp. 439, 443 (1993). Surely, it is time to move beyond this vestige of discrimination and misconception of gay men and women.

II. Irreparable Harm

Without this Court's immediate intervention, the Plaintiff will lose his job, income, pension, health and life insurance, and all the other benefits attendant with being a Naval officer. Having served honorably for the last seventeen years, Plaintiff will be separated from a position which is central to his life on the sole ground that he has been labeled a "homosexual," and thus by definition unfit for service. The stigma that attaches to such an accusation without substantiation is significant enough that this Court believes it must grant the injunctive relief sought. In cases nearly identical to this, courts have accordingly granted a preliminary injunction, see Elzie v. Aspin, 841 F. Supp. 439, 443 (D.D.C. 1993) (loss of benefits and "rights as a Marine" constitute irreparable harm); May v. Gray, 708 F. Supp. 716, 719 (E.D.N.C. 1988) (same); see also Saunders v. George Washington University, 768 F. Supp. 843, 845 (D.D.C. 1991); Huynh v. Carlucci, 679 F. Supp. 61, 67 (D.D.C. 1988).

III. Harm to other Parties

In contrast to the serious injury that Plaintiff immediately faces if discharged, there is no appreciable harm to the Navy if Senior Chief McVeigh is permitted to remain in active service. Indeed, the Navy will only be enhanced by being able to retain the Plaintiff's seventeen years of service experience.

IV. Public Interest

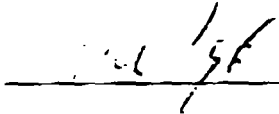
Certainly, the public has an inherent interest in the preservation of privacy rights as advanced by Plaintiff in this case. With literally the entire world on the world-wide web,

enforcement of the ECPA is of great concern to those who bare the most personal information about their lives in private accounts through the Internet. In this case in particular, where the government may well have violated a federal statute in its zeal to brand the Plaintiff a homosexual, the actions of the Navy must be more closely scrutinized by this Court. It is disputed in the record exactly as to how the Navy represented itself to AOL when it requested information about the Plaintiff. The Defendants contend that Legalman Kaiser merely asked for confirmation of a fax sheet bearing Plaintiff's account. Plaintiff contends, and AOL confirms, however, that the Naval officer "mislead" AOL's representative by "both failing to disclose the identity and purpose [of his request] and by portraying himself as a friend or acquaintance of Senior Chief McViegh's." See AOL Statement on the Matter of Timothy McVeigh, Ct. Ex. 1. At the final injunction hearing, this issue should be fully explored.

The Court believes that when this case is finally determined, it will become clear that the case will be able to be disposed on the basis of the "Don't Ask, Don't Tell, Don't Pursue" policy. This provision draws a fine balance between the interests of gay service members and the Armed Forces. It is a way of permitting gay women and men to serve in the Armed Forces, a right that the military did not provide them prior to the adoption of "Don't Ask, Don't Tell, Don't Pursue."

To make the policy work requires each of the parties to refrain from taking certain actions. Under the provisions of the policy, if the gay member agrees to remain silent about his or her sexual orientation, he or she is permitted to serve. For its part under the policy, the military is required to refrain from asking any of its members about their sexual orientation or pursuing an inquiry into a member's sexual orientation without a reasonable basis in fact. So far, pursuant to the record developed in this case, while Plaintiff complied with the requirements

imposed upon him under "Don't Ask, Don't Tell, Don't Pursue," the Defendant went further than the policy permits. Although Officer McVeigh did not publicly announce his sexual orientation, the Navy nonetheless impermissibly embarked on a search and "outing" mission. Therefore, when this case is finally heard, if the record remains as it is now, the Plaintiff will likely prevail. It is accordingly for this reason that a preliminary injunction will issue. An appropriate order follows.



Date



Stanley Sporkin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, et al.,

Defendants.

Civil Action No. 98-116
Judge Stanley Sporkin

ORDER

For the reasons set forth in the opinion above, it is hereby

ORDERED that good cause having been shown pursuant to Rule 65 of the Federal Rules of Civil Procedure that immediate and irreparable injury and damage will result to Plaintiff before a trial on the merits can be heard and decided, that Plaintiff's Motion for a Preliminary Injunction is **GRANTED**; and it is

FURTHER ORDERED that Defendants, their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them who receive actual notice of the Order by personal service or otherwise, shall be preliminarily enjoined from taking any adverse action against Plaintiff, including discharging Plaintiff from the United States Navy or otherwise hindering Plaintiff's Naval Service, on the basis of his alleged sexual orientation pending final resolution of Plaintiff's Complaint; and it is

FURTHER ORDERED that the parties shall appear before this Court on January 29, 1998 at 10:00 in Courtroom 6 for a status conference, at which time a briefing schedule and date

9

for a hearing on final injunctive relief will be determined.

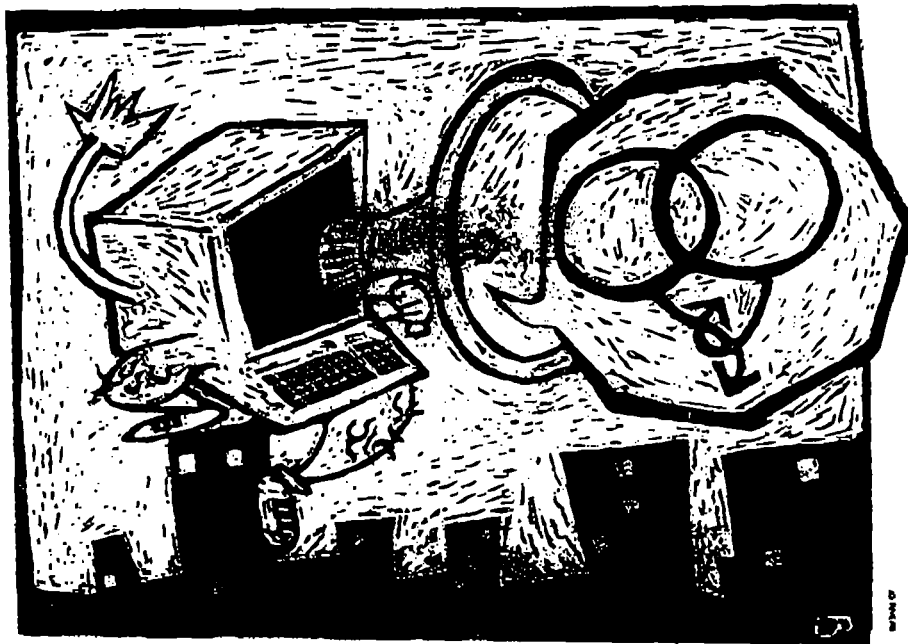
1/21/98
Date

Stanley Sporkin
Stanley Sporkin
United States District Judge

C O M M E N T A R Y A N D A N A L Y S I S

Improperly Asked, Improperly Told

Case of
Sailor Outed
Through
AOL Sets
First Real
Limits On
Gays-in-
Military
Policy



BY CHRISTOPHER WOLF

Finding that the Navy had engaged in a "search and outing" mission, U.S. District Judge Stanley Sporkin issued an order last month barring the U.S. Navy from discharging Senior Chief Petty Officer Timothy McVeigh. Although Sporkin is not the first judge to consider the military's "don't ask, don't tell, don't pursue" policy on gay servicemembers, his decision is significant for several reasons: It is the first to set limits on military conduct under the policy. It recognizes an exclusion-

Christopher Wolf, a partner in the D.C. office of New York's Proskauer Rose, is lead counsel for Timothy McVeigh. Wolf chairs the firm's entertainment, media, and information technology practice group.

ary rule for evidence obtained in violation of the Electronic Communications Privacy Act. And it highlights once again the wastefulness of homophobia.

McVeigh, a 17-year Navy veteran (and no relation to the Oklahoma City bomber), served aboard the nuclear submarine USS *Chicago*. His latest performance evaluation rated him an inspiring, "superior leader" and the "embodiment of Navy Core Values." But that record provided no protection when the Navy chose to invade his privacy last fall.

In September 1997, McVeigh sent an e-mail message to a civilian to assist in a Christmas toy drive for the children of the crew of his boat. The e-mail was sent through America Online. Curious about the sender's screen name, which was "Boysrch," the recipient looked up the AOL user profile connected to that name. The

profile had several gay references. The recipient then alerted the Navy to the profile, and the Navy commenced an investigation of McVeigh on suspicion of violating the "don't ask, don't tell" policy.

A JAG officer and the legal assistant assigned to her concocted a plan to see if they could link the anonymous AOL profile to McVeigh. When the legal assistant contacted AOL, he did not identify himself as a Navy investigator and, according to AOL, misled the customer service representative into believing he was a friend of McVeigh's. Although AOL policy prohibits disclosure of personal information even to "friends," the customer service representative released information sufficient for the Navy to conclude that the profile with gay references belonged to McVeigh. (AOL has

SEE DON'T PURSUE, PAGE 30

Violating Essence of 'Don't Ask'

DON'T PURSUE FROM PAGE 27

since apologized for the human error that led to the unauthorized disclosure.)

On the basis of this evidence obtained from AOL, the Navy conducted an administrative discharge hearing. A three-member board determined that McVeigh should be removed from the service because he is "openly gay."

On Jan. 15, 1998, McVeigh brought suit in the U.S. District Court for the District of Columbia challenging the proposed discharge. A hearing was held Jan. 21. Five days later, Judge Sporkin issued a strongly worded preliminary injunction barring the Navy from removing McVeigh. And on Jan. 29, Sporkin made that injunction permanent.

In his 15-page injunction decision, Judge Sporkin ruled that the Navy's investigation of McVeigh's AOL profile failed to follow proper procedures under the Electronic Communications Privacy Act of 1986. ECPA specifies procedures that must be followed when government attempts to access the contents of electronic communications and records concerning electronic communications—such as the identity of an e-mail user, 18 U.S.C. §§2703 (a)-(c). Depending on the type of information being sought from an online or Internet service provider, the government must have a warrant, a subpoena, or the subscriber's permission. The service provider is prohibited from releasing information in the absence of such authorization or court document.

Rejecting the government's argument that these provisions only govern the conduct of service providers, Judge Sporkin found that the ECPA imposes a "reciprocal obligation to obtain a warrant or the like before requiring disclosure." The judge went on:

It appears from the face of the statute that all of the subsections of 2703 were intended to work in tandem to protect consumer privacy. . . . [T]he government knew or should have known that by turning over the information without a warrant, AOL was breaking the law. Yet, the Navy, in this case, directly solicited the information anyway. What is most telling

is that the Navy investigator did not identify himself when he made his request. While the government makes much of the fact that §2703(c)(1)(B) does not provide a cause of action against the government, it is elementary that information obtained improperly can be suppressed where an individual's rights have been violated.

Thus Judge Sporkin acted to protect the privacy interests of Tim McVeigh and all other online users. The government's interpretation of the ECPA would have freed the state to attempt to pry out information whose disclosure the law clearly makes illegal. In an age when more and more personal information can be found online all too easily, Judge Sporkin has served notice that the ECPA's protections must be strictly observed.

POLICY CONCERNS

Of equal importance is Judge Sporkin's interpretation of the military's "don't ask, don't tell" policy. Sporkin noted correctly that "[t]he limits on the Navy's right to investigate sexual orientation and the restrictions on an officer's right to be a gay man or woman in the military—i.e., what it practically means not to ask, not to tell, and not to pursue—have yet to be litigated." For that reason, his decision is a milestone.

Finding that "the Navy has gone too far," Judge Sporkin drew a line. As to "telling," the judge found that "suggestions of sexual orientation in a private, anonymous e-mail account did not give the Navy a sufficient reason to investigate to determine whether to commence discharge proceedings." Without the kind of evidence that is more than suspicion or belief that a servicemember had declared his homosexuality, there was no credible information on which to trigger an investigation. "When the Navy affirmatively took steps to confirm the identity of the e-mail respondent," wrote Sporkin, "it violated the very essence" of the "don't ask, don't tell" policy.

Thus, an anonymous user profile on AOL—even one that through an inquiry could be linked to a servicemember—is not enough to constitute "telling" or to warrant

"asking and pursuing." The policy requires some effective distinction between information about sexual orientation that is available if the military goes hunting and information that is actually made known to fellow servicemembers.

Judge Sporkin wrote that the "don't ask, don't tell" policy "was intended to bring our nation's armed forces in line with the rest of society, which finds discrimination of virtually every form intolerable," and to permit gay servicemembers to serve their country honorably "so long as they are discrete in pursuing their personal lives." The judge appeared particularly offended by the Navy's attempts to oust an officer with "an exemplary service record for some seventeen years." Moreover, Sporkin declared, "[n]othing has been produced before [the] Court which would in any way suggest that [McVeigh's] sexual orientation has adversely affected his job performance."

Judge Sporkin took the opportunity presented by the Navy's misconduct, and its threatened harm to a sterling senior enlisted man, to lay down this reminder:

It is self-evident that a person's sexual orientation does not affect that individual's performance in the workplace. At this point in our history, our society should not be deprived of the many accomplishments provided by people who happen to be gay. The "Don't Ask, Don't Tell, Don't Pursue" policy was a bow to society's growing recognition of this fact.

For Tim McVeigh and other servicemembers, Judge Sporkin's decision provides the protection necessary to keep their private lives private—especially if they choose to avail themselves of the anonymity of cyberspace. For users of the Internet and online services, the decision gives some comfort that information shielded by electronic privacy law cannot be used by the government if obtained without process or permission. And for all of us, the decision is a welcome recognition that a person's sexual orientation is irrelevant to his value in the workplace. For a case that was brought and decided within two weeks, much has been accomplished. ■

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'Don't Ask, Don't Tell' Online

The Navy's move to dismiss a highly decorated sailor, Senior Chief Petty Officer Timothy R. McVeigh, for homosexuality shows the senselessness of the military's "don't ask, don't tell" policy and the vulnerability of private information on the Internet.

Mr. McVeigh, no relation to the man convicted of the Oklahoma City bombing, is a 17-year Navy veteran with an exemplary record. Recent performance reviews have called him "inspiring," an "outstanding role model" and the "embodiment of Navy core values." Yet Mr. McVeigh is being drummed out on the suspicion that he is gay.

The case began when Mr. McVeigh, who is a subscriber to America Online, sent an E-mail message to the wife of a fellow crewman about a Christmas toy drive with a return address of "boysrch." She looked up the user profile under that address and found the name "Tim," a marital status of "gay" and a hobby of "boy watching." This information was given to a commanding officer who believed that there was no basis for further inquiry. A superior officer overruled that decision and turned the case over for investigation.

A Navy investigator obtained Mr. McVeigh's

full name and address from AOL. The company admits that disclosure violated its own confidentiality rules, but says the investigator failed to identify himself or the purpose of the request. Federal law prohibits the Government from getting customer information without a subpoena or court order, which the investigator did not have. Now the Navy is using that information against Mr. McVeigh.

The guidelines on "don't ask, don't tell" allow military personnel to attend gay rights parades, go to gay bars and read gay literature without having evidence of those activities used against them. The policy supposedly allows associational freedom and a zone of privacy. The idea is to protect individuals from inquiries spurred by rumor and suspicion.

The fact that the Navy had to pry away, by improper means, an essentially anonymous E-mail address shows how far it went beyond the "don't ask, don't tell" policy. Mr. McVeigh has asked a Federal court to enjoin his discharge. That request should be granted when the judge rules this week. Otherwise the "don't ask, don't tell" policy affords no privacy protection at all. This is another grievous instance of the military destroying an honorable career solely for homophobic reasons.