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Don't Ask / Don't Tell #2 [3]

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BARNEY FRANK
4TH DISTRICT, MASSACHUSETTS

2210 RAYBURN BUILDING
WASHINGTON, DC 20515-2104
(202) 225-5931

29 CRAFTS STREET
NEWTON, MA 02158
(617) 332-3920

Congress of the United States
House of Representatives
Washington, DC

PLEASANT STREET
ROOM
BEDFORD, MA 02740
(508) 898-8482

222 MILLIKEN PLACE
THIRD FLOOR
FALL RIVER, MA 02721
(508) 874-3551

89 MAIN STREET
BRIDGEWATER, MA 02324
(508) 697-9403

MEMORANDUM

TO: The President
FROM: Rep. Barney Frank
RE: Timothy McVeigh and the Navy
DATE: March 11, 1998

I understand that the administration is now trying to decide what it will do with regard to appealing the decision of Judge Sporkin requiring the Navy to drop its effort to throw Timothy McVeigh out of the service. And I understand that the next place where this decision will be made is the Office of the Solicitor General. Obviously if the Solicitor General decides not to go forward with the appeal that would be very helpful in achieving the result, but I want to make the case to you that it would be even better if a decision not to appeal were to come from you.

As I believe Judge Sporkin's opinion makes clear -- it is fairly short and well worth reading -- the Navy's behavior in this case was egregiously wrong on two counts. First, it blatantly violated the spirit and I believe the letter of your policy regarding gays in the military. Timothy McVeigh was making no effort to tell anybody anything. Instead, the Navy invaded his privacy by calling AOL to find out who was the owner of a particular e-mail account. It is through this Navy initiated inquiry into records that AOL should not have divulged that they found out that Timothy McVeigh was gay. In fact, in his own interactions with his Navy colleagues he never told. The Navy asked. He should not be penalized.

In addition, the Navy did this, as Judge Sporkin points out, in a way that violated the basic principles of privacy on the Internet to which your administration has been strongly committed. Thus to appeal the decision is to validate a Navy policy which disregarded not only your policy on "Don't Ask, Don't Tell" but also your administration's policy regarding protecting privacy on the Internet.

Unfortunately, this violation of your Don't Ask, Don't Tell policy is not unique. As I have said publicly, both orally and in writing on hundreds of occasions, your record in defense of the rights of gay and lesbian people not be discriminated against is an excellent one, and obviously unparalleled in American history. But I've had to concede one flaw in that record -- the refusal of the Armed Services Forces to comply with the Don't Ask, Don't Tell policy.

While I was not happy with that policy, it did seem to me an improvement in its terms over previous practice. Sadly, by a policy of resistance to your approach to this, the Armed Services have undermined it and have left many gay and lesbian people worse off than they were before you sought to intervene on behalf of fairness. And the Navy has been especially egregious in this regard.

Thus, this seems to me an excellent opportunity for you to demonstrate that you are supportive of the policy you promulgated and that you will not stand by idly when the Armed Forces undermine it. So, while I would be pleased if the Solicitor General decided not to appeal, I think it would be a lost opportunity for you to demonstrate that you intend to enforce the policy over opposition to it.

This is especially the case because you simply would not be overruling the Navy, but rather deciding not to appeal a very well reasoned decision from a highly respected Judge -- and a Reagan appointed Judge at that. The concern for fair treatment for gay and lesbian people in the military that led you to take on this difficult political issue in the first place argues strongly in favor of your being the one who decides at this point not to appeal the decision. I am not asking you to overturn the policy you promulgated, or to express any criticism of it. Exactly the opposite is the case -- I believe this is a very important opportunity for you to show that you in fact will insist that the policy you formulated in this regard be followed, and that you will not tolerate the uniform services undermining it in a way that leaves many innocent young men and women worse off than they were before some of us tried to help them.

I am convinced that if you were to read Judge Sporkin's opinion as a lawyer and defender of anti-discrimination policies, and probably even more so if you were to read the Navy's briefs on the subject, you would agree deciding not to appeal would not only bring the best result in terms of fairness, but would be a very important step towards making sure that the policy you promulgated is adhered to and not violated in fact.

THE WHITE HOUSE
WASHINGTON

COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: 3-13-98

TOTAL PAGES (including cover page): 4

TO: Rob Weiner
61647

FROM: Chuck Duff PHONE: (202) 456-2632
FAX: (202) 456-6279

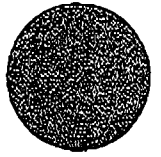
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Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/12 ACTION/CONCURRENCE/COMMENT DUE BY: 3/13SUBJECT: Barney Frank letter

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☒	☐	McCURRY	☐	☒
BOWLES	☒	☐	McGINTY	☐	☐
McLARTY	☐	☐	NASH	☐	☐
PODESTA	☒	☐	RADD	☐	☐
MATHEWS	☒	☐	REED	☐	☐
RAINES	☐	☐	~~RUFF~~	☒	☐
BLUMENTHAL	☐	☐	SMITH	☐	☐
BERGER	☒	☐	SOSNIK	☐	☐
ECHAVESTE	☐	☐	SPERLING	☐	☐
EMANUEL	☒	☐	STREETT	☐	☐
GIBBONS	☐	☐	TARULLO	☐	☐
STEIN	☐	☐	VERVEER	☐	☐
IBARRA	☐	☐	WALDMAN	☐	☐
KLAIN	☐	☐	YELLEN	☐	☐
LEWIS	☐	☐	BEGALA	☐	☐
LINDSEY	☐	☐	<u>Socarides</u>	☒	☐
MARSHALL	☐	☐		☐	☐
				☐	☐

REMARKS:

How should this be handled?

RESPONSE:

BARNEY FRANK
4TH DISTRICT, MASSACHUSETTS

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MEMORANDUM

98 MAR 12 PM 7:01

TO: The President
FROM: Rep. Barney Frank
RE: Timothy McVeigh and the Navy
DATE: March 11, 1998

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03/13/96 FAX 11:09 FAX 202 456 0178 COUNSEL'S OFFICE
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THE WHITE HOUSE
WASHINGTON

February 26, 1998

MEMORANDUM

TO: Rob Weiner

CC: Laura Marcus
Richard Socarides

FROM: Thurgood Marshall, Jr. (6-7072) *TM*

SUBJECT: More! Navy Senior Chief Petty Officer Timothy McVeigh

I am forwarding the attached, more information regarding the case, Timothy R. McVeigh v. William S. Cohen, et al., for your review and appropriate action.

If you have any questions, please give me a call (6-7072).

Thank you.

PROSKAUER ROSE LLP

1585 Broadway
 New York, NY 10036-8299
 Telephone 212.969.3000
 Fax 212.969.2900

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 WASHINGTON DC
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Sender Christopher Wolf	Date February 18, 1998	Client-Matter 00019-008	Fax Transmittal	
Sender's Voice Number 202.416.6818	Main Fax Operator's Number 212.969.5050 (Voice)	Room Number	Pages (incl. cover) 6	
To Thurgood Marshall, Jr., Esq.	Company The White House	Fax Number 202-456-6704	Voice Number 202-456-2572	

Message

THIS IS FOR YOUR REVIEW IN CONNECTION WITH OUR PRIOR CONVERSATION.

--CHRIS

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PROSKAUER ROSE LLP

1233 Twentieth Street NW
Suite 800
Washington, DC 20036-2396
Telephone 202.416.6800
Fax 202.416.6899

NEW YORK
LOS ANGELES
BOCA RATON
CLIFTON NJ
PARIS

Alec W. Farr
Attorney at Law

Direct Dial 202.416.6862
afarr@proskauer.com

VIA FACSIMILE: 202-616-8470

February 18, 1998

David M. Glass, Esq.
Civil Division
United States Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20004

Re: Timothy R. McVeigh v. William Cohen, et al.; Civ. Action No. 1:98CV00116

Dear David:

I am writing in response to your letter forwarding the BuPers memorandum concerning Senior Chief McVeigh's assignment.

The billets listed in the BuPers memo do not satisfy Judge Sporkin's Order and admonishment to the government in court that Mr. McVeigh be placed in a position commensurate with his prior responsibilities, rank and experience. As the Court recognized, Senior Chief McVeigh must be made whole and placed as nearly as possible in the position he would have been in but for the Navy's illegal acts in this case. Indeed, Captain Horgan's prior memorandum acknowledges this, as he indicated the Navy would propose positions which "would be viewed by the submarine community as career-enhancing, follow-on tours for one who has already completed a tour as Chief of the Boat (COB)" (emphasis added). The billets offered do not meet this description, and fall far short of making Mr. McVeigh whole. Moreover, the Navy's reasons for not giving Mr. McVeigh a Chief of the Boat (COB) or Command Master Chief ashore position are invalid for the following reasons:

First, it can be no argument that all COB billets in SubLant and SubPac allegedly are filled. Captain Decicco writes that placing Mr. McVeigh in such a position would require the Navy "to displace another deserving service member who has already received orders into such a billet." Mr. McVeigh has, as the Court held, already been wrongfully displaced from his COB billet on the Chicago as a result of the Navy's illegal actions. Making him whole must take precedent over other considerations. Moreover, because Mr. McVeigh was already in a COB billet, there is

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David M. Glass, Esq.
February 18, 1998
Page 2

at least one service member currently serving in that capacity who would not have received those orders but for the Navy's wrongful actions in this case. Order modifications from BuPers are a regular occurrence, so there is no procedural obstacle to making a COB position available to Mr. McVeigh.

Second, even if the Court would not require the Navy to make a COB billet available, in determining an appropriate shore billet, Mr. McVeigh should not be penalized for not having advanced to the rank of Master Chief Petty Officer. Had Mr. McVeigh been allowed to complete his three year tour as COB, it is virtually certain he would have been selected for advancement to Master Chief Petty Officer simply by virtue of his position as COB of a 688(I) attack sub. Advancement statistics from BuPers would easily confirm this. Moreover, Mr. McVeigh's fitness reports as COB of the Chicago speak for themselves. Mr. McVeigh had already put in five very productive months as COB before the Navy's unlawful investigation, and his CO and XO wrote that his leadership had a tangible, positive affect on the crew's efficiency and morale. But for the Navy's actions, there is no reason to believe Mr. McVeigh would not have continued his exemplary service and advanced to Master Chief Petty Officer. Therefore, assignment to any other duties puts him at an unfair disadvantage for advancement. Again, there is no procedural obstacle to placing Mr. McVeigh in a Command Master Chief ashore position. Waivers from BuPers are always an option and are not unusual in daily Naval operations.

Third, the billets offered are not equivalent to the level at which Senior Chief McVeigh was working as COB, let alone "career enhancing, follow-on tours for one who has already completed a tour" as COB. As set forth above, had Mr. McVeigh been allowed to complete his tour as COB, he would have advanced to Command Master Chief. The billets offered are all Division Leading Chief Petty Officer (LCPO) billets with limited or no personnel management and supervisory responsibilities. Mr. McVeigh was filling division LCPO billets approximately eight years ago. He has since progressed through Department and on to Command billets where, in the case of his COB billet, he was supervising the actions of 134 men. To offer him a Divisional LCPO billet would not even put him in a position equivalent to his prior position as COB, let alone place him in a "career enhancing, follow-on tour for one who has already completed" a COB tour.

Finally, the offer of \$208 per month in commuted rations does not begin to compensate Senior Chief McVeigh for his loss of \$415 per month in sea pay until May 2000. Along with sea pay, Mr. McVeigh would have received all rations provided by the submarine during that period. Commuted rations, as stated in Captain Decicco's letter, are to compensate for a members' loss of rations — which would have been provided by the submarine had the Navy not interrupted Mr. McVeigh's COB tour — and are in no way compensation for loss of sea pay. Mr. McVeigh's sea

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David M. Glass, Esq.

February 18, 1998

Page 3

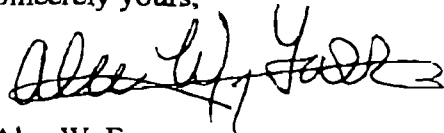
pay alone for the portion of his unfinished tour, for the period of September 1997 to May 2000, not including any rank, annual or longevity increases (which he almost certainly would have received), would have amounted to \$13,695.00. Even if Senior Chief McVeigh is assigned to shore duty, we believe the only way for the Navy to satisfy Judge Sporkin's order is for him to continue to receive this pay, or its equivalent in a monetary settlement between the parties.

In addition, it appears that the Navy has, for some reason, limited its billet run to Hawaii-area positions. As I stated in my prior letter, Senior Chief McVeigh has no desire to remain in the Hawaii area if he can not be accommodated in a COB billet. The only reason Mr. McVeigh moved to Hawaii was to accommodate the needs of the Navy in changing U.S.S. Chicago's home port from San Diego to Pearl Harbor. If shore duty is the only possible choice for reasons the Court accepts, his choices for shore duty preferences continue to be in Kings Bay, Georgia, Jacksonville, Florida or San Diego, California. Again, there should be no procedural impediment to accommodating this request. Normal detailing practices do not unilaterally limit assignment options to one spot.

It appears from the BuPers memo that the Navy does not believe it can accommodate Senior Chief McVeigh. If so, as we have told you from the outset of this litigation, the Navy has another option which Mr. McVeigh would accept: early retirement with a full pension equivalent to what he would have earned if he had been allowed to finish his twenty years. This has always seemed to us — and certainly seemed to the Court when we raised it at our last hearing — to be an easier solution for both our clients.

Please let me know the Navy's position in response to this as soon as possible. If the Navy refuses to (a) make a COB billet available to Senior Chief McVeigh; (b) provide a shore assignment consistent with the parameters outlined above and in my last letter (complete with the equivalent of sea pay until at least May 2000); or (c) settle on the terms we have offered throughout this case, we will have no choice but to raise the issue with the Court.

Sincerely yours,



Alec W. Farr



DEPARTMENT OF THE NAVY
BUREAU OF NAVAL PERSONNEL
WASHINGTON, D.C. 20370-5000

IN REPLY REFER TO
FEB 13 1998

MEMORANDUM

From: Legal Counsel, Bureau of Naval Personnel
To: Deputy Assistant Judge Advocate General of the Navy
(General Litigation)

Subj: ASSIGNMENT OF ETCS(SS) TIMOTHY R. MCVEIGH, USN

1. In reply to the letter indicating ETCS(SS) McVeigh's preferences for his next assignment, the following is provided.

2. All Chief of the Boat billets (Atlantic and Pacific Fleets) have been filled through September 1999. To make such a billet available to him at this time would require us to displace another deserving service member who has already received orders into such a billet. Therefore, the Bureau cannot accommodate his first two requests.

3. Second, ETCS(SS) McVeigh does not qualify for a position as a Command Master Chief Ashore. He does not have the proper NEC (9580), he is not an E-9, and he has not been selected by a Navy-wide selection board as a Command Master Chief. Therefore, the Bureau cannot place him in such a billet.

4. Alternatively, the three billets listed below are available and take into consideration ETCS(SS) McVeigh's qualifications, his career progression, the Order of the District Court, and the needs of the naval service. Post-tour Chiefs of the Boat in the grade of E-8 are normally rotated ashore to fill various positions in their specialty. The below-listed billets are commensurate with ETCS(SS) McVeigh's experience and seniority, and the third billet would include entitlement to sea pay while aboard vessels at sea. It would also include per diem and travel allowances on certain occasions.

- a. Naval Computer and Telecommunications Area Master Station, Eastern Pacific, Hawaii, HI. This is an E-8 billet in which ETCS(SS) McVeigh would be the leading CPO of a special communications division. This Communications station has six other sites under its direction and is responsible for connectivity of special communications in support of national security. This billet is classified as shore duty.
- b. Naval Submarine Training Facility, Pacific, Pearl Harbor, HI. This is a new billet coming on line for an E-8 or E-9 with an instructor background, which ETCS(SS) McVeigh possesses. He would work in the curriculum information standards office and head up the local training authority, and be the Fleet Liaison for non-

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CIVIL DIVISION FP

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Subj: ASSIGNMENT OF ETCS(SS) TIMOTHY R. MCVEIGH, USN

traditional education for all commands. This billet will require significant interaction with civilian universities to evaluate accreditation of military training and on the job training for college credit. This billet is classified as shore duty.

- c. SSEF PAC, Pearl Harbor, HI. This is an E-8 billet in which ETCS(SS) McVeigh would be the leading CPO on the ESM Groom Team. This position normally requires the incumbent to travel extensively to various locations throughout the world in support of submarine special operations electronics. This billet is classified as sea duty for rotational purposes, and the incumbent would receive per diem while in a travel status and would be entitled to sea pay on a day-for-day basis while underway.

5. If ETCS(SS) McVeigh elects option a or b, he would not be entitled to sea pay. If he elects option c, he will be entitled to sea pay, but only during certain periods. Entitlement to sea pay is governed by statute (37 U.S. Code 305a) and regulation (SECNAVINST 7220.77D) for only those personnel on sea duty. The Navy cannot pay him this pay when he is assigned ashore.

6. Regarding ETCS(SS) McVeigh's submarine pay, steps have been taken to renew entitlement to this pay and obtain retroactive submarine pay back to the date he left USS CHICAGO. We anticipate he should receive all of his retroactive submarine pay by the 1 March 1998 payday.

W. A. Decicco
W. A. DECICCO
CAPT, JAGC, USN

10 USCS @ 654 (1997) printed in FULL format.

UNITED STATES CODE SERVICE

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*** THIS SECTION IS CURRENT THROUGH 105-145, APPROVED 12/15/97 ***
*** WITH GAPS OF 85, 92, 101, 102, 106, 111-114, 119, 127 ***
*** 129, 134, 135, 137-139 & 142 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 37. GENERAL SERVICE REQUIREMENTS

10 USCS @ 654 (1997)

@ 654. Policy concerning homosexuality in the armed forces

(a) Findings. Congress makes the following findings:

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

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

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

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

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

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

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

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

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

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

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

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

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

deployment to a combat environment.

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Entry standards and documents.

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

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

(d) Required briefings. The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937

DONT
ASK
POLICY

of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction. Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that--

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

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

(f) Definitions. In this section:

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

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

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

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

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

HISTORY: (Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, @ 571(a)(1), 107 Stat. 1670.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Regulations. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, @ 571(b), 107 Stat. 1673, provides: "Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a)."

Savings provision. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, @ 571(c), 107 Stat. 1673, provides: "Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654."

Sense of Congress. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, @ 571(d), 107 Stat. 1673, provides: "It is the sense of Congress that--

"(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10,

United States Code, as added by subsection (a); and

"(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice).".

INTERPRETIVE NOTES AND DECISIONS

In deciding to issue preliminary injunctions in case brought by six gay or lesbian members of armed forces challenging constitutionality of law embodying "don't ask, don't tell" policy, district court should have required plaintiffs to prove likelihood of success on merits rather than only "serious questions going to merits," since governmental policies implemented through legislation or regulations developed through presumptively democratic processes are entitled to higher degree of deference and should not be enjoined lightly. *Able v United States* (1995, CA2 NY) 44 F3d 128, 65 CCH EPD P 43399.

Air Force Captain who admitted to his commanding officer that he was homosexual was not entitled to injunction preventing his discharge pending appeal since he did not have substantial likelihood of success on merits of appeal challenging constitutionality of statute, nor had he shown irreparable injury since if he prevailed on appeal he would be entitled to reinstatement with full back pay and benefits or other comparable monetary relief. *Richenberg v Perry* (1995, CA8 Neb) 73 F3d 172, 69 BNA FEP Cas 883.

Plaintiffs had standing to challenge @ 654(b)(1) since they all stated that they were homosexuals and thus member of allegedly disadvantaged group, statute imposes government-imposed barrier to homosexual conduct in providing for separation of servicemembers who engage, attempt to engage, or solicit homosexual acts, and Act treats homosexuals and heterosexuals differently even though they have engaged in similar acts within broad range of sexual conduct. *Able v United States* (1996, CA2 NY) 88 F3d 1280, 71 BNA FEP Cas 419.

Servicemember who informed his commanding officer that he was homosexual failed to rebut presumption that he had propensity or intent to engage in homosexual acts, despite his testimony that he did not intend to engage in such acts, since on cross-examination he admitted to being sexually attracted to men. *Richenberg v Perry* (1996, CA8 Neb) 97 F3d 256, 68 CCH EPD P 44259.

Discharge of servicemember who stated that he was homosexual and had engaged in and intended to continue to engage in homosexual acts did not violate servicemember's right to equal protection since his discharge under "acts" prong of statute is constitutionally permissible because relationship between Navy's mission and its policy on homosexual acts renders distinction between acts and status rational; nor did his discharge violate his First Amendment right to free speech since his statements were used as evidence, not as reason for discharge. *Philips v Perry*, (1997, CA9 Wash) 106 F3d 1420, 97 CDOS 1038, 97 Daily Journal DAR 1551.

Preliminary injunction will issue, in action by lesbian and gay members of United States Armed Services challenging constitutionality of new policy and regulations as to homosexuals in armed forces, enjoining United States and Secretary of Defense from investigating, discharging, or taking other adverse action against plaintiffs because they have identified themselves as homosexuals, because: (1) showing of possible violation of constitutional rights constitutes irreparable harm justifying preliminary injunction; (2) exhaustion of administrative remedies is not required when plaintiffs raise constitutional questions and when irreparable injury will occur without preliminary injunctive relief; (3) plaintiffs have established serious questions going to merits of dispute; and (4) hardship to 6 plaintiffs is evident and immediate and their

free speech rights to pursue this case will be chilled without injunctive relief, so balance of hardships tips decidedly in favor of plaintiffs. *Able v United States* (1994, ED NY) 847 F Supp 1038, 64 BNA FEP Cas 692, 64 CCH EPD P 42966.

Claim of members of United States Armed Services, alleging that they are homosexuals and that Services' policy and regulations as to homosexuals violated their right to equal protection, is not dismissed, because although government is entitled to deference where constitutional rights of service members are implicated, plaintiffs are entitled to attempt to prove that findings underlying statute are based solely on prejudice or fear of prejudice, or otherwise that there is no rational relationship between statute's classifications of gay and lesbian service members and legitimate government purpose. *Able v United States* (1994, ED NY) 863 F Supp 112, app den (1994, ED NY) 870 F Supp 468.

In action by 6 self-identified homosexual members of Armed Services, court declares 10 USCS @ 654 unconstitutional, where statute prohibits statement "I am homosexual or have homosexual propensities," because @ 654(b)(2) burdens speech based solely on its content by subjecting member to discharge process in which member has only at best hypothetical chance to escape separation. *Able v United States* (1995, ED NY) 880 F Supp 968, 67 BNA FEP Cas 1098, 66 CCH EPD P 43470.

Navy service member's discharge from U.S. Navy on grounds that he engaged in homosexual acts must be upheld, where discharged service member stated to superior that he was homosexual but had never engaged in homosexual acts with other servicemen although he did frequent gay bars while off duty, which led to consensual sexual encounters, because while service members cannot be discharged solely because they are homosexuals, under Uniform Code of Military Justice (10 USCS @ 654(a), (b), (f), service members may be discharged because of homosexual acts. *Philips v Perry* (1995, WD Wash) 883 F Supp 539, 66 CCH EPD P 43469.

Individual, who, pursuant to military's "old policy," had been denied benefits of voluntary separation incentive and special separation benefit program (10 USCS @ 1174a and 1175) solely on ground that individual admitted that he was homosexual, was entitled to have his eligibility reviewed under military's new policy, as codified at 10 USCS @ 654; such denial of benefits raised serious equal protection questions. *Elzie v Aspin* (1995, DC Dist Col) 897 F Supp 1, 68 BNA FEP Cas 1674.

Admittedly homosexual sergeant's case is remanded with instructions that his status in Marine Corps and his eligibility for voluntary retirement program be reviewed under military's current "Don't Ask, Don't Tell" policy as codified at 10 USCS @ 654, where sergeant had met all eligibility requirements for enrollment in program based on very distinguished service since 1982, but was discharged after stating publicly that he was homosexual, because new policy was enacted since discharge, and it is difficult to conceive how military's stated rationale--military morale and discipline--for discharging professed homosexuals applies to prevent homosexuals from receiving retirement benefits already earned. *Elzie v Aspin* (1995, DC Dist Col) 897 F Supp 1, 68 BNA FEP Cas 1674.

Challenge of homosexual serviceman to his separation from service under 10 USCS @ 654 "Don't Ask, Don't Tell" policy is unsuccessful, where he was assigned to serve as supply officer on fast-attack nuclear submarine preparing for top secret mission, because deference towards congressional and presidential judgment in military context is great, and serviceman could not show that application of policy to his situation clearly violated his First, Fifth, or Eighth Amendment rights. *Selland v Perry* (1995, DC Md) 905 F Supp 260.

10 USCS @ 654 does not constitute unconstitutional bill of attainder, where statute creates rebuttable presumption that military officer who states he or she is homosexual has propensity to engage in homosexual acts, but policy expressed by statute does not fall within historical meaning of legislative

punishment, since under policy homosexuals are not barred from military simply because they are homosexuals, and statute leaves open possibility of qualifying for continued military service when homosexual overcomes presumption that he or she does engage in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. *Richenberg v Perry* (1995, DC Neb) 909 F Supp 1303.

Military's "Don't Ask, Don't Tell" policy, implemented under 10 USCS @ 654, which discharges homosexuals from military service who admit to being homosexuals, did not substantially further government's interest in preventing unit polarization as required under heightened scrutiny standard of First Amendment, where silent homosexuals were allowed to serve, even though they still could read gay literature, frequent gay bars, march in gay rights parades, and vociferously advocate right of gays to serve, thus causing same degree of debate, unrest, and polarization as that caused by person who admitted homosexuality. *Thorne v United States DOD* (1996, ED Va) 916 F Supp 1358, 71 BNA FEP Cas 565.

Department of Defense's "Don't Ask, Don't Tell" policy regarding homosexuals in military was constitutionally applied to servicemember, where he denied to Board of Review having engaged in any homosexual conduct with any military student or servicemember and denied engaging in homosexual conduct during performance of military duty or while on military installation, because such statements were sufficient to create presumption that he has engaged in, or has intent to engage in, homosexual conduct with nonservicemembers while off base and off duty, and such conduct may be constitutionally prohibited and provides sufficient grounds for separation. *Watson v Perry* (1996, WD Wash) 918 F Supp 1403.

California Army National Guard shall reinstate and restore federal officer status of lieutenant, where, despite stated goal of proscribing homosexual conduct while ostensibly permitting homosexuals to serve, 10 USCS @ 654 and its implementing directives target and punish service members who simply acknowledge who they are, because policy violates gay lieutenant's equal protection and free speech rights. *Holmes v California Army Nat'l Guard* (1996, ND Cal) 920 F Supp 1510.

10 USCS @ 654 could not be sustained against equal protection challenge on ground that statute tended to protect privacy interests of service personnel who would fear sexual attacks from avowed homosexuals in their midst, where there was no indication that homosexuals were any more likely than heterosexuals to violate armed services rules regarding sexual conduct, heterosexuals would not believe there were no homosexuals among them even if gays and lesbians kept their sexual orientation to themselves, and privacy concern actually was the armed services' response to heterosexual dislike of homosexuals, which was impermissible basis for statute. *Able v United States* (1997, ED NY) 968 F Supp 850.

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*** THIS SECTION IS CURRENT THROUGH 105-145, APPROVED 12/15/97 ***
*** WITH GAPS OF 85, 92, 101, 102, 106, 111-114, 119, 127 ***
*** 129, 134, 135, 137-139 & 142 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 121. STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS
ACCESS

18 USCS @ 2701 (1997)

@ 2701. Unlawful access to stored communications

(a) Offense. Except as provided in subsection (c) of this section whoever--

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

(b) Punishment. The punishment for an offense under subsection (a) of this section is--

(1) if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain--

(A) a fine under this title or imprisonment for not more than one year, or both, in the case of a first offense under this subparagraph; and

(B) a fine under this title or imprisonment for not more than two years, or both, for any subsequent offense under this subparagraph; and

(2) a fine under this title or imprisonment for not more than six months, or both, in any other case.

(c) Exceptions. Subsection (a) of this section does not apply with respect to conduct authorized--

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 2703, 2704 or 2518 of this title.

HISTORY: (Added Oct. 21, 1986, P.L. 99-508, Title II, @ 201(a), 100 Stat. 1860.)

(As amended Sept. 13, 1994, P.L. 103-322, Title XXXIII, @ 330016(1)(K), (U), 108 Stat. 2147, 2148; Oct. 11, 1996, P.L. 104-294, Title VI, @ 601(a)(3), 110 Stat. 3498.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1994. Act Sept. 13, 1994, in subsec. (b), in para. (1)(A), substituted "under this title" for "not more than \$ 250,000" and, in para. (2), substituted

18 USCS @ 2701 (1997)

"under this title" for "not more than \$ 5,000".

1996. Act Oct. 11, 1996, in subsec. (b), in paras. (1)(A) and (2), substituted "fine under" for "fine of under".

Short titles:

Act Nov. 5, 1988, P.L. 100-618, @ 1, 102 Stat. 3195, provides: "This Act may be cited as the 'Video Privacy Protection Act of 1988'.". For full classification of such Act, consult USCS Tables volumes.

Other provisions:

Effective date and application of Act Oct. 21, 1986. Act Oct. 21, 1986, P.L. 99-508, Title II, @ 202, 100 Stat. 1868, provides: "This title and the amendments made by this title [adding 18 USCS @@ 2701 et seq.] shall take effect ninety days after the date of the enactment of this Act and shall, in the case of conduct pursuant to a court order or extension, apply only with respect to court orders or extensions made after this title takes effect.".

INTERPRETIVE NOTES AND DECISIONS

Banks cannot be held civilly liable under 18 USCS @ 2707(a) for violation of 18 USCS @ 2701 based on government's seizure of numerous electronic fund transfers alleged to involve drug proceeds because good faith reliance on court warrant or order is complete defense under @ 2707(d)(1). Organizacion JD Ltda. v United States Dep't of Justice (1994, CA2 NY) 18 F3d 91, cert den (US) 129 L Ed 2d 813, 114 S Ct 2679.

Police officers, faced with internal affairs investigation based on contents of messages sent to one another via "Alphapage" system, unsuccessfully challenge storage and retrieval of those messages from police department's computer network, where city is "provider" of "electronic communications service" at issue here, because neither city nor its employees can be liable since 18 USCS @ 2701(c)(1) allows service providers to do as they wish when it comes to accessing communications in electronic storage. Bohach v City of Reno (1996, DC Nev) 932 F Supp 1232, 11 BNA IER Cas 1707.

Video game manufacturer did not violate 18 USCS @ 2701(a), even though manufacturer, suspecting copyright infringement, had its employee access electronic billboard run by defendant by use of pseudonym, because bulletin board is open to public and normally accessed by use of alias or pseudonym, and employee's access was directly or indirectly authorized by valid user of bulletin board who was informant. Sega Enters. v MAPHIA (1996, ND Cal) 948 F Supp 923, 41 USPQ2d 1705.

Multiplicitous count is dismissed from indictment charging defendant with listening to stored voice mail messages intended for third parties, where "listening" to stored messages is not "intercept" in violation of 18 USCS @ 2511 but merely aspect of illegal accessing of stored messages in violation of @ 2701, since only interception of voice mail while in transmission, like wiretap on telephone in use, can amount to violation of @ 2511. United States v Moriarty (1997, DC Mass) 962 F Supp 217.

DATE: MARCH 4, 1998

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*** THIS SECTION IS CURRENT THROUGH 105-145, APPROVED 12/15/97 ***

*** WITH GAPS OF 85, 92, 101, 102, 106, 111-114, 119, 127 ***

*** 129, 134, 135, 137-139 & 142 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 121. STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS
ACCESS

18 USCS @ 2703 (1997)

@ 2703. Requirements for governmental access

(a) Contents of electronic communications in electronic storage. A governmental entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of an electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) Contents of electronic communications in a remote computing service.

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection--

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity--

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any electronic communication that is held or maintained on that service--

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(c) Records concerning electronic communication service or remote computing

service.

(1) (A) Except as provided in subparagraph (B), a provider of electronic communication service or remote computing service may disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to any person other than a governmental entity.

(B) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to a governmental entity only when the governmental entity--

(i) obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant;

(ii) obtains a court order for such disclosure under subsection (d) of this section; or

(iii) has the consent of the subscriber or customer to such disclosure.

(C) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of such service and the types of services the subscriber or customer utilized, when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under subparagraph (B).

(2) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) Requirements for court order. A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction described in section 3127(2)(A) and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e) No cause of action against a provider disclosing information under this chapter. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or certification under this chapter [18 USCS @@ 2701 et seq.].

(f) Requirement to preserve evidence.

(1) In general. A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) Period of retention. Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

HISTORY: (Added Oct. 21, 1986, P.L. 99-508, Title II, @ 201(a), 100 Stat. 1861; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, @@ 7038, 7039, 102 Stat. 4399.)

(As amended Sept. 13, 1994, P.L. 103-322, Title XXXIII, @ 330003(b), 108 Stat. 2140; Oct. 25, 1994, P.L. 103-414, Title II, @ 207(a), 108 Stat. 4292; April 24, 1996, P.L. 104-132, Title VIII, Subtitle A, @ 804, 110 Stat. 1305; Oct. 11, 1996, P.L. 104-293, Title VI, @ 601(b), 110 Stat. 3469; Oct. 11, 1996, P.L. 104-294, Title VI, @ 605(f), 110 Stat. 3510.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Act Oct. 21, 1986, P.L. 99-508, Title II, @ 202, 100 Stat. 1868, which appears as 18 USCS @ 2701 note, provides that this section is effective 90 days after enactment.

Amendments:

1988. Act Nov. 18, 1988, in subsecs. (b)(1)(B)(i) and (c)(1)(B)(i), inserted "or trial"; and in subsec. (d), inserted "may be issued by any court that is a court of competent jurisdiction set forth in section 3126(2)(A) of this title and".

1994. Act Sept. 13, 1994, in subsec. (d), substituted "section 3127(2)(A)" for "section 3126(2)(A)".

Act Oct. 25, 1994, in subsec. (c)(1), in subpara. (B), deleted cl. (i), which read: "uses an administrative subpoena authorized by a Federal or State statute, or a Federal or State grand jury or trial subpoena;", and redesignated cls. (ii)-(iv) as cls. (i)-(iii), respectively, and added subpara. (C); and, in subsec. (d), substituted "A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction described in section 3126(2)(A) and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." for "A court order for disclosure under subsection (b) or (c) of this section may be issued by any court that is a court of competent jurisdiction set forth in section 3127(2)(A) of this title and shall issue only if the governmental entity shows that there is reason to believe the contents of a wire or electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry."

1996. Act April 24, 1996 added subsec. (f).

Act Oct. 11, 1996, P.L. 104-293, in subsec. (c)(1)(C), inserted "local and long distance".

Act Oct. 11, 1996, P.L. 104-294, in subsec. (d), substituted "3127(2)(A)" for "3126(2)(A)".

Other provisions:

Application of section. For application of this section, see Act Oct. 21, 1986, P.L. 99-508, Title II, @ 202, 100 Stat. 1868, which appears as 18 USCS @ 2701 note.

NOTES:

CROSS REFERENCES

This section is referred to in 18 USCS @@ 2701, 2702, 2704, 2705, 2706, 2707.

RESEARCH GUIDE

Federal Procedure L Ed:

8 Fed Proc L Ed, Criminal Procedure @@ 22:299-303.

INTERPRETIVE NOTES AND DECISIONS

Since language of 18 USCS @ 2703(c), as opposed to (a) or (b), does not prohibit any governmental conduct, and thus governmental entity may not violate that subsection by simply accessing information improperly, 18 USCS @ 2707 did not authorize private cause of action by person claiming that City or its police officers violated @ 2707 by obtaining subscriber information about her through telephone service through use of two improper subpoenas. *Tucker v Waddell* (1996, CA4 NC) 83 F3d 688.

18 USCS @ 2707 did not authorize private cause of action against city or its police officers for violating 18 USCS @ 2703(c), which prohibits providers of electronic communication service or remote computing service from improperly disclosing to government entity information pertaining to subscriber or customer, since language of @ 2703(c) does not prohibit any governmental conduct, and thus government entity may not violate subsection by simply accessing information improperly. *Tucker v Waddell* (1996, CA4 NC) 83 F3d 688.

Computer book/magazine/game publisher is awarded judgment for more than \$ 50,000 against U.S. Secret Service, where agents obtained warrant and seized computers, disks, and other materials of publisher under false notion that employee had sensitive, proprietary computer document that had been wrongfully made available to public via computer bulletin boards, because seizure of work product materials violated 42 USCS @ 2000aa-6 and 18 USCS @ 2703, even though seizure could not constitute interception of "electronic communication" so as to bring into play statutory scheme at 18 USCS @@ 2510 et seq. *Steve Jackson Games, Inc. v United States Secret Serv.* (1993, WD Tex) 816 F Supp 432.

Communications company loses argument that it is lawfully required only to produce long-distance cellular telephone billing records since local cellular telephone billing records are not "telephone toll billing records" under 18 USCS @ 2703(c)(1)(C), even if some local customers choose to prepay for specified amount of air time and are not assessed separate charge for each call, because common-sense plain meaning of phrase includes all billing records that contain information which was used or could be used to charge for telephone calls or services. *In re Grand Jury Subpoenas* (1995, WD Mo) 894 F Supp 355.

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 Sporkin

MEMORANDUM 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.

✓ 1
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STATEMENT OF FACTS

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

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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-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 bo 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 Micky, 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. ✓ 4

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. 5

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. § 2703 (b)(A)-(B), (c)(1)(B). 2a

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. 2 b

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. 12

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

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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. 15

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). 15 16 17 18

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.

1/26/98
Date

Stanley Sporkin
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

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for a hearing on final injunctive relief will be determined.

1/21/98

Date

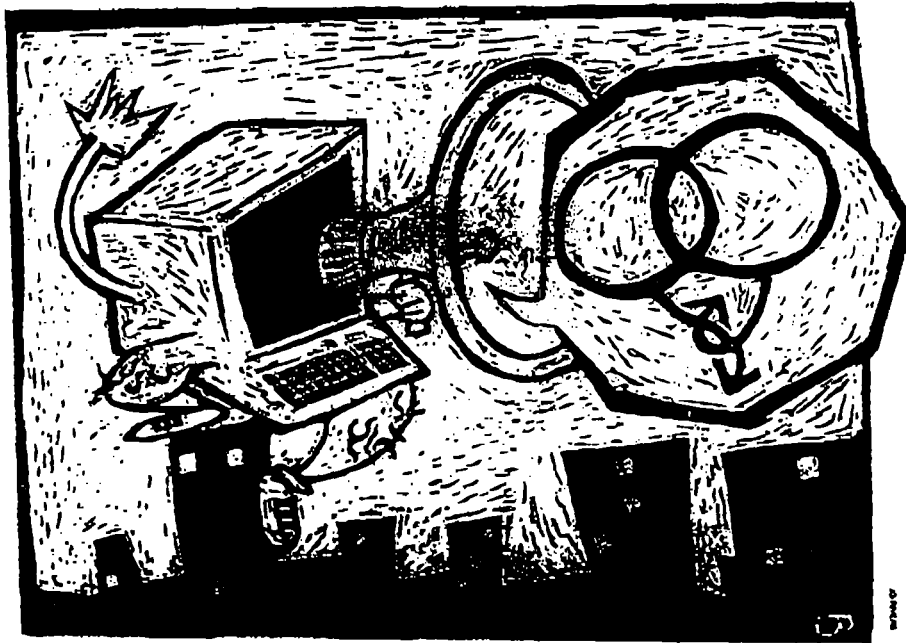
Stanley Sporkin

Stanley Sporkin
United States District Judge

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-

*
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 choose 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

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.

EXCLUSIONARY
RULE

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. ■

 THE NEW YORK TIMES EDITORIALS/LETTERS MONDAY, JANUARY 26, 1998

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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.

LEVEL 1 - 60 OF 360 STORIES

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THE DALLAS MORNING NEWS

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HEADLINE: Navy may settle with sailor accused of being gay;
Judge issues injunction against veteran's ouster

BYLINE: New York Times News Service

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WASHINGTON - The Navy is considering dropping its efforts to dismiss a highly decorated sailor accused of homosexuality after a federal judge issued a permanent injunction Thursday barring his ouster, Defense Department officials said.

The Navy said it would appeal the injunction issued by U.S. District Judge Stanley Sporkin in Washington, who accused the Navy this week of conducting a "search and destroy" mission against the 36-year-old sailor after he posted a message on a computer online service that described himself as gay.

But Defense Department officials, speaking on condition that they not be identified, said the appeal might be unnecessary under a settlement proposed Thursday by the sailor's lawyers that would allow him to retire with full benefits.

A settlement would bring to an end an embarrassing case in which Navy investigators have been accused of violating both federal privacy laws and the military's "don't ask, don't tell" policy by seeking information on the sailor's sexual orientation through his online computer service.

The 5-year-old military policy is intended to allow gay members of the services to remain in the military as long as they are discreet about their private lives.

A lawyer for the sailor, Senior Chief Petty Officer Timothy R. McVeigh of Honolulu, said that he might be willing to consider retirement as long as the 17-year Navy veteran was guaranteed a full pension and other retirement benefits, which usually are granted only after 20 years in the service.

Pentagon officials said that they were willing to consider such a deal, especially given the judge's harsh criticism of the Navy's tactics in its investigation.

"I think many of us would like to see this case go away," a senior Defense Department official said.

LANGUAGE: ENGLISH

THE DALLAS MORNING NEWS, January 30, 1998

LOAD-DATE: February 3, 1998

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1. Journal of Commerce, March 23, 1998, Monday, EDITORIAL/OPINION; Pg. 7A, 908 words, Privacy needs protection, BY LAWRENCE A. PONEMON
2. The News and Observer (Raleigh, NC), March 17, 1998 Tuesday, FINAL EDITION, BUSINESS;; Pg. D2, 705 words, Privacy and Internet don't go together well, PAUL GILSTER
3. New York Law Journal, March 16, 1998, Monday, SUPPLEMENT: TECH TRENDS; Tech Files; Pg. S3, 3089 words, Privacy on the Internet: Concerns Grow, Laws Lag, BY ALAN COHEN
4. CNBC News Transcripts, EQUAL TIME (7:30 PM ET) , March 2, 1998, Monday 10:14 AM, 4513 words, WOMAN STEPS FORWARD TO CONTRIBUTE TO THE MONICA LEWINSKY DEFENSE FUND; MAN INVESTIGATED BY NAVY FOR REVEALING HIS SEXUAL ORIENTATION ONLINE
5. People, March 2, 1998, PICKS & PANS; Pg. 48, 532 words, Bytes, Vicki Sheff-Cahan; Maggie Hall; Kate Klise
6. The San Francisco Examiner, February 23, 1998, Monday; Second Edition, NEWS; Pg. A-16, 569 words, Go ahead and ask; Pervasiveness of military "don't ask, don't tell" hypocrisy should prompt Clinton to command equal standing for gays
7. Texas Lawyer, February 23, 1998, Pg. 40, 1415 words, IMPROPERLY ASKED, IMPROPERLY TOLD; GAY SAILOR'S ONLINE "OUTING" SETS FIRST REAL LIMITS ON MILITARY POLICY., Christopher Wolf
8. Chicago Tribune, February 23, 1998 Monday, NORTH SPORTS FINAL EDITION, EDITORIAL; Pg. 14; ZONE: N, 424 words, THE REALITY OF 'DON'T ASK, DON'T TELL'
9. The Houston Chronicle, February 19, 1998, Thursday, 3 STAR EDITION, A;; Pg. 4, 705 words, Group says military violated gay policy in record numbers, ERIC ROSENBERG, WASHINGTON, Discrimination
10. The Connecticut Law Tribune, February 16, 1998, Monday, NEWS, 1276 words, DON'T ASK, DON'T TELL, DON'T PURSUE, CHRISTOPHER WOLF
11. The Connecticut Law Tribune, February 16, 1998, Monday, NEWS, 1276 words, DON'T ASK, DON'T TELL, DON'T PURSUE, CHRISTOPHER WOLF
12. The New Republic, FEBRUARY 16, 1998, Notebook;; Pg. 9, 1339 words
13. New Jersey Law Journal, February 16, 1998, Opinion and Commentary; Pg. 25, 1512 words, Improperly Asked, Improperly Told; (151 N.J.L.J. 657), Christopher Wolf*
14. The Boston Globe, February 15, 1998, Sunday, City Edition, FOCUS; Pg. C3, 1122 words, A problem with privacy, and with openness; Navy's Internet case shows dilemma when public, personal lives don't match; LAW & TECHNOLOGY; Michael Joseph Gross is a freelance writer in Boston., By Michael Joseph Gross
15. THE DALLAS MORNING NEWS, February 15, 1998, Sunday, HOME FINAL EDITION, SUNDAY READER; INTERVIEW; Pg. 1J, 1787 words, Elizabeth Birch, Aline McKenzie, Staff Writer of The Dallas Morning News

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16. The Union Leader (Manchester, NH), February 15, 1998 Sunday, ALL EDITIONS, SECTION A, Pg. 3, 725 words, Think Your E-Mail's Private? Think Again, JEANNE MORRIS Sunday News Staff
17. Fulton County Daily Report, February 12, 1998, Thursday, 1413 words, Judge to Navy: Don't Search, Don't Out; Ruling Places Limits on 'Don't Ask, Don't Tell'
18. Chicago Daily Law Bulletin, February 12, 1998, Thursday, Pg. 5, 1396 words Navy goes overboard in hunt for submariner, DAVID J LOUNDY
19. The Palm Beach Post, February 11, 1998, Wednesday, FINAL EDITION, Pg. 15A, 203 words, INTERNET NOT SET UP FOR MILITARY SNOOPS
20. THE HARTFORD COURANT, February 9, 1998 Monday, STATEWIDE, EDITORIAL; Pg. A10, 413 words, THE NAVY RUINS A GOOD CAREER
21. The National Law Journal, February 9, 1998, REGIONAL REPORTS; Pg. A8, 177 words, Judge Sporkin Scolds Navy; DISTRICT OF COLUMBIA, Compiled from National Law Journal staff, correspondent and Associated Press reports., WASHINGTON
22. Time, February 9, 1998, NOTEBOOK/MILESTONES; Pg. 25, 481 words, Milestones M.M. Buechner, Daniel Eisenberg, Jon Goldstein, Tam Gray, Nadya Labi, Michele Orecklin and Alain Sanders
23. The Boston Globe, February 8, 1998, Sunday, City Edition, FOCUS; Pg. C1, 1777 words, Taming the beast; The lure of the internet disguises a welter of issues - privacy, commerce, free speech; TECHNOLOGY; Mary Leonard is the Globe's Focus writer., By Mary Leonard, Globe Staff
24. The Sunday Gazette Mail, February 08, 1998, Sunday, Editorial; Pg. P6B, 943 words, Editorials
25. New America News Service, February 05, 1998, Thursday, Domestic, non-Washington, general news item, 810 words, ''DON'T ASK; DON'T TELL'' DOESN'T WORK, CHUCK COLBERT
26. AP Online, February 04, 1998; Wednesday, Domestic, non-Washington, general news item, 2563 words, Editorial Roundup, The Associated Press
27. The Associated Press, February 4, 1998, Wednesday, BC cycle, UNDEFINED, 2534 words
28. Sacramento Bee, February 4, 1998, METRO FINAL, EDITORIALS; Pg. B6, 426 words, ELECTRONIC WITCH HUNT
29. The San Diego Union-Tribune, February 4, 1998, Wednesday, OPINION; Ed. B-5;Pg. 1,6,7,8 Ed. B-7;Pg. 2,3,4,5, 791 words, A Navy reluctant to join 20th century, Lionel Van Deerlin; VAN DEERLIN represented a San Diego County district in Congress for 18 years.
30. The Boston Globe, February 3, 1998, Tuesday, City Edition, EDITORIAL PAGE; Pg. A16, 330 words, A failed policy

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31. The Arkansas Democrat-Gazette, February 02, 1998, Monday, Pg. D1, 705 words, Something else not to trust; AOL does little to monitor; spurious member profiles, Jeff Porter, 'Net Gains
32. Dayton Daily News, February 2, 1998, Monday, CITY EDITION, Pg. 1A, 724 words, COURTS, CONSTITUTION ACE NAVY'S INTERNET SNOOPING CASE
33. The Houston Chronicle, February 02, 1998, Monday, 2 STAR EDITION, HOUSTON; Pg. 1, 1053 words, HGO, Skovhus sail with fine 'Billy Budd', CHARLES WARD
34. St. Louis Post-Dispatch, February 2, 1998, Monday, FIVE STAR LIFT EDITION, EDITORIAL, Pg. B6, 450 words, 'DON'T ASK, DON'T TELL,' DOESN'T WORK
35. Sun-Sentinel (Fort Lauderdale, FL), February 2, 1998, Monday, FINAL EDITION, Pg. 7A, 220 words, ON HOMOSEXUALS IN THE NAVY, PRIVACY, AMERICA ONLINE AND A MISSING SUBPOENA:
36. The Tampa Tribune, February 2, 1998, Monday, FINAL EDITION, Pg. 5, 759 words, Cidco introduces telephone for surfing the Internet, From Tribune wire services
37. The Buffalo News, February 1, 1998, Sunday, FINAL EDITION, NEWS, Pg. 9A, 470 words, REINSTATED CHIEF PETTY OFFICER FEARS REPRISALS FROM NAVY; SAILOR NOT SURE HE CAN RETURN TO OLD JOB ABOARD SUB, BEN DiPIETRO; Associated Press, HONOLULU
38. Dayton Daily News, February 1, 1998, Sunday, CITY EDITION, Pg. 5A, 451 words, OFFICER BACK ON BOARD, BUT NOT IN CHARGE, Ben DiPietro ASSOCIATED PRESS, HONOLULU
39. THE INDIANAPOLIS STAR, February 1, 1998 Sunday, CITY FINAL EDITION, Pg. B02;, 1031 words, THE WEEK IN REVIEW: Jan. 25-31
40. The Internet Newsletter Legal & Business Aspects, February 1998, Vol. 2; No. 11; Pg. 8, 1053 words, Cases of Interest to The Budding Internet Attorney
41. Multimedia & Web Strategist, February 1998, Vol. 4; No. 4; Pg. 1, 675 words, RIAA Music Lawsuits Settled
42. The News and Observer (Raleigh, NC), February 1, 1998 Sunday, FINAL EDITION, QUESTION;, Pg. A24, 694 words, Student Press
43. THE ORANGE COUNTY REGISTER, February 1, 1998 Sunday, MORNING EDITION, Pg. K08;, 653 words, OFF THE HOOK; 'DON'T ASK, DON'T TELL' BATTLE PLAYED OUT OVER THE INTERNET, LESLIE GORNSTEIN, The Orange County Register
44. The Ottawa Citizen, February 1, 1998, Sunday, FINAL EDITION, WORLD; Pg. A9 519 words, His dismissal overturned, sailor wants command back: Former U.S. sub commander fired for alleged homosexuality continues lawsuit vs. top brass, BEN DIPIETRO; THE ASSOCIATED PRESS, HONOLULU
45. The Record (Bergen County, NJ), February 1, 1998; SUNDAY; ALL EDITIONS, NEWS; Pg. A12, 283 words, REINSTATED SAILOR FIGHTS FOR CAREER, BEN DiPIETRO, The Associated Press, HONOLULU, UNITED STATES (54%); , OKLAHOMA CITY, OK, USA (55%);

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46. The Sunday Gazette Mail, February 01, 1998, Sunday, News; Pg. P19A, 456 words, Sailor back on job, but life isn't same, Ben DiPietro the Associated Press
47. The Tennessean, February 1, 1998, Sunday, CITY EDITION, Pg. 4D, 1162 words GOING COLD TURKEY IN GENERAL ASSEMBLY
48. The Associated Press, January 31, 1998, Saturday, AM cycle, Domestic News, 508 words, Reinstated sailor fears reprisals from Navy, fellow sailors, By BEN DIPIETRO, Associated Press Writer, HONOLULU
49. The Fresno Bee, January 31, 1998 Saturday, HOME EDITION, Pg. B4, 432 words Navy's electronic witch hunt; In its 'outing' of a decorated sailor, the Navy goes too far.
50. The News and Observer (Raleigh, NC), January 31, 1998 Saturday, FINAL EDITION Correction Appended , NEWS;, Pg. B3, 694 words, Navy secretary boosts Scouting, TREVA JONES, STAFF WRITER
51. Sarasota Herald-Tribune, January 31, 1998, Saturday, ALL EDITIONS, A SECTION, Pg. 14A, 511 words, NAVAL MANEUVERS
52. Chicago Tribune, January 31, 1998 Saturday, NORTH SPORTS FINAL EDITION, COMMENTARY; Pg. 23; ZONE: N; What other newspapers are saying., 881 words, From Chicago Tribune wires.
53. January 30, 1998, Friday, Nationwide General News; Overseas News, 325 words, US: JUDGE ORDERS NAVY TO REINSTATE SAILOR
54. ABC NEWS, ABC GOOD MORNING AMERICA (7:00 am ET), JANUARY 30, 1998, Transcript # 98013006-j01, PACKAGE, NEWS, 692 words, NATIONAL AND INTERNATIONAL NEWS, KEVIN NEWMAN
55. The Associated Press, January 30, 1998, Friday, PM cycle, Washington Dateline, 648 words, Judge bars Navy from ousting alleged homosexual, By JOHN DIAMOND, Associated Press Writer, WASHINGTON
56. Austin American-Statesman, January 30, 1998, News; Pg. A7, 498 words, Gay sailor's dismissal in error, judge decides; Plots against Castro
57. The Bulletin's Frontrunner, January 30, 1998, Friday, WASHINGTON NEWS, 292 words, Judge Bars Ouster Of Gay Sailor.
58. The Chattanooga Times, January 30, 1998, Friday, World; Pg. A2, 907 words Nation/world news in brief, Wire services
59. The Commercial Appeal (Memphis, TN), January 30, 1998, FRIDAY, FINAL EDITION, Pg. A5, 313 words, NAVY VIOLATED GAY POLICY IN SAILOR'S DISMISSAL, JUDGE SAYS, John Diamond The Associated Press, WASHINGTON
60. THE DALLAS MORNING NEWS, January 30, 1998, Friday, HOME FINAL EDITION, NEWS; Pg. 5A, 299 words, Navy may settle with sailor accused of being gay; Judge issues injunction against veteran's ouster, New York Times News Service, WASHINGTON

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61. Dayton Daily News, January 30, 1998, Friday, CITY EDITION, Pg. 13A, 489 words, NAVY WRONG TO DISMISS SAILOR, JUDGE SAYS, John Diamond Associated Press
62. The Des Moines Register, January 30, 1998, Friday, Main News, Pg.3, 324 words, Judge: Navy broke rules to oust sailor
63. The Des Moines Register, January 30, 1998, Friday, Main News, Pg.3, 324 words, Judge: Navy broke rules to oust sailor
64. The Detroit News, January 30, 1998, Friday, NationWorld; Pg. Pg. A5, 850 words, Briefly
65. The Fresno Bee, January 30, 1998 Friday, HOME EDITION, Pg. A8, 701 words, Mir, Endeavor go separate ways, Bee News Services
66. The Guardian (London), January 30, 1998, The Guardian Foreign Page; Pg. 17 123 words, News in brief: Navy told to reinstate sailor, REUTERS, WASHINGTON.
67. The Houston Chronicle, January 30, 1998, Friday, 3 STAR EDITION, A;, Pg. 9 395 words, National briefs
68. Media Daily, January 30, 1998, No. 5, Vol. 4, 163 words, JUDGE ORDERS NAVY TO REINSTATE SAILOR IN PRIVACY CASE, 03933018 ND
69. The New York Times, January 30, 1998, Friday, Late Edition - Final, Section A; Page 8; Column 2; National Desk , 598 words, Navy May Resolve Gay Case by Letting Sailor Retire, By PHILIP SHENON , WASHINGTON, Jan. 29
70. Newsday (New York, NY), January 30, 1998, Friday, ALL EDITIONS, Page A21, 603 words, WORLD/NATION BRIEFS, COMPILED FROM NEWS DISPATCHES
71. Newsday (New York, NY), January 30, 1998, Friday, HOME EDITION, Page A21, 610 words, WORLD/NATION BRIEFS, COMPILED FROM NEWS DISPATCHES
72. NPR, MORNING EDITION (NPR 10:00 am ET), JANUARY 30, 1998, FRIDAY, Transcript # 98013005-210, PACKAGE, News; Domestic, 665 words, Judge Reinstates McVeigh, Larry Abramson, Washington, DC; Bob Edwards, Washington
73. OC Weekly, January 30, 1998, News; Pg. 14, 1277 words, WINGS OF DECEIT: TRUTH CRASH-LANDS ON GOVERNMENT'S NEW EL TORO SITE, Wyn Hilty
74. The Plain Dealer, January 30, 1998 Friday, FINAL / ALL, NATIONAL; Pg. 8A, 586 words, UNITED STATES
75. The Providence Journal-Bulletin, January 30, 1998, Friday, ALL EDITIONS, Pg. 6B, 288 words, Online invasions
76. The Record (Bergen County, NJ), January 30, 1998; FRIDAY; ALL EDITIONS, NEWS; Pg. A14, 785 words, REPUTEDLY GAY SAILOR UPHELD AGAIN BY JUDGE, JOHN DIAMOND, The Associated Press, WASHINGTON
77. Sacramento Bee, January 30, 1998, METRO FINAL, MAIN NEWS; Pg. A15, 129 words, NAVY DISMISSAL OF GAY NULLIFIED, Bee news services

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78. St. Louis Post-Dispatch, January 30, 1998, Friday, THREE STAR EDITION, NEWS, Pg. A6, NATION BRIEFS COLUMN, 719 words, NATION, From News Services
79. St. Louis Post-Dispatch, January 30, 1998, Friday, FIVE STAR LIFT EDITION, NEWS, Pg. A6, NATION BRIEFS COLUMN, 741 words, NATION, From News Services
80. USA TODAY, January 30, 1998, Friday, FINAL EDITION, NEWS;, Pg. 10A, 919 words, Ruling: Navy violated 'don't ask, don't tell', John Bacon; Steven Komarow; Traci Watson; Tamara Lush; Paul Hoversten; With staff and wire reports
81. Information Bank Abstracts, WALL STREET JOURNAL, January 30, 1998, Friday, Section B; Page 8, Column 2, 36 words, JUDGE RULES NAVY VIOLATED 'DON'T ASK, DON'T TELL' RULE
82. The Washington Post, January 30, 1998, Friday, Final Edition, A SECTION; Pg. A02, 847 words, Judge Tells Navy Not to Dismiss Sailor With 'Gay' Online Identity; Ruling Reinforces Electronic Confidentiality Rights, Bradley Graham, Washington Post Staff Writer
83. Chicago Tribune, January 30, 1998 Friday, NORTH SPORTS FINAL EDITION, NEWS; Pg. 10; ZONE: N, 345 words, JUDGE RULES NAVY VIOLATED ITS 'DON'T ASK' GAY POLICY, Associated Press., WASHINGTON
84. AP Online, January 29, 1998; Thursday, Washington - general news, 872 words, Judge To Navy: Reinstate Sailor, JOHN DIAMOND, WASHINGTON
85. AP Online, January 29, 1998; Thursday, Washington - general news, 834 words, Judge To Navy: Reinstate Sailor, JOHN DIAMOND, WASHINGTON
86. AP Online, January 29, 1998; Thursday, Domestic, non-Washington, general news item, 770 words, AP Top News at 7 p.m. EST Thursday, Jan. 29, 1998, LAURA K. BARGE
87. AP Online, January 29, 1998; Thursday, Domestic, non-Washington, general news item, 800 words, AP Top News at 5 p.m. EST Thursday, Jan. 29, 1998, LAURA K. BARGE
88. AP Online, January 29, 1998; Thursday, Washington - general news, 798 words, Judge To Navy: Reinstate Sailor, JOHN DIAMOND, WASHINGTON
89. AP Online, January 29, 1998; Thursday, Washington - general news, 600 words, Judge To Navy: Reinstate Sailor, JOHN DIAMOND, WASHINGTON
90. AP Online, January 29, 1998; Thursday, Domestic, non-Washington, general news item, 754 words, AP Top News at 6 p.m. EST Thursday, Jan. 29, 1998, LAURA K. BARGE
91. AP Online, January 29, 1998; Thursday, Washington - general news, 665 words, Judge To Navy: Reinstate Sailor, JOHN DIAMOND, WASHINGTON
92. AP Worldstream, January 29, 1998; Thursday, International news, 642 words, Judge orders Navy to reinstate alleged homosexual, JOHN DIAMOND, WASHINGTON
93. THE ARIZONA REPUBLIC, January 29, 1998 Thursday, Final Chaser, EDITORIAL/OPINION; Pg. B5, 676 words, NAVY'S ANTI-GAY SNOOPING RUNS INTO THE

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CONSTITUTION, CLARENCE PAGE, Tribune Media Services

94. The Associated Press, January 29, 1998, Thursday, AM cycle, Washington Dateline, 806 words, Judge bars Navy from ousting alleged homosexual, By JOHN DIAMOND, Associated Press Writer, WASHINGTON

95. The Associated Press, January 29, 1998, Thursday, PM cycle, Washington Dateline, 639 words, Judge orders Navy to reinstate alleged homosexual, By JOHN DIAMOND, Associated Press Writer, WASHINGTON

96. The Associated Press, January 29, 1998, Thursday, AM cycle, Washington Dateline, 845 words, Judge bars Navy from ousting alleged homosexual, By JOHN DIAMOND, Associated Press Writer, WASHINGTON

97. Austin American-Statesman, January 29, 1998, Editorial; Pg. A13, 712 words Soar through cyberspace on wings of privacy, CLARENCE PAGE

98. Capital Times (Madison, WI.), January 29, 1998, Thursday, ALL EDITIONS, Pg. 10A, 301 words, SEEKING JUSTICE IN PRIVACY CASE

99. The Chattanooga Times, January 29, 1998, Thursday, National; Pg. A6, 562 words, The Navy as Big Brother, Michael Loftin

100. Facts on File World News Digest, January 29, 1998, UNITED STATES, Pg. 53 A1, 455 words, Gay Navy Officer's Discharge Blocked by Judge ; --Electronic Privacy at Issue.

101. Gannett News Service, January 29, 1998, Thursday, FINAL EDITION, Pg. arc, 593 words, Judge orders Navy to reinstate sailor, JOHN YAUKEY; Gannett News Service, WASHINGTON

102. The New York Times, January 29, 1998, Thursday, Late Edition - Final, Section A; Page 22; Column 6; Editorial Desk , 128 words, Independent Counsel Act Is Two-Edged Sword; 'Don't Ask' Hypocrisy

103. Sacramento Bee, January 29, 1998, METRO FINAL, EDITORIALS; Pg. B6, 735 words, NAVY GOES TOO FAR, Clarence Page, WASHINGTON

104. The Seattle Times, January 29, 1998, Thursday, Final Edition, NEWS;, Pg. A6;, 719 words, REPORT: RAMSEYS GIVE POLICE CLOTHES FOR FIBER EXAMINATION

105. TechWeb News, January 29, 1998, 1039 words, Judge: Gay Officer Stays In Navy, John Borland, Net Insider

106. AP Online, January 28, 1998; Wednesday, Domestic, non-Washington, general news item, 2896 words, Editorial Roundup, The Associated Press

107. The Associated Press, January 28, 1998, Wednesday, BC cycle, UNDEFINED, 2869 words

108. The Herald (Rock Hill, S.C.), January 28, 1998 Wednesday, 1ST EDITION, Pg. 11A, 220 words, Sailor's privacy invaded

109. International Herald Tribune (Neuilly-sur-Seine, France), January 28, 1998, Wednesday, News; Pg. 3, 418 words, Reprimanding Navy, Judge Blocks

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Ouster of Gay Sailor, By Bradley Graham; Washington Post Service, WASHINGTON

110. St. Petersburg Times, January 28, 1998, Wednesday, 0 South Pinellas Edition, EDITORIAL; EDITORIAL; Pg. 12A, 613 words, The Navy behaved badly

111. USA TODAY, January 28, 1998, Wednesday, FINAL EDITION, NEWS;; Pg. 12A, 398 words, Ruling proves need to revoke 'don't ask' policy

112. Chicago Tribune, January 28, 1998 Wednesday, NORTH SPORTS FINAL EDITION, COMMENTARY; Pg. 15; ZONE: N, 710 words, DON'T ASK, DON'T SNOOP IN CYBERSPACE, Clarence Page., WASHINGTON

113. January 27, 1998, Tuesday, Western Australian Regional; Overseas News, 576 words, US: NAVY VIOLATED OVER, DON'T-ASK POLICY, By John Diamond=

114. AP Online, January 27, 1998; Tuesday, Washington - general news, 701 words, Judge: Sailor's Privacy Violated, JOHN DIAMOND, WASHINGTON

115. The Associated Press, January 27, 1998, Tuesday, PM cycle, Washington Dateline, 677 words, Judge says Navy violated sailor's privacy, don't-ask policy By JOHN DIAMOND, Associated Press Writer, WASHINGTON

116. The Atlanta Journal and Constitution, January 27, 1998, Tuesday, JOURNAL EDITION, 716 words, NATION IN BRIEF; Judge bars discharge of gay sailor, From our news services

117. The Atlanta Journal and Constitution, January 27, 1998, Tuesday, CONSTITUTION EDITION, 827 words, NATION IN BRIEF; U.S., Russia ease huff over spacesuit, From news services

118. Austin American-Statesman, January 27, 1998, News; Pg. A2, 454 words, Suit fits with alterations, so American stays on Mir; Judge blocks

119. The Buffalo News, January 27, 1998, Tuesday, CITY EDITION, NEWS, Pg. 7A, 478 words, JUDGE BLOCKS NAVY FROM DISCHARGING GAY SAILOR, BRADLEY GRAHAM; Washington Post, WASHINGTON

120. The Chattanooga Times, January 27, 1998, Tuesday, World; Pg. A2, 815 words, Nation/world news in brief, Wire services

121. Chattanooga Free Press, January 27, 1998, Tuesday, NEWS; Pg. A8, 378 words, Homosexual Sailor Wins Suit, By The Associated Press

122. City News Service, January 27, 1998, Tuesday, 410 words, Gay Sailor, LOS ANGELES

123. The Commercial Appeal (Memphis, TN), January 27, 1998, TUESDAY, FINAL EDITION, Pg. A2, 347 words, JUDGE REBUKES NAVY IN AOL 'OUTING'; SAILOR CAN STAY ON ACTIVE DUTY TILL CASE SETTLED, The Associated Press, WASHINGTON

124. Daily News (New York), January 27, 1998, Tuesday, News; Pg. 16, 429 words, U.S./WORLD NEWS

125. Dayton Daily News, January 27, 1998, Tuesday, CITY EDITION, Pg. 2A, 592 words, NEWS BRIEFS

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126. The Des Moines Register, January 27, 1998, Tuesday, Main News, Pg.012, 367 words, Navy violated sailor's privacy, judge rules 'The Navy has gone too far' in violating the 'don't ask, don't tell' policy, the judge says.
127. THE FORT WORTH STAR-TELEGRAM, January 27, 1998, Tuesday, FINAL AM EDITION NEWS;, Pg. 4, 1354 words, National Digest, Staff and Wire Reports
128. Network Briefing, January 27, 1998, ISSN: 1360-1369, 221 words, SAILOR WINS INJUNCTION AGAINST NAVY AFTER AOL DISCLOSURE, 03928691 ND
129. The New York Times, January 27, 1998, Tuesday, Late Edition - Final, Section A; Page 8; Column 6; National Desk , 756 words, 'Gay' Sailor's Dismissal Is Blocked, By PHILIP SHENON , WASHINGTON, Jan. 26
130. Newsday (New York, NY), January 27, 1998, Tuesday, NASSAU AND SUFFOLK EDITION, Page A19, 668 words, WORLD/NATION BRIEFS, COMPILED FROM NEWS DISPATCHES
131. Newsday (New York, NY), January 27, 1998, Tuesday, ALL EDITIONS, Page A33 1522 words, LETTERS, Joan Edmondson Suny; Seth Kisch; Christian Padgett; Steven Spiegel; Todd Jennings; George M. Lasher; Kate McCarthy; Anthony R. Arroyo; James Moyssiadis
132. Newsday (New York, NY), January 27, 1998, Tuesday, HOME EDITION, Page A19 653 words, WORLD/NATION BRIEFS, COMPILED FROM NEWS DISPATCHES
133. Newsday (New York, NY), January 27, 1998, Tuesday, NASSAU AND SUFFOLK EDITION, Page A19, 668 words, WORLD/NATION BRIEFS, COMPILED FROM NEWS DISPATCHES
134. THE ORANGE COUNTY REGISTER, January 27, 1998 Tuesday, MORNING EDITION, Pg. A12, 393 words, Judge: Navy violated 'don't ask, don't tell'; MILITARY: Sailor's homosexuality disclosed on an AOL profile., JOHN DIAMOND, The Associated Press, WASHINGTON, DC
135. The Record (Bergen County, NJ), January 27, 1998; TUESDAY; ALL EDITIONS, NEWS; Pg. A07, 767 words, NAVY VIOLATED SAILOR'S PRIVACY, JUDGE RULES, JOHN DIAMOND, The Associated Press, WASHINGTON
136. The San Francisco Chronicle, JANUARY 27, 1998, TUESDAY, FINAL EDITION, NEWS; Pg. A3, 743 words, Navy Barred From Booting Sailor It Says Is Gay 'Don't ask, don't tell' violated, judge rules, Elaine Herscher, Chronicle Staff Writer
137. St. Louis Post-Dispatch, January 27, 1998, Tuesday, THREE STAR EDITION, NEWS, Pg. A4, NATION BRIEFS COLUMN, 685 words, NATION, From News Services
138. Star Tribune (Minneapolis, MN), January 27, 1998, Metro Edition, News; Pg. 4A, 473 words, Judge blocks Navy's efforts to oust sailor; Ruling blisters investigation's tactics, Washington, D.C.
139. The State Journal-Register (Springfield, IL), January 27, 1998, Sunday, EARLY AND CITY EDITIONS, Pg. 2, 660 words
140. TULSA WORLD, January 27, 1998, 356 words, The Navy's Mistake

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141. USA TODAY, January 27, 1998, Tuesday, FINAL EDITION, NEWS;, Pg. 6A, 413 words, Judge blocks Navy from removing sailor Online profile can't be used as proof of homosexuality, Steven Komarow, WASHINGTON
142. Ventura County Star (Ventura County, Ca.), January 27, 1998, Tuesday, News; Pg. A08, 390 words, State promises to beat tobacco/Teachers unions might merge/Republicans unveil child-care plan/Judge assails Navy's tactics
143. The Village Voice, January 27, 1998, CYBER; Pg. 37, 1271 words, MACHINE AGE, Austin Bunn
144. The Washington Post, January 27, 1998, Tuesday, Final Edition, A SECTION; Pg. A06, 794 words, Judge Blocks Navy's Discharge of Gay Sailor, Bradley Graham, Washington Post Staff Writer
145. Chicago Tribune, January 27, 1998 Tuesday, NORTH SPORTS FINAL EDITION, NEWS; Pg. 7; ZONE: N, 516 words, JUDGE RULES FOR SAILOR ACCUSED OF BEING GAY, Associated Press., WASHINGTON
146. AP Online, January 26, 1998; Monday, Washington - general news, 362 words Judge Says Sailor Can Stay in Navy, JOHN DIAMOND, WASHINGTON
147. AP Online, January 26, 1998; Monday, Domestic, non-Washington, general news item, 753 words, AP Top News at 9 p.m. EST Monday, Jan. 26, 1998, HOWARD SINER
148. AP Online, January 26, 1998; Monday, Domestic, non-Washington, general news item, 755 words, AP Top News at 4 p.m. EST Monday, Jan. 26, 1998, HOWARD SINER
149. AP Online, January 26, 1998; Monday, Domestic, non-Washington, general news item, 741 words, AP Top News at 3 p.m. EST Monday, Jan. 26, 1998, SUZANNE ROWLAND
150. AP Online, January 26, 1998; Monday, Domestic, non-Washington, general news item, 687 words, AP Top News at 5 p.m. EST Monday, Jan. 26, 1998, HOWARD SINER
151. AP Online, January 26, 1998; Monday, Domestic, non-Washington, general news item, 727 words, AP Top News at 8 p.m. EST Monday, Jan. 26, 1998, HOWARD SINER
152. AP Online, January 26, 1998; Monday, Washington - general news, 769 words Judge: Sailor's Privacy Violated, JOHN DIAMOND, WASHINGTON
153. AP Online, January 26, 1998; Monday, Domestic, non-Washington, general news item, 692 words, AP Top News at 6 p.m. EST Monday, Jan. 26, 1998, HOWARD SINER
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156. AP Worldstream, January 26, 1998; Monday, International news, 349 words, Federal Judge Says McVeigh Can Remain In Navy, JOHN DIAMOND, WASHINGTON
157. The Associated Press, January 26, 1998, Monday, AM cycle, Washington Dateline, 761 words, Judge says Navy violated sailor's privacy, don't-ask policy By JOHN DIAMOND, Associated Press Writer, WASHINGTON
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161. The New York Times, January 26, 1998, Monday, Late Edition - Final, Section A; Page 18; Column 1; Editorial Desk , 399 words, 'Don't Ask, Don't Tell' Online
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163. TechWeb News, January 26, 1998, 466 words, Court Blocks Officer's Dismissal Over AOL Page, John Borland, Net Insider
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165. The Atlanta Journal and Constitution, January 25, 1998, Sunday, ALL EDITIONS, 732 words, Personal Technology; Tech Report; On Technology; Souped-up telephone can surf the Net, Michael E. Kanell; STAFF WRITER
166. Deutsche Presse-Agentur, January 25, 1998, Sunday, International News, 645 words, Case of "gay" sailor on Internet raises privacy questions, By Tilman Streif, Seattle
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168. The Times-Picayune, January 25, 1998 Sunday, THIRD, NATIONAL; Pg. A6, 926 words, ON THE HILL; NEWS FROM THE LOUISIANA DELEGATION AND THE NATION'S CAPITAL, Compiled by Bruce Alpert and Jonn McQuaid
169. TULSA WORLD, January 25, 1998, 716 words, The Two Tim McVeighs, Frank Rich
170. THE DALLAS MORNING NEWS, January 24, 1998, Saturday, HOME FINAL EDITION, EDITORIALS; EDITORIALS; Pg. 26A, 387 words, SCORECARD; Here are some of week's

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winners and losers

171. The Palm Beach Post, January 24, 1998, Saturday, FINAL EDITION, Pg. 14A, 399 words, AMERICA OFF BASE
172. The Washington Post, January 24, 1998, Saturday, Final Edition, EDITORIAL; Pg. A24, 431 words, When Online Privacy Slips
173. The New York Times, January 23, 1998, Friday, Late Edition - Final, Section A; Page 20; Column 6; Editorial Desk , 185 words, On H.I.V., Don't Name Names; 'Don't Ask' Is a Failure
174. The New York Post, January 23, 1998, Friday, All Editions; Pg. 028, 298 words, FOR THE 'BOYS'
175. Sun-Sentinel (Fort Lauderdale, FL), January 23, 1998, Friday, Final EDITION, Pg. 18A, 405 words, NAVY, AOL BEHAVIOR OUT OF LINE; VIOLATED POLICY, SAILOR'S PRIVACY
176. AP Online, January 22, 1998; Thursday, Washington - general news, 538 words, Sailor's Career in Hands of Judge, JOHN DIAMOND, WASHINGTON
177. The Associated Press, January 22, 1998, Thursday, PM cycle, Business News, 514 words, Sailor's career in hands of judge, By JOHN DIAMOND, Associated Press Writer, WASHINGTON
178. Austin American-Statesman, January 22, 1998, News; Pg. A4, 464 words, AOL apologizes for telling Navy name of gay sailor; Postmaster
179. The Buffalo News, January 22, 1998, Thursday, CITY EDITION, NEWS, Pg. 4A, 158 words, AOL ACCEPTS FAULT FOR GIVING SAILOR'S NAME, Associated Press, WASHINGTON
180. The Commercial Appeal (Memphis, TN), January 22, 1998, THURSDAY, FINAL EDITION, Pg. A2, 820 words, 44 POLICE, GUARDS ARRESTED IN CLEVELAND STING, Compiled by Cynthia Sutter from these news services: The; Associated Press, Los Angeles Times-Washington Post, The New York; Times, Reuters and Scripps Howard
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183. Gannett News Service, January 22, 1998, FINAL EDITION, Pg. arc, 637 words Technology and Trends Column, DEBORAH PORTERFIELD; Gannett Suburban Newspapers
184. The Herald-Sun (Durham, N.C.), January 22, 1998, Thursday, Inside Front; Pg. A2;, 1460 words, The News in Brief
185. Newsbytes, January 22, 1998, 783 words, McVeigh Still In Navy Pending Court Ruling 01/22/98, IAC 06403542

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186. THE ORANGE COUNTY REGISTER, January 22, 1998 Thursday, MORNING EDITION, Pg. A07, 311 words, CAPITAL BRIEFLY, From Register news services
187. Pittsburgh Post-Gazette, January 22, 1998, Thursday, SOONER EDITION, Pg. A-14, 809 words, THE OTHER TIMOTHY MCVEIGH CASE; HUNTED DOWN IN CYBERSPACE, THIS DISTINGUISHED OFFICER IS A VICTIM OF THE; NAVY'S EXTREME HOMOPHOBIA, ROBERT SCHEER, LOS ANGELES
188. PR Newswire, January 22, 1998, Thursday, Financial News, 634 words, Evidence Mounts Against Military's Efforts to Discharge Naval Officer; America Online and Author of 'Don't Ask, Don't Tell, Don't Pursue' Question Military's Actions, WASHINGTON, Jan. 22
189. Press Journal (Vero Beach, FL), January 22, 1998, Thursday, A section; Pg. A17, 193 words, AOL ADMITS POLICY BREECH, BRIEF
190. The Record (Bergen County, NJ), January 22, 1998; THURSDAY; ALL EDITIONS, NEWS; Pg. A22, 448 words, AOL REGRETS RELEASE OF GAY SAILOR'S NAME IDENTIFICATION WAS A BREACH OF POLICY, JOHN DIAMOND, The Associated Press, WASHINGTON
191. The San Francisco Chronicle, JANUARY 22, 1998, THURSDAY, FINAL EDITION, NEWS; Pg. A5, 579 words, AOL Admits Error in Telling Navy Name of 'Gay' Sailor, Elaine Herscher, Chronicle Staff Writer
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193. The Washington Post, January 22, 1998, Thursday, Final Edition, A SECTION; Pg. A15, 593 words, AOL Admits Violating Its Own Disclosure Policy, Rajiv Chandrasekaran, Washington Post Staff Writer
194. The Washington Times, January 22, 1998, Thursday, Final Edition, Part A; NATION; Pg. A6, 581 words, Sailor's case tests 'tell' part of gay rule, Rowan Scarborough; THE WASHINGTON TIMES
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197. ABC NEWS, ABC WORLD NEWS THIS MORNING (6:30 am ET), JANUARY 21, 1998, Transcript # 98012106-j03, PACKAGE, NEWS, 372 words, EVENTS MAKING NEWS AND PRIMETIME LIVE PREVIEW, ASHA BLAKE
198. AP Online, January 21, 1998; Wednesday, Washington - general news, 810 words, AOL Admits Error in Sailor Case, JOHN DIAMOND, WASHINGTON
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203. THE PRESS-ENTERPRISE (RIVERSIDE, CA.), January 21, 1998 Wednesday, ALL ZONES, Pg. A10, 1043 words, EDITORIALS, The Press-Enterprise
204. The Seattle Times, January 21, 1998, Wednesday, Final Edition, EDITORIAL; Pg. B4, 306 words, THE NAVY AND AOL VIOLATED ONLINE PRIVACY
205. The Virginian-Pilot (Norfolk, VA), January 21, 1998, Wednesday, FINAL EDITION, Pg. B8, 752 words, LETTERS TO THE EDITOR - THE VIRGINIAN-PILOT
206. THE ARIZONA REPUBLIC, January 20, 1998 Tuesday, Final Chaser, BUSINESS; Pg. B4, 797 words, AOL, NAVY BREACH PRIVACY POLICY, By Dan Gillmor, San Jose Mercury News
207. The Denver Post, January 20, 1998 Tuesday, 2D EDITION, Pg. C-07, 726 words, The two Timothy McVeighs, Frank Rich
208. Los Angeles Times, January 20, 1998, Tuesday, Home Edition, Page 7, 796 words, COLUMN LEFT/ ROBERT SCHEER; COMMENTARY; The Navy Makes War on Its Own; A witch hunt against a veteran submariner violated military rules and federal privacy laws., ROBERT SCHEER
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213. Roanoke Times & World News, January 18, 1998, Sunday, METRO EDITION, Pg. 2, 370 words, DON'T ASK, DON'T TELL, DON'T SEND E-MAIL
214. South China Morning Post, January 18, 1998, America; Pg. 11, 875 words, Sailor sunk by Web surf, Simon Beck
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3480 words, Latest in Science News, Ann Kellan, Rick Lockridge, Jonathan Karl, Charles Feldman, Ed Garsten

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217. The New York Times, January 17, 1998, Saturday, Late Edition - Final, Section A; Page 6; Column 1; National Desk , 968 words, Navy Case Combines Gay Rights and On-Line Privacy, By PHILIP SHENON , WASHINGTON, Jan. 16

218. Telegraph Herald, January 17, 1998, Saturday, 881 words, National Briefs, Associated Press

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224. CNNFN, DIGITAL JAM 19:30 pm ET, January 16, 1998; Friday 7:35 pm Eastern Time, Transcript # 97011603FN-111, PACKAGE, Business, 362 words, AOL & Gay Sailor Update, CNNfn, John Defterios, Jonathan Karl

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231. The Patriot Ledger (Quincy, MA), January 16, 1998 Friday, ROP Edition, Pg. 05, 161 words, Pentagon delays dismissal of sailor
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233. Press Journal (Vero Beach, FL), January 16, 1998, Friday, A section; Pg. A15, 151 words, PENTAGON DELAYS SAILOR'S DISMISSAL, BRIEF
234. The Record (Bergen County, NJ), January 16, 1998; FRIDAY; ALL EDITIONS, NEWS; Pg. A13, 468 words, OFFICER FACING DISCHARGE SUES NAVY FOR ON-LINE PRIVACY BREACH, From staff and news service reports, WASHINGTON
235. The San Francisco Chronicle, JANUARY 16, 1998, FRIDAY, FINAL EDITION, NEWS; Pg. A3, 567 words, Navy Delays Discharge Of Sailor Government says he's gay -- he files privacy suit, Elaine Herscher, Chronicle Staff Writer
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237. USA TODAY, January 16, 1998, Friday, FINAL EDITION, NEWS;, Pg. 1A, 263 words, Sailor says Navy violated on-line privacy, Jill Lawrence; Steven Komarow, WASHINGTON
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239. Information Bank Abstracts, WALL STREET JOURNAL, January 16, 1998, Friday, Section B; Page 22, Column 2, 51 words, OFFICER FIGHTS DISCHARGE ON 'DON'T ASK, DON'T TELL'
240. The Washington Times, January 16, 1998, Friday, Final Edition, Part A; Pg. A1, 788 words, Navy secretary agrees sailor violated gay ban; White House intercedes to delay ouster, Rowan Scarborough; THE WASHINGTON TIMES
241. U.S. Newswire, January 15, 1998, 16:18 Eastern Time, NATIONAL DESK, 288 words, Sailor Targeted for Use of 'Gay' on AOL, Files Lawsuit to Stay in Military, Christopher Wolf (through Rich Klein), 212-969-3061, Dixon Osburn, 202-328-3244, or Kevin Winston, 202-66 7-0901, WASHINGTON, Jan. 15
242. AP Online, January 15, 1998; Thursday, Washington - general news, 320 words, Pentagon Delays Gay Sailor Dismissal, JOHN DIAMOND, WASHINGTON
243. AP Online, January 15, 1998; Thursday, Washington - general news, 320 words, Pentagon Delays Gay Sailor Dismissal, JOHN DIAMOND, WASHINGTON
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245. AP Online, January 15, 1998; Thursday, Domestic, non-Washington, general news item, 726 words, AP Top News at 5 p.m. EST Thursday, Jan. 15, 1998, HOWARD SENER

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252. CNN, CNN TALKBACK LIVE 15:00 pm ET, January 15, 1998; Thursday 3:00 pm Eastern Time, Transcript # 98011500V14, SHOW, News; Domestic, 6077 words, Navy Officer Discharged Because of Sexual Preference, Robert Maginnis, Kirk Childress, J.C. Herz, Faith Daniels

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258. ABC NEWS, ABC GOOD MORNING AMERICA (7:00 am ET), JANUARY 14, 1998, Transcript # 98011407-j01, INTERVIEW, NEWS, 894 words, US NAVY VERSUS MCVEIGH, Senior Chief Petty Officer TIMOTHY McVEIGH, NANCY SNYDERMAN

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260. The Bulletin's Frontrunner, January 14, 1998, Wednesday, WASHINGTON NEWS,
378 words, Gay Sailor Fights Dismissal.
261. M2 PRESSWIRE, January 14, 1998, 2752 words, U.S. DOD DoD news briefing
262. Newsday (New York, NY), January 14, 1998, Wednesday, HOME EDITION, Page
A25, 578 words, WORLD/NATION BRIEFS, COMPILED FROM NEWS DISPATCHES
263. Newsday (New York, NY), January 14, 1998, Wednesday, NASSAU AND SUFFOLK
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EDITION, Pg. 1D, 493 words, ONLINE PRIVACY AGAIN AN ISSUE; SAILOR FIRED FOR
'GAY' POSTING, L.A. LOREK ; Business Writer
266. Information Bank Abstracts, WALL STREET JOURNAL, January 14, 1998,
Wednesday, Section B; Page 1, Column 3, 74 words, PRIVACY: DON'T CHAT, DON'T
TELL? NAVY CASE TESTS PRIVACY LIMITS, BY JOHN SIMONS
267. ABC NEWS, WORLD NEWS TONIGHT WITH PETER JENNINGS (6:30 pm ET), JANUARY
13, 1998, Transcript # 98011303-j04, PACKAGE, NEWS, 526 words, GAY SAILOR WILL
FIGHT DISMISSAL FROM NAVY, JOHN MCWETHY, PETER JENNINGS
268. AP Online, January 13, 1998; Tuesday, Washington - general news, 727
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274. The Arkansas Democrat-Gazette, January 13, 1998, Tuesday, Pg. A1, 574
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277. Federal News Service, JANUARY 13, 1998, TUESDAY, DEFENSE DEPARTMENT BRIEFING, 2862 words, DEFENSE DEPARTMENT REGULAR BRIEFING BRIEFER: CAPT. MICHAEL DOUBLEDAY THE PENTAGON
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282. THE ORANGE COUNTY REGISTER, January 13, 1998 Tuesday, MORNING EDITION, Pg. A03, 504 words, THE UNITED STATES, The Orange County Register
283. Pittsburgh Post-Gazette, January 13, 1998, Tuesday, SOONER EDITION, Pg. A-5, 80 words, GAY SAILOR'S OUSTER, WASHINGTON
284. The Record (Bergen County, NJ), January 13, 1998; TUESDAY; ALL EDITIONS, NEWS; Pg. A14, 564 words, NAVY DEFENDS DISCHARGING SAILOR FOR HOMOSEXUALITY, The Associated Press, WASHINGTON
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288. Austin American-Statesman, January 12, 1998, News; Pg. A4, 386 words, Navy fires gay sailor because of AOL profile, BY RAJIV CHANDRASEKARAN
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290. The San Francisco Chronicle, JANUARY 10, 1998, SATURDAY, FINAL EDITION, NEWS; Pg. A3, 781 words, Discharge For Online Gay Profile Sailor says Navy got info improperly, Elaine Herscher, Chronicle Staff Writer
291. Computer Law Strategist, January 1998, Vol. 16; No. 9; Pg. 4, 563 words

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292. Multimedia & Web Strategist, January 1998, MULTIMEDIA DOCKET SHEET; Vol. 4; No. 3; Pg. 9, 2743 words
293. The Atlanta Journal and Constitution, December 22, 1997, Monday, ALL EDITIONS, 863 words, PEACH BUZZ; People intrigued by Elton, Richard L. Eldredge
294. The Boston Globe, December 16, 1997, Tuesday, City Edition, NATIONAL/FOREIGN; Pg. A3, 755 words, Be skeptical, Nichols lawyer says; Jurors get late plea before deliberations, By Lynda Gorov, Globe Staff, DENVER
295. The Denver Post, December 15, 1997 Monday, 2D EDITION, Pg. F-01, 2595 words, Right-wing Airwaves in Americana Johnstown broadcaster preaches Patriot revolution, By Bill Briggs, Denver Post Staff Writer
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297. The Arkansas Democrat-Gazette, November 16, 1997, Sunday, Pg. A1, 7011 words, BY MICHAEL LEAHY, ARKANSAS DEMOCRAT-GAZETTE
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325. The Denver Post, May 12, 1997 Monday, 2D EDITION, Pg. F-01, 1281 words, Reward for Information Fast cash slow way to nab criminals, By Bill Briggs, Denver Post Staff Writer
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EARLY AND CITY EDITIONS, Pg. 2, 645 words

360. Chattanooga Free Press, March 30, 1996, Saturday, 343 words, QUICK GLANCE
AT TODAY'S NEWS, Dee Decker, Free Press Copy Editor

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The San Francisco Examiner

February 23, 1998, Monday; Second Edition

SECTION: NEWS; Pg. A-16

LENGTH: 569 words

HEADLINE: Go ahead and ask;
Pervasiveness of military "don't ask, don't tell" hypocrisy should prompt Clinton to command equal standing for gays

SOURCE: EXAMINER EDITORIAL WRITER

BODY:

HYPOCRISY became official federal doctrine in 1993, when a hostile Pentagon and a poll-frightened Congress pressured the new president to back down from a promise that gays and lesbians could serve in the U.S. military without facing court martial and disgrace.

Instead, Bill Clinton agreed to the policy of "don't ask, don't tell, don't pursue." Homosexual behavior would remain a crime in the military, but if they kept quiet, and saluted when necessary, gays and lesbians could stay nervous in the service.

The compromise was doomed from the start. This is clear from anecdotal evidence, such as the Navy's determined investigation to root out the ownership of an unsigned e-mail profile placed in America Online by a 17 -year submariner, Senior Chief Petty Officer Timothy R. McVeigh.

His discharge was overruled last month by a federal judge who said it "violated the very essence of "don't ask, don't pursue." "

The McVeigh travesty epitomizes a growing caseload of similar violations of a policy that forces gays to live lives of desperate quiet. The policy encourages homophobic commanders and their toadies to fixate on deceit as justification for the hundreds of incidents carefully documented and disclosed Thursday by a gay rights organization, the Servicemembers Legal Defense Network.

In the first year of "don't ask," 340 violations of the policy were reported by the organization; in 1995, 363; in 1996, 443, and last year, a 27 percent increase brought the total to 563.

In 124 cases, according to the report, commanders broke the rules by demanding an answer to the question: Are you homosexual?

In 235 cases, commanders began investigations without "credible evidence" (in other words, more than a single accusation).

And 182 anti-gay harassment incidents, including beatings and death threats, were a 38 percent increase over 1996.

It's not just the principle of the thing. It's the ruinous effect on military capability, which depends on trust.

The San Francisco Examiner, February 23, 1998

As every ex-GI, ex-swabbie and ex-WAC knows, the military always has had numerous closeted homosexuals in the barracks, the crew quarters, the officers mess and the Pentagon itself. Each is a target for extortion, blackmail and sexual harassment. Need a new field jacket? Just ask that supply sergeant over there, and wink knowingly, with menace.

As president, Harry Truman didn't ask the segregationists of the 80st Congress to desegregate the armed forces. He did so with Executive Order 9981 in 1948, six years before the U.S. Supreme Court came down with Brown vs. Board of Education and ended "separate but equal" as a hypocritical way to suppress the educational rights of African Americans and other racial minorities.

In the military, which defends democracy but doesn't find it efficient, an order is an order. Commanders grumbled about Truman's directive but obeyed it.

This is the 50th anniversary of Truman's historic command. We can't help but notice, however, that racial integration of the military didn't keep too many commanders in the 1990s from sabotaging the "don't ask, don't tell" fiction.

It's time for Clinton, as commander in chief, to bypass Congress and issue an executive order that will acknowledge equal rights and opportunities for those gays and lesbians who are willing to risk their lives, and work for peanuts, in their country's defense.

End the hypocrisy.

LANGUAGE: English

LOAD-DATE: February 24, 1998

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FEBRUARY 16, 1998

SECTION: Notebook; Pg. 9

LENGTH: 1339 words

BODY:

SCHOOL'S OUT: President Clinton made some good proposals in his State of the Union address, and so it is more out of bemusement than outrage that we draw attention to one of its salient absurdities. For some time now, Clinton has been recasting spending initiatives as tax cuts. The conceit here is that giving somebody, say, \$500 for child care expands government, while giving a \$500 tax cut shrinks government. This metaphysical nuance, while inscrutable to outside analysts, apparently matters enough to congressional Republicans to make Clinton's domestic programs palatable. And so, by way of complying with this distinction, Clinton proposed during the State of the Union to enact "a schoolconstruction tax cut." The idea sounds worthy, yet strange-- local school boards do not pay federal taxes. So we did some checking. (The White House returned our non-Monica-related phone call with lightning speed.) Here's how the plan works: local governments will raise money for school repair by issuing bonds. The bonds, however, will not pay interest. The incentive to buy and hold them is, instead, a federal tax break. This tax break will be calculated by the Treasury Department to be equivalent to the interest such municipal bonds periodically yield. For sure, it would have been far simpler to issue normal interest-paying bonds, subsidized by Washington. But that would be spending! And the era of big government, you see, is over.

CREDIT CRUNCH: Everyone has been scrutinizing the president's body language for the slightest sign he might be bending the truth about Monica Lewinsky. But what about the half-truth he told at the State of the Union about the origins of the budget surplus? He credited the disappearance of the budget deficit to two acts: "the courageous vote in 1993" and "the historic, bipartisan balanced budget agreement" of 1997. He got the first part right; the '93 deal obliged Congress both to raise revenues and to accept serious spending cuts. But the '97 budget deal had nothing to do with the current bounty. The deficit-reduction measures in that bill haven't even taken effect yet. (In fact, it was projected to temporarily increase the deficit in its first year.) If Clinton wanted to share the credit with Republicans, he could have touted the 1990 budget deal, brokered by George Bush at the price of his "no new taxes" pledge, which reduced the deficit even more than the 1993 agreement. Of course, doing so would have left out a certain sitting president.

PRIME MINISTER: As Jeffrey Rosen points out elsewhere in these pages ("The End of Privacy," p. 21), one perverse result of recent federal court decisions is to restrict the range of people the president may consult in crises such as the current one. As the law now stands, anyone who talks to Clinton about Monica Lewinsky risks being hit with a subpoena (and a mountain of legal bills) unless that individual enjoys some formal privilege, such as those that protect conversations between a husband and his wife, or between a lawyer and his client. Thus, Clinton's political advisers are out of the loop, while his lawyer-wife commands the White House counterattack. But how did the Rev. Jesse Jackson work his way into the inner circle, emerging on "Larry King Live" as

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an unequivocal Clinton defender? Well, Jackson enjoys a privilege, too: he's a minister, and you can't subpoena a conversation between a pastor and a member of his flock. So it turns out that his visit to the White House on Super Sunday was a religious mission to raise the first family's spirits. "I was there not as a political legal strategist-tactician," Jackson went out of his way to tell King, "but as a friend and as a minister. ... We did have prayer." It was also through Jackson that the Clintons subtly reminded the public of how cruel this ordeal has been to their daughter. "That which touched me most was my conversations with Chelsea," Jackson reported, going on to describe what a source of strength she and her father and mother are to one another in these troubled times. This little speech was a big political favor for the president, and you can be sure that, if Clinton survives, Jackson will expect to be repaid in equal measure--yet another reason to regret the tawdry spectacle that has enveloped the administration.

WITH DEFENDERS LIKE THIS...: "Nobody understands that women can feel relieved sometimes when their husband is fucking someone else. It's hard to satisfy men with big egos. But there's no way that Hillary could come out and say, I don't care that Bill is fucking someone else. Sex is not the way we prove our commitment.' In terms of their relationship, they are the most progressive couple we've ever had in the White House. People want to make them pay for that. It would be the most positive thing for our culture if we respected the love between Hillary and her man. We need a love ethic at the seat of power. And these two people do seem to deeply care about one another. So in that way they are better role models than any previous couple in the White House. Their relationship is based on respect and love. Not necessarily on sex. People hate that."--bell hooks, in the online magazine Salon.

WITH DEFENDERS LIKE THIS, CONTINUED: "There are a thousand things, not including oral sex, which could have gone on, which fall well short of adultery.... Let's assume that some of the allegations that Hillary sometimes--not necessarily being into regular sex with men--might be true. Let's assume that this is a guy who has been sexually active for a long time, and then got it that as president ... he'd have to shut himself down. You would then expect a variety of things which would be quasi-sexual in nature but which would fall short of it.... Phone sex might be one of them, fantasies might be one of them.... Those all could be real things without actually committing adultery."--Dick Morris, on kabc radio in Los Angeles.

DON'T ASK, DON'T E-MAIL: What was Senior Chief Petty Officer Timothy R. McVeigh (no relation to the Oklahoma City bomber) thinking when he apparently sent an America Online computer message under the screen name "boysrch" to a military colleague? Word got back to Navy administrators, who looked up the user's profile on AOL's public screen-profile menu and reported that they found that the person behind "boysrch" had indeed entered "gay" under his marital status. Approached by Navy investigators, AOL disclosed the real name behind "boysrch"--a clear violation of the company's subscriber confidentiality policy. AOL has apologized. But that won't help McVeigh, who, though currently under the protection of a court-ordered temporary injunction, could face discharge three years before he can qualify for a pension. As a result, McVeigh is pursuing action against the Navy for violating the Electronic Communications Privacy Act. There's also the unsettled question of whether McVeigh's online correspondence, in which he never disclosed his full name, really did violate the military's "don't ask, don't tell" policy. But one thing is clear: the military continues to resolve every ambiguity in its murky policy to the disadvantage of its

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suspected gay servicemembers, even if that means pursuing them into the far reaches of cyberspace.

BAD WILL HUNTING: The editors of TNR wish to announce a new contest: Who can come up with the best name for the current Washington scandale? We'll accept nominations that employ the "-gate" suffix--like you, we've already heard Fornigate, Zippergate, Monicagate, and Starrgate. But we encourage contestants to think outside that particular box. Our 1987 contest winner avoided the "Contragate" temptation and produced the sobriquet "Iranamok" to describe the arms-for-hostages scandal that crippled Ronald Reagan--but which has nevertheless been recorded in history as "the Iran-Contra affair." This year's winner could make history and will receive a free one-year subscription to TNR.

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LOAD-DATE: February 12, 1998

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Chicago Daily Law Bulletin

February 12, 1998, Thursday

SECTION: Pg. 5

LENGTH: 1396 words

HEADLINE: Navy goes overboard in hunt for submariner

BYLINE: DAVID J LOUNDY

BODY:

Many people are not very well attuned to issues of personal privacy, often until a particularly resonant issue comes to their attention. A number of recent issues, however, show how privacy should be of greater concern in a world of electronic communication and data storage. It's surprising that with all of the high-profile privacy incidents involving well-known politicians and their cohorts, there is not more awareness of privacy issues in the context of the electronic media.

President Clinton has a poor record on privacy rights in an electronic environment based on his stance on regulation of encryption and promotion of wiretap-friendly communications systems. I am sure, however, that he has had a few sobering experiences in light of the current allegations against him in the White House sex scandal and the possibly illegal recording of Monica Lewinsky's conversations with her friend," which were recorded using a (Linda) Tripp-wire for the benefit of the independent counsel Kenneth Starr. I'm also sure that Newt Gingrich is likely to think a bit more carefully about what he says over a cellular telephone, now knowing that the phone beams his conversations off into the ether to be heard, legally or otherwise, by anyone with the appropriate radio receiver.

Of course, the last several presidents have all been fighting to restrict access to White House e-mail, all beginning with the Iran-Contra affair. There are many people who legitimately would be curious to know a piece of e-mail could be found approving of an arms-for-hostages trade, and even more curious to know if the message was carbon-copied to the president.

Within the last few months, several lawsuits have been filed concerning attempts to find out whether a sailor in the U.S. Navy really is gay and to find out what local government employees are looking at when they surf the Internet. As the glacier of the judicial process carves some new legal precedent into the landscape of existing privacy law, these incidents should give everyone a reason to examine their own local privacy topography.

The most recent electronic privacy case, and the one addressed in this article, is *McVeigh v. Cohen*, No. 98-116 (D. D.C., Jan. 26), available on the Internet at www.Loundy.com/CASES/McVeighvCohen.html. This case involves the Navy's attempt to sink the career of Timothy McVeigh (no, not that one), a Navy officer serving as the senior-most enlisted man on the nuclear submarine U.S.S. Chicago. It seems that McVeigh is a user of America Online in his off-duty above-water time. It also seems that he had an interest in the toy drive that was organized for the children of the U.S.S. Chicago's crew members.

Apparently, McVeigh was bright enough not to put his real name in his member profile," which was available to other AOL users, but he did list his marital status in that profile as gay," noted that he is in the Navy and stationed in Hawaii, and listed as interests collecting pics of other young studs" and boy-watching." Worse still was the fact that he then corresponded from the AOL account listing that profile with the wife of a fellow officer from the U.S.S. Chicago. The wife was organizing the toy drive, and McVeigh, of course, signed his e-mail message Tim."

The woman who received McVeigh's note gave it and a copy of the AOL profile to her husband, who gave them to his commander, who thought they may have originated with McVeigh. The commander then passed the information on to a lieutenant in the Judge Advocate General's Corps, who then gave it to a paralegal (with instructions to try to match McVeigh to the profile), who then called AOL. The online service then said, oh yes, the previously anonymous user whose privacy we are supposed to guard is the suspected sailor.

At this point, the Navy began an administrative discharge proceeding against McVeigh.

Of course, the America Online representative did not mention anything about the AOL user's privacy when turning over confidential information concerning his identity. Also apparently not considered was the Electronic Communications Privacy Act, 18 U.S.C. sec2701, et seq., which establishes certain privacy rights. Upon being confronted with this issue, AOL pleaded, Oops." McVeigh is said to be contemplating a lawsuit.

Of course, the Navy paralegal also did not inform AOL that he was a military officer conducting an investigation - for which the Electronic Communications Privacy Act provides a specific warrant requirement for the discovery of such information from a service provider. Upon being confronted with this issue, the Navy blamed AOL. A lawsuit, of course, resulted.

In his opinion granting a preliminary injunction preventing the Navy's discharge of McVeigh, U.S. District Judge Stanley Sporkin of the District of Columbia stated that the Navy violated 10 U.S.C. sec654, the Don't Ask, Don't Tell, Don't Pursue" policy implemented to address the issue of homosexuals in the military, and the associated investigative guidelines. The judge held that, but for AOL's provision of its user's identity, there would have been no way to connect the e-mail to McVeigh. Furthermore, the Navy either knowingly broke the law to obtain the message sender's identity, or it solicited a violation of the law from AOL. Sporkin found that under the Navy's own investigative guidelines, at no point did it have enough information to even commence an investigation, much less engage in the search-and-destroy mission that resulted from the suspicion that the message sender was McVeigh.

This case offers a number of lessons. First of all, to quote Sporkin, 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." One of the fastest laws of any kind passed in this country was the Bork Bill," enacted to protect the privacy of movie-rental records. The law was passed after Robert H. Bork's confirmation hearings for the Supreme Court during which a reporter obtained the list of movies the federal appeals court judge had rented.

Chicago Daily Law Bulletin, February 12, 1998

As such, some judges (and the legislators who voted on the Bork Bill) have been presented with a resonant privacy experience and realize that the minimal privacy rights U.S. citizens still enjoy are important. If you are bound by a law that says, Don't ask" -- don't ask!

Second, service providers also should be aware of any obligations they may have regarding protection of their users' privacy rights, whether such rights are established by law or contract. If McVeigh does sue AOL over its actions, Oops" is not a recognized defense under the Electronic Communications Privacy Act. Furthermore, privacy is an important issue to many consumers, as some companies are finding out the hard way. Companies that treat their customers' privacy loosely are attracting unwanted publicity in increasing numbers, and online privacy concerns are an important agenda item for many Internet users. Many privacy-conscious service providers simply do not keep certain records. You cannot divulge records that no longer exist.

Finally, if you are a user of electronic communications, don't be dumb. Cellular and cordless telephones are transmitters. They send a signal via airwaves to a receiver. The receiver may be a cordless telephone base-station in your office -- or the office of a neighbor, competitor, opponent, regulator, reporter. If you have a profile that says you are a gay sailor based in Hawaii, it is not advisable to send e-mail signed with your first name to someone in the family of a fellow officer about a toy drive for the submarine you're assigned to -- unless, of course, you want to risk a 17-year military career and the associated pension and other benefits.

Quite simply, don't tell, and if enough is at stake, don't hint either.

Technology has the ability to preserve the integrity, anonymity and privacy of electronic communications. Technology will not, however, avoid the consequences of human error. The law may help, but to some extent you must be your own privacy advocate.

LANGUAGE: ENGLISH

LOAD-DATE: February 17, 1998

LEVEL 1 - 21 OF 360 STORIES

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The National Law Journal

February 9, 1998

SECTION: REGIONAL REPORTS; Pg. A8

LENGTH: 177 words

HEADLINE: Judge Sporkin Scolds Navy;
DISTRICT OF COLUMBIA

BYLINE: Compiled from National Law Journal staff, correspondent and Associated Press reports.

DATELINE: WASHINGTON

BODY:

U.S. District Judge Stanley Sporkin Jan. 29 ordered the Navy to reinstate a senior sailor who faced dismissal for alleged homosexuality based on information the Navy obtained from an online computer service. Lawyers for the Navy reserved the right to appeal but accepted the court's ruling, a concession that appeared to end the effort to oust Senior Chief Petty Officer Timothy R. McVeigh. The ruling marks a first in the four-year history of the Pentagon's "don't ask, don't tell" policy on gays in the military. The petty officer's troubles began last fall when the Navy found a "profile page" posted on America Online in which "Tim" from Honolulu described himself as gay and expressed sexual interest in young men. A Navy investigator called AOL anonymously and obtained the author's full name, a disclosure AOL later said it regretted and acknowledged had violated its confidentiality policies. Judge Sporkin said both the Navy and AOL violated the law in delving into what should have been confidential information held by the online service.

LANGUAGE: ENGLISH

LOAD-DATE: February 27, 1998

1ST CASE of Level 1 printed in FULL format.

TIMOTHY R. McVEIGH, Plaintiff, v. WILLIAM S. COHEN, et al.,
Defendants.

Civil Action No. 98-116

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

983 F. Supp. 215; 1998 U.S. Dist. LEXIS 790; 75 Fair Empl.
Prac. Cas. (BNA) 1656

January 26, 1998, Decided
January 26, 1998, Filed

DISPOSITION: [*1] Plaintiff's Motion for a Preliminary Injunction GRANTED.

COUNSEL: For TIMOTHY R. MCVEIGH, plaintiff: Amybeth Garcia-Bokor, GUERRIERI,
EDMOND & CLAYMAN, P.C., Christopher Wolf, Alec W. Farr, PROSKAUER, ROSE, GOETZ &
MENDELSON, L.L.P., Washington, DC.

JUDGES: Stanley Sporkin, United States District Judge.

OPINIONBY: Stanley Sporkin

OPINION: MEMORANDUM 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 [*2] to prevail on the merits of his claims.

STATEMENT OF FACTS

The Plaintiff, Senior Chief Timothy R. McVeigh, is a highly decorated seventeen-year 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 [*3] 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 [*4] 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. n1 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." [*5] AR at 107.

- - - - -Footnotes- - - - -

n1 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.

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

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 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 [*6] 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*, 189 U.S. App. D.C. 212, 581 F.2d 990, 992 (D.C. Cir. 1978) (footnote [*7] omitted); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 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.

I. 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., *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), cert. denied, 136 L. [*8] Ed. 2d 250, 117 S. Ct. 358 (1996); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 139 L. Ed. 2d 12, 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 [*9] 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." [*10] 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 [*11] 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 [*12] 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 [*13] 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, [*14] 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 [*15] 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 [*16] 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 [*17] 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 [*18] 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 [*19] 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 [*20] 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.

983 F. Supp. 215; 1998 U.S. Dist. LEXIS 790, *20;
75 Fair Empl. Prac. Cas. (BNA) 1656

1/26/98

Date

Stanley Sporkin

United States District Judge

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 [*21] 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 for a hearing on final injunctive relief will be determined.

1/26/98

Date

Stanley Sporkin

United States District Judge

UNITED STATES v. CHADWICK

No. 75-1721

SUPREME COURT OF THE UNITED STATES

433 U.S. 1; 97 S. Ct. 2476; 1977 U.S. LEXIS 133; 53 L. Ed.
2d 538

Argued April 26, 1977
June 21, 1977; as amended

OPINION:

... [*4] [**2480] [***6] no risk that whatever [***7] was contained in the footlocker trunk would be removed by the defendants or their associates." App. 44. The agents had no reason to believe that the footlocker contained explosives or other inherently dangerous items, or that it contained evidence which would lose its value unless the footlocker were opened at once. Facilities were readily available in which the footlocker could have been stored securely; it is not contended that there was any exigency calling for an

... [*8] [**2482] [***13] houses, papers, and effects" in safeguarding against unreasonable searches and seizures. See <=13> United States v. Rabinowitz, 339 U. S. 56, 68 (1950) (Frankfurter, J., dissenting).

Moreover, if there is little evidence that the Framers intended the Warrant Clause to operate outside the [***14] home, there is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not ...

... [*9] [**2482] [***14] acknowledges that the core values the Fourth Amendment protects are privacy interests. In its view, those privacy interests which should receive the "maximum protection from governmental search or seizure" provided by the Warrant Clause include private oral and electronic communication, "[i]n addition to the home and other structures such as an office or hotel room...." Brief for United States 30. It is not readily apparent how the Government's contention that the Warrant Clause applies to high privacy ...

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Article Text:

LOS ANGELES, Jan. 28 -- A Federal district judge ruled today that the Pentagon's ban on homosexuals was unconstitutional and permanently enjoined the military services from discharging or denying enlistment to gay people 'in the absence of sexual conduct which interferes with the military mission.'

The judge, Terry J. Hatter Jr., then ordered the Navy to reinstate permanently Petty Officer V. Keith Meinhold, 30, who was discharged last year after proclaiming his homosexuality on national television. Judge Hatter ruled that the Navy's action violated the Constitution's guarantee of equal protection.

Lawyers familiar with the case said the order applied to all branches of the armed services in Judge Hatter's jurisdiction, the Central District of California, and was not binding elsewhere, although it could be persuasive in other cases. 'This is a great decision, but it has greater political impact than legal impact,' said one of Mr. Meinhold's lawyers, John McGuire of the Los Angeles firm of White & Case.

The crucial question now was whether the new Clinton Administration, which has pledged to end the military's ban on homosexuals, will permit the Navy to appeal the decision. The Pentagon declined to comment on the ruling tonight.

Comparison With Segregation

In Judge Hatter's order, which was issued late this afternoon, he wrote: 'Gays and lesbians have served, and continue to serve, the United States military with honor, pride, dignity and loyalty. The Department of Defense's justifications for its policy banning gays and lesbians from military service are based on cultural myths and false stereotypes. These justifications are baseless and very similar to the reasons offered to keep the military racially segregated in the 1940's.'

Homosexual-rights advocates applauded the Federal court ruling, saying it provided the Clinton Administration new ammunition to counter arguments from the Joint Chiefs of Staff and supporters of the ban in Congress.

'The real impact of this decision will be political not legal,' said Kevin Cathcart, a lawyer who is executive director of the Lambda Legal Defense and Education Fund, a group that promotes gay rights. 'The question right now is how will Congress react and will it press this issue further.'

Judge Refers to Studies

Judge Hatter ruled that the military policy violated Mr. Meinhold's rights to equal protection under the Fifth Amendment and, citing several Pentagon and other Government studies, that there was no rational basis for discrimination against gay men and women in the military.

One of the sailor's lawyers, Christopher Rudd, hailed the ruling. 'A U.S. District Court judge has ruled that the U.S. Navy's policy banning gays from military solely based on their status is unconstitutional.'

because it is discrimination based on prejudice and has no rational basis,' he said. 'If this decision is upheld on appeal, it doesn't matter what Congress does.'

Mr. Meinhold, an airborne sonar analyst and instructor, has become a national symbol of the fight by homosexuals to lift the longstanding policy of excluding gay people and discharging them if found out. He joined the Navy at the age of 17 in 1980 and has never been accused of sexual misconduct. After he publicly announced his sexual orientation last year on a program on ABC, the Navy relieved him of duty at the Moffett Field Naval Air Station in Mountain View, Calif., south of San Francisco.

The sailor sued, and last November Judge Hatter issued a temporary injunction ordering the Navy to reinstate Mr. Meinhold while his case was argued. The order today made the injunction permanent and extended it to all other people as well.

If upheld or allowed to stand, the order would reverse numerous previous Federal court rulings generally upholding the military policy on the ground that the armed forces are permitted to use their own judgment on such matters.

But today Judge Hatter, relying on a 1992 ruling by the Court of Appeals for the Ninth Circuit, in San Francisco, wrote that the court 'cannot merely defer to the 'military judgment' as the rationale for the policy -- the court must consider the factual basis underlying the 'military judgment.'

Cheney Comments Cited

He then cited numerous Government statements and documents that he said undermined the rationale for the exclusion, including televised comments by former Secretary of Defense Dick Cheney. He also cited a study commissioned by the Defense Department in 1988 that found that sexual orientation was no more related to job performance than being left- or right-handed.

The judge also quoted Lawrence J. Korb, a former Assistant Secretary of Defense responsible for approving and carrying out the current policy as saying 'there is no longer any justification for the armed services' current ban on homosexuals serving in the military.'

Judge Hatter, who was appointed by President Jimmy Carter in 1979, concluded, 'Gays and lesbians should not be banned from serving our country in the absence of conduct which interferes with the military mission.'

At Mr. Meinhold's home in Palo Alto, Calif., telephone calls were greeted by a recorded message that said: 'Hi, this is Keith Meinhold. We just got a very favorable ruling from the judge. The policy banning gays from the military is unconstitutional.'

(2)

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Access No: 9300054966 ProQuest - The New York Times (R) Ondisc
Title: WHITE HOUSE PLANS TO FIGHT FOR DISCHARGE OF GAY SAILOR
Authors: Special to The New York Times
Source: The New York Times, Late Edition - Final
Date: Saturday Jul 31, 1993 Sec: 1 National Desk p: 10
Length: Medium (308 words)
Subjects: UNITED STATES ARMAMENT & DEFENSE; HOMOSEXUALITY; MILITARY
PERSONNEL; NAVIES
Names: CLINTON, BILL (PRES); MEINHOLD, KEITH
Companies: DEFENSE DEPARTMENT

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(R) Service.

Article Text:

SAN FRANCISCO, July 30 -- The Clinton Administration argued in a court brief today that the old Pentagon ban on homosexuals was constitutional and indicated that it would continue fighting for the discharge of a gay sailor.

In a brief filed here in the United States Court of Appeals for the Ninth Circuit, the Administration criticized Judge Terry J. Hatter Jr. of Federal District Court for overturning the discharge of Keith Meinhold, a sonar operator at Moffett Field Naval Air Station in Mountain View, Calif.

The Defense Department discharged Mr. Meinhold last August after he disclosed in a national television interview that he was homosexual. He was reinstated in January on Judge Hatter's orders.

The Clinton Justice Department argued that Judge Hatter's decision overstepped his judicial authority by making decisions that fall in the jurisdiction of the legislative and executive branches of the Federal Government.

Furthermore, the brief argued, 'the District Court's ruling may interfere with implementation of the President's new policy regarding homosexuality in the military' because of an implication that the court's decision in the Meinhold case could be construed to mean that the new policy first had to be reviewed by the court.

Under President Clinton's compromise policy, homosexuality will still be grounds for discharge, although the military will not ask incoming men and women whether they are homosexuals or lesbians. The policy will be effective on Oct. 1.

After reviewing the Administration's brief, Mr. Meinhold's lawyer, John I. McGuire, said the Government's legal arguments today indicated little difference between the old and new policies.

'Here the Clinton Administration is claiming before the courts that they are not kicking gays out, but then they defend the old rule,' Mr. McGuire said in a telephone interview.

Access No: 9300067299 ProQuest - The New York Times (R) Ondisc
Title: GAY SAILOR CLAIMS A VICTORY AS COURT CASE DEADLINE PASSES
Authors: DAVID JOHNSTON, Special to The New York Times
Source: The New York Times, Late Edition - Final
Date: Monday Oct 17, 1994 Sec: A National Desk p: 12
Length: Medium (505 words) Illus: Photo
Subjects: UNITED STATES ARMAMENT & DEFENSE; HOMOSEXUALITY; NAVIES;
SUITS & CLAIMS AGAINST GOVERNMENT; SUSPENSIONS, DISMISSALS
& RESIGNATIONS
Names: MEINHOLD, KEITH

Abstract: Keith Meinhold, the homosexual sailor who has waged a two-year legal battle against his discharge by the Navy, said on Oct 16, 1994 that he had prevailed because the government allowed a legal deadline to pass on Oct 14 without challenging an appeals court decision in his favor.

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Article Text:

WASHINGTON, Oct. 16 -- A homosexual sailor who has waged a two-year legal battle against his discharge by the Navy said today that he had prevailed because the Government allowed a legal deadline to pass on Friday without challenging an appeals court decision in his favor.

Lawyers for the Navy flight instructor, Petty Officer Keith Meinhold, said the Government did not file a required notice seeking a review of a Sept. 1 decision by a panel of the Ninth Circuit Court of Appeals in San Francisco. The judges ruled that the Navy could not discharge Mr. Meinhold merely because he is gay.

'For two and a half years, the Pentagon has fought tooth and nail to kick me out of the Navy because I'm gay,' said Mr. Meinhold in a statement quoted by The Associated Press and Reuters in California. 'By this decision, they finally have admitted that I can say I am gay and proudly serve my country in the military.'

A Government lawyer said today that the Justice Department had not ignored the deadline, but was intentionally allowing the decision to stand without asking for a review by the full appeals court. But the official added that the Justice Department had not decided whether to petition the Supreme Court. The Government has more than a month to decide whether to seek a review by the High Court.

But one lawyer who has followed the case suggested that the Justice Department officials may have decided against all further appeals. 'The Solicitor General believes that policy issues could be better litigated in the context of other cases,' he said, referring to Drew S. Days, the

Solicitor General, who is the Government's chief lawyer in appellate courts.

Mr. Meinhold was discharged in 1992 under a longstanding policy barring homosexuals from the armed forces, after he said in an interview on a nationwide television broadcast that he is a homosexual.

He challenged the discharge, and after a long battle the appeals court upheld a lower court's order that Mr. Meinhold be reinstated. He is now stationed at the Naval Air Station on Whidbey Island in Washington State.

John McGuire, Mr. Meinhold's lawyer, said in the statement quoted by the news services that the Government's decision against further action 'is an acknowledgement that the court's decision is correct and that the gay ban is headed toward its ultimate and deserved demise.'

Mr. McGuire suggested that the case could influence courts considering newer regulations, 'the don't ask, don't tell, don't pursue' policy adopted under the Clinton Administration in which recruits cannot be asked if they are homosexuals. 'The Meinhold ruling, in effect, eliminates the 'don't tell' provision from the 'don't ask, don't tell' policy,' Mr. McGuire said.

But a Government lawyer said the Meinhold case would probably not affect the legal debate over the new policy. He said the appeals court said that its ruling in the Meinhold case applied only to his treatment under the old policy and reached no legal conclusions about the validity of the new regulations.

Caption:

Photo: Petty Officer Keith Meinhold (Agence France-Presse)

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Access No: 9300079524 ProQuest - The New York Times (R) Ondisc
Title: U.S. DROPS EFFORT TO OUST A GAY SAILOR
Authors: STEPHEN LABATON, Special to The New York Times
Source: The New York Times,
Late Edition - Final Correction Appended
Date: Tuesday Nov 29, 1994 Sec: A National Desk p: 20
Length: Long (907 words) Illus: Photo
Subjects: UNITED STATES ARMAMENT & DEFENSE; HOMOSEXUALITY;
DISCRIMINATION; SUITS & LITIGATION; NAVIES
Names: CLINTON, BILL (PRES); MEINHOLD, KEITH (PETTY OFFICER)

Abstract: The Clinton administration said on Nov 28, 1994 that it would drop its effort to bar a homosexual from serving in the Navy and would not appeal the case to the US Supreme Court. Government lawyers insisted that their decision in the case of Petty Officer Keith Meinhold was not intended to convey the message that the military must admit homosexuals, but was simply a tactical decision in the long-running court battle between the armed services and gay and civil rights groups over the Pentagon's policy on homosexuality.

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Correction:

November 30, 1994, Wednesday

An article on Tuesday about the Government's decision to drop its effort to bar a homosexual from serving in the Navy misstated a Federal appeals court's rationale in the case. The United States Court of Appeals for the Ninth Circuit, in San Francisco, found that under the old military policy restricting homosexuals, the Navy officer, Keith Meinhold, could not be discharged for merely saying he is homosexual. But the ruling did not say the policy violated equal protection guarantees of the Constitution.

Article Text:

WASHINGTON, Nov. 28 -- The Clinton Administration said today that it would drop its effort to bar a homosexual from serving in the Navy and would not appeal the case to the United States Supreme Court.

Government lawyers insisted that their decision in the case of Petty Officer Keith Meinhold was not intended to convey the message that the military must admit homosexuals. Rather, they said, it was simply a tactical decision in the long-running court battle between the armed services and gay and civil rights groups over the Pentagon's policy on homosexuality.

Last August, the United States Court of Appeals for the Ninth Circuit, in San Francisco, said Mr. Meinhold could not be discharged merely for saying he is gay. The Navy had tried to remove him under the policy, in effect when Mr. Clinton took office in January 1993, that prohibited anyone who described himself as gay from serving in the armed services.

Administration officials said that the Meinhold case was not worth appealing because the regulations under which the Navy sought to discharge Mr. Meinhold have since been rewritten and that the case could therefore

be distinguished from others that have begun to arise under the new policy written by the Clinton Administration. The Meinhold decision had cast doubt on that new policy.

Moreover, last week the Administration won a different case revolving around the old policy in a different appeals court. Government lawyers said that victory, in the case of former Midshipman Joseph C. Steffan, would have the effect of limiting any damage done to the military policy by the Meinhold case.

Still, the decision means the Government may be prevented from taking disciplinary action against Petty Officer Meinhold, a Navy flight instructor whom the Government had tried to discharge after he said in a television interview in 1992 that he is gay.

The Government's decision not to appeal the Meinhold case was announced today by Joseph Krovisky, a Justice Department spokesman, who said it was made by Solicitor General Drew S. Days 3d, who represents the Administration before the Supreme Court.

The Pentagon rules written by the Clinton Administration took effect in February 1994 and permit the military to remove members who say they are homosexuals. But Government lawyers say that because the new rules are more flexible, they are more likely to withstand constitutional challenges.

The new rules strike a compromise between Mr. Clinton's 1992 campaign promise to remove the ban on homosexuals entirely and the sentiments of military leaders and Congress to keep the ban in place.

Under the new policy, known as 'Don't ask, don't tell, don't pursue,' homosexuals may serve in the military so long as they remain silent about their sexual preferences, except in the most private of settings, and abstain from homosexual acts. The new policy also discourages supervising officers from opening sexual investigations without significant evidence of homosexuality.

John McGuire, Mr. Meinhold's lawyer, said today that his client was told last week that he would not be disciplined under the new policy so long as he did not repeat his earlier statement that he is gay.

'He was told by the executive officer of his squadron that he has a clean slate, and that he would be permitted to remain, but that if he says he's gay again, then they would be taking action against him under the new policy,' Mr. McGuire said. 'It's ridiculous.' They live with a known homosexual so long as he doesn't show how gay he is. It shows how symbolic the policy really is.'

While the case was moving through the courts, a district court order prevented the Navy from discharging Petty Officer Meinhold, and he has continued to serve at the Naval Airborne Station at Whidby Island in the Washington State.

In the Meinhold case, the appeals court said that the military could not discharge Mr. Meinhold and that the old policy violated the equal protection guarantees of the Constitution. Although the court said that it was not passing judgment on the new regulations, the decision cast doubt on them because it said that Mr. Meinhold could not be dismissed merely for asserting that he is gay.

The court said it would defer to the Navy's judgment that homosexual conduct 'seriously impairs the accomplishment of the military mission.' But the court distinguished between words and deeds and rejected the argument that a declaration of homosexuality was reason enough for discharge.

The Meinhold opinion conflicts with the decision in the case involving Mr. Steffan, which was handed down last week by the United States Court of Appeals for the District of Columbia Circuit. Mr. Steffan, a top-ranking midshipman from the United States Naval Academy in Annapolis, Md., was forced to resign six weeks before graduation because he acknowledged under

questioning by a disciplinary board that he is gay.

In the Steffan case, the court upheld the right of the Government to impose restrictions on gays who wish to serve in the military. In contrast to the Meinhold decision, the court in the Steffan case said that if a person declared himself to be gay, then it was reasonable to conclude that the person had engaged in conduct proscribed by the regulations. The decision said rules prohibiting homosexuals were no different than other employment restrictions, like those imposing height or age restrictions or requiring good eyesight.

Caption:

Photo: Petty Officer Keith Meinhold (Agence France-Presse)



HUMAN
RIGHTS
CAMPAIGN

March 30, 1998

TO RRB
WYNNER
Kor

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

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,



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
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.

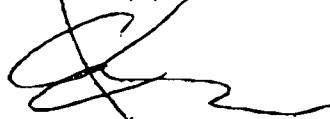
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phone (202) 628 4160 fax (202) 347 5323 e-mail hrc@hrc.org

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 a circular scribble.

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
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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

THE WHITE HOUSE
WASHINGTON

March 30, 1998

MEMORANDUM

TO: John Podesta
Rob Weiner

CC: Laura Marcus
Richard Socarides

FROM: Thurgood Marshall, Jr. *TM*

SUBJECT: Navy Senior Chief Petty Officer Timothy McVeigh

I am forwarding the attached, more information regarding the case, Timothy R. McVeigh v. William S. Cohen, et al., for your review and appropriate action.

If you have any questions, please do not hesitate to contact me (6-7072).

Thank you.

PROSKAUER ROSE LLP

1233 Twentieth Street NW
Suite 800
Washington, DC 20036-2396
Telephone 202.416.6800
Fax 202.416.6899

NEW YORK
LOS ANGELES
BOCA RATON
CLIFTON NJ
PARIS

Christopher Wolf
Member of the Firm

Direct Dial 202.416.6818
cwolf@proskauer.com

March 26, 1998

VIA FACSIMILE: (202) 456-6704

Thurgood Marshall, Jr., Esq.
Office of Cabinet Affairs
The White House
Old Executive Office Building
Room 160
Washington, D.C. 20502

Dear Goody:

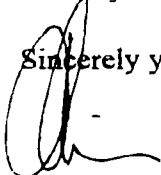
You'll recall that a while back I called to seek your assistance with the case of the Navy servicemember whose electronic privacy rights and rights under the "Don't Ask, Don't Tell" policy were found by Judge Sporkin to have been violated.

As the attached letter reflects, the Navy continues to behave inappropriately.

When you have a moment, please call to discuss.

Thank you for your consideration.

Sincerely yours,



Christopher Wolf

Attachment

PROSKAUER ROSE LLP

1233 Twentieth Street NW
Suite 800
Washington, DC 20036-2396
Telephone 202.416.6800
Fax 202.416.6899

NEW YORK
LOS ANGELES
BOCA RATON
CLIFTON NJ
PARIS

Christopher Wolf
Member of the Firm

Direct Dial 202.416.6818
cwolf@proskauer.com

VIA FACSIMILE: 202-616-8470

March 26, 1998

David M. Glass, Esq.
Civil Division
United States Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20004

Re: Timothy R. McVeigh v. William Cohen, et al.; Civ. Action No. 1:98CV00116

Dear David:

On January 26, 1998, U.S. District Judge Sporkin ruled that the Navy improperly removed Timothy R. McVeigh from his position as Chief of the Boat of the U.S.S. Chicago through a series of illegalities violating the "Don't Ask, Don't Tell, Don't Pursue" policy and the Electronic Communications Privacy Act. In response to that ruling, you advised us and the Court that no Chief of Boat positions were available to reinstate Mr. McVeigh, and you proposed as an alternative one of three positions, which we do not believe are equivalent to the Chief of the Boat position or suitable for someone of Mr. McVeigh's rank and service record. You raised an objection, on justiciability grounds, to the Court reviewing the suitability of those positions and the Navy's compliance with the Court's Order. The Court overruled that objection and set today as the date for commencement of a trial on whether the Navy is in compliance with the January Order.

Late last week, we reached agreement on a continuance of the trial set for today in light of the upcoming Promotions Board, which will consider Mr. McVeigh's eligibility for a promotion to an E-9 rank. We agreed that if Mr. McVeigh were promoted, the suitability of the three positions being proposed for him at his E-8 rank, should become a moot issue. At no time did you advise us that a Chief of the Boat position was opening up.

Suddenly, this morning, as I was heading to Court, I received your Court filing indicating that a Chief of the Boat position was in fact opening up but that the Navy was going to fill that position with someone other than Mr. McVeigh. No explanation was given for why Mr. McVeigh was not reinstated to the position illegally taken from him last Fall.

PROSKAUER ROSE LLP

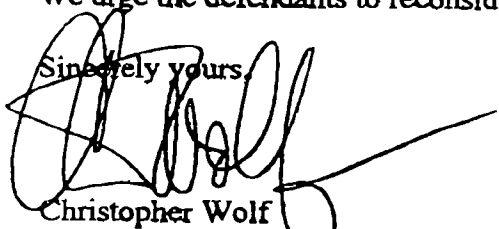
David M. Glass, Esq.
March 26, 1998
Page 2

In open Court, during the hearing before Judge Sporkin, you refused to provide the reasons — apparently known to you — as to why Mr. McVeigh was not reinstated, other than vaguely to refer to the “notoriety of the case” and the “confined conditions aboard a submarine.” When we requested a statement of the reasons, you insisted on providing them no earlier than May 1, as part of discovery.

Mr. McVeigh believes that the Navy’s refusal to reinstate him to the Chief of Boat position, from which he was removed illegally last Fall, is a clear violation of the Court’s ruling, and that the refusal — except through formal discovery — even to attempt an explanation of why he was not reinstated is a further indication of the Navy’s bad faith in this matter.

We urge the defendants to reconsider their course of conduct in this matter.

Sincerely yours,



Christopher Wolf
Counsel for Timothy R. McVeigh



HUMAN
RIGHTS
CAMPAIGN

1101 14th Street NW
Washington, DC 20005
phone 202 628 4160
fax 202 347 5323

FAX TRANSMISSION

Rob Weiner

DATE: March 30, 1998

TO: Charles Ruff

FIRM/COMPANY:

FAX NUMBER: 456.6279

VOICE NUMBER:

FROM: Winnie Stachelberg, Political Director

TOTAL No. OF PAGES
(Incl. this coversheet): 5

MESSAGE: *Thought you would want to see...Here are two letters that we sent out today.*

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HUMAN
RIGHTS
CAMPAIGN

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
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,



Elizabeth Birch
Executive Director

cc: Seth Waxman, Solicitor General
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Bill Lann Lee, Acting Assistant Attorney General, Civil Rights
William R. Yeomans, Chief of Staff & Senior Counsel, DoJ, Civil Rights
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HUMAN
RIGHTS
CAMPAIGN

March 30, 1998

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Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000
via FAX: 703-695-0100

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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.

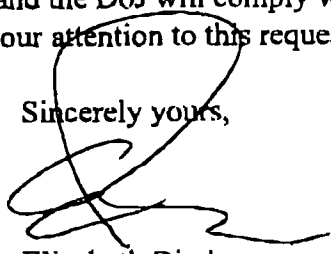
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Letter to Secretary Cohen
March 30, 1998
Page 2

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Sincerely yours,



Elizabeth Birch
Executive Director

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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

Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 29, § 1, 43 Stat. 937; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54). This section consolidates part of section 344 of Title 28, U.S.C., 1940 ed., with sections 876 and 877 of said title. Other provisions of said section 344 are incorporated in sections 1657 and 2103 of this title.

Words "or a court of appeals" were inserted after "Supreme Court" upon authority of *United States v. Illinois Surety Co.*, C.C.A. 1915, 226 F. 653, affirmed 37 S.Ct. 614, 244 U.S. 376, 61 L.Ed. 1206, wherein it was held that this section also applied to the courts of appeals in view of section 11 of the Circuit Court of Appeals Act of Mar. 3, 1891, c. 517, 28 Stat. 829. [During the course of revision the words "or any other court of appellate jurisdiction" were substituted for "or court of appeals".]

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Changes were made in phraseology. 80th Congress House Report No. 308.

§ 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

(June 25, 1948, c. 646, 62 Stat. 963; May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104; Nov. 6, 1978, Pub.L. 95-598, Title II, § 248, 92 Stat. 2672; Dec. 9, 1991, Pub.L. 102-198, § 12, 105 Stat. 1627.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 227a, 230, and section 1142 of Title 26, U.S.C., 1940 ed., Internal Revenue Code (Mar. 3, 1891, c. 517, § 11, 26 Stat. 829; Mar. 3, 1911, c. 231, § 129, 36 Stat. 1134; Feb. 13, 1925, c. 229, § 8(c), 43 Stat. 940; Feb. 28, 1927, c. 228, 44 Stat. 1261; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54; Feb. 10, 1939, c. 2, § 1142, 53 Stat. 165; Oct. 21, 1942, c. 619, Title V, § 504(a), (c), 56 Stat. 957).

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Section 227a of Title 28, U.S.C., 1940 ed., provided a time limit of 30 days for appeals from patent-infringement decisions, and section 230 of Title 28, U.S.C., 1940 ed., permitted 3 months for appeals generally. The revised section adopts the 30-day limit in conformity with recommendations of members of the Judicial Conference of the United States and proposed amendment to Rule 73 of the Federal Rules of Civil Procedure.

Section 1142 of Title 26, U.S.C., 1940 ed., provided for 3 months within which to petition for appeal from a decision of The Tax Court. The second paragraph of the revised section reduces this to 60 days for reasons explained above. Other provisions of said section 1142 making a distinction between decisions before and after June 6, 1932, were omitted as executed.

Words "in an action, suit, or proceeding of a civil nature" were added in view of Rule 37 of the Federal Rules of Criminal Procedure prescribing a different limitation for criminal appeals.

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(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

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Effective Dates

1982 Acts. Amendment by Pub.L. 97-164 effective Oct. 1, 1982, see section 402 of Pub.L. 97-164, set out as a note under section 171 of this title.

1958 Acts. Amendment of section by Pub.L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub.L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

Termination of United States District Court for the District of the Canal Zone

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 3831 and 3841 to 3843 of Title 22, Foreign Relations and Intercourse.

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of that Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an



U. S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

March 26, 1998

BY HAND-DELIVERY

Robert N. Weiner
Senior Counsel to the Counsel
128 Old Executive Office Building
17th Street & Pennsylvania Avenue, NW
Washington, DC 20502

RE: Timothy R. McVeigh v. William S. Cohen
Secretary of Defense, et al.

Dear Rob:

As per your request, enclosed are the briefs which have been filed in the referenced matter along with the Court's Orders of January 26 and 30, 1998.

With kindest regards,

A handwritten signature in cursive script, appearing to read "Gary G. Grindler", is written over the typed name.

Gary G. Grindler
Deputy Assistant Attorney General

Enclosure

cc: David W. Ogden (w/encl.)
Counselor to the Attorney General

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,
95-185 Wainaku Place
Mililani, Hawaii 96789,

Plaintiff,

v.

THE HONORABLE WILLIAM COHEN,
Secretary of Defense
U.S. Department of Defense
Washington, DC 20301
in his capacity as Secretary of Defense, and

THE HONORABLE JOHN H. DALTON,
Secretary of the Navy
Department of the Navy
Washington, DC 20350
in his capacity as Secretary of the Navy,

Defendants.

CIVIL ACTION NO. _____

PLAINTIFF'S MEMORANDUM
IN SUPPORT OF HIS MOTION FOR A
TEMPORARY RESTRAINING ORDER

This case involves the Navy's admitted violation of federal electronic privacy law in its effort to obtain evidence that a senior enlisted man is gay, so it could find grounds to discharge him. Absent the immediate and effective intervention of this Court, the United States Navy will in several hours discharge a highly decorated seventeen-year Naval veteran in gross violation of his rights under the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701 *et seq.*, the Fourth and Fifth Amendments, the Administrative Procedure Act ("APA"),

and the Defense Department's "Don't Ask, Don't Tell, Don't Pursue" policy. Senior Chief Timothy R. McVeigh submits this motion for a temporary restraining order to delay his discharge so that the status quo is preserved pending his expedited application for a preliminary injunction to enjoin the Navy's unlawful conduct.¹

Senior Chief McVeigh's case rests on two bedrock legal principles: (1) the government may not use unlawfully-obtained evidence to punish a citizen in a criminal or administrative proceeding; and (2) the government may not act in contravention of its own regulations. Senior Chief McVeigh's discharge from the Navy is based on evidence obtained by Navy investigators from America Online without the warrant or equivalent authorization required by EPCA, 18 U.S.C. § 2703(c)(1)(B), and the Fourth Amendment. Predicated on fruit of this poisonous tree, Senior Chief McVeigh's discharge cannot stand. The Navy's investigation and prosecution of Senior Chief McVeigh also violates the regulations implementing the "Don't Ask, Don't Tell, Don't Pursue" policy, in derogation of the Fifth Amendment and the APA.

The wrongful and unconstitutional separation from service planned by the Navy would immediately inflict grievous and irreparable harm on Senior Chief McVeigh by virtue of the dishonor and stigma attending his expulsion from the Navy, the forced severance of his life-long commitment to military service, and the violation of his Constitutional rights. In light of the irreparable injury to Senior Chief McVeigh that would be inflicted by a discharge, and the

¹ Plaintiff is unrelated to the individual of the same name who stands convicted of the Oklahoma City bombing.

utter absence of any harm to the Navy in a brief delay of the planned discharge, we respectfully request that the Court grant a Temporary Restraining Order in the form submitted with this motion.

STATEMENT OF FACTS

Senior Chief McVeigh is a highly decorated seventeen-year veteran of the United States Navy. He has served honorably and continuously in the Navy since he was nineteen. Senior Chief McVeigh is among the Navy's elite corps of seamen serving in Nuclear submarines and was, at the time of the Navy's unlawful discharge, the senior-most enlisted man aboard the U.S.S. Chicago.

In September 1997, a civilian Navy employee, Helen Hajne, received an anonymous electronic mail message (the "E-Mail") via the American Online Service ("AOL"). Through an option available to users of AOL, Ms. Hajne obtained a "profile" of the sender which specified the user's name of "Tim," a location of "Hawaii," and marital status of "gay." The profile did not specify the full name, address, phone number, or social security number of the user.

Ms. Hajne forwarded the E-Mail and profile to her husband, a noncommissioned officer aboard the USS Chicago. These materials eventually were furnished to Commander John Mickey, the captain of the Chicago and commanding officer of Senior Chief McVeigh. Commander Mickey chose not to initiate an investigation of alleged homosexuality. In fact, Commander Mickey stated that he "didn't see any point in investigating." Instead, Commander

Mickey sought guidance from *his* immediate supervisor, Commander Christopher R. Earl, as to whether the E-Mail and profile constituted a statement that the author of the E-Mail engaged in homosexual conduct.

Instead of responding to Commander Mickey's request for guidance, Commander Earl -- in violation of military regulations -- initiated his own investigation into whether Senior Chief McVeigh was the author of the E-Mail, and whether there was credible evidence that he had engaged in homosexual acts. To this end, he enlisted Lt. Karin Morean, who in turn asked naval legal assistant Joseph Kaiser to contact AOL to determine the author of the E-Mail.

Without obtaining a warrant, court order, or customer permission, as required by EPCA and the Fourth Amendment, Kaiser contacted a person named "Owen" from AOL Technical Services and obtained personal information about Senior Chief McVeigh's account, allegedly including verification that the screen-name in the E-Mail belonged to Senior Chief McVeigh. Kaiser failed to identify himself as law enforcement personnel and failed to inform the AOL representative that he had no right to the information that he sought without a court order or subpoena. Record of Administrative Proceedings at 11-14 attached to Senior Chief McVeigh's Verified Complaint as Exhibit A.

Upon obtaining the alleged verification from AOL, Lt. Morean confronted Senior Chief McVeigh and accused him of committing sodomy and indecent acts. Shortly thereafter, Senior Chief McVeigh was notified that he was being considered for "administrative separation" because of "homosexual conduct, as evidenced by [his] statement that [he is] a homosexual." After a hearing, the administrative board ruled that the government had shown, by a

preponderance of the evidence, that Senior Chief McVeigh had committed "homosexual conduct," and should be discharged from the Navy.

The Navy has accelerated McVeigh's separation and ordered it to occur by no later than 5:00 a.m. EST on Friday, January 16, 1998.

ARGUMENT

I. Standard for Temporary Restraining Order

A temporary restraining order may be granted when "the plaintiff demonstrates (1) a substantial likelihood of success on the merits; (2) that irreparable harm will result in the absence of the requested relief; (3) that no other parties will be harmed if temporary relief is granted; and (4) that the public interest favors entry into a temporary restraining order." *SEC v. Stratton Oakmont, Inc.*, 1994 U.S. Dist. LEXIS 19565 (D.D.C. 1994), citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

II. Substantial Likelihood of Success on the Merits

In the Electronic Communications Privacy Act ("ECPA"), Congress precisely specifies the circumstances under which a government entity may obtain personal information concerning subscribers to online services, and authorizes such access "only when the governmental entity (i) obtains a warrant under the Federal Rules of Criminal Procedure or equivalent State warrant; (ii) obtains a court order for such disclosure . . . ; or (iii) has the consent of the subscriber or customer to such disclosure." 18 U.S.C. § 2703(c)(1)(B) (emphasis added). *See also* 18 U.S.C. § 2707 (establishing a private cause of action for violations of ECPA).

In soliciting and obtaining personal information regarding Senior Chief McVeigh from America Online, the Navy acted without a warrant, court order, or Senior Chief McVeigh's consent. Accordingly, it knowingly violated ECPA. By violating the expectation of privacy that Senior Chief McVeigh enjoyed as a result of ECPA, and by its use of deceitful and unlawful means to seize Senior Chief McVeigh's records from America Online, the Navy also violated the Fourth Amendment's prohibition against unreasonable seizures and Senior Chief McVeigh's Fifth Amendment's right to due process of law.

It is well established that the government may not use unlawfully-obtained evidence to punish a citizen in a criminal or administrative proceeding. *See United States v. Jordan*, 958 F.2d 1085, 1089 (D.C. Cir. 1992) ("evidence secured as the result of an illegal search or seizure is tainted 'fruit of a poisonous tree,' and not admissible at trial"); *Chandler v. United States Army*, 125 F.3d 1296 (9th Cir. 1997) (applying 'poisonous fruit' doctrine to army discharge proceedings). As the Supreme Court explained in the context of a criminal case, "The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits." *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291 (1985). *See also Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).

The Navy's reliance on the 'poisonous fruit' of the unlawful and deceitful seizure of McVeigh's records from America Online in deciding to discharge Senior Chief McVeigh clearly violates his search and seizure rights under the Fourth Amendment and his due process rights under the Fifth Amendment and the Administrative Procedure Act ("APA"). Senior Chief McVeigh thus is substantially likely to succeed in his claim that the discharge must be reversed.

The Navy's investigation, prosecution, and discharge, of Senior Chief McVeigh also violated the regulations embodying the Navy's "Don't Ask, Don't Tell, Don't Pursue" policy.² The following elements of this policy were violated in the Navy's rush to investigate and discharge Officer McVeigh:

A. The Navy initiated an investigation of Senior Chief McVeigh's alleged homosexuality without the required authorization of his commanding officer, LCDR John Mickey. *See* DoD Guidelines, at 4-1.

B. The investigation of McVeigh was initiated without the requisite "credible information" concerning homosexual conduct. DoD Guidelines, at 4-2. In this case, the investigation was commenced based solely on an E-Mail having nothing to do with homosexuality and the profile of a "screen-name" used to communicate through American Online that officials suspected to have been created by McVeigh. Under the Regulations, mere suspicions do not constitute "credible information," nor do associations with gay activity, such as attendance at a gay bar or the reading of homosexual publications. *Id.* at 4-3 - 4-4.

C. The E-Mail and profile on which the Navy based its investigation were not "statements" sufficient to constitute "credible information" of homosexual activity, or a propensity or intent to engage in homosexual activity, as required to initiate an investigation. *Id.*, at 4-2.

D. LT Morean, one of the officers responsible for investigating Senior Chief McVeigh, informed him that he was being investigated for "sodomy and indecent acts," neither of which can be supported by the allegation originally made against Senior Chief McVeigh nor by any evidence on the record. This type of "fishing expedition" is prohibited by the DoD Guidelines. *Id.* at 4-1, 4-3.

² The military regulations implementing the "Don't Ask, Don't Tell, Don't Pursue" policy are titled "Guidelines for Fact-Finding Inquiries Into Homosexual Conduct" ("DoD Guidelines," attached as Exhibit A). The official citation is DoD 1332.14, Enclosure 4 [MILPERSMAN 3530400.4]. These regulations are expressly authorized by the enabling statute, 10 U.S.C. § 654(b)(1)-(2) and 654(c). *See also* Pub. L. No. 103-160, § 571(b), 107 Stat 1670, 1673 (1993) (requiring and delegating to the Secretary to "revise [DoD] regulations, and issue such new regulations as may be necessary to implement section 654"), *codified at* 10 U.S.C. § 654 note. Like other branches of government, the military is obligated to follow its own regulations. *See Adkins v. United States*, 68 F.3d 1317, 1322 (Fed. Cir. 1995); *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993), *cert. denied*, 128 L.Ed.2d 75 (1994); *Sargisson v. United States*, 913 F.2d 918, 921 (Fed. Cir. 1990).

E. The Navy used every means at its disposal, including guile and unlawful violations of ECPA, to vigorously pursue its suspicions of homosexual activity. This improper intrusion into the sphere of personal privacy violated the policies underlying the "Don't Ask, Don't Tell, Don't Pursue" policy.

These errors, among others alleged by Senior Chief McVeigh, constitute violations of the APA and the Fifth Amendment.

III. Irreparable Harm

Unless this Court grants immediate injunctive relief, Senior Chief McVeigh will be discharged from the Navy on Friday, January 16th at 5:00 a.m. E.S.T. This discharge will cause Senior Chief McVeigh irreparable harm, including loss of his rights as a Senior Chief, and a deprivation of his constitutional rights under the Fourth and Fifth Amendments.

Without this Court's intervention, Senior Chief McVeigh will lose his job, income, pension and other benefits. *See Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993) (loss of benefits and "rights as a Marine" constitute irreparable harm). The discharge will deprive him of the career to which he has devoted his entire working life — the only career he has ever known. He will lose his professional reputation, opportunity for advancement, professional standing and self-esteem, and the comradery of fellow service members. In such circumstances, courts have found irreparable harm and granted injunctive relief. *May v. Gray*, 708 F. Supp. 716, 719 (E.D.N.C. 1988) (damage to discharged Army private's reputation constitutes irreparable harm); *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); *Golden v. Lutheran Family Servs.*, 601 F. Supp. 383, 384 (W.D.N.C. 1984).³

Senior Chief McVeigh's discharge papers indicating homosexuality as the cause of his discharge will also cause him irreparable harm. Although Senior Chief McVeigh has never stated that he is gay, the official basis for his discharge will be alleged homosexual conduct. He will thus suffer irreparably the stigma of being adjudged unworthy to serve his country and bear the brunt of public disapprobation for being labeled homosexual. *See Elzie*, 841 F. Supp. at 443 ("stigma of being removed from active duty ... in the Marine Corps ... and labeled as unfit for service solely on the basis of ... sexual orientation, a criterion which has no bearing on [plaintiff's] ability to perform his job" constitutes irreparable injury). *See also Huynh*, 679 F. Supp. at 67 (stigma of being declared unfit for government service for invidiously discriminatory reasons constitutes irreparable harm).

Fundamentally, irreparable harm must be presumed because the government has denied Senior Chief McVeigh his constitutional right to be free of illegal search and seizure. The means used by the Navy to investigate and prosecute this matter amount to nothing less than a deprivation of McVeigh's Fourth Amendment right to be protected from unwarranted governmental intrusion. Even the temporary denial of this constitutional right constitutes irreparable and uncompensable injury. *See, e.g., Amalgamated Transit Union Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560, 1564 (C.D. Cal. 1987) (finding irreparable harm and

³ Even if Senior Chief McVeigh's discharge is only temporary, he will still suffer an irreparable setback to his career. The break in military service would require explanation for the duration of his career, and it could be used against him in the calculation of his entitlement to future benefits and promotions. *See Saunders*, 768 F. Supp. at 845; *Huynh*, 679 F. Supp. at 67.

granting injunction to prevent violation of employees' Fourth Amendment rights); *Elzie*, 841 F. Supp. at 443. *See also* 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2948.1 (1995) (citing over three dozen cases).

For these reasons, *Sampson v. Murray*, 415 U.S. 61 (1974) is distinguishable. As this Court recently made clear, "Equitable relief is by no means foreclosed to plaintiffs seeking injunctions against the federal government" upon a showing of "extraordinary" injury, or upon a showing that an adverse personnel action is likely to have an "adverse chilling effect" on fellow employees. *Bonds v. Heyman*, 950 F. Supp. 1202, 1214-15 (D.D.C. 1997). Here, the constitutional deprivation clearly establishes extraordinary injury placing it outside the scope of *Sampson*. Moreover, as the court held in *Bonds*, an employee whose life is fundamentally "tie[d] into [his or her] career," as plaintiff's here, meets the extraordinary standard. *See also Saunders*, 768 F. Supp. at 845 ("damages would not compensate [plaintiff] for lost career opportunities. [...] [I]f her ... employment and career ... were interrupted [plaintiff] would lose the ability to gain the satisfaction that cannot be adequately compensated by a damage award.").⁴

⁴ In addition, as *Bonds* establishes, adverse personnel actions which have a chilling effect on other employees by encouraging employees not to engage in the same behavior as plaintiff would also vault *Sampson's* barrier. This is just such a case. Permitting Senior Chief McVeigh's discharge in this instance could not but have a chilling effect on military personnel causing them to refrain from engaging in communication over the Internet protected by the First Amendment for fear that they will, by virtue of their communications, be subject to unwarranted searches and intrusions by the military.

IV. Prospect of Harm to Enjoined Party

In contrast to the clear and irreparable harm that an immediate discharge would cause Senior Chief McVeigh, a brief delay in the discharge will cause no appreciable harm to the Navy. Throughout seventeen years in the Navy, Senior Chief McVeigh has served the Navy with dedication and honor. The continuation of his service for the brief period necessary to permit the Court to hear his expedited motion for a preliminary injunction will cause the Navy no harm.

V. Public Interest

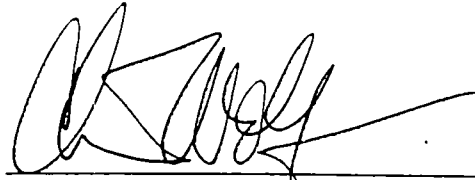
Finally, the public interest would also be served by the issuance of a temporary restraining order. The public has a strong interest in the preservation and enforcement of constitutional and statutory rights to privacy and due process, such as those advanced by Senior Chief McVeigh in this case. The public also has a strong interest in ensuring the privacy of information it provides to online service providers. The only way these issues can be resolved in a full and effective manner is through a status quo injunction pending resolution of an expedited motion for a preliminary injunction.

CONCLUSION

For the reasons stated above, Senior Chief Petty Officer McVeigh respectfully requests the issuance of a Temporary Restraining Order in the form submitted with this motion.

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to read 'C. Wolf', written over a horizontal line.

Christopher Wolf (D.C. Bar No. 335885)

Alec W. Farr (D.C. Bar No. 440046)

Amybeth García-Bokor (D.C. Bar No. 453279)

Jeffrey M. Lubell*

Eric Wechselblatt*

PROSKAUER ROSE LLP

1233 Twentieth Street, N.W.

Suite 800

Washington, D.C. 20036

(202) 416-6800

[* Not Admitted in D.D.C.]

Dated: January 15, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,	)	No. 1:98cv00116 (SS)
	)	
Plaintiff,	)	DEFENDANTS' OPPOSITION TO
	)	PLAINTIFF'S MOTIONS FOR A
v.	)	TEMPORARY RESTRAINING
	)	ORDER AND PRELIMINARY
WILLIAM S. COHEN, Secretary of	)	INJUNCTION
Defense, <u>et al.</u> ,	)	
	)	
Defendants.	)	

PRELIMINARY STATEMENT

In this action, plaintiff seeks a temporary restraining order ("TRO") and preliminary injunction ("PI") enjoining his discharge from the Navy under the statutory policy concerning homosexual conduct in the military contained in 10 U.S.C. § 654 ("§ 654"). In support of his TRO motion, plaintiff argues that a Navy paralegal violated the Electronic Communications Privacy Act of 1986 ("ECPA"), Pub. L. No. 99-508, 100 Stat. 1848, and likewise violated the Fourth Amendment, when he dialed the toll-free 1-800 number that America Online ("AOL") maintains for the convenience of the general public and confirmed that an AOL member profile belonged to plaintiff. In addition, plaintiff argues that his discharge was, and is, invalid on a series of miscellaneous procedural grounds.

As is demonstrated below, plaintiff is unlikely to succeed on the merits, and he has not shown that the balance of hardships favors him. His motions for a TRO and PI should therefore be denied.

THE STATUTORY AND REGULATORY SCHEME

A. § 654. § 654 is the statutory "policy concerning homosexuality and the armed forces" that Congress enacted in November 1993, "[a]fter lengthy deliberations." Thomasson v. Perry, 80 F.3d 915, 919 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 358 (1996). Among other things, §654 provides that a service member "shall be separated from the armed forces" if he or she is found to have "stated that he or she is a homosexual or bisexual, or words to that effect," unless a further finding is made "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. § 654(b)(2).

Directives implementing § 654 were issued by the Department of Defense ("DOD") in December 1993. Thomasson, 80 F.3d at 920 (referring, e.g., to DOD Dir. 1332.14 (Dec. 21, 1993) (enlisted personnel)). Rules incorporating the substantive provisions of the DOD directives were issued thereafter by the individual military services. For Navy enlisted personnel, the applicable rules are set forth in Naval Military Personnel Manual ("MILPERSMAN") ¶ 3630400 (copy submitted as Admin. Rec. ("AR") 113-19).[✓] Throughout this case, the navy has referred to the

[✓]The AR is submitted as an attachment to the Miller Declaration. References in this memorandum to the AR are to the sequential page numbers stamped thereon by defendants.

provisions of MILPERSMAN ¶ 3630400, rather than the parallel provisions of the DOD directives. See AR 50.

The provisions contained in MILPERSMAN ¶ 3630400 state that "[h]omosexual conduct is grounds for separation from the naval service." MILPERSMAN ¶ 3630400(1)(b). "Homosexual conduct" includes "homosexual acts, [or] a statement by a member that demonstrates a propensity or intent to engage in homosexual acts." Id.

MILPERSMAN ¶ 3630400 specifies procedures for investigating and processing those who are suspected of violating § 654's policy regarding homosexual conduct in the armed forces. However, the MILPERSMAN procedures explicitly state that they "create no substantive or procedural rights." MILPERSMAN ¶ 3630400(4)(c)(7). Specifically:

[n]othing in this provision * * * provide[s] the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

Id. ¶ (4)(c)(3).

Nonetheless, under the MILPERSMAN procedures, "only the member's commander" is permitted to "initiate fact-finding inquiries involving homosexual conduct." Id. ¶ (4)(a)(1). A "commander," in turn, is defined as "a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a 'command.'" Id. ¶ (2)(i).

A "fact-finding inquir[y] involving homosexual conduct" may not be initiated by a commander unless "he or she has credible information that there is a basis for discharge." MILPERSMAN ¶ 3630400(4)(b)(1); see id. § (4)(a)(1). However, "[c]redible information" exists, e.g., in cases where

a reliable person states that he or she heard, observed, or discovered a member made a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

Id. ¶ (4)(b)(4)(b).

B. ECPA. ECPA is an outgrowth of "the Federal wiretap law," Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. S. Rep. No. 99-541, 99th Cong., 2d Sess. 1 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3555. Enacted in 1986, ECPA was an attempt on the part of Congress to "amend the 1968 law to update and clarify Federal Privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." Id.

Title II of ECPA, codified as amended at 18 U.S.C. § 2701 - 2711, deals with "Stored Wire and Electronic Communications and Transactional Records Access." 100 Stat 1860 (caption of Title II). Among other things, Title II states that, with certain exceptions, a "provider of electronic communication service or "remote computing service" may disclose a "record or other information pertaining to a subscriber to or customer of such service * * * to a governmental entity only when the governmental

entity" obtains a warrant, court order, or the consent of the customer or subscriber. 18 U.S.C. § 2703(c)(1)(B).^{2/}

Any "subscriber[] or other person" who is aggrieved by any violation of Title II "in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind" may bring a civil action against the party who committed the violation and obtain "such relief as may be appropriate," including an award of damages. 18 U.S.C. § 2707(a), (b)(2). The "remedies and sanctions described in [Title II] are the only judicial remedies and sanctions for nonconstitutional violations of [the Title]." Id. § 2708.

STATEMENT OF FACTS

Plaintiff enlisted in the Navy in July 1980. AR 233. He was assigned to the USS CHICAGO (SSN-721), a nuclear submarine, in April 1997. Id. 233-34, 237-38. By this time, he had reached the rank of Electronics Technician Senior Chief ("ETCS"). E.g., id. 141. During his service on the CHICAGO, plaintiff was the ship's senior noncommissioned officer. See AR 65.

The CHICAGO was affiliated with a sponsor club in Chicago, Illinois, called the "721 Club." AR 13. One of the activities of the 721 Club was an "annual Christmas gift-giving program" pursuant to which Chicago-area residents gave gifts to "kids of

^{2/}For purposes of Title II, "electronic communication service" means "any service which provides to users thereof the ability to send or receive wire or electronic communications." Id. § 2510(15). "Remote computing service" means "the provision to the public of computer storage or processing services by means of an electronic communications system." Id. § 2711(2).

the crewmembers." Id. To make the program a success, efforts were made through "various sources" to "find[] out the names, ages and sexes of the kids so they could get the appropriate gifts." Id.; see also id. 84. Two of the people who participated in these efforts were plaintiff and Helen Hajny, a volunteer "ombudsman" of the CHICAGO who was married to one of the CHICAGO's other noncommissioned officers. See id. 13, 84; see also Compl. ¶¶ 23, 26. As ombudsman, Ms. Hajny served as the liaison between the commander of the CHICAGO and the wives of its crew members. She does not receive compensation for her activities and is not a Navy employee.

On September 2, 1997, as the CHICAGO was getting ready to go to sea, plaintiff sent an e-mail message to Ms. Hajny pertaining to the 721 Club and its activities. AR 13, 84, 110. Plaintiff sent the e-mail via AOL. Compl. ¶ 23. The e-mail said that it came from "Boysrch," and was signed "Tim." AR 110.

Curious about the use of the screen name "Boysrch," Ms. Hajny utilized an option available to AOL users and looked in the "member profile directory" to see the "member profile" for the person who had sent the message.^{2/} See AR 13, 66 86: Compl.

¶ 24. The profile that she found read as follows:

Member Name:	Tim
Location:	Honolulu, Hawaii
Birthdate:	December 31
Sex:	Male
Marital Status:	Gay

^{2/}Testimony at the administrative hearing indicated that member profiles are available to any AOL subscriber. See AR 15.

Hobbies: Driving, boy watching, and collecting
pics of other young studs. (send some
and i'll [sic] reply)
Computers: Of course. How else can you download
pics.
Occupation: Military
Personal Quote: My God, he's got a nice butt. And
I know because I'm a bootyologist!

AR 111.

Thinking that the e-mail had come from plaintiff -- and thinking, therefore, that the above profile belonged to him -- Ms. Hajny began to wonder about plaintiff. See id. AR 66. Unsure what to do, Ms. Hajny spoke to her husband, who consulted with another of the CHICAGO's noncommissioned officers. Id. The two then spoke to the captain of the ship, who referred the matter to the deputy commander of Submarine Squadron THREE, the submarine squadron to which the CHICAGO is assigned. Id. The deputy commander referred the matter to the commander of the Submarine Squadron THREE. See id. 1, 29-30. The commander of Submarine Squadron THREE is the direct superior of the commanding officer of the CHICAGO.

The Commander of Submarine Squadron THREE directed his principal legal adviser, Lieutenant Karin S. Morean, Judge Advocate General's Corps, to investigate the matter, i.e., to "give [plaintiff] an opportunity to explain anything he wanted explain * * * [r]egarding the profile, regarding the screen name, and regarding the events that had transpired." AR 12, 29; see also id. 42. Before she spoke to plaintiff, Lieutenant Morean asked a Navy paralegal on her staff, Legalman First Class Joseph M. Kaiser, to "call AOL and find out could we actually connect

this screen name and member name Tim living in Honolulu, Hawaii with a birth date December 31 to Senior Chief McVeigh." Id. 13. Legalman Kaiser responded by calling 1-800-827-6264, the toll-free telephone number maintained by AOL, and "talk[ing] to a gentleman named Owen at Tech Services." Id. 14, 23. Legalman Kaiser told Owen that he was "the third party in receipt of a fax sheet and wanted to confirm the profile sheet, who it belonged to." Id. 14. Owen responded by saying that "it came from Hawaii and that it was 'Timothy R. McVeigh' on the billing." Id. Owen did not provide any other information pertaining to plaintiff. See id. 14, 15.

On September 12, 1997, Lieutenant Morean summoned plaintiff to her office and told him that the Navy had obtained "some indications that he had made a statement of homosexuality." AR 27, 28. In doing so, she showed him the e-mail and the member profile. Id. 28. Concerned that plaintiff might respond to her questions by providing answers that might tend to incriminate him under provisions of the Uniform Code of Military Justice prohibiting sodomy and indecent acts, Lieutenant Morean "[p]rovided him a rights advisement," i.e., advised him of his right to remain silent. See id. 28; see also id. 30. In doing so, Lieutenant Morean felt that she was "doing [plaintiff] a favor" by "looking out for [his] rights." Id. 28, 32. She also felt that, if advised of his rights, plaintiff might respond -- as he did -- by choosing "not to provide a statement." Id. 30; see id. 32.

By memorandum dated September 22, 1997, plaintiff was advised of the commencement against him of administrative discharge proceedings, "by reason of homosexual conduct, as evidenced by your statement that you are a homosexual." AR 107. On November 7, 1997, a day-long administrative discharge hearing took place before a three-member board. Id. 4, 104. Plaintiff was represented at the hearing by a member of the Judge Advocate General's Corps. Id. 5.

As part of his case-in-chief, plaintiff made an unsworn oral statement. AR 80. In the course of doing so, plaintiff confirmed that he had sent the e-mail to Ms. Hajny, and that the user profile accompanying the e-mail had been his. Id. 84, 85. He also said that the purpose of the member profile was to solicit responses from other people on the internet. As he explained: "All the stuff that's in there is sort of a trial and error thing. You put it out there and its's kind of, you see what you get back, it's kind of like advertising, like McDonald's * * *." Id. 85; see also id. 88.

At the close of the administrative hearing, the discharge board voted unanimously to recommend that plaintiff be separated, based on his "homosexual statement." AR 103, 104. The board also voted that he be given an honorable discharge. Id. 104. By memorandum dated December 15, 1997, the commander of Submarine Squadron THREE concurred in the recommendation, rejecting, in the process, certain allegations of error made by plaintiff's counsel. Id. 2-3; see Compl. ex. C. By message dated January 5,

1998, the Navy's Bureau of Personnel directed the commander of Submarine Squadron THREE to discharge plaintiff within 10 days. AR 395.

On January 15, 1998, plaintiff commenced this lawsuit. In his complaint, plaintiff alleges that Legalman Kaiser violated § 2703(c)(1)(B) of ECPA -- and that he likewise violated the Fourth Amendment -- when he telephoned Owen at AOL and obtained confirmation that the member profile at issue in this case was plaintiff's. Compl. ¶¶ 52-56, 58-61. In addition, plaintiff alleges that certain procedural aspects of the investigation and discharge proceedings were contrary to § 654 and the Navy's implementing regulations, as well as the Administrative procedures Act and the due process clause of the Constitution. Id. ¶¶ 63-64, 66-68. Named as defendants are the Secretary of Defense and the Secretary of the Navy. Id. ¶¶ 8-9.

For relief, plaintiff seeks an order vacating his discharge, along with an award of damages. Compl. prayer ¶¶ 1, 3. In addition, plaintiff seeks a TRO and a PI enjoining his discharge pendente lite. Id. prayer ¶ 2.

ARGUMENT

PLAINTIFF'S MOTIONS FOR A TRO AND PI SHOULD BE DENIED.

The same four factors that govern the issuance of PIs govern the issuance of TROs. See Markle v. Perry, 1994 WL 192038 at *1 (D.C. Cir. May 11, 1994). These factors require the court to consider "(1) the likelihood that plaintiffs will prevail on the merits; (2) the prospect of irreparable injury to plaintiffs if

relief is withheld; (3) the possibility of harm to other interested parties * * * if preliminary relief is granted; and (4) the public interest." Dendy v. Washington Hosp. Center, 581 F.2d 990, 992 (D.C. Cir. 1978) (footnote omitted); accord Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

In assessing these factors, the Court should adhere to the traditional judicial deference accorded to the military. "Unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Department of Navy v. Egan, 484 U.S. 518, 530 (1988). This reluctance is especially pronounced with regard to a matter that "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." United States v. Shearer, 473 U.S. 52, 58 (1985). This deference thus exceeds the usual deference accorded administrative agencies under the Administrative Procedures Act, under which a court's "only task in reviewing substantial evidence questions is to determine whether there is such relevant evidence as a reasonable mind might accept as adequate to support the [agency's] conclusions." Pierce v. Underwood, 487 U.S. 552, 564 (1988). See, e.g., Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1513-14 (D.C. Cir. 1989) (adopting an "unusually deferential" standard of review that "substantially restrict[s] the authority of the reviewing

court to upset the Secretary's determination," in order to insure that final military determinations are particularly "free of judicial second-guessing").

As is demonstrated below, plaintiff has not satisfied the four-part test for temporary or preliminary injunctive relief. First, plaintiff is unlikely to succeed on the merits. See Point I, infra. No violation of ECPA has taken place here and, even if it had, no ground would exist for the vacation of plaintiff's discharge. See Point I(A), infra. The same applies to plaintiff's argument under the Fourth Amendment. See Point I(B), infra. In addition, the arguments that plaintiff makes about miscellaneous procedural errors in his investigation and discharge proceedings are without merit. See Point I(C), infra. The Navy committed no errors, but even if it had, the errors plaintiff alleges provide no grounds for enjoining plaintiff's discharge.

Second, as a separate matter, plaintiff has not shown that the balance of hardships warrants the entry of preliminary injunctive relief. See Point II, infra. His motions for a TRO and PI should therefore be denied.

I. PLAINTIFF IS UNLIKELY TO SUCCEED ON THE MERITS.

A. PLAINTIFF IS NOT ENTITLED TO ANY RELIEF UNDER ECPA.

The substantive provision of ECPA upon which plaintiff relies is 18 U.S.C. § 2703(c)(1)(B). Compl. ¶¶ 52-56; Pl.'s Mem. Supp. His Mot. TRO ("Pl.'s Mem.") at 5. Section 2703(c)(1)(B) provides that "[a] provider of electronic communication service

or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service * * * to a governmental entity only when the governmental entity" obtains a warrant, court order, or the consent of the subscriber or customer. Plaintiff alleges that AOL is a "provider of electronic communication service or remote computing service," and argues that Legalman Kaiser violated § 2703(c)(1)(B) when he dialed AOL's toll-free number and spoke to Owen. Pl.'s Mem. at 6; see Compl. ¶ 52.

Plaintiff's argument is without merit, as the U.S. Court of Appeals for the Fourth Circuit recognized when it rejected the argument in Tucker v. Waddell, 83 F.3d 688 (4th Cir. 1996). ECPA § 2703(c)(1)(B) generally prohibits only a "provider of electronic communication service or remote computing service" from disclosing information about a subscriber to a "governmental entity," unless the "governmental entity" has obtained a warrant, court order or the consent of the subscriber. ECPA § 2703(c)(1)(B) does not provide a cause of action against a "governmental entity," however, in cases where that entity seeks voluntary disclosure of information from an electronics communication service provider. If a "governmental entity" asks a "provider" for information about a subscriber -- and if the provider complies with the request, even though the governmental entity has not obtained a warrant, court order, or the consent of the subscriber -- the governmental entity has not violated § 2703(c)(1)(B).

In Tucker, police officers employed by a city used improper subpoenas to obtain subscriber information about the plaintiff from the plaintiff's telephone company. Holding that liability under § 2703(c) did not extend to the city -- or, indeed, to any governmental entity -- the court discussed both the text of § 2703(c) and its legislative history. Referring to the text of the statute, the court said: "The language of § 2703(c) does not expressly proscribe any action by governmental entities or their employees. Rather, § 2703(c) only prohibits the actions of providers of electronic communication services and remote computing services." 83 F.3d at 691 (emphasis supplied). Referring to the legislative history of § 2703(c), the court said that ECPA "'was modeled after the Right to Financial Privacy Act, 12 U.S.C. 3401 et seq.,'" but that "the Right to Financial Privacy Act, unlike the statute involved here, also contains a 'companion' section limiting the circumstances under which governmental authorities may obtain access to customer records from the financial institutions." Id. at 692 (citing 12 U.S.C. § 3402). Finding dispositive the fact that Congress had decided against including a cognate to 12 U.S.C. § 3402 in ECPA, the court said: "The absence [from ECPA] of a 'companion' section limiting the access of customer information by governmental entities indicates that Congress did not intend to authorize civil suits against governmental entities for improperly obtaining customer records." Id.

Even if this Court is unpersuaded by Tucker -- even if it finds that Congress did intend to "authorize civil suits against governmental entities for improperly obtaining customer records" -- suit would not be justified here. A civil action based on an alleged violation of ECPA -- a criminal statute -- may be maintained only in cases where "the conduct constituting the violation is engaged in with a knowing or intentional state of mind." 18 U.S.C. § 2707(a). However, "[k]nowledge in criminal law is actual consciousness." United States v. Bader, 956 F.2d 708, 710 (7th Cir. 1992) (court's emphasis). "'Knowledge' is a cousin to 'purpose;' both concepts exclude 'should have known but didn't.'" Id.

In this case, nothing in the administrative record suggests that Lieutenant Morean or Legalman Kaiser knew that calling the 1-800 number maintained by AOL for the purpose of confirming that the member profile at issue in this case belonged to plaintiff could be construed as a violation of a federal statute. As a result, this case does not involve conduct "engaged in with a knowing or intentional state of mind." Even if ECPA authorized suits against governmental entities for violations of § 2703(c), the conduct of Lieutenant Morean and Legalman Kaiser would not state a claim upon which relief could be granted.

Even if the conduct of Lieutenant Morean and Legalman Kaiser did state a claim, plaintiff would not be entitled to the principal form of relief that he seeks: an order vacating his discharge order. A person who brings a civil action under Title

II of ECPA is entitled to various forms of relief. However, "[t]he remedies and sanctions described in [Title II] are the only judicial remedies and sanctions for nonconstitutional violations of [Title II]." 18 U.S.C. § 2708. Title II of ECPA does not contain the explicit remedy for the suppression of information that Congress provided in Title I of ECPA, see 18 U.S.C. § 2515.^{4/}

None of the provisions of Title II that deals with civil actions suggests that an available remedy in any such action is an order suppressing evidence in an unrelated civil administrative proceeding. As a result, the information that Legalman Kaiser obtained from Owen of AOL could not be made the subject of such an order, even if Legalman Kaiser had committed an actionable violation of § 2703(c)(1)(B) when he obtained the information.

Furthermore, a court reviewing administrative action "must be guided by 'the rule of prejudicial error.'" Evans v. Perry, 944 F. Supp. 25, 29 (D.D.C. 1996) (quoting 5 U.S.C. § 706). In this case, the Navy already had reason to believe that the AOL

^{4/}Because Chandler v. United States Army, 125 F.3d 1296 (9th Cir. 1996), concerned Title I of the ECPA and not Title II, plaintiff's citation to Chandler is inapposite. Unlike Title II, which governs only the actions of providers of electronic communication services and remote computing services (see Tucker, discussed supra), Title I governs any person or entity that "intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(d).

profile belonged to plaintiff, based on Ms. Hajny's receipt of an e-mail concerning the 721 Club, from someone named "Tim." The phone call to AOL served only to confirm what the Navy already had reason to suspect. Moreover, plaintiff admitted in the course of the administrative hearing that he was the sender of the e-mail that Ms. Hajny received, and that the member profile attached to the e-mail belonged to him. AR 84, 85. As a result, suppression of the information that Legalman Kaiser obtained from AOL would not require vacation of plaintiff's discharge order, because the information at issue is cumulative of other information that appears in the record independently. As a result, the granting of plaintiff's motion for a TRO would be unwarranted even if -- as is not the case -- plaintiff were able to state a claim under § 2703(c)(1)(B).

B. PLAINTIFF IS NOT ENTITLED TO ANY RELIEF
UNDER THE FOURTH AMENDMENT.

In addition to arguing that he is entitled to a TRO because the call that Legalman Kaiser made to Owen of AOL violated § 2703(c)(1)(B), plaintiff argues that he is entitled to a TRO because the call violated the Fourth Amendment. Compl. ¶¶ 58-61. For the following reasons, the argument is without merit.

As a threshold matter, the very existence of ECPA forecloses the Fourth Amendment argument that plaintiff seeks to make. In Bush v. Lucas, 462 U.S. 367 (1983), the existence of a comprehensive regulatory scheme governing the removal or demotion of federal employees was held to preclude the inference of "a new nonstatutory damages remedy for federal employees whose First

Amendment rights are violated by their superiors." 462 U.S. at 368, 388-90. As the Court explained:

The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights.

Id. at 390.

The holding of Bush -- that a constitutional remedy should not be inferred where a comprehensive regulatory scheme exists -- has been applied to cases similar to this one. In In re Askin, 47 F.3d 100 (4th Cir.), cert. denied, 116 S. Ct. 382 (1995), the plaintiff argued that the government's interception of certain telephone calls violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by Title I of ECPA, and that the interception of the calls likewise violated the Fourth Amendment. The court rejected the contention that the interception of the calls violated Title III and declined to infer a cause of action under the Fourth Amendment. 47 F.3d at 104, 106. The court said:

. In the fast-developing area of communications technology, courts should be cautious not to wield the amorphous "reasonable expectation of privacy" standard, see Katz v. United States, 389 U.S. 347, 351-52 (1967), in a manner that nullifies the balance between privacy rights and law enforcement needs struck by Congress in

Title III. Decisionmaking in this area demands a comprehension of complex technologies. Such understanding, however, requires precisely the type of expertise that courts are institutionally ill-equipped to acquire and to apply. As new technologies continue to appear in the marketplace and outpace existing surveillance law, the primary job of evaluating their impact on privacy rights and of updating the law must remain with the branch of government designed to make such policy choices, the legislature. Congress undertook in Title III to legislate comprehensively in this field and has shown no reluctance to revisit it. Accordingly, we must decline Askin's invitation to usher in through the Fourth Amendment a prohibition of that which Title III tells us, in no uncertain terms, Congress affirmatively permitted at the time this case arose.

Id. at 105-06 (citations & footnote omitted).

This case is on all fours with Bush and Askin. Here, as there, a comprehensive statutory or regulatory scheme has been established. Here, as there, the question is not whether the court should infer a constitutional remedy "for a wrong that would otherwise go unredressed." Bush, 462 U.S. at 388. Instead, the question is whether the court should "usher in through the Fourth Amendment a prohibition of that which [Title II] tells us, in no uncertain terms, Congress affirmatively permit[s]." See Askin, 41 F.3d at 106. Because Askin indicates that the answer is "no," the Fourth Amendment should be held inapplicable to this case.

Nor would the result be different even if Title II did not foreclose plaintiff's Fourth Amendment argument. The "touchstone" of Fourth Amendment analysis is "whether a person has a 'constitutionally protected reasonable expectation of privacy.'" Oliver v. United States, 466 U.S. 170, 177 (1984)

(quoting Katz, 389 U.S. at 360 (Harlan, J., concurring)); see Askin, 47 F.3d 105; Tri-State Steel Constr., Inc. v. Occupational Safety & Health Review Comm'n, 26 F.3d 173, 176 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 1355 (1995). The Fourth Amendment "does not protect the merely subjective expectation of privacy, but only those 'expectation[s] that society is prepared to recognize as 'reasonable.'" Oliver, 466 U.S. at 177 (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring); see Tri-State, 26 F.3d at 176.

A "reasonable expectation of privacy" does not exist in cases where the thing to be searched is freely accessible. That is the case with regard to the information at issue in this case, for Title II of ECPA expressly permits a regulated service to "disclose a record or other information pertaining to a subscriber to or customer of such service * * * to any person other than a governmental entity." 18 U.S.C. § 2703(c)(1)(A). Just as "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government agents," even if the fields are protected by fences and "No Trespassing" signs, Oliver, 466 U.S. at 181, 182-83, plaintiff had no legitimate expectation of privacy in the freely available information at issue in this case. An expectation of privacy is not legitimized by the fact that "the individual chooses to conceal assertedly 'private' activity." Id. at 182.

In this case, plaintiff put his member profile onto the internet -- where thousands of people had access to it -- for the

express purpose of attracting attention from others. As he said at the administrative hearing: "All the stuff that's in there is sort of a trial and error thing. You put it out there and its's kind of, you see what you get back, it's kind of like advertising, like McDonald's * * *." AR 85. If, as plaintiff says, his member profile was intended to be a form of advertisement, he cannot legitimately object when the profile attracted the attention he sought, albeit from parties that he did not intend.

Furthermore, plaintiff also did not have a "reasonable expectation of privacy" in the information that Legalman Kaiser obtained from Owen of AOL. Legalman Kaiser contacted Owen by using a method freely available to any member of the public: he picked up the telephone and dialed a 1-800 number. The accessibility of the AOL 800 number meant -- in effect -- that AOL was available to provide certain information to any member of the general public upon request. Therefore, no violation of the Fourth Amendment took place here.

Even if none of the foregoing were true -- even if the Fourth Amendment were relevant to this case and even if a violation of the amendment had taken place -- plaintiff would not be entitled to a TRO or PI. The fundamental purpose of this lawsuit -- and of plaintiff's motions for a TRO and PI -- is to secure the vacation of plaintiff's discharge order. See Compl. prayer ¶¶ 1, 2. However, the constitutional exclusionary rule has been held inapplicable to military discharge proceedings.

Garrett v. Lehman, 751 F.2d 997, 1005 (9th Cir. 1985); Varn v. United States, 13 Cl. Ct. 391, 396 (1987).^{5/} As a result, a holding that Legalman Kaiser violated the Fourth Amendment when he spoke to Owen of AOL would not result in an order suppressing the information that Legalman Kaiser obtained from Owen.

Furthermore -- as discussed above -- plaintiff admitted at the administrative hearing that he sent the e-mail to Ms. Hajny, and that the member profile at issue in this case belonged to him. AR 84, 85. As a result, an order suppressing the conversation between Legalman Kaiser and Owen of AOL would not remove from the record the information that formed the basis for the board's decision. The decision would stand irrespective of any such suppression order, rendering plaintiff's Fourth Amendment argument immaterial.

C. THE MISCELLANEOUS PROCEDURAL ARGUMENTS
THAT PLAINTIFF MAKES ARE WITHOUT MERIT.

Plaintiff is also mistaken when he argues that he is entitled to temporary relief because of various alleged violations of the Navy's regulations. As we now show, none of those regulations give plaintiff a basis for challenging the Navy's actions. Moreover, the record supports the Navy's conclusion that none of the alleged violations in fact occurred.

^{5/}Plaintiff's citation to Chandler, discussed above, is also inapposite in this regard, as Chandler did not concern a Fourth Amendment exclusionary rule. Rather, Chandler concerned the statutory exclusionary rule contained in Title I of ECPA, to which there is no analogue in Title II.

1. As a threshold matter, plaintiff cannot rely on the procedures specified in MILPERSMAN ¶ 3630400 to challenge the Navy's investigation and processing of him. That is because the MILPERSMAN procedures explicitly specify that they "create no substantive or procedural rights." MILPERSMAN

¶ 3630400(4)(c)(7). As stated in MILPERSMAN ¶ 3630400(4)(c)(3):

[n]othing in this provision * * * provide[s] the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

In this regard, the Navy specifically crafted its MILPERSMAN ¶ 3630400 procedures to implement the will of Congress expressed when it adopted § 654. Congress expressly declined to grant a cause of action for violation of these procedures, finding that "the discretion of commanders to initiate investigations" and competently complete them could only be preserved in the absence of "a whole set of legal obstacles that have to be adjudicated by a judge every time a commander makes a decision." Senate Report No. 112, 103d Cong., 1st Sess. 290-291 (1993). Congress reached that conclusion after reviewing an "investigative guidelines" draft that had also "expressly state[d] that it 'creates no substantive or procedural rights.'" Id. Congress specifically approved of this language because it would mean that such guidelines would not "give an individual the right to invalidate an administrative or judicial proceeding . . . by alleging that an investigation was conducted in a manner contrary to the policy." Id. "It is important that the guidelines not be misinterpreted to establish new grounds for challenging

administrative or disciplinary proceedings," Congress found, to preserve a military commander's "broad powers" over "inquiries, inspections, and investigations," which are "essential to the commander's authority to maintain morale, good order and discipline, and unit cohesion." Id. Such guidelines therefore concern only "the proper allocation of scarce Department of Defense resources" and "reasonable investigative priorities." Id.

2. in this case, plaintiff argues that he is entitled to temporary relief because the investigation that culminated in his discharge was initiated and conducted by the commander of Submarine Squadron THREE, not the commander of the CHICAGO. Pl.'s Mem. at 7. The apparent basis for this argument is MILPERSMAN ¶ 3630400(4)(a)(1), which provides that "[o]nly the member's commander as defined in subparagraph 1i is authorized to initiate fact-finding inquiries involving homosexual conduct." See id.

Plaintiff's argument is without merit. The definition of "commander" referred to in ¶ 36304004(a)(1) encompasses not only the commander of the CHICAGO, but any and all of his superiors. The definition states: "[A]s used in this article * * * * Commander [means] a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a 'command.'" MILPERSMAN ¶ 3630400(2)(i).

The commander of Submarine Squadron THREE is the officer to whom the commander of the CHICAGO reports. As a result, the commander of Submarine Squadron THREE was as much plaintiff's commander under MILPERSMAN ¶ 3630400(4)(a)(1) as was the commander of the CHICAGO. See 32 C.F.R. § 700.811 ("All persons in the naval service on active service * * * exercise authority over all persons who are subordinate to them"). Accordingly, the commander of Submarine Squadron THREE had full authority to initiate and conduct the investigation that culminated in plaintiff's discharge.

3. Plaintiff also argues that he is entitled to temporary relief because the Navy did not have "credible information" that "a basis for discharge" existed at the time it initiated its investigation. Pl.'s Mem. at 7. The argument is without merit.

The Navy did have sufficient information for investigating plaintiff. A civilian volunteer doing work for the Navy -- Ms. Hajny -- received an e-mail from someone named "Tim" dealing with the gift-giving program of the 721 Club. AR 13, 110. Ms. Hajny had been working with plaintiff, whose name is Tim, on that program. Id. 13, 84; compl. preamble. Sufficient information thus existed to suspect that plaintiff had sent the e-mail. Moreover, the e-mail bore the screen name "Boysrch," id. 13, 110, and the associated AOL profile identified the "Marital Status" of the sender as "Gay;" the "Sex" of the sender as "Male;" the "Hobbies" of the sender as "[B]oy watching, and collecting pics of other young studs;" and the "Personal Quote" of the sender as

"My God, he's got a nice butt. And I know because I'm a bootyologist!" Id. 111.

A reasonable person could surely have inferred from these facts -- as the Navy did, see AR 30 -- that plaintiff had "made a * * * written statement that * * * was intended to convey the fact that he * * * engage[d] in * * * or ha[d] a propensity or intent to engage in homosexual acts." See MILPERSMAN ¶ 3630400(b)(4)(b). In view of this fact, the Navy had more than sufficient "credible information" upon which to base the investigation that culminated in plaintiff's discharge.

4. Still another argument of plaintiff's is that he is entitled to temporary relief because Lieutenant Morean gave him a "rights advisement" when she called him to her office. Pl.'s Mem. at 7. According to plaintiff, the rights advisement constituted an improper "fishing expedition," therefore requiring the invalidation of his discharge order. Id.

Plaintiff's argument is baseless. When Lieutenant Morean gave plaintiff his rights advisement, she informed him that he had the right to remain silent. See AR 28, 30. Exercising this right, plaintiff declined to give a statement. Id. As a result, nothing that Lieutenant Morean said or did injured plaintiff in any way.

5. Yet another of plaintiff's arguments is that "[t]he Navy used every means at its disposal * * * to vigorously pursue its suspicions of homosexual activity," and that he therefore is entitled to a TRO. Pl.'s Mem. at 8. This argument, too, is

baseless. The entire investigation that the Navy conducted consisted of Lieutenant Morean's meeting with plaintiff on a single occasion -- a meeting in which plaintiff chose to remain silent -- and Legalman Kaiser's calling AOL to confirm that the profile was plaintiff's. See AR 29, 32. Even assuming, arguendo, that a "vigorous" investigation would justify the entry of a TRO or PI -- which it would not -- no such investigation took place here.

6. A final contention made by plaintiff -- one that appears in the complaint but not in plaintiff's TRO papers (plaintiff has not attempted to support his motion for a PI with a memorandum of law) -- is that his discharge proceedings were flawed because the discharge board was biased; because his counsel did not have sufficient time to prepare a post-hearing deficiency letter; and because the government's version of the hearing transcript contains inaccuracies. Compl. ¶¶ 64(F), 68(F). These arguments are baseless. In the course of the administrative hearing, plaintiff's counsel was given two separate opportunities to voir dire the members of the discharge board. AR 6, 37. On each occasion, he examined the members of the board, then said that he had no basis for challenging them. Id. 8, 40. After the hearing ended, plaintiff's counsel had more than a month to prepare his deficiency letter. See id. 2. The corrections to the hearing transcript that plaintiff would make are not extensive. See id. 294-394.

As noted above, a court reviewing agency action "must be guided by 'the rule of prejudicial error.'" Evans, 944 F. Supp. at 29 (quoting 5 U.S.C. § 706). In this case, even if the "errors" that plaintiff alleges had in fact occurred in the administrative proceedings -- and, as we have shown, they did not -- they would not be significant enough to warrant invalidation of the proceedings.

II. THE "BALANCE OF HARDSHIPS" DOES NOT FAVOR THE ENTRY OF A TRO.

A. The requirements for preliminary injunctive relief that apply to cases like this one are set forth in Sampson v. Murray, 415 U.S. 61 (1974), and its progeny. In Sampson, a federal employee who had been notified of her impending discharge brought suit against the government. In doing so, the plaintiff alleged that her discharge would deprive her of income, cause "spurious and un rebutted charges" to remain outstanding against her and subject her to the "embarrassment of being wrongfully discharged in the presence of her coworkers." 415 U.S. at 89. On the basis of these allegations, the plaintiff obtained a series of temporary injunctions prohibiting her discharge. Overruling the issuance of the injunctions, the Supreme Court said that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies" and that the "[u]se of the court's injunctive power" to grant preliminary injunctions to government employees challenging their discharges should be limited to "the genuinely extraordinary situation" rather than "employed in the routine case." Id. at 88 & 92 n.68

(quoting Beacon Theatres v. Westover, 359 U.S. 500, 506-07 (1959)). Finding insufficient the claims of injury that the plaintiff had made, the Court said:

Assuming for the purpose of discussion that respondent had made a showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action, we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case.

Id. at 91-92.

In Hartikka v. United States, 754 F.2d 1516 (9th Cir. 1985), the "heightened-injury" standard of Sampson was held applicable to service members' challenging their involuntary separations. Vacating the issuance of a preliminary injunction to an Air Force officer who claimed that his "less than honorable" separation would result in "loss of income, loss of retirement and relocation pay, and damage to his reputation resulting from the stigma attaching to a less than honorable discharge," the court said:

Application of the standard enunciated by the Supreme Court in Sampson would * * * require that the moving party make a much stronger showing of irreparable harm than the ordinary standard for injunctive relief.
* * * * The necessity of making this stronger showing is implicit in the magnitude of the interests weighing against judicial interference in the internal affairs of the armed forces.

754 F.2d at 1518.

Turning to the case before it, the court said:

The loss of income, the ensuing collateral effects thereof, and the possibility of stigma are "external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself [and] will not support a finding of

irreparable injury, however severely they may affect a particular individual."

754 F.2d at 1518 (quoting Sampson, 415 U.S. at 92 n. 68); accord Guerra v. Scruggs, 942 F.2d 270, 274-75 (4th Cir. 1991).

In this case, plaintiff argues that he is entitled to a TRO enjoining his discharge because his dismissal from the military could deprive him of his "professional reputation, opportunity for advancement, professional standing and self-esteem, and the camaraderie of fellow service members." Pl.'s Mem. at 8. However, these allegations ignore the fact that what plaintiff seeks in this action is a permanent injunction enjoining his discharge. See Compl. prayer ¶ 1. If plaintiff obtains such relief, he will not be injured, on more than a temporary basis, by the discharge that he now faces. See Barnes v. Perry, No. 96-591 (EGS), slip. op. at 14 (D.D.C. Apr. 26, 1996) (copy attached) (denying motion for preliminary injunction in case challenging the discharge of the plaintiff from the Navy pursuant to § 654; noting that the plaintiff "can be made whole at the conclusion of this proceeding if she is successful on the merits").

Furthermore, unlike the Hartikka plaintiff's "less than honorable discharge," the plaintiff in this case is to receive an honorable discharge with all benefits and privileges. See AR 103, 104. The allegations of injury that plaintiff makes in this case are therefore no different from those that any discharged employee could make. As a result, the injuries that plaintiff alleges "fall[] far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary

injunction in this type of case." Sampson, 415 U.S. at 91-92. Plaintiff has not made a sufficient showing, therefore, to justify the entry of a TRO.

B. As a final matter, plaintiff premises his application for temporary relief on the notion that the public interest will not be harmed if his discharge is enjoined. See Pl.'s Mem. at 11. To the contrary, the harm to military readiness resulting from judicial intrusion in military affairs weigh heavily against plaintiff's request for an injunction. In determining whether an injunction would interfere with military operations, this Court cannot focus narrowly on this single case:

The harm to the Army is greater than it first appears. If we upheld the injunction granted under the facts before us, injunctions would routinely be sought in drug discharge cases. The result would be judicial second-guessing of a kind that the courts have been reluctant to engage in. . . . To start second-guessing the military "would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities. . . ." We conclude that the harm to the Army would be substantial if we upheld this injunction.

Guerra v. Scruggs, 942 F.2d 270, 275 (4th Cir. 1991). Even if an order enjoining a single discharge might have little impact on military operations, the result would be otherwise if TROs were issued routinely in military discharge cases. "To start second guessing the military under those circumstances 'would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities.'" Guerra, 942 F.2d at 275 (quoting Orloff v. Willoughby, 345 U.S. 83, 95 (1953)).

Finally, there is little question where the public interest lies here. Congress and the Executive Branch have determined

that the restrictions imposed are necessary to ensure unit cohesion and military readiness. Because "the full play of the democratic process involving both the legislative and executive branches has produced a policy in the name of the public interests embodied in a statute and implementing regulation," it would be "inappropriate for this court to substitute its own determination of the public interest for that arrived at by the political branches, whether or not there may be doubt regarding the wisdom of their conclusion." Able v. United States, 44 F.3d 44 F.3d 128, 131-32 (2d Cir. 1995) (per curiam).

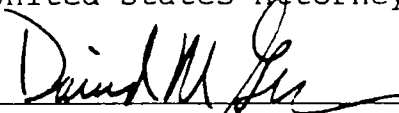
CONCLUSION

For the foregoing reason, plaintiff's motion for a TRO should be denied.

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Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
WILMA A. LEWIS
United States Attorney



VINCENT M. GARVEY
DAVID M. GLASS
Attorneys, Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20530
Tel: (202) 514-4469
Fax: (202) 616-8470
E-mail: david.glass@usdoj.gov
Attorneys for Defendant