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Gays in the Military [2]

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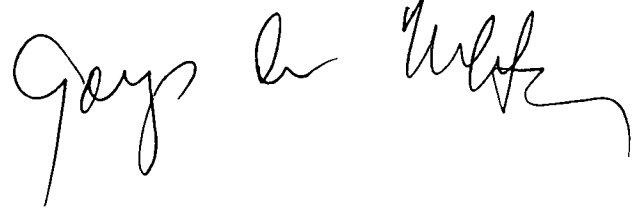
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October 17, 1994, 1830

REVISED TALKING POINTS ON MEINHOLD

Summary of Reasons Why Rehearing Was Not Sought

- The decision not to seek en banc review in Meinhold was proposed in the first instance by the uniformed services. Essentially, the services concluded, among other things, that because the court did not find either the old or new homosexual conduct policies unconstitutional, further review of the Meinhold decision would not be necessary to protect the interests of the armed forces. The Navy formally transmitted the recommendation to the Department of Justice, with the concurrence of OSD. The Solicitor General agreed, and decided not to seek rehearing en banc.
- The government chose not to pursue the extraordinary step of seeking en banc review in Meinhold because the court's decision agreed with the government on many of the constitutional issues relating to the old homosexual conduct policy.
- The narrow restriction on the old policy contained in the opinion has no legal effect on the new policy.

Summary of Holding in Meinhold

- The Ninth Circuit held it is constitutional to discharge members for homosexual acts.
- The court recognized that it is constitutional to discharge members for statements demonstrating a propensity to engage in homosexual acts.
  - The court specifically acknowledged the Department's argument that, because of the critical nature of the military mission, the military need not assume the risk that a person with homosexual propensity will act consistent with that propensity.
- The court recognized that courts must defer to the military's judgments about military personnel matters, including the homosexual conduct policy.

- The court did not rule any aspect of the old or new policies unconstitutional.
  - It vacated the district court's holding that the old policy is unconstitutional.
  - It interpreted the language of the old policy as not supporting the discharge in the narrow circumstances of Meinhold's case.
- The court vacated those portions of the district court's injunction that would have interfered with enforcement of the policy with respect to other servicemembers, and those aspects that would have interfered with enforcement of the new policy against Meinhold himself.

The Administration Continues to be Committed to Defending the New and Old Policies

- Contrary to the quoted statement of Meinhold's attorney, the Department of Defense does not acknowledge that the decision in Meinhold was correct in all respects. To the contrary, the Department disagrees with the court's interpretation of the old policy and its order requiring that Meinhold be retained on active duty.
- The Department has long advanced a contrary reading of the old policy: in the Steffan case, pending in the D.C. Circuit, the government continues to argue that the old policy requires the separation of servicemembers who identify themselves as gay. The Department stands by its reading, which would have required Meinhold's discharge.
- The Administration stands by its position that the old and new policies are constitutional.

Why the Relief Granted in Meinhold Has Very Limited Significance

- Meinhold is an old policy case without impact on the new policy. The Court specifically stated that the ruling does not concern the new policy. Only a handful of old policy cases remain.
- The injunction in Meinhold concerns Meinhold only. No other servicemembers are subject to the Meinhold injunction.

- The injunction in Meinhold does not prohibit the Department from enforcing its current regulations against other statements Meinhold might make.

#### Additional Background

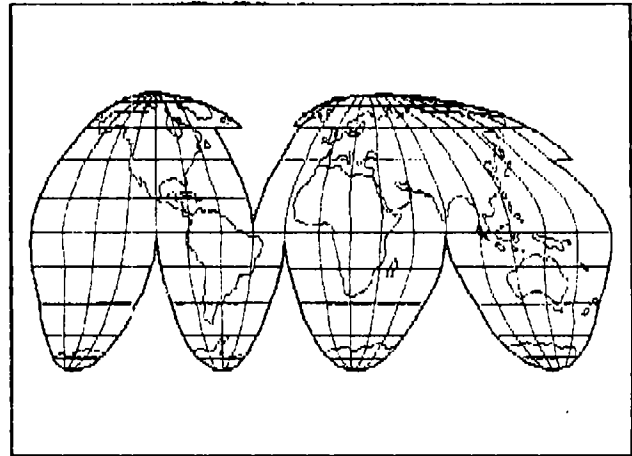
- Rehearing en banc is an unusual step, when a court decides to reconsider a decision it has already issued. The United States rarely seeks rehearing en banc and it is very rarely granted.
- The Solicitor General has not made a final decision whether to seek certiorari in the Supreme Court; a petition would be due approximately November 30.

Goy Mueby

U.S. DEPARTMENT OF JUSTICE  
WASHINGTON, D.C.

VIA FAX NO. 456 6279

DATE: AUGUST 31, 1994



TO:

Joel Klein  
White House Counsel

FROM:

MICHAEL VATIS  
Counsel to the  
Deputy Attorney General

SUBJECT:

Meinhold Decision

MESSAGE:

Attached is the Ninth Circuit's  
decision in Meinhold, released  
at 1 P.M. EDT today.

(TOTAL NUMBER OF PAGES INCLUDING THIS ONE) 24

TRANSMITTED BY: Kois Paris-White

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VOLKER KEITH MEINHOLD,  
Plaintiff-Appellee,

No. 93-55242

v.

D.C. No.  
UNITED STATES DEPARTMENT OF  
CV-92-06044-TJH  
DEFENSE; UNITED STATES  
DEPARTMENT OF THE NAVY,  
Defendants-Appellants.

VOLKER KEITH MEINHOLD,  
Plaintiff-Appellee,

No. 93-56354

v.

D.C. No.  
UNITED STATES DEPARTMENT OF  
CV-92-06044-TJH  
DEFENSE; UNITED STATES  
OPINION  
DEPARTMENT OF THE NAVY,  
Defendants-Appellants.

Appeals from the United States District Court  
for the Central District of California  
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted  
December 16, 1993--San Francisco, California

Filed August 31, 1994

Before: Otto R. Skopil, Jr., David R. Thompson, and  
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Rymer

10115

## SUMMARY

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### Government Law/Military Law

The court of appeals reversed a judgment of the district court in part, affirmed in part and vacated in part. The court held that a military service cannot discharge a servicemember solely because of a statement of sexual orientation devoid of a concrete, expressed desire or intent to act on his homosexual propensity contrary to military policy.

During a television broadcast, appellee Volker Meinhold acknowledged that he is gay. Meinhold is a United States Navy petty officer. The Navy commenced discharge proceedings against Meinhold pursuant to now-superseded Department of Defense (DOD) regulations providing that homosexuality is incompatible with military service, and that persons who by their statements demonstrate a propensity to engage in homosexual conduct impair the accomplishment of the military mission.

The regulations defined "homosexual" as one who desires or intends to engage in homosexual acts, i.e., bodily contact with persons of the same sex for the purpose of gratifying sexual desires. Separation from the service was authorized for either conduct or statements.

At the discharge hearing, the Navy took the position that Meinhold had to be discharged if he is a homosexual, and that a member of the service is a homosexual if he says he is or has engaged in homosexual conduct. Meinhold received an honorable discharge.

Meinhold filed an action for declaratory relief, alleging that the DOD policy regarding homosexuals was unconstitutional. He sought reinstatement on the grounds that his discharge was procedurally defective, the Navy was estopped from sep-

arating him on the basis of status, and the regulations were constitutionally infirm.

On cross-motions for summary judgment, the district court held that exhaustion of administrative remedies was not required under the futility doctrine because it was undisputed that a new hearing would yield the same result. On the merits, the court held that gays should not be banned from serving in the military absent conduct that interfered with the military mission. The court rescinded Meinhold's discharge and permanently enjoined DOD from discharging or denying enlistment to anybody based on sexual orientation in the absence of sexual conduct that interfered with the military's mission. DOD appealed.

While the appeal was pending, President Clinton announced the "don't ask/don't tell" policy regarding homosexuals in the military. DOD sought an emergency stay on the ground that the injunction would bar enforcement of the new policy. The district court amended the injunction to restrain DOD from creating or maintaining files based on sexual orientation and from taking any actions against gay or lesbian servicemembers based on their sexual orientation. DOD appealed the order and obtained a stay of the amended injunction from the Supreme Court to the extent that it conferred relief on anybody but Meinhold.

[1] It was error for the district court to pass over Meinhold's nonconstitutional estoppel claim. [2] However, because further factfinding was unnecessary, the court of appeals could determine as easily as the district court whether Meinhold's evidence showed the Navy's prior knowledge of homosexuality and affirmative misconduct. It did not.

[3] The Navy never asked about Meinhold's status, although it asked whether he had ever engaged in homosexual activity, which he denied; Navy personnel knew that he is gay; the Navy never told him that he would be discharged on

the basis of his orientation; and the Navy ostensibly enforced its discharge policy mainly in cases of improper conduct.

[4] There was no affirmative misconduct in the form of ongoing active misrepresentations by Navy officials. Noone vouched for Meinhold's abilities despite his homosexuality prior to the litigation and the Navy did not tell him that his orientation would not be considered in the discharge proceedings. He had no track record from which to assume that it made no difference. The Navy's conduct amounted to at most a failure to inform or assist. Standing aside or doing nothing is insufficient to create an estoppel.

[5] When the constitutional validity of a regulation is in question, courts must first determine whether a construction is possible by which the constitutional problem may be avoided. [6] Another long-settled rule is that the military's professional judgment is not lightly to be overruled by the judiciary.

[7] There was no dispute that the Navy's policy was constitutionally permissible to the extent it related to homosexual conduct. But the issue in Meinhold's case was his classification as a homosexual. [8] Construing the regulation to apply to the classification of being a homosexual implicated equal protection. [9] Equating status or propensity with conducts or prohibited acts was problematic as well. [10] Whether the regulation passed constitutional muster was a close question only because of the greater license the courts give to the military to control the military environment.

[11] DOD's policy hinged on conduct whereas the separation provisions included statements. Arguably, a statement admitting homosexuality admits "desire" and "propensity" to commit homosexual acts, so that the "statement" basis for separation might have turned on something more than status. [12] But nothing in the policy stated that the presence of persons who say they are gay impairs the military mission. The

focus was on prohibited conduct and persons likely to engage in it. Construing the regulation to reach only statements manifesting a fixed or expressed desire to commit a prohibited act coincided with the military's concern for its mission and gave content to "desire" apart from the defining characteristic of sexual orientation.

[13] The regulation under which Meinhold was processed could reasonably be construed to reach only statements that showed a concrete, fixed, or expressed desire to commit homosexual acts despite their being prohibited. The Navy's presumption that Meinhold desired or intended to engage in prohibited conduct on the basis of his statement alone went beyond what DOD's policy sought to prevent. His discharge on that basis could not stand.

[14] An injunction should be no more burdensome to the defendant than necessary to provide relief to the plaintiff. Meinhold sought only to have his discharge voided and to be reinstated. Beyond reinstatement and not separating Meinhold because of his statement that he is gay, DOD should not have been constrained from applying its regulations to him and other military personnel. The injunction therefore had to be vacated except to the extent that it enjoined DOD from discharging Meinhold due solely to his statement that he made.

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#### COUNSEL

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United States Department of Justice, Washington, D.C., for  
the defendants-appellants.

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Victor J. Wolski, Pacific Legal Foundation, Sacramento, California,  
amicus curiae for Pacific Legal Foundation, et al.

Ruth E. Harlow, American Civil Liberties Union, New York,  
New York, amicus curiae for American Civil Liberties Union.

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## OPINION

RYMER, Circuit Judge:

These consolidated appeals present a number of questions arising out of the Navy's discharge of Petty Officer Volker Keith Meinhold on account of his statement on ABC World News Tonight, "Yes, I am in fact gay."

Finding that the Navy's policy was to ban gays and lesbians based on status, not on conduct, and that such a policy violates the Equal Protection Clause of the Fifth Amendment, the district court granted Meinhold's motion for summary judgment and enjoined the Department of Defense (DOD) from discharging or denying enlistment based on sexual orientation.<sup>1</sup> It also restrained DOD from maintaining files having to do with the sexual orientation of any member of the armed forces in the absence of conduct affecting the military mission. The court did not rule on Meinhold's estoppel claim, and it declined to require exhaustion of administrative remedies despite Meinhold's failure to appeal to the Board for Correction of Naval Records (BCNR) as it found that the government had conceded that a new hearing would result in the same decision.

Meinhold's nonconstitutional claim should have been resolved before his equal protection claim was reached. Nevertheless, because the record on summary judgment was fully developed and we can decide whether it suffices to estop the Navy as a matter of law, we have reviewed it independently and conclude that the Navy engaged in no affirmative miscon-

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<sup>1</sup> The district court's opinion is published. *Meinhold v. Department of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993).

duct and so cannot be estopped to order Meinhold separated on the ground of his homosexuality. Since the Navy's position leaves no room for supposing that its regulations could be differently interpreted by the BCNR, we agree that further review would be futile.

On the merits, we defer to the Navy's judgment that the presence of persons who engage in homosexual conduct, or who demonstrate a propensity to engage in homosexual conduct by their statements, impairs the accomplishment of the military mission. However, DOD regulations<sup>2</sup> do not have to be applied as the Navy did in this case, to require separation based only on Meinhold's statement that he is gay. Rather, the regulations can be read to reach a statement of homosexuality only when the statement itself manifests a concrete, expressed desire or intent to engage in homosexual acts. Construing the regulations in this way is consistent with the military judgment that homosexual conduct is incompatible with military service, and with our obligation to construe regulations so as to avoid constitutionally problematic results. Accordingly, we hold that the regulations then in effect, reasonably and constitutionally construed, could not be applied so as to discharge Meinhold solely because of a statement of orientation devoid of any concrete, expressed desire or intent to act on his homosexual propensity contrary to military policy. Therefore, to the extent the district court's judgment enjoins the Navy from discharging Meinhold based solely on his statement of status, we affirm; beyond that, we do not agree that injunctive relief may properly extend past the Navy's treatment of Meinhold to the Department of Defense's treatment of all members of the

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<sup>2</sup> DOD Directive 1332.14, 32 C.F.R. Pt. 41, App. A (1981) and Naval Military Personnel Manual 3630400(1) (1992) were in effect at the time of Meinhold's discharge. These regulations have since been changed. This appeal does not involve the so-called "don't ask/don't tell" policy, which became effective February 28, 1994. See 10 U.S.C. § 654 (Supp. 1994). We express no opinion as to that policy or the regulations implementing it.

armed services. To that extent, the judgment is overbroad and we reverse.

I

Meinhold had served for twelve years as an enlisted member of the United States Navy. On May 19, 1992, he acknowledged on television that he was gay. The next day the United States Navy initiated discharge proceedings pursuant to Naval Military Personnel Manual 3630400(1).<sup>3</sup>

At the hearing, both the Navy Recorder and the Legal Advisor to the administrative discharge board took the position that the board must recommend discharge if it found that Meinhold is homosexual, and that a member of the service is homosexual if he says he is whether or not he has engaged in homosexual conduct. The board so found, due to Meinhold's televised statement. As a result, Meinhold was given an honorable discharge on August 12, 1992.

Meinhold brought this action for a declaration that the Department of Defense's then-existing policy regarding homosexuals was unconstitutional, and sought reinstatement in the Navy on the ground that his discharge was procedurally defective, the Navy was estopped from separating him on the basis of status, and the relevant regulations were constitutionally infirm. In ruling on cross-motions for summary judgment, the district court held that further proceedings to exhaust administrative remedies would be futile as it was undisputed that a new hearing would result in the same decision. The court then held that gays and lesbians should not be banned from serving in the military in the absence of conduct which interferes with the military mission. It therefore rescinded

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<sup>3</sup> As they read at the time of Meinhold's discharge, Naval Military Personnel Manual 3630400 was essentially identical to DOD Directive 1332.14(H). We shall refer to them together as "the regulation," and cite only to DOD Directive 1332.14.

Meinhold's discharge and permanently enjoined the Department of Defense "from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." Meinhold, 808 F. Supp. at 1456.

DOD timely appealed and sought an emergency stay of the district court's injunction to the extent it conferred relief on persons other than Meinhold. After this relief was denied, President Clinton announced a new policy regarding homosexuals in the military, popularly identified as the "don't ask/don't tell" policy. DOD again applied for an emergency stay, this time on the ground that the injunction barred it from implementing the new policy. Meanwhile, Meinhold also asked the district court to hold DOD in contempt based on the Department's announced intention to transfer two servicemembers who had admitted their homosexuality to the standby reserves. Although the court made no finding of contempt, it did amend the previous injunction to restrain DOD from creating or maintaining files based on sexual orientation and from taking any actions against gay or lesbian servicemembers based on their sexual orientation. DOD appealed this order and sought an emergency reconsideration of this court's denial of a stay pending appeal. We declined to reconsider our earlier rulings, but on October 23, 1993, the Supreme Court granted a stay of the injunction, as amended, to the extent it conferred relief on persons other than Meinhold.

## II

We first consider whether the district court's decision and order should be vacated for either of the preliminary reasons urged by the Navy: that the court erred in adjudicating Meinhold's constitutional claim before requiring him to exhaust intramilitary remedies, and that it erred in failing to resolve

the nonconstitutional claims that Meinhold contends require his reinstatement before holding the policy unconstitutional.

A

DOD argues that the exhaustion doctrine applies with particular force in cases where a discharged servicemember seeks reinstatement because separation of powers concerns and military discipline considerations are implicated. It also contends that exhaustion promotes judicial economy by producing a record for judicial review, affording the relief sought, and possibly mooted issues. We agree that strict application of exhaustion requirements in military discharge cases helps maintain the balance between military authority and federal court intervention, but exhaustion is not required where an administrative appeal would be futile. See *Watkins v. United States Army*, 875 F.2d 699, 705 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).

DOD suggests that instead of finding that it had conceded futility, the district court should have found that exhaustion was required based on Meinhold's "concession" that constitutional arguments need not be reached because his nonconstitutional arguments mandate reinstatement. It also suggests that further review could have made a difference as the parties differed over the regulatory definition of "homosexual": Meinhold took the view the regulations mandate discharge based solely on status, whereas in the Navy's view the regulations apply to those who either have engaged in past homosexual acts or who by their statements indicate a propensity to engage in future homosexual acts. Meinhold, on the other hand, contends that exhaustion has to be futile since there are no exceptions to DOD's policy that if a servicemember states that he is homosexual, discharge is mandatory unless he can prove that he is not a homosexual.

We have difficulty with the Navy's argument because it doesn't square with the official position taken in Meinhold's

discharge proceeding. There, the Navy Recorder argued, and the Legal Advisor to the administrative discharge board advised, that the board had to recommend separation if it found Meinhold is homosexual and that a servicemember is a homosexual if he makes a statement that he is. The Navy points to nothing in the record which suggests that a disposition by the BCNR could have differed. We therefore cannot say the district court erred in concluding that futility was undisputed.

B

In *Watkins*, we held that equitable estoppel may be applied against the military and should be considered as a basis for relief before constitutional claims are reached. The Navy submits that *Watkins* controls and required the district court to resolve Meinhold's equitable estoppel claim prior to reaching his equal protection issue. Meinhold responds that the government raised a triable issue of fact which precluded summary judgment on the estoppel claim. For that reason, he argues, reaching the constitutional issue was not unnecessary.

[1] It is clear that the nonconstitutional claims should have been decided first. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979); cf. *Watkins*, 875 F.2d at 705. As the Supreme Court instructed in *Jean v. Nelson*, 472 U.S. 846 (1985):

Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision. This is a fundamental rule of judicial restraint. . . . [I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.

*Id.* at 854 (citations and quotation marks omitted). We are not persuaded by Meinhold's argument that there should be an

exception simply because the constitutional claim could be resolved summarily whereas the nonconstitutional claim could not be. See *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105-06 (1944). In any event, the district court gave no such reason, but simply passed over the nonconstitutional claim. It was error to do so.

[2] In these circumstances, we can either remand for the district court to consider the equitable estoppel claim, or dispose of it ourselves if it is possible to do so as a matter of law.

*United States v. Locke*, 471 U.S. 84, 92 n.9 (1985). In this case, it appears to us that further factfinding is unnecessary and we can determine as easily as the district court whether Meinhold's evidence, viewed most favorably to him, shows the Navy's prior knowledge of homosexuality and affirmative misconduct. As a matter of law, it does not.

Under *Watkins*, "a court must find affirmative misconduct by the government and must also find that the government's conduct will cause a serious injustice and that estoppel will not cause undue harm to the public interest." *Watkins*, 875 F.2d at 706. "Affirmative misconduct" is conduct "going beyond mere negligence." *Id.* at 707 (quotation marks omitted). While "[t]here is no single test for detecting the presence of affirmative misconduct[, and] each case must be decided on its own particular facts and circumstances[, a]ffirmative misconduct does require an affirmative misrepresentation or affirmative concealment of a material fact by the government." *Id.* (citation omitted).

[3] Viewing the record in Meinhold's favor and indulging the inferences he urges, the evidence shows that the Navy never asked about his status, although it did ask whether he had ever engaged in homosexual activity, which he truthfully denied; Navy personnel knew he was gay; the Navy never specifically told him that he would be discharged solely on the basis of orientation; and the Navy appeared to enforce its

discharge policy mainly in cases of improper conduct.<sup>4</sup> This does not amount to affirmative misconduct, however, as comparison with Watkins makes clear.

Watkins had been drafted into the United States Army in 1967, and had reenlisted three times before he was denied reenlistment in 1982 because he was a homosexual. Meanwhile, Watkins had acknowledged his homosexuality on a medical form prior to his initial induction; during his first tour of duty, he had signed an affidavit admitting that he had been a homosexual for years and that since his enlistment, he had engaged in sodomy with two other servicemen; he was investigated on criminal sodomy charges, but the charges were dropped; after he was honorably discharged and his reenlistment eligibility code was listed as "unknown," he requested correction and the code was changed to "eligible for reentry on active duty"; he was reenlisted, and during his second tour, discharge proceedings were brought because of his homosexual tendencies, yet the board found him "suitable for retention in the military service"; he then got a security clearance for "Secret" information, was nevertheless rejected for a position in the Nuclear Surety Personnel Reliability Program because he had admitted homosexual tendencies, but following a request by his commanding officer for reconsideration, was requalified for the position; and, after he worked for several years under the security clearance, it was revoked when he again said he was homosexual, but after still another investigation, Watkins was again reenlisted. In those circumstances we held that the Army "plainly acted affirmatively in admitting, reclassifying, reenlisting, retaining, and promoting Watkins," and its "ongoing active misrepresentations" enabled Watkins to enter, remain, and progress in the Army. Id. at 708.

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<sup>4</sup> The parties dispute whether Meinhold was asked by the doctor who performed his physicals at enlistment if he had homosexual tendencies. However, this fact is not material. If the doctor did fail to ask, such a failure amounts to no more than negligence, which is insufficient to create estoppel.

[4] No official, affirmative misconduct of this sort appears in Meinhold's record. There were no "ongoing active misrepresentations" by Navy officials. No one vouched for Meinhold's abilities despite his homosexuality prior to this incident.<sup>5</sup> Meinhold was not told his homosexuality would not be considered in a discharge proceeding, and he had no track record from which he could have assumed that his own homosexuality made no difference to his reenlistment or retention. Thus, the Navy's conduct amounts at most to "[a] mere failure to inform or assist." *Lavin v. Marsh*, 644 F.2d 1378, 1384 (9th Cir. 1981). Compare *Watkins*, 875 F.2d at 708 (applying standard; finding conduct went beyond it) with *Lavin*, 644 F.2d at 1383-84 (adopting standard; finding failure to determine pension benefits or correct misunderstanding did not amount to pervasive pattern of false promises and so fell short). As *Watkins* instructs, standing aside or doing nothing, or even providing misinformation, is insufficient to create estoppel. *Watkins*, 875 F.2d at 708. For this reason, there is no basis for finding here, as the court did in *Watkins*, that the Navy repeatedly acted so as to promise Meinhold that he would not be discharged solely because of his sexual orientation. As a matter of law, therefore, Meinhold's estoppel claim must fail.

### III

On the merits of Meinhold's equal protection claim, DOD contends that since it is constitutionally permissible to conclude that homosexual conduct adversely affects the military, *Beller v. Middendorf*, 632 F.2d 788, 811-12 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981), it is equally permissible for

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<sup>5</sup> Meinhold submitted declarations by colleagues which said that his homosexuality was common knowledge, but they do not show that anyone knew of it before his reenlistment. Likewise, while there is evidence that his performance was well regarded, there is no evidence that any of his commanding officers commended Meinhold with knowledge of his homosexuality prior to the separation proceedings.

the regulations to target those who are likely to engage in homosexual conduct. DOD faults the district court's definition of the pertinent classification for purposes of its equal protection analysis as "gays and lesbians who do not engage in prohibited conduct," arguing instead that under the regulations, the relevant classification is persons who the military reasonably concludes either have committed or are likely to commit homosexual acts based on their admitted "desire" and "propensity" to engage in homosexual conduct. In holding to the contrary, DOD believes the district court failed to test the policy "in light of the purposes [the Navy] sought to achieve," as courts are obliged to do under *Rostker v. Goldberg*, 453 U.S. 57, 75 (1981). DOD then suggests that simply by acknowledging his homosexuality, Meinhold admitted under the regulations that he had a "desire" and "propensity" to commit homosexual acts. From this, it urges, the Navy could permissibly infer that he would probably commit such acts, if he had not done so already.

[5] We believe that both the Navy's application of its regulations and the district court's equal protection analysis start a step too far down the path. When the constitutional validity of a statute or regulation is called into question, it is a cardinal

rule that courts must first determine whether a construction is possible by which the constitutional problem may be avoided. *New York City Transit Auth.*, 440 U.S. at 582 & n.22.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Indeed, we have said that "a court must construe a statute so as to avoid raising constitutional questions." *Tashima v. Administrative Office of the United States Courts*, 967 F.2d 1264, 1269 (9th Cir. 1992) (emphasis added); see also *Northwest Hosp., Inc. v. Hospital Serv. Corp.*, 687 F.2d 985, 992 (7th Cir. 1982) (applying canon to regulation); cf. *United States v. Stansell*,

847 F.2d 609, 613-16 (9th Cir. 1988) (same). Thus, it is incumbent on us to see whether there is some way the regulation can be construed to resolve the matter on a nonconstitutional ground. See *New York City Transit Auth.*, 440 U.S. at 582 & n.22.

[6] As we consider the regulation in this case, however, we are guided by another long-settled rule: The military's "considered professional judgment," *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986), is "not lightly to be overruled by the judiciary," *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992).

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

*Rostker*, 453 U.S. at 65-66 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). Our review, therefore, is as deferential as our constitutional responsibilities permit. *Id.* at 70.

To accommodate both principles, we start with the Navy's professional judgment. It is that "[h]omosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14(H)(1)(a).

The regulation, in turn, defines "homosexual" as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directive 1332.14(H)(1)(b)(1). "A homosexual act means bodily con-

tact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." DOD Directive 1332.14(H)(1)(b)(3). Eliminating from the equation a person who has previously engaged in homosexual acts because acts were not at issue in Meinhold's proceeding, a "homosexual" according to the regulations is someone who "desires" or "intends" to engage in bodily contact with members of the same sex for the purpose of satisfying sexual desires.

Separation may be based on homosexuality due to conduct or statements. DOD Directive 1332.14(H)(1)(c). "Conduct" consists of engaging in, attempting to engage in, or soliciting another to engage in a homosexual act;<sup>6</sup> a "statement" that the member is a homosexual is the basis for separation unless the board finds the member is not a homosexual. *Id.*

[7] There is no dispute in this case that the Navy's policy is constitutionally permissible to the extent it relates to homosexual conduct.<sup>7</sup> However, the issue in Meinhold's separation proceeding was his classification as a homosexual.<sup>8</sup> Thus, our task is to decide whether this application raises constitutional

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<sup>6</sup> If such conduct is found, the servicemember must be separated unless the board finds that it was a departure from usual behavior, is unlikely to recur, was not accomplished by force, the member's continued presence is consistent with the interest of proper discipline, and the member does not "desire" or "intend" to engage in homosexual acts. DOD Directive 1332.14(H)(1)(c)(1).

<sup>7</sup> See, e.g., *Schowengerdt v. United States*, 944 F.2d 483, 486, 489-90 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1378, 1384 (9th Cir.), cert. denied, 454 U.S. 864 (1981); *Beller*, 632 F.2d at 792, 810.

<sup>8</sup> The Legal Advisor counseled the discharge board: "Also, if I can just add, there seems to be some confusion about the acts, and the classification here. And I think that . . . you should completely disregard the acts. There are no allegations whatsoever of act. We're talking specifically about the classification, and not the act. So, even though there--there is mention in that definition of the act, we're not dealing with that here. We are dealing merely with the classifications."

concerns that can be obviated by construing the regulations differently, but still consistently with the purposes DOD sought to achieve.

[8] Construing the regulation to apply to the "classification of being homosexual" clearly implicates equal protection. We recognized that the Army's discharge of a servicemember because of her acknowledged homosexuality states an equal protection claim in *Pruitt*, 963 F.2d at 1164.9 Here, the regulation as applied to Meinhold assumes that persons who say they are gay, but who have not acted in accordance with their propensity in the past, will nevertheless act in accordance with their propensity in the future -- whether or not to do so is lawful or acceptable military behavior. Yet no similar assumption is made with respect to servicemembers who are heterosexual.<sup>10</sup> Although courts defer to the military's judgment about homosexual conduct, and classifications having to do with homosexuality may survive challenge if there is any rational basis for them, see *Heller v. Doe*, 113 S. Ct. 2637, 2642-43 (1993); *High Tech Gays v. Defense Indus. Sec.*

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9 See also *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), vacated for reh'g en banc, 8 F.3d 70 (D.C. Cir. 1994); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 925 (W.D. Wash. 1994) (striking down same policy; calling "presumption that servicemembers with a homosexual orientation will engage in proscribed homosexual conduct" "unfounded"); *Dahl v. Secretary of the Navy*, 830 F. Supp. 1319, 1334-35 & n. 17 (E.D. Cal. 1993) (striking down same regulations; comparing policy to "patently unconstitutional" hypothetical policy excluding ethnic minorities because they have a "propensity" to engage in theft though non-minorities are not excluded until they engage in theft). But see *Ben-Shalom v. Marsh*, 881 F.2d 454, 463-65 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (rejecting equal protection challenge); *Woodward v. United States*, 871 F.2d 1068, 1075-77 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990) (same).

<sup>10</sup> Prohibited conduct includes adultery, indecent assault, wrongful cohabitation, fraternization, indecent language, indecent acts with another, pandering and prostitution, sodomy and bigamy. Articles 120, 125, 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, 934 (Supp. 1994).

Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990), at least a serious question is raised whether it can ever be rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not. 11

[9] Equating status or propensity with conduct or acts that are prohibited is problematic as well. The Supreme Court has long recognized the constitutional infirmity of penalizing status alone. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (ethnicity is insufficient basis to believe persons are illegal aliens); *Robinson v. California*, 370 U.S. 660, 665-67 (1962) (unconstitutional to criminalize narcotics addiction in absence of proof of use); cf. *Powell v. Texas*, 392 U.S. 514, 532-34 (1968) (recognizing *Robinson* rule that criminal penalties may be inflicted only if accused has committed act by contrast with status). While not controlling because the discharge process is not a criminal proceeding and does not impose punishment, *Garrett v. Lehman*, 751 F.2d 997, 1002-03 (9th Cir. 1985), *Robinson*, *Powell* and *Brignoni-Ponce* nevertheless point out the constitutionally significant danger of making status a surrogate for prohibited conduct. As Justice Black's concurring opinion in *Powell*, joined by Justice Harlan, observed:

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11 We acknowledge the force of DOD's argument that it need not take the risk of a person with homosexual desire or propensity acting on it because of the critical nature of the military mission. See *Ben-Shalom*, 881 F.2d at 460-61 (rejecting equal protection challenge to discharge of servicemember who admitted homosexuality in part on the footing that the military does not have to take the risk that an admitted homosexual will not commit homosexual acts). But cf. *Pruitt*, 963 F.2d at 1167 (equal protection challenge withstands Rule 12(b)(6) dismissal). However, DOD is prepared to take the risk that a servicemember who has committed a homosexual act but isn't homosexual won't do so again. For that reason, its argument is not wholly rational. In any event, the risk factor alone does not eliminate equal protection difficulties.

Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. . . .

. . . Perhaps more fundamental is the difficulty of distinguishing, in the absence of any conduct, between desires of the day-dream variety and fixed intentions that may pose a real threat to society; extending the criminal law to cover both types of desire would be unthinkable, since "[t]here can hardly be anyone who has never thought evil. When a desire is inhibited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal."

Powell, 392 U.S. at 543-44 (Black, J., concurring) (quoting Glanville Williams, *Criminal Law -- the General Part* 2 (1961)). And as Justice Harlan wrote in *Robinson* :

Since addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

If the California statute reaches this type of conduct, . . . it is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law.

*Robinson*, 370 U.S. at 678-79 (Harlan, J., concurring). The effect of the regulation as applied in *Meinhold's* case is much the same. Cf. *Jacobson v. United States*, 112 S. Ct. 1535, 1542 (1992) (past conduct does not demonstrate propensity to engage in similar conduct later made illegal); *Paris Adult*

Theatre I v. Slaton, 413 U.S. 49, 67 (1973) (individual's thoughts and fantasies "are his own and beyond the reach of government").

[10] Thus, whether the regulation passes constitutional muster is a close question only because of the greater license we give the military to control the military environment. See Beller, 632 F.2d at 810 ("[C]onstitutional rights must be viewed in light of the special circumstances and needs of the armed forces."). Constitutional tensions may be avoided, however, if the regulation can reasonably be construed to mandate separation due to a statement of homosexuality only when that statement itself indicates more than the inchoate "desire" or "propensity" that inheres in status. We believe it can be.

[11] DOD's policy judgment hinges on conduct<sup>12</sup> -- whereas the separation provisions include "conduct or statements." DOD contends that a statement admitting homosexuality under the regulation admits "desire" and "propensity" to commit homosexual acts. Arguably it does, in the abstract, because the regulatory definition of "homosexual" is a person who "engages in, desires to engage in, or intends to engage in homosexual acts." <sup>13</sup> But as DOD's brief also acknowledges: "[A] service member's expressed 'desire' to commit homosexual [acts] evidences more than an abstract, ephemeral, or suppressible whim. Like acts themselves and like intentions, 'desire' in the relevant sense evidences a 'propensity,' or an 'often intense natural inclination,'

---

<sup>12</sup> "The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14(H)(1)(a). Our conclusion in *Fruitt* that the regulation targets homosexual status, 963 F.2d at 1163, is not to the contrary because we were concerned there with whether it targeted speech or status in *Fruitt*'s case.

<sup>13</sup> There is no evidence that Meinhold "engaged" in homosexual acts and DOD doesn't argue that he "intended" to.

.Webster's New Collegiate Dictionary 943 (9th ed. 1990), to commit serious regulatory violations." (Emphasis added.) Taking DOD's suggestion at face value, the "statement" prong for separation may turn on something more than status: a concrete, expressed desire to commit homosexual acts which are, in turn, prohibited.

[12] This interpretation is consistent with the military's judgment that the presence of persons who engage in homosexual conduct, or make a statement indicating their propensity for engaging in, or attempting to engage in, or soliciting someone else to engage in homosexual acts, impairs the military mission. Nothing in the policy states that the presence of persons who say they are gay impairs the military mission. Rather, the focus is on prohibited conduct and persons likely to engage in prohibited conduct. Construing the regulation to reach only statements which manifest a fixed or expressed desire to commit a prohibited act not only coincides with the military's concern for its mission, but gives content to "desire" apart from the defining characteristic of sexual orientation.

[13] We therefore hold that the regulation under which Meinhold was processed need not be construed so broadly as to raise constitutional concerns. It can reasonably be construed to reach only statements that show a concrete, fixed, or expressed desire to commit homosexual acts despite their being prohibited. The Navy applied its regulation to Meinhold's statement of orientation alone and based his separation solely on his classification as a homosexual. His statement -- "I am in fact gay" -- in the circumstances under which he made it manifests no concrete, expressed desire to commit homosexual acts. The Navy's presumption that Meinhold desires or intends to engage in prohibited conduct on the basis of his statement alone therefore arbitrarily goes beyond what DOD's policy seeks to prevent. Accordingly, Meinhold's discharge on that basis cannot stand.

## IV

In addition to rescinding Meinhold's discharge, the district court permanently enjoined DOD from "discharging, changing [the] enlistment status of or denying enlistment to any person," from maintaining files, and from "taking any actions" against gay or lesbian servicemembers based on sexual orientation in the absence of sexual conduct which interferes with the military's mission. The Navy argues that even if the district court did not err on the constitutional issue, its nation-wide injunction cannot stand.<sup>14</sup> We agree.

[14] An injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); see also *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). This is not a class action, and Meinhold sought only to have his discharge voided and to be reinstated. Effective relief can be obtained by directing the Navy not to apply its regulation to Meinhold based only on his statement that he is gay. Beyond reinstatement, and not separating Meinhold on that basis, DOD should not be constrained from applying its regulations to Meinhold and all other military personnel. Accordingly, the injunction is vacated except to the extent it enjoins DOD from discharging Meinhold due solely to the statement that he made.

JUDGMENT AFFIRMED IN PART; REVERSED AND  
VACATED IN PART.

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<sup>14</sup> DOD also contends that the district court lacked jurisdiction to issue its amended order, which broadened the scope of injunctive relief, because an appeal had already been taken from the original order. As the district court issued the amended order to clarify its original injunction and to supervise compliance in the wake of Meinhold's motion for contempt, it did not lack jurisdiction. See *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) (appeal from supervisory order does not divest district court of jurisdiction to continue supervision and modify order as necessary).



## GEORGETOWN UNIVERSITY LAW CENTER

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## GEORGETOWN UNIVERSITY LAW CENTER

Federal Legislation Clinic

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DirectorR. Scott Foster  
Teaching Fellow

TO: Nancy McFadden

FROM: Chai Feldblum *CF*

RE: Standard of Review

DATE: July 27, 1994

This is just a short memo to follow up on my conversation with you Monday night at Senator Kennedy's house.

My conversation with Joel Klein on Monday about the Administration's hesitancy with the finding in the Senate version of ENDA crystallizes for me the need to address the issue of the heightened scrutiny standard head-on -- and to do so before a possible Senate Committee markup of ENDA in September and before final decisions are made regarding DOJ's intervention in the ballot initiative cases.

All through the final days of the military policy resolution last July, we heard from all quarters (White House, DOD, DOJ) that there would be a **real effort** to confine the **legal damage** from adoption of the policy to the **military arena itself**. All of us in the gay community would like to believe that. All of us would like to believe the Administration will make every effort not to allow the military policy to have adverse legal ramifications outside of the military context, if there is any possible way to confine such ramifications.

DOJ lawyers have done their bit in the military case briefs by always adding the magic mantra "in the military context" each time they say gay people only get "rational basis" review. But that is not enough.

Mark Levy and John Rogovan have both said they are not closing the door to hearing arguments for, and perhaps accepting, a heightened standard of review for gay people in the non-military context. I have consistently voiced my skepticism of their ability to adopt such a position, once rational basis is advocated by DOJ in the military context. Hence, I have consistently argued that DOJ should adopt a Rostker v. Goldberg approach in the military cases: i.e., (1) throw doubt on the concepts of levels of scrutiny in general (as

the government did in that case); (2) assume, for purposes of argument, an intermediate scrutiny level (as the Court did in that case); and (3) argue the military wins anyway (as the government argued, and the Court accepted, in that case).

Here are the advantages to that approach:

1) It is a position of integrity as a constitutional matter (at least, with regard to the standard);

2) I personally believe it reduces the government's chance of winning or losing on the military policy only marginally -- because if a court wants to rule against the government (as eight courts have done), they will do so on the prejudice issue, which applies equally in the context of a rational basis standard and a heightened scrutiny standard; and

3) It allows the Administration to carry out its commitment to limit the damage to the military context.

My conversation with Joel on Monday only heightens my concern that DOJ will **not** be able to adopt a rational basis standard in the military context and then adopt a different standard in non-military contexts. After all, ENDA exempts the military completely -- so the finding there should not really be problematic if you were truly considering adopting a different standard outside of the military. **If there's a problem with effectively cabining the damage to the military, we need to talk about that now.** We either need to figure out a way for DOJ, in reality, to adopt a different standard outside of the military context or we need to revisit the issue of the standard of review DOJ is currently adopting in the military cases.

Even if finding #7 is dropped from ENDA, I believe it is essential to deal with this issue over the next few weeks -- before a potential markup of ENDA and in time for DOJ's intervention in the ballot initiative cases.

I look forward to a personal meeting with folks at Justice about this issue.

cc. Jamie Gorelick  
Drew Days  
Walter Dellinger  
Deval Patrick  
Eleanor Acheson  
Joel Klein  
George Stephanopoulos

*Gary Sullivan*

**TALKING POINTS ON CAMMERMEYER APPEAL DECISION**

- \* On behalf of the Department of Defense, the Department of Justice today filed a notice of appeal [and a request for a stay] in the Cammermeyer decision.
- \* The Solicitor General authorized the filing of the notice of appeal at the request of the Defense Department. The Justice Department notified the White House Counsel's office of this decision. The White House Counsel's office reviewed the matter and determined that the decision was a litigation judgment within the discretion of DOJ and DOD.
- \* As we have said before, the Administration believes that the military's new policy includes important improvements in this area. Cammermeyer is an "old policy" case. In this transitional period, DOJ and DOD have been continuing to defend the old policy in litigation. Particular litigation judgments are made on the basis of the circumstances and procedural posture of each case.
- \* ~~The Meinhold case is already pending in the Court of Appeals which will have jurisdiction over the Cammermeyer case. The outcome of the Meinhold case may well have a significant impact on the Cammermeyer case.~~

*would delete*

*File*  
*File*  
*et al.*  
Judge Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

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

Defendants.

Civil Action No. C92-942Z

DEFENDANTS' MOTION TO SHORTEN TIME

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

Moving Party: Defendants.

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

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

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

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

Respectfully submitted,

FRANK W. HUNGER  
Assistant Attorney General

KATRINA C. PFLAUMER  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

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

Defendants.

Civil Action No. C92-942Z

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

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

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

6 Respectfully submitted,

7 FRANK W. HUNGER  
8 Assistant Attorney General

9 KATRINA C. PFLAUMER  
10 United States Attorney

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

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

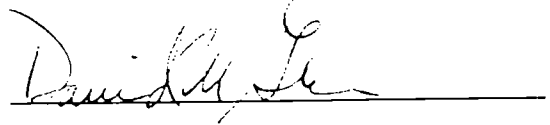
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25 Attorneys for Defendants  
26  
27  
28

CERTIFICATE OF SERVICE

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

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



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

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

Defendants.

Civil Action No. C92-942Z

DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

NOTE ON MOTION CALENDAR: July 1, 1994

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

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

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

Defendants.

Civil Action No. C92-942Z

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

STATEMENT

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

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

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

#### 7 DISCUSSION

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

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

23 481 U.S. at 776.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 CONCLUSION

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

4 Respectfully submitted,

5 FRANK W. HUNGER  
6 Assistant Attorney General

7 KATRINA C. PFLAUMER  
8 United States Attorney

9 VINCENT M. GARVEY  
VINCENT M. GARVEY

10  
11 OF COUNSEL:  
12 CAPTAIN TARA O. HAWK  
13 Department of the Army  
14 Office of the Judge Advocate  
15 General

16 DAVID M. GLASS  
17 DAVID M. GLASS  
18 Attorneys, Dep't of Justice  
19 901 E Street N.W., Room 1080  
20 Washington, D.C. 20530  
21 Tel: (202) 514-4469  
22 Fax: (202) 616-8470

23 Attorneys for Defendants

24  
25 <sup>2</sup> In addition to directing that Plaintiff be restored to  
26 duty, the Court's recent order directs Defendants to "expunge all  
27 record of plaintiff's sexual orientation and her statements, if  
28 any, regarding same from any and all records in defendants'  
possession." Order at 50. By its very nature, any expunction of  
records is irrevocable. Accordingly, if Defendants conduct the  
expunction of records that Court has ordered and then prevail on  
appeal, they will have suffered irreparable injury.

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

Judge Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

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

Defendants.

Civil Action No. C92-942Z

ORDER

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

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

Dated this \_\_\_\_ day of \_\_\_\_\_ 1994.

UNITED STATES DISTRICT JUDGE

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

1 PRESENTED BY:

2 FRANK W. HUNGER  
Assistant Attorney General

3 KATRINA C. PFLAUMER  
4 United States Attorney

5 VINCENT M. GARVEY  
6 VINCENT M. GARVEY

7 DAVID M. GLASS  
8 DAVID M. GLASS  
Attorneys, Dep't of Justice  
9 901 E Street N.W., Room 1080  
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Fax: (202) 616-8470

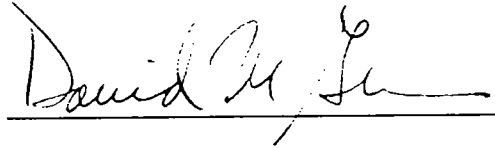
11 Attorneys for Defendants  
12  
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DEPARTMENT OF JUSTICE  
901 E Street, N.W.  
Washington, D.C. 20530  
(202) 514-4469

CERTIFICATE OF SERVICE

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

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

  
\_\_\_\_\_

**MARGARETHE CAMMERMEYER**

**Civil Action No. C92-942Z**

**V.**

## Defendants

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

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

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

Homosexual conduct is grounds for separation from the Military Services ... Homosexual conduct includes homosexual acts, statements by a servicemember that demonstrate a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.

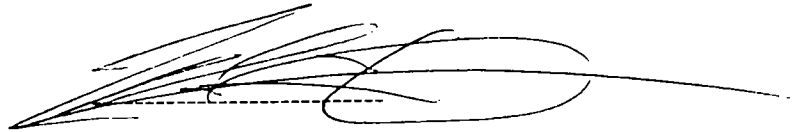
3. The presence in the military of those who violate this policy has a direct, adverse impact on morale, good order, discipline, and unit cohesion. To my knowledge, this view is shared by the majority of military personnel as a product of their own experience, practical knowledge, and considered judgment.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

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

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

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

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

A handwritten signature in black ink, appearing to read 'EDWIN DORN', with a long horizontal line extending to the right.

EDWIN DORN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MARGARETHE CAMMERMEYER,

Plaintiff,

v.

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

Defendants.<sup>1</sup>

Civil Action No. C92-942Z

NOTICE OF APPEAL

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

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

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

Respectfully submitted,

FRANK W. HUNGER  
Assistant Attorney General

KATRINA C. PFLAUMER  
United States Attorney

VINCENT M. GARVEY  
VINCENT M. GARVEY

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Attorneys for Defendants

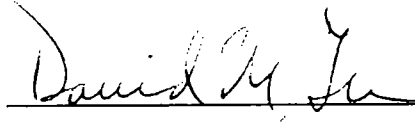
OF COUNSEL:  
CAPTAIN TARA O. HAWK  
Department of the Army  
Office of the Judge Advocate  
General

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

CERTIFICATE OF SERVICE

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

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

  
\_\_\_\_\_

THE WHITE HOUSE  
WASHINGTON

DATE: 6/13/94

TO:

*Joel Klein*

FROM:

White House Counsel  
Room 128, OEOB, x7900

☒ FYI

*Cliff Sloan*

☐ Appropriate Action

☐ Let's Discuss

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

*472*  
*for*



GEORGETOWN UNIVERSITY LAW CENTER

Federal Legislation Clinic

Judith C. Areen  
Dean

Chai R. Feldblum  
Associate Professor of Law  
Director  
R. Scott Foster  
Teaching Fellow

Federal Legislation Clinic  
111 F Street, N.W.  
Washington, DC 20001  
Telefax No.: 202-662-9682

*File*  
*Copy*  
*Thurs*

**TELEFAX COVER MEMORANDUM**

DATE: 6-13-94

NUMBER OF PAGES, INCLUDING THIS SHEET: 4

TO: Cliff Sloan

Country: \_\_\_\_\_

Fax Number: 456-1647

FROM: Chai Feldblum

of: \_\_\_\_\_

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

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

*GEORGETOWN UNIVERSITY LAW CENTER**Federal Legislation Clinic*

Judith C. Areen  
Dean

Chai R. Feldblum  
Associate Professor of Law  
Director  
R. Scott Foster  
Teaching Fellow

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

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

The four main points are:

1. Try to explore a creative way to appeal only part of the Cammemeyer decision -- so you reach a result analogous to the one reached in Steffan. (I'm not sure this is possible while still meeting everyone's needs.)
2. If it is not possible to avoid an appeal on the merits, at a minimum, do not ask for a stay of the Cammemeyer ruling.
3. At all costs, do not appeal the latest **injunction** in the Able case. Unlike appealing Cammemeyer (where the 9th Circuit already has Meinhold before it), appealing the injunction in Able would bring a new circuit court, the 2nd Circuit, into the picture. It is also unnecessary to appeal this injunction which applies only to 6 people.
4. Tell DOJ you would like them to make a concerted effort to reduce offensive comments about gay people in their briefs in these cases -- although, obviously, consistent with their need to defend the policy.

*GEORGETOWN UNIVERSITY LAW CENTER**Federal Legislation Clinic*

Judith C. Aron  
Dean

Chai R. Feldblum  
Associate Professor of Law  
Director  
R. Scott Foster  
Teaching Fellow

TO: Mark Levy  
John Rogovan

FROM: Chai Feldblum

DATE: June 10, 1994

RE: Gays in the Military Cases

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

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

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

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

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

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

Cheers.

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

*Gay - in the military Cammermeyer*

*[Handwritten signature]*

FILED ENTERED  
LOUDED RECEIVED

JUN 01 1994

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

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARGARETHE CAMMERMEYER,  
Plaintiff,

NO. C92-9422

v.

ORDER

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

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

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

95

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

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

#### 17 I. BACKGROUND

18 Margarethe Cammermeyer is a former Colonel of the  
19 Washington State National Guard. She entered the Army Student  
20 Nurse Corps in 1961, and with the exception of a four year  
21 period when she was ineligible for service,<sup>1</sup> Cammermeyer  
22 served in the Army until 1986. In that year, Cammermeyer

23  
24  
25 <sup>1</sup> Cammermeyer was married from 1966 until 1980 and she  
26 and her husband had four sons. She was forced to resign upon  
her first pregnancy in 1968 following more than seven years of  
active duty as a result of then-applicable Army regulations.  
Due to a change in Army regulations, she was able to reenlist  
in the Army Reserve in 1972.

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

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

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

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

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

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

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

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

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

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

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

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

## 9 II. DISCUSSION

### 10 A. Summary Judgment Standard

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

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

11 **B. Equal Protection Challenge**

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

16 **1. Equal Protection Standard**

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

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

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

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

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

13 2. Rational Basis Review

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

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

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

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

25  
26

1           a. Deference to the Military

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

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

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

1 In view of this standard, the Court must be particularly  
2 careful not to substitute its own judgment as to what is  
3 "desirable" or its own evaluation of what the executive branch  
4 may have intended by a given policy. The Court is also  
5 mindful, however, that there is not and must never be a  
6 "military exception" to the Constitution. Indeed, courts have  
7 been willing to defer to the military only within the confines  
8 of ordinary constitutional analysis. See Rostker, 451 U.S. at  
9 67, 69 L.Ed.2d at 488 (deference to the judgment of other  
10 branches in the area of military affairs does not require  
11 abdication of "ultimate responsibility to decide  
12 constitutional question"). This principle applies with even  
13 greater force to equal protection claims since it has  
14 traditionally been the domain of the federal courts to  
15 scrutinize classifications challenged on equal protection  
16 grounds.

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

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

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

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

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

22 b. Scope of Rational Basis Review

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Id. at 284.

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

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

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

18 Id. at 1327.

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

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

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<sup>9</sup> Dahl is currently on appeal.

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

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

17 (c) Orientation v. Conduct

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

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

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

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

<sup>11</sup> This is substantially the same Army regulation  
challenged by Cammermeyer.

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

10 The Ninth Circuit has recognized a distinction between  
11 homosexual status or orientation and conduct. In Pruitt, the  
12 plaintiff was discharged from the Army because of her public  
13 acknowledgment in a newspaper interview that she is a  
14 homosexual. She subsequently brought an action to challenge  
15 the same Army regulation at issue in this case. The  
16 Government argued, citing several cases, that its right to  
17 discharge homosexual servicemembers was so firmly supported in  
18 the law that any equal protection claim asserted by Pruitt was  
19 legally insufficient on its face. In rejecting this argument,  
20 the Ninth Circuit distinguished these prior cases, including  
21 Bowers and other cases relying on Bowers, as cases "relating  
22 to conduct, not orientation." Pruitt, 963 F.2d at 1165-66 n.  
23 4 and 5.<sup>12</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Korb. Decl., ¶ 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 Most notably, the defendants offer the Rule 30(b)(6)  
23 deposition testimony of Major General John P. Otjen and former  
24 Assistant Secretary of Defense Edwin Dorn. General Otjen was  
25 a member of the Military Working Group ("MWG") that studied  
26 the issue of homosexuals in the military and reported its  
findings to the Secretary of Defense in June, 1993.<sup>18</sup> See

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

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

16 The Government's evidence offers justifications for the  
17 policy of excluding homosexuals from military service. Under  
18 Haller, 125 L.Ed.2d at 271, the burden is on the plaintiff "to  
19 negative every conceivable basis which might support" the  
20

21  
22 recommending to the President a new policy on homosexuals in  
23 the military that would "compl[y] with the President's  
24 direction to end discrimination while maintaining high  
standards of combat effectiveness and unit cohesion." See  
Memorandum for the Secretary of Defense, Attached to MWG  
Report, Otjen Dep., at Ex. 10.

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

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

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

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

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

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

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

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

4 Plaintiff offers evidence demonstrating that this  
5 justification is based solely on prejudice. President Clinton  
6 has stated that "most military people [are] opposed to lifting  
7 the ban because of the feared impact on unit cohesion, rooted  
8 in disapproval of homosexual lifestyles," and "those who  
9 oppose lifting the ban are clearly focused not on the conduct  
10 of individual gay servicemembers, but on how nongay  
11 servicemembers feel about gays in general and, in particular,  
12 those in the military service." Himes Decl., Ex. 4.  
13 Plaintiff also notes that this rationale, as well as virtually  
14 every other justification used today to exclude homosexuals  
15 from military service, was also used to justify the military's  
16 discrimination against African-Americans in World War II.  
17 Harek Decl. at §§ 19-22, Ex. I. There is no dispute that the  
18 exclusion of African-Americans from military service was based  
19 solely on prejudice.

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

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

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

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

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

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

7 (6) Recruitment and Retention of Military Personnel.

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

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

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

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

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

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

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

25  
26 <sup>20</sup> Defendants would appear to concede this, as the new  
"don't ask, don't tell" policy, as codified in 10 U.S.C. §  
2382, does not include this rationale.

1 "the fear of invasion of privacy of heterosexual soldiers" and  
2 "how nongay servicemembers feel about gays in general and, in  
3 particular, those in the military service." Himes Decl., Ex.  
4 4.<sup>21</sup> General Colin Powell has also admitted in testimony  
5 before Congress that the policy was originally implemented  
6 more than ten years ago "[i]n simple language, to keep  
7 homosexuals out of the service." Glass Decl., Ex. T at 111.  
8 Dr. Lawrence Korb, the former Assistant Secretary of Defense  
9 who was responsible for implementing the policy at issue in  
10 this case, testified that:

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

21 Korb Decl. ¶ 6. The uncontroverted evidence establishes that  
22 many homosexuals have served, and currently serve, in the  
23 military, and that the majority of them do so without incident  
24  
25

26 <sup>21</sup> Assistant Secretary of Defense Dorn testified that  
President Clinton's statements reflect the views of the  
Department of Defense. Dorn Dep. at 31:1-9.

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

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

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

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

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

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

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

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

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

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

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

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

19 **B. Substantive Due Process Claim**

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

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

7 **1. Standard of Review**

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

1 Plaintiff's challenge to Army Regulation 135-178 is based on  
2 the substantive component of the due process clause.

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

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

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

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

3 2. Due Process Analysis

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

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

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

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

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

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

---

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

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

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

21  
22 <sup>26</sup> The Woodward court stated: "While acts of sodomy  
23 have not been expressly admitted by Woodward, in view of [his  
24 statements, his known association with gays, and his failure  
25 to claim celibacy] we need not address the factual situation  
where there is action based solely on 'status as a person with  
a homosexual orientation.'" Woodward, 871 F.2d at 1074 n.6.

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

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

8 **C. First Amendment Claim**

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

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

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

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

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

**D. Other Claims**

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

**E. Conclusion**

12  
13 All who had the opportunity to serve with Margarethe  
14 Cammermeyer agree that she was an outstanding officer and Army  
15 Nurse. Her care and professionalism in performing her duties  
16 earned her numerous awards and distinctions, including the  
17 Bronze Star Medal for distinguished service in Vietnam.  
18 Undoubtedly, Colonel Cammermeyer would have continued to serve  
19 in the Washington State National Guard, earning the continued  
20 respect and admiration of her peers, had she not applied for a  
21 top secret clearance to gain admission to the Army War  
22 College, and admitted in response to a direct question during  
23 her clearance interview that she is a lesbian. That admission  
24 led to her discharge from military service.  
25  
26

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

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

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

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

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

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

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

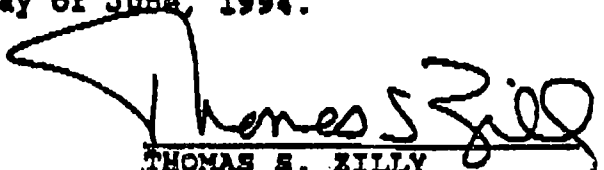
13 g. Costs of suit.

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

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

18 IT IS SO ORDERED.

19  
20 DATED this 1<sup>st</sup> day of June, 1994.

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



U. S. Department of Justice

The Deputy Attorney General

Washington, D.C. 20530

## FACSIMILE COVER SHEET

DATE:

June 10, 1994

TO:

Joe Klein

Deputy Counsel to the President

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PHONE NUMBER:

456-6611

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Janice A. Gorelick

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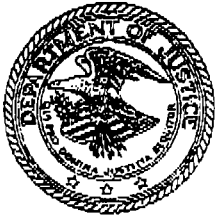
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Office of the Attorney General  
Washington, D. C. 20530

June 10, 1994

MEMORANDUM FOR MARY MAGUIRE DUNNE

FROM: THE ATTORNEY GENERAL

SUBJECT: Fidel Armando Toboso-Alfonso, A23 220 644

Pursuant to the provisions of 8 CFR § 3.1(h)(1)(i), I hereby direct that the Board of Immigration Appeals refer to me for review its decision in re: Fidel Armando Toboso-Alfonso, A23 220 644, dated March 12, 1990.

JUN-09-1994 16:07 FROM DOJ EOIR

TO COVEN OAG

P.02  
*Wm*

## U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals*

Chairman

5107 Leesburg Pike, Suite 2400

Falls Church, Virginia 22041

May 25, 1994

Doris Meissner  
Commissioner  
Immigration and Naturalization Service  
425 Eye Street N.W.  
Washington, D.C. 20536

Re: Matter of Toboso (BIA March 12, 1990)

Dear Commissioner Meissner:

This is in reply to your letter of May 16, 1994, in which you request that the Board of Immigration Appeals designate for publication its March 12, 1990, decision in Matter of Toboso. The Board considered your request under the provisions of 8 C.F.R. § 3.1(g), but voted not to designate this decision for publication.

As you are aware, at present there are only three members of the Board. The decision in Matter of Toboso was rendered by a 3-2 majority of the Board over four years ago in a case in which the Immigration and Naturalization Service appealed from the immigration judge's grant of relief to the applicant under section 243(h) of the Immigration and Nationality Act, but did not address one of the significant issues relevant to the disposition of the appeal. There is nothing to preclude the Service from affirmatively stating in a pending case its present position regarding the important issues raised in cases such as Matter of Toboso and I would strongly encourage the Service do so. It is important to the adjudication process for the Service to address significant issues in a timely and uniform manner on the record. As I am sure you are aware, you have the authority under 8 C.F.R. § 3.1(c) to require certification to the Board of any decision of an immigration judge in a case in which such an issue may be addressed.

Sincerely yours,

Mary Maguire Dunne  
Acting Chairman

JUN-09-1994 16:07 FROM DOJ EOIR

TO COVEN OAG  
U.S. Department of Justice  
Immigration and Naturalization Service

P.03



Office of the Commissioner:

425 Eye Street N.W.  
Washington, D.C. 20536

May 16, 1994

Ms. Mary Maguire Dunne  
Acting Chairperson  
Board of Immigration Appeals  
5107 Leesburg Pike  
Suite 2400  
Falls Church, VA 22041

SUBJECT: Matter of Toboso, A23 220 644 (Houston)

In Matter of Toboso, (BIA March 12, 1990), the Board in a 3-2 decision, recognized a homosexual's claim for withholding of deportation based on membership in a particular social group and upon facts clearly demonstrating the Cuban Government's persecution of homosexuals. I am writing to request that the Toboso decision be published as a precedent decision.

There are now several cases pending before the Board and immigration judges which raise the issue of a homosexual's eligibility for protection under the refugee laws based on fear of persecution on account of membership in a particular social group. I believe there is a need for guidance to immigration judges, the Service and the public with respect to this sensitive aspect of refugee law and that the Toboso decision provides appropriate guidance.

I am aware that the Service, from time to time, has requested publication of decisions when a precedent would be helpful in settling an issue of law. Although I recognize that the lapse of time since the Toboso decision was issued makes this request unusual, I think the benefit of having a precedent decision in this area outweighs the novelty of publishing at this time.

Thank you for your consideration of this request. I would be grateful if you would expedite this matter.

Sincerely,

Doris Meissner  
Commissioner



## § 3.1

8 CFR Ch. I (1-1-93 Edition)

**Subpart A—Board of Immigration Appeals****§ 3.1 General authorities.**

(a)(1) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review. The Board shall exercise so much of the immigration and nationality laws as he may delegate to it. The Board shall consist of a Chairman and four other members. A vacancy, or the absence or unavailability of a Board Member, shall not impair the right of the remaining members to exercise all the powers of the Board, and three members of the Board shall constitute a quorum of the Board. The Director may in his discretion designate immigration judges to act as temporary, additional Board members for whatever time the Director deems necessary. In the event that immigration judges are so designated, two panels of three members each may be designated by the Chairman. Each panel shall be empowered to review cases by majority vote. Each panel may exercise the appropriate authority of the Board as set out in part 3 which is necessary to review cases before it. The permanent Board may, by majority vote on its own motion, reconsider en banc any case decided by a panel. The total number of Board members and temporary, additional Board members may not exceed seven individuals at any time. There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

(2) *Chairman.* The Chairman shall direct, supervise, and establish internal operating procedures and policies of the Board. He shall designate a member of the Board to act as Chairman in his absence or unavailability. The Chairman shall be assisted in the performance of his duties by a Chief Attorney Examiner, who shall be directly responsible to the Chairman. The Chief Attorney Examiner shall serve as an Alternate Board Member when, in the absence or unavailability of a Board Member or Members, his

participation is deemed necessary by the Chairman. Once designated, his participation in a case shall continue to its normal conclusion.

(3) *Board Members.* Board Members shall perform the quasi-judicial function of adjudicating cases coming before the Board.

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

(1) Decisions of Immigration Judges in exclusion cases, as provided in part 236 of this chapter.

(2) Decisions of Immigration Judges in deportation cases, as provided in part 242 of this chapter, except that no appeal shall lie from an order of a Immigration Judge under § 244.1 of this chapter granting voluntary departure within a period of at least 30 days, if the sole ground of appeal is that a greater period of departure time should have been fixed.

(3) Decisions of Immigration Judges on applications for the exercise of the discretionary authority contained in section 212(c) of the Act as provided in part 212 of this chapter.

(4) Decisions involving administrative fines and penalties, including mitigation thereof, as provided in part 280 of this chapter.

(5) Decisions on petitions filed in accordance with section 204 of the act (except petitions to accord preference classifications under section 203(a)(3) or section 203(a)(6) of the act, or a petition on behalf of a child described in section 101(b)(1)(F) of the act), and decisions on requests for revallidation and decisions revoking the approval of such petitions, in accordance with section 205 of the act, as provided in parts 204 and 205, respectively, of this chapter.

(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in part 242 of this chapter.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 246 of this chapter.

## 8 CFR Ch. I (1-1-93 Edition)

## Immigration and Naturalization Service, Justice

## § 3.1

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(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in part 242 of this chapter.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 246 of this chapter.

(9) Decisions of Asylum Officers of the Service on applications for asylum or withholding of deportation filed by alien crewman or stowaways, as provided in § 253.1(f)(4) of this chapter.

(10) Decisions of Immigration Judges relating to Temporary Protected Status as provided in part 240 of this chapter.

(c) *Jurisdiction by certification.* The Commissioner, or any other duly authorized officer of the Service, any Immigration Judge, or the Board may in any case arising under paragraph (b) of this section require certification of such case to the Board.

(d) *Powers of the Board.*—(1) *Generally.* Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case.

(1-a) *Summary dismissal of appeals.*

(i) *Standards.* The Board may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR-26 or Form EOIR 29 (Notices of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

(C) The appeal is from an order that granted the party concerned the relief that had been requested;

(D) The Board is satisfied, from a review of the record, that the appeal lacks an arguable basis in law or fact, or that the appeal is filed for an improper purpose, such as to cause unnecessary delay;

(E) The party concerned indicates on Form EOIR-26 or FORM EOIR-29 that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing; or

(F) The appeal fails to meet essential statutory or regulatory require-

ments or is expressly excluded by statute or regulation.

(ii) *Disciplinary consequences.* The filing by an attorney or representative accredited under 8 CFR 292.2(d) of an appeal which is summarily dismissed under paragraph (d)(1-a)(i) of this section may constitute frivolous behavior under 8 CFR 292.3(a)(15). Summary dismissal of an appeal under paragraph (d)(1-a)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(2) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or Immigration Judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(3) *Rules of practices: Discipline of attorneys and representatives.* The Board shall have authority, with the approval of the Director, EOIR, to prescribe rules governing proceedings before it. It shall also determine whether any organization desiring representation is of a kind described in § 1.1(j) of this chapter, and shall regulate the conduct of attorneys, representatives of organizations, and others who appear in a representative capacity before the Board or the Service or any special Inquiry Officer.

(e) *Oral argument.* When an appeal has been taken, request for oral argument if desired shall be included in the Notice of Appeal. Oral argument shall be heard at the discretion of the Board at such date and time as the Board shall fix. The Service may be represented before the Board by an officer of the Service designated by the Service.

(f) *Service of Board decisions.* The decision of the Board shall be in writing and copies thereof shall be transmitted by the Board to the Service and a copy shall be served upon the alien or party affected as provided in part 292 of this chapter.

(g) *Decisions of the Board as precedents.* Except as they may be modified or overruled by the Board or the Attorney General, decisions of the Board

## § 3.2

## 8 CFR Ch. I (1-1-93 Edition)

shall be binding on all officers and employees of the Service or Immigration Judges in the administration of the Act, and selected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues.

(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases which:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Commissioner requests be referred to the Attorney General for review.

(2) In any case in which the Attorney General reviews the decision of the Board, the decision of the Attorney General shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in paragraph (f) of this section.

[23 FR 9117, Nov. 26, 1958, as amended at 27 FR 96, Jan. 5, 1962; 27 FR 10789, Nov. 6, 1962; 30 FR 14772, Nov. 30, 1965; 36 FR 316, Jan. 9, 1971; 40 FR 37207, Aug. 26, 1975; 44 FR 67960, Nov. 28, 1979; 47 FR 16772, Apr. 20, 1982; 48 FR 8039, Feb. 25, 1983; 52 FR 2943, Jan. 29, 1987; 52 FR 24981, July 2, 1987; 53 FR 15659, May 3, 1988; 55 FR 30680, July 27, 1990; 56 FR 624, Jan. 7, 1991; 57 FR 11570, Apr. 6, 1992]

## § 3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief

was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purpose of this section, any final decision made by the Commissioner prior to the effective date of the Act with respect to any case within the classes of cases enumerated in § 3.1(b) (1), (2), (3), (4), or (5) shall be regarded as a decision of the Board.

[27 FR 96, Jan. 5, 1962]

## § 3.3 Notice of appeal.

(a) A party affected by a decision who is entitled under this chapter to appeal to the Board shall be given notice of his or her right to appeal. An appeal shall be taken by filing Notice of Appeal Form I-290A in triplicate with the Service office or Office of the Immigration Judge having administrative jurisdiction over the case, within the time specified in the governing sections of this chapter. The certification of a case as provided in this part shall not relieve the party affected from compliance with the provisions of this section in the event that he is entitled, and desires, to appeal from an initial decision, nor shall it serve to extend the time specified in the applicable parts of this chapter for the taking of an appeal. Departure from the United States of a person under deportation proceedings prior to the taking of an appeal from a decision in his case shall constitute a waiver of his right to appeal.

(b) *Fees.* Except as otherwise provided in this section, a notice of appeal or a motion filed under this part by any person other than an officer of the Service shall be accompanied by the appropriate fee specified by, and re-

## Memorandum



HQ 1453

Subject Asylum Claims based on  
Coercive Family Planning  
Practices

Date  
MAY 20 1994

To William C. Bryson  
Acting Associate  
Attorney General

From Office of the  
General Counsel

Through: Doris Meissner  
Commissioner

We seek your guidance with respect to asylum claims based on the family planning practices of the PRC. There has long been uncertainty between the INS and the Executive Office for Immigration Review (EOIR) over the proper treatment of asylum claims based on coercive family planning practices. The conflict arises over the effect of a Board of Immigration Appeals (BIA) decision in light of a seemingly contrary Executive Order.

On May 12, 1989, the BIA decided in Matter of Chang, Int. Dec. 3107 (BIA 1989), that the "one couple, one child policy" of the Chinese Government is not on its face persecutive and that it does not give rise to a well-founded fear of persecution on account of one of the five reasons enumerated in the Immigration and Nationality Act (Act) for purposes of determining refugee status:

We cannot find that implementation of the "one couple, one child" policy in and of itself, even to the extent that involuntary sterilizations occur, is persecution or creates a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."

Int. Dec. 3107 at 11. On January 29, 1990, the Attorney General published an interim regulation, 55 Fed. Reg. 2803, which provided that an applicant who establishes a well-founded fear of being forced to undergo a sterilization or abortion, or who would be persecuted for a failure to do so, may be granted asylum on the basis of a well-founded fear of persecution on account of political opinion. On April 11, 1990, after having pocket-vetoed the Emergency Chinese Immigration Relief Act, H.R. 2712,<sup>1</sup> the

<sup>1</sup> The House of Representatives voted to override the veto, but the Senate failed by five votes to do so. Several Senators  
(continued...)

President issued Executive Order 12711, which directed the Attorney General and the Secretary of State to afford protection to certain Chinese nationals in the United States and to:

provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization as implemented by the Attorney General's regulation effective January 29, 1990.

55 Fed. Reg. 13897. On July 27, 1990, the Attorney General published a final rule with respect to asylum processing that recodified 8 C.F.R. section 208. 55 Fed. Reg. 30680. The provision governing coercive family planning claims was not included in the final rule and no mention of it was made in the explanatory comments accompanying the rule.

Immigration Judges have generally continued to follow Matter of Chang, holding that persons making such claims are not entitled to asylum. The INS Office of the General Counsel has maintained that INS's obligations with respect to such claims stem from Executive Order 12711 and earlier related Department of Justice directives. In November 1991, INS General Counsel Grover Joseph Rees III directed INS trial attorneys to assert the position before the immigration courts and the BIA that the Executive Order, and not Chang, controlled the disposition of family planning claims. Similar guidance was provided to the INS's Asylum Officers. That direction has not been rescinded. In addition, the Office of the General Counsel asked the BIA to reopen and terminate a number of deportation cases in which asylum had been denied on the basis of Chang. Those requests for termination remain pending with the BIA.

In June, 1993, the BIA certified two cases to the Attorney General -- Matter of Chu, A71 824 281 (BIA June 7, 1993), and Matter of Tzun, A71 824 320 (BIA June 7, 1993) -- and requested that the conflict between the position of the Board and that of the INS on such cases be resolved. The Office of the General Counsel filed a brief in those cases asserting (1) that the cases could be resolved without reaching the Chang issue and (2) that the Executive Order should control over Chang. On December 7th, the Attorney General issued a memorandum revoking her order granting review of the two cases. Her memorandum was based upon a determination that the two cases "do not require a

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<sup>1</sup>(...continued)

who voted to uphold the veto noted that they were doing so in reliance on the President's assurances that administrative action would be taken to ensure that Chang was reversed.

determination that one or the other of these standards [i.e., that of Chang or that of the Executive Order] is lawful and binding." The Attorney General's December 7th memorandum does not address the effect of the Executive Order.

The following day the Board of Immigration Appeals issued Matter of G-, Int. Dec. 3215 (BIA December 8, 1993), its first published decision on this issue since Chang. In Matter of G- the Board followed Chang to deny an asylum claim based upon coercive population control practices. The BIA explicitly rejected the applicant's argument that the Executive Order supported a different conclusion:

... while Executive Order No. 12,711 directs the Secretary of State and the Attorney General to give enhanced consideration to the asylum and withholding claims of individuals who express a fear of persecution related to a policy of forced abortion or coerced sterilization, the Attorney General has never directed this Board to evaluate these claims other than in accordance with the July 27, 1990, regulations.

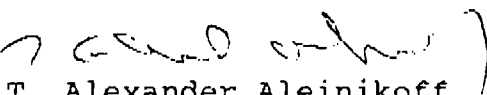
Int. Dec. 3215 at 15. (emphasis in original). Matter of G- represents an exercise by the Board of the power delegated to it by the Attorney General to issue a published precedent decision. That decision would normally be binding on employees of the Service. See 8 C.F.R. § 3.1(g).

Several months have passed since the BIA decided Matter of G-, and a number of circumstances have delayed our resolution of this issue. First, the Administration has undertaken a review of its policy with respect to coercive family planning practices and, in particular, is looking at what, if any, protection should be afforded to those fleeing persecution on that basis. That review is continuing. Second, in March, Senators Helms and DeConcini added an amendment to the State Department Authorization bill that would have afforded protection from return, outside of the asylum context, to those persons who established a fear of serious harm for failing to comply with coercive family planning directives. That amendment was recently dropped from the bill and was not included in the legislation just adopted.

Finally, the BIA's interpretation in Chang has been at issue in a number of habeas corpus actions brought by persons who have had their asylum claims denied by the BIA. In those cases the Civil Division has argued that Chang is a reasonable interpretation of asylum law and that the BIA is bound by the July 27, 1990 regulation, not the Executive Order, in the absence of specific direction from the Attorney General, to whom the Executive Order was directed. Three decisions have now been rendered in Federal District Court for the Eastern District of

Virginia. In Guo Chun Di v. Carroll, CV 93-1377-A (E.D. VA, Jan. 14, 1994) the court concluded (after a lengthy review of the bidding on this issue) that the "cacophonous administrative record merits no judicial deference..." The court rejected Chang and found the petitioner statutorily eligible for asylum and remanded the case to the BIA for an exercise of discretion. However, in two recent decisions, Chen Zhou Chai v. Carroll, CV 94-0037-A (E.D. VA, May 4, 1994) and Li Zhi Guan v. Carroll, CV 94-0410-A (E.D. VA, May 13, 1994), the district court agreed with the position taken by the Civil Division, holding that the BIA decisions were supported by Matter of Chang which the court found to be "a reasonable interpretation of the laws governing asylum in the United States, and which is controlling in this case." The Court concluded, therefore, that not only was the Board's interpretation in Matter of Chang entitled to deference, but that Chang is "legally correct, [and] it is consistent with the Supreme Court's decision in INS v. Elias-Zacarias, 112 S. Ct. 812 (1992)."

We propose to modify the INS position to be consistent with the BIA decision in Matter of G- by revising the guidance to our trial attorneys and asylum officers and withdrawing the motions to terminate the cases currently pending at the BIA. However, given the continuing policy review by the Administration and the uncertain impact of the Executive Order, which has not been withdrawn, we bring this matter to your attention.

  
T. Alexander Aleinikoff  
General Counsel

Attachments



U. S. Department of Justice

The Deputy Attorney General

Washington, D.C. 20530

## FACSIMILE COVER SHEET

DATE:

June 10, 1994

TO:

Joe Klein

Deputy Counsel to the President

FAX NUMBER:

456-6299

PHONE NUMBER:

456-6611

FROM:

Janice L. Garellick

FAX NUMBER: 202-514-0467

PHONE NUMBER:

514-2101

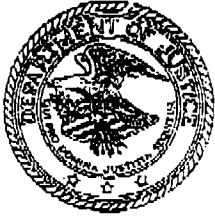
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Office of the Attorney General  
Washington, D. C. 20530

June 10, 1994

MEMORANDUM FOR MARY MAGUIRE DUNNE

FROM: THE ATTORNEY GENERAL

SUBJECT: Fidel Armando Toboso-Alfonso, A23 220 644

Pursuant to the provisions of 8 CFR § 3.1(h)(1)(i), I hereby direct that the Board of Immigration Appeals refer to me for review its decision in re: Fidel Armando Toboso-Alfonso, A23 220 644, dated March 12, 1990.

JUN-09-1994 16:07 FROM DOJ EOIR

TO COVEN DAG

P.02  
*Werner*

## U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

5107 Leesburg Pike, Suite 2400

Falls Church, Virginia 22041

May 25, 1994

Doris Meissner  
Commissioner  
Immigration and Naturalization Service  
425 Eye Street N.W.  
Washington, D.C. 20536

Re: Matter of Toboso (BIA March 12, 1990)

Dear Commissioner Meissner:

This is in reply to your letter of May 16, 1994, in which you request that the Board of Immigration Appeals designate for publication its March 12, 1990, decision in Matter of Toboso. The Board considered your request under the provisions of 8 C.F.R. § 3.1(g), but voted not to designate this decision for publication.

As you are aware, at present there are only three members of the Board. The decision in Matter of Toboso was rendered by a 3-2 majority of the Board over four years ago in a case in which the Immigration and Naturalization Service appealed from the immigration judge's grant of relief to the applicant under section 243(h) of the Immigration and Nationality Act, but did not address one of the significant issues relevant to the disposition of the appeal. There is nothing to preclude the Service from affirmatively stating in a pending case its present position regarding the important issues raised in cases such as Matter of Toboso and I would strongly encourage the Service do so. It is important to the adjudication process for the Service to address significant issues in a timely and uniform manner on the record. As I am sure you are aware, you have the authority under 8 C.F.R. § 3.1(c) to require certification to the Board of any decision of an immigration judge in a case in which such an issue may be addressed.

Sincerely yours,

Mary Maguire Dunne  
Acting Chairman

JUN-09-1994 16:07 FROM DOJ EOIR

TO COVEN OAG  
U.S. Department of Justice  
Immigration and Naturalization Service

P.03



Office of the Commissioner

425 Eye Street N.W.  
Washington, D.C. 20536

May 16, 1994

Ms. Mary Maguire Dunne  
Acting Chairperson  
Board of Immigration Appeals  
5107 Leesburg Pike  
Suite 2400  
Falls Church, VA 22041

SUBJECT: Matter of Toboso, A23 220 644 (Houston)

In Matter of Toboso, (BIA March 12, 1990), the Board in a 3-2 decision, recognized a homosexual's claim for withholding of deportation based on membership in a particular social group and upon facts clearly demonstrating the Cuban Government's persecution of homosexuals. I am writing to request that the Toboso decision be published as a precedent decision.

There are now several cases pending before the Board and immigration judges which raise the issue of a homosexual's eligibility for protection under the refugee laws based on fear of persecution on account of membership in a particular social group. I believe there is a need for guidance to immigration judges, the Service and the public with respect to this sensitive aspect of refugee law and that the Toboso decision provides appropriate guidance.

I am aware that the Service, from time to time, has requested publication of decisions when a precedent would be helpful in settling an issue of law. Although I recognize that the lapse of time since the Toboso decision was issued makes this request unusual, I think the benefit of having a precedent decision in this area outweighs the novelty of publishing at this time.

Thank you for your consideration of this request. I would be grateful if you would expedite this matter.

Sincerely,

Doris Meissner  
Commissioner



## § 3.1

8 CFR Ch. I (1-1-93 Edition)

**Subpart A—Board of Immigration Appeals****§ 3.1 General authorities.**

(a)(1) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review. The Board shall exercise so much of the immigration and nationality laws as he may delegate to it. The Board shall consist of a Chairman and four other members. A vacancy, or the absence or unavailability of a Board Member, shall not impair the right of the remaining members to exercise all the powers of the Board, and three members of the Board shall constitute a quorum of the Board. The Director may in his discretion designate immigration judges to act as temporary, additional Board members for whatever time the Director deems necessary. In the event that immigration judges are so designated, two panels of three members each may be designated by the Chairman. Each panel shall be empowered to review cases by majority vote. Each panel may exercise the appropriate authority of the Board as set out in part 3 which is necessary to review cases before it. The permanent Board may, by majority vote on its own motion, reconsider en banc any case decided by a panel. The total number of Board members and temporary, additional Board members may not exceed seven individuals at any time. There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

(2) *Chairman.* The Chairman shall direct, supervise, and establish internal operating procedures and policies of the Board. He shall designate a member of the Board to act as Chairman in his absence or unavailability. The Chairman shall be assisted in the performance of his duties by a Chief Attorney Examiner, who shall be directly responsible to the Chairman. The Chief Attorney Examiner shall serve as an Alternate Board Member when, in the absence or unavailability of a Board Member or Members, his

participation is deemed necessary by the Chairman. Once designated, his participation in a case shall continue to its normal conclusion.

(3) *Board Members.* Board Members shall perform the quasi-judicial function of adjudicating cases coming before the Board.

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

(1) Decisions of Immigration Judges in exclusion cases, as provided in part 236 of this chapter.

(2) Decisions of Immigration Judges in deportation cases, as provided in part 242 of this chapter, except that no appeal shall lie from an order of a Immigration Judge under § 244.1 of this chapter granting voluntary departure within a period of at least 30 days, if the sole ground of appeal is that a greater period of departure time should have been fixed.

(3) Decisions of Immigration Judges on applications for the exercise of the discretionary authority contained in section 212(c) of the Act as provided in part 212 of this chapter.

(4) Decisions involving administrative fines and penalties, including mitigation thereof, as provided in part 280 of this chapter.

(5) Decisions on petitions filed in accordance with section 204 of the act (except petitions to accord preference classifications under section 203(a)(3) or section 203(a)(6) of the act, or a petition on behalf of a child described in section 101(b)(1)(F) of the act), and decisions on requests for revocation and decisions revoking the approval of such petitions, in accordance with section 205 of the act, as provided in parts 204 and 205, respectively, of this chapter.

(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in part 242 of this chapter.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 246 of this chapter.