

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Clifford Sloan to Bruce Lindsey re: insert (2 pages)	07/16/1993	P5 ~~650~~ 651✓
002. memo	Stuart Schiffer to Webster Hubbell re: Homosexuals in the Military (9 pages)	06/29/1993	P5 652✓
003. memo	Bernard Nussbaum and Clifford Sloan to President William J. Clinton re: Office of Personnel Management's Anti-discrimination Memorandum (2 pages)	07/15/1993	P5 653✓
004. memo	Stuart Schiffer to Webster Hubbell re: Homosexuals in the Military (9 pages)	06/29/1993	P5 654 dup of 652
005. memo	H. Jefferson Powell to the Associate Attorney General re: Policy Regarding Homosexuals in the Military (10 pages)	06/29/1993	P5 655 - pulled incomp.
006. memo	Drew S. Days, III to the Associate Attorney General re: Policy on Homosexuals in the Military (5 pages)	06/29/1993	P5 656
007. memo	Stuart Schiffer to Webster Hubbell re: Meinhold v. Department of Defense (2 pages)	06/30/1993	P5 657

COLLECTION:

Clinton Presidential Records
Counsel's Office
Bruce Lindsey
OA/Box Number: 24795

FOLDER TITLE:

Gays in the Military [1]

Kelly Hendren
2006-0227-F
kh577

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

RR. Document will be reviewed upon request.

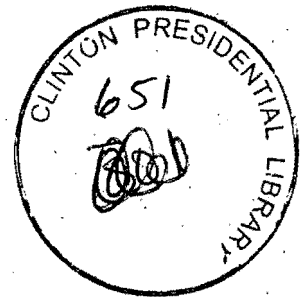
Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

CLINTON LIBRARY PHOTOCOPY

THE WHITE HOUSE
WASHINGTON

July 16, 1993



MEMORANDUM FOR BRUCE LINDSEY

FROM: CLIFFORD M. SLOAN *CMS*
ASSOCIATE COUNSEL TO THE PRESIDENT

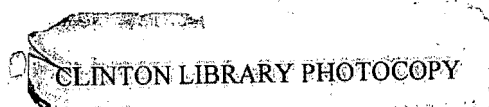
1. A possible insert to the fact sheet regarding the rebuttable presumption would be:

A statement by an individual that he or she is a homosexual or a bisexual creates a rebuttable presumption that the individual has a propensity to engage in homosexual conduct. If the individual presents credible evidence that he or she will not engage in homosexual conduct, the presumption is rebutted. Credible evidence to rebut the presumption includes a credible statement by the individual that, although he or she is a homosexual or bisexual, he or she will not engage in homosexual conduct during the term of his or her military service. If the presumption created by a statement about homosexuality or bisexuality is rebutted, the military may take action against the individual for homosexual conduct only if the military establishes that the evidence, taken as a whole, proves that the individual has engaged in homosexual conduct.

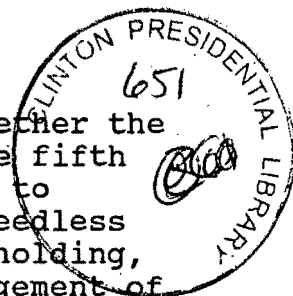
2. Conforming changes about the impact of statements will have to be made in the sections on (1) "Discharge Policy," (2) "Investigations" (1st and 4th paragraphs), and (3) "The Prohibition of Statements" (the paragraph regarding the finding of federal courts).

3. Two other points that occur to me on review of the policy and memorandum:

a. With respect to the statement at the end of the memorandum that "[a]ny changes to existing policies shall be prospective only," I wonder if it would not be preferable to have pending cases (administrative and court) reprocessed under the new policy. As we know, several cases are percolating in the courts of appeals and district courts, and government briefs are due very soon. Under a prospective application, we will be busily defending the old policy in court in the next several weeks even as we prepare to implement the new policy. Perhaps it would be better to focus all of the government's energy on a careful implementation and defense of the new policy. Indeed, a vigorous defense of the old policy within a week or two of the announcement of the new policy might be viewed as support for a charge that the new policy is only cosmetic.



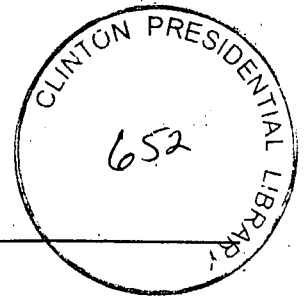
b. With respect to the memorandum, I also wonder whether the "e.g., handholding, kissing" can be deleted from the fifth paragraph. It seems unnecessary, and it may appear to demean the tone of the policy. It also may raise needless controversies about the circumstances in which handholding, for example, could be seen as far from an acknowledgement of homosexuality (e.g., clasping hands after a high five). (A corresponding change would have to be made in the first paragraph of the "Permitted Activities" section of the fact sheet).





U.S. Department of Justice

Civil Division



Office of the Assistant Attorney General

Washington, D.C. 20530

June 29, 1993

MEMORANDUM

TO: Webster L. Hubbell
Associate Attorney General

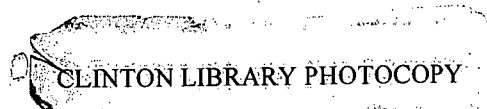
FROM: *JS* Stuart E. Schiffer
Acting Assistant Attorney General

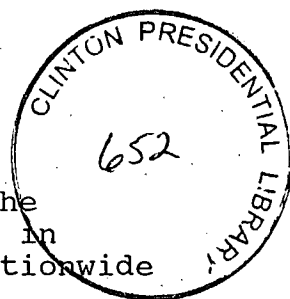
SUBJ: Litigation Implications of Potential Changes in Policy
Regarding Homosexuals in the Military

We have been asked to comment on the litigation risks of the policy option concerning homosexuals in the military currently being drafted by the Defense Department's military working group. We understand the basic outlines of that option to be: (1) sexual orientation is generally a private matter and the military will not make inquiries about a person's sexual orientation alone; (2) a person may be discharged for engaging in homosexual acts, entering into (or attempting to enter into) a homosexual marriage, or making a statement that he or she has engaged in homosexual acts or is a homosexual; and (3) sexual orientation is not a bar to service unless manifested by prohibited homosexual acts, homosexual marriage or attempted marriage, or statements that an individual has engaged in homosexual acts or is a homosexual.

It is our conclusion¹ that if certain aspects of this policy are implemented as a direct regulation of speech divorced from conduct or the propensity to engage in conduct, they will pose unnecessary litigation risks. Rather, we think that DOD should endeavor to achieve the objectives of its policy by adjusting the non-speech aspects of its policy concerning homosexuals, including enforcement policy. We also discuss below findings that DOD could make to support its new policy. Finally, the

¹ This conclusion is based on our understanding, as reflected in the first paragraph of this memorandum, that the proposed policy makes substantive changes to the current policy. If, to the contrary, the new policy is limited to changes in the method of enforcement, this conclusion and many of the problems noted below will not be applicable. See *infra* pp. 5-6.





policy-makers need to be aware of the interaction of the President's announcement of a new policy and two cases in litigation, in one of which there is an outstanding nationwide injunction.

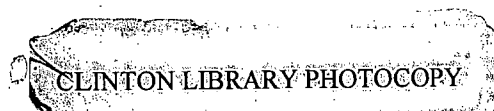
1. The Traditional Military Policy. The current Department of Defense Directive on homosexuality states: "Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14 ¶ H.1.a, 32 C.F.R. Part 41, App. A. "Homosexual" is defined as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." Id. at ¶ H.1.b.(1). "Homosexual acts" are defined as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." Id. at ¶ H.1.b.(3).

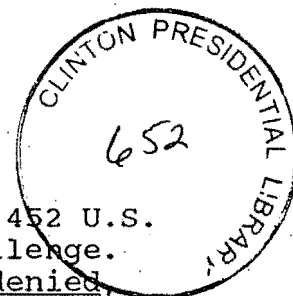
Litigation defending the traditional policy has been largely successful by characterizing the policy as directed at excluding persons who engage in, or have a propensity to engage in, homosexual conduct, even in cases where there was no proof of homosexual acts. We have opposed the contentions of plaintiffs that this policy is directed at orientation rather than conduct.

Four courts of appeals have without question accepted the Government's defense of the constitutionality of this policy (at least as applied to practicing homosexuals), and sustained it against due process, equal protection, and First Amendment challenges.² Several courts have rejected plaintiffs' argument that homosexuals are a suspect class entitled to the same protection as racial classes. See e.g. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984). The Seventh and Federal Circuits upheld the traditional policy in cases where the plaintiff admitted being a homosexual, but there was no proof of any homosexual acts. Ben-Shalom v. Marsh, 881 F.2d at 462; Woodward v. United States, 871 F.2d at 1069-1070.

The Ninth Circuit's rulings are more complicated. It has upheld the policy in a case where a serviceman was being discharged because he engaged in homosexual acts. Beller v.

² Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).



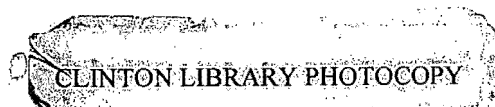


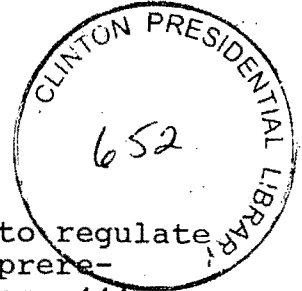
Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). It has also rejected a First Amendment challenge. Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992). On the equal protection issue, however, where the Government did not establish that any homosexual conduct had in fact occurred, Pruitt accepted the Government's argument that strict scrutiny did not apply, but rejected the Government's position that the policy was directed at conduct. The court held that the traditional policy classifies on the basis of homosexual status and could be sustained only if on remand the military presented evidence showing that it is "rationally related to a permissible governmental purpose." 963 F.2d at 1167. The Pruitt court also held that the ban could not be justified based upon "the prejudice of others against homosexuals * * *." Id. at 1165.

As noted, in several of the suits the basis for the discharge has been plaintiffs' public acknowledgement of homosexuality. We have successfully defended against claims that the First Amendment prohibits discharging a person based upon his admission that he is a homosexual. Courts have concluded that the military's restrictions do not limit what military personnel can say about homosexuality or about the military's policy concerning homosexuals; rather, they have held that admissions of homosexuality can be relied upon in a decision to exclude a member of the military because such admissions constitute a declaration that the person has the requisite propensity to engage in prohibited homosexual conduct and, hence, is ineligible for military service. Ben-Shalom v. Marsh, 881 F.2d at 462.

2. Litigation Risks of a Policy Directed at Speech. We are concerned that significant litigation risks will be incurred by the aspect of the policy option that appears to make statements admitting homosexuality to be in and of themselves a basis for discharge. Under the current policy, admissions of homosexuality have been used to establish that the service member is a member of a class of persons who engage in or have the propensity to engage in prohibited homosexual conduct. As we understand the proposed new policy, one of the prohibited acts may be the admission of homosexuality itself. If such statements are a basis for discharge without a link to underlying prohibited conduct, serious First Amendment problems may be raised.

To the extent that a court views the policy as directed against speech, divorced from conduct, our litigation risks will increase. A policy that punishes an individual who is frank and open in his speech and rewards the individual who is secretive, although they have both engaged in the same conduct, would, for many judges, raise serious questions about whether the restriction is unrelated to the suppression of free speech and restricts speech no more than is necessary to protect military effectiveness.

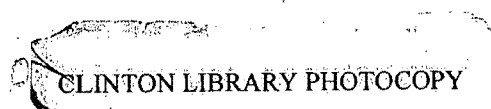


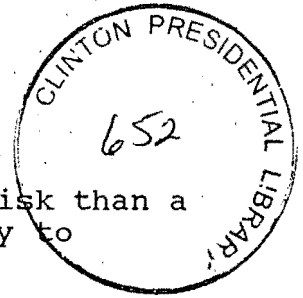


There are, of course, numerous cases stating that substantial deference must be granted to the military to regulate speech where speech is likely to interfere with vital prerequisites for military effectiveness, see Brown v. Glines, 444 U.S. 348, 354 (1980). Nonetheless, the regulations must "protect a substantial Governmental interest unrelated to the suppression of free expression," and they "must restrict speech no more than is reasonably necessary to protect" that interest. Id. at 354, 355. We could argue that a regulation making statements admitting homosexuality a basis for discharge is constitutionally permissible because the military has wide latitude to determine what statements will interfere with military effectiveness. The military could presumably conclude, as a matter of administrative judgment, that the presence of an acknowledged homosexual in a military unit would in a large number of cases result in (i) privacy concerns on the part of heterosexual members, (ii) fear on the part of heterosexual members of sexual misconduct by a homosexual member, (iii) distractions from duty and loss of unit cohesion based on the introduction into the unit of disagreements about an intensely debatable political and moral issue, and (iv) similar morale problems resulting from moral revulsion felt, whether justifiably or not, by a large number of heterosexual members. Such an argument, however, may be pushing the limits of the deference that courts are willing to accord the military.³

An added complication may be that under the proposed policy the opportunity for a person to rebut the use of an admission of homosexuality against him may be reduced. Under the current policy, if a person states that he or she is a homosexual, that statement constitutes a presumption that the person engages in or has a propensity to engage in homosexual conduct. The person making the statement, however, is given an opportunity to rebut the presumption and show that he or she is not a homosexual within the meaning of the current regulations. If, under the proposed policy, the statement admitting homosexuality is itself an act for which the person can be discharged, the opportunity for rebuttal would appear to have been removed. Thus, in that respect, the new policy would appear to require discharge for

³ We are aware of the Connick v. Myers, 461 U.S. 138, 147 (1983), line of cases, holding that when a public employee's speech is not a matter of public concern, courts will ordinarily not interfere with restrictions on the speech. However, we are doubtful that this line of cases will protect a direct bar on speech in the circumstances that are likely to be present in litigation over discharge of homosexuals. Persons excluded from the military because of admissions of homosexuality will in many cases be able to tie their admissions to opposition to the military's policy regarding homosexuality and, thus, avoid the Connick v. Myers cases.





orientation alone and would pose more of a litigation risk than a regulation that is directed at conduct or the propensity to engage in conduct.⁴

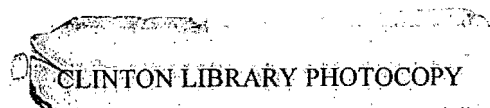
If, on the other hand, the proposed policy is intended to permit a service member to rebut his or her proposed discharge on the basis that the statement did not mean that he or she engages in or has the propensity to engage in prohibited conduct, the policy would presumably retain the conduct-based direction of the traditional policy. In that event, the wording may need to be changed so as not to lead courts to think that the policy is directed at speech alone rather than at conduct.

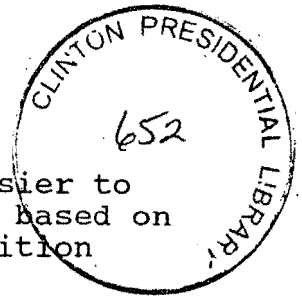
In sum, our litigation posture would be strengthened if we can accomplish the desired policy goals without directly providing for discharge based solely on speech. The prohibition on speech should be linked to some form of prohibited conduct. As reflected in the large number of cases upholding the current policy which has this linkage, the First Amendment does not prohibit the use of statements to establish that the service member is in a class of persons whose prohibited conduct makes them ineligible for service.

We have based the above analysis on the First Amendment because under current law the Government would have to meet a higher standard than it would under an analysis pursuant to the Equal Protection Clause. However, if the policy results in treating differently two service members only because one spoke publicly and one did not, we think there may be a serious equal protection problem as well.

3. Possible Non-Speech Related Means to Achieve the Policy Objectives. Because we think that a policy directed solely at speech poses significant litigation risks, we think that DOD should attempt to achieve its policy objectives through other means. For example, DOD may wish to consider some or all of the following methods, if appropriate to DOD goals. These methods

→ ⁴ This aspect of the policy could also cause problems with the question of whether a "celibate homosexual" can serve in the military. Under the traditional policy, which is directed at conduct or the propensity to engage in conduct, a celibate homosexual could attempt to show that he or she does not, in any realistic sense, have the desire or propensity to engage in homosexual conduct. But if a person's statement admitting that he or she is a homosexual is itself an act requiring discharge, the celibate homosexual may not be given the same opportunity that he or she had under the traditional policy. We believe that this would increase the possibility that some courts might invalidate the policy on the grounds that the military is attempting to proscribe orientation, not conduct.





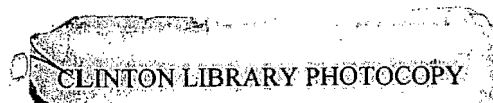
pose little litigation risk (and some of them may be easier to defend than the current policy). All these methods are based on the assumption that DOD will retain some form of prohibition against homosexual conduct.

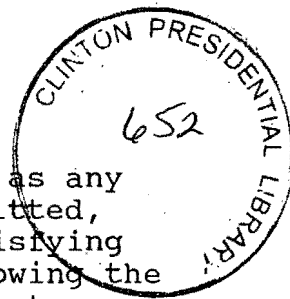
a. The new policy could be cast, at least in part, as a matter of enforcement policy. Obviously, the military will not exclude anyone if it does not know that the person is a homosexual. It is also clear that it is within reasonable military discretion to determine how to enforce its policy against service by persons who engage in homosexual conduct (or, if covered, have a desire or intent to do so). In balancing a code of conduct that prohibits homosexual conduct against privacy concerns of service members, the military could determine under what circumstances it will initiate an investigation to determine whether a service member has violated the code of conduct. For instance, it could (i) presume, absent reliable evidence to the contrary, that service members will conform to the code of conduct; (ii) decline to initiate questions about homosexuality, absent reliable evidence that a service member has violated the code of conduct; (iii) determine that mere hearsay alone is not sufficient evidence to justify the initiation of an investigation.

It may be necessary, however, for guidelines to be issued setting forth the conditions under which investigations will be conducted. Otherwise, we could face a challenge based on a claim that the initiation of certain investigations is arbitrary or capricious. In Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978), the discharge of an airman was set aside where the policy required exclusion of homosexuals except "where the most unusual circumstances exist and provided that the airman's ability to perform military service has not been compromised." The court held that the Air Force did not have adequate guidelines to govern its discretion and permit judicial review to determine whether the exclusion was arbitrary and capricious.

b. The existing DOD Directive defines a "homosexual" as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directive 1332.14 ¶ H.1.b.(1). It would cause no litigation difficulty if the definition of homosexual were narrowed to include only persons who engage in "homosexual acts." Indeed, elimination of the "desires to engage in" language would remove a current weak point in our litigation posture. With elimination of both the "desires to engage in" and "intends to engage in" language, an admission that a person is a homosexual would presumptively constitute an admission that the person engages in the prohibited acts. Of course, DOD would have to judge whether such a change would be consistent with its policy goals.

c. Similarly, the definition of "homosexual act" could also be changed without presenting any litigation difficulty. The





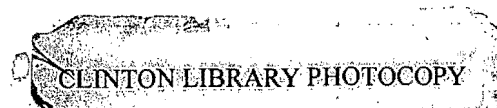
current DOD Directive defines "homosexual act" broadly as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." DOD Dir. 1332.14, ¶ H.1.b.(3). Narrowing the definition of "homosexual acts" to include only those acts proscribed by Article 125 of the U.C.M.J. (10 U.S.C. § 925), i.e., sodomy, would facilitate defense of the policy because it would permit exclusion only for conduct that constitutes a criminal offense and is analogous to the criminal prohibition upheld by the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986).⁵ Obviously, DOD would also have to determine whether this change is desirable as a policy matter.

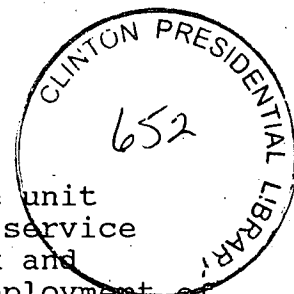
Undoubtedly there are many other methods by which the military can achieve its policy objectives without directly regulating speech. But the key point remains: if DOD regulates speech directly, it will face a severe litigation risk. If it avoids regulating speech directly, the risk can be held to a lower level. One word of caution: it is important that the policy which is promulgated not be officially described as "Don't Ask, Don't Tell." Even a legitimately articulated policy is subject to a serious legal challenge if its enforcement is directed against speech.

4. Recommended Findings. We believe that the likelihood of courts deferring to the judgment embodied in the new policy would be enhanced if explicit findings were set forth. Indeed, our litigation prospects would be significantly enhanced if DOD would prepare a well-reasoned statement setting forth in detailed terms the rationale for its policy. We know for instance that the Ninth Circuit in Pruitt required that the Government show in some depth that its policy is rationally related to a permissible governmental purpose. 963 F.2d at 1167. Accordingly, although we disagree with the Ninth Circuit, we recommend that findings be drafted to satisfy even its stringent requirements. The findings could be of two types.

The first type would explain why military effectiveness would be impaired if persons who engage in the prohibited homosexual conduct (however defined) were permitted to serve. To the extent consistent with the new Department of Defense policy, these findings might include: (a) experience has shown that the presence of individuals who engage in the prohibited conduct adversely affects the ability of the Military Services to

5 Perhaps, such a narrowing of the definition could be accompanied by a statement that admissions of homosexuality or evidence of bodily contact with a person of the same sex for purposes of satisfying sexual desire may give rise to a rebuttable presumption that the persons engages in or is likely to engage in homosexual sodomy.



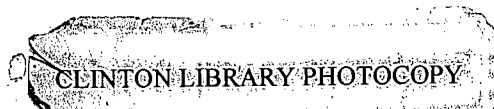


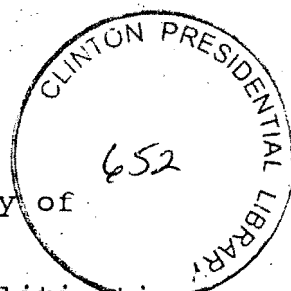
maintain good order, discipline, and morale; to ensure unit cohesion; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; and to facilitate assignment and worldwide deployment of service members; (b) the presence of individuals who engage in the prohibited conduct will interfere with the privacy rights of other service members who frequently must live and work under close conditions affording less privacy than is present in civilian life; (c) the presence of persons who engage in the prohibited conduct will also adversely affect public acceptability of the military service and thereby interfere with recruiting and retention in the all volunteer military concept.

The second type of finding should be made if the military changes its enforcement policy. It would explain why the military would not, absent reliable evidence, commence questioning or an investigation to determine whether a service member had engaged in the prohibited homosexual conduct. To the extent consistent with Department of Defense policy, these findings would include: (a) privacy concerns ordinarily preclude delving into a person's private sex life absent reliable evidence that the person has engaged in proscribed activity; (b) the Military Services recognize the need to prevent unwarranted investigations into a person's private life on the basis of rumor, innuendo, or unreliable evidence; (c) the risk of blackmail must be minimized.

5. Effect of the Meinhold Injunction and Other Pending Litigation. The final implementation of any new policy in this area must take into account the outstanding injunction in Meinhold v. United States Dept. of Defense, 808 F. Supp. 1455 (C.D. Cal., 1993), appeal pending, No. 93-55242 (9th Cir.). That injunction "permanently enjoin[s]" 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." While we are appealing from that injunction, and believe we have an excellent chance of ultimately reversing the injunction (or at least confining it to Meinhold), it has not been stayed.

Unless the ultimate policy which is developed is one limited to "sexual conduct which interferes with the military mission" -- and off-base, off-duty conduct, and pre-service conduct may not meet that definition -- the new policy cannot be immediately implemented without our first taking some action in the litigation to get the injunction modified or stayed. Any Executive Order or DOD Directive which announces the new policy must therefore be formulated so that no discharges or denials of enlistment can occur until the injunction is modified. Absent such recognition of the injunction, there is a serious risk that





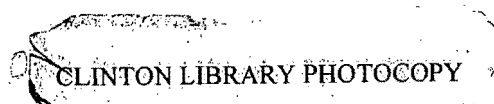
the district court (Hatter, J.) will hold the Secretary of Defense (or even the President) in contempt.

Policy-makers also need to be aware of two other litigation-related events. In both our pending appeal in Meinhold and in our defense of an appeal in Steffan v. Aspin, No. 91-5409 (D.C. Cir.), we will have briefs due on July 19 (assuming our latest request for an extension in Meinhold is granted).⁶ Both these cases involve publicly acknowledged homosexuals, and we are in a litigation posture where we will be required to present a legal defense of the merits of the former military policy. We can get no further extension in either case. The only way we can avoid briefing the merits of the former policy is if DOD agrees to reprocess both individuals. Such reprocessing might be justified if changes are made to redefine the prohibited practices and the new policy is made applicable to persons in litigation. Reprocessing might also be justified if DOD concludes that all pending discharges should be reconsidered in light of the policy determinations and supporting findings that resulted from the exhaustive review of the homosexual issue by the President and Congress. Of course, any such reprocessing would have to have a meaningful purpose and not be used simply as a delaying tactic.

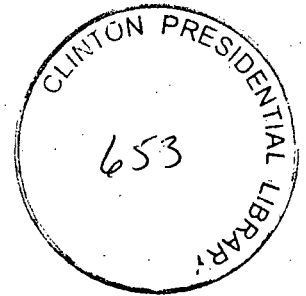
6. Avoiding the "Worst Case" Scenario. We emphasize the need for the Government to develop a policy position that will give us the ability to present legal arguments with a high likelihood of success in litigation. For instance, consider the adverse impact of the following "worst case" scenario if the policy is speech-directed. On July 15, the President announces the policy. On July 19, we file briefs in Meinhold and Steffan arguing that the former policy was permissible (and in Steffan we would be including an argument that homosexuals are not a suspect class and that homosexuality is not a fundamental right). Shortly thereafter the district court in Meinhold strikes down the new policy, and we are unsuccessful in obtaining a stay of its injunction. Needless to say, such an occurrence would represent a major policy disaster.

However, with a strong litigation posture we should be able to obtain a stay, at least at the court or appeals or Supreme Court level, of the Meinhold injunction, and the new policy would have a chance to operate. Moreover, if the changes in the prohibited practices affected Meinhold and Steffan and DOD were willing to reprocess them, we could avoid filing briefs in the courts of appeals defending the former policy on the heels of the President's announcement of the new policy.

⁶ We also have a brief due in the district court case of Dahl v. Secretary of the Navy, No. 89-0351-MLS-JFM (E.D. Cal.), on July 16, 1993.



THE WHITE HOUSE
WASHINGTON
July 15, 1993



MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM
COUNSEL TO THE PRESIDENT 
CLIFFORD M. SLOAN *CMS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Office of Personnel Management's
Anti-discrimination Memorandum

We have reviewed the Office of Personnel Management's memorandum regarding "Discrimination on the Basis of Prohibited Personnel Practices" (a copy of which is attached). We have two concerns about the memorandum.

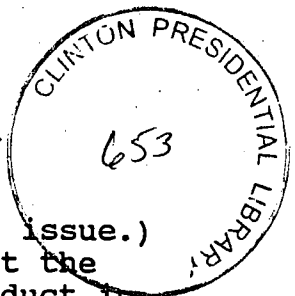
First, the legal issue in the memorandum is not explicitly settled by the pertinent statute. The memorandum states that adverse action on the basis of sexual orientation is a "prohibited personnel practice" under 5 U.S.C. 2302. That statute includes several specific grounds that may not be the basis for an adverse employment action (such as race, color, sex, age, religion, national origin, or political affiliation). 5 U.S.C. 2302(b)(1). But the statute does not include sexual orientation among these prohibited bases for employment actions.

OPM cites a catch-all, general provision, which prohibits discrimination "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." 5 U.S.C. 2302(b)(10). But the statute nowhere explicitly states that sexual orientation is unrelated to performance. Although that is certainly a reasonable conclusion, one can easily imagine opponents arguing vehemently the other way and trying to raise a parade of horrors. For example, opponents might point to federal employees in a role model situation (such as Head Start or various Education programs) and might claim that the proposed interpretation would give license for flamboyant displays of sexual orientation to children. The opponents' statutory argument would be that, in such situations, sexual orientation is related to job performance.

An OPM memorandum in the last year of the Carter Administration (May 12, 1980) does state that adverse actions based on sexual orientation is a prohibited personnel practice. OPM states that it is not aware of any policy statement in the Reagan or Bush Administrations repealing or changing this administrative interpretation.



OPM also advises that it is unaware of Merits System Protection Board decisions specifically addressing the permissibility of using sexual orientation as a basis for personnel decisions. (OPM is continuing to research this issue.) With respect to sexual conduct generally, OPM advises that the case law is complex. The inquiry into whether sexual conduct is related to job performance is sometimes complicated and fact-intensive.



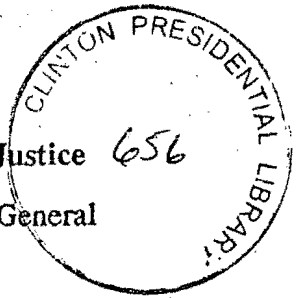
Thus, although OPM's opinion is defensible as a legal matter, the interpretation is not entirely immune from possible attack.

Second, as a policy matter, it may be unwise to open up this issue at this time. As suggested above, it is predictable that opponents will try to raise what they consider to be troubling hypotheticals -- school teachers and other role models for children, health care professionals, and so on. Opponents may also raise questions about individuals with AIDS and the HIV virus. Unlike the military policy, these matters have not yet been the focus of widespread public debate. It may well be that interjecting them now would be counter-productive and would undermine an attempt to address the issues rationally and responsibly.





U. S. Department of Justice 656
Office of the Solicitor General



The Solicitor General

Washington, D.C. 20530

June 29, 1993

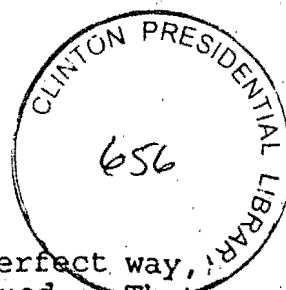
MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

Re: Potential Changes in Policy on Homosexuals in the Military

I am in general agreement with the views expressed by the Civil Division in its Memorandum of this date, and especially with its emphasis on the need to develop a strategy for dealing with the outstanding Meinhold injunction. There are, however, several points that bear further comment.

1. The Civil Division proceeds on the assumption (which is probably correct) that military restrictions on homosexual conduct of any kind are clearly permissible. Civil therefore argues for tying any restriction on service by homosexuals to such prohibitions on conduct. DOD's policy review, on the other hand, apparently suggests that realistically, as DOD has put it in our discussions, "knowledge is everything": that is, it is the knowledge that a particular service member has engaged, is likely to engage, or desires to engage in homosexual conduct that the military has concluded is likely to cause problems of morale, cohesion and so forth among the other members of a military unit. The latter position offers an attractively coherent and focused rationale for the exclusion of "known" homosexuals. It does, however, seem to be in some tension with the government's prior defense of the military's exclusion policy on the ground that it focused exclusively on "conduct." In addition, the "knowledge" rationale may not satisfactorily explain certain outlying cases that the military apparently intends to include within the new policy (such as, for example, where a commander alone receives reliable information about past conduct that is removed in time and place from the individual's current military post or unit).

It seems to me that any tension between the "knowledge" and "conduct" rationales may be explained on the ground that while the military's core concern is "knowledge," its definitions of prohibited "conduct" (whether actual or presumed to be likely)



serve to define and limit, in a rational if not wholly perfect way, the circumstances in which that concern will be pursued. That explanation is likely to satisfy a court otherwise concerned about an imperfect fit between the knowledge rationale and some atypical cases.

2. I am somewhat less concerned than the Civil Division that a new policy emphasis on the knowledge of a member's homosexuality, including knowledge obtained through declarations or communications by the member, will make the new policy more vulnerable to First Amendment challenge than the previous one. The government has been quite successful in the past in arguing that the unique requirements of the military mission can justify limitations on speech that would be impermissible in civilian society. See, e.g., Parker v. Levy, 417 U.S. 733 (1974) (political statements); Brown v. Glines, 444 U.S. 348 (1980) (circulation of petitions on base); Goldman v. Weinberger, 475 U.S. 503 (1986) (prohibition on wearing of yarmulkes). And the "knowledge" rationale advances, if anything, a more coherent argument for why speech that identifies a member as homosexual is incompatible with the good order of the service. Moreover, the new policy appears to make no significant change in the substantive predicates for discharge (including declarations of homosexual status); it merely imposes slightly tighter and more specific limits on the circumstances under which the military will attempt to establish and act on those substantive predicates. Although I agree fully with the Civil Division that it would be preferable to phrase any policy in terms of "conduct" and not "speech," fundamentally (i) the threat to speech interests is neither smaller nor larger under the new policy than under the old, and (ii) the courts that routinely upheld the old policy's limitations on speech would probably be reluctant to strike down on First Amendment grounds a new policy that imposes identical restrictions, but promises to pursue them less vigorously. Still, a court that is hostile to the substance of the new policy might seize on any perceived First Amendment defect as a rationale for striking the policy down or limiting its reach.

3. I think that we also have to admit candidly that the "knowledge" rationale ultimately sanctions the view that burdens may properly be imposed on one individual on the basis of other individuals' subjective reactions to his or her personal characteristics (at least if those characteristics are manifested by conduct, or even a propensity for conduct). An argument that an individual's known homosexuality will disrupt unit morale and effectiveness must, for instance, finally be based on concerns such as the following (which are similar to ones identified by DOD):

(i) that heterosexual service members will find their privacy intolerably compromised by having to live in close physical quarters with individuals whom they believe may find them sexually attractive;

(ii) that such members will fear unwanted advances, harassment or assault by a colleague known to be homosexual;

(iii) that unit cohesion will be disrupted by the introduction, in a uniquely particularized way, of disagreements about an intensely debated social issue; or

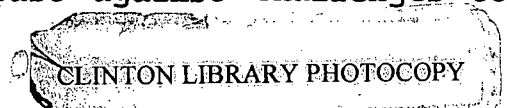
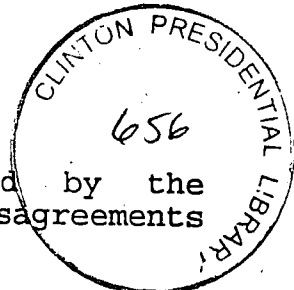
(iv) that many heterosexual members' moral revulsion at homosexual conduct will make it impossible for them to work effectively with a known homosexual.

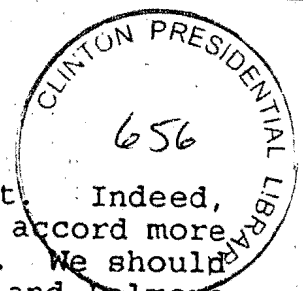
All of these arguments rely on opinions and moral judgments presumed to be shared by most service members about an underlying characteristic (at least if manifested by actual or anticipated conduct) that is an important component of personality, is at least arguably immutable, and, by hypothesis, has not been shown to bear any direct relationship to an excluded individual's own ability to perform required duties.

The Supreme Court has in other contexts rejected "mere negative attitudes, or fear" on the part of others as a justification for governmental action otherwise deemed irrational under the Equal Protection Clause. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985) (city could not deny permit for group home for retarded persons based on negative attitude of surrounding landowners). As the Court has put it, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Ibid. (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (court could not determine that continued custody was not in best interests of child solely because parent had begun living with member of different race)). And in Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), which held that the military was required to justify exclusion of homosexuals based on status without proof of related conduct under "'active' rational basis review," the Ninth Circuit relied on Cleburne and Palmore in holding that exclusion cannot be justified on the basis of the "prejudices" of other service members. Id. at 1165.

It may be that Palmore and Cleburne can be distinguished to the satisfaction of the Administration and the courts, as a general matter, on the ground that the policy here can be tied to the reaction by others to actual or anticipated behavior ("conduct"), which is presumptively volitional and mutable, even if orientation is not. For that reason, I think it would be wise to ground the policy on knowledge of conduct (or at least propensity for conduct), rather than orientation. That approach would also help avoid due process and privacy concerns about taking action against individuals based on their desires, beliefs, state of mind or status alone. But whatever the proper resolution in other contexts of that issue, or the issue of how much weight may permissibly be given to the reactions of others, the special status and needs of the armed forces would probably provide a sufficient answer to such arguments in the limited context of determinations of suitability for military service.

As noted above, the argument that the military is special has prevailed in the past against challenges to policies otherwise





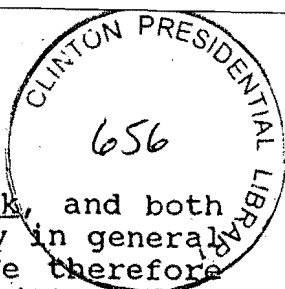
subject to strict scrutiny under the First Amendment. Indeed, there are few contexts in which the Court is likely to accord more deference to Presidential and Congressional decisions. We should recognize, however, that arguments based on Cleburne and Palmere have been and will continue to be made in this context, and that they have considerable force with respect to a policy that is primarily justified not by reference to an individual's actions (or potential actions) themselves, but by reference to others' social or moral attitudes toward those actions -- and, presumably, to an aspect of personality that those actions reflect.

2. Finally, any policy that continues to exclude homosexuals from service on any basis other than for violating rules of conduct that apply equally to heterosexuals -- such as the criminal prohibition against sodomy -- remains subject to challenge under the Equal Protection Clause.

a. The courts of appeals have declined to use strict or semi-strict scrutiny in reviewing regulations disfavoring homosexuals as a class, and generally have found that the military exclusion passes rational basis review. The proposed policy can be defended in the lower courts on the basis of those precedents.

It should be noted, however, that the Supreme Court has not considered an equal protection challenge to a classification based on homosexual orientation or conduct. The majority opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), which held that there is no substantive Due Process right to engage in homosexual (or, presumably, heterosexual) sodomy, noted explicitly that the case presented no equal protection claim. *Id.* at 196 n.8. The courts of appeals have tended to dismiss arguments for enhanced scrutiny of classifications based on homosexuality rather summarily, largely on the basis of Hardwick, and may well continue to do so. See, e.g., Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Ben-Shalom v. Marsh, 881 F.2d 454, 464-465 (7th Cir. 1989). Hardwick did not address the relevant constitutional issue, however, and the other arguments that are advanced against enhanced scrutiny are not altogether compelling.¹ Moreover, the membership

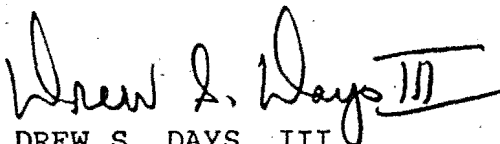
¹ The most common argument is that Hardwick effectively resolves the suspect classification argument because it approved "making the conduct that defines the class criminal." Woodward, 871 F.2d at 1076 (quoting Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987)). But Hardwick did not approve anything from an equal protection perspective, and the conduct proscribed by the statute at issue in Hardwick -- and prohibited for both homo- and heterosexuals by Article 125 of the U.C.M.J. -- hardly "defines the class" of homosexuals. Leaving aside the question of pure status, the military itself defines even homosexual conduct much more broadly. DOD's suspended policy defines a "homosexual act" as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." Sodomy statutes, including Georgia's and Article 125, typically proscribe only a precise subset of that conduct.

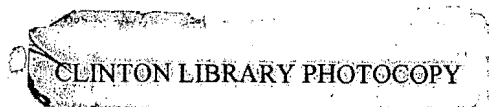


of the Court has changed significantly since Hardwick, and both that case in particular and the issue of homosexuality in general have received considerable attention since 1986. We therefore should not take it for granted that the Supreme Court will apply a rational basis standard if the equal protection issue is cleanly presented to it.

Again, in the military context, the Court would probably uphold restrictions based on a well-founded fear of disruptions to morale or effectiveness even under heightened scrutiny. But the ramifications of losing such a case are obviously significant, and courts applying heightened scrutiny might limit the scope, if not the fundamental premises, of the exclusion policy. That possibility points up again that it is important for the military to articulate the bases for its policy clearly and, to the extent possible, to support its conclusions with findings, and to identify in particular cases the nexus between rationale and findings, on the one hand, and proposed outcome, on the other.

b. We will be required to come to grips with the equal protection issues (including the appropriate level of scrutiny) in drafting briefs in various lower courts -- including the D.C. Circuit in the Steffan case (where our brief is due on July 19), which specifically raises the level-of-scrutiny issue. Because these issues have not been resolved by the Supreme Court, it is open to us to reconsider the government's position. Although I am not prepared to express a view on the matter at this time, I think the various aspects of the equal protection argument (both inside and outside the military) deserve serious review within the Department of Justice and elsewhere in the government, before the Administration commits itself to a legal position in Steffan or Meinhold, or in the district court on remand in Pruitt (where I understand that proceedings have been stayed until July 15).

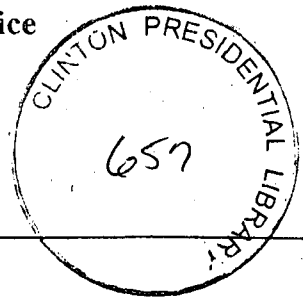

DREW S. DAYS, III
Solicitor General





U.S. Department of Justice

Civil Division



Office of the Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

JUN 30 1993

TO: WEBSTER L. HUBBELL
Associate Attorney General

FROM:  STUART E. SCHIFFER
Acting Assistant Attorney General
Civil Division

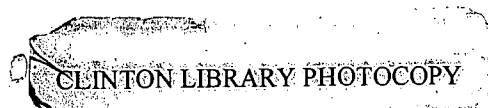
RE: Meinhold v. Department of Defense,
No. 93-55242 (9th Cir.).

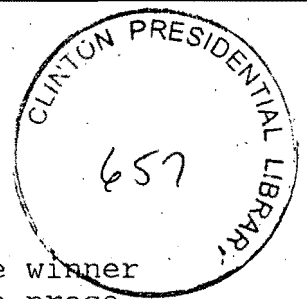
Attached is a draft brief in this case. The following is a summary of the primary arguments:

1. Preliminarily, we acknowledge (pp. 9-14) that the question of whether homosexuals should be permitted to serve in the military is controversial. We emphasize that this policy judgment is constitutionally reserved to the Political Branches so long as the policy is reasonable and consistent with constitutional principles. The fact that a different policy may emerge from the review being conducted by the Political Branches does not impugn the validity of the former policy.

2. In Part I (pp. 15-23), we argue that the district court's decision should be vacated and the case remanded because: (1) Meinhold failed to exhaust his intramilitary remedies; (2) the court impermissibly adjudicated Meinhold's equal protection claim without first resolving his nonconstitutional claims; and (3) the court improperly insinuated itself into the policy-review process that was underway pursuant to the President's directive. Our second argument above remains reasonably strong; however, our first argument has been substantially weakened by the Supreme Court's recent decision in Darby v. Cisneros, No. 91-2045 (U.S. June 21, 1993), and our third argument will lose its significance when the new policy is issued if the new policy still mandates Meinhold's separation. If Meinhold would not be separated under the new policy, we will have a strong argument that the case will then be moot.

3. In Part II (pp. 24-26), we argue that vacatur and remand are warranted because the district court failed to consider record evidence -- in the form of three declarations from high-level DOD officials -- supporting DOD's former homosexual policy.





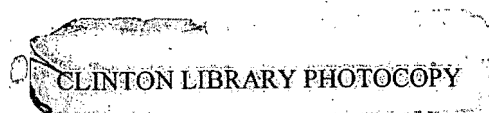
- 2 -

Although this is a powerful argument, it is not a sure winner because Meinhold will argue that the declarations were procedurally defective in several respects, and that the court therefore properly declined to consider them.

4. In Part III (pp. 27-40), we argue that if the court of appeals reaches the merits of the equal protection issue, it should reverse. We first argue that the former policy is related to conduct; that is, Meinhold's admission of homosexuality raised a reasonable inference that he would commit (if he had not already committed) homosexual acts. We then argue that DOD's policy satisfies equal protection standards because it is rationally related to maintaining operational effectiveness and efficiency within the Armed Forces. We argue that this conclusion is compelled by precedent and record evidence. Although we refrain from arguing directly that the former policy is supportable on the basis of moral intolerance toward homosexual conduct, we do rely generally upon Bowers v. Hardwick, 478 U.S. 186 (1987), which upheld a criminal sodomy statute based upon society's moral objections to that form of homosexual conduct.

5. Finally, we argue in Part IV (pp. 41-49) that the district court's order is overbroad. Because Meinhold's suit was not a class action, and because he sought injunctive relief only on his own behalf in the form of rescission of his discharge and reinstatement, the court exceeded its remedial authority in enjoining DOD from "discharging or denying enlistment to any person based on sexual orientation"

Our brief is due for filing on July 6, 1993.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Stephen Neuwirth to Bernard Nussbaum re: Meinhold v. Department of Defense (2 pages)	01/29/1993	P5 658
002. fax cover sheet	Marcus Kerner to Bernie Nussbaum re: Meinhold [partial] (1 page)	01/28/1993	~~P6/b(6)~~
003a. note	Jerome Chapman to Vince Foster re: fax [partial] (1 page)	01/28/1993	~~P6/b(6)~~
003b. memo	Jerome Chapman to Vince Foster and Webb Hubbell re: Justice Department Litigation Involving Gays in the Military (3 pages)	01/27/1993	P5 659
004a. list	Status of Cases -- Actions Required (2 pages)	ca. 01/27/1993	P5 660
004b. list	Action Deadlines in Pending Cases (1 page)	ca. 01/27/1993	P5 661
005a. memo	Jerome Chapman to Vince Foster and Webb Hubbell re: Justice Department Litigation Involving Gays in the Military (3 pages)	01/27/1993	P5 662
005b. list	Status of Cases -- Actions Required (2 pages)	ca. 01/27/1993	P5 663
005c. list	Action Deadlines in Pending Cases (1 page)	ca. 01/27/1993	P5 664
006. cover page	Re: Report to President-Elect Clinton: Homosexuals in the Military [partial] (1 page)	ca. 01/1993	~~P6/b(6)~~

COLLECTION:

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Counsel's Office
Stephen Neuwirth
OA/Box Number: CF 384

FOLDER TITLE:

Gays in Military

Kelly Hendren
2006-0227-F
kh319

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

CLINTON LIBRARY PHOTOCOPY



January 29, 1993

MEMORANDUM FOR BERNARD NUSSBAUM
COUNSEL TO THE PRESIDENT

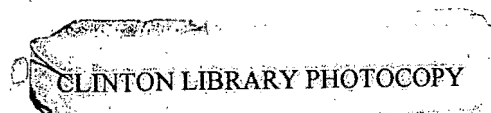
FROM: STEPHEN R. NEUWIRTH
ASSOCIATE COUNSEL TO THE PRESIDENT

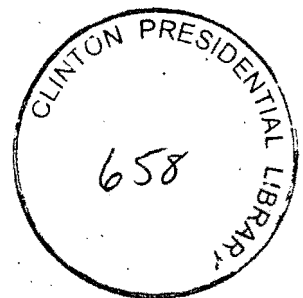
RE: MEINHOLD v. DEPARTMENT OF DEFENSE;
POLICY EXCLUDING HOMOSEXUALS FROM MILITARY SERVICE

On January 28, the United States District Court for the Central District of California entered an order permanently enjoining 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 v. United States Department of Defense, CV 92-6044 TJH (JRx), slip op. at 6 (C.D. Cal. Jan. 28, 1993). The Court held that homosexual status -- as opposed to homosexual conduct -- may no longer be a basis either for discharge from the armed forces or denial of enlistment. As the Court noted, the plaintiff in Meinhold "was discharged not because he engaged in prohibited conduct, but because he labeled himself as gay." Id., slip op. at 2.

The President plans to announce that he has directed the Secretary of Defense to conduct a review of the current Department of Defense policy that excludes homosexuals from military service and prepare a draft executive order based upon that review by July 15, 1993. The draft announcement, dated January 28, calls for the President to agree that, among other things:

Cases involving acknowledged homosexual status being contested by the individual will be processed through all applicable stages, including notice of the basis for separation, hearing before a board of officers, review of the board's recommendations by the separation authority, and action by the separation authority to discharge the person. If directed by the Attorney General, the final discharge in cases based only on status will be suspended until the President acts on the





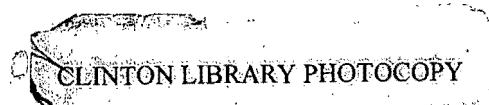
recommendations of the Secretary of Defense with respect to current policy. A member whose discharge has been suspended by the Attorney General will be separated from active duty and placed in the standby reserve. Individuals in the standby reserve would have the option to return, upon request, to active duty should the current policy be changed. Those personnel whose cases have not been suspended will be discharged.

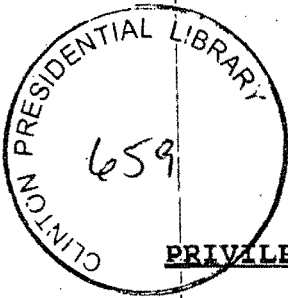
This proposed procedure, drafted without knowledge of the decision in Meinhold, assumes that homosexual status can be a basis for discharge: it calls for notice to be provided that such status is a basis for separation; it calls for action by the separation authority to discharge individuals based solely on homosexual status; and it gives the Attorney General discretion to effect no more than a suspension of such discharge, while individuals with homosexual status are immediately suspended from active duty and placed in the standby reserve. The Meinhold order, however (unless stayed or otherwise reversed on appeal), will preclude discharge based solely on homosexual status.

To avoid violation of the Meinhold injunction, the proposed temporary procedure for addressing homosexual status could be revised along the following lines:

Cases involving acknowledged homosexual status being contested by the individual will be commenced, but, in light of the decision of the United States District Court for the Central District of California in Meinhold v. United States Department of Defense, CV 92-6044 TJH(JRx) (C.D. Cal. Jan. 28, 1993), will be suspended and no final discharges in cases based only on status will be ordered until the President acts on the recommendations of the Secretary of Defense with respect to current policy.

Arguably, even the mere commencement of proceedings based on homosexual status could be challenged as in violation of the Meinhold order. This proposed approach, however, avoids direct conflict with that order and may provide the basis for an acceptable compromise.





January 27, 1993

~~PRIVILEGED AND CONFIDENTIAL~~MEMORANDUM

DETERMINED TO BE AN ADMINISTRATIVE
MARKING Per E.O. 12958 as amended, Sec. 3:
Initials: KBH Date: 4/21/2009
2006-0227-F

TO: Vince Foster and Webb Hubbell
FROM: Jerome Chapman *jc*
RE: Justice Department Litigation
Involving Gays in the Military

I met yesterday with Robert Kopp, Tony Steinmeyer and Vince Garvey, Civil Division career lawyers familiar with the Government's defense of suits by homosexuals discharged by the military. Based on the information I obtained at that meeting, I make the following recommendations:

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Strategy -- There are currently 10 pending lawsuits. Until there is an Executive order lifting the ban on gays in the military and dealing with related issues of conduct standards and retroactivity, DOJ's strategy should be:

1. To try to stay further proceedings in all pending cases until after the Executive order;
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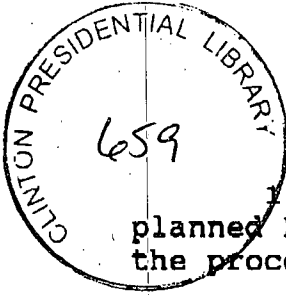
Implementation -- The steps required to implement this strategy will vary depending on the status of each case. In Attachment A, I summarize the status of each case and indicate what action, if any, should be taken.

Deadlines -- Note that early action is required in the first 6 cases listed in Attachment A. The pending case deadlines are listed in chronological order in Attachment B.

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To perform effectively, the Justice Department will need:

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- 2 -

1. The earliest feasible advance notice of the planned Presidential and DOD actions that will initiate the process of changing policy.

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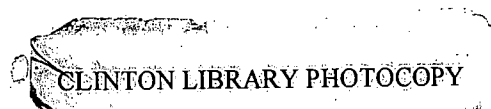
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From DOJ's perspective, the immediate issues are:

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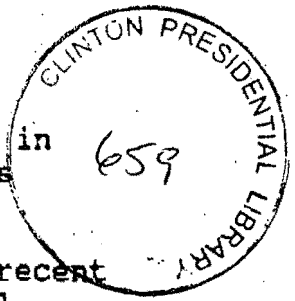
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Background -- In my meeting with the DOJ Staff, it was impossible to explore, much less resolve, all the issues involved in retroactivity. The following points should be noted:



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1. Unless the policy is fully retroactive, in some cases -- involving discharges before, or cases filed after, the cut-off date -- DOJ will have to continue to defend the constitutionality of the pre-Clinton policy. The test applied in the most recent cases is whether the discrimination had a "rational basis."



2. The burden of retroactive application depends on the relief sought:

a. Correction of records should not be problematic.

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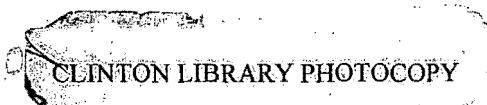
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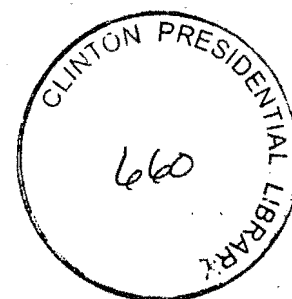
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ATTACHMENT ASTATUS OF CASES -- ACTIONS REQUIRED

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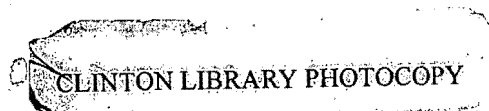
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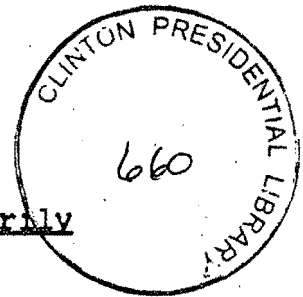
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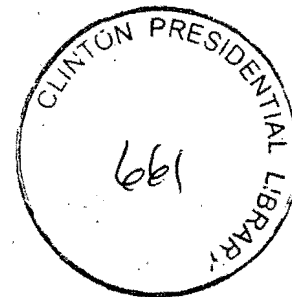
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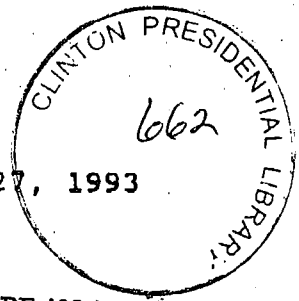
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January 27, 1993

~~PRIVILEGED AND CONFIDENTIAL~~MEMORANDUM

DETERMINED TO BE AN ADMINISTRATIVE
MARKING Per E.O. 12958 as amended, Sec. 3.2 (c)
Initials: KBH Date: 4/21/2009
2006-0227-F

TO: Vince Foster and Webb Hubbell
FROM: Jerome Chapman *jc*
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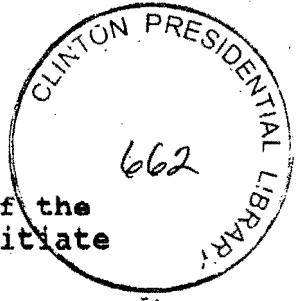
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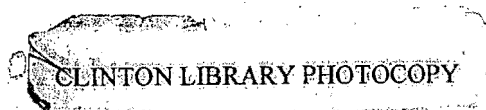
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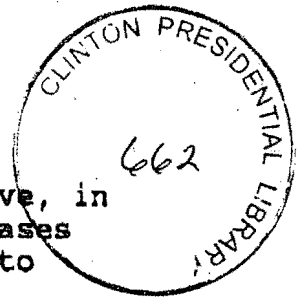
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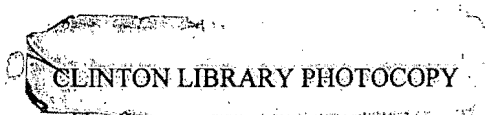
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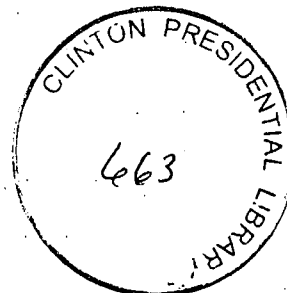
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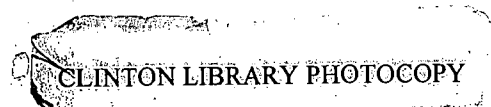
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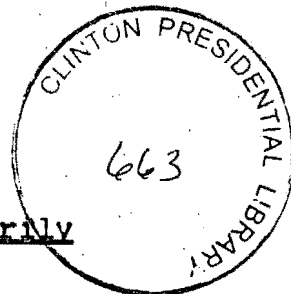
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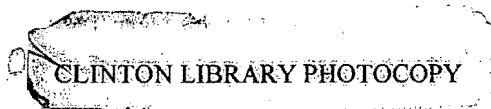
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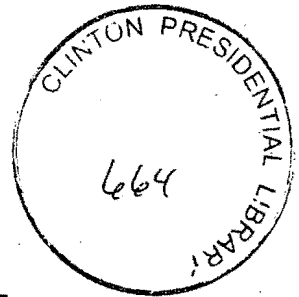
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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. report	Re: Policy on Gays and Lesbians in the Armed Forces (5 pages)	ca. 06/28/1993	P5 <i>lele 5</i>
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COLLECTION:

Clinton Presidential Records
Counsel's Office
Stephen Neuwirth
OA/Box Number: CF 370

FOLDER TITLE:

Gays in the Military

Kelly Hendren
2006-0227-F
kh578

RESTRICTION CODES

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

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

RR. Document will be reviewed upon request.

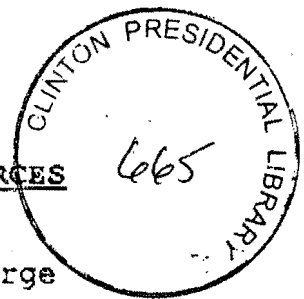
b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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TEL:

Jun 28,93 16:14 No.002 P.02

POTENTIAL CHALLENGES AND POSSIBLE DEFENSES
RE: POLICY ON GAYS AND LESBIANS IN THE ARMED FORCES



DoD Policy: The DoD regulation on military discharge provides that a servicemember who attempts, solicits, or engages in homosexual acts, makes a statement that he or she is a homosexual or bisexual, or marries or attempts to marry a person of the same sex, is subject to mandatory discharge.

I. First Amendment

A. Argument/Challenge: The DoD regulation has the effect of chilling a servicemember's free speech rights as guaranteed by the First Amendment in that the regulation would limit the ability of a service member to identify himself as a homosexual.

B. Defense:

1. The military is, by necessity, a specialized society separate from civilian society.

The differences between military and civilian communities result from the fact that it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. Parker v. Levy, 417 U.S. 733 (1974). In Parker, the Supreme Court noted that while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

2. Deference by the courts to the decisions of the Executive Branch or Congress is great.

The courts have long recognized that they must defer to the decisions of the Executive Branch or Congress concerning military personnel. Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

The Supreme Court has repeatedly applied this doctrine of deference in First Amendment cases involving the military. See e.g., Goldman v. Weinberger, 475 U.S. 503 (1986).

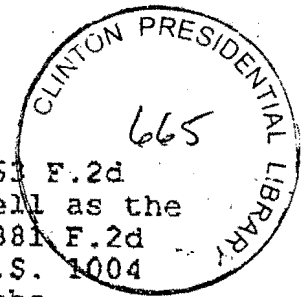
3. The self-identification of sexual orientation is unprotected by the First Amendment.

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Body
contact
actively
undertaken

acts understood
to be
homosexual
conduct

Speech,
but
divisive
Speech
is
evidence
of acts
not speech
etc



The Ninth Circuit in Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), reh'g denied, as well as the Seventh Circuit in Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990), concluded that discharges under the military regulation were not based on the advocacy of ideas, actions or conduct, but rather solely on an admission of fact. The "act" of identifying oneself as homosexual does not qualify as speech. Individuals are still free to advocate that DoD change its policy, to argue the relative merits of the lifestyle, and to associate with known homosexuals. What is prohibited, however, is the act of identification.

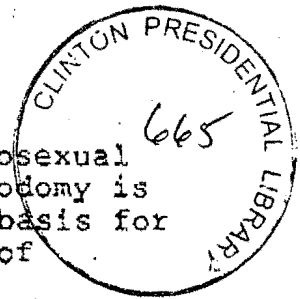
4. Even if "self-identification" were deemed to be speech, because it is not a matter of "public concern" it may be regulated even in the civilian workplace.

In Connick v. Myers, 461 U.S. 138, 147 (1983), the Supreme Court held that when an employee speaks not as a citizen upon matters of public concern, but instead upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel action taken in response to the employee's behavior. Moreover, the Connick rule has been applied to acknowledgments of homosexuality by civilian and military personnel. See e.g., Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985).

II. Right of Privacy

- A. Argument/challenge: There is a constitutional right of privacy to engage in homosexual acts.
- B. Defense
 1. The Supreme Court has never defined the right of privacy so broadly as to encompass homosexual conduct.

The Supreme Court held in Bowers v. Hardwick, 478 U.S. 186 (1986), that the constitutionally protected right of privacy recognized in cases such as Griswold v. Connecticut, does not extend to acts of consensual homosexual sodomy because the activity bears no relationship to marriage, procreation, or family life. And because the



right of privacy does not extend to homosexual sodomy, a judgement by the state that sodomy is immoral provides a sufficient rational basis for sodomy laws to satisfy the requirement of substantive due process.

2. If a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context.

The military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society. This has repeatedly been made clear by the Supreme Court. See Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

3. Alternatively, whatever privacy rights one might have in civilian life to engage in certain types of conduct, those rights are subservient to the legitimate need for discipline and unit cohesion in the military.

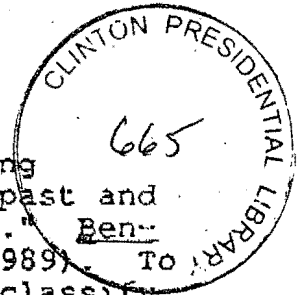
III. Equal Protection

- A. Argument/Challenge: The plaintiff is part of a suspect or quasi-suspect class and the DoD regulation constitutes invidious discrimination based on sexual orientation.

- B. Defense:

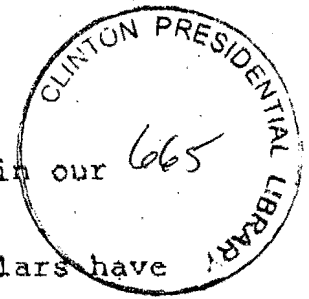
1. As long as the behavior that defines homosexuals as a class may be criminally proscribed (and such criminal prohibitions are upheld under the constitution), it is hardly open to a lower court to conclude that state-sponsored discrimination against the class is invidious. Article 125 of the Uniform Code of Military Justice criminally proscribes sodomy.
2. Even those who have not engaged in homosexual acts, but have merely stated that they are homosexual or bisexual, do not constitute a suspect or quasi-suspect class under a Ben-Shalom type analysis.

A homosexual's acknowledgement of his or her sexual orientation, "if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without



individual exceptions, but it is compelling evidence that [an individual] has in the past and is likely to again engage in such conduct." Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989). To this extent, the DoD regulation does not classify based merely upon homosexual status, but upon reasonable inferences about probable conduct in the past and future.

3. In the absence of a finding that homosexuals comprise a suspect class or quasi-suspect class, the DoD regulation will be scrutinized to determine if it is rationally related to a legitimate government interest. Those interests include:
 - a. Privacy -- when deployed on ships and overseas, servicemembers must often work, eat, relax, bathe, and sleep together in close proximity 24-hours a day. For some, if not many, the presence of openly homosexual individuals in that environment constitutes a major and unacceptable invasion of what little privacy remains. It is the knowing of another's homosexual orientation that undermines privacy interests.
 - b. Unit Cohesion -- The presence of open homosexuals tends to affect a unit, detracting from the primary task of maintaining combat effectiveness, and directly and negatively impacting unit cohesion, leadership, good order, discipline, morale, and overall readiness. There are no empirical data on the impact on a unit. Given the threat to this important interest identified by the military, however, the policy is a measured and rational one.
 - c. Divisiveness/Morality -- Society has not come to grips with the issue of homosexuality. Many states continue to proscribe certain forms of homosexual behavior. Our major religions teach that homosexual conduct is immoral. While we need not accept those teachings as correct, we must recognize that Americans tend to hold very strong beliefs on homosexuality, on both sides of the issue. The military reflects society. In order to preserve the military's ability to recruit and retain the most effective fighting force, a military ban on homosexual statements and conduct is necessary (at least until this country arrives at some consensus that



homosexual behavior is acceptable in our society).

- d. Economy -- Courts and various scholars have concluded that statements of one's homosexuality and homosexual acts are inextricably linked, i.e., when one states that he or she is a homosexual, he or she is, at least, demonstrating a propensity to engage in conduct proscribed by military regulation or law. Thus, by separating those who acknowledge their homosexual status, but no homosexual acts, the military does not invest time, money, and resources in costly investigations of criminal conduct or likewise devote those resources to criminal prosecutions.

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. fax cover sheet	Mike Anastasio to George Stephanopolous re: gays in the military [partial] (1 page)	01/19/1995	~~P6/b(6)~~
001b. letter	Mike Anastasio to George Stephanopoulos re: gays in the military (2 pages)	01/18/1995	~~P6/b(6)~~
002. memo	Drew S. Days, III to the Associate Attorney General re: Homosexuals in the Military (5 pages)	06/29/1993	P5 6666✓
003. memo	H. Jefferson Powell to the Associate Attorney General re: Homosexuals in the Military (10 pages)	06/29/1993	P5 667✓
004. memo	Drew S. Days, III to the Associate Attorney General re: Homosexuals in the Military; incomplete copy (1 page)	06/29/1993	P5 668✓
005. memo	Drew S. Days, III to the Associate Attorney General re: Homosexuals in the Military; incomplete copy (1 page)	06/29/1993	P5 669 - dup of 668
006. memo	Stuart Schiffer to Webster Hubbell re: Homosexuals in the Military (9 pages)	06/29/1993	P5 670✓
007. memo	Drew S. Days, III to the Associate Attorney General re: Homosexuals in the Military; incomplete copy (1 page)	06/29/1993	P5 671 - dup of 668
008a. draft	Legal Summary (2 pages)	ca. 07/06/1993	P5 672
008b. draft	Legal Argument Regarding Homosexuals Serving in the Armed Forces (6 pages)	ca. 07/06/1993	P5 673

COLLECTION:

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FOLDER TITLE:

Gays in the Military [1]

Kelly Hendren
2006-0227-F
kh322

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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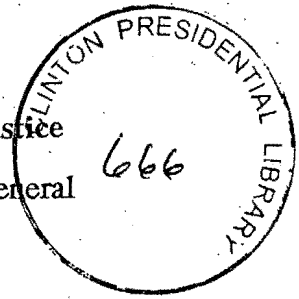
RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



U. S. Department of Justice
Office of the Solicitor General



The Solicitor General

Washington, D.C. 20530

June 29, 1993

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

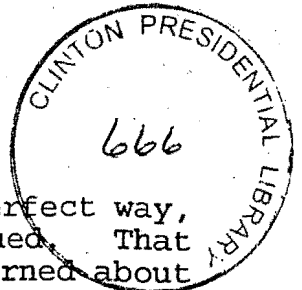
Re: Potential Changes in Policy on Homosexuals in the Military

I am in general agreement with the views expressed by the Civil Division in its Memorandum of this date, and especially with its emphasis on the need to develop a strategy for dealing with the outstanding Meinhold injunction. There are, however, several points that bear further comment.

1. The Civil Division proceeds on the assumption (which is probably correct) that military restrictions on homosexual conduct of any kind are clearly permissible. Civil therefore argues for tying any restriction on service by homosexuals to such prohibitions on conduct. DOD's policy review, on the other hand, apparently suggests that realistically, as DOD has put it in our discussions, "knowledge is everything": that is, it is the knowledge that a particular service member has engaged, is likely to engage, or desires to engage in homosexual conduct that the military has concluded is likely to cause problems of morale, cohesion and so forth among the other members of a military unit. The latter position offers an attractively coherent and focused rationale for the exclusion of "known" homosexuals. It does, however, seem to be in some tension with the government's prior defense of the military's exclusion policy on the ground that it focused exclusively on "conduct." In addition, the "knowledge" rationale may not satisfactorily explain certain outlying cases that the military apparently intends to include within the new policy (such as, for example, where a commander alone receives reliable information about past conduct that is removed in time and place from the individual's current military post or unit).

It seems to me that any tension between the "knowledge" and "conduct" rationales may be explained on the ground that while the military's core concern is "knowledge," its definitions of prohibited "conduct" (whether actual or presumed to be likely)

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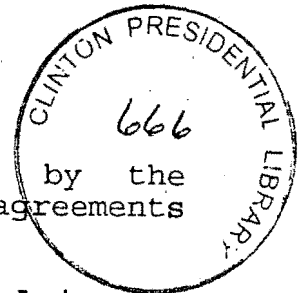
serve to define and limit, in a rational if not wholly perfect way, the circumstances in which that concern will be pursued. That explanation is likely to satisfy a court otherwise concerned about an imperfect fit between the knowledge rationale and some atypical cases.

2. I am somewhat less concerned than the Civil Division that a new policy emphasis on the knowledge of a member's homosexuality, including knowledge obtained through declarations or communications by the member, will make the new policy more vulnerable to First Amendment challenge than the previous one. The government has been quite successful in the past in arguing that the unique requirements of the military mission can justify limitations on speech that would be impermissible in civilian society. See, e.g., Parker v. Levy, 417 U.S. 733 (1974) (political statements); Brown v. Glines, 444 U.S. 348 (1980) (circulation of petitions on base); Goldman v. Weinberger, 475 U.S. 503 (1986) (prohibition on wearing of yarmulkes). And the "knowledge" rationale advances, if anything, a more coherent argument for why speech that identifies a member as homosexual is incompatible with the good order of the service. Moreover, the new policy appears to make no significant change in the substantive predicates for discharge (including declarations of homosexual status); it merely imposes slightly tighter and more specific limits on the circumstances under which the military will attempt to establish and act on those substantive predicates. Although I agree fully with the Civil Division that it would be preferable to phrase any policy in terms of "conduct" and not "speech," fundamentally (i) the threat to speech interests is neither smaller nor larger under the new policy than under the old, and (ii) the courts that routinely upheld the old policy's limitations on speech would probably be reluctant to strike down on First Amendment grounds a new policy that imposes identical restrictions, but promises to pursue them less vigorously. Still, a court that is hostile to the substance of the new policy might seize on any perceived First Amendment defect as a rationale for striking the policy down or limiting its reach.

3. I think that we also have to admit candidly that the "knowledge" rationale ultimately sanctions the view that burdens may properly be imposed on one individual on the basis of other individuals' subjective reactions to his or her personal characteristics (at least if those characteristics are manifested by conduct, or even a propensity for conduct). An argument that an individual's known homosexuality will disrupt unit morale and effectiveness must, for instance, finally be based on concerns such as the following (which are similar to ones identified by DOD):

(i) that heterosexual service members will find their privacy intolerably compromised by having to live in close physical quarters with individuals whom they believe may find them sexually attractive;

(ii) that such members will fear unwanted advances, harassment or assault by a colleague known to be homosexual;



(iii) that unit cohesion will be disrupted by the introduction, in a uniquely particularized way, of disagreements about an intensely debated social issue; or

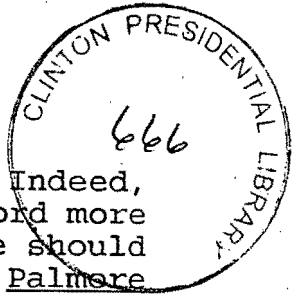
(iv) that many heterosexual members' moral revulsion at homosexual conduct will make it impossible for them to work effectively with a known homosexual.

All of these arguments rely on opinions and moral judgments presumed to be shared by most service members about an underlying characteristic (at least if manifested by actual or anticipated conduct) that is an important component of personality, is at least arguably immutable, and, by hypothesis, has not been shown to bear any direct relationship to an excluded individual's own ability to perform required duties.

The Supreme Court has in other contexts rejected "mere negative attitudes, or fear" on the part of others as a justification for governmental action otherwise deemed irrational under the Equal Protection Clause. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985) (city could not deny permit for group home for retarded persons based on negative attitude of surrounding landowners). As the Court has put it, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Ibid. (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (court could not determine that continued custody was not in best interests of child solely because parent had begun living with member of different race)). And in Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), which held that the military was required to justify exclusion of homosexuals based on status without proof of related conduct under "'active' rational basis review," the Ninth Circuit relied on Cleburne and Palmore in holding that exclusion cannot be justified on the basis of the "prejudices" of other service members. Id. at 1165.

It may be that Palmore and Cleburne can be distinguished to the satisfaction of the Administration and the courts, as a general matter, on the ground that the policy here can be tied to the reaction by others to actual or anticipated behavior ("conduct"), which is presumptively volitional and mutable, even if orientation is not. For that reason, I think it would be wise to ground the policy on knowledge of conduct (or at least propensity for conduct), rather than orientation. That approach would also help avoid due process and privacy concerns about taking action against individuals based on their desires, beliefs, state of mind or status alone. But whatever the proper resolution in other contexts of that issue, or the issue of how much weight may permissibly be given to the reactions of others, the special status and needs of the armed forces would probably provide a sufficient answer to such arguments in the limited context of determinations of suitability for military service.

As noted above, the argument that the military is special has prevailed in the past against challenges to policies otherwise



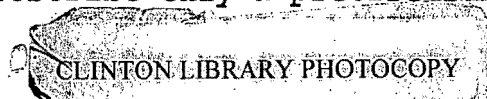
subject to strict scrutiny under the First Amendment. Indeed, there are few contexts in which the Court is likely to accord more deference to Presidential and Congressional decisions. We should recognize, however, that arguments based on Cleburne and Palmere have been and will continue to be made in this context, and that they have considerable force with respect to a policy that is primarily justified not by reference to an individual's actions (or potential actions) themselves, but by reference to others' social or moral attitudes toward those actions -- and, presumably, to an aspect of personality that those actions reflect.

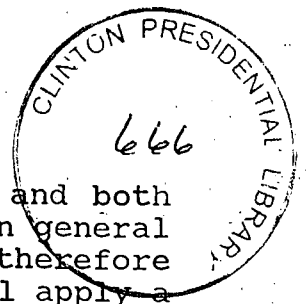
2. Finally, any policy that continues to exclude homosexuals from service on any basis other than for violating rules of conduct that apply equally to heterosexuals -- such as the criminal prohibition against sodomy -- remains subject to challenge under the Equal Protection Clause.

a. The courts of appeals have declined to use strict or semi-strict scrutiny in reviewing regulations disfavoring homosexuals as a class, and generally have found that the military exclusion passes rational basis review. The proposed policy can be defended in the lower courts on the basis of those precedents.

It should be noted, however, that the Supreme Court has not considered an equal protection challenge to a classification based on homosexual orientation or conduct. The majority opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), which held that there is no substantive Due Process right to engage in homosexual (or, presumably, heterosexual) sodomy, noted explicitly that the case presented no equal protection claim. *Id.* at 196 n.8. The courts of appeals have tended to dismiss arguments for enhanced scrutiny of classifications based on homosexuality rather summarily, largely on the basis of Hardwick, and may well continue to do so. See, e.g., Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Ben-Shalom v. Marsh, 881 F.2d 454, 464-465 (7th Cir. 1989). Hardwick did not address the relevant constitutional issue, however, and the other arguments that are advanced against enhanced scrutiny are not altogether compelling.¹ Moreover, the membership

¹ The most common argument is that Hardwick effectively resolves the suspect classification argument because it approved "making the conduct that defines the class criminal." Woodward, 871 F.2d at 1076 (quoting Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987)). But Hardwick did not approve anything from an equal protection perspective, and the conduct proscribed by the statute at issue in Hardwick -- and prohibited for both homo- and heterosexuals by Article 125 of the U.C.M.J. -- hardly "defines the class" of homosexuals. Leaving aside the question of pure status, the military itself defines even homosexual conduct much more broadly. DOD's suspended policy defines a "homosexual act" as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." Sodomy statutes, including Georgia's and Article 125, typically proscribe only a precise subset of that conduct.

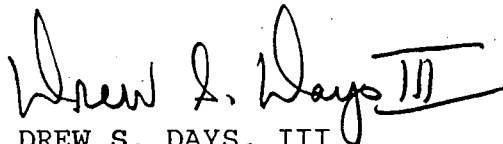


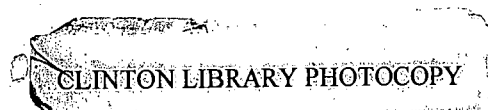


of the Court has changed significantly since Hardwick, and both that case in particular and the issue of homosexuality in general have received considerable attention since 1986. We therefore should not take it for granted that the Supreme Court will apply a rational basis standard if the equal protection issue is cleanly presented to it.

Again, in the military context, the Court would probably uphold restrictions based on a well-founded fear of disruptions to morale or effectiveness even under heightened scrutiny. But the ramifications of losing such a case are obviously significant, and courts applying heightened scrutiny might limit the scope, if not the fundamental premises, of the exclusion policy. That possibility points up again that it is important for the military to articulate the bases for its policy clearly and, to the extent possible, to support its conclusions with findings, and to identify in particular cases the nexus between rationale and findings, on the one hand, and proposed outcome, on the other.

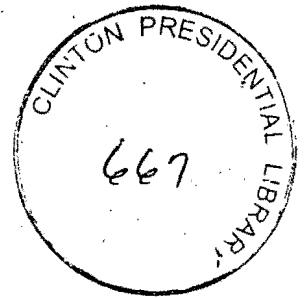
b. We will be required to come to grips with the equal protection issues (including the appropriate level of scrutiny) in drafting briefs in various lower courts -- including the D.C. Circuit in the Steffan case (where our brief is due on July 19), which specifically raises the level-of-scrutiny issue. Because these issues have not been resolved by the Supreme Court, it is open to us to reconsider the government's position. Although I am not prepared to express a view on the matter at this time, I think the various aspects of the equal protection argument (both inside and outside the military) deserve serious review within the Department of Justice and elsewhere in the government, before the Administration commits itself to a legal position in Steffan or Meinhold, or in the district court on remand in Pruitt (where I understand that proceedings have been stayed until July 15).


DREW S. DAYS, III
Solicitor General





U.S. Department of Justice
Office of Legal Counsel



Washington, D.C. 20530

June 29, 1993

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

Re: Possible Constitutional Problems Raised by Proposed Changes in Policy Regarding Homosexuals in the Military

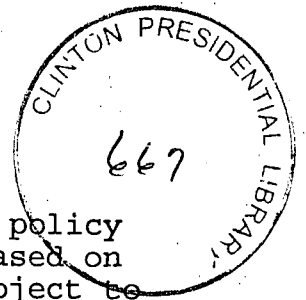
This memorandum presents the views of the Office of Legal Counsel on possible constitutional problems raised by a proposed policy option concerning homosexuals in the armed services being considered by the Department of Defense's military working group. The memorandum concludes that the proposed policy might be subject to challenge on equal protection grounds, and that it can probably be defended against first amendment challenges.

Because of uncertainty about some of the details of the policy, we have attempted at several points to indicate what assumptions we are making about its scope and effect. If those assumptions are mistaken, the conclusions might be different. As we understand the proposal, it would provide that: (1) sexual orientation is generally a private matter and the military will not make inquiries about a person's sexual orientation alone; (2) a person may be discharged for engaging in homosexual acts, entering into (or attempting to enter into) a homosexual marriage, or making a statement that he or she has engaged in homosexual acts or is a homosexual; and (3) sexual orientation is not a bar to service unless manifested by prohibited homosexual acts, homosexual marriage or attempted marriage, or statements that he or she has engaged in homosexual acts or is a homosexual.

1. Equal Protection. We generally agree with the Civil Division's assessment of the state of current law regarding equal protection challenges to the military's policy on homosexuals (Civil Division memo, p. 2). However, we believe that the proposed policy may be vulnerable to an equal protection challenge even under rational basis review.¹

¹ The circuits appear to be in general agreement that homosexuality is not a "suspect class" entitled to strict scrutiny of government action differentiating between homosexuals and heterosexuals. See Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert.

(continued...)



A member of the armed forces discharged under the policy could make a substantial argument that a distinction based on homosexual status rather than homosexual conduct is subject to "active" or "heightened" equal protection rational basis review. Under the rational basis test, government action is "sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). The more rigorous "active" form of rational basis analysis imposes a more substantial burden on the government to justify its policy than is required to defend economic regulations.² For example, in Cleburne, the Court invalidated a city zoning ordinance requiring homes for the mentally retarded to obtain a special use permit even though other care and multiple-dwelling facilities were not required to obtain such a permit. The Court held that mental retardation was not a suspect class triggering strict scrutiny but invalidated the ordinance because the government had failed to offer a rational basis justifying it. See 473 U.S. at 442, 448-49 (rejecting government's assertion that ordinance could be justified based on "mere negative attitudes, or fear" of the mentally retarded).

The Ninth Circuit has explicitly adopted the Cleburne active rational basis analysis as the appropriate standard for reviewing classifications based on homosexual status. In Pruitt v. Cheney, 963 F.2d 1156 (9th Cir.), cert. denied, 113 S. Ct. 655 (1992), the court held that the discharge of an army officer due to her homosexuality (as opposed to homosexual conduct) must be reviewed "to see whether the government ha[s] established on the record a rational basis for the challenged discrimination." Id. at 1165-66 (emphasis omitted). The court also specifically stated that the military could not justify the exclusion policy on the ground that prejudice against homosexuals would create tension in the ranks. Id. at 1165. This conclusion was based on Palmore v. Sidoti, 466 U.S. 429 (1984), in which the Supreme Court held that a state judge's order denying custody of a child based on social disapproval of her mother's interracial marriage violated the Equal Protection Clause, because the Constitution does not permit the government to make public decisions based on invidious private prejudice. See Pruitt, 963 F.2d at 1165 (reasoning that

¹ (...continued)
denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984).

² Compare, e.g., FCC v. Beach Communications, Inc., 61 U.S.L.W. 4526, 4527 (June 1, 1993) (economic regulation must be upheld if "there is any conceivable rational basis justifying" the distinction it makes).





"Cleburne made clear that [the Palmore] principle is not confined to instances of racial discrimination reviewed under strict scrutiny").

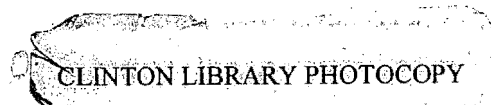
As we understand the new policy, it would be based at least partly on the assumption that some service members may be hostile towards homosexuals, and therefore morale and unit cohesion would be undermined by knowledge of another service member's homosexuality. Under Pruitt, this rationale would not be a legitimate government purpose. Nevertheless, some of the other justifications for the policy of shielding service members from knowledge of others' homosexuality, such as the need to protect members' privacy, are not based on prejudice and would therefore withstand scrutiny under Pruitt. Furthermore, other circuits have applied a more deferential version of the rational basis standard and have not applied the Cleburne/Palmore reasoning to classifications based on homosexuality.³ Because of the substantial deference traditionally accorded to Congress and the President in the unique context of regulating the military,⁴ we believe that most courts will consider the government's concern about prejudice against homosexuals to be valid here.

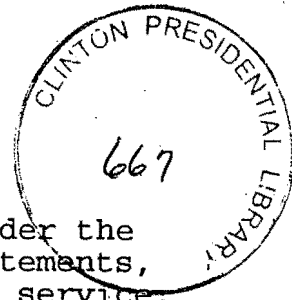
Nevertheless, even some cases in the circuits applying a more deferential form of rational basis review than the Ninth Circuit have required the government to articulate a rational basis on the record and have subjected the government's justifications to more searching scrutiny than would be required of economic regulations.⁵ As presently articulated, the new

³ See Ben-Shalom v. Marsh, 881 F.2d 454 at 464; Woodward v. United States, 871 F.2d at 1076-77; Dronenburg v. Zech, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d at 1229.

⁴ See, e.g., Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (First Amendment review of regulations governing the military is "far more deferential than constitutional review of similar laws or regulations designed for civilian society"); Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (noting deference accorded Congress's exercise of its authority over defense and military affairs in context of reviewing equal protection claim); Parker v. Levy, 417 U.S. 733, 756 (1974) (Congress has greater flexibility when prescribing code of conduct for the military).

⁵ See, e.g., Padulla v. Webster, 822 F.2d at 104 (noting that inapplicability of strict scrutiny "does not mean . . . that any kind of negative state action against homosexuals would be constitutionally authorized"; requiring "a governmental agency that discriminates against homosexuals [to] justify that discrimination in terms of some government purpose," but holding (continued...)





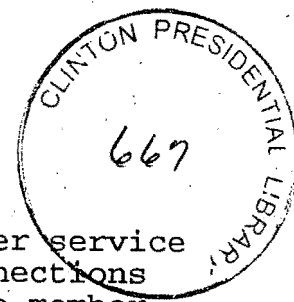
policy could still be held irrational even though the government's purpose can be defended as legitimate. Under the new policy, homosexuality, when manifested by acts, statements, or marriage, would be deemed incompatible with military service, whether or not this point is incorporated as a policy statement in the new DOD directive, service members will be discharged for homosexual conduct, which is defined to include statements about homosexuality. However, recruits and persons serving in the military will not be asked about their sexual orientation, because the policy recognizes that sexual orientation is a personal, private matter. The policy attempts to acknowledge that being homosexual does not disqualify a person from serving in the military, while at the same time requiring the discharge of any person who admits to being homosexual; this contradiction pushes the limits of constitutional rationality.

Other aspects of the new policy also border on irrationality. For example, the linchpin of the policy is the notion that "knowledge is everything," i.e., concerns about privacy and morale can be accommodated even if homosexuals remain in the military, so long as those with whom they serve do not know that they are homosexual. This rationale only makes sense in the context of members of the same unit, or persons sharing living quarters, showers, and so forth. However, under the policy a commander would be required to investigate and institute

5 (...continued)
that "[i]t is not irrational for the [FBI] to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes many homosexuals" to the risk of blackmail); Stephan v. Cheney, 780 F. Supp. 1, 11-17 (D.D.C. 1991) (accepting Pruitt's requirement that government must articulate a rational basis for decisions to exclude homosexuals from the military, but finding adequate justification), appeal pending (D.C. Cir.). In addition, the court in Pruitt read High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (upholding a DOD policy of subjecting gay applicants for security clearances to expanded investigations) as applying "active" rational basis review. See Pruitt, 963 F.2d at 1165.

It is also noteworthy that, with the exception of Stephan, these decisions have relied on justifications linked to homosexual conduct, as have cases that applied a more deferential standard. See, e.g., Ben-Shalom v. Marsh, 881 F.2d at 464 (because plaintiff's "lesbian acknowledgment, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in such conduct, . . . the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future").





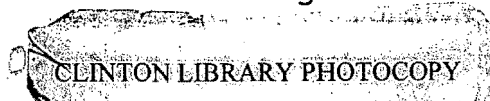
discharge proceedings against a service member if another service member outside the unit, or even a civilian with no connections to the military, informed the commander that the service member under his or her command had committed homosexual acts (again, including mere statements). The commander would be required to act on this information even though he or she might be the only one with the "knowledge," so that no threat to morale existed; this application of the policy would be rationally related to its purpose only in the most attenuated manner.

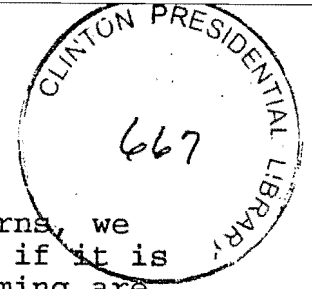
Similarly, under the new policy, enforcement guidelines would provide that commanders institute investigations and discharge proceedings only if they receive "credible evidence" that a service member has committed homosexual acts. These guidelines, as we understand them, also would provide that "mere hearsay" should not be treated as sufficient credible evidence. Thus, the policy seems to mean that a person's statement that he heard a service member say she was a lesbian would not be sufficient to trigger an investigation against her; however, that statement would constitute evidence that the alleged lesbian had committed a homosexual "act" by making the statement, so it would be illogical not to require the commander to act on this "mere hearsay." Furthermore, assuming the commander is required to investigate, he could not ask the service member whether she was a lesbian; he could only ask whether she had said that she was a lesbian. However, for practical purposes the permissible question would be as intrusive as the impermissible one.

The policy's internal inconsistency could be cured if statements of homosexuality were excluded from the definition of homosexual acts requiring discharge. At the very least, a modification allowing commanders greater discretion to decline to investigate and institute discharge proceedings in cases where the evidence of homosexuality comes from outside the unit, and knowledge has not been imparted to service members in the unit, would render the policy less vulnerable to being held constitutionally irrational.

Finally, we are concerned that inclusion of the proposed "policy statement" that "homosexuality is incompatible with military service" would make the policy more difficult to defend. Since the statement would not actually describe the acts prohibited by the policy, it adds to the appearance of irrationality. Therefore, we recommend that the statement either be (1) deleted from the new directive, or (2) modified so that it identifies the specific acts that are prohibited and says that these acts are incompatible with military service.

2. First Amendment Issues. As we understand the proposed policy, it would provide that the commission of homosexual acts and statements that one is homosexual would be grounds for dismissal. While we share the concerns of the Civil Division

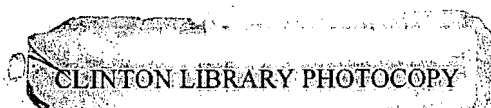




that the policy raises significant first amendment concerns, we believe that it should survive first amendment challenge if it is carefully tailored. The crucial points that we are assuming are that (1) the policy will not single out, on its face or in its application, service personnel who speak about their homosexual orientation -- in other words, that the policy will address in an even-handed fashion **all** personnel who engage in the conduct about which the military is concerned -- and (2) the policy will not place special restrictions on non-personalized speech about homosexuality or about the propriety of gays being in the military that are not imposed on other topics. If our assumptions about the policy are mistaken, the conclusions might change.

The policy would be most easily defended against first amendment challenge if it could be written and justified on the basis of the military's prohibition of homosexual acts, on the assumption that Bowers v. Hardwick, 478 U.S. 186 (1986), would be reaffirmed if the Supreme Court again addressed the issue. Under Bowers, the prohibition in the Uniform Code of Military Justice on "sodomy" is constitutional. Existing caselaw supports the military's judgment that it is contrary to morale, good order and so on to retain personnel who may be inclined to violate the prohibition. See, e.g., Ben-Shalom v. Marsh, 881 F.2d 454, 460-61 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). The cases, finally, also have sustained as reasonable the military's decision that persons who define themselves as homosexual fall within the category of persons inclined to violate the prohibition. See, e.g., id. The proposed policy, on this reasoning, employs speech as evidence of likelihood to commit a criminal violation of the Uniform Code, or to engage in other overt homosexual behavior violative of military standards of conduct. "The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Wisconsin v. Mitchell, --- U.S. --- (June 11, 1993), at 11. If the proposed policy can fairly be described as dealing with declarations of homosexuality as a means toward the end of prohibiting (the likelihood of occurrence of) non-speech acts, we do not think it would be vulnerable on first amendment grounds.

If the policy is written and justified on the basis of a military judgment that the presence of homosexuals in the military is disruptive, bad for morale, contrary to unit cohesion, etc., we still believe that the policy could be defended against first amendment challenge, although the question may become a closer one. Because of the special nature of military society, we do not think that the bare fact that the policy would reduce the absolute amount of speech permitted in military settings or by service personnel creates first amendment problems. See Brown v. Glines, 444 U.S. 348, 353-54 (1980). The more difficult issues arise from the fact that the policy on its

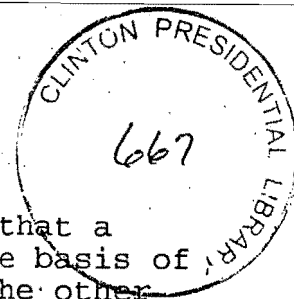


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face targets a particular issue and particular speakers. The first amendment, of course, "generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas involved. Content-based regulations are presumptively invalid." R.A.V. v. City of St. Paul, 112 S.Ct. 2538, 1543 (1992). On this basis, it might be argued that under the policy homosexual personnel who discuss their sexual orientation will be dismissed from service while heterosexual personnel will not be, or that the policy targets speech that supports the presence of gays in the military. Such a policy, the argument would go, imposes "special prohibitions on those speakers who express views on disfavored subjects," id. at 2547, or is "actual viewpoint discrimination." Id. The government would have to carry a very heavy burden of justification in order to sustain the policy if the courts concluded that it embodied content or viewpoint discrimination.

As we understand it, however, the proposed policy does not attempt directly to censor either the content of speech or the viewpoints expressed. The policy would not "effectively drive certain ideas or viewpoints from the marketplace," R.A.V., 112 S.Ct. at 2545, quoting Simon & Schuster v. New York Crime Victims Bd., 112 S.Ct. 501, 508 (1991), even the military marketplace. Service personnel would remain free to discuss sexual orientation or to argue for or against gays in the military subject to the general restrictions military commanders can place on political expression. While it is true that the policy "singles out" a particular category of expression, Simon & Schuster, 112 S.Ct. at 508, it does not do so in order to eliminate a certain content or to suppress viewpoint but in order to prevent certain results that the government clearly has the power to prevent. Cf. R.A.V., 112 S.Ct. at 2546 (government may use content-defined basis for banning obscenity when the content-based category "happens to be associated with particular 'secondary effects of the speech'").

The proposed policy's consistency with the first amendment can be defended by emphasizing that the persons and actions it addresses are not defined with the suppression of speech in mind. The policy would prohibit all actions (speech, sexual acts, marriage) that may produce the detrimental effects about which the military is concerned; in parallel fashion it does not prohibit all speech concerning homosexuality, but only that speech that may directly impinge upon the privacy interests of other service personnel, the military community's strong interests in unit cohesion, and so on. Furthermore, the universe of persons who would be subject to dismissal under the policy is not persons who engage in a certain expression; instead, it is those who engage in conduct disruptive to the services. Some examples of that conduct, to be sure, involve talking, but that talking is proscribed not because of what its intellectual content is but because it leads to the results the government may



act to avoid (disruption and so on). "The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of the other (opposition to the city of government) is commonplace, and has found application in many contexts." R.A.V., 112 S.Ct. at 2544.

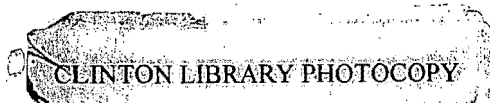
The conclusion that the proposed policy does not violate the first amendment is supported of course by the judiciary's general posture of deference to military decisions. "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). The courts "must give great deference" to the military's judgment about the means necessary to achieve those goals, even where those means tread upon ordinary first amendment freedoms. Id.

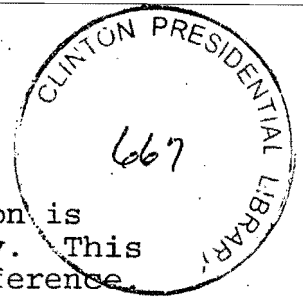
The proposed policy is for constitutional purposes not dissimilar to the passive enforcement policy of prosecuting selective service non-registrants that the Supreme Court upheld against constitutional challenge in Wayte v. United States, 470 U.S. 598 (1985). Under the passive enforcement policy, the government "prosecute[d] only those who reporte[d] themselves as having violated the law" in violation. Id. at 600. The Court noted that the government did not actively seek out those in violation of the law, id. at 603, and prosecuted only those persons who "stated affirmatively that they had refused to comply with the law." Id. at 609. In other words, only those persons who announced that they were out of compliance (whether publicly or only to the government by letter, id. at 610) were prosecuted. The Court held that the appropriate first amendment test was that articulated in United States v. O'Brien, 391 U.S. 367 (1968):

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

Wayte, 470 U.S. at 611, quoting O'Brien, 391 U.S. at 377. Applying this test, the Court concluded that the passive enforcement policy was constitutional.

We believe that the proposed policy is consistent with the first amendment for reasons similar to those the Court accepted in Wayte. It is true that the draft protests at issue in Wayte were of purely instrumental interest to the government, as a means toward identifying persons who had not registered for the





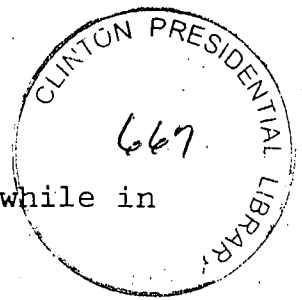
draft, while speech about one's own homosexual orientation is itself one of the "acts" forbidden by the proposed policy. This distinction, however, does not make a constitutional difference. In both situations, the government is employing certain speech as a means of identifying those in violation of a policy that is directed not to eliminating disfavored speech but to the achievement of another, valid goal. The conclusion in Wayte therefore supports our conclusion that the proposed policy, appropriately drafted, will withstand first amendment challenge.

The government's power to prescribe the qualifications for military service is "beyond question," O'Brien, 391 U.S. at 377, and Wayte itself restated the Court's view that "[f]ew interests can be more compelling than a nation's need to ensure its own security." 470 U.S. at 611. (Wayte concluded that the passive enforcement policy was adequately related to this compelling governmental interest because it promoted deterrence and prosecutorial efficiency. Id. at 612-13.) For the reasons we have stated above, if the policy is properly drafted it should be defensible as resting on an interest "unrelated to the suppression of free expression." Id.

Finally, and most controversially, the "incidental restriction" on the freedom of gay service personnel to speak about homosexuality or to advocate the presence of gays in the military arguably would be "no greater than is essential to the furtherance of" the military's "interest" in avoiding the disruptive effects of having known homosexuals in the military: put briefly, the policy would penalize only that speech that itself is one form of the activities the government may prohibit in the interests of morale, unit cohesion and so forth. This argument comes under strain because of the breadth of the proposed policy: The policy apparently would apply even in circumstances in which the serviceperson's sexual orientation became known against her will and in circumstances in which it would not be reasonable to argue that her immediate unit would be affected. Such applications of the policy are constitutionally troubling, but our conclusion is that they would be consistent with the first amendment. In the military context, such marginal cases, where the relationship of the intrusion on first amendment interests to the government's goals are debatable, do not render classifications unconstitutional. Military regulations are made for the service or services as a whole; the Constitution does not require the services to create exceptions to general policies that are themselves reasonably tailored to the military's goals. See Brown, 444 U.S. at 356-57; cf. Goldman, 475 U.S. at 508-10



(regulations concerning the wearing of religious apparel while in uniform).⁶

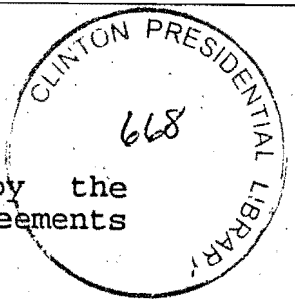


* * *

In conclusion, we believe that the proposed change in policy may raise equal protection problems, but that these problems would be minimized if the policy is more narrowly drawn. We have also concluded that the proposal would probably withstand first amendment scrutiny.

H. Jefferson Powell
H. Jefferson Powell

⁶ We agree with Civil Division's conclusion that the government might not be able to rely on the Connick line of decisions in defending the proposed policy. See Connick v. Myers, 461 U.S. 138 (1983) (public employee's speech on private matters not ordinarily protected speech for purposes of reviewing personnel decisions by employer). In addition to the Civil Division's rationale, we note the existence of language in some opinions suggesting that the situation of individual gay servicepersons may be "of public concern" for Connick purposes. See Rowland v. Mad River Local School District, 730 F.2d 444, 449 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985).



(iii) that unit cohesion will be disrupted by the introduction, in a uniquely particularized way, of disagreements about an intensely debated social issue; or

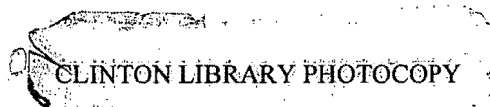
(iv) that many heterosexual members' moral revulsion at homosexual conduct will make it impossible for them to work effectively with a known homosexual.

All of these arguments rely on opinions and moral judgments presumed to be shared by most service members about an underlying characteristic (at least if manifested by actual or anticipated conduct) that is an important component of personality, is at least arguably immutable, and, by hypothesis, has not been shown to bear any direct relationship to an excluded individual's own ability to perform required duties.

The Supreme Court has in other contexts rejected "mere negative attitudes, or fear" on the part of others as a justification for governmental action otherwise deemed irrational under the Equal Protection Clause. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985) (city could not deny permit for group home for retarded persons based on negative attitude of surrounding landowners). As the Court has put it, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Ibid. (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (court could not determine that continued custody was not in best interests of child solely because parent had begun living with member of different race)). And in Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), which held that the military was required to justify exclusion of homosexuals based on status without proof of related conduct under "'active' rational basis review," the Ninth Circuit relied on Cleburne and Palmore in holding that exclusion cannot be justified on the basis of the "prejudices" of other service members. Id. at 1165.

It may be that Palmore and Cleburne can be distinguished to the satisfaction of the Administration and the courts, as a general matter, on the ground that the policy here can be tied to the reaction by others to actual or anticipated behavior ("conduct"), which is presumptively volitional and mutable, even if orientation is not. For that reason, I think it would be wise to ground the policy on knowledge of conduct (or at least propensity for conduct), rather than orientation. That approach would also help avoid due process and privacy concerns about taking action against individuals based on their desires, beliefs, state of mind or status alone. But whatever the proper resolution in other contexts of that issue, or the issue of how much weight may permissibly be given to the reactions of others, the special status and needs of the armed forces would probably provide a sufficient answer to such arguments in the limited context of determinations of suitability for military service.

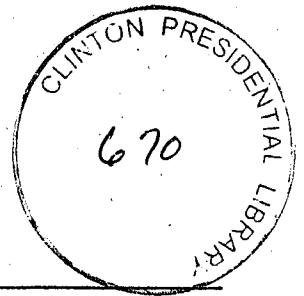
As noted above, the argument that the military is special has prevailed in the past against challenges to policies otherwise





U.S. Department of Justice

Civil Division



Office of the Assistant Attorney General

Washington, D.C. 20530

June 29, 1993

MEMORANDUM

TO: Webster L. Hubbell
Associate Attorney General

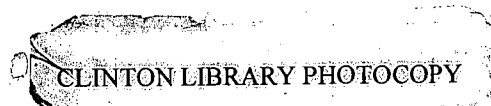
FROM: Stuart E. Schiffer
Acting Assistant Attorney General

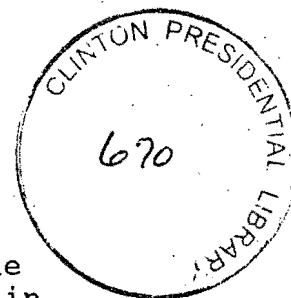
SUBJ: Litigation Implications of Potential Changes in Policy
Regarding Homosexuals in the Military

We have been asked to comment on the litigation risks of the policy option concerning homosexuals in the military currently being drafted by the Defense Department's military working group. We understand the basic outlines of that option to be: (1) sexual orientation is generally a private matter and the military will not make inquiries about a person's sexual orientation alone; (2) a person may be discharged for engaging in homosexual acts, entering into (or attempting to enter into) a homosexual marriage, or making a statement that he or she has engaged in homosexual acts or is a homosexual; and (3) sexual orientation is not a bar to service unless manifested by prohibited homosexual acts, homosexual marriage or attempted marriage, or statements that an individual has engaged in homosexual acts or is a homosexual.

It is our conclusion¹ that if certain aspects of this policy are implemented as a direct regulation of speech divorced from conduct or the propensity to engage in conduct, they will pose unnecessary litigation risks. Rather, we think that DOD should endeavor to achieve the objectives of its policy by adjusting the non-speech aspects of its policy concerning homosexuals, including enforcement policy. We also discuss below findings that DOD could make to support its new policy. Finally, the

¹ This conclusion is based on our understanding, as reflected in the first paragraph of this memorandum, that the proposed policy makes substantive changes to the current policy. If, to the contrary, the new policy is limited to changes in the method of enforcement, this conclusion and many of the problems noted below will not be applicable. See infra pp. 5-6.





policy-makers need to be aware of the interaction of the President's announcement of a new policy and two cases in litigation, in one of which there is an outstanding nationwide injunction.

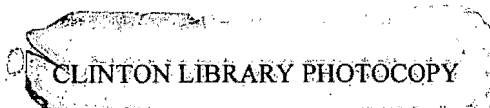
1. The Traditional Military Policy. The current Department of Defense Directive on homosexuality states: "Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14 ¶ H.1.a, 32 C.F.R. Part 41, App. A. "Homosexual" is defined as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." Id. at ¶ H.1.b.(1). "Homosexual acts" are defined as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." Id. at ¶ H.1.b.(3).

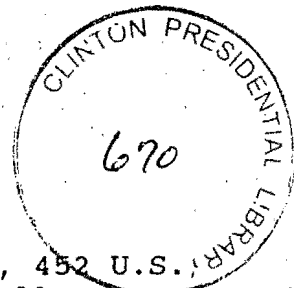
Litigation defending the traditional policy has been largely successful by characterizing the policy as directed at excluding persons who engage in, or have a propensity to engage in, homosexual conduct, even in cases where there was no proof of homosexual acts. We have opposed the contentions of plaintiffs that this policy is directed at orientation rather than conduct.

Four courts of appeals have without question accepted the Government's defense of the constitutionality of this policy (at least as applied to practicing homosexuals), and sustained it against due process, equal protection, and First Amendment challenges.² Several courts have rejected plaintiffs' argument that homosexuals are a suspect class entitled to the same protection as racial classes. See e.g. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984). The Seventh and Federal Circuits upheld the traditional policy in cases where the plaintiff admitted being a homosexual, but there was no proof of any homosexual acts. Ben-Shalom v. Marsh, 881 F.2d at 462; Woodward v. United States, 871 F.2d at 1069-1070.

The Ninth Circuit's rulings are more complicated. It has upheld the policy in a case where a serviceman was being discharged because he engaged in homosexual acts. Beller v.

² Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).





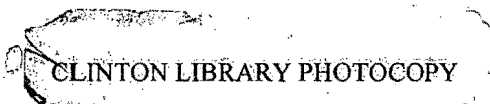
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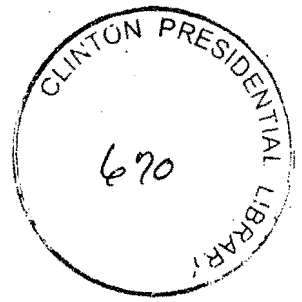
Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). It has also rejected a First Amendment challenge. Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992). On the equal protection issue, however, where the Government did not establish that any homosexual conduct had in fact occurred, Pruitt accepted the Government's argument that strict scrutiny did not apply, but rejected the Government's position that the policy was directed at conduct. The court held that the traditional policy classifies on the basis of homosexual status and could be sustained only if on remand the military presented evidence showing that it is "rationally related to a permissible governmental purpose." 963 F.2d at 1167. The Pruitt court also held that the ban could not be justified based upon "the prejudice of others against homosexuals * * *." Id. at 1165.

As noted, in several of the suits the basis for the discharge has been plaintiffs' public acknowledgement of homosexuality. We have successfully defended against claims that the First Amendment prohibits discharging a person based upon his admission that he is a homosexual. Courts have concluded that the military's restrictions do not limit what military personnel can say about homosexuality or about the military's policy concerning homosexuals; rather, they have held that admissions of homosexuality can be relied upon in a decision to exclude a member of the military because such admissions constitute a declaration that the person has the requisite propensity to engage in prohibited homosexual conduct and, hence, is ineligible for military service. Ben-Shalom v. Marsh, 881 F.2d at 462.

2. Litigation Risks of a Policy Directed at Speech. We are concerned that significant litigation risks will be incurred by the aspect of the policy option that appears to make statements admitting homosexuality to be in and of themselves a basis for discharge. Under the current policy, admissions of homosexuality have been used to establish that the service member is a member of a class of persons who engage in or have the propensity to engage in prohibited homosexual conduct. As we understand the proposed new policy, one of the prohibited acts may be the admission of homosexuality itself. If such statements are a basis for discharge without a link to underlying prohibited conduct, serious First Amendment problems may be raised.

To the extent that a court views the policy as directed against speech, divorced from conduct, our litigation risks will increase. A policy that punishes an individual who is frank and open in his speech and rewards the individual who is secretive, although they have both engaged in the same conduct, would, for many judges, raise serious questions about whether the restriction is unrelated to the suppression of free speech and restricts speech no more than is necessary to protect military effectiveness.





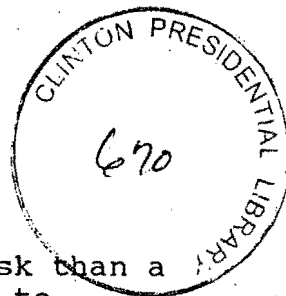
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There are, of course, numerous cases stating that substantial deference must be granted to the military to regulate speech where speech is likely to interfere with vital prerequisites for military effectiveness, see Brown v. Glines, 444 U.S. 348, 354 (1980). Nonetheless, the regulations must "protect a substantial Governmental interest unrelated to the suppression of free expression," and they "must restrict speech no more than is reasonably necessary to protect" that interest. Id. at 354, 355. We could argue that a regulation making statements admitting homosexuality a basis for discharge is constitutionally permissible because the military has wide latitude to determine what statements will interfere with military effectiveness. The military could presumably conclude, as a matter of administrative judgment, that the presence of an acknowledged homosexual in a military unit would in a large number of cases result in (i) privacy concerns on the part of heterosexual members, (ii) fear on the part of heterosexual members of sexual misconduct by a homosexual member, (iii) distractions from duty and loss of unit cohesion based on the introduction into the unit of disagreements about an intensely debatable political and moral issue, and (iv) similar morale problems resulting from moral revulsion felt, whether justifiably or not, by a large number of heterosexual members. Such an argument, however, may be pushing the limits of the deference that courts are willing to accord the military.³

An added complication may be that under the proposed policy the opportunity for a person to rebut the use of an admission of homosexuality against him may be reduced. Under the current policy, if a person states that he or she is a homosexual, that statement constitutes a presumption that the person engages in or has a propensity to engage in homosexual conduct. The person making the statement, however, is given an opportunity to rebut the presumption and show that he or she is not a homosexual within the meaning of the current regulations. If, under the proposed policy, the statement admitting homosexuality is itself an act for which the person can be discharged, the opportunity for rebuttal would appear to have been removed. Thus, in that respect, the new policy would appear to require discharge for

³ We are aware of the Connick v. Myers, 461 U.S. 138, 147 (1983), line of cases, holding that when a public employee's speech is not a matter of public concern, courts will ordinarily not interfere with restrictions on the speech. However, we are doubtful that this line of cases will protect a direct bar on speech in the circumstances that are likely to be present in litigation over discharge of homosexuals. Persons excluded from the military because of admissions of homosexuality will in many cases be able to tie their admissions to opposition to the military's policy regarding homosexuality and, thus, avoid the Connick v. Myers cases.





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orientation alone and would pose more of a litigation risk than a regulation that is directed at conduct or the propensity to engage in conduct.⁴

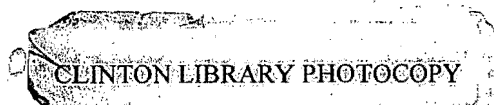
If, on the other hand, the proposed policy is intended to permit a service member to rebut his or her proposed discharge on the basis that the statement did not mean that he or she engages in or has the propensity to engage in prohibited conduct, the policy would presumably retain the conduct-based direction of the traditional policy. In that event, the wording may need to be changed so as not to lead courts to think that the policy is directed at speech alone rather than at conduct.

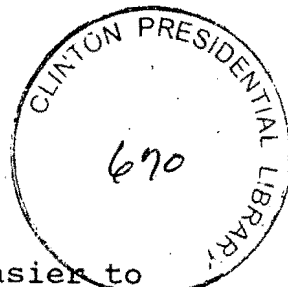
In sum, our litigation posture would be strengthened if we can accomplish the desired policy goals without directly providing for discharge based solely on speech. The prohibition on speech should be linked to some form of prohibited conduct. As reflected in the large number of cases upholding the current policy which has this linkage, the First Amendment does not prohibit the use of statements to establish that the service member is in a class of persons whose prohibited conduct makes them ineligible for service.

We have based the above analysis on the First Amendment because under current law the Government would have to meet a higher standard than it would under an analysis pursuant to the Equal Protection Clause. However, if the policy results in treating differently two service members only because one spoke publicly and one did not, we think there may be a serious equal protection problem as well.

3. Possible Non-Speech Related Means to Achieve the Policy Objectives. Because we think that a policy directed solely at speech poses significant litigation risks, we think that DOD should attempt to achieve its policy objectives through other means. For example, DOD may wish to consider some or all of the following methods, if appropriate to DOD goals. These methods

4 This aspect of the policy could also cause problems with the question of whether a "celibate homosexual" can serve in the military. Under the traditional policy, which is directed at conduct or the propensity to engage in conduct, a celibate homosexual could attempt to show that he or she does not, in any realistic sense, have the desire or propensity to engage in homosexual conduct. But if a person's statement admitting that he or she is a homosexual is itself an act requiring discharge, the celibate homosexual may not be given the same opportunity that he or she had under the traditional policy. We believe that this would increase the possibility that some courts might invalidate the policy on the grounds that the military is attempting to proscribe orientation, not conduct.





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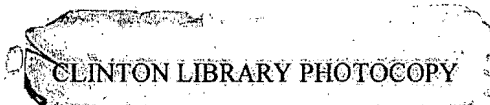
pose little litigation risk (and some of them may be easier to defend than the current policy). All these methods are based on the assumption that DOD will retain some form of prohibition against homosexual conduct.

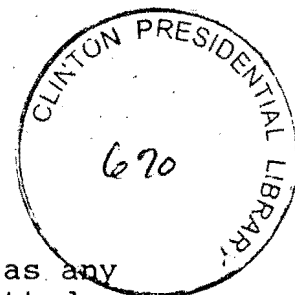
a. The new policy could be cast, at least in part, as a matter of enforcement policy. Obviously, the military will not exclude anyone if it does not know that the person is a homosexual. It is also clear that it is within reasonable military discretion to determine how to enforce its policy against service by persons who engage in homosexual conduct (or, if covered, have a desire or intent to do so). In balancing a code of conduct that prohibits homosexual conduct against privacy concerns of service members, the military could determine under what circumstances it will initiate an investigation to determine whether a service member has violated the code of conduct. For instance, it could (i) presume, absent reliable evidence to the contrary, that service members will conform to the code of conduct; (ii) decline to initiate questions about homosexuality, absent reliable evidence that a service member has violated the code of conduct; (iii) determine that mere hearsay alone is not sufficient evidence to justify the initiation of an investigation.

It may be necessary, however, for guidelines to be issued setting forth the conditions under which investigations will be conducted. Otherwise, we could face a challenge based on a claim that the initiation of certain investigations is arbitrary or capricious. In Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978), the discharge of an airman was set aside where the policy required exclusion of homosexuals except "where the most unusual circumstances exist and provided that the airman's ability to perform military service has not been compromised." The court held that the Air Force did not have adequate guidelines to govern its discretion and permit judicial review to determine whether the exclusion was arbitrary and capricious.

b. The existing DOD Directive defines a "homosexual" as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directive 1332.14 ¶ H.1.b.(1). It would cause no litigation difficulty if the definition of homosexual were narrowed to include only persons who engage in "homosexual acts." Indeed, elimination of the "desires to engage in" language would remove a current weak point in our litigation posture. With elimination of both the "desires to engage in" and "intends to engage in" language, an admission that a person is a homosexual would presumptively constitute an admission that the person engages in the prohibited acts. Of course, DOD would have to judge whether such a change would be consistent with its policy goals.

c. Similarly, the definition of "homosexual act" could also be changed without presenting any litigation difficulty. The





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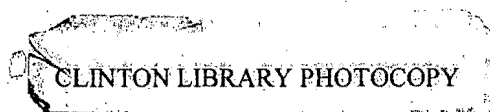
current DOD Directive defines "homosexual act" broadly as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." DOD Dir. 1332.14, ¶ H.1.b.(3). Narrowing the definition of "homosexual acts" to include only those acts proscribed by Article 125 of the U.C.M.J. (10 U.S.C. § 925), i.e., sodomy, would facilitate defense of the policy because it would permit exclusion only for conduct that constitutes a criminal offense and is analogous to the criminal prohibition upheld by the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986).⁵ Obviously, DOD would also have to determine whether this change is desirable as a policy matter.

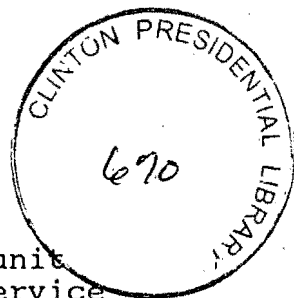
Undoubtedly there are many other methods by which the military can achieve its policy objectives without directly regulating speech. But the key point remains: if DOD regulates speech directly, it will face a severe litigation risk. If it avoids regulating speech directly, the risk can be held to a lower level. One word of caution: it is important that the policy which is promulgated not be officially described as "Don't Ask, Don't Tell." Even a legitimately articulated policy is subject to a serious legal challenge if its enforcement is directed against speech.

4. Recommended Findings. We believe that the likelihood of courts deferring to the judgment embodied in the new policy would be enhanced if explicit findings were set forth. Indeed, our litigation prospects would be significantly enhanced if DOD would prepare a well-reasoned statement setting forth in detailed terms the rationale for its policy. We know for instance that the Ninth Circuit in Pruitt required that the Government show in some depth that its policy is rationally related to a permissible governmental purpose. 963 F.2d at 1167. Accordingly, although we disagree with the Ninth Circuit, we recommend that findings be drafted to satisfy even its stringent requirements. The findings could be of two types.

The first type would explain why military effectiveness would be impaired if persons who engage in the prohibited homosexual conduct (however defined) were permitted to serve. To the extent consistent with the new Department of Defense policy, these findings might include: (a) experience has shown that the presence of individuals who engage in the prohibited conduct adversely affects the ability of the Military Services to

5 Perhaps, such a narrowing of the definition could be accompanied by a statement that admissions of homosexuality or evidence of bodily contact with a person of the same sex for purposes of satisfying sexual desire may give rise to a rebuttable presumption that the persons engages in or is likely to engage in homosexual sodomy.





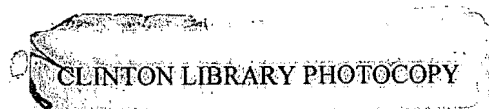
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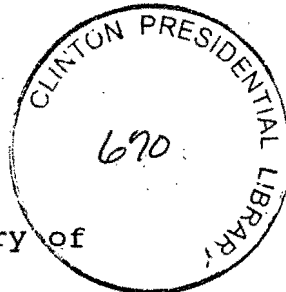
maintain good order, discipline, and morale; to ensure unit cohesion; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; and to facilitate assignment and worldwide deployment of service members; (b) the presence of individuals who engage in the prohibited conduct will interfere with the privacy rights of other service members who frequently must live and work under close conditions affording less privacy than is present in civilian life; (c) the presence of persons who engage in the prohibited conduct will also adversely affect public acceptability of the military service and thereby interfere with recruiting and retention in the all volunteer military concept.

The second type of finding should be made if the military changes its enforcement policy. It would explain why the military would not, absent reliable evidence, commence questioning or an investigation to determine whether a service member had engaged in the prohibited homosexual conduct. To the extent consistent with Department of Defense policy, these findings would include: (a) privacy concerns ordinarily preclude delving into a person's private sex life absent reliable evidence that the person has engaged in proscribed activity; (b) the Military Services recognize the need to prevent unwarranted investigations into a person's private life on the basis of rumor, innuendo, or unreliable evidence; (c) the risk of blackmail must be minimized.

5. Effect of the Meinhold Injunction and Other Pending Litigation. The final implementation of any new policy in this area must take into account the outstanding injunction in Meinhold v. United States Dept. of Defense, 808 F. Supp. 1455 (C.D. Cal., 1993), appeal pending, No. 93-55242 (9th Cir.). That injunction "permanently enjoin[s]" 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." While we are appealing from that injunction, and believe we have an excellent chance of ultimately reversing the injunction (or at least confining it to Meinhold), it has not been stayed.

Unless the ultimate policy which is developed is one limited to "sexual conduct which interferes with the military mission" -- and off-base, off-duty conduct, and pre-service conduct may not meet that definition -- the new policy cannot be immediately implemented without our first taking some action in the litigation to get the injunction modified or stayed. Any Executive Order or DOD Directive which announces the new policy must therefore be formulated so that no discharges or denials of enlistment can occur until the injunction is modified. Absent such recognition of the injunction, there is a serious risk that





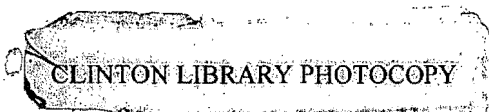
the district court (Hatter, J.) will hold the Secretary of Defense (or even the President) in contempt.

Policy-makers also need to be aware of two other litigation-related events. In both our pending appeal in Meinhold and in our defense of an appeal in Steffan v. Aspin, No. 91-5409 (D.C. Cir.), we will have briefs due on July 19 (assuming our latest request for an extension in Meinhold is granted).⁶ Both these cases involve publicly acknowledged homosexuals, and we are in a litigation posture where we will be required to present a legal defense of the merits of the former military policy. We can get no further extension in either case. The only way we can avoid briefing the merits of the former policy is if DOD agrees to reprocess both individuals. Such reprocessing might be justified if changes are made to redefine the prohibited practices and the new policy is made applicable to persons in litigation. Reprocessing might also be justified if DOD concludes that all pending discharges should be reconsidered in light of the policy determinations and supporting findings that resulted from the exhaustive review of the homosexual issue by the President and Congress. Of course, any such reprocessing would have to have a meaningful purpose and not be used simply as a delaying tactic.

6. Avoiding the "Worst Case" Scenario. We emphasize the need for the Government to develop a policy position that will give us the ability to present legal arguments with a high likelihood of success in litigation. For instance, consider the adverse impact of the following "worst case" scenario if the policy is speech-directed. On July 15, the President announces the policy. On July 19, we file briefs in Meinhold and Steffan arguing that the former policy was permissible (and in Steffan we would be including an argument that homosexuals are not a suspect class and that homosexuality is not a fundamental right). Shortly thereafter the district court in Meinhold strikes down the new policy, and we are unsuccessful in obtaining a stay of its injunction. Needless to say, such an occurrence would represent a major policy disaster.

However, with a strong litigation posture we should be able to obtain a stay, at least at the court or appeals or Supreme Court level, of the Meinhold injunction, and the new policy would have a chance to operate. Moreover, if the changes in the prohibited practices affected Meinhold and Steffan and DOD were willing to reprocess them, we could avoid filing briefs in the courts of appeals defending the former policy on the heels of the President's announcement of the new policy.

⁶ We also have a brief due in the district court case of Dahl v. Secretary of the Navy, No. 89-0351-MLS-JFM (E.D. Cal.), on July 16, 1993.



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The district court inexplicably failed to consider important evidence in the record. Furthermore,

SUMMARY

We show in Part II that the district court erred on the merits in holding that DOD's former policy violated equal protection.

Military officials ~~have decided~~ ^{adopted the former policy} as a matter of "considered professional judgment" ^{about the requirements of military service,} ~~that homosexuality is incompatible with~~

~~submit, hold~~ Previous decisions of this Court, ~~we~~ foreclose, ~~we submit, debate~~ that it is constitutionally

permissible for DOD to conclude that homosexual conduct adversely affects the military. Beller v. Middendorf, 632 F.2d 788 (8th Cir. 1980), cert. denied, 452 U.S. 905 (1981). In an effort to avoid

this Ninth Circuit precedent, ~~upholding the military's right to~~

~~separate members for homosexual conduct~~, the district court here defined the classification in question as "gays and lesbians who do

not engage in prohibited conduct." However, the regulatory language, DOD's reasonable interpretations, and judicial precedent,

make plain that the policy targets members who have engaged, or (as relevant here) will likely engage in homosexual conduct. ~~The~~

policy "target[s] [homosexual] conduct past, present, [or] future, but conduct nonetheless." Watkins v. United States Army, 847 F.2d 1329, 1362 (9th Cir. 1988) (Reinhardt, J., dissenting), vacated,

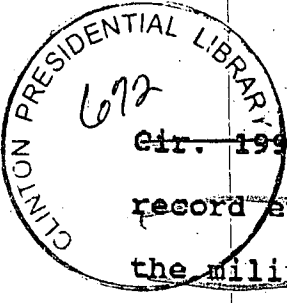
875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).

Courts have consistently upheld as rational, as a matter of law,

DOD's policy to discharge all members who, through their acts or statements, demonstrates a propensity to commit homosexual acts,

~~has repeatedly been held to be rational.~~ See Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989). Moreover, ~~here the Government~~

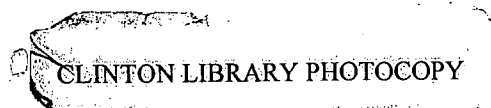
~~justified, consistent with~~ Pruitt v. Cheney, 963 F.2d 1160 (9th



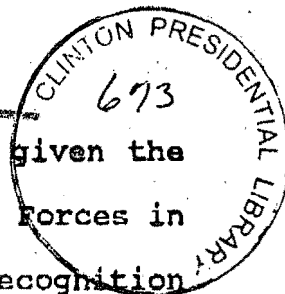
~~cir. 1991), cert. denied, 113 S. Ct. 655 (1992) by reference to
record evidence which the district judge failed to consider, that
the military's prior policy had a rational basis.~~

Thus, if the Court reaches the merits¹ which we argue should
be unnecessary given available nonconstitutional grounds for
overturning the trial court's judgment¹ it should reverse and
remand with instructions to enter judgment in favor of DOD. See,
High Tech. Gays v. DISCO, 895 F.2d 563, 574 (9th Cir. 1990)¹

¹ INSERT.



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B. DOD's Former Policy Is Not Unconstitutional

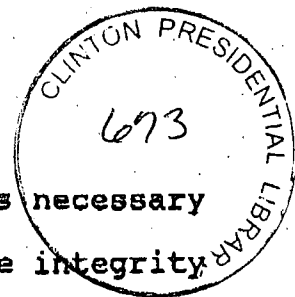
The President, in consultation with Congress, is given the responsibility by the Constitution for running the Armed Forces in a manner that ~~must~~ protects our national security. In recognition of this constitutional mandate, the courts have accorded significant deference to the "considered professional judgment" of the "appropriate military officials" regarding the proper composition of the Armed Forces. Goldman v. Weinberger, 475 U.S. 503, 509 (1986). The Supreme Court has observed, with respect to the "complex, subtle, and professional decisions as to the composition . . . and control of a military force," that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." Rostker v. Goldberg, 453 U.S. 57, 65 (1981). ^{Under the former policy,} "Appropriate military officials" ~~have~~ decided, as a matter of "considered professional judgment," that ~~"homosexuality is incompatible with military service" and that~~ "the presence 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." See DOD Directive 1332.14.

Previous decisions of this Court foreclose, we submit, debate over whether it is constitutionally permissible for DOD to have concluded that homosexual conduct adversely affects the military. In Beller v. Middendorf, this Court ^{upheld} the military's policy "requiring discharge of all who have engaged in homosexual conduct." 632 F.2d 788, 812 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). In sustaining the Navy's policy as constitutionally permissible, this Court stated that the Navy acted

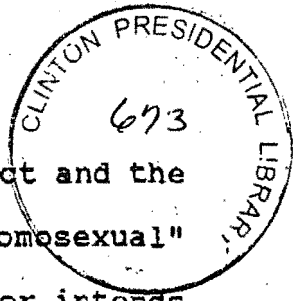
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within its discretion in concluding that its policy was necessary "to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own." 632 F.2d at 811. The Beller holding remains the law of this Circuit, and was recently reaffirmed in Schowengerdt v. United States, 944 F.2d 483, 389-90 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992). Accord, High Tech Gays v. DISCO, 895 F.2d 563 (9th Cir. 1990).

In an effort to avoid this line of circuit precedent upholding the military's right to separate members for homosexual conduct, the district court here defined the classification in question as "gays and lesbians who do not engage in prohibited conduct." ER at 84. ^{does not precisely and accurately state the classification at issue, see} That is ~~wrong~~. Under the military's regulations, the relevant classification is persons who the military reasonably concludes either have committed or, as relevant here, are likely to commit, homosexual acts based on their admitted "desire" or "propensity" to engage in homosexual conduct. The regulatory language makes plain that the policy target members who have engaged, or (as relevant here) will likely engage in homosexual conduct. As quoted earlier, ^{pertinent} ^{applies to} ~~the military policy applicable to Meinhold states, inter alia, that "the presence in military environment of persons who . . . , by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission."~~ DOD Directive 1332.14. Similarly, the regulatory



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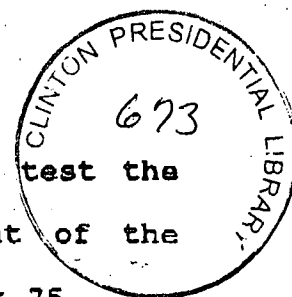
definition of "homosexual" is linked to homosexual conduct and the propensity to engage in homosexual conduct. See id. ("homosexual" defined as person who "engages in, desires to engage in, or intends to engage in homosexual acts.")

As Judge Reinhardt concludes, "the regulations are targeted at conduct--past, present, and future, but conduct nonetheless." Watkins v. Army, 847 F.2d 1329, 1362 (9th Cir. 1989) (Reinhardt, J. dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990). The Seventh Circuit and the Federal Circuit have both held that the regulations target past and prospective homosexual conduct. See, Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); and Woodward v. United States, 871 F.2d 1068, 1074 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). ^{DOD has concluded that,} in admitting his homosexuality, Meinhold admitted ~~at the very least~~ that he had a "desire" and "propensity" to commit homosexual acts. See DOD Directive 1332.30. Absent a contrary showing or assertion by Meinhold, the Navy permissibly could infer that Meinhold would ^{likely} ~~probably~~ commit such acts, if he had not already done so.¹

In sum, the relevant classification is not, as the district court held, ^{erroneously} homosexuals "who do not engage in [homosexual] conduct." ER at 84. Rather both precedent and DOD's reasonable construction of its regulations show that the relevant classification is persons who the Navy has concluded have committed or, as pertinent here, will likely commit homosexual acts. In

¹ See Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1074.

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concluding the contrary, the district court failed to test the policy, as the Supreme Court has directed, "in light of the purposes [DOD] sought to achieve." Rostker, 453 U.S. at 75.

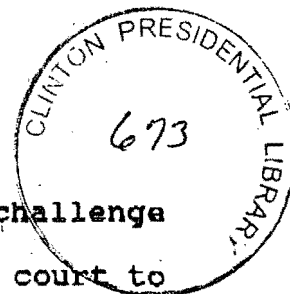
In Beller, this Court, found that the military's policy with respect to homosexual conduct satisfied even heightened constitutional scrutiny. Subsequently, it held that only rational basis review was required. See, High Tech Gays, 895 F.2d at 571. The question presented here is whether constitutional principles require the military to retain members it believes have committed homosexual acts or who are sufficiently likely to commit future homosexual acts, when it has made the policy determination that retention of such individuals impairs its ability to maintain an effective fighting force. Stated differently, the question is whether the Constitution compels the military to retain members who it reasonably concludes will commit acts that it further concludes will "seriously impair the accomplishment of the military mission . . . DOD Directive 1332.30.

← DOD's policy to discharge all members who, through their acts or statements, demonstrate a propensity to commit homosexual acts has repeatedly been held ^{as a matter of law} to be rational, ~~because it serves to protect what this court has found to be a reasonable prospect of interference with military effectiveness, while conserving scarce resources and protecting individual privacy.~~ See Ben-Shalom, 881 F.2d at 464. **MOVE SENTENCE FROM P. 6 HERE + STRING CITES**

↑ In Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), this Court reversed a district

A. The District Court Erroneously Failed To Consider Important Evidence

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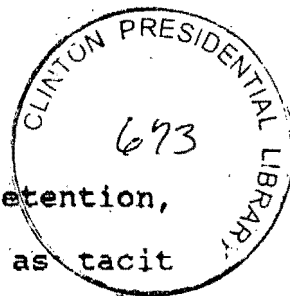
court's dismissal of a service member's equal protection challenge to the military's homosexual policy, and remanded for the court to determine whether the military could produce a rational basis in the record to justify the policy.² This Court instructed that, on remand, the reasons put forth on the record underlying the military's policy would be entitled to the utmost deference. See, 963 F.2d at 1166-67.

Here, consistent with Pruitt, the Government ^{supported} justified its then-existing policy by reference to record evidence, including a GAO Report of June 1992, see ER at 34, a Navy Times article discussing the homosexual policies of foreign militaries, see Memorandum in Opposition to Plaintiffs Motion For Summary Judgment (Jan. 11, 1993), and three declarations of high-ranking DOD officials explaining and justifying the military's homosexual policy. See Declarations of Assistant Secretary of Defense Christopher John; Rear Admiral S. Frank Gallo; Captain Gregory A. Markwell, ER at 52-74.³ This record evidence showed ~~that~~ ^{is reasoning and basis for its conclusion} the military ~~could rationally conclude~~ that the former policy promoted, inter alia: (1) the privacy interests of heterosexual members; (2) the military's interest in discharging service members before their propensity to commit impermissible acts ripened into regulatory or

² In Pruitt, this Court stated that the relevant classification was homosexual "status," but did not explain its use of the term precisely. See 963 F.2d at 1163. Notably the term homosexual "status" is not to be found in the regulations which, as discussed supra, speak in terms of homosexual conduct and the propensity to engage in such conduct.

³ INSERT.

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criminal misconduct; (3) discipline recruitment, and retention, because a less broad prohibition might be understood as tacit approval or tolerance of misconduct; and (4) economy, because a less ~~and~~ ^{broad} prohibition could have a significant budgetary impact if it required constructing separate berthing and sanitary areas for homosexuals.

Without explanation, the district court failed to consider DOD's declarations. The district court stated--erroneously--that the Navy "rest[ed] solely on [the GAO Report of June 1992]," ER at 85, and the court found ~~(also erroneously we submit)~~ that this Report in conjunction with the military's considered professional judgment was insufficient to sustain the homosexual policy. The court then proceeded to strike down the policy based on its assessment of record evidence that was critical of the policy. See ER at 85-88.

~~The declarations submitted by DOD, especially when read against the backdrop of precedent and DOD's policy statement, support the rationality of DOD's homosexual policy. Every court of appeals, including this one, that has reached the merits has upheld DOD's homosexual policy against constitutional attack.~~

(Pick up at p.39 and go on to p.40)

Under Pruett, the district court's failure to consider this important record evidence was errors.

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: Dasell [partial] (1 page)	~~n.d.~~	~~P6/b(6)~~
002. memo	Michael Vatis to Jamie Gorelick et al re: New Policy on Homosexual Conduct in the Armed Forces (23 pages)	~~11/18/1993~~	~~P5, P6/b(6)~~
003. report	Re: Defense of DOD's Former Policy on Military Service by Homosexuals (3 pages)	n.d.	P5 674
004. memo	Edwin Kneedler et al. to Jamie Gorelick re: New Policy on Homosexuals in the Military (4 pages)	09/28/1993	P5 675

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

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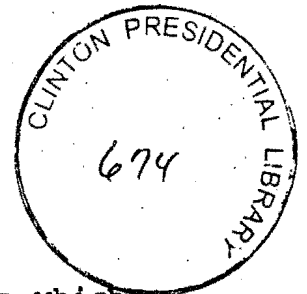
RR. Document will be reviewed upon request.

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

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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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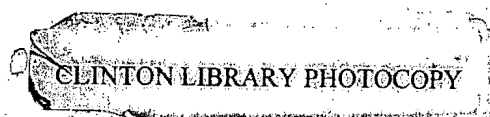
Re: Defense of DOD's former policy on
military service by homosexuals

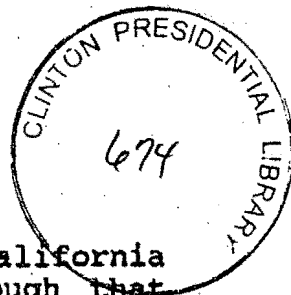


You asked about the procedural posture of cases in which we are currently defending the policy on military service by homosexuals. There are three categories of cases: (i) those involving the policy in place before the recent policy review announced by the President on January 29; (ii) those involving the interim policy put in place on January 29 pending the outcome of that review; and (iii) one case already filed, and presumably more to come, challenging the new policy announced by the Secretary of Defense on July 19. The new policy was originally scheduled to take effect on October 1, but implementation has been delayed pending enactment of legislation mandating a similar policy (expected later this month) and the stay or reversal of the overbroad injunction entered by the district court in the Meinhold case, described below.

1. The most prominent cases in which we are defending the former policy are the Meinhold case in the Ninth Circuit and the Steffan case in the D.C. Circuit.¹ We have also noticed an appeal

¹ Steffan was argued on September 13, and is under submission. Meinhold has been set for argument in December. In the meantime we have been endeavoring, on an emergency basis, to get the Ninth Circuit to limit the very broad order entered by the district court, so that it will apply only to Meinhold and will not further interfere with application of the interim and new policies to others in the military. The court of appeals denied our initial motion for a stay of the injunction (as it applies to anyone besides Meinhold) last March, on the ground that there was no apparent inconsistency between the original injunction (which prohibited, inter alia, discharges based on sexual orientation alone) and the interim policy (which provided for transfers to the standby reserve in lieu of discharges). In early September we renewed the motion, in light of the need to clear the way for the new policy to take effect. The court's motions panel denied that motion on September 22, and we asked for en banc reconsideration on September 30. Also on September 30, the district court held a hearing on Meinhold's motion to hold the Secretary of Defense in contempt of the original injunction for enforcing the interim policy (even though the court of appeals' earlier order had said there was no conflict between that policy and the injunction). At that hearing the district court declined to find the Secretary in contempt, but entered a new order "clarifying" its earlier injunction and, in fact, significantly expanding it to prevent the military from taking any action (including keeping records) on the basis of sexual orientation, in the absence of demonstrably detrimental sexual "conduct" (which in the context of the order presumably means acts, not statements which might be defined as "conduct" under the new policy). On October 1 we filed a new





in another case (Dahl) in which a district court in California entered judgment against the Navy on August 30, although that appeal has not been formally authorized and no briefs have been filed. We are also defending at least seven cases challenging the old policy that are currently pending before various district courts. Moreover, there are several individuals who have been transferred to the "standby reserve" under the interim policy announced in January. The interim policy differs from the former policy only in allowing individuals who have been processed for discharge without a specific finding of homosexual acts to be transferred to the standby reserve, rather than discharged, pending implementation of the new policy. One of those individuals (Lt. Selland) has recently obtained a preliminary injunction from the D.C. district court ordering him reinstated to active duty.

2. During the policy review initiated by the President, it was necessary to defend pending (and newly filed) cases in order to preserve the status quo. Once the new policy was announced in July, it became clear that there would not be major changes in the substantive criteria for discharge (which will still include, in general, any homosexual act or any statement, public or private, of homosexual orientation).² Thus, it is now necessary to defend the

appeal from that new order, moved to consolidate that appeal with the appeal from the prior injunction, asked for initial en banc consideration of an emergency motion to limit the new injunction to Meinhold alone (to be considered along with the reconsideration of the denial of our previous motion to limit the original injunction), and asked for an emergency "mini-stay" of the new order while the court considered the other motions. We understand that all of our papers have been circulated to the full court (quite an exercise in the Ninth Circuit), but as of late afternoon today we have recieved no further response from the court.

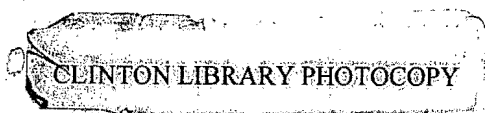
² The only arguably significant change in those criteria involves what the Department of Justice has termed, in defending the former policy, the "rebuttable presumption" of dischargeability that arises from a service member's statement of homosexual orientation. The former and interim policies define a dischargeable "homosexual" as one who "engages in, desires to engage in, or intends to engage in homosexual acts"; to rebut the "presumption" of dischargeability, a service member must in theory demonstrate that he or she has no "desire" to engage in homosexual acts. The new policy ties discharges based on statements of orientation explicitly to a presumption that one who makes such statements "is engaging in homosexual acts or has a propensity or intent to do so." Arguably, disproving a "propensity or intent" to act is easier than disproving a "desire" to do so. It must be recognized, however, that (i) DOJ has consistently defended the old policy on the theory that "desire" in this context must be taken to mean something quite strong (basically "propensity"), so that in our



old policy in order to remain in a position to defend the new policy -- at least unless all service members processed under the old and interim policies are temporarily reinstated and then reconsidered for separation under the new policy.

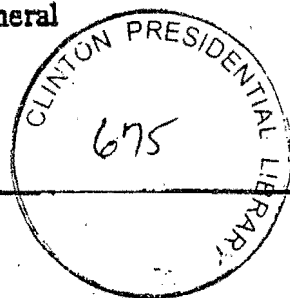
3. We have in fact suggested several times that the Department of Defense consider reinstating current plaintiffs such as Meinhold and Dahl (who, ironically, has moved on to a law career and probably does not want actual reinstatement as a lieutenant in the Navy) and reprocessing them for discharge under the new policy. Reprocessing would in most cases be a formality, because the plaintiffs in pending litigation have ipso facto acknowledged a homosexual orientation, and none has to date attempted to rebut the resulting presumption of homosexual acts. It is possible that the courts would therefore view it as a dilatory tactic, and would refuse to dismiss cases presently pending as moot because of reinstatement under these circumstances. Moreover, DOD has on occasion expressed a desire to prosecute pending cases actively to a speedy and favorable conclusion, because (i) the policies are so similar in terms of the substantive discharge criteria that decisions upholding the former policy will be very strong authority for the validity of the new one, and (ii) a refusal to defend prior discharges would, DOD fears, be viewed as a concession that the prior policy was flawed or as a reflection of a lack of commitment on the part of the Executive Branch (specifically including the Department of Justice) to mount a vigorous defense of the military's fundamental position regarding service by homosexuals.

view the change in phrasing merely clarifies the policy rather than changing it; and (ii) it does not appear that the military sees any difference in the formulations, or has any intention of implementing the new phraseology in any more expansive way.





U.S. Department of Justice
Office of the Solicitor General



Washington, D.C. 20530

September 28, 1993

TO: Jamie Gorelick
General Counsel
Department of Defense

FROM: Edwin S. Kneedler
Deputy Solicitor General

Mark I. Levy
Deputy Assistant Attorney General

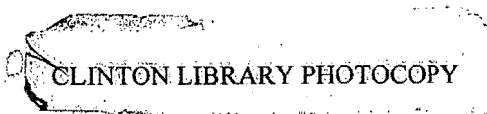
John A. Rogovin
Deputy Assistant Attorney General

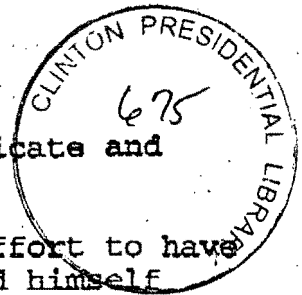
RE: Promulgation of Regulations Implementing
New Policy on Homosexuals in the Military

We understand that the Department of Defense is considering public issuance on October 1, 1993, of regulations implementing the new policy on homosexuals in the military announced by the President and the Secretary on July 19, 1993. The regulations would be slated to take effect on November 1, subject however to the effect of any judicial injunction then in place.

A. As we discussed yesterday evening, we believe that the proposed action would present substantial litigation risks that should be taken into account in reaching a final decision:

1. Publication before we have succeeded in narrowing the existing Meinhold injunction would almost certainly lead Judge Hatter to examine the new regulations and issue a further order finding some or all of them unconstitutional and specifically enjoining their implementation. This would cut against our goal of having the Ninth Circuit or, if necessary, the Supreme Court narrow the existing injunction to Meinhold individually. That goal is important precisely so that the new policy may be implemented, and so that Judge Hatter will not have the chance to offer the first, highly visible, and almost certainly highly unfavorable judicial reaction to it.

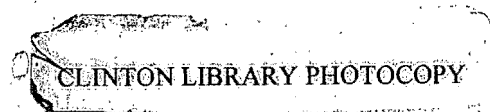


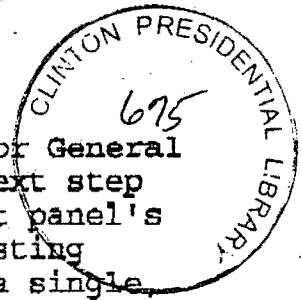


2. Publication of regulations would also complicate and worsen our procedural posture.

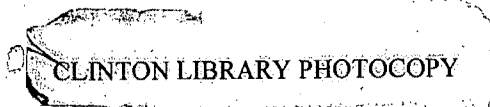
- a. At a minimum, further proceedings in our effort to have the existing injunction limited to Meinhold himself will be clouded by arguments that will be raised about the new policy, including specific objections to particular implementing regulations.
- b. If Judge Hatter asserts jurisdiction and enjoins the new regulations, we will have to take a new appeal to the Ninth Circuit, probably before it has acted on our petition to rehear en banc the panel's denial of our motion to narrow the existing injunction. That would be a very confusing procedural situation for the court of appeals to resolve.
- c. While our emergency efforts to narrow the injunction thus far have been limited to the procedural ground of overbreadth, DOD's proposed implementation would probably force us to brief and argue, for the first time, the facial validity of the new policy. That argument would have to be made before the new policy can be implemented, in highly visible emergency proceedings, and in a case that should involve (and in which the record addresses) only one individual and only the old, less favorable and somewhat less defensible policy.
- d. It would be preferable to wait until we can rely on an Act of Congress, together with implementation of the President's policy, in seeking a stay from the Supreme Court, should that be necessary. We could then argue that the political branches have spoken in unison, that their actions are presumptively constitutional, and that the way should be clear for implementation. It would be best to have no detailed implementing regulations to bog the Court down in secondary issues (let alone consideration of the new policy on the merits).

3. Publication of new regulations at this point may invite on-the-record Congressional examination before the pending legislation is passed. This could lead to Congressional objections to particular implementing regulations, or attempts to modify the legislation that would at best delay its passage. It would also weaken considerably the otherwise useful argument that, under Chevron, the courts owe deference to the regulations as legitimate administrative interpretations of whatever statutory provisions are ultimately enacted. Finally, it could lead to the inclusion in committee reports or floor statements of unfavorable language that would undercut the argument for deference.

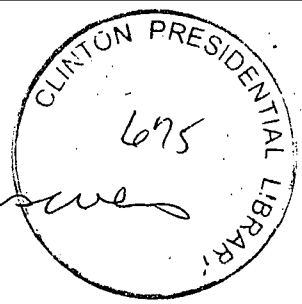




B. We would instead propose (although the Solicitor General has not yet formally authorized this course) that our next step be a petition for en banc rehearing of the Ninth Circuit panel's September 22 order denying our motion to narrow the existing injunction to Meinhold. Such a petition would present a single, essentially procedural issue (the nationwide scope of the injunction entered in a suit brought by one plaintiff) on which Judge Hatter is certainly wrong, irrespective of the merits of Meinhold's substantive constitutional arguments. If the Ninth Circuit has not acted by the time the pending legislation is enacted, we could seek a stay from the Supreme Court -- again solely on the scope of the injunction -- in order to allow the Secretary to implement the President's policy and the legislation. Accordingly, solely from the standpoint of litigation strategy, we strongly advise awaiting passage of the legislation, and then taking the position that the regulations are ready for promulgation but will not be published until the cloud of the injunction is lifted. That strategy is designed to minimize Judge Hatter's involvement, contain any possible damage from adverse appellate resolution of the Meinhold case, and reserve all arguments concerning the validity of the new policy and regulations for later cases, before other judges, arising from the actual application of that policy.



re: response to Waco questions - I've answered



J.O.K.

- not always kept -

→ Josh Stie

- Check re: Roger Altman
- will she give audio?

I was wrong
• person?

Carol Kuro - not just a file -

re: info on infant for -

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Stuart Schiffer to Webster Hubbell re: Policy Regarding Homosexuals in the Military (9 pages)	06/29/1993	P5 676✓
002. memo	Drew S. Days, III to the Associate Attorney General re: Policy on Homosexuals in the Military (4 pages)	06/29/1993	P5 677✓
003. memo	H. Jefferson Powell to the Associate Attorney General re: Changes in Policy Regarding Homosexuals in the Military (10 pages)	06/29/1993	P5 678✓
004. note	Cliff Sloan to Jamie Gorelick re: Nunn Legislation (1 page)	n.d.	P5 679✓
005. memo	Clifford Sloan to President William J. Clinton re: New York Times Editorial (3 pages)	09/20/1993	P5 680✓
006. memo	Re: DOD's Former Policy on Military Service by Homosexuals (3 pages)	n.d.	P5 681✓
007a. memo	Leigh A. Bradley to Ms. Gorelick re: Homosexual Cases in Litigation (7 pages)	05/24/1993	P6/b(6)
007b. form	Re: Tracy Thorne [partial] (1 page)	~~07/26/1993~~	~~P6/b(6)~~
007c. form	Re: Miller (1 page)	~~07/26/1993~~	~~P6/b(6)~~
007d. form	Re: Watson (1 page)	~~07/26/1993~~	~~P6/b(6)~~
007e. form	Re: Richard Selland [partial] (1 page)	~~07/26/1993~~	~~P6/b(6)~~
007f. form	Re: Biggers (1 page)	~~07/26/1993~~	~~P6/b(6)~~

COLLECTION:

Clinton Presidential Records
Counsel's Office
Cliff Sloan
OA/Box Number: 4658

FOLDER TITLE:

Gays in the Military - General [2]

Kelly Hendren
2006-0227-F
kh325

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007g. form	Re: Gallaher (1 page)	~~07/26/1993~~	P6/b(6)
007h. paper	Information Paper re: Homosexual Status Case Concerning U.S. Marines: Justin C. Elzie [partial] (1 page)	~~07/26/1993~~	P6/b(6)
007i. form	Re: Frederick Seltzer [partial] (1 page)	~~07/26/1993~~	P6/b(6)
007j. memo	Kevin J. Keefe to Rudy de Leon re: Standby Reserve Cases Based on Homosexual Status (3 pages)	~~n.d.~~	P6/b(6)
008. memo	Cliff Sloan to George Stephanopoulos re: Nunn Legislation on Gays-in-the-Military (2 pages)	09/20/1993	P5
009. memo	Cliff Sloan to George Stephanopoulos re: Nunn Legislation on Gays-in-the-Military (2 pages)	09/20/1993	P5
010. memo	Bernard Nussbaum and Clifford Sloan to President William J. Clinton re: New York Times Editorial (3 pages)	09/20/1993	P5
011. memo	Bernard Nussbaum and Clifford Sloan to President William J. Clinton re: New York Times Editorial (3 pages)	09/20/1993	P5
012. memo	Bernard Nussbaum and Clifford Sloan to President William J. Clinton re: New York Times Editorial (3 pages)	09/20/1993	P5
013. memo	Cliff Sloan to George Stephanopoulos re: Gays-in-the-military litigation (1 page)	09/07/1993	P5
014. note	Cliff Sloan to Jamie Gorelick re: Nunn Legislation (2 pages)	ca. 09/20/1993	P5

682✓
683-dup of 682
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COLLECTION:

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Counsel's Office
Cliff Sloan
OA/Box Number: 4658

FOLDER TITLE:

Gays in the Military - General [2]

Kelly Hendren
2006-0227-F
kh325

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

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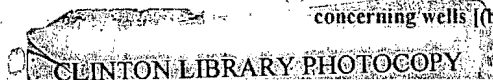
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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015. memo	Cliff Sloan to George Stephanopoulos re: Gays-in-the-military litigation (1 page)
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09/07/1993

P5

689

COLLECTION:

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Counsel's Office
Cliff Sloan
OA/Box Number: 4658

FOLDER TITLE:

Gays in the Military - General [2]

Kelly Hendren

2006-0227-F

kh325

RESTRICTION CODES

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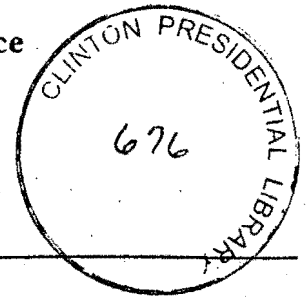
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U.S. Department of Justice

Civil Division



Office of the Assistant Attorney General

Washington, D.C. 20530

June 29, 1993

MEMORANDUM

TO: Webster L. Hubbell
Associate Attorney General

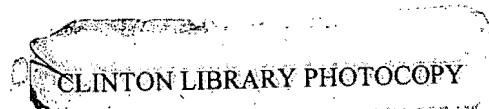
FROM: *JS* Stuart E. Schiffer
Acting Assistant Attorney General

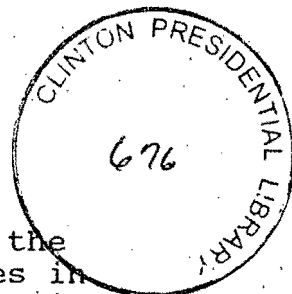
SUBJ: Litigation Implications of Potential Changes in Policy
Regarding Homosexuals in the Military

We have been asked to comment on the litigation risks of the policy option concerning homosexuals in the military currently being drafted by the Defense Department's military working group. We understand the basic outlines of that option to be: (1) sexual orientation is generally a private matter and the military will not make inquiries about a person's sexual orientation alone; (2) a person may be discharged for engaging in homosexual acts, entering into (or attempting to enter into) a homosexual marriage, or making a statement that he or she has engaged in homosexual acts or is a homosexual; and (3) sexual orientation is not a bar to service unless manifested by prohibited homosexual acts, homosexual marriage or attempted marriage, or statements that an individual has engaged in homosexual acts or is a homosexual.

It is our conclusion¹ that if certain aspects of this policy are implemented as a direct regulation of speech divorced from conduct or the propensity to engage in conduct, they will pose unnecessary litigation risks. Rather, we think that DOD should endeavor to achieve the objectives of its policy by adjusting the non-speech aspects of its policy concerning homosexuals, including enforcement policy. We also discuss below findings that DOD could make to support its new policy. Finally, the

¹ This conclusion is based on our understanding, as reflected in the first paragraph of this memorandum, that the proposed policy makes substantive changes to the current policy. If, to the contrary, the new policy is limited to changes in the method of enforcement, this conclusion and many of the problems noted below will not be applicable. See infra pp. 5-6.





policy-makers need to be aware of the interaction of the President's announcement of a new policy and two cases in litigation, in one of which there is an outstanding nationwide injunction.

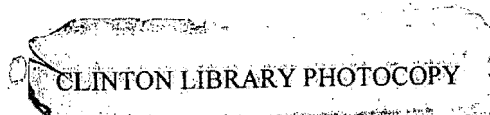
1. The Traditional Military Policy. The current Department of Defense Directive on homosexuality states: "Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14 ¶ H.1.a, 32 C.F.R. Part 41, App. A. "Homosexual" is defined as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." Id. at ¶ H.1.b.(1). "Homosexual acts" are defined as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." Id. at ¶ H.1.b.(3).

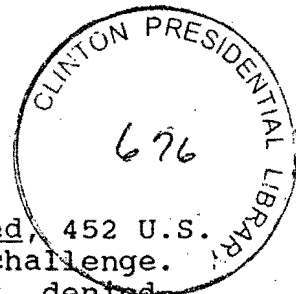
Litigation defending the traditional policy has been largely successful by characterizing the policy as directed at excluding persons who engage in, or have a propensity to engage in, homosexual conduct, even in cases where there was no proof of homosexual acts. We have opposed the contentions of plaintiffs that this policy is directed at orientation rather than conduct.

Four courts of appeals have without question accepted the Government's defense of the constitutionality of this policy (at least as applied to practicing homosexuals), and sustained it against due process, equal protection, and First Amendment challenges.² Several courts have rejected plaintiffs' argument that homosexuals are a suspect class entitled to the same protection as racial classes. See e.g. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984). The Seventh and Federal Circuits upheld the traditional policy in cases where the plaintiff admitted being a homosexual, but there was no proof of any homosexual acts. Ben-Shalom v. Marsh, 881 F.2d at 462; Woodward v. United States, 871 F.2d at 1069-1070.

The Ninth Circuit's rulings are more complicated. It has upheld the policy in a case where a serviceman was being discharged because he engaged in homosexual acts. Beller v.

² Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).



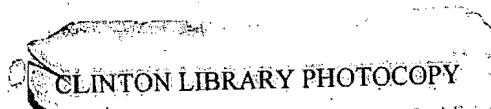


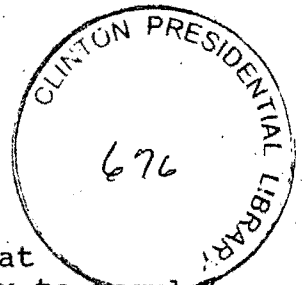
Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). It has also rejected a First Amendment challenge. Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992). On the equal protection issue, however, where the Government did not establish that any homosexual conduct had in fact occurred, Pruitt accepted the Government's argument that strict scrutiny did not apply, but rejected the Government's position that the policy was directed at conduct. The court held that the traditional policy classifies on the basis of homosexual status and could be sustained only if on remand the military presented evidence showing that it is "rationally related to a permissible governmental purpose." 963 F.2d at 1167. The Pruitt court also held that the ban could not be justified based upon "the prejudice of others against homosexuals * * *." Id. at 1165.

As noted, in several of the suits the basis for the discharge has been plaintiffs' public acknowledgement of homosexuality. We have successfully defended against claims that the First Amendment prohibits discharging a person based upon his admission that he is a homosexual. Courts have concluded that the military's restrictions do not limit what military personnel can say about homosexuality or about the military's policy concerning homosexuals; rather, they have held that admissions of homosexuality can be relied upon in a decision to exclude a member of the military because such admissions constitute a declaration that the person has the requisite propensity to engage in prohibited homosexual conduct and, hence, is ineligible for military service. Ben-Shalom v. Marsh, 881 F.2d at 462.

2. Litigation Risks of a Policy Directed at Speech. We are concerned that significant litigation risks will be incurred by the aspect of the policy option that appears to make statements admitting homosexuality to be in and of themselves a basis for discharge. Under the current policy, admissions of homosexuality have been used to establish that the service member is a member of a class of persons who engage in or have the propensity to engage in prohibited homosexual conduct. As we understand the proposed new policy, one of the prohibited acts may be the admission of homosexuality itself. If such statements are a basis for discharge without a link to underlying prohibited conduct, serious First Amendment problems may be raised.

To the extent that a court views the policy as directed against speech, divorced from conduct, our litigation risks will increase. A policy that punishes an individual who is frank and open in his speech and rewards the individual who is secretive, although they have both engaged in the same conduct, would, for many judges, raise serious questions about whether the restriction is unrelated to the suppression of free speech and restricts speech no more than is necessary to protect military effectiveness.

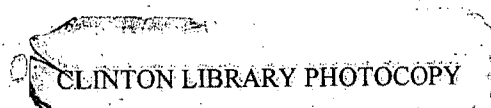


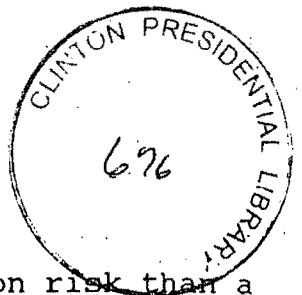


There are, of course, numerous cases stating that substantial deference must be granted to the military to regulate speech where speech is likely to interfere with vital prerequisites for military effectiveness, see Brown v. Glines, 444 U.S. 348, 354 (1980). Nonetheless, the regulations must "protect a substantial Governmental interest unrelated to the suppression of free expression," and they "must restrict speech no more than is reasonably necessary to protect" that interest. Id. at 354, 355. We could argue that a regulation making statements admitting homosexuality a basis for discharge is constitutionally permissible because the military has wide latitude to determine what statements will interfere with military effectiveness. The military could presumably conclude, as a matter of administrative judgment, that the presence of an acknowledged homosexual in a military unit would in a large number of cases result in (i) privacy concerns on the part of heterosexual members, (ii) fear on the part of heterosexual members of sexual misconduct by a homosexual member, (iii) distractions from duty and loss of unit cohesion based on the introduction into the unit of disagreements about an intensely debatable political and moral issue, and (iv) similar morale problems resulting from moral revulsion felt, whether justifiably or not, by a large number of heterosexual members. Such an argument, however, may be pushing the limits of the deference that courts are willing to accord the military.³

An added complication may be that under the proposed policy the opportunity for a person to rebut the use of an admission of homosexuality against him may be reduced. Under the current policy, if a person states that he or she is a homosexual, that statement constitutes a presumption that the person engages in or has a propensity to engage in homosexual conduct. The person making the statement, however, is given an opportunity to rebut the presumption and show that he or she is not a homosexual within the meaning of the current regulations. If, under the proposed policy, the statement admitting homosexuality is itself an act for which the person can be discharged, the opportunity for rebuttal would appear to have been removed. Thus, in that respect, the new policy would appear to require discharge for

³ We are aware of the Connick v. Myers, 461 U.S. 138, 147 (1983), line of cases, holding that when a public employee's speech is not a matter of public concern, courts will ordinarily not interfere with restrictions on the speech. However, we are doubtful that this line of cases will protect a direct bar on speech in the circumstances that are likely to be present in litigation over discharge of homosexuals. Persons excluded from the military because of admissions of homosexuality will in many cases be able to tie their admissions to opposition to the military's policy regarding homosexuality and, thus, avoid the Connick v. Myers cases.





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orientation alone and would pose more of a litigation risk than a regulation that is directed at conduct or the propensity to engage in conduct.⁴

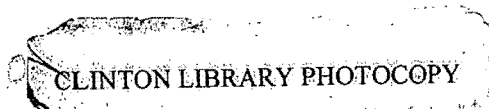
If, on the other hand, the proposed policy is intended to permit a service member to rebut his or her proposed discharge on the basis that the statement did not mean that he or she engages in or has the propensity to engage in prohibited conduct, the policy would presumably retain the conduct-based direction of the traditional policy. In that event, the wording may need to be changed so as not to lead courts to think that the policy is directed at speech alone rather than at conduct.

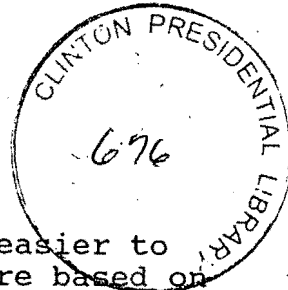
In sum, our litigation posture would be strengthened if we can accomplish the desired policy goals without directly providing for discharge based solely on speech. The prohibition on speech should be linked to some form of prohibited conduct. As reflected in the large number of cases upholding the current policy which has this linkage, the First Amendment does not prohibit the use of statements to establish that the service member is in a class of persons whose prohibited conduct makes them ineligible for service.

We have based the above analysis on the First Amendment because under current law the Government would have to meet a higher standard than it would under an analysis pursuant to the Equal Protection Clause. However, if the policy results in treating differently two service members only because one spoke publicly and one did not, we think there may be a serious equal protection problem as well.

3. Possible Non-Speech Related Means to Achieve the Policy Objectives. Because we think that a policy directed solely at speech poses significant litigation risks, we think that DOD should attempt to achieve its policy objectives through other means. For example, DOD may wish to consider some or all of the following methods, if appropriate to DOD goals. These methods

4 This aspect of the policy could also cause problems with the question of whether a "celibate homosexual" can serve in the military. Under the traditional policy, which is directed at conduct or the propensity to engage in conduct, a celibate homosexual could attempt to show that he or she does not, in any realistic sense, have the desire or propensity to engage in homosexual conduct. But if a person's statement admitting that he or she is a homosexual is itself an act requiring discharge, the celibate homosexual may not be given the same opportunity that he or she had under the traditional policy. We believe that this would increase the possibility that some courts might invalidate the policy on the grounds that the military is attempting to proscribe orientation, not conduct.





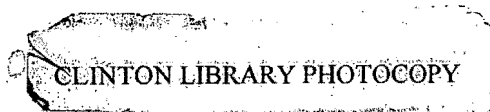
pose little litigation risk (and some of them may be easier to defend than the current policy). All these methods are based on the assumption that DOD will retain some form of prohibition against homosexual conduct.

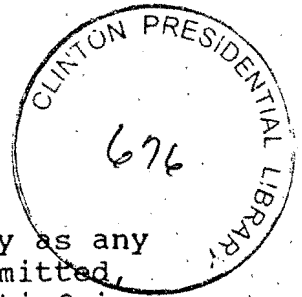
a. The new policy could be cast, at least in part, as a matter of enforcement policy. Obviously, the military will not exclude anyone if it does not know that the person is a homosexual. It is also clear that it is within reasonable military discretion to determine how to enforce its policy against service by persons who engage in homosexual conduct (or, if covered, have a desire or intent to do so). In balancing a code of conduct that prohibits homosexual conduct against privacy concerns of service members, the military could determine under what circumstances it will initiate an investigation to determine whether a service member has violated the code of conduct. For instance, it could (i) presume, absent reliable evidence to the contrary, that service members will conform to the code of conduct; (ii) decline to initiate questions about homosexuality, absent reliable evidence that a service member has violated the code of conduct; (iii) determine that mere hearsay alone is not sufficient evidence to justify the initiation of an investigation.

It may be necessary, however, for guidelines to be issued setting forth the conditions under which investigations will be conducted. Otherwise, we could face a challenge based on a claim that the initiation of certain investigations is arbitrary or capricious. In Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978), the discharge of an airman was set aside where the policy required exclusion of homosexuals except "where the most unusual circumstances exist and provided that the airman's ability to perform military service has not been compromised." The court held that the Air Force did not have adequate guidelines to govern its discretion and permit judicial review to determine whether the exclusion was arbitrary and capricious.

b. The existing DOD Directive defines a "homosexual" as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directive 1332.14 ¶ H.1.b.(1). It would cause no litigation difficulty if the definition of homosexual were narrowed to include only persons who engage in "homosexual acts." Indeed, elimination of the "desires to engage in" language would remove a current weak point in our litigation posture. With elimination of both the "desires to engage in" and "intends to engage in" language, an admission that a person is a homosexual would presumptively constitute an admission that the person engages in the prohibited acts. Of course, DOD would have to judge whether such a change would be consistent with its policy goals.

c. Similarly, the definition of "homosexual act" could also be changed without presenting any litigation difficulty. The





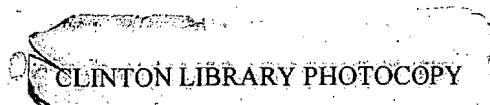
current DOD Directive defines "homosexual act" broadly as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." DOD Dir. 1332.14, ¶ H.1.b.(3). Narrowing the definition of "homosexual acts" to include only those acts proscribed by Article 125 of the U.C.M.J. (10 U.S.C. § 925), i.e., sodomy, would facilitate defense of the policy because it would permit exclusion only for conduct that constitutes a criminal offense and is analogous to the criminal prohibition upheld by the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986).⁵ Obviously, DOD would also have to determine whether this change is desirable as a policy matter.

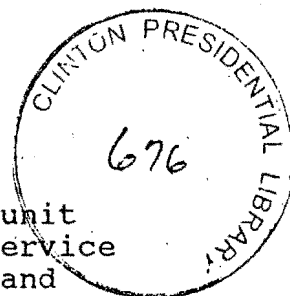
Undoubtedly there are many other methods by which the military can achieve its policy objectives without directly regulating speech. But the key point remains: if DOD regulates speech directly, it will face a severe litigation risk. If it avoids regulating speech directly, the risk can be held to a lower level. One word of caution: it is important that the policy which is promulgated not be officially described as "Don't Ask, Don't Tell." Even a legitimately articulated policy is subject to a serious legal challenge if its enforcement is directed against speech.

4. Recommended Findings. We believe that the likelihood of courts deferring to the judgment embodied in the new policy would be enhanced if explicit findings were set forth. Indeed, our litigation prospects would be significantly enhanced if DOD would prepare a well-reasoned statement setting forth in detailed terms the rationale for its policy. We know for instance that the Ninth Circuit in Pruitt required that the Government show in some depth that its policy is rationally related to a permissible governmental purpose. 963 F.2d at 1167. Accordingly, although we disagree with the Ninth Circuit, we recommend that findings be drafted to satisfy even its stringent requirements. The findings could be of two types.

The first type would explain why military effectiveness would be impaired if persons who engage in the prohibited homosexual conduct (however defined) were permitted to serve. To the extent consistent with the new Department of Defense policy, these findings might include: (a) experience has shown that the presence of individuals who engage in the prohibited conduct adversely affects the ability of the Military Services to

⁵ Perhaps, such a narrowing of the definition could be accompanied by a statement that admissions of homosexuality or evidence of bodily contact with a person of the same sex for purposes of satisfying sexual desire may give rise to a rebuttable presumption that the persons engages in or is likely to engage in homosexual sodomy.



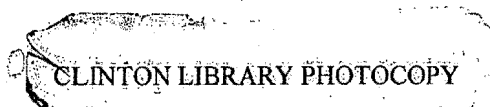


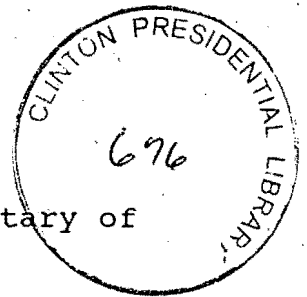
maintain good order, discipline, and morale; to ensure unit cohesion; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; and to facilitate assignment and worldwide deployment of service members; (b) the presence of individuals who engage in the prohibited conduct will interfere with the privacy rights of other service members who frequently must live and work under close conditions affording less privacy than is present in civilian life; (c) the presence of persons who engage in the prohibited conduct will also adversely affect public acceptability of the military service and thereby interfere with recruiting and retention in the all volunteer military concept.

The second type of finding should be made if the military changes its enforcement policy. It would explain why the military would not, absent reliable evidence, commence questioning or an investigation to determine whether a service member had engaged in the prohibited homosexual conduct. To the extent consistent with Department of Defense policy, these findings would include: (a) privacy concerns ordinarily preclude delving into a person's private sex life absent reliable evidence that the person has engaged in proscribed activity; (b) the Military Services recognize the need to prevent unwarranted investigations into a person's private life on the basis of rumor, innuendo, or unreliable evidence; (c) the risk of blackmail must be minimized.

5. Effect of the Meinhold Injunction and Other Pending Litigation. The final implementation of any new policy in this area must take into account the outstanding injunction in Meinhold v. United States Dept. of Defense, 808 F. Supp. 1455 (C.D. Cal., 1993), appeal pending, No. 93-55242 (9th Cir.). That injunction "permanently enjoin[s]" 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." While we are appealing from that injunction, and believe we have an excellent chance of ultimately reversing the injunction (or at least confining it to Meinhold), it has not been stayed.

Unless the ultimate policy which is developed is one limited to "sexual conduct which interferes with the military mission" -- and off-base, off-duty conduct, and pre-service conduct may not meet that definition -- the new policy cannot be immediately implemented without our first taking some action in the litigation to get the injunction modified or stayed. Any Executive Order or DOD Directive which announces the new policy must therefore be formulated so that no discharges or denials of enlistment can occur until the injunction is modified. Absent such recognition of the injunction, there is a serious risk that





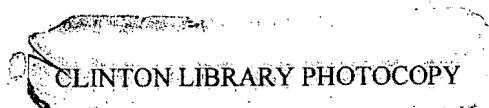
the district court (Hatter, J.) will hold the Secretary of Defense (or even the President) in contempt.

Policy-makers also need to be aware of two other litigation-related events. In both our pending appeal in Meinhold and in our defense of an appeal in Steffan v. Aspin, No. 91-5409 (D.C. Cir.), we will have briefs due on July 19 (assuming our latest request for an extension in Meinhold is granted).⁶ Both these cases involve publicly acknowledged homosexuals, and we are in a litigation posture where we will be required to present a legal defense of the merits of the former military policy. We can get no further extension in either case. The only way we can avoid briefing the merits of the former policy is if DOD agrees to reprocess both individuals. Such reprocessing might be justified if changes are made to redefine the prohibited practices and the new policy is made applicable to persons in litigation. Reprocessing might also be justified if DOD concludes that all pending discharges should be reconsidered in light of the policy determinations and supporting findings that resulted from the exhaustive review of the homosexual issue by the President and Congress. Of course, any such reprocessing would have to have a meaningful purpose and not be used simply as a delaying tactic.

6. Avoiding the "Worst Case" Scenario. We emphasize the need for the Government to develop a policy position that will give us the ability to present legal arguments with a high likelihood of success in litigation. For instance, consider the adverse impact of the following "worst case" scenario if the policy is speech-directed. On July 15, the President announces the policy. On July 19, we file briefs in Meinhold and Steffan arguing that the former policy was permissible (and in Steffan we would be including an argument that homosexuals are not a suspect class and that homosexuality is not a fundamental right). Shortly thereafter the district court in Meinhold strikes down the new policy, and we are unsuccessful in obtaining a stay of its injunction. Needless to say, such an occurrence would represent a major policy disaster.

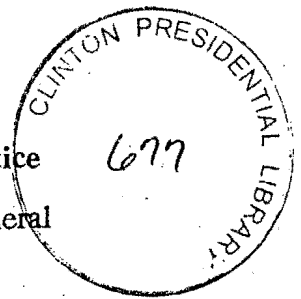
However, with a strong litigation posture we should be able to obtain a stay, at least at the court or appeals or Supreme Court level, of the Meinhold injunction, and the new policy would have a chance to operate. Moreover, if the changes in the prohibited practices affected Meinhold and Steffan and DOD were willing to reprocess them, we could avoid filing briefs in the courts of appeals defending the former policy on the heels of the President's announcement of the new policy.

⁶ We also have a brief due in the district court case of Dahl v. Secretary of the Navy, No. 89-0351-MLS-JFM (E.D. Cal.), on July 16, 1993.





U. S. Department of Justice
Office of the Solicitor General



The Solicitor General

Washington, D.C. 20530

June 29, 1993

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

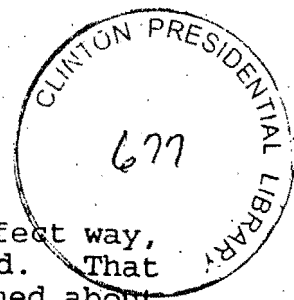
Re: Potential Changes in Policy on Homosexuals in the Military

I am in general agreement with the views expressed by the Civil Division in its Memorandum of this date, and especially with its emphasis on the need to develop a strategy for dealing with the outstanding Meinhold injunction. There are, however, several points that bear further comment.

1. The Civil Division proceeds on the assumption (which is probably correct) that military restrictions on homosexual conduct of any kind are clearly permissible. Civil therefore argues for tying any restriction on service by homosexuals to such prohibitions on conduct. DOD's policy review, on the other hand, apparently suggests that realistically, as DOD has put it in our discussions, "knowledge is everything": that is, it is the knowledge that a particular service member has engaged, is likely to engage, or desires to engage in homosexual conduct that the military has concluded is likely to cause problems of morale, cohesion and so forth among the other members of a military unit. The latter position offers an attractively coherent and focused rationale for the exclusion of "known" homosexuals. It does, however, seem to be in some tension with the government's prior defense of the military's exclusion policy on the ground that it focused exclusively on "conduct." In addition, the "knowledge" rationale may not satisfactorily explain certain outlying cases that the military apparently intends to include within the new policy (such as, for example, where a commander alone receives reliable information about past conduct that is removed in time and place from the individual's current military post or unit).

It seems to me that any tension between the "knowledge" and "conduct" rationales may be explained on the ground that while the military's core concern is "knowledge," its definitions of prohibited "conduct" (whether actual or presumed to be likely)

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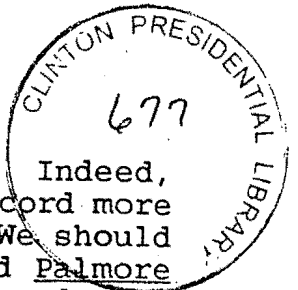
serve to define and limit, in a rational if not wholly perfect way, the circumstances in which that concern will be pursued. That explanation is likely to satisfy a court otherwise concerned about an imperfect fit between the knowledge rationale and some atypical cases.

2. I am somewhat less concerned than the Civil Division that a new policy emphasis on the knowledge of a member's homosexuality, including knowledge obtained through declarations or communications by the member, will make the new policy more vulnerable to First Amendment challenge than the previous one. The government has been quite successful in the past in arguing that the unique requirements of the military mission can justify limitations on speech that would be impermissible in civilian society. See, e.g., Parker v. Levy, 417 U.S. 733 (1974) (political statements); Brown v. Glines, 444 U.S. 348 (1980) (circulation of petitions on base); Goldman v. Weinberger, 475 U.S. 503 (1986) (prohibition on wearing of yarmulkes). And the "knowledge" rationale advances, if anything, a more coherent argument for why speech that identifies a member as homosexual is incompatible with the good order of the service. Moreover, the new policy appears to make no significant change in the substantive predicates for discharge (including declarations of homosexual status); it merely imposes slightly tighter and more specific limits on the circumstances under which the military will attempt to establish and act on those substantive predicates. Although I agree fully with the Civil Division that it would be preferable to phrase any policy in terms of "conduct" and not "speech," fundamentally (i) the threat to speech interests is neither smaller nor larger under the new policy than under the old, and (ii) the courts that routinely upheld the old policy's limitations on speech would probably be reluctant to strike down on First Amendment grounds a new policy that imposes identical restrictions, but promises to pursue them less vigorously. Still, a court that is hostile to the substance of the new policy might seize on any perceived First Amendment defect as a rationale for striking the policy down or limiting its reach.

3. I think that we also have to admit candidly that the "knowledge" rationale ultimately sanctions the view that burdens may properly be imposed on one individual on the basis of other individuals' subjective reactions to his or her personal characteristics (at least if those characteristics are manifested by conduct, or even a propensity for conduct). An argument that an individual's known homosexuality will disrupt unit morale and effectiveness must, for instance, finally be based on concerns such as the following (which are similar to ones identified by DOD):

(i) that heterosexual service members will find their privacy intolerably compromised by having to live in close physical quarters with individuals whom they believe may find them sexually attractive;

(ii) that such members will fear unwanted advances, harassment or assault by a colleague known to be homosexual;



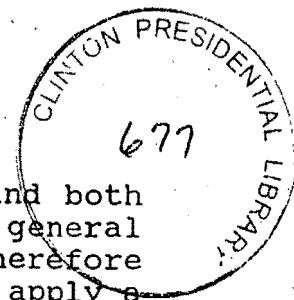
subject to strict scrutiny under the First Amendment. Indeed, there are few contexts in which the Court is likely to accord more deference to Presidential and Congressional decisions. We should recognize, however, that arguments based on Cleburne and Palmore have been and will continue to be made in this context, and that they have considerable force with respect to a policy that is primarily justified not by reference to an individual's actions - (or potential actions) themselves, but by reference to others' social or moral attitudes toward those actions -- and, presumably, to an aspect of personality that those actions reflect.

2. Finally, any policy that continues to exclude homosexuals from service on any basis other than for violating rules of conduct that apply equally to heterosexuals -- such as the criminal prohibition against sodomy -- remains subject to challenge under the Equal Protection Clause.

a. The courts of appeals have declined to use strict or semi-strict scrutiny in reviewing regulations disfavoring homosexuals as a class, and generally have found that the military exclusion passes rational basis review. The proposed policy can be defended in the lower courts on the basis of those precedents.

It should be noted, however, that the Supreme Court has not considered an equal protection challenge to a classification based on homosexual orientation or conduct. The majority opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), which held that there is no substantive Due Process right to engage in homosexual (or, presumably, heterosexual) sodomy, noted explicitly that the case presented no equal protection claim. Id. at 196 n.8. The courts of appeals have tended to dismiss arguments for enhanced scrutiny of classifications based on homosexuality rather summarily, largely on the basis of Hardwick, and may well continue to do so. See, e.g., Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Ben-Shalom v. Marsh, 881 F.2d 454, 464-465 (7th Cir. 1989). Hardwick did not address the relevant constitutional issue, however, and the other arguments that are advanced against enhanced scrutiny are not altogether compelling.¹ Moreover, the membership

¹ The most common argument is that Hardwick effectively resolves the suspect classification argument because it approved "making the conduct that defines the class criminal." Woodward, 871 F.2d at 1076 (quoting Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987)). But Hardwick did not approve anything from an equal protection perspective, and the conduct proscribed by the statute at issue in Hardwick -- and prohibited for both homo- and heterosexuals by Article 125 of the U.C.M.J. -- hardly "defines the class" of homosexuals. Leaving aside the question of pure status, the military itself defines even homosexual conduct much more broadly. DOD's suspended policy defines a "homosexual act" as any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." Sodomy statutes, including Georgia's and Article 125, typically proscribe only a precise subset of that conduct.

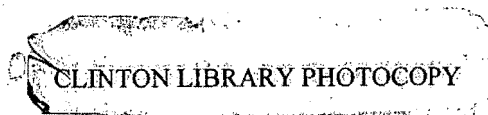


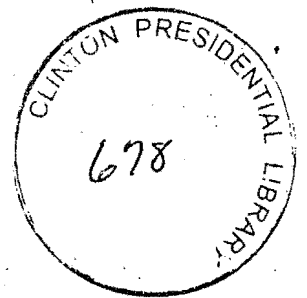
of the Court has changed significantly since Hardwick, and both that case in particular and the issue of homosexuality in general have received considerable attention since 1986. We therefore should not take it for granted that the Supreme Court will apply a rational basis standard if the equal protection issue is cleanly presented to it.

Again, in the military context, the Court would probably uphold restrictions based on a well-founded fear of disruptions to morale or effectiveness even under heightened scrutiny. But the ramifications of losing such a case are obviously significant, and courts applying heightened scrutiny might limit the scope, if not the fundamental premises, of the exclusion policy. That possibility points up again that it is important for the military to articulate the bases for its policy clearly and, to the extent possible, to support its conclusions with findings, and to identify in particular cases the nexus between rationale and findings, on the one hand, and proposed outcome, on the other.

b. We will be required to come to grips with the equal protection issues (including the appropriate level of scrutiny) in drafting briefs in various lower courts -- including the D.C. Circuit in the Steffan case (where our brief is due on July 19), which specifically raises the level-of-scrutiny issue. Because these issues have not been resolved by the Supreme Court, it is open to us to reconsider the government's position. Although I am not prepared to express a view on the matter at this time, I think the various aspects of the equal protection argument (both inside and outside the military) deserve serious review within the Department of Justice and elsewhere in the government, before the Administration commits itself to a legal position in Steffan or Meinhold, or in the district court on remand in Pruitt (where I understand that proceedings have been stayed until July 15).

DREW S. DAYS, III
Solicitor General





Washington, D.C. 20530

June 29, 1993

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

Re: Possible Constitutional Problems Raised by Proposed
Changes in Policy Regarding Homosexuals in the Military

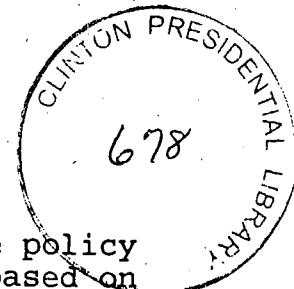
This memorandum presents the views of the Office of Legal Counsel on possible constitutional problems raised by a proposed policy option concerning homosexuals in the armed services being considered by the Department of Defense's military working group. The memorandum concludes that the proposed policy might be subject to challenge on equal protection grounds, and that it can probably be defended against first amendment challenges.

Because of uncertainty about some of the details of the policy, we have attempted at several points to indicate what assumptions we are making about its scope and effect. If those assumptions are mistaken, the conclusions might be different. As we understand the proposal, it would provide that: (1) sexual orientation is generally a private matter and the military will not make inquiries about a person's sexual orientation alone; (2) a person may be discharged for engaging in homosexual acts, entering into (or attempting to enter into) a homosexual marriage, or making a statement that he or she has engaged in homosexual acts or is a homosexual; and (3) sexual orientation is not a bar to service unless manifested by prohibited homosexual acts, homosexual marriage or attempted marriage, or statements that he or she has engaged in homosexual acts or is a homosexual.

1. Equal Protection. We generally agree with the Civil Division's assessment of the state of current law regarding equal protection challenges to the military's policy on homosexuals (Civil Division memo, p. 2). However, we believe that the proposed policy may be vulnerable to an equal protection challenge even under rational basis review.¹

¹ The circuits appear to be in general agreement that homosexuality is not a "suspect class" entitled to strict scrutiny of government action differentiating between homosexuals and heterosexuals. See Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert.

(continued...)



A member of the armed forces discharged under the policy could make a substantial argument that a distinction based on homosexual status rather than homosexual conduct is subject to "active" or "heightened" equal protection rational basis review. Under the rational basis test, government action is "sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). The more rigorous "active" form of rational basis analysis imposes a more substantial burden on the government to justify its policy than is required to defend economic regulations.² For example, in Cleburne, the Court invalidated a city zoning ordinance requiring homes for the mentally retarded to obtain a special use permit even though other care and multiple-dwelling facilities were not required to obtain such a permit. The Court held that mental retardation was not a suspect class triggering strict scrutiny but invalidated the ordinance because the government had failed to offer a rational basis justifying it. See 473 U.S. at 442, 448-49 (rejecting government's assertion that ordinance could be justified based on "mere negative attitudes, or fear" of the mentally retarded).

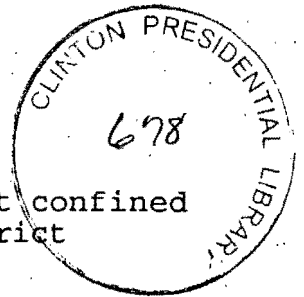
The Ninth Circuit has explicitly adopted the Cleburne active rational basis analysis as the appropriate standard for reviewing classifications based on homosexual status. In Pruitt v. Cheney, 963 F.2d 1156 (9th Cir.), cert. denied, 113 S. Ct. 655 (1992), the court held that the discharge of an army officer due to her homosexuality (as opposed to homosexual conduct) must be reviewed "to see whether the government ha[s] established on the record a rational basis for the challenged discrimination." Id. at 1165-66 (emphasis omitted). The court also specifically stated that the military could not justify the exclusion policy on the ground that prejudice against homosexuals would create tension in the ranks. Id. at 1165. This conclusion was based on Palmore v. Sidoti, 466 U.S. 429 (1984), in which the Supreme Court held that a state judge's order denying custody of a child based on social disapproval of her mother's interracial marriage violated the Equal Protection Clause, because the Constitution does not permit the government to make public decisions based on invidious private prejudice. See Pruitt, 963 F.2d at 1165 (reasoning that

¹ (...continued)

denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984).

² Compare, e.g., FCC v. Beach Communications, Inc., 61 U.S.L.W. 4526, 4527 (June 1, 1993) (economic regulation must be upheld if "there is any conceivable rational basis justifying" the distinction it makes).

"Cleburne made clear that [the Palmore] principle is not confined to instances of racial discrimination reviewed under strict scrutiny").



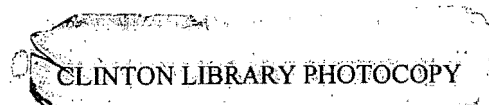
As we understand the new policy, it would be based at least partly on the assumption that some service members may be hostile towards homosexuals, and therefore morale and unit cohesion would be undermined by knowledge of another service member's homosexuality. Under Pruitt, this rationale would not be a legitimate government purpose. Nevertheless, some of the other justifications for the policy of shielding service members from knowledge of others' homosexuality, such as the need to protect members' privacy, are not based on prejudice and would therefore withstand scrutiny under Pruitt. Furthermore, other circuits have applied a more deferential version of the rational basis standard and have not applied the Cleburne/Palmore reasoning to classifications based on homosexuality.³ Because of the substantial deference traditionally accorded to Congress and the President in the unique context of regulating the military,⁴ we believe that most courts will consider the government's concern about prejudice against homosexuals to be valid here.

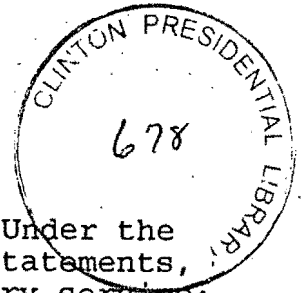
Nevertheless, even some cases in the circuits applying a more deferential form of rational basis review than the Ninth Circuit have required the government to articulate a rational basis on the record and have subjected the government's justifications to more searching scrutiny than would be required of economic regulations.⁵ As presently articulated, the new

³ See Ben-Shalom v. Marsh, 881 F.2d 454 at 464; Woodward v. United States, 871 F.2d at 1076-77; Dronenburg v. Zech, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d at 1229.

⁴ See, e.g., Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (First Amendment review of regulations governing the military is "far more deferential than constitutional review of similar laws or regulations designed for civilian society"); Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (noting deference accorded Congress's exercise of its authority over defense and military affairs in context of reviewing equal protection claim); Parker v. Levy, 417 U.S. 733, 756 (1974) (Congress has greater flexibility when prescribing code of conduct for the military).

⁵ See, e.g., Padulla v. Webster, 822 F.2d at 104 (noting that inapplicability of strict scrutiny "does not mean . . . that any kind of negative state action against homosexuals would be constitutionally authorized"; requiring "a governmental agency that discriminates against homosexuals [to] justify that discrimination in terms of some government purpose," but holding (continued...)



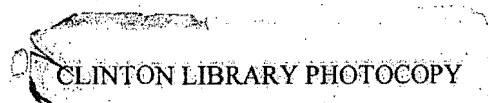


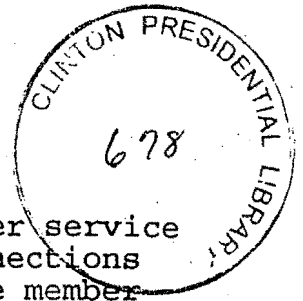
policy could still be held irrational even though the government's purpose can be defended as legitimate. Under the new policy, homosexuality, when manifested by acts, statements, or marriage, would be deemed incompatible with military service; whether or not this point is incorporated as a policy statement in the new DOD directive, service members will be discharged for homosexual conduct, which is defined to include statements about homosexuality. However, recruits and persons serving in the military will not be asked about their sexual orientation, because the policy recognizes that sexual orientation is a personal, private matter. The policy attempts to acknowledge that being homosexual does not disqualify a person from serving in the military, while at the same time requiring the discharge of any person who admits to being homosexual; this contradiction pushes the limits of constitutional rationality.

Other aspects of the new policy also border on irrationality. For example, the linchpin of the policy is the notion that "knowledge is everything," i.e., concerns about privacy and morale can be accommodated even if homosexuals remain in the military, so long as those with whom they serve do not know that they are homosexual. This rationale only makes sense in the context of members of the same unit, or persons sharing living quarters, showers, and so forth. However, under the policy a commander would be required to investigate and institute

5 (...continued)
that "[i]t is not irrational for the [FBI] to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes many homosexuals" to the risk of blackmail); Stephan v. Cheney, 780 F. Supp. 1, 11-17 (D.D.C. 1991) (accepting Pruitt's requirement that government must articulate a rational basis for decisions to exclude homosexuals from the military, but finding adequate justification), appeal pending (D.C. Cir.). In addition, the court in Pruitt read High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (upholding a DOD policy of subjecting gay applicants for security clearances to expanded investigations) as applying "active" rational basis review. See Pruitt, 963 F.2d at 1165.

It is also noteworthy that, with the exception of Stephan, these decisions have relied on justifications linked to homosexual conduct, as have cases that applied a more deferential standard. See, e.g., Ben-Shalom v. Marsh, 881 F.2d at 464 (because plaintiff's "lesbian acknowledgment, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in such conduct, . . . the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future").





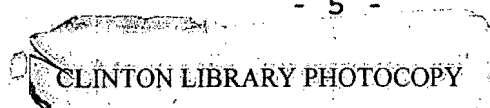
discharge proceedings against a service member if another service member outside the unit, or even a civilian with no connections to the military, informed the commander that the service member under his or her command had committed homosexual acts (again, including mere statements). The commander would be required to act on this information even though he or she might be the only one with the "knowledge," so that no threat to morale existed; this application of the policy would be rationally related to its purpose only in the most attenuated manner.

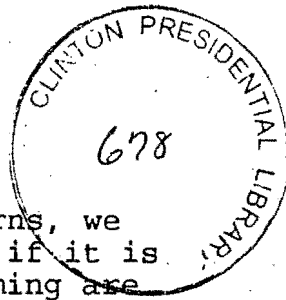
Similarly, under the new policy, enforcement guidelines would provide that commanders institute investigations and discharge proceedings only if they receive "credible evidence" that a service member has committed homosexual acts. These guidelines, as we understand them, also would provide that "mere hearsay" should not be treated as sufficient credible evidence. Thus, the policy seems to mean that a person's statement that he heard a service member say she was a lesbian would not be sufficient to trigger an investigation against her; however, that statement would constitute evidence that the alleged lesbian had committed a homosexual "act" by making the statement, so it would be illogical not to require the commander to act on this "mere hearsay." Furthermore, assuming the commander is required to investigate, he could not ask the service member whether she was a lesbian; he could only ask whether she had said that she was a lesbian. However, for practical purposes the permissible question would be as intrusive as the impermissible one.

The policy's internal inconsistency could be cured if statements of homosexuality were excluded from the definition of homosexual acts requiring discharge. At the very least, a modification allowing commanders greater discretion to decline to investigate and institute discharge proceedings in cases where the evidence of homosexuality comes from outside the unit, and knowledge has not been imparted to service members in the unit, would render the policy less vulnerable to being held constitutionally irrational.

Finally, we are concerned that inclusion of the proposed "policy statement" that "homosexuality is incompatible with military service" would make the policy more difficult to defend. Since the statement would not actually describe the acts prohibited by the policy, it adds to the appearance of irrationality. Therefore, we recommend that the statement either be (1) deleted from the new directive, or (2) modified so that it identifies the specific acts that are prohibited and says that these acts are incompatible with military service.

2. First Amendment Issues. As we understand the proposed policy, it would provide that the commission of homosexual acts and statements that one is homosexual would be grounds for dismissal. While we share the concerns of the Civil Division

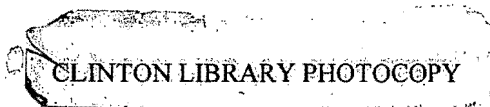




that the policy raises significant first amendment concerns, we believe that it should survive first amendment challenge if it is carefully tailored. The crucial points that we are assuming are that (1) the policy will not single out, on its face or in its application, service personnel who speak about their homosexual orientation -- in other words, that the policy will address in an even-handed fashion all personnel who engage in the conduct about which the military is concerned -- and (2) the policy will not place special restrictions on non-personalized speech about homosexuality or about the propriety of gays being in the military that are not imposed on other topics. If our assumptions about the policy are mistaken, the conclusions might change.

The policy would be most easily defended against first amendment challenge if it could be written and justified on the basis of the military's prohibition of homosexual acts, on the assumption that Bowers v. Hardwick, 478 U.S. 186 (1986), would be reaffirmed if the Supreme Court again addressed the issue. Under Bowers, the prohibition in the Uniform Code of Military Justice on "sodomy" is constitutional. Existing caselaw supports the military's judgment that it is contrary to morale, good order and so on to retain personnel who may be inclined to violate the prohibition. See, e.g., Ben-Shalom v. Marsh, 881 F.2d 454, 460-61 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). The cases, finally, also have sustained as reasonable the military's decision that persons who define themselves as homosexual fall within the category of persons inclined to violate the prohibition. See, e.g., id. The proposed policy, on this reasoning, employs speech as evidence of likelihood to commit a criminal violation of the Uniform Code, or to engage in other overt homosexual behavior violative of military standards of conduct. "The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Wisconsin v. Mitchell, --- U.S. --- (June 11, 1993), at 11. If the proposed policy can fairly be described as dealing with declarations of homosexuality as a means toward the end of prohibiting (the likelihood of occurrence of) non-speech acts, we do not think it would be vulnerable on first amendment grounds.

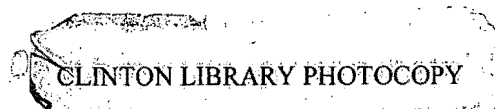
If the policy is written and justified on the basis of a military judgment that the presence of homosexuals in the military is disruptive, bad for morale, contrary to unit cohesion, etc., we still believe that the policy could be defended against first amendment challenge, although the question may become a closer one. Because of the special nature of military society, we do not think that the bare fact that the policy would reduce the absolute amount of speech permitted in military settings or by service personnel creates first amendment problems. See Brown v. Glines, 444 U.S. 348, 353-54 (1980). The more difficult issues arise from the fact that the policy on its



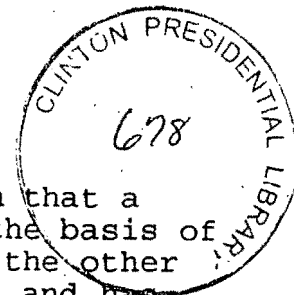
face targets a particular issue and particular speakers. The first amendment, of course, "generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas involved. Content-based regulations are presumptively invalid." R.A.V. v. City of St. Paul, 112 S.Ct. 2538, 1543 (1992). On this basis, it might be argued that under the policy homosexual personnel who discuss their sexual orientation will be dismissed from service while heterosexual personnel will not be, or that the policy targets speech that supports the presence of gays in the military. Such a policy, the argument would go, imposes "special prohibitions on those speakers who express views on disfavored subjects," id. at 2547, or is "actual viewpoint discrimination." Id. The government would have to carry a very heavy burden of justification in order to sustain the policy if the courts concluded that it embodied content or viewpoint discrimination.

As we understand it, however, the proposed policy does not attempt directly to censor either the content of speech or the viewpoints expressed. The policy would not "effectively drive certain ideas or viewpoints from the marketplace," R.A.V., 112 S.Ct. at 2545, quoting Simon & Schuster v. New York Crime Victims Bd., 112 S.Ct. 501, 508 (1991), even the military marketplace. Service personnel would remain free to discuss sexual orientation or to argue for or against gays in the military subject to the general restrictions military commanders can place on political expression. While it is true that the policy "singles out" a particular category of expression, Simon & Schuster, 112 S.Ct. at 508, it does not do so in order to eliminate a certain content or to suppress viewpoint but in order to prevent certain results that the government clearly has the power to prevent. Cf. R.A.V., 112 S.Ct. at 2546 (government may use content-defined basis for banning obscenity when the content-based category "happens to be associated with particular 'secondary effects of the speech'").

The proposed policy's consistency with the first amendment can be defended by emphasizing that the persons and actions it addresses are not defined with the suppression of speech in mind. The policy would prohibit all actions (speech, sexual acts, marriage) that may produce the detrimental effects about which the military is concerned; in parallel fashion it does not prohibit all speech concerning homosexuality, but only that speech that may directly impinge upon the privacy interests of other service personnel, the military community's strong interests in unit cohesion, and so on. Furthermore, the universe of persons who would be subject to dismissal under the policy is not persons who engage in a certain expression; instead, it is those who engage in conduct disruptive to the services. Some examples of that conduct, to be sure, involve talking, but that talking is proscribed not because of what its intellectual content is but because it leads to the results the government may



act to avoid (disruption and so on). "The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of the other (opposition to the city of government) is commonplace, and has found application in many contexts." R.A.V., 112 S.Ct. at 2544.



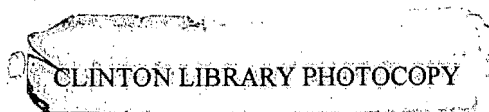
The conclusion that the proposed policy does not violate the first amendment is supported of course by the judiciary's general posture of deference to military decisions. "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). The courts "must give great deference" to the military's judgment about the means necessary to achieve those goals, even where those means tread upon ordinary first amendment freedoms. Id.

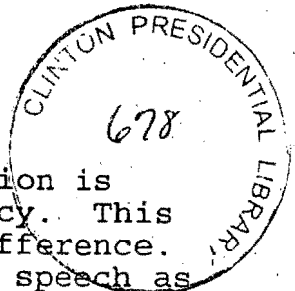
The proposed policy is for constitutional purposes not dissimilar to the passive enforcement policy of prosecuting selective service non-registrants that the Supreme Court upheld against constitutional challenge in Wayte v. United States, 470 U.S. 598 (1985). Under the passive enforcement policy, the government "prosecute[d] only those who reporte[d] themselves as having violated the law" in violation. Id. at 600. The Court noted that the government did not actively seek out those in violation of the law, id. at 603, and prosecuted only those persons who "stated affirmatively that they had refused to comply with the law." Id. at 609. In other words, only those persons who announced that they were out of compliance (whether publicly or only to the government by letter, id. at 610) were prosecuted. The Court held that the appropriate first amendment test was that articulated in United States v. O'Brien, 391 U.S. 367 (1968):

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

Wayte, 470 U.S. at 611, quoting O'Brien, 391 U.S. at 377. Applying this test, the Court concluded that the passive enforcement policy was constitutional.

We believe that the proposed policy is consistent with the first amendment for reasons similar to those the Court accepted in Wayte. It is true that the draft protests at issue in Wayte were of purely instrumental interest to the government, as a means toward identifying persons who had not registered for the

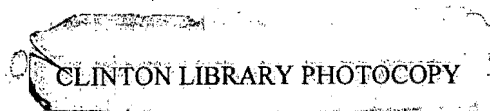




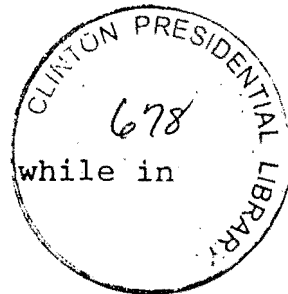
draft, while speech about one's own homosexual orientation is itself one of the "acts" forbidden by the proposed policy. This distinction, however, does not make a constitutional difference. In both situations, the government is employing certain speech as a means of identifying those in violation of a policy that is directed not to eliminating disfavored speech but to the achievement of another, valid goal. The conclusion in Wayte therefore supports our conclusion that the proposed policy, appropriately drafted, will withstand first amendment challenge.

The government's power to prescribe the qualifications for military service is "beyond question," O'Brien, 391 U.S. at 377, and Wayte itself restated the Court's view that "[f]ew interests can be more compelling than a nation's need to ensure its own security." 470 U.S. at 611. (Wayte concluded that the passive enforcement policy was adequately related to this compelling governmental interest because it promoted deterrence and prosecutorial efficiency. Id. at 612-13.) For the reasons we have stated above, if the policy is properly drafted it should be defensible as resting on an interest "unrelated to the suppression of free expression." Id.

Finally, and most controversially, the "incidental restriction" on the freedom of gay service personnel to speak about homosexuality or to advocate the presence of gays in the military arguably would be "no greater than is essential to the furtherance of" the military's "interest" in avoiding the disruptive effects of having known homosexuals in the military: put briefly, the policy would penalize only that speech that itself is one form of the activities the government may prohibit in the interests of morale, unit cohesion and so forth. This argument comes under strain because of the breadth of the proposed policy: The policy apparently would apply even in circumstances in which the serviceperson's sexual orientation became known against her will and in circumstances in which it would not be reasonable to argue that her immediate unit would be affected. Such applications of the policy are constitutionally troubling, but our conclusion is that they would be consistent with the first amendment. In the military context, such marginal cases, where the relationship of the intrusion on first amendment interests to the government's goals are debatable, do not render classifications unconstitutional. Military regulations are made for the service or services as a whole; the Constitution does not require the services to create exceptions to general policies that are themselves reasonably tailored to the military's goals. See Brown, 444 U.S. at 356-57; cf. Goldman, 475 U.S. at 508-10



(regulations concerning the wearing of religious apparel while in uniform).⁶



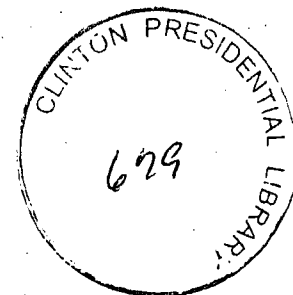
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In conclusion, we believe that the proposed change in policy may raise equal protection problems, but that these problems would be minimized if the policy is more narrowly drawn. We have also concluded that the proposal would probably withstand first amendment scrutiny.

H. Jefferson Powell
H. Jefferson Powell

⁶ We agree with Civil Division's conclusion that the government might not be able to rely on the Connick line of decisions in defending the proposed policy. See Connick v. Myers, 461 U.S. 138 (1983) (public employee's speech on private matters not ordinarily protected speech for purposes of reviewing personnel decisions by employer). In addition to the Civil Division's rationale, we note the existence of language in some opinions suggesting that the situation of individual gay servicepersons may be "of public concern" for Connick purposes. See Rowland v. Mad River Local School District, 730 F.2d 444, 449 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985).





TO: Jamie Gorelick

FROM: Cliff Sloan

Are the following points accurate?

* DOD is preparing implementing directives based on the July 19 policy. The new directives will effectuate every element of the July 19 policy. There is not one single aspect of the July 19 policy that cannot be effectuated with the Nunn legislation.

* Our position that the Nunn legislation is "consistent" with the new policy applies only to the statute, not the report language. (The report contains some very troubling language. We may want to try to affect the conference report, but this has not been decided yet).

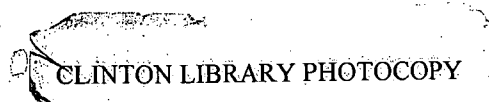
* The discharge criteria are the same under the Nunn legislation and the July 19 policy. Both the legislation and the July 19 directive include the rebuttable presumption and the elimination of "desire" as a basis for discharge.

* Critics of our statement on the Nunn legislation claim that there is a difference about the investigative policy. The legislation itself is silent on investigations and will not conflict with implementation of the July 19 policy on investigations.

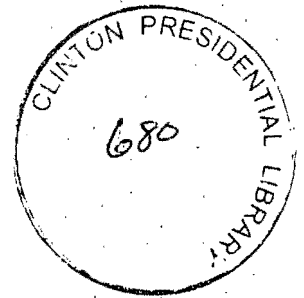
* Critics of our statement on the Nunn legislation claim that there is a difference about the "don't ask" part of the investigative policy. In fact, the Nunn legislation approves the "don't ask" policy as a sense of the Congress resolution, but emphasizes that the policy can be changed by the Secretary of Defense. The Nunn legislation thus does not affect the July 19 policy on this point.

* The Nunn legislation contains a finding that "[t]he 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 armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." It also does not include the statement about "homosexual orientation" that the July 19 policy included ("homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.") But nothing in the Nunn legislation prohibits implementation of the specifics of the July 19 policy.

* Critics of our statement on the Nunn legislation object that the legislation does not include the July 19 policy's statement on "even-handed enforcement" of the military code. But DOD fully intends to effectuate the principle of even-handedness in the implementation of the policy.



THE WHITE HOUSE
WASHINGTON



September 20, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN *CMS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: New York Times editorial and op/ed
piece re: Nunn legislation on gays-
in-the-military

At George Stephanopoulos' request, I have analyzed each of the criticisms in the New York Times editorial and op/ed piece.

Despite the criticisms raised in these articles, nothing in the Nunn legislation will prevent implementation of any aspect of the July 19 policy.

I. The New York Times editorial

A copy of the September 19, 1993 editorial is attached.

Here are the specific points discussed in the editorial:

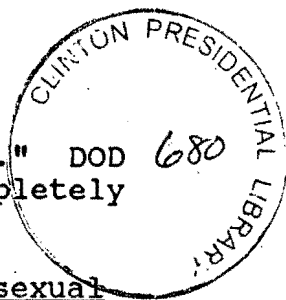
1. "[T]he Senate tepidly endorsed Mr. Clinton's order to stop asking all recruits about homosexuality, but stressed that the Secretary of Defense could reinstate the questioning at any time."

* The Nunn legislation includes a sense of Congress resolution specifying that the "don't ask" policy should be continued. It also specifies that the Secretary of Defense may reinstate questioning if he determines it necessary to do so. Under our July 19 policy, the questioning could be resumed as a matter of Executive Branch action. The Nunn legislation thus does not change the situation with regard to the "don't ask" policy.

2. "The Senate report also expressed concern that the Administration's plan to tamp down overzealous investigations might go too far; it emphasized that commanders still retain discretion to initiate investigations as they deem necessary."

* The Senate legislation is silent on investigations. Although the Senate Report expresses some concern about issues raised by application of the guidelines, the Report's bottom line is that "[t]he committee . . . received assurances from the Department of Defense that the investigative guidance would be implemented in a manner that would provide commanders with the

discretion they need to maintain good order and discipline." DOD 680
intends to exercise its discretion in a manner that is completely
consistent with the July 19 policy.



3. "The Administration has told commanders to investigate sexual conduct violations in 'an even-handed manner,' but the Senate made no mention of equal treatment and focused instead on homosexual conduct."

* The legislative silence on even-handedness will not affect DOD's implementation of the July 19 policy. DOD plans to investigate sexual conduct violations in an even-handed manner.

4. "The whole purpose of the Senate bill is to exclude homosexuals because that would create an 'unacceptable risk' to morale, discipline, and unit cohesion."

* The Nunn legislation includes a legislative finding about "unacceptable risk." ("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 armed forces' high standards of morale, good order, and discipline, and unit cohesion that are the essence of military capability.") Although the "unacceptable risk" language is not found in the July 19 policy, the legislative finding is restricted to individuals with "a propensity or intent to engage in homosexual acts" -- which is a basis for exclusion under the July 19 policy. (DOD advises that the legislative finding is consistent with DOD testimony explaining the new policy).

5. "[T]he Administration, eager to get beyond a losing fight, has capitulated with a false statement that Mr. Nunn's language is 'fully consistent' with its own July 19 policy."

* Nothing in the Nunn legislation will prevent implementation of any aspect of the July 19 policy. The statement about the consistency of the Nunn legislation, moreover, is not a new development or "capitulation," but rather a contemporaneous assessment given on July 23.

6. "The senators want to codify into law the most repressive parts while inviting an overturn of the more liberal parts."

* Unfortunately, the Nunn legislation does codify certain restrictions in the new policy, while either maintaining silence on or leaving discretionary some improvements in the new policy. But neither legislative silence nor explicit discretion will prevent implementation of anything in the July 19 policy.

II. The Tom Stoddard op/ed piece

A copy of Stoddard's September 20, 1993 op/ed piece is attached.

Here are the specific points discussed in the piece:

1. "The proposal, drafted by Senator Sam Nunn, obliterates even the small protections contained in July's directive."

* This statement is incorrect. Nothing in the Nunn legislation will prevent implementation of a single aspect of the July 19 policy.

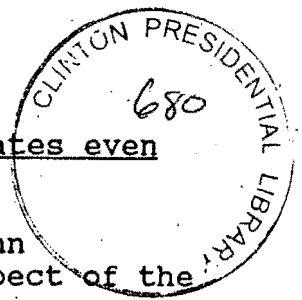
2. "The directive, at least, barred 'inquiries or investigations solely to determine a member's sexual orientation.' Senator Nunn's proposal wipes out any such limitation."

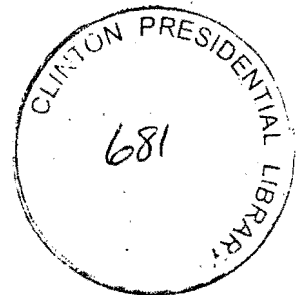
* This statement is incorrect. The Nunn legislation is silent on investigations. DOD plans to proceed with the investigative guidelines outlined in the July 19 policy.

3. "Indeed, the Nunn language encourages probes and purges. It contains a long list of Congressional 'findings' designed to insure the complete exclusion of gays."

* The only specific finding pointed to by Stoddard is the one about "unacceptable risk" described in #4 above. As noted, that finding refers to "a propensity or intent to engage in homosexual acts." Stoddard himself recognizes that the July 19 policy similarly addresses a propensity or intent to engage in homosexual acts (and Stoddard goes on to criticize "the President's so-called compromise" on that ground). Only one of the 14 other findings specifically addresses homosexuality. (It says: "The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.")

In sum, the most important point is that the Nunn legislation will not prevent implementation of any aspect of the July 19 policy. DOD reports that it is busily drafting directives to effectuate the July 19 policy, and that nothing in the Nunn legislation will require the Department to change its efforts to implement faithfully the July 19 policy.



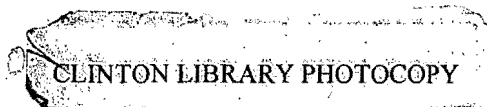


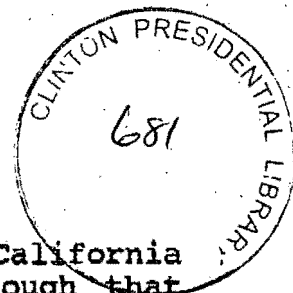
Re: Defense of DOD's former policy on
military service by homosexuals

You asked about the procedural posture of cases in which we are currently defending the policy on military service by homosexuals. There are three categories of cases: (i) those involving the policy in place before the recent policy review announced by the President on January 29; (ii) those involving the interim policy put in place on January 29 pending the outcome of that review; and (iii) one case already filed, and presumably more to come, challenging the new policy announced by the Secretary of Defense on July 19. The new policy was originally scheduled to take effect on October 1, but implementation has been delayed pending enactment of legislation mandating a similar policy (expected later this month) and the stay or reversal of the overbroad injunction entered by the district court in the Meinhold case, described below.

1. The most prominent cases in which we are defending the former policy are the Meinhold case in the Ninth Circuit and the Steffan case in the D.C. Circuit.¹ We have also noticed an appeal

¹ Steffan was argued on September 13, and is under submission. Meinhold has been set for argument in December. In the meantime we have been endeavoring, on an emergency basis, to get the Ninth Circuit to limit the very broad order entered by the district court, so that it will apply only to Meinhold and will not further interfere with application of the interim and new policies to others in the military. The court of appeals denied our initial motion for a stay of the injunction (as it applies to anyone besides Meinhold) last March, on the ground that there was no apparent inconsistency between the original injunction (which prohibited, inter alia, discharges based on sexual orientation alone) and the interim policy (which provided for transfers to the standby reserve in lieu of discharges). In early September we renewed the motion, in light of the need to clear the way for the new policy to take effect. The court's motions panel denied that motion on September 22, and we asked for en banc reconsideration on September 30. Also on September 30, the district court held a hearing on Meinhold's motion to hold the Secretary of Defense in contempt of the original injunction for enforcing the interim policy (even though the court of appeals' earlier order had said there was no conflict between that policy and the injunction). At that hearing the district court declined to find the Secretary in contempt, but entered a new order "clarifying" its earlier injunction and, in fact, significantly expanding it to prevent the military from taking any action (including keeping records) on the basis of sexual orientation, in the absence of demonstrably detrimental sexual "conduct" (which in the context of the order presumably means acts, not statements which might be defined as "conduct" under the new policy). On October 1 we filed a new





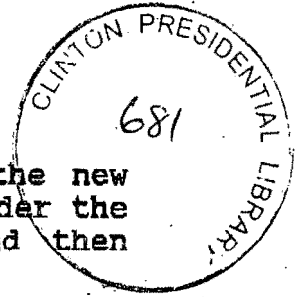
2

in another case (Dahl) in which a district court in California entered judgment against the Navy on August 30, although that appeal has not been formally authorized and no briefs have been filed. We are also defending at least seven cases challenging the old policy that are currently pending before various district courts. Moreover, there are several individuals who have been transferred to the "standby reserve" under the interim policy announced in January. The interim policy differs from the former policy only in allowing individuals who have been processed for discharge without a specific finding of homosexual acts to be transferred to the standby reserve, rather than discharged, pending implementation of the new policy. One of those individuals (Lt. Selland) has recently obtained a preliminary injunction from the D.C. district court ordering him reinstated to active duty.

2. During the policy review initiated by the President, it was necessary to defend pending (and newly filed) cases in order to preserve the status quo. Once the new policy was announced in July, it became clear that there would not be major changes in the substantive criteria for discharge (which will still include, in general, any homosexual act or any statement, public or private, of homosexual orientation).² Thus, it is now necessary to defend the

appeal from that new order, moved to consolidate that appeal with the appeal from the prior injunction, asked for initial en banc consideration of an emergency motion to limit the new injunction to Meinhold alone (to be considered along with the reconsideration of the denial of our previous motion to limit the original injunction), and asked for an emergency "mini-stay" of the new order while the court considered the other motions. We understand that all of our papers have been circulated to the full court (quite an exercise in the Ninth Circuit), but as of late afternoon today we have recieved no further response from the court.

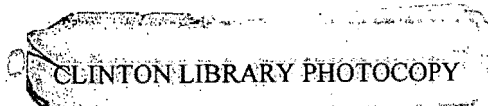
² The only arguably significant change in those criteria involves what the Department of Justice has termed, in defending the former policy, the "rebuttable presumption" of dischargeability that arises from a service member's statement of homosexual orientation. The former and interim policies define a dischargeable "homosexual" as one who "engages in, desires to engage in, or intends to engage in homosexual acts"; to rebut the "presumption" of dischargeability, a service member must in theory demonstrate that he or she has no "desire" to engage in homosexual acts. The new policy ties discharges based on statements of orientation explicitly to a presumption that one who makes such statements "is engaging in homosexual acts or has a propensity or intent to do so." Arguably, disproving a "propensity or intent" to act is easier than disproving a "desire" to do so. It must be recognized, however, that (i) DOJ has consistently defended the old policy on the theory that "desire" in this context must be taken to mean something quite strong (basically "propensity"), so that in our



old policy in order to remain in a position to defend the new policy -- at least unless all service members processed under the old and interim policies are temporarily reinstated and then reconsidered for separation under the new policy.

3. We have in fact suggested several times that the Department of Defense consider reinstating current plaintiffs such as Meinhold and Dahl (who, ironically, has moved on to a law career and probably does not want actual reinstatement as a lieutenant in the Navy) and reprocessing them for discharge under the new policy. Reprocessing would in most cases be a formality, because the plaintiffs in pending litigation have ipso facto acknowledged a homosexual orientation, and none has to date attempted to rebut the resulting presumption of homosexual acts. It is possible that the courts would therefore view it as a dilatory tactic, and would refuse to dismiss cases presently pending as moot because of reinstatement under these circumstances. Moreover, DOD has on occasion expressed a desire to prosecute pending cases actively to a speedy and favorable conclusion, because (i) the policies are so similar in terms of the substantive discharge criteria that decisions upholding the former policy will be very strong authority for the validity of the new one, and (ii) a refusal to defend prior discharges would, DOD fears, be viewed as a concession that the prior policy was flawed or as a reflection of a lack of commitment on the part of the Executive Branch (specifically including the Department of Justice) to mount a vigorous defense of the military's fundamental position regarding service by homosexuals.

view the change in phrasing merely clarifies the policy rather than changing it; and (ii) it does not appear that the military sees any difference in the formulations, or has any intention of implementing the new phraseology in any more expansive way.



THE WHITE HOUSE

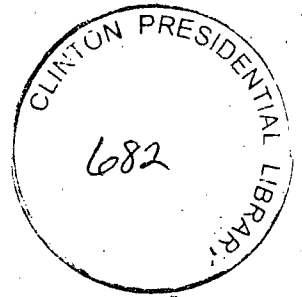
WASHINGTON

September 20, 1993

MEMORANDUM FOR GEORGE STEPHANOPOULOS

FROM: CLIFF SLOAN

SUBJECT: Nunn legislation on gays-in-the military



I have had an extensive discussion with Jamie Gorelick and reviewed the Nunn legislation.

The following points should be noted:

* DOD is preparing implementing directives based on the July 19 policy. The new directives will effectuate every element of the July 19 policy. There is not a single aspect of the July 19 policy that cannot be effectuated with the Nunn legislation.

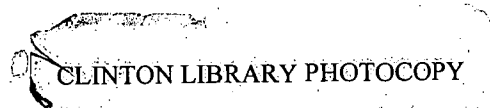
* Our position that the Nunn legislation is "consistent" with the new policy applies only to the statute, not the report language. (The report contains some very troubling language. We may want to try to affect the conference report, but this has not been decided yet).

* The discharge criteria are the same under the Nunn legislation and the July 19 policy. Both the legislation and the July 19 directive include the rebuttable presumption and eliminate "desire" as a basis for discharge.

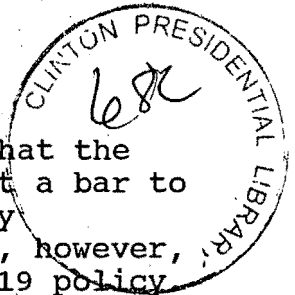
* Critics of our statement on the Nunn legislation claim that there is a difference regarding the investigative policy. The legislation itself is silent on investigations and will not conflict with implementation of the July 19 policy on investigations.

* Critics of our statement on the Nunn legislation claim that there is a difference regarding the "don't ask" part of the investigative policy. In fact, the Nunn legislation approves the "don't ask" policy as a sense of the Congress resolution, but emphasizes that the policy can be changed by the Secretary of Defense. The Nunn legislation thus does not affect the July 19 policy on this point.

* The Nunn legislation contains a finding that "[t]he 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 armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." The Nunn legislation also does not



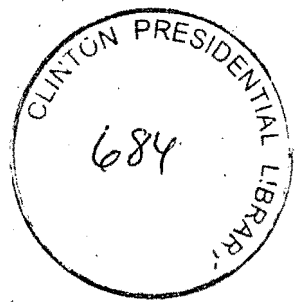
include the statement about "homosexual orientation" that the July 19 policy included ("homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.") Nothing in the Nunn legislation, however, prohibits implementation of the specifics of the July 19 policy



* Critics of our statement on the Nunn legislation object that the legislation does not include the July 19 policy's statement on "even-handed enforcement" of the military code. But DOD fully intends to effectuate the principle of even-handedness in the implementation of the policy.

* There has been no recent change in Administration policy on this matter. The Administration's statement that the Nunn legislation was consistent with the July 19 policy was made public on July 23. This is an old story that is being misunderstood as a recent development.

THE WHITE HOUSE
WASHINGTON



September 20, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM *BN*
COUNSEL TO THE PRESIDENT

CLIFFORD M. SLOAN *CMS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: New York Times editorial and op/ed
piece re: Nunn legislation on gays-
in-the-military

At George Stephanopoulos' request, we have analyzed each of the criticisms in the New York Times editorial and op/ed piece.

Despite the criticisms raised in these articles, nothing in the Nunn legislation will prevent implementation of any aspect of the July 19 policy.

I. The New York Times editorial

A copy of the September 19, 1993 editorial is attached.

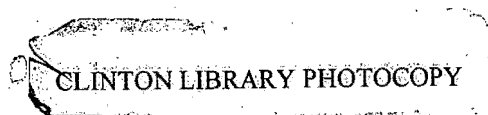
Here are the specific points discussed in the editorial:

1. "[T]he Senate tepidly endorsed Mr. Clinton's order to stop asking all recruits about homosexuality, but stressed that the Secretary of Defense could reinstate the questioning at any time."

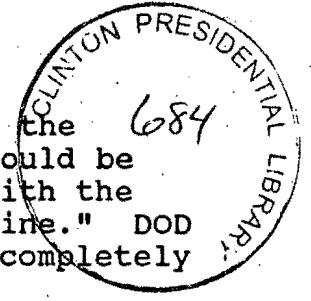
* The Nunn legislation includes a sense of Congress resolution specifying that the "don't ask" policy should be continued. It also specifies that the Secretary of Defense may reinstate questioning if he determines it necessary to do so. Under our July 19 policy, the questioning could be resumed as a matter of Executive Branch action. The Nunn legislation thus does not change the situation with regard to the "don't ask" policy.

2. "The Senate report also expressed concern that the Administration's plan to tamp down overzealous investigations might go too far; it emphasized that commanders still retain discretion to initiate investigations as they deem necessary."

* The Senate legislation is silent on investigations. Although the Senate Report expresses some concern about issues raised by application of the guidelines, the Report's bottom line



is that "[t]he committee . . . received assurances from the Department of Defense that the investigative guidance would be implemented in a manner that would provide commanders with the discretion they need to maintain good order and discipline." DOD intends to exercise its discretion in a manner that is completely consistent with the July 19 policy.



3. "The Administration has told commanders to investigate sexual conduct violations in 'an even-handed manner,' but the Senate made no mention of equal treatment and focused instead on homosexual conduct."

* The legislative silence on even-handedness will not affect DOD's implementation of the July 19 policy. DOD plans to investigate sexual conduct violations in an even-handed manner.

4. "The whole purpose of the Senate bill is to exclude homosexuals because that would create an 'unacceptable risk' to morale, discipline, and unit cohesion."

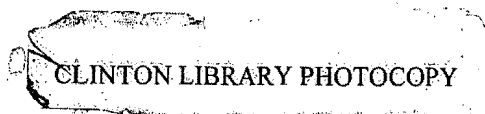
* The Nunn legislation includes a legislative finding about "unacceptable risk." ("The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the armed forces' high standards of morale, good order, and discipline, and unit cohesion that are the essence of military capability.") Although the "unacceptable risk" language is not found in the July 19 policy, the legislative finding is restricted to individuals with "a propensity or intent to engage in homosexual acts" -- which is a basis for exclusion under the July 19 policy. (DOD advises that the legislative finding is consistent with DOD testimony explaining the new policy).

5. "[T]he Administration, eager to get beyond a losing fight, has capitulated with a false statement that Mr. Nunn's language is 'fully consistent' with its own July 19 policy."

* Nothing in the Nunn legislation will prevent implementation of any aspect of the July 19 policy. The statement about the consistency of the Nunn legislation, moreover, is not a new development or "capitulation," but rather a contemporaneous assessment given on July 23.

6. "The senators want to codify into law the most repressive parts while inviting an overturn of the more liberal parts."

* Unfortunately, the Nunn legislation does codify certain restrictions in the new policy, while either maintaining silence on or leaving discretionary some improvements in the new policy. But neither legislative silence nor explicit discretion will prevent implementation of anything in the July 19 policy.



II. The Tom Stoddard op/ed piece

A copy of Stoddard's September 20, 1993 op/ed piece is attached.

Here are the specific points discussed in the piece:

1. "The proposal, drafted by Senator Sam Nunn, obliterates even the small protections contained in July's directive."

* This statement is incorrect. Nothing in the Nunn legislation will prevent implementation of a single aspect of the July 19 policy.

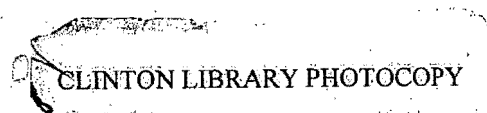
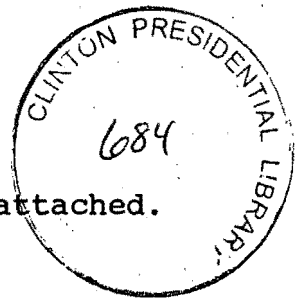
2. "The directive, at least, barred 'inquiries or investigations solely to determine a member's sexual orientation.' Senator Nunn's proposal wipes out any such limitation."

* This statement is incorrect. The Nunn legislation is silent on investigations. DOD plans to proceed with the investigative guidelines outlined in the July 19 policy.

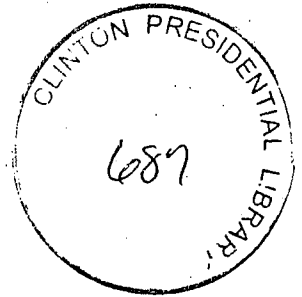
3. "Indeed, the Nunn language encourages probes and purges. It contains a long list of Congressional 'findings' designed to insure the complete exclusion of gays."

* The only specific finding pointed to by Stoddard is the one about "unacceptable risk" described in #4 above. As noted, that finding refers to "a propensity or intent to engage in homosexual acts." Stoddard himself recognizes that the July 19 policy similarly addresses a propensity or intent to engage in homosexual acts (and Stoddard goes on to criticize "the President's so-called compromise" on that ground). Only one of the 14 other findings specifically addresses homosexuality. (It says: "The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.")

In sum, the most important point is that the Nunn legislation will not prevent implementation of any aspect of the July 19 policy. DOD reports that it is busily drafting directives to effectuate the July 19 policy, and that nothing in the Nunn legislation will require the Department to change its efforts to implement faithfully the July 19 policy.



THE WHITE HOUSE
WASHINGTON



September 7, 1993

MEMORANDUM FOR GEORGE STEPHANOPOULOS

FROM CLIFF SLOAN *CMS*

Subject: Gays-in-the-military litigation

I wanted to bring you up to date on a couple of developments in the gays-in-the-military litigation.

In the Meinhold case, DOJ is preparing to file an emergency motion to vacate the part of the injunction that applies to anybody besides Meinhold himself. (The trial court entered a nation-wide injunction preventing the discharge of any military individual for homosexuality in the absence of proof of sexual conduct which would impair the mission of the military). DOJ's motion states that it is essential to vacate the injunction (except as it applies to Meinhold) so that the new policy can be implemented on October 1.

I have reviewed DOJ's draft motion. The legal basis for the motion is quite strong -- the trial court had no business entering a nation-wide injunction, and it makes sense to try to straighten this out before October 1.

A *X* || Some of the statements in DOJ's draft, however, are troublesome. For instance, DOJ says that, with respect to the policy on discharges, the new policy is "substantially identical" to the old policy. I will make sure that such descriptions -- which are not accurate -- are not included in the motion as filed.

In the Steffan case, the D.C. Circuit (a panel of Mikva, Wald, and Edwards) is scheduled to hear argument on September 13. I plan to attend a moot court for the DOJ lawyer on September 9 and try to make sure that any references to the new policy, in the context of litigating the old policy, do not minimize the significance of the changes in the new policy.

Let me know if you have any comments on either of these developments.

To: Cliff

Fr: GS

Looks good to me. Let me know if you need help.

(GS)
CLINTON LIBRARY PHOTOCOPY

TO: Jamie Gorelick

FROM: Cliff Sloan



Are the following points accurate?

* DOD is preparing implementing directives based on the July 19 policy. The new directives will effectuate every element of the July 19 policy. There is not one single aspect of the July 19 policy that cannot be effectuated with the Nunn legislation.

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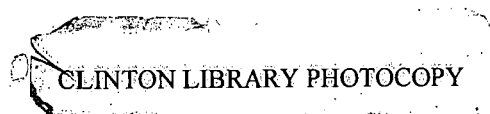
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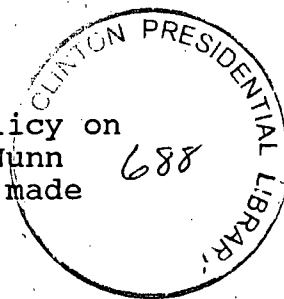
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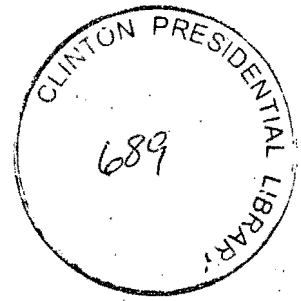
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THE WHITE HOUSE
WASHINGTON



September 7, 1993

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Potential Challenges and Possible Defenses re: Policy on Gays and Lesbians in the Armed Forces (5 pages)	ca. 06/28/1993	P5 690✓
002. draft	Legal Argument, incomplete copy (4 pages)	n.d.	P5 691✓
003. draft	Legal Argument, incomplete copy (16 pages)	n.d.	P5 692✓
004a. memo	H. E. Grant to The Chief of Naval Operations re: Results of Administrative Separation Hearing (2 pages)	07/27/1994	~~P6/b(6)~~
004b. form	Administration Discharge Board Proceeding (2 pages)	n.d.	~~P6/b(6)~~

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Gays in the Military - General [3]

Kelly Hendren
2006-0227-F
kh326

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

RR. Document will be reviewed upon request.

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

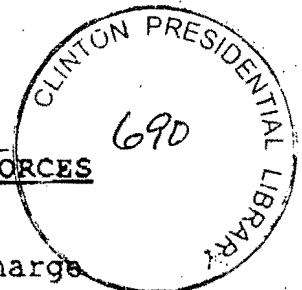
- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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TEL:

Jun 28.93 16:14 No.002 P.02

POTENTIAL CHALLENGES AND POSSIBLE DEFENSES
RE: POLICY ON GAYS AND LESBIANS IN THE ARMED FORCES



DoD Policy: The DoD regulation on military discharge provides that a servicemember who attempts, solicits, or engages in homosexual acts, makes a statement that he or she is a homosexual or bisexual, or marries or attempts to marry a person of the same sex, is subject to mandatory discharge.

I. First Amendment

A. Argument/Challenge: The DoD regulation has the effect of chilling a servicemember's free speech rights as guaranteed by the First Amendment in that the regulation would limit the ability of a service member to identify himself as a homosexual.

B. Defense:

1. The military is, by necessity, a specialized society separate from civilian society.

The differences between military and civilian communities result from the fact that it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. Parker v. Levy, 417 U.S. 733 (1974). In Parker, the Supreme Court noted that while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

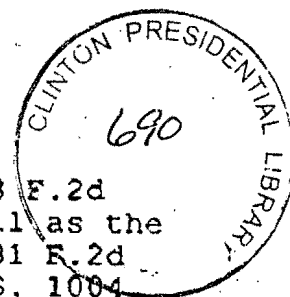
2. Deference by the courts to the decisions of the Executive Branch or Congress is great.

The courts have long recognized that they must defer to the decisions of the Executive Branch or Congress concerning military personnel. Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

The Supreme Court has repeatedly applied this doctrine of deference in First Amendment cases involving the military. See e.g., Goldman v. Weinberger, 475 U.S. 503 (1986).

3. The self-identification of sexual orientation is unprotected by the First Amendment.

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The Ninth Circuit in Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), reh'g denied, as well as the Seventh Circuit in Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990), concluded that discharges under the military regulation were not based on the advocacy of ideas, actions or conduct, but rather solely on an admission of fact. The "act" of identifying oneself as homosexual does not qualify as speech. Individuals are still free to advocate that DoD change its policy, to argue the relative merits of the lifestyle, and to associate with known homosexuals. What is prohibited, however, is the act of identification.

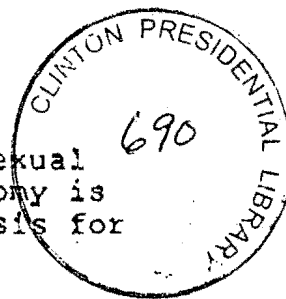
4. Even if "self-identification" were deemed to be speech, because it is not a matter of "public concern" it may be regulated even in the civilian workplace.

In Connick v. Myers, 461 U.S. 138, 147 (1983), the Supreme Court held that when an employee speaks not as a citizen upon matters of public concern, but instead upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel action taken in response to the employee's behavior. Moreover, the Connick rule has been applied to acknowledgments of homosexuality by civilian and military personnel. See e.g., Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985).

II. Right of Privacy

- A. Argument/challenge: There is a constitutional right of privacy to engage in homosexual acts.
- B. Defense
 1. The Supreme Court has never defined the right of privacy so broadly as to encompass homosexual conduct.

The Supreme Court held in Bowers v. Hardwick, 478 U.S. 186 (1986), that the constitutionally protected right of privacy recognized in cases such as Griswold v. Connecticut, does not extend to acts of consensual homosexual sodomy because the activity bears no relationship to marriage, procreation, or family life. And because the



right of privacy does not extend to homosexual sodomy, a judgement by the state that sodomy is immoral provides a sufficient rational basis for sodomy laws to satisfy the requirement of substantive due process.

2. If a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context.

The military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society. This has repeatedly been made clear by the Supreme Court. See Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

3. Alternatively, whatever privacy rights one might have in civilian life to engage in certain types of conduct, those rights are subservient to the legitimate need for discipline and unit cohesion in the military.

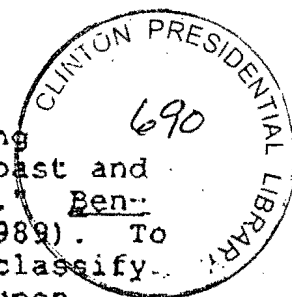
III. Equal Protection

- A. Argument/Challenge: The plaintiff is part of a suspect or quasi-suspect class and the DoD regulation constitutes invidious discrimination based on sexual orientation.

- B. Defense:

1. As long as the behavior that defines homosexuals as a class may be criminally proscribed (and such criminal prohibitions are upheld under the constitution), it is hardly open to a lower court to conclude that state-sponsored discrimination against the class is invidious. Article 125 of the Uniform Code of Military Justice criminally proscribes sodomy.
2. Even those who have not engaged in homosexual acts, but have merely stated that they are homosexual or bisexual, do not constitute a suspect or quasi-suspect class under a Ben-Shalom type analysis.

A homosexual's acknowledgement of his or her sexual orientation, "if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without



individual exceptions, but it is compelling evidence that [an individual] has in the past and is likely to again engage in such conduct. Ben Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989). To this extent, the DoD regulation does not classify based merely upon homosexual status, but upon reasonable inferences about probable conduct in the past and future.

3. In the absence of a finding that homosexuals comprise a suspect class or quasi-suspect class, the DoD regulation will be scrutinized to determine if it is rationally related to a legitimate government interest. Those interests include:
 - a. Privacy -- when deployed on ships and overseas, servicemembers must often work, eat, relax, bathe, and sleep together in close proximity 24-hours a day. For some, if not many, the presence of openly homosexual individuals in that environment constitutes a major and unacceptable invasion of what little privacy remains. It is the knowing of another's homosexual orientation that undermines privacy interests.
 - b. Unit Cohesion -- The presence of open homosexuals tends to affect a unit, detracting from the primary task of maintaining combat effectiveness, and directly and negatively impacting unit cohesion, leadership, good order, discipline, morale, and overall readiness. There are no empirical data on the impact on a unit. Given the threat to this important interest identified by the military, however, the policy is a measured and rational one.
 - c. Divisiveness/Morality -- Society has not come to grips with the issue of homosexuality. Many states continue to proscribe certain forms of homosexual behavior. Our major religions teach that homosexual conduct is immoral. While we need not accept those teachings as correct, we must recognize that Americans tend to hold very strong beliefs on homosexuality, on both sides of the issue. The military reflects society. In order to preserve the military's ability to recruit and retain the most effective fighting force, a military ban on homosexual statements and conduct is necessary (at least until this country arrives at some consensus that

homosexual behavior is acceptable in our society). 690

- d. Economy -- Courts and various scholars have concluded that statements of one's homosexuality and homosexual acts are inextricably linked, i.e., when one states that he or she is a homosexual, he or she is, at least, demonstrating a propensity to engage in conduct proscribed by military regulation or law. Thus, by separating those who acknowledge their homosexual status, but no homosexual acts, the military does not invest time, money, and resources in costly investigations of criminal conduct or likewise devote those resources to criminal prosecutions.

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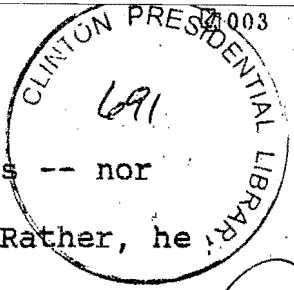
v. Williams, 397 U.S. 471, 485 (1970), and Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).⁸

Significantly, this case involves rational-basis review in the context of matters involving "national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded [the Political Branches] greater deference." Rostker, 453 U.S. at 64-65. When promulgating rules for the governance of the military, the Political Branches are permitted to regulate "both with greater breadth and with greater flexibility" than in the civilian context. Id. at 66 (quoting Parker v. Levy, 417 U.S. 733, 756 (1974)). Thus, in deciding questions regarding the appropriate composition of the military, courts must be "particularly careful not to substitute [their] judgment of what is desirable for that of [the Political Branches], [nor should courts substitute their] own evaluation of evidence for a reasonable evaluation by the [Political Branches]." Rostker, 453 U.S. at 68.

~~We emphasize that Meinhold does not challenge DOD's policy to the extent it applies to homosexuals whose propensity to engage in~~

⁸ Meinhold incorrectly claims, see Meinhold Br. 20, that Heller does not affect the validity of the "active" rational-basis test announced in Pruitt. Heller plainly establishes -- contrary to Pruitt -- that DOD was not required to produce objective record evidence, to be weighed by the court, to defend its policy. See Gov't Br. 25 n.10. In any event, DOD satisfied the heightened evidentiary requirements of Pruitt by submitting record evidence to support its policy. See Gov't Br. 26-27. The district court, without explanation, ignored this evidence and struck down DOD's policy based on the court's analysis of evidence critical of the policy. This alone was reversible error. See id. at 27 & n.11.

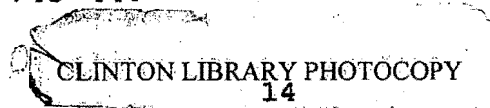
Meinhold now contends, see Meinhold Br. 36, that the Government's declarations should not have been considered because they were not offered in opposition to his motion for summary judgment. This contention is insubstantial. The declarations were offered in support of our own motion for summary judgment and that motion opposed Meinhold's motion.

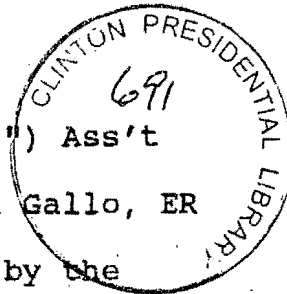


homosexual conduct is evidenced by specific homosexual acts -- nor could he in light of binding precedent. See supra p. 5. Rather, he claims that some members of the class of homosexuals with a propensity to engage in homosexual conduct should be exempt from DOD's policy; namely, those members who admit their homosexuality but for whom DOD has no evidence of specific homosexual acts. This assertion is incorrect. As we show below, given the legitimate reasons underlying DOD's policy, equal protection does not require DOD to adopt the special exemption urged by Meinhold for that sub-class of homosexuals. See New York Transit Auth., 440 U.S. at 590-92.

2. DOD's former policy of discharging service members who, through their acts or statements, demonstrate a propensity to commit homosexual acts is rational because it is designed to protect against what this Court has found to be a reasonable prospect of interference with military effectiveness, while conserving scarce resources and protecting individual privacy. See Schowengerdt, 944 F.2d at 490; Hatheway, 641 F.2d at 1382; Beller, 632 F.2d at 812, 813. Accord Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d 1068; Dronenburg v. Zech, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984).

Military life is fundamentally different from civilian life. The primary purpose of the Armed Forces is to prepare for and prevail in combat. That unique purpose makes the military a unique and specialized society characterized by extraordinary responsibility and accountability. The military is governed by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable outside the military context. See Goldman v. Weinberger, 475 U.S. 503, 508-10 (1986); Parker, 417 U.S. at 743-44.

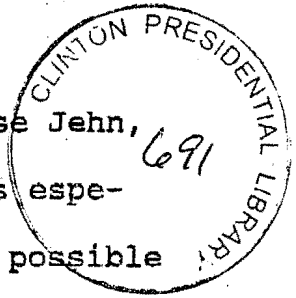




services find to be disturbing, see Declaration ("Decl.") Ass't Secretary of Defense Jehn, ER 54-55; Decl. Rear Admiral Gallo, ER 69, 71, and that this Court has held may be proscribed by the military. See Schowengerdt, 944 F.2d at 490; Beller, 632 F.2d at 812. The need for good order, discipline, and unit cohesion in the military is unlike anything in civilian society, and military authorities are entitled to consider how these crucial needs will be affected when determining the appropriate composition of the military services. See Rostker, 453 U.S. at 65-66.¹⁰

Second, in the unique military context, DOD could consider what it determined were significant concerns relating to privacy. In this regard, ~~we note~~ ^{that despite the substantial privacy infringements that accompany military service, DOD attempts to separate men and women while they sleep, bathe, and use toilet facilities to preserve their privacy} ~~when in states of undress.~~ DOD's efforts in this regard promote good order and discipline by accommodating concerns relating to modesty and decorum. ^{Similarly,} ~~DOD could ration-~~ ^{ally} conclude ^(d) that in the unique military environment where members of the same sex sleep, bath, ^(e) and live in extremely close proximity, the presence of persons who commit or are likely to commit homosexual acts would be an intrusion into the privacy of personnel of the same sex because of discomfort or embarrassment that they are being

¹⁰ As we stated in our opening brief, see Gov't Br. 28-29, this Court may also take notice of the testimony given during extensive hearings before Congress when it examined the military's policy regarding homosexuals. See Hearing Before The Senate Committee On Armed Services To Receive Testimony On DOD Policy On The Service Of Gay Men And Lesbians In The Armed Forces, 103rd Cong., 1st Sess. (July 20, 1993). Contrary to Meinhold's assertion, see Meinhold Br. 37 & n.39, this Court, in adjudicating the important constitutional issue presented, need not ignore the national debate on the subject involved in this case.



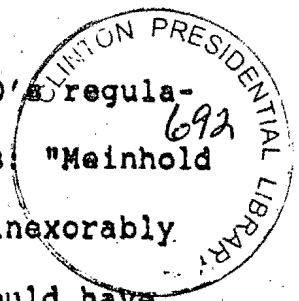
viewed as sex objects. See Decl. Ass't Secretary of Defense Jehn, ER 55; Decl. Rear Admiral Gallo, ER 69-70. This concern is especially acute in the military given the "potential . . . of possible close confinement aboard ships or bases for long periods of time" Beller, 632 F.2d at 812. This concern about privacy issues, which implicates military cohesion and morale, provides a constitutionally permissible basis for the ^{military} policy before this Court.¹¹

DOD also rationally concluded that a ban that did not prohibit service by those who are likely to engage in homosexual acts might adversely affect retention and recruitment, which could have a serious impact on our all-volunteer military force. See Beller, 632 F.2d at 812; Decl. Ass't Secretary of Defense Jehn, ER 54; Decl. Rear Admiral Gallo, ER 72.

Additionally, the use of reliable evidence such as the admission of a person that he or she is a homosexual prevents the military from having "to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct" in order to enforce its ban on such conduct. Ben-Shalom, 881 F.2d at 464. Thus, the privacy of service members is not unnecessarily invaded by unavoidably intrusive investigations. Id.

¹¹ Meinhold asserts, see Meinhold Br. 26, that DOD's concern is based on the "unfounded assumptions that lesbians and gay men cannot (or do not) control their sexual urges; that they will satisfy their own sexual desires regardless of the appropriateness of doing so . . . ; and that they will molest unwary heterosexuals." He is wrong. DOD's policy is based on concerns relating to privacy, modesty, and decorum wholly apart from additional concerns regarding unwanted sexual contact. Moreover, under the rational-basis test, DOD was permitted to consider the "adverse budgetary impact of constructing separate berthing and sanitary areas" for homosexual service members. See Decl. Rear Admiral Gallo, ER 70.

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only because he does not dispute that he falls within DOD's regula-
~~tory definition of "homosexual."~~ In his brief, he states: "Meinhold
 has repeatedly acknowledged that he is gay. It follows inexorably
 that exhaustion of administrative remedies in the Navy would have
 resulted in ~~Meinhold's discharge~~." Meinhold Br. 7. This statement
 may ~~be intended to be a statement~~ ^{mean} ~~that he commits, or will likely commit,~~
~~homosexual acts.~~ ^{in which case estoppel would have been futile.} In ~~any event~~, ~~Meinhold cannot both:~~ (1) dispute
 that he falls within ^{DOD's narrower} ~~the regulatory definition of "homosexual;"~~ and
 (2) claim that ~~exhaustion of his administrative remedy~~ would have
 been futile.

II.

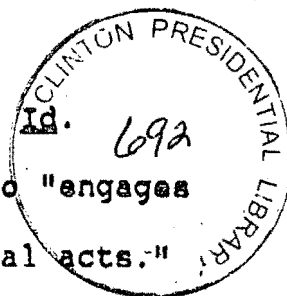
**THE DISTRICT COURT ERRED IN RESOLVING THE CONSTITUTIONAL
 ISSUE WHILE LEAVING THE NONCONSTITUTIONAL ESTOPPEL ISSUE
 UNRESOLVED.**

Meinhold's amended complaint alleges, see ER 29, that the Navy
 discharged him "in violation of traditional principles of equitable
 estoppel." In Watkins v. Army, 875 F.2d 699, 706 (9th Cir. 1988)
 (en banc), cert. denied, 498 U.S. 957 (1990), this Court squarely
 held that a court should not reach the constitutional issues in a
 military homosexual case "when the case could have been decided
 narrowly under the doctrine of equitable estoppel." Meinhold seeks
 to distinguish this controlling precedent by arguing that his equal
 protection claim was appropriate for summary judgment, but a triable
 issue of fact was presented on his estoppel claim. See Meinhold Br.
 9-10. Even assuming arguendo the existence of an issue of material
 fact, but see [cite], the doctrine against deciding constitutional
 issues unnecessarily cannot be so easily evaded.

Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944), disposes
 of Meinhold's claim. There the Court stated: "If there is one

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finding that the member is not a homosexual or bisexual." Id. 692
 1332.14.H.1.c.(2). "Homosexual" is defined as a person who "engages
 in, desires to engage in, or intends to engage in homosexual acts."
 Id. 1332.14.H.1.b(1).

Our opening brief explained that DOD has construed "desire" narrowly, in accordance with the requirement for a "propensity to engage in homosexual conduct." See Gov't Br. 23 n.8. In contrast, Meinhold construes that term broadly by equating it with "thoughts" and "feelings" unrelated to conduct. See Meinhold Br. 16. Not only must his construction be rejected as contrary to the reasonable agency construction, it also violates the principle that regulations should not be construed in a manner that may render the constitutional issue more problematic. See New York Transit Auth., 440 U.S. at 582 n.22.

The Seventh Circuit and the Federal Circuit have both correctly held, contrary to Meinhold's argument, that the Directive targets past and prospective homosexual conduct. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1074 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). As the Seventh Circuit explained: [A person's admission of homosexuality]

is compelling evidence that plaintiff has in the past and is likely to again engage in [homosexual] conduct. To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future.

[he]

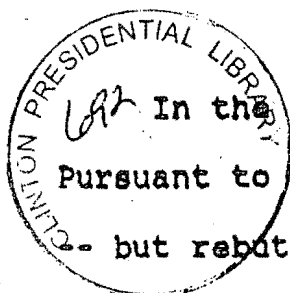
[homosexual orientation]

[homosexual]

Ben-Shalom, 881 F.2d at 464.³

³ DOD's former policy provided that a service member who has committed a homosexual act may, under exceptional circumstances, be retained if he shows that: (1) the act was a depar-

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stated

692 In the instant case, Meinhold ~~admitted~~ ^{statement} that he was homosexual. Pursuant to the regulations, that ~~admission~~ ^{statement} constituted prima facie but rebuttable -- evidence that Meinhold engaged in, or would likely engage in, homosexual acts. Meinhold's failure to rebut the regulatory presumption mandated his discharge.

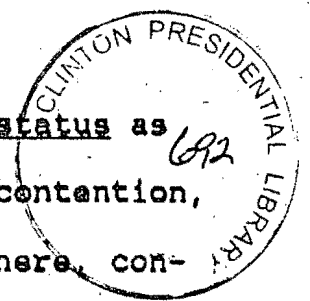
2. Meinhold errs in asserting that Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), compels this Court to reject DOD's reasonable interpretation of its regulation and to hold that the classification at issue here is unrelated to homosexual conduct. See Meinhold Br. 12. In Pruitt, the district court dismissed a service member's First Amendment challenge to her discharge based on her admission of homosexuality. Although this Court affirmed the dismissal of the First Amendment claim, it nevertheless remanded for further proceedings, holding that Pruitt could state an equal protection claim on a theory that the military's policy was based on homosexual status wholly unrelated to conduct. See 963 F.2d at 1162-64.

In that part of its opinion rejecting Pruitt's First Amendment claim, this Court observed that the military is "not discharging members just for homosexual conduct, or even primarily for homosex-

³(...continued)

ture from his customary behavior; (2) the act under all the circumstances is unlikely to recur; (3) the act was not accomplished by use of force; (4) the member does not have a propensity to commit future acts; and (5) the member's continued presence in the military is consistent with the interest of the military. DOD Dir. 1332.14.H.c.(1). Contrary to Meinhold's argument, see Meinhold Br. 11-12, this exception does not mean that the policy discriminates solely on the basis of homosexual status. Rather, it is consistent with the principle that the military will not retain persons who it concludes will likely commit homosexual acts. See Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992) ("For purposes of rational basis review, the latitude of discretion is notably wide in . . . the granting of partial or total exemptions

9



ual conduct. It is discharging members because of their status as homosexuals." 963 F.2d at 1163. Contrary to Meinhold's contention, this statement does not foreclose the Court from holding here, consistent with the regulatory language and DOD's reasonable construction, that the pertinent regulatory classification is persons who commit, or will likely commit, homosexual acts. First, as shown in our opening brief, see Gov't Br. 23 n.8, the Pruitt Court did not precisely explain its use of the term homosexual "status" -- a term that is not found in the regulation itself, which speaks in terms of homosexual conduct and the propensity to engage in such conduct. To the extent that the term homosexual "status" is synonymous with a propensity to commit homosexual acts, the term accurately reflects the regulatory meaning.⁴ Second, the statement in Pruitt is not dispositive of the correct regulatory interpretation here because the statement -- which appears in the First Amendment portion of the opinion -- was not essential to the Court's narrow holding that the district court erroneously dismissed Pruitt's equal protection claim for failure to state a claim.⁵ Third, the statement in Pruitt does not foreclose accepting DOD's reasonable construction of its regulations here because the Court there neither conducted an equal

New Policy Statement - Conduct

~~Strictly speaking,~~ the panel in Pruitt was correct that the plaintiff there was not discharged "for homosexual conduct, or even primarily for homosexual conduct." Rather, the plaintiff there -- like Meinhold -- was discharged because her admission of homosexuality gave rise to a presumption that she committed, or would commit, homosexual acts. Like Meinhold, she was unable or unwilling to rebut the presumption. This Court, however, did not explore this aspect of the regulations, but instead remanded to the district court for further proceedings.

for specific homosexual acts.

⁵ United States v. Stanley, 483 U.S. 669, ____ (1987) (no holding can be broader than the facts before the court); Kastigar v. United States, 406 U.S. 441, 454 (1972) (language unnecessary

protection analysis nor considered whether the regulation required the discharge of members based solely on sexual status unrelated to conduct.⁶ Finally, this Court should accept DOD's reasonable construction of its own regulation to avoid passing on the constitutionality of a non-existent policy urged upon this Court by Meinhold. See Rostker, 453 U.S. at 75; New York Transit Auth., 440 U.S. at 582 n.22.

3. Meinhold errs in asserting that DOD's regulatory inference is irrational. See Meinhold Br. 14-17. "The fact that . . . persons of 'homosexual orientation' engage in or seek to engage in homosexual conduct is as unremarkable as the fact that . . . persons of 'heterosexual orientation' engage in or seek to engage in heterosexual conduct. To pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd." Watkins v. Army, 847 F.2d at 1361 n.19 (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990). NOT A BREAK

Of course, not everyone of a particular sexual orientation will necessarily act on that orientation. Indeed, and DOD's regulations therefore provide an opportunity for self-avowed homosexual members to demonstrate that they do not, and will not, commit homosexual acts. It is eminently rational, however, for military authorities to presume that, absent contrary evidence, a person who states without qualification that he is a homosexual is likely to commit homosexual

⁶ See Miller v. California Pacific Medical Center, 991 F.2d 536, 541 (9th Cir. 1993) (decisions that do not consider issues are not binding as to those issues); United States v. Vroman, 975 F.2d 669, 672 (9th Cir. 1992) (same); United States v. Faulkner,

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TP DOD's regulatory presumption, moreover, allows DOD to forego extensive investigations.

acts. It would be ironic, to say the least, to hold that precepts of individual liberty required DOD to initiate an unavoidably intrusive investigation into the intimate details of a service member's personal life rather than accept his statements at face value and act on the basis of reasonable, and unrebutted, administrative inferences therefrom. See Orloff v. Willoughby, 345 U.S. 83, 91 (1953).

Precedent and DOD's reasonable construction of its former policy mandate the conclusion that the relevant classification is persons who DOD determines have committed or are likely to commit homosexual acts. Meinhold had the opportunity to rebut the reasonable inference of homosexual acts. He declined to do so, and the military "need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here." Ben-Shalom, 881 F.2d at 464.

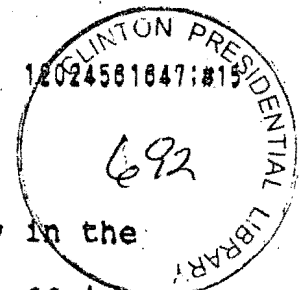
B. DOD's Former Policy Is Rationally Related To A Legitimate Governmental End.

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1. Meinhold's equal protection ^(challenge to this military policy) claim involves application of the rational-basis test. (See High Tech Gays v. DISCO, 895 F.2d 563, 573 (9th Cir. 1990).) Rational basis review "is not a license for

See Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1074; Steffan v. Cheney, 780 F. Supp. 1, (D.D.C. 1991) (appeal pending). Accord High Tech Gays v. DISCO, 909 F.2d 375, 380 (9th Cir. 1990) (Canby, joined by Norris, JJ., dissenting from denial of rehearing en banc). (~~observing that persons of homosexual status are "physically attracted to members of their own sex. That is the source of the behavior that we notice about them."~~) Cf. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 778-789 (1990) (rebuttable presumptions are valid when "proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred]

(13)



Significantly, this case involves rational-basis review in the context of matters involving "national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded [the Political Branches] greater deference." Rostker, 453 U.S. at 64-65. When promulgating rules for the governance of the military, the Political Branches are permitted to regulate "both with greater breadth and with greater flexibility" than in the civilian context. Id. at 66 (quoting Parker v. Levy, 417 U.S. 733, 756 (1974)). Thus, in deciding questions regarding the appropriate composition of the military, courts must be "particularly careful not to substitute [their] judgment of what is desirable for that of [the Political Branches], [nor should courts substitute their] own evaluation of evidence for a reasonable evaluation by the [Political Branches]." Rostker, 453 U.S. at 68.

We emphasize that Meinhold does not challenge DOD's policy to the extent it applies to the class of homosexuals who have committed homosexual acts -- nor could he in light of binding precedent. See supra p. 5. Rather, he claims that some members of the class of homosexuals should be exempt from DOD's policy; namely, those members for whom DOD has no tangible evidence (other than an admission of homosexuality) of homosexual acts. This assertion is

⁸ (...continued)

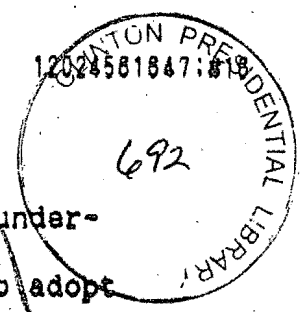
district court, without explanation, ignored this evidence and struck down DOD's policy based on the court's analysis of evidence critical of the policy. This alone was reversible error. See id. at 27 & n.11.

Meinhold now contends, see Meinhold Br. 36, that the Government's declarations should not have been considered because they were not offered in opposition to his motion for summary judgment. This contention is immaterial. The declarations were offered in support of our own motion for summary judgment

his special exemption or the subclass argument is quick different anything forth here in a Steffen. also is not consistent with a basic defense - that the policy is conduct - based.

It's one thing to make the point again that he doesn't challenge ban on acts. But this IP goes much further.

(14)



incorrect. As we show below, given the legitimate reasons underlying DOD's policy, equal protection does not require DOD to adopt the special exemption urged by Meinhold for that sub-class of homosexuals. See New York Transit Auth., 440 U.S. at 590-92.

2. DOD's former policy of discharging service members who, through their acts or statements, demonstrate a propensity to commit homosexual acts is rational because it is designed to protect against what this Court has found to be a reasonable prospect of interference with military effectiveness, while conserving scarce resources and protecting individual privacy. See Schowengerdt, 944 F.2d at 490; Hatheway, 641 F.2d at 1382; Beller, 632 F.2d at 812, 813. Accord Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d 1068; Dronenburg v. Zech, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984).

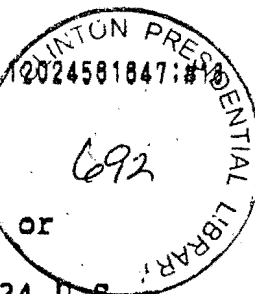
Military life is fundamentally different from civilian life. The primary purpose of the Armed Forces is to prepare for and prevail in combat. That unique purpose makes the military a unique and specialized society characterized by extraordinary responsibility and accountability. The military is governed by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable outside the military context. See Goldman v. Weinberger, 475 U.S. 503, 508-10 (1986); Parker, 417 U.S. at 743-44.

Success in combat requires military units that are characterized by high morale, good order, discipline, and a degree of unit cohesion that is unparalleled elsewhere. Unit cohesion, in turn, involves building bonds of trust and mutual respect among individual service members that make the unit as a whole more effective than the sum of the effectiveness of individual unit members. Those

bonds must be built and maintained in a context where service members must be prepared at all times for world-wide deployments where they may be required to accept living and working conditions that are spartan and primitive, involving forced intimacy and leaving room for little or no privacy. Because of this constant need for readiness, military rules and standards of conduct apply to members of the Armed Forces at all times -- whether on base or off base, on duty or off. See Solorio v. United States, 483 U.S. 435, 439-41 (1987); Chappell v. Wallace, 462 U.S. 296, 300 (1983).

Military professionals have concluded that in light of the unique duties of the military and its specialized society, the longstanding prohibition against homosexual conduct in the military context is necessary, and that 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, discipline, and unit cohesion that are the essence of military capability. In view of that conclusion by those most directly responsible for the ordering of the Nation's military forces, rationality permits the military to adopt and enforce a policy of discharging a member whose statements reveal such ^{an intent or} propensity. As the Seventh Circuit has held, the military "does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission." Ben-Shalom, 881 F.2d at 460-61.

Rationality plainly permits those with responsibility for the military to prevent or remedy circumstances that they conclude would adversely affect military preparedness. "[N]othing in the Constitu-
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tion disables a military commander from acting to avert what



he perceives to be a clear danger to the loyalty, discipline, or morale of troops . . . under his command." Greer v. Spock, 424 U.S. 828, 840 (1976). "The [military] need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here." Ben-Shalom, 881 F.2d at 464.

Indeed, the military's interest in determining who might engage in future homosexual acts while in the military is ^{similar} ~~substantially~~ ~~identical~~ to its interest in determining who has engaged in past homosexual acts. In both cases, the classification of "homosexuals" consists of persons who have a propensity to commit homosexual acts, and whose presence, under Schowengerdt, Hatheway, and Beller, may permissibly be determined to be detrimental to the accomplishment of the military mission. In one category, the propensity has already been acted upon; in the other, the military has a reasonable basis to believe that it will be acted upon. ^{Just as} ~~Because~~ the military may ^{so too} ~~unquestionably~~ discharge members in the former category, it [^] ~~unquestionably~~ may discharge members in the latter category. In other words, if, as military authorities have concluded, morale is damaged and divisiveness among the troops is promoted by the presence of individuals who are likely to commit proscribed acts, the military need not wait until those acts in fact take place before taking steps to maintain an effective fighting force.

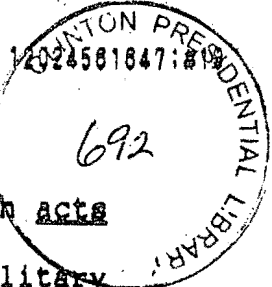
in this unique military context

DOD's policy is not "invidious" as that term has been used with respect to discrimination based on classifications that have been held to be suspect or quasi-suspect. See Padula, 822 F.2d at 103.

CLINTON LIBRARY PHOTOCOPY

The policy at issue affects persons

This is how
is stated in
letter
brief
and it's
more
accurate



who engage in or are reasonably considered likely to engage in acts that are explicitly and validly proscribed in the separate military society that they have voluntarily chosen to join. ^{Behavior cannot be said} In addition, to be wholly immutable in the same sense that applies to characterizations ~~this Court has held: "[Homosexual behavior] is not an immutable~~ such as race and gender, see Woodward, 871 F.2d 1076, and characteristic, "High Tech Gays", 895 F.2d at 573, and "homosexual conduct is not a fundamental right." Id. at 574 (citing Bowers v.

Hardwick, 478 U.S. 186 (1986)). Moreover, the military is entitled

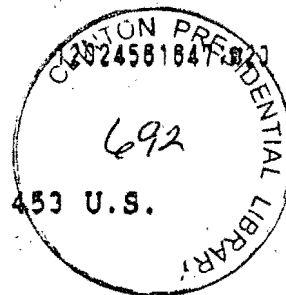
to impose restraints on behavior that might not be tolerated in

other contexts. See Goldman, 475 U.S. at 507-10; Rostker, 453 U.S.

at 66; Parker, 417 U.S. at 756. ^{FN} ~~In High Tech Gays~~, 895 F.2d at 573-74, this Court, relying on Bowers v. Hardwick, 478 U.S. 186 (1986),

3. The DOD Policy Statement, DOD Directive 1332.14.H.1.a, sets forth ample reasons justifying DOD's conclusion that the presence of persons in the military environment ^{whose statements reveal} with a propensity to commit homosexual acts may cause divisiveness. First, in assessing possible impairments to military effectiveness, the military leadership was not required to ignore the tensions and effect on morale that it found would be caused by the service of persons who have engaged in, or who by their statements exhibit a propensity to engage in, homosexual conduct that many members of the military services find to be disturbing, see Declaration ("Decl.") Ass't Secretary of Defense Jehn, ER 54-55; Decl. Rear Admiral Gallo, ER 69, 71, and that this Court has held may be proscribed by the military. See Schowengardt, 944 F.2d at 490; Beller, 632 F.2d at 812. The need for good order, discipline, and unit cohesion in the military is unlike anything in civilian society, and military authorities are entitled to consider how these crucial needs will be affected when determining the appro-

held that classification based on homosexuality do not warrant heightened scrutiny.

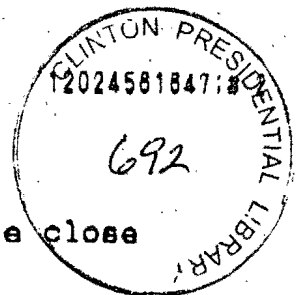


priate composition of the military services. See Roatker, 453 U.S.
at 65-66.⁹

Second, the military could consider what it determined were
significant concerns relating to privacy. ^{In the unique military context,} ~~In our society, individ-~~
~~members of the same sex sleep, bathe, and live in extremely close~~
~~duals are entitled to exercise strict control over circumstances~~
~~proximity.~~
~~that may lead to the viewing of their unclothed bodies. Being~~
~~viewed while naked by a member of the opposite sex can cause signi-~~
~~ficant discomfort and embarrassment. Accordingly, despite the sub-~~
~~stantial privacy infringements that accompany military service, DOD~~
~~attempts to separate men and women while they sleep, bathe, and use~~
~~toilet facilities to preserve their privacy when in states of un-~~
~~dress. DOD's efforts in this regard promote good order and disci-~~
~~pline by accommodating deeply held societal values relating to~~
~~modesty and decorum.~~ ^{thus} DOD could rationally conclude that the pre-
^{this unique} sence in the military environment of persons ^{who have committed or are likely} ~~with a known propensity~~
^{an} to commit homosexual acts would be a ~~disruptive intrusion into the~~
^{Because of fear or embarrassment} ~~privacy of personnel of the same sex, who may object to the viewing~~
~~that they are being viewed as sex objects,~~
~~of their unclothed bodies by persons who avowedly engage, or will~~
~~likely engage, in "bodily contact. . . [with] members of the same~~
~~sex for the purpose of satisfying sexual desires."~~ See DOD Direc-
tive 1332.14. See Decl. Ass't Secretary of Defense Jehn, ER 55;
Decl. Rear Admiral Gallo, ER 69-70. This concern is especially

⁹ As we stated in our opening brief, see Gov't Br. 28-29,
this Court may also take notice of the testimony given during
extensive hearings before Congress when it examined the milita-
ry's policy regarding homosexuals. See Hearing Before The Senate
Committee On Armed Services To Receive Testimony On DOD Policy On
The Service Of Gay Men And Lesbians In The Armed Forces, 103rd
Cong., 1st Sess. (July 20, 1993). Contrary to Meinhold's asser-
tion, see Meinhold Br. 37 & n.39, this Court, in adjudicating the
important constitutional issue presented, need not ignore the
~~lengthy and intense~~ national debate on the subject involved in

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acute in the military given the "potential . . . of possible close confinement aboard ships or bases for long periods of time"

Beller, 632 F.2d at 812. This concern about privacy issues, which implicates military cohesion and morale, provides a constitutionally permissible basis for the policy before this Court.¹⁰

DOD also rationally concluded that a ban that did not prohibit service by those who are likely to engage in homosexual acts might adversely affect retention and recruitment, which could have a serious impact on our all-volunteer military force. See Beller, 632 F.2d at 812; Decl. Ass't Secretary of Defense Jehn, ER 54; Decl. Rear Admiral Gallo, ER 72.

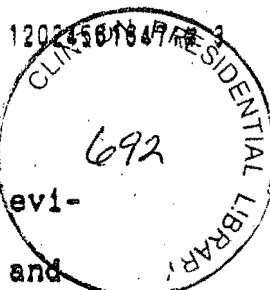
Additionally, the use of reliable evidence such as the admission of a person that he or she is a homosexual prevents the military from having "to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct" in order to enforce its ban on such conduct. Ben-Shalom, 881 F.2d at 464. Thus, the privacy of service members is not unnecessarily invaded by unavoidably intrusive investigations. Id.

¹⁰ Meinhold asserts, see Meinhold Br. 26, that DOD's concern is based on the "unfounded assumptions that lesbians and gay men cannot (or do not) control their sexual urges; that they will satisfy their own sexual desires regardless of the appropriateness of doing so . . . ; and that they will molest unwary heterosexuals." He is wrong. DOD's ~~concern~~ is based on ~~legitimate societal notions of privacy, modesty, and decorum wholly apart from additional concerns regarding unwanted sexual contact.~~ CONCERN

We note, moreover, that the rational-basis test does not require DOD to adopt a policy that reflects the least restrictive alternative for military service by homosexuals. [cite] Thus, in designing its homosexual policy, DOD was permitted to consider the "feasibility and ~~adverse~~ adverse impact of constructing separate berthing and sanitary areas" for homosexual service

ES this
help at all?
201
equity?
+7

692

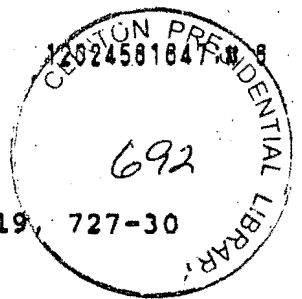


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Meinhold nevertheless argues that this Court, guided by evidence contained in "expert testimony," "scientific studies," and "research reports" that are critical of DOD's policy, should hold that the policy is irrational. See Meinhold Br. 24 n.21. This argument ignores the admonition in Goldman, 475 U.S. at 509, that "whether or not expert witnesses may feel that religious exceptions to [DOD's uniform regulations] are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." ^{Just as} ~~if, as the Supreme Court held,~~ the Constitution "does not require the military to accommodate [religious] practices in the face of its view that they would detract from" military effectiveness, ^{so too} ~~id. at~~ id. at , ~~then a fortiori~~ the Constitution does not require the military to accommodate homosexual conduct, or retain service members who demonstrate a propensity to engage in such conduct, in the face of its view that such conduct would detract from military effectiveness.

Moreover, to accept Meinhold's assertions that DOD's policy is irrational, this Court must dismiss as insignificant the serious problems that DOD has determined will occur if the military retains members who, through their acts or statements, reveal a propensity to engage in homosexual conduct. The Supreme Court has firmly stated that when military staffing decisions have been made on the basis of professional judgments as to practical problems that might otherwise arise, "[i]t is not for [the courts] to dismiss such problems as insignificant in the context of military preparedness." Rostker, 453 U.S. at 81. ^{CLINTON LIBRARY PHOTOCOPY} The Supreme Court also has recognized that

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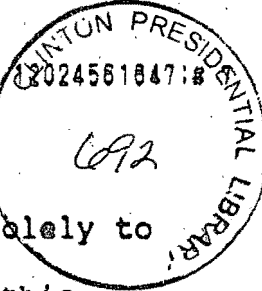
their behalf. See Zepeda v. United States INS, 753 F.2d 719, 727-30 & n.1 (9th Cir. 1983).¹²

Extending injunctive relief beyond Meinhold is improper, more-
over, because he can be accorded full relief by an injunction
tailored solely to him. ~~That "Meinhold's mere presence as an ac-
knowledgeed gay man is a violation of Navy policy" is beside the~~
~~point. See Meinhold Br. 44.~~ If Meinhold believes that he suffers
unlawful discrimination, the remedy is to seek modification of the
injunction as it applies to him.

In that regard, Meinhold decries "the Navy's conduct toward
[him] upon his return" to active duty in November 1992. See
Meinhold Br. 44. Much of the challenged conduct, however, occurred
prior to entry of the final injunction, and Meinhold states that the
practices to which he objects "have ceased." Id. at 45 n.49. No
further injunctive relief is warranted, of course, by practices that
Meinhold concedes have ended. See City of Los Angeles v. Lyons, 461
U.S. 95, 111 (1983).¹³ In any event, any objectionable "conduct

¹² Meinhold attempts to justify the instant injunction by
reference to Soto-Lopez v. New York City Civil Service Comm'n,
840 F.2d 162 (2d Cir. 1988). See Meinhold Br. 42. He does not
at all address our showing that Soto-Lopez: (1) is contrary to
Zepeda and Bresgal; (2) in conflict with United States v. Mendo-
za, 464 U.S. 154 (1984); and (3) has not been subsequently fol-
lowed either in the Second Circuit or any other Circuit. See
Gov't Br. 36-37. In addition, Soto-Lopez is distinguishable
because of its special procedural setting. That decision was
issued on remand from a Supreme Court decision that resolved the
merits issue. Unlike the district court's decision here, the
Supreme Court's Soto-Lopez decision was binding nationwide.

¹³ Meinhold relied upon these same assertions in seeking to
have the Government held in contempt for violating the injunc-
tion. The district court declined to hold that the government
had violated its injunction, although it issued an amended in-
junction. We have appealed that new injunction. Pursuant to
this Court's order of October 6, 1993, our two appeals have been
consolidated, and we will address the new injunction in a supple-



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toward Meinhold" can be addressed by an injunction limited solely to him. The Navy's conduct toward Meinhold, in the context of this case, does not justify injunctive relief addressed to anyone else.

We note that other homosexual service members have filed their own suits challenging both the President's interim policy and the new policy that is scheduled to become effective soon. E.g., Elzie v. Aspin, No. 93-1853-SS (D.D.C.) (challenging interim policy); Doe v. Aspin, No. 93-1519-TPJ (D.D.C.) (class action challenging new policy). In addition, in Selland v. Aspin, No. 93-1924-LFO (D.D.C.

Sept. 28, 1993), the district court entered a preliminary injunction barring the Navy from implementing the President's interim policy to a plaintiff expressly on the ground that the Meinhold injunction "applies nation-wide to cabinet officers of the national government" and is "the law of the land on this subject." Slip op. at 6, 7.

There is no reason why Meinhold's suit challenging the former policy, which he brought as an individual plaintiff seeking relief solely on his own behalf, should be extended to encompass the rights or obligations of other service members, especially when they have demonstrated that they are fully capable of asserting their own challenges to the interim and new policies in suits brought in other courts.¹⁴

¹⁴ The overbroad injunction should also be limited to Meinhold pursuant to the fundamental principle that courts should refrain from issuing unnecessarily broad constitutional proclamations. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 447 (1985) ("the preferred course of adjudication [is] to avoid making unnecessarily broad constitutional judgments"). Here, in derogation of this "preferred course of adjudication," the district court entered a nation-wide injunction that sweeps with the generality of a legislative enactment. See supra note 11. The district court's extension of relief to persons other than Meinhold was serious error and should be reversed.