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Folder Title: Gays in the Military				
Staff Office-Individual: Legal Advisor-Derosa, Mary				
Original OA/ID Number: 3407				
Row: 39	Section: 5	Shelf: 7	Position: 1	Stack: V

Baker, James E.

From: Baker, James E.
Sent: Tuesday, January 20, 1998 8:41 PM
To: @NSA - Natl Security Advisor
Cc: Bell, Robert G.; Bouchard, Joseph F.; @LEGAL - Legal Advisor
Subject: McVeigh Don't Ask Don't Tell [UNCLASSIFIED]

DELIBERATIVE

Rob: Please Pass to Sandy in the event he would like to provide comments back to John. Thank you.

Sandy:

At a meeting with Don Kerrick today on the McVeigh case, John Podesta asked if you had any views on the case.

Status of Case: The Navy currently plans to discharge McVeigh on Friday. There is a hearing tomorrow before Judge Sporkin on McVeigh's request for a TRO. Defense anticipates that Sporkin will grant the TRO based on his earlier rulings in other "Don't Ask, Don't Tell" cases. In the event the district court grants a TRO, the case will eventually proceed to a hearing, etc. and will likely continue on for a number of years. The underlying facts, as presented in an earlier e-mail, are below.

Recommendation: (a) **Substance:** Joe Bouchard and I not believe the NSC is in a position to comment on the substantive merits of the case based on newspaper reports and DOD summaries, particularly since this case raises troubling and particularly difficult privacy issues; I have a clear sense on whether McVeigh "told", but not on the possible impact of the Electronic Privacy Act (et al) on this case. (b) **Process:** With that in mind, we recommend against the White House directing a specific action by Defense or publicly commenting on this case (including while the district court is contemplating a TRO, which it is expected to grant). While reaffirming the President's policy, in past instances, the NSC has declined to comment on specific cases.

(Bob was at a diplomatic reception; Joe is confident this e-mail reflects Bob's views.)

Note: Whether or not this information has appeared in the newspaper, it is covered by the Privacy Act, and should not be divulged outside the White House without legal concurrence.

Background

The issue arose when McVeigh e-mailed the spouse of a Navy employee from his home computer regarding a charitable project involving toys for children. The message inbox indicated a message with the alias "Boysrch" and gave as a subject "Hey." The recipient did not know who the message was from and was concerned about the nature of the incoming message. She called up the computer profile of "Boysrch." The Profile included the following information:

Name: "Tim";
marital status: "gay";
Hobbies: "Driving, boy watching and collecting pics of other young studs. Send me some and I will reply."
Occupation: "military"

When the recipient opened the message the text referred to the upcoming charitable project.

The recipient gave the profile sheet and e-mail to her Navy spouse who provided them to his commander and up the chain of command. A paralegal of the Staff Judge Advocate called AOL to confirm the identity of the sender. AOL provided the name and address of the subscriber: McVeigh and Honolulu. A board was subsequently convened. McVeigh in an unsworn statement denied he was gay and stated that he chose that profile because he had been told it was a good way to meet girls.

He is scheduled to receive an honorable discharge Thursday night. In the interim he may seek a TRO. Defense/GC also reports that staff attorneys at Justice have informally advised that they view this case as consistent with the President's policy. I do not purport to have expertise re: "don't ask don't tell." However, I sense from the facts that the service member did "tell" in that he identified his marital status as "gay" in a public document that also listed his occupation as "military."

The case also raises questions regarding the applicability of the Electronic Privacy Act, which I choose not to focus on here. These questions are particularly relevant for AOL.

File: _____

Don't Ask Don't
Tell

on Defense

Let me know

when please

er of an armed force, other than a person
e of section 6(d) (1) of the Military Selective
serve in the armed forces for a total initial
than eight years, as provided in regulations
the armed forces under his jurisdiction and
C Guard when it is not operating as a
s sooner discharged under such regulations
such vice that is not active duty or that is
in a reserve component.

ne for text of (b)]

, § 1022(b) (1), 97 Stat. 670.)

STATUTORY NOTES

Effective Date of 1983 Amendment

Section 1022(b) (2) of Pub.L. 98-94 provided that: "The amendment made by paragraph (1) [amending this section] shall apply only with respect to persons who enter the Armed Forces 60 or more days after the date of the enactment of this Act [Sept. 24, 1983]."

Legislative History

For legislative history and purpose of Pub.L. 98-94, see 1983 U.S. Code Cong. and Adm. News, p. 1081.

REFERENCES

Retention of reserve commissioned officer, other than commissioned warrant officer, until completion of service required by this section, see 10 USCA § 12645.

DECISIONS

forces can only be honorably terminated by a completion of the service obligation or a valid discharge. *Wickham v. Hall*, C.A.5 (Tex.) 1983, 706 F.2d 713, rehearing denied 712 F.2d 1416.

A, Title XVI, § 1661(a)(3)(A), Oct. 5, 1994,

STATUTORY NOTES

Effective Date of Repeal

Repeal effective Dec. 1, 1994, see section 1691(a) of Pub.L. 103-337, set out as a note under section 10001 of this title.

for certain flight crew positions

gation of any member who successfully com-
ot shall be 8 years, if the member is trained to
e member is trained to fly any other type of

(b) **Navigators and naval flight officers.**—The minimum service obligation of any member who successfully completes training in the armed forces as a navigator or naval flight officer shall be 6 years.

(c) **Definition.**—In this section, the term "service obligation" means the period of active duty or, in the case of a member of a reserve component who completed flight training in an active duty for training status as a member of a reserve component, the period of service in an active status in the Selected Reserve required to be served after—

- (1) completion of undergraduate pilot training, in the case of training as a pilot;
- (2) completion of undergraduate navigator training, in the case of training as a navigator; or
- (3) completion of undergraduate training as a naval flight officer, in the case of training as a naval flight officer.

(Added Pub.L. 101-189, Div. A, Title VI, § 634(a)(1), Nov. 29, 1989, 103 Stat. 1454, and amended Pub.L. 101-510, Div. A, Title XIV, § 1484(k)(3), Nov. 5, 1990, 104 Stat. 1719; Pub.L. 102-484, Div. A, Title V, § 506(a), Oct. 23, 1992, 106 Stat. 2404.)

HISTORICAL AND STATUTORY NOTES

1992 Amendments

Subsec. (a). Pub.L. 102-484, Title V, § 506(a)(1), substituted "service obligation" for "active duty obligation".

Subsec. (b). Pub.L. 102-484, Title V, § 506(a)(1), substituted "service obligation" for "active duty obligation".

Subsec. (c). Pub.L. 102-484, Title V, § 506(a)(2), substituted provisions defining service obligation, for provisions defining active duty obligation.

1990 Amendment

Subsec. (a). Pub.L. 101-510, § 1484(k)(3)(A), substituted "or" for "and".

Subsec. (c). Pub.L. 101-510, § 1484(k)(3)(B)(i), (ii), substituted: in pars. (1) and (2), "pilot training," for "pilot training" and "navigator training," for "navigator training"; and in par. (3), "naval flight officer, in the case" for "naval flight officer in the case", respectively.

Effective Date of 1992 Amendment

Section 506(b) of Pub.L. 102-484 provided that: "The amendments made by subsection (a) [amending this section] shall take effect as of November 29, 1989."

Effective Date

Div. A, Title VI, Section 634(b) of Pub.L. 101-189 provided that:

"(1) Except as provided in paragraphs (2) and (3), section 653 of title 10, United States Code, as added by subsection (a)(1) [this section], shall apply to persons who begin under-

graduate pilot training, undergraduate navigator training, or undergraduate naval flight officer training, as the case may be, after September 30, 1990.

"(2) Such section shall apply to persons who graduate from the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the Coast Guard Academy after December 31, 1991, and to persons who satisfactorily complete the academic and military requirements of the Senior Reserve Officers' Training Corps program (provided for in chapter 103 of title 10, United States Code [section 2101 et seq. of this title]) after December 31, 1991.

"(3) The minimum service requirements provided for such section shall not apply in the case of any person who entered into an agreement with the Secretary concerned before October 1, 1990, and who is obligated under the terms of such agreement to serve on active duty for a period less than the applicable period specified in section 653 of such title.

"(4) For purposes of this subsection, the term 'Secretary concerned' has the meaning given that term in section 101(8) of title 10, United States Code [section 101(8) of this title]."

Legislative History

For legislative history and purpose of Pub.L. 101-189, see 1989 U.S. Code Cong. and Adm. News, p. 839. See, also, Pub.L. 101-510, 1990 U.S. Code Cong. and Adm. News, p. 2931; Pub.L. 102-484, 1992 U.S. Code Cong. and Adm. News, p. 1636.

LIBRARY REFERENCES

Armed Services ⇐6, 15.
C.J.S. Armed Services §§ 5, 25 to 33.
WESTLAW Topic No. 34.

§ 654. Policy concerning homosexuality in the armed forces

(a) **Findings.**—Congress makes the following findings:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) such conduct is in the interest of the national defense;

(B) such conduct is in the interest of the national defense;

(C) such conduct is in the interest of the national defense;

(D) under the circumstances, the member's presence in the armed forces is proper;

(E) the member's conduct is in the interest of the national defense.

(2) That the member's conduct is in the interest of the national defense, in accordance with procedures set forth in such regulations, that the member has demonstrated that the member has a propensity to engage in such conduct.

(3) That the member's conduct is in the interest of the national defense, in accordance with procedures set forth in such regulations, that the member has a propensity to engage in such conduct.

(c) Entry standards.—The standards for entry into the armed forces shall reflect the policies set forth in such regulations.

(2) The documents of the member of the armed forces shall be in accordance with the policies set forth in such regulations.

(d) Required briefing.—Upon entry into the armed forces, the member shall be briefed on the title (article 137 of the Uniform Code of Military Justice) and the explanation of the application of the standards of conduct of the armed forces, including the standards of conduct of the armed forces, in accordance with the policies set forth in such regulations.

(e) Rule of construction.—The standards of conduct of the armed forces shall be applied in such a manner that a member of the armed forces shall be separated from the armed forces when a determination is made by the Secretary of Defense that the member's conduct is in the interest of the national defense.

(1) the member's conduct is in the interest of the national defense, in accordance with procedures set forth in such regulations, that the member has a propensity to engage in such conduct.

(2) separation of the member from the armed forces.

(f) Definitions.—In this section:

(1) The term "homosexual acts" means any act of sodomy, whether or not the act is consensual, or any act of sexual intercourse between two persons of the same sex.

(2) The term "propensity to engage in homosexual acts" means a propensity to engage in homosexual acts.

(3) The term "unacceptable risk" means a risk that is unacceptable to the Secretary of Defense.

(A) any act of sodomy, whether or not the act is consensual, or any act of sexual intercourse between two persons of the same sex.

(B) any act of sodomy, whether or not the act is consensual, or any act of sexual intercourse between two persons of the same sex.

graph (A).

(Added Pub.L. 103-160,

Regulations; Savings Clause; Implementation of Policy Against Homosexuality in the Armed Forces; Section 571(b)-(d) of the Uniform Code of Military Justice.

"(b) Regulations.—The regulations shall be in effect after the date of enactment of this Act.

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

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

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

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

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

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

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

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

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

(d) **Required briefings.**—The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

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

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

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

(f) **Definitions.**—In this section:

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

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

(3) The term "homosexual act" means—

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

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

(Added Pub.L. 103-160, Div. A, Title V, § 571(a)(1), Nov. 30, 1993, 107 Stat. 1670.)

HISTORICAL AND STATUTORY NOTES

Regulations; Savings Provision; Sense of Congress; Implementation of Discriminatory Policy Against Homosexual Members of the Armed Forces

Section 571(b)-(d) of Pub.L. 103-160 provided that:

"(b) **Regulations.**—Not later than 90 days after the date of enactment of this Act (Nov. 30,

1993], the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a) [this section].

"(c) **Savings provision.**—Nothing in this section [probably means this note] or section 654 of title 10, United States Code, as added by subsec-

DRAFT

STATEMENT BY THE SECRETARY OF DEFENSE

I am concerned by recent press reports that raise questions about the [fair and even-handed] implementation of the "don't ask, don't tell policy." While the facts and circumstances of each [of the individual] cases will have to be litigated and determined in the appropriate administrative hearings and/or in the courts, I want to make sure that it is clear to commanding officers and all military personnel what the appropriate procedures are in these cases. I have therefore instructed the Under Secretary for Personnel and Readiness, in connection with our previously announced review of the implementation of this policy, to within thirty days issue guidelines to all personnel detailing the specific procedures authorized in such matters. [It is my hope that] these guidelines will clarify existing policy to ensure that the legitimate privacy rights of service members will be respected and maintained. In developing these guidelines, we will consult with both military personnel presently responsible for enforcing the policy and with outside groups that monitor compliance.

###

DOO credit for effort
 under no obligation
 refer to review last year
 request.

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Sent: Tuesday, January 20, 1998 8:41 PM
To: @NSA - Natl Security Advisor
Cc: Bell, Robert G.; Bouchard, Joseph F.; @LEGAL - Legal Advisor
Subject: McVeigh Don't Ask Don't Tell [UNCLASSIFIED]

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Status of Case: The Navy currently plans to discharge McVeigh on Friday. There is a hearing tomorrow before Judge Sporkin on McVeigh's request for a TRO. Defense anticipates that Sporkin will grant the TRO based on his earlier rulings in other "Don't Ask, Don't Tell" cases. In the event the district court grants a TRO, the case will eventually proceed to a hearing, etc. and will likely continue on for a number of years. The underlying facts, as presented in an earlier e-mail, are below.

Recommendation: (a) **Substance:** Joe Bouchard and I not believe the NSC is in a position to comment on the substantive merits of the case based on newspaper reports and DOD summaries, particularly since this case raises troubling and particularly difficult privacy issues; I have a clear sense on whether McVeigh "told", but not on the possible impact of the Electronic Privacy Act (et al) on this case. (b) **Process:** With that in mind, we recommend against the White House directing a specific action by Defense or publicly commenting on this case (including while the district court is contemplating a TRO, which it is expected to grant). While reaffirming the President's policy, in past instances, the NSC has declined to comment on specific cases.

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Background

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The recipient gave the profile sheet and e-mail to her Navy spouse who provided them to his commander and up the chain of command. A paralegal of the Staff Judge Advocate called AOL to confirm the identity of the sender. AOL provided the name and address of the subscriber: McVeigh and Honolulu. A board was subsequently convened. McVeigh in an unsworn statement denied he was gay and stated that he chose that profile because he had been told it was a good way to meet girls.

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The case also raises questions regarding the applicability of the Electronic Privacy Act, which I choose not to focus on here. These questions are particularly relevant for AOL.



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600



TELECOPIER MEMORANDUM

DATE: 21 JAN 98

To: MARY DEROSA **FAX:** 202 456-9110

FROM: B. Wiegman N

We are submitting 34 pages, including this Telecopier Memorandum.

If you do not receive all pages, please call SSG WRIGHT at (703) 695-6710 or (703) 697-2714.

REMARKS:

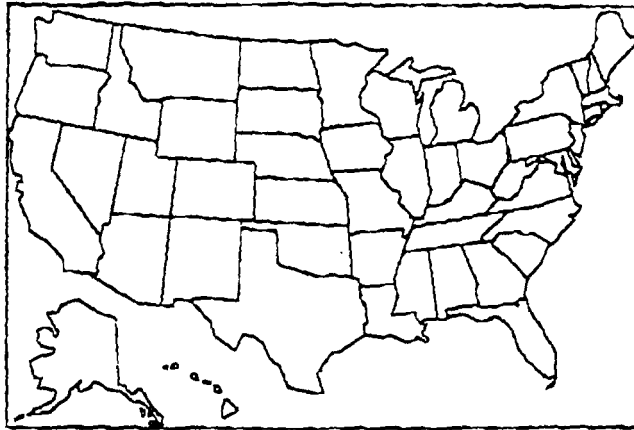




Civil Division

Washington, D.C. 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER SHEET



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, Secretary of
Defense, et al.,

Defendants.

No. 1:98cv00116 (SS)

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTIONS FOR A
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION

PRELIMINARY STATEMENT

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

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

THE STATUTORY AND REGULATORY SCHEME

A. § 654. § 654 is the statutory "policy concerning homosexuality and the armed forces" that Congress enacted in November 1993, "[a]fter lengthy deliberations." Thomasson v. Perry, 80 F.3d 915, 919 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 358 (1996). Among other things, §654 provides that a service member "shall be separated from the armed forces" if he or she is found to have "stated that he or she is a homosexual or bisexual, or words to that effect," unless a further finding is made "that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Id. § 654(b)(2).

Directives implementing § 654 were issued by the Department of Defense ("DOD") in December 1993. Thomasson, 80 F.3d at 920 (referring, e.g., to DOD Dir. 1332.14 (Dec. 21, 1993) (enlisted personnel)). Rules incorporating the substantive provisions of the DOD directives were issued thereafter by the individual military services. For Navy enlisted personnel, the applicable rules are set forth in Naval Military Personnel Manual ("MILPERSMAN") ¶ 3630400 (copy submitted as Admin. Rec. ("AR") 113-19).^{1/} Throughout this case, the navy has referred to the

^{1/}The AR is submitted as an attachment to the Miller Declaration. References in this memorandum to the AR are to the sequential page numbers stamped thereon by defendants.

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

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

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

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

Id. ¶ (4)(c)(3).

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

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

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

Id. §(4)(b)(4)(b).

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

Curious about the use of the screen name "Boysrch," Ms. Hajny utilized an option available to AOL users and looked in the "member profile directory" to see the "member profile" for the person who had sent the message.³ See AR 13, 66 86; Compl.

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

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

³Testimony at the administrative hearing indicated that member profiles are available to any AOL subscriber. See AR 15.

USC-DBL

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

AR 111.

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

I. PLAINTIFF IS UNLIKELY TO SUCCEED ON THE MERITS.

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

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

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

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

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

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

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

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

II of ECPA is entitled to various forms of relief. However, "[t]he remedies and sanctions described in [Title II] are the only judicial remedies and sanctions for nonconstitutional violations of [Title II]." 18 U.S.C. § 2708. Title II of ECPA does not contain the explicit remedy for the suppression of information that Congress provided in Title I of ECPA, see 18 U.S.C. § 2515.⁴

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

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

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

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

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

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

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

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

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

Id. at 390.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiff's argument is without merit. The definition of "commander" referred to in § 3630400(4)(a)(1) encompasses not only the commander of the CHICAGO, but any and all of his superiors. The definition states: "[A]s used in this article * * * * Commander [means] a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a 'command.'" MILPERSMAN § 3630400(2)(i).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 91-92.

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

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

754 F.2d at 1518.

Turning to the case before it, the court said:

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

file: gays in the military

MEMORANDUM FOR ALAN KRECZKO

FROM: KEITH HAHN *CH*

SUBJECT: Letter to the President from Senator Boxer Re:
Homosexuals in the Military

Alan, before I draft a response to this letter from Senator Boxer, can you provide some insight into the merits of her description of Justice's brief on the Meinhold case. If what she says is true, Justice has probably overstated the President's announcement and Aspin's subsequent implementing directive. How can we fix this? What should we tell Boxer?

I would also appreciate your thoughts on the second order question -- whether the President should actively oppose congressional efforts to codify the ban. Can Congress legislate this? If it legislates something different than the President's program, what steps can/should the President pursue?

Any help on this one will be greatly appreciated.

- DoD -

enforce policy
see Aspin - adhere very closely to
new policy

- legislation -

what new position
on the legis.
pres had

a brief - fold into another P

in respect to M. brief, DOJ
deferring const. of former policy

no debate. directionally characteristic
but!

more constructive
human policy

DOJ

Aspin knows
I felt that
changes to
make

I disagreed w/ former policy -

very glad Aspin -
has it work DO

intensive process/review

NATIONAL SECURITY COUNCIL

03-Sep-1993 07:55 EDT

UNCLASSIFIED

MEMORANDUM FOR:

Neal S. Wolin

(WOLIN)

FROM:

Keith D. Hahn
(HAHN)

SUBJECT:

Boxer Letter

RE: Boxer letter on Meinhold case -- I sure would appreciate your assistance on drafting a response that addresses the specifics of her letter.

r/Keith