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001. draft
Department of Defense v. Volker Keith Meinhold Emergency
Application for a Stay Pending Appeal to the United States Court of
Appeals (44 pages)

10/21/1993 P5

693

COLLECTION:

Clinton Presidential Records
Counsel's Office
Cliff Sloan
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FOLDER TITLE:

Gays in the Military - Meinhold #1 [2]

Kelly Hendren
2006-0227-F
kh579

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]

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

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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]

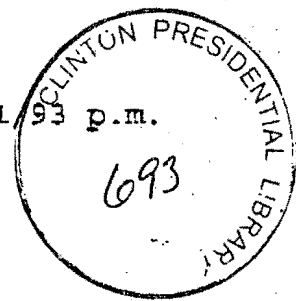
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draft 2 -- 10/21/93 p.m.

No. A-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993



UNITED STATES DEPARTMENT OF DEFENSE, ET AL., APPLICANTS

v.

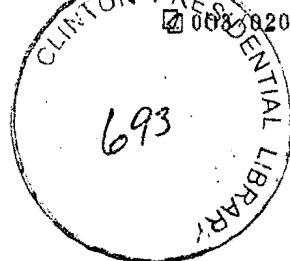
VOLKER KEITH MEINHOLD

EMERGENCY APPLICATION FOR A STAY PENDING APPEAL
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the Department of Defense and the Secretary of Defense, respectfully applies for a partial stay of the orders entered by the United States District Court for the Central District of California on January 29 and September 30, 1993, pending appeal of those orders to the United States Court of Appeals for the Ninth Circuit.

This action was brought by a single individual, respondent Meinhold, to challenge his discharge from the United States Navy under the military policy regarding homosexuals then in effect. The district court declared that the policy violated equal protection, and it ordered Meinhold's discharge rescinded. In addition, however, the court granted a nationwide injunction that

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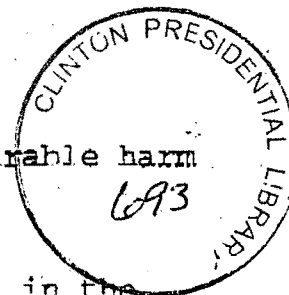
bars any officer of the Defense Department from discharging, ^{regarding military duties,} denying enlistment, or taking "any action whatsoever" ^{assigned} against any ^{as} person in any of the military services "based on sexual ^{State} orientation," except in cases involving "proven sexual conduct" - ^{or} - and, even then, only "if such conduct is proven to interfere with the military mission of the armed forces of the United States." App. H, infra, 2. The injunction also prohibits the Department from "creating or maintaining" any record based on sexual orientation, with the same narrow exception. Ibid. By this application, the government seeks a stay of this broad injunction to the extent that it grants relief to persons other than Meinhold, ~~and requires the destruction of documents,~~ ^{including documents pertaining to Meinhold.}

The court clearly erred with respect to issues of great importance. The entry of a nationwide injunction in this non-class action conflicts with decisions of this Court and numerous courts of appeals holding that an injunction may not be broader than necessary to provide relief to the party before the court. The district court's injunction ^{also} broadly intrudes the court into the day-to-day management and discipline of military personnel -- a responsibility which, as this Court repeatedly has recognized, is confided by the Constitution to the political branches, and in which courts have little competence. Moreover, the district court's ruling on the merits conflicts with numerous decisions rejecting equal protection challenges in this setting.

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The district court's injunction will cause irreparable harm unless stayed pending appeal. First, it prevents the implementation of the new Policy on Homosexual Conduct in the Armed Forces, which was announced by the President on July 19, 1993, and which is ready for effectuation in regulations to be issued by the Secretary of Defense. That policy directive by the Commander-in-Chief has, moreover, been approved in ~~theoretical~~ identical bills passed by both Houses of Congress. Those bills are now before a conference committee and are expected to be enacted into law as part of the Defense Authorization Act of 1994 within the next few weeks.

Second, the injunction interferes with the administration of the military services and creates grave uncertainty for military commanders at the present time: It prohibits them from taking measures in response to homosexual conduct that is prohibited not only under the President's new policy, but also under the interim policy that the President announced on January 29 and that remains in place pending implementation of the new policy. By prescribing a stringent yet vague standard prohibiting "any action whatsoever * * * based on sexual orientation" and ~~prohibiting~~ prohibiting permitting such actions only for ~~sexual conduct~~ sexual conduct * * * proven to interfere with the military mission of the armed forces," App. H, infra, 2, the injunction makes ~~virtually every~~ a wide range of military decision ~~affecting a homosexual servicemember or prospective servicemember~~ a possible basis for contempt proceedings. The uncertainty also adversely affects members of the military, who may be encouraged

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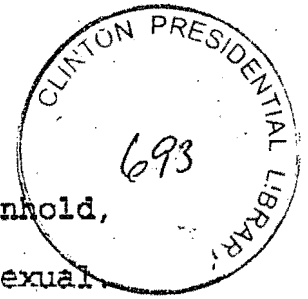
by the district court's injunction to make statements ~~regarding~~ ⁶⁹³ ~~their homosexuality~~ or take other actions that they believe are permitted under the injunction, but that ^{may} ~~will~~ be the basis for discipline or discharge under the President's new policy and the pending legislation if the injunction is set aside upon further review.

Finally, the injunction ^{appears to} ~~requires~~ the Department of Defense to search records regarding some 5.1 million present and former servicemembers, and to identify all records "based on sexual orientation" that do not relate to "proven sexual conduct." Moreover, because the injunction prohibits the Department from "maintain[ing]" such documents, it could be read to require the destruction of ~~material~~ ^{records} pertaining to sexual orientation. Injunctions that have such adverse consequences -- and that are wholly beyond the power of a court to issue -- should not remain in effect.^{1/}

^{1/} Appended to this application are the First Amended Verified Complaint for Equitable Relief and Injunction (App. A, infra); the January 29, 1993, Order and Judgment of the district court granting summary judgment and a permanent injunction in favor of Meinhold (App. B, infra); the January 29, 1993, Amended Opinion of the district court ruling on cross-motions for summary judgment (App. C, infra); the February 19, 1993, Order of the district court denying the government's motion for clarification or, in the alternative, for stay pending appeal (App. D, infra); the March 12, 1993, Order of the court of appeals denying the government's emergency motion for a stay pending appeal (App. E, infra); the September 22, 1993, Order of the district court ordering the Secretary of Defense and others to appear to show cause why they should not be held in contempt (App. F, infra); the September 22, 1993, Order of the court of appeals denying the government's emergency motion for summary reversal and, in the alternative, for a stay of the district court's injunction (App. G, infra); the September 30, 1993, Amended Order and Judgment of the district court (App. H, infra); Tr. of September 30, 1993,

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STATEMENT



1. In May 1992, the respondent, Volker Keith Meinhold, announced on a television broadcast that he is a homosexual. App. C, infra, 1-2. At that time, Meinhold was a Petty Officer on active duty in the United States Navy. App. A, infra, 8. Military regulations then in effect barred service by "persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct." App. L, infra, 1. The Navy convened an administrative discharge board to assess Meinhold's continued suitability for service. The board concluded, based on Meinhold's televised statement, that his discharge was required under the regulations. On August 12,

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hearing before the district court on the show cause order (App. I, infra); the October 8, 1993, Order of the court of appeals denying the government's outstanding motions (App. J, infra); Memorandum from the Secretary of Defense regarding "Policy on Homosexual Conduct in the Armed Forces" (July 19, 1993) (App. K, infra); Department of Defense (DOD) Directive 1332.14 (App. L, infra); Naval Military Personnel Manual 3630400 (App. M, infra); Memorandum from Edwin Dorn, Assistant Secretary of Defense, re Policy on Homosexual Conduct in the Armed Forces (Sept. 30, 1993) (App. N, infra); Memorandum from Edwin Dorn, Assistant Secretary of Defense, re Policy on Homosexual Conduct in the Armed Forces (Oct. 1, 1993) (App. O, infra); S. 1298, 103d Cong., 1st Sess. § 546 (1993) (App. P, infra); H.R. 2401, 103d Cong., 1st Sess. § 575 (1993) (App. Q, infra); S. Rep. No. 112, 103d Cong., 1st Sess. 263-301 (1993) (App. R, infra); H.R. Rep. No. 200, 103d Cong., 1st Sess. 286-290 (1993) (App. S, infra); Office of the Secretary of Defense, Summary Report of the Military Working Group (July 1, 1993) (App. T, infra); Selland v. Aspin, Civ. No. 93-1924-LFO (D.D.C. Sept. 28, 1993) (App. U, infra); Tr. of July 20, 1993, Hearing Before the Sen. Comm. on Armed Services to Receive Testimony on Dep't of Defense Policy on the Service of Gay Men and Lesbians in the Armed Forces 12-28 (App. V, infra); Declaration of Edwin Dorn, Assistant Secretary of Defense for Personnel and Readiness (App. W, infra); Air Force Regulation 110-19 (Supp. July 20, 1992) (App. X, infra); Army Regulation 27-10, Ch. 20 (App. Y, infra); U.S. Navy Regulations, Ch. III (App. Z, infra).

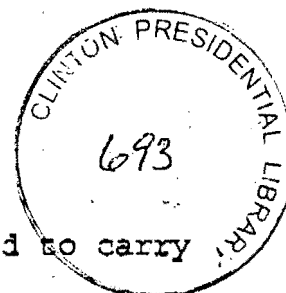
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1992, Meinhold received an honorable discharge. App. A, infra, 693 11-12; App. C, infra, 1-2.

Meinhold then filed this action, alleging that his discharge violated the equal protection guarantees of the Fifth Amendment. App. A, infra, 16.2/ The suit was not brought as a class action, and Meinhold did not seek injunctive relief on behalf of anyone other than himself. More specifically, Meinhold sought a declaration that the regulations under which he was discharged are unconstitutional and an injunction requiring his reinstatement. Id. at 17.

On January 29, 1993, the district court granted summary judgment in favor of Meinhold. App. B, infra. Without first addressing either of Meinhold's non-constitutional arguments, the court held that the policy under which Meinhold was discharged violated the equal protection component of the Due Process Clause. App. C, infra, 2-6. The court understood that policy to permit discharges "based merely on [homosexual] status, and not conduct." Id. at 2. The court determined that the government bore the burden of proving, "through a factual record" in court, that the policy was rationally related to permissible goals; it declined to defer to "military judgment" on that matter. Id. at

2/ The complaint also alleged violations of the Administrative Procedure Act, 5 U.S.C. 551 et seq., "traditional principles of equitable estoppel," and the Bill of Attainder Clause, Art. I, § 9. App. A, infra, 12-16.



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2-3. The court concluded that the government had failed to carry its evidentiary burden. Id. at 3-6.^{3/}

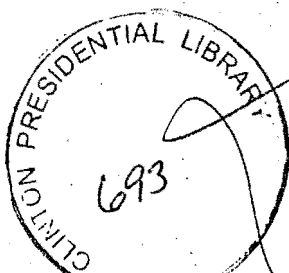
As relief, the court issued an order "rescind[ing]" Meinhold's discharge, as Meinhold had requested. But the order also went much further. It permanently enjoined the Department of Defense "from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." App. B, infra, 2. Nothing in the court's opinion offered a justification for the nationwide scope of the injunction. See App. C, infra, 1-6.

2. ~~That~~ ^{Canaditely} same day, January 29, 1993, the President directed the Secretary of Defense to undertake a comprehensive review of the military's policy regarding homosexuals.^{4/} At the same time, the President directed that an interim policy be put in effect pending completion of the review and implementation of any new policy.^{5/} The interim policy modified then-existing policy

3/ The court nonetheless acknowledged the Navy's submission that the policy under which Meinhold was discharged "is rationally related to its goals of maintaining discipline, good order and morale; fostering mutual trust and confidence among servicemembers; the need to recruit and retain servicemembers; and maintaining public acceptability of the Navy." Id. at 3 (citing Navy Military Personnel Manual 3630400(1) (App. M, infra)).

4/ The President's directive was not related to the order in this case.

5/ The interim policy remains in effect (to the extent it is not enjoined) until the new policy is implemented. Memorandum from Edwin Dorn, Assistant Secretary of Defense, re Policy on

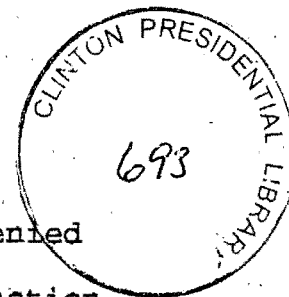


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in two ways. First, ~~based on the recommendation of the Joint Chiefs of Staff,~~ it provided that new recruits are not to be questioned about homosexuality during the enlistment process. Second, the interim policy authorized the Attorney General to suspend the discharge of, and to transfer to standby reserve status pending implementation of a new policy, any servicemember who is subject to separation based solely on his or her acknowledgement of homosexuality (without specific proof of homosexual acts). S. Rep. No. 112, 103d Cong., 1st Sess. 268 (1993).

The government filed a motion in the district court pursuant to Fed. R. Civ. P. 59(e), asking the court to clarify its January 29 order to specify that the Department could implement the President's interim policy. In the alternative, the government asked the court to stay its order pending appeal to the extent it grants relief to persons other than Meinhold. The court, without explanation, denied the motion on February 17, 1993. App. D, infra.

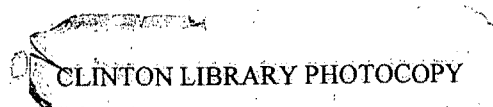
3. On March 3, 1993, the government filed a motion asking the Ninth Circuit to stay the district court's order to the extent it confers relief on persons other than Meinhold. On March 12, 1993, the Ninth Circuit denied the motion. App. E, infra. It recognized that "there is a legitimate dispute as to whether the permanent injunction entered by the district court



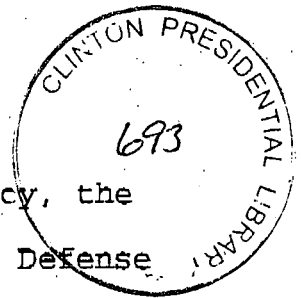
should extend beyond Meinhold." Ibid. It nonetheless denied relief because it discerned no conflict between the injunction and the President's interim policy. The court reasoned that because the injunction bars "discharg[es]," the Department of Defense could transfer to standby reserve status servicemembers who had acknowledged being homosexual, since "transfer to the standby reserve is not a discharge from military service." Ibid.

In light of the court of appeals' interpretation of the district court's January 29 order, the government did not seek a stay in this Court. The government's appeal of that order then proceeded to briefing in the ordinary course.

4. On July 19, 1993, the President and the Secretary of Defense announced a new policy, (to be instituted by October 1, 1993,) regarding homosexual conduct by members of the Armed Forces. App. K, infra. The policy is the result of an exhaustive six-month review of existing policy by the Secretary of Defense, in consultation with the Joint Chiefs of Staff, the acting Secretary of each military department, a working group of senior officers in the Defense Department, outside experts, and the Department of Justice. 7/20/93 Tr. of Hearing Before the Senate Comm. on Armed Services 15-17 (testimony of Secretary of Defense Les Aspin) (App. V, infra); see also id. at 22-24 (testimony of General Colin Powell) (App. V, infra); Office of the Secretary of Defense, Summary Report of the Military Working Group (July 1, 1993) (App. T, infra).



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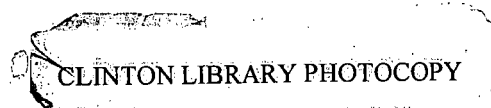
In his formal memorandum setting forth the new policy, the Secretary of Defense explained that "[t]he Department of Defense has long held that, as a general rule, homosexuality is incompatible with military service because it interferes with the factors critical to combat effectiveness, including unit morale, unit cohesion and individual privacy." App. K, infra, 1. "Nevertheless," he continued, "the Department of Defense also recognizes that individuals with a homosexual orientation have served with distinction in the armed services of the United States." Ibid. The Secretary then stated (id. at 1-2):

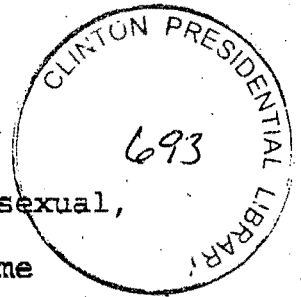
Therefore, it is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct. Homosexual conduct will be grounds for separation from the military services. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.

* * * * *

The constraints of military service require servicemembers to keep certain aspects of their personal lives private for the benefit of the group.

The new policy addresses three areas: accession, discharge, and investigations. With regard to accession, it provides that applicants for military service will not be asked if they are homosexual, but they will be told that homosexual conduct by servicemembers is prohibited. App. K, infra, 4. The policy further provides that "[t]he military will discharge members who engage in homosexual conduct, which is defined as a homosexual





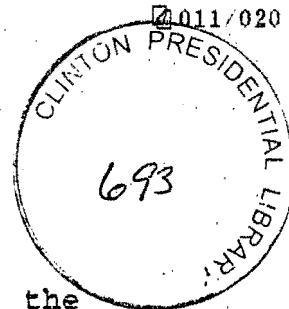
act, [6/] a statement that the member is homosexual or bisexual, or a marriage or attempted marriage to someone of the same gender." Ibid. The policy elaborates (id. at 2):

A statement by a servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts or has a propensity or intent to do so. The servicemember has the opportunity to present evidence that he does not engage in homosexual acts and does not have a propensity or intent to do so. The evidence will be assessed by the relevant separation authority.

With regard to investigations, the policy provides that no investigations or inquiries will be conducted solely to determine a servicemember's sexual orientation. Commanders will initiate an investigation or inquiry only when there is credible information that a basis for discharge or disciplinary action exists, and an allegation or statement by another person that a servicemember is a homosexual, alone, is not grounds for either a criminal investigation or a commander's inquiry. App. E, infra, 2. The Secretary's memorandum announcing the policy stated that the Secretaries of the Military Departments were to implement the policy by October 1, 1993. Id. at 3.

5. On September 7, 1993, the government filed a motion in the Ninth Circuit seeking partial summary reversal, or, in the alternative, a stay pending appeal of the district court's January 29 injunction to the extent that it confers relief on

6/ The term "homosexual act" is defined to include "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires or any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts." App. K, infra, 2.

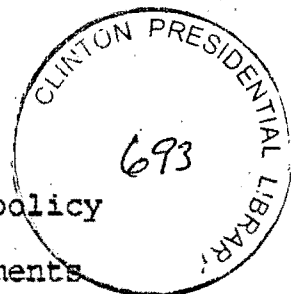


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persons other than Meinhold. In support of the motion, the government explained that the injunction would bar implementation of the President's new policy on October 1. The government pointed out that the new policy ^{includes in its definition} ~~provides for the discharge of~~ ^{persons who, by their statements, demonstrate an intent or propensity to engage in homosexual ^{acts} conduct,} whereas the injunction ^{prohibits the discharge of such persons in the absence of proof of specific sexual conduct proven to interfere with the military mission.} ~~prohibits the discharge of such persons in the absence of proof of specific sexual conduct proven to interfere with the military mission.~~ On September 22, 1993, the Ninth Circuit denied the government's motion without explanation and directed that the appeal be scheduled for oral argument in December 1993. App. G, infra. On September 30, 1993, the government filed a motion for reconsideration by the Ninth Circuit, with a suggestion for reconsideration en banc.

6. In the meantime, the district court had entered an order on September 22, 1993, directing the Secretary of Defense and the Secretary of the Navy (or their representatives) to appear and show cause why they should not be held in contempt for violating the January 29 injunction. App. F, infra. The district court held a hearing on the show-cause order on September 30, 1993.^{7/} At the hearing, Meinhold argued that the government had violated

^{7/} In accordance with the court's order that defendants appear "personally, or through an agent, other than counsel" (App. F, infra), the hearing was attended by the Assistant Secretary of Defense for Personnel and Readiness, the Lieutenant Commander for Meinhold's command, and officials from the Judge Advocate General's Office of the Department of Navy, the Office of the General Counsel of the Department of Defense, and the Office of the Secretary of Defense. App. I, infra, 4.



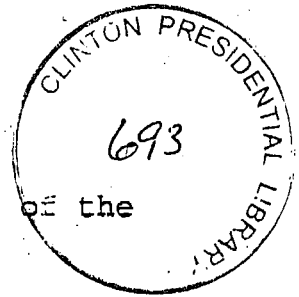
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the injunction by implementing the President's interim policy insofar as members (other than Meinhold) who made statements acknowledging their homosexuality were placed on standby reserve. App. I, infra, 8-12.^{8/} The court indicated its willingness to entertain claims by non-party servicemembers that the Secretary was violating its injunction. Id. at 31. It declined, however, to make a finding of contempt. Id. at 37.

Instead, the district court issued an amended order broadening the January 29 injunction. App. H, infra. The amended order purports to grant injunctive relief to some 5.1 million present and retired servicemembers worldwide and to all persons seeking to become servicemembers. It enjoins the Department and any of its officers and employees from taking any of the following actions "based on sexual orientation in the absence of proven sexual conduct -- if such conduct is proven to

^{8/} Meinhold cited (App. I, infra, 8-11) Selland v. Aspin, Civ. No. 93-1924-LFO (D.D.C. Sept. 28, 1993) (App. U, infra), a case that involved a servicemember who was scheduled to be transferred to standby reserve on September 30, 1993. On September 29, 1993, Judge Oberdorfer issued a preliminary injunction barring Selland's transfer to standby reserve. In issuing the injunction, Judge Oberdorfer characterized the January 29 injunction in Meinhold as the "law of the land," even "if only temporarily." App. U, infra, 7. The preliminary injunction in Selland had not been issued, however, when Meinhold filed the motion seeking to hold the defendants in contempt of the injunction entered in this case. Meinhold also relied on Elsie v. Aspin, Civil No. 93-1853 (D.D.C. Compl. filed Sept. 7, 1993), an action brought by a servicemember who was transferred to standby reserve on September 1, 1993, based on an admission of homosexuality. On October 14, 1993, Elsie demanded reinstatement to active duty based on the September 30 order entered in the present case. Under compulsion of the injunction, Selland and Elsie have been returned to active duty.

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interfere with the military mission of the armed forces of the United States":

(1) "discharging, changing enlistment status or denying enlistment to any person";

(2) "creating or maintaining * * * any record or file, including, but not limited to, lists, evaluations, reports, classifications, and designations, whether official or unofficial, at any level of command, of any member of the armed forces of the United States"; and

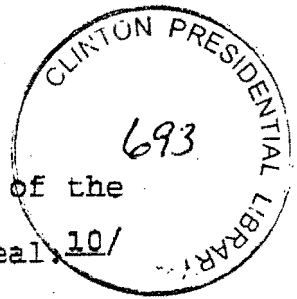
(3) "any actions whatsoever, * * * against gay or lesbian service members, or prospective service members, that in any way affects, impedes, interferes with, or influences their military status, advancement, evaluation, duty assignment, duty location, promotion, enlistment or reenlistment."

App. H, infra, 2. The district court stated at the September 30 hearing that it would punish future violations of the new injunction with fines "at a minimum of \$10,000 per day." App. I, infra, 36.

7. The Government filed a notice of appeal from the district court's amended order and judgment on the day after it was entered, October 1, 1993. On the same day, the government filed: (1) a motion (with suggestion of initial en banc consideration) for partial summary reversal, or a stay pending appeal, of the portion of the district court's September 30, 1993, amended order and judgment that affords relief to persons other than Meinhold;^{2/} and (2) an emergency motion for a

^{2/} The motion also sought a stay of the order insofar as it requires destruction of any records pertaining to Meinhold.

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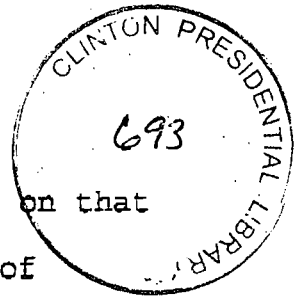
temporary stay of the amended order pending disposition of the motion for partial summary reversal or stay pending appeal.^{10/}

On October 8, 1993, the Ninth Circuit issued an order denying all of the government's outstanding motions. App. J, infra. The court gave no reason for its denial of relief.

8. As noted above, on July 19, 1993, the President directed that the new policy concerning homosexuality in the Armed Forces be implemented on October 1. The Department of Defense has prepared the necessary regulations and is ready to implement the new policy. In addition, the President's new policy has essentially been codified in ^{ratified by Congress} identical bills passed by the Senate and the House of Representatives. S. 1298, 103d Cong., 1st Sess. § 546 (1993) (App. P, infra); H.R. 2401, 103d Cong., 1st Sess. § 575 (1993) (App. Q, infra). Those bills await final enactment as part of the Defense Authorization Act for 1994, which is expected ^{pass after it emerges from conference and} to be signed into law in the next few weeks. 11V

Each House's passage of the bill followed extensive hearings in which congressional committees received testimony from military leaders, military historians, sociologists, and individual citizens. See S. Rep. No. 112, supra, at 268-270; see also id. at 272-273, 286-292 (App. R, infra); H.R. Rep. No. 200,

^{10/} The government also filed a supplemental memorandum in support of its motion for reconsideration of the Ninth Circuit's September 21 order denying the government's motion for partial summary reversal or a stay of the district court's January 29, 1993 order. On October 6, 1993, the court of appeals granted the government's motion to consolidate the appeals from the January 29 and September 30 orders. Oral argument will be heard on both appeals in December 1993.

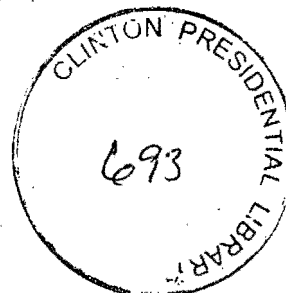


103d Cong., 1st Sess. 287 (1993) (App. S, infra). Based on that legislative record, each bill begins with a lengthy set of findings, including the following one:

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

S. 1298, supra, § 546(a) (proposed 10 U.S.C. 654(a)(15)) (App. P, infra); H.R. 2401, supra, § 575(a) (same) (App. Q, infra). Each bill then provides that, with certain exceptions, "[a] member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense" if it is found (1) "[t]hat the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act"^{11/}; (2) "[t]hat the member has stated that he or she is a homosexual or bisexual"; or (3) "[t]hat the member has married or attempted to marry a person known to be of the same biological sex." S. 1298, supra, § 546(a) (proposed 10 U.S.C. 654(b)) (App. P, infra); H.R. 2401, supra, § 575(a) (same) (App. Q, infra). Each bill requires the Secretary to issue implementing regulations. S. 1298, supra, § 546(b) (App. P, infra); H.R. 2401, supra,

^{11/} The definition of the term "homosexual act" in the bills is substantially identical to the definition of that term in the directive announcing the President's new policy. Compare S. 1298, § 546(a) (proposed 10 U.S.C. 654(f)(3)) (App. P, infra) and H.R. 2401, § 575(a) (same) (App. Q, infra) with App. K, infra, 2.



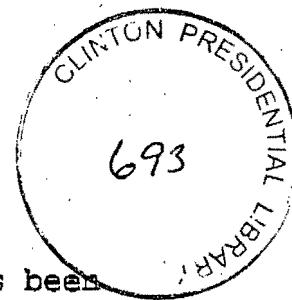
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§ 575(b) (App. Q, infra).^{12/}

ARGUMENT

It is well settled that this Court, or a single Justice, has authority under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, to stay a district court order pending appeal to the court of appeals. See Baker v. Haitian Refugee Center, Inc., 112 S. Ct. 1072 (1992); United States Dep't of Justice v. Rosenfeld, 111 S. Ct. 2846 (1991); Bureau of Economic Analysis v. Long, 450 U.S. 975 (1981); Heckler v. Redbud Hospital Dist., 473 U.S. 1308 (1985) (Rehnquist, Circuit Justice); Heckler v. Lopez, 463 U.S. 1328 (1983) (Rehnquist, Circuit Justice); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 17.13 (6th ed. 1986). An application for a stay in these circumstances calls for a weighing of (a) the probability that the courts below were in error and that this Court would grant review; (b) whether irreparable injury may occur absent a stay; and (c) the public interests that may be affected. See Republican State Central Comm. v. Ripon Society, 409 U.S. 1222, 1224 (1972) (Rehnquist, Circuit Justice); see also California v. American Stores Co., 492 U.S. 1301 (1989) (O'Connor, Circuit Justice); John Doe Agency v. John Doe Corp., 488 U.S. 1306 (1989) (Marshall, Circuit Justice). Those factors strongly support a stay of the district court's injunction, which, as amended by the court's September 30 order,

^{12/} The bills require the regulations to be issued within 90 days of enactment. S. 1298, supra, § 546(b) (App. P, infra); H.R. 2401, supra, § 575(b) (App. Q, infra). As discussed earlier, however, the Department of Defense is prepared to issue the implementing regulations forthwith.



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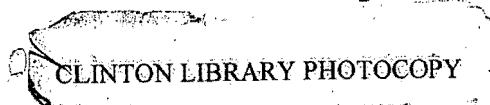
broadly intrudes into all aspects of military life and peremptorily prevents implementation of a policy that has been formally adopted by the President, as Commander-in-Chief, in the interests of national security and personal privacy, and has been approved by both Houses of Congress.

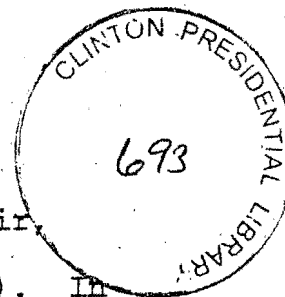
A. THERE IS A STRONG PROBABILITY THAT THE
DISTRICT COURT'S DECISION WILL BE REVERSED
UPON FURTHER REVIEW

1. The district court's nationwide injunction violates fundamental principles governing the permissible scope of injunctive relief.

a. As this Court and numerous courts of appeals have recognized, an injunction may be no broader than necessary to afford relief to the parties before the court. The district court's injunction conflicts with that principle. Indeed, as the Ninth Circuit seemed to recognize in its March 12 order in this very case, there is controlling precedent in that Circuit making clear that the injunction below could not extend beyond Meinhold. See App. E, *infra*, 1, citing *Zepeda v. INS*, 753 F.2d 719 (9th Cir. 1983). But even if the court of appeals should nevertheless affirm the injunction, there is a very strong probability that this Court would grant review and reverse.

This Court has made clear that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Indeed, it is well settled that "[i]njunctive relief * * * cannot be granted to persons who are





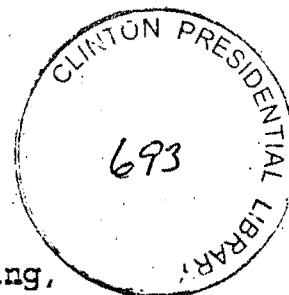
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not before the court." 7 J. Moore, J. Lucas & K. Sinclair, Moore's Federal Practice ¶ 65.17, at 65-167 (2d ed. 1993). In order for a court to grant relief to such persons, the court must properly certify a class action under Fed. R. Civ. P. 23. Otherwise, "[w]hensoever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases." Zepeda, 753 F.2d at 730 n.1. "But such broad authority has never been granted to individual plaintiffs absent certification of a class." Ibid.; accord Bresgal v. Brock, 843 F.2d 1163, 1170-1171 (9th Cir. 1987).

Under these principles, the district court's injunction is plainly overbroad. Meinhold is the only plaintiff in this case; he did not bring it as a class action. The injunctive relief he sought, a rescission of his discharge, was solely for his own benefit. He sought declaratory relief solely with respect to the validity of "the regulations pursuant to which the Navy discharged [him]," App. A, infra, 17, and not with respect to the interim policy or the new policy announced after his discharge. Thus, the only relief sought, and the only relief that could properly be granted, related to Meinhold's own discharge under the policy regarding homosexuality then in effect.

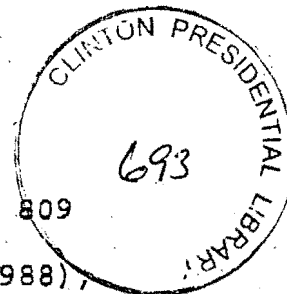
The injunction nonetheless is not limited to Meinhold or the policy under which he was discharged. As amended by the district court's September 30 order, the injunction purports to grant relief for the benefit of millions of members of the United

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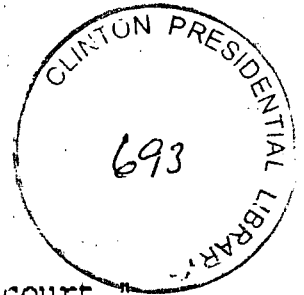
States armed services and all persons who seek to become servicemembers. It enjoins the defendants from discharging, denying enlistment, or taking "any action whatsoever" regarding "any person," and from creating or maintaining "any record or file," based on sexual orientation, except in cases of "sexual conduct * * * proven to interfere with the military mission of the armed forces of the United States." App. H, infra, 2-3. This breathtakingly broad order far exceeds what was necessary to provide relief to Meinhold.

In analogous circumstances, at least three other circuits have set aside injunctions granting relief to nonparties. In Lever Brothers Co. v. United States, 981 F.2d 1330, 1338 (1993), the D.C. Circuit vacated an injunction to the extent it barred the Customs Service from enforcing a regulation as to all foreign goods, and not merely those of the plaintiff's foreign affiliates. In Brown v. Trustees of Boston Univ., 891 F.2d 337, 361 (1989), cert. denied, 496 U.S. 937 (1990), the First Circuit vacated that portion of a district court order that enjoined a university from discriminating on the basis of sex with respect to the appointment, promotion, and tenure of all faculty members, and not just the plaintiff. Finally, in Everhart v. Bowen, 853 F.2d 1532, 1538-1539 (1988), rev'd on other grounds, 494 U.S. 83 (1990), the Tenth Circuit vacated a statewide injunction barring the Social Security Administration from enforcing a regulation that was held invalid as applied to a single disability claimant. See also, e.g., Ameron, Inc. v. United States Army Corps of



Eng'rs, 787 F.2d 875, 887-891, modified on other grounds, 809 F.2d 979 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988), Professional Ass'n of College Educators v. El Paso County Community College Dist., 730 F.2d 258, 273-274 (5th Cir.), cert. denied, 469 U.S. 881 (1984); Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974); Tape Head Co. v. RCA Corp., 452 F.2d 816, 819 (10th Cir. 1971). But cf. Soto-Lopez v. New York City Civil Service Comm'n, 840 F.2d 162, 168 (2d Cir. 1988).

In Brown, the First Circuit held that, in a non-class action, an injunction prohibiting sex discrimination against all faculty members would improperly "embroil the courts in the University's internal affairs, allowing faculty members to circumvent administrative procedures by simply invoking the contempt jurisdiction of the district court whenever a dispute arises." 891 F.2d at 361. Similar considerations apply with far greater force in this case. The injunction at issue here directly involves the court in the ongoing management and discipline of U.S. military personnel throughout the world, under the threat of contempt sanctions. Yet as this Court has observed, it is "difficult to conceive of an area * * * in which the courts have less competence" than in the "complex, subtle, and professional decisions as to the composition * * * and control of a military force." Rostker v. Goldberg, 453 U.S. 57, 65 (1981). The Court's decisions accordingly evince particular "concern with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result

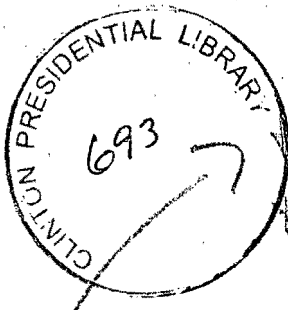


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if the soldier were allowed to hale his superiors into court." Chappell v. Wallace, 462 U.S. 296, 304 (1983) (quoting Stencel Aero Engineering Corp. v. United States, 431 U.S. 665, 676 (1977) (Marshall, J., dissenting), quoting in turn United States v. Brown, 348 U.S. 110, 112 (1954)).

The district court's injunction flouts that concern. It purports to grant relief to "any person" with respect to discharges, denials of enlistment, the maintenance and creation of records, and "any action whatsoever" that "in any way affects" "gay or lesbian service members," in the absence of sexual conduct "Proven to interfere with the military mission of the armed forces." App. H, infra, 2-3. The breadth of this relief threatens to convert the district court into a specialized tribunal asserting worldwide jurisdiction over persons with claims based on sexual orientation against any military officer or any person acting in concert with a military officer. Indeed, the district court has indicated its willingness to entertain such claims. App. I, infra, 31. ^{the military status, duties, or responsibilities} What he did and felt ^{or responsible} 13/

13/ Meinhold argued in the court of appeals that a nationwide injunction was justified because it is necessary to afford him effective relief. See 93-55242 Appellee's Br. at 44 (9th Cir.); cf. Brown, 891 F.2d at 361. However, the federal courts provide complete relief in hundreds of employment discrimination cases by issuing injunctions limited solely to the individual plaintiff. Meinhold's case is no different. Meinhold also argued that the scope of relief was justified by his request for declaratory relief stating that the regulations under which he was discharged are unconstitutional on their face. See 93-55242 Appellee's Br. at 43 (9th Cir.). That argument ignores a crucial difference between injunctive and declaratory relief. Under United States v. Mead, 499 U.S. 470 (1991), a declaration that the Navy's regulations are invalid would be binding



no grants under the new policy. The new policy has not been applied to Meinhold or to any other individual. (C) By the district court, the new policy is applied to all persons.

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b. For the reasons just explained, the district court had no power to grant injunctive relief to persons other than the sole plaintiff in the case, respondent Meinhold. But the ~~injunction is improper for a further reason: It authorizes the district court to entertain a broad range of claims arising~~

~~throughout the military, and to challenge both the new and the interim policies announced by the President, neither of which was at issue in this case.~~ As extended by the district court's order of September 30, the injunction covers not only discharges and denials of enlistment but also

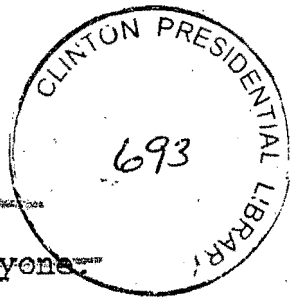
any action whatsoever, that in any way affects, impedes, interferes with, or influences [homosexual servicemembers'] military status, advancement, evaluation, duty assignment, duty location, promotion, enlistment or reenlistment based upon their sexual orientation in the absence of proven sexual conduct -- if such conduct is proven to interfere with the military mission of the armed forces of the United States.

App. H, infra, 2-3. The validity of that broad array of actions -- ~~and of the President's new policy and the interim policy~~ -- however, has never been at issue in this case. In granting summary judgment for Meinhold on January 29, the district court held only that the government had failed, on the basis of the rationale it offered, to prove a rational basis for Meinhold's discharge under the military policy regarding homosexuals then in

subjected the defendants to contempt sanctions for implementing those regulations as to other servicemembers. See Steffel v.

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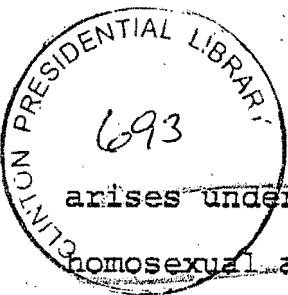
effect. ~~The new policy clearly cannot be the subject of a judicial challenge, because it has yet to be applied to anyone.~~

Furthermore, the injunction permits the district court to entertain challenges to ~~the~~ interim policy that are not ripe for judicial review and as to which administrative remedies must be exhausted -- for example, challenges by a servicemember who, because of statement of homosexuality, has been transferred to standby reserve pursuant to the interim policy. There are, however, procedures within each of the military services that must be exhausted before such challenges are presented to a court. Each of the military services has administrative procedures for separation that provide for evidentiary hearings and administrative appeals. See 32 C.F.R. pt. 41; see also App. A, *infra*, 9-12 (describing administrative proceedings leading to Meinhold's discharge). In addition, pursuant to 10 U.S.C. 938, each of the services has established administrative procedures for consideration of grievances by servicemembers concerning matters short of discharge. See *Chappell v. Wallace*, 462 U.S. at 302-303; Apps. X, Y, & Z, *infra* (armed service grievance procedures).

The discharge and grievance procedures allow a servicemember to develop evidence concerning his or her case and provide the military service involved with an opportunity to resolve the case on non-constitutional grounds. ~~For example, if an individual made a statement of homosexuality, the hearing would provide an opportunity for the individual to rebut the presumption that~~

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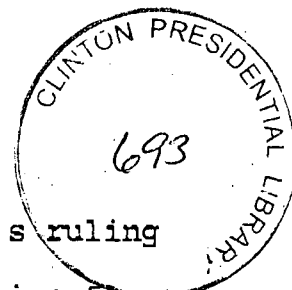
arises under the interim policy that he or she engages in homosexual acts or has a propensity or intent to do so. See S.

Rep. No. 112, supra, at 290 (App. R, infra). Utilization of the internal military procedures would then furnish a court with a basis for evaluating the individual's constitutional claims in light of the service's factual determinations and in the context of the application of the relevant portion of the governing policy to a concrete factual situation. See, e.g., Reno v. Catholic Social Services, Inc., 113 S. Ct. 2485, 2494-2497 (1993); Weinberger v. Salfi, 422 U.S. 749, 765-766 (1975).

The factors weighing against premature judicial intervention are especially compelling in this case. This case arose under the prior policy regarding homosexuality in the armed services. Thus, the validity of the President's new policy and of the interim policy now in effect was not at issue. Consequently, the record does not contain any evidence concerning the interim policy or the new policy, the report of the Military Working Group, upon which the new policy is based (App. T, infra), or the congressional testimony concerning the President's policy, upon which the pending legislation is based (App. V, infra). This case, in short, is plainly an improper vehicle for addressing the multifarious claims that undoubtedly will arise under the injunction. (14) - Move up -

14/ The district court recognized that it was in no position to rule on the validity of the President's new policy. App. I, infra, 4-5. Yet its injunction plainly bars the implementation of that policy. See pp. , infra. Most obviously, the injunction requires that discharges be based on

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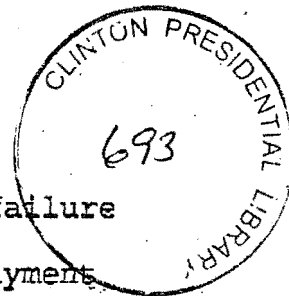
c. This Court need not review the district court's ruling on the merits for purposes of considering this application for a stay. We seek relief from the district court's injunction only insofar as it (1) grants relief to persons other than Meinhold, and is therefore overbroad and intrudes the court into military affairs entrusted to the political Branches, and (2) may be read to require the ^{Section 2} destruction of documents (including those related to Meinhold), a requirement that must be stayed not only to prevent the irreparable harm that will result from destruction of the documents but also to preserve for appellate review the issue of the validity of the document-destruction provision, cf. John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, Circuit Justice), discussed pp. ___-___, *infra*. Under Heckler v. Lopez, 463 U.S. 1328 (Rehnquist, Circuit Justice), motion to vacate stay denied, 464 U.S. 879 (1983); see also 464 U.S. at 881 (Stevens, J., with Blackmun, J., dissenting in part), it is clear that a district court's injunction may be stayed by this Court pending appeal to a court of appeals when, as here, the injunction imposes a significant burden on an agency in the Executive Branch by granting relief to persons who are not properly before the court.

Section 2 acts or intent
 proof that homosexual conduct has occurred and will interfere with the military mission, whereas under the President's new policy ~~(and the interim policy) a person can be discharged when that person fails to rebut a presumption raised by his or her statements that he or she has a propensity to engage in homosexual conduct.~~ Compare App. H, *infra*, 2-3, with App. K, *infra*, 2. acts

prohibited
 homosexual
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 includes
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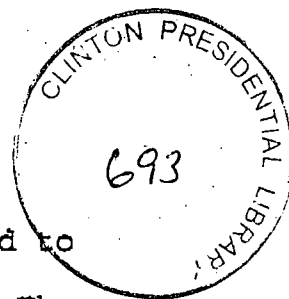
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stated does not include



Lopez was a class action challenging the Secretary's failure to follow two Ninth Circuit decisions in terminating the payment of disability benefits under Title II and Title XVI of the Social Security Act. 463 U.S. at 1328. After certifying a class, the district court granted a preliminary injunction that, among other things, required the Secretary to pay benefits to every recipient of disability benefits whose benefits had been terminated within the preceding two years because of cessation of disability, until the Secretary established their lack of disability in accordance with the two Ninth Circuit decisions that she had declined to follow. Id. at 1329-1330, 1334. Then-Justice Rehnquist stayed that portion of the injunction pending appeal to the Ninth Circuit, and this Court subsequently sustained the stay.

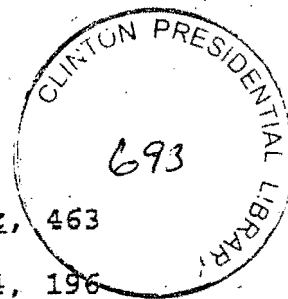
The stay was based solely on the overbreadth of the district court's injunction. Then-Justice Rehnquist assumed that the Ninth Circuit would rule for the plaintiff class on the merits of its challenge to the Secretary's policy and that a majority of the members of this Court would not vote to review the Ninth Circuit's ruling on the merits. Id. at 1331. He also accepted the determinations of both lower courts, upon the Secretary's application to those courts for a stay, that the balance of equities favored the plaintiffs. Id. at 1337. He nonetheless granted a stay because the district court's injunction went "far beyond the application of [the two prior Ninth Circuit decisions that the Secretary declined to follow] to concrete cases before it." Id. at 1331. More specifically, it granted relief to



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persons who, after having their benefits terminated, failed to exhaust their administrative remedies. Id. at 1334-1336. Then Justice Rehnquist rejected the plaintiffs' argument that "the District Court ha[d] merely exercised its broad remedial powers to return the class members to the positions they occupied before the unlawful termination." Id. at 1336. He stated, "Whatever might be the merits of such a determination in a lawsuit between private litigants, the remedial powers of a federal court in an action seeking to enjoin an agency of a coordinate branch of the government are circumscribed." Ibid. As indicated above, this Court subsequently refused to vacate the stay. 464 U.S. 879 (1983).

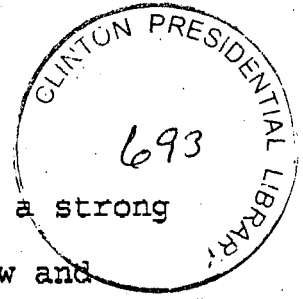
This Court's action in Lopez compels the conclusion that a stay is warranted here. In Lopez, a class had been certified; thus, the injunction, though overbroad, at least did not extend beyond the plaintiffs. Nevertheless, a stay was entered because it provided relief to plaintiffs who had failed to exhaust administrative remedies. Here, respondent Meinhold was and is the sole plaintiff in this case. Yet the injunction plainly extends well beyond him by granting relief to persons who are not entitled to such relief both because they are not parties to this case and because they have failed to exhaust their administrative remedies. Moreover, Lopez involved the administration of the Social Security program in the civilian sector. In that context, it is well settled that courts generally may not grant relief that "propel[s] [them] into the domain which Congress has set



aside exclusively for the administrative agency." Lopez, 463 U.S. at 1333 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). That principle applies with much greater force in the context of judicial relief that intrudes directly into military affairs and interferes with the policy of the Commander-in-Chief and Congress. See Chappell v. Wallace, 462 U.S. at 301.

2. As we have said, this Court need not reach the merits of the equal protection issue (either as it affects Meinhold's own discharge or more generally) in order to grant this application for a stay, in light of the fundamental defects in the scope and intrusiveness of the injunction. Nevertheless, the district court seriously erred in its analysis of Meinhold's equal protection challenge to his discharge. ~~If the court applied its flawed analysis to the President's new policy, the new policy would almost certainly be invalidated. And, as discussed above, the sweeping terms of the court's injunction permit the court to entertain challenges to the new policy, notwithstanding the court's patent lack of authority and an adequate record for doing so. Moreover,~~ The district court's equal protection analysis conflicts with the decisions of the other courts of appeals that have considered equal protection challenges to ^{military} ~~discharges based on homosexuality.~~ ^{15/} Thus, quite apart from the improper

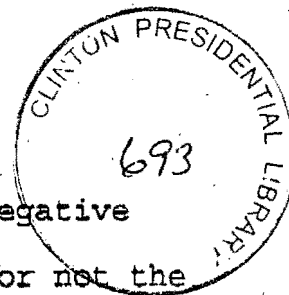
15/ Dronenburg v. Zech, 741 F.2d 1388, 1391-1398 (D.C. Cir. 1984); Ben-Shalom v. Marsh, 881 F.2d 454, 463-466 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Rich v. Secretary of Army, 735 F.2d 1220, 1229 (10th Cir. 1984); Woodward v. United States, 871 F.2d 1068, 1075-1077 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); see also Schowengerdt v. United States, 944 F.2d 483, 489-490 (9th Cir. 1991) (rejecting substantive due



breadth and intrusiveness of the injunction, there is a strong probability that this Court would grant further review and reverse if the Ninth Circuit were to affirm the district court's decision.

Judicial consideration of Meinhold's challenge is governed by three principles. First, it is firmly established that courts owe great deference to the "considered professional judgment" of the "appropriate military officials" regarding the composition of the Armed Forces. Goldman v. Weinberger, 475 U.S. 503, 509 (1986); see also Department of Navy v. Egan, 484 U.S. 518, 527-530 (1988) (courts must show "utmost deference" to "[p]redictive judgments[s]" by the Executive Branch such as those in the military context). Second, in light of the foregoing principles of deference, it is appropriate in the special military setting to apply the standard for reviewing equal protection challenges set forth in Heller v. Doe, 113 S. Ct. 2637 (1993). Under that standard, a classification challenged on equal protection grounds "must be upheld * * * if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. at 2642. Such a classification is "not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data," and the

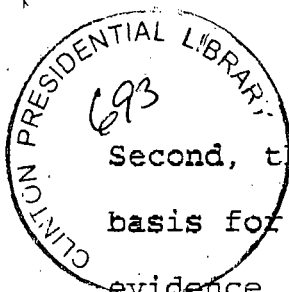
process challenge), cert. denied, 112 S. Ct. 1514 (1992); Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980) (same), cert. denied, 452 U.S. 905 (1981); High Tech Gays v. Defense Indus. Security Clearance Off., 895 F.2d 563, 570-578 (9th Cir. 1990) (rejecting equal protection challenge); but see Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), discussed in note infra.



burden is on the one attacking the classification "to negative every conceivable basis which might support it whether or not the basis has a foundation in the record." Id. at 2643 (internal quotation marks and citations omitted). Third, with regard to classifications in the military context, nothing in the Constitution requires the President or the Congress to eschew categorical rules in favor of a case-by-case inquiry into the extent to which particular conduct may interfere with the military mission. Solorio v. United States, 483 U.S. 435 (1987); see also Weinberger v. Salfi, 422 U.S. 749 (1975); Beller v. Middendorf, 632 F.2d 788, 808-809 n.20 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

The district court's analysis and the resulting injunction violate these principles. First, the court refused to accord any deference to the judgment of the military ^{under the former military policy} that "[t]he 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) (App. I, infra, 1).^{16/} App. C, infra, 2-3.

^{16/} The directive setting forth the military policy on homosexuality at the time of Meinhold's discharge explained that the presence of actively homosexual members "adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of



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Second, the court required the government to establish a rational basis for the policy regarding homosexuals through record evidence, a requirement that cannot be squared with Heller.^{17/}

Finally, the court erred by entering an injunction that bars the discharge of an actively homosexual servicemember in the absence of proof of specific "sexual conduct * * *" proven to interfere

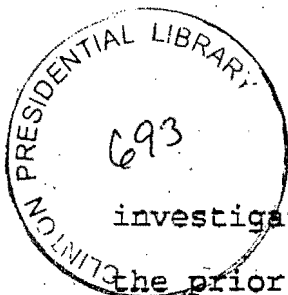
with the military mission of the armed forces of the United States." App. H, infra, 2. That prohibition cannot be squared with the authority of the political branches to adopt categorical rules governing military personnel that operate without the need to establish that application of the rule in each particular case is necessary to prevent interference with the military mission.

See Solorio v. United States, supra. While

The President's new policy differs in meaningful ways from the policy that Meinhold challenged, particularly with respect to conditions of enlistment, recognition of sexual orientation per se as a personal and private matter, and grounds for

security." DOD Directive 1332.14(H)(1)(a) (App. L, infra, 1); see also Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980) (Kennedy, J.), cert. denied, 452 U.S. 905 (1981).

^{17/} The district court gleaned such a requirement from Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992). App. C, infra, 2-3. In Pruitt, the Ninth Circuit reversed an order dismissing an equal protection challenge by a homosexual servicemember to her discharge and remanded the case for further proceedings on whether the government had established, through evidence in the record, a rational basis for the discharge. 963 F.2d at 1165-1167. Pruitt does not survive Heller v. Doe, supra. In any event, the government did produce declarations and other evidence in the district court in this case setting forth the basis for the policy. See Excerpts of Record 52-74, 84.



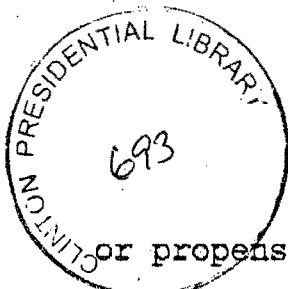
*False
retrospective*

the new policy does not require that sexual conduct be proven. A clear notice to interfere with the military mission of the United States. The military is a separate entity from the civilian population.

investigations. The flaws in the district court's analysis of the prior policy, however, together with the sweep of the injunction, create serious obstacles defending the new policy in possible contempt proceedings in the district court with regard to the grounds for discharge. Under the prior policy (which the interim policy continues with respect to discharges), a person may be discharged if he or she engages in homosexual acts or demonstrates by his or her statements a propensity to engage in such acts.^{18/} The President's new policy also provides for discharges under those circumstances. App. K, *infra*, 1-2. Under the prior (and interim) policy, a servicemember's statement that he or she is a homosexual in effect raises a regulatory presumption that the person is engaging, intends to engage, or has a propensity to engage in homosexual acts. See DOD Directive 1332.14(E)(b)(1), App. L, *infra*, 1 ("homosexual" means a person "who engages in, desires to engage in, or intends to engage in homosexual acts"). That presumption is made explicit in the President's new policy. See App. K, *infra*, 2. Under the prior (and interim) policy, a person who makes a statement of homosexuality may rebut the presumption by showing that he or she does not engage in homosexual acts and does not have the intent

*Further
the new policy includes a definition of prohibited homosexual conduct under the statute. It leaves little room for a person to engage in homosexual acts, to the extent that the district court's interpretation of such statute from discharges of the prior policy from the military is not only inconsistent with the military's mission, but also with the military's right to self-defense.*

^{18/} Contrary to the district court's belief, the policy it invalidated was not based "merely on status." App. C, *infra*, 2. The Seventh and Federal Circuits have recognized as much, holding that the policy 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 1066, 1074 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); cf. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-789 (1990) (discussing use of rebuttable presumptions).



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While the new policy
differs from the old
policy in meaningful ways,

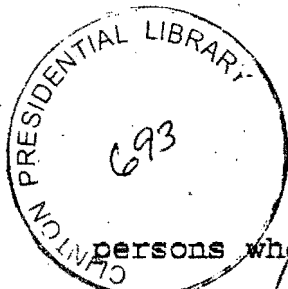
or propensity to do so. This, too, is made explicit in the President's new policy. Ibid. The district court, however, relying on its flawed equal protection analysis, has invalidated this approach, by permitting discharge only for specific "sexual conduct proven to interfere with the military mission of the armed forces." App. H, infra, 2. The serious flaws in the district court's ruling on the equal protection issue thus provide powerful support for a stay.

the new policy does not require

B. THE DISTRICT COURT'S INJUNCTION WILL CAUSE IRREPARABLE INJURY UNLESS STAYED PENDING APPEAL

1. Most importantly, the district court's injunction causes irreparable injury by preventing the implementation of the new policy on homosexuality ^{conduct} in the Armed Forces, which was developed by the President as Commander-in-Chief and has been approved by each House of Congress in identical bills -- a policy that both political Branches have determined is necessary to the effectiveness and readiness of our Armed Forces.

Although Meinhold did not challenge the President's new policy, the injunction bars implementation of that policy by setting forth standards that conflict with the standards developed by the President and Congress. Specifically, as explained above, under the new policy (as well as under the pending legislation), servicemembers who, like Meinhold, make ^{unrebutted} statements demonstrating their propensity or intent to engage in homosexual acts are subject to discharge. App. K, infra, 1-2; → Cites to DOD see pp. ___, supra. Yet the injunction bars the discharge of



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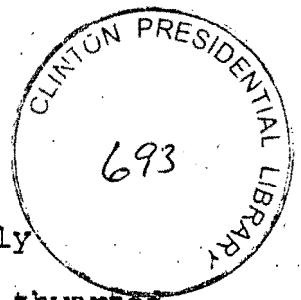
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*What the district
court decision is*

persons who make such statements unless the military can prove both that they engaged in specific "sexual conduct" that is *and* proven to "interfere with the mission of the armed forces." App. H, infra, 1-2. Indeed, the injunction appears to prohibit the Department of Defense even from creating records regarding such persons in the absence of proven conduct that satisfies the district court's standard. *the card*

The barrier erected by the district court to implementation of the President's new policy and the pending legislation is all the more egregious in light of the enormous amount of time and attention that the political Branches devoted to developing that policy. The policy is the result of an exhaustive review by the Secretary and other high-level military and civilian officials, including the Joint Chiefs of Staff and a military working group in the Department of Defense. Those officials consulted extensively with members of Congress, military officers, enlisted personnel, and outside experts, and they considered "a huge outpouring of mail from the American people on all sides of this issue." 7/20/93 Tr. of Hearing Before the Senate Comm. on Armed Services, supra, at 22 (testimony of Gen. Powell).

The resulting policy reflects a carefully crafted compromise on an extraordinarily sensitive issue of great importance to both servicemembers and the general public. It has, moreover, been approved by both Houses of Congress in ~~identical~~ bills that are expected to be enacted shortly. *and that are identical to one another* See S. 1293, supra, § 546 (App. P, infra); H.R. 2401, supra, § 575 (App. Q, infra). The policy



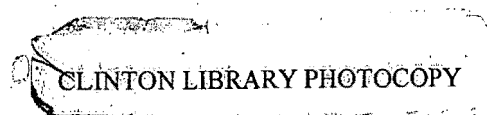
thus bears the clear stamp of approval of the politically accountable Branches. Its implementation should not be thwarted by a single district court in a suit brought by a single individual. Cf. Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist J., Circuit Justice).

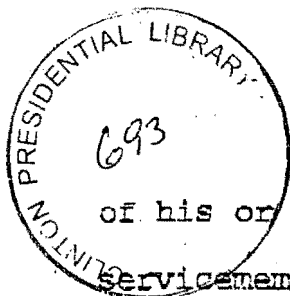
2. As extended by the district court's September 30 order, the injunction by its terms also has an immediate impact on the effectiveness and readiness of our Armed Forces. The injunction prohibits discharges of ~~actively homosexual~~ ^g servicemembers, except ^{on the basis of moral acts or Statute} in conformity with the stringent standard that the court imposed -- ^{What the district court said was} i.e., proof of specific "sexual conduct * * * proven to interfere with the military mission of the armed forces." App. H, infra, 2. That prohibition, standing alone, has a dramatic impact. Since 1989, more than 3500 servicemembers have been discharged under the military's regulations regarding homosexuality. Declaration of Edwin Dorn, Assistant Secretary of Defense for Personnel and Readiness -- (App. W, infra). Moreover, at least 115 separation proceedings are pending under those regulations. Ibid.

*HECK
DOW
STATEMENT*

?

In addition to discharges, the injunction applies to "any action[] whatsoever" that "in any way affects" an individual's "military status, advancement, evaluation, duty assignment, duty location, promotion, enlistment or reenlistment." App. H, infra, 2-3. Thus, a commanding officer must refrain from taking actions that he or she considers necessary to maintaining the readiness





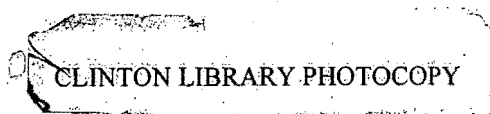
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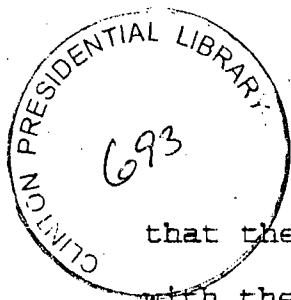
of his or her units, if the action adversely affects a homosexual servicemember in one of the ways specified in the injunction,

unless the commanding officer can prove that the servicemember has engaged in specific sexual conduct that "interferes with the military mission." For example, a commander in charge of a unit engaged in hostilities could not transfer an admitted homosexual to another unit, even if that person's presence were having an immediate adverse impact, unless the officer could prove that the member engaged in specific sexual conduct and that such conduct (as opposed to the mere presence of the servicemember) interfered with the military mission. Military commanders should not be placed in such a dilemma when the court of appeals has yet to pass upon the validity of the injunction.

The effect of the injunction in this regard is not merely hypothetical. One servicemember previously transferred to standby reserve under the interim policy has already been restored to active duty under compulsion of the Meinhold injunction, [despite the military's determination that his presence undermines military readiness and effectiveness.] Elzie v. Aspin, et al., Civil No. 93-1853 (D.D.C.); see also Selland v. Aspin, supra, (App. U, infra), discussed in note __, supra.

Another servicemember -- against whom discharge proceedings were instituted based on her homosexual affair with a subordinate officer and who subsequently brought an action challenging those proceedings -- has invoked the Meinhold injunction to demand that the proceedings be stayed and that she be promoted; she contends





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that the military has failed to prove that her conduct interfered with the military mission of the armed services and that such proof is required under the Meinhold injunction. See De Jesus Lopez v. Donley, No. 93-1162 (5th Cir. June 7, 1993).

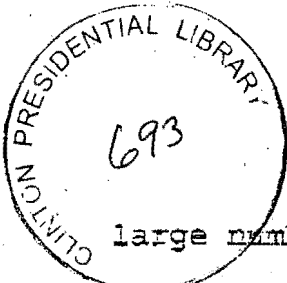
3. The potential for irreparable injury resulting from the injunction is compounded by its breadth and vagueness. Discharge or any other action on the basis of homosexuality is barred "in the absence of sexual conduct * * * proven to interfere with the military mission of the armed forces of the United States." App. H, infra, 2-3. It is uncertain what the district court meant by "sexual conduct." It is doubtful, however, that the term encompasses the full range of conduct reached by the term

~~"homosexual act," as the latter term is used~~ in Department of

Defense regulations and in the President's new policy ^{which includes} ~~to refer to~~ ^{unsubstantiated sexual activity on the part of a person who is a member of the armed forces} ~~conduct for which separation is required.~~ See App. L, infra, 1;

note __, supra.

It is also unclear ^{the manner in which} ~~how~~ "sexual conduct" ^{not} can be "proven to interfere with the military mission of the armed forces of the United States." The injunction could be read to require individualized proof in each case that the particular sexual conduct interfered with the military mission of the Armed Forces. See Selland v. Aspin, supra, at 2 (App. U, infra). Yet the district court did not indicate what type of interference (or proof thereof) it would regard as sufficient. More fundamentally, a requirement of case-by-case proof ignores the overriding need for clear rules in regulating the behavior of



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large numbers of people, especially in the military setting.

That need is reflected both in the policy under which Meinhold

was discharged and the President's new policy, which are premised

on the considered military judgment that the presence of ^{homosexuals} ~~individuals who engage in or demonstrate a propensity to engage~~ ^{in homosexual conduct, including homosexual} ~~in homosexual acts~~ ^{and} ~~is~~ ^{stated} as a categorical matter, detrimental to

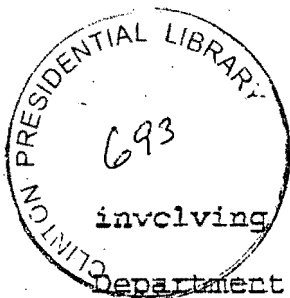
the military mission of the Armed Forces. App. L, infra,

1.19/

The prospects of irreparable injury flowing from the breadth and vagueness of the injunctions are not limited to the military and its commanding officers; they also extend to the very persons the injunction purports to benefit. That is so because servicemembers and applicants for enlistment may be lulled by the injunctions into the belief that they may make statements ^{demonstrating a belief or propensity to engage in homosexual acts} ~~regarding their homosexuality~~, or ~~even~~ ^{such} engage in homosexual acts, ~~that are barred under the military's policy~~, without exposing themselves to discharge or disciplinary action. If the injunctions are subsequently set aside, however, those individuals could be subject to discharge under the new policy.

4. As extended on September 30, the district court's ^{injunction requires} ~~injunction~~ the Department of Defense to undertake a massive search to identify all records, "whether official or unofficial," that are "based on sexual orientation," except those

19/ See also S. Rep. No. 112, supra, at 284 (under prior policy and President's new policy, "[t]he government is not required to prove in each individual case that a service member will not remain celibate or to otherwise prove adverse impact on a specific unit").



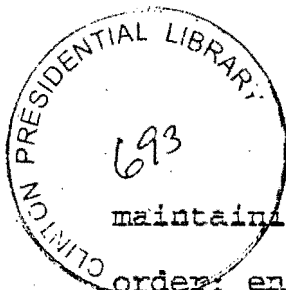
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involving "proven sexual conduct," and it prohibits the Department from "maintaining or creating" such records. App. H, infra, 2. The burdensomeness of ^{such} ~~that~~ requirement cannot be overstated.

Because the order encompasses "any member of the armed forces of the United States" (App. H, infra, 2), the required search would have to cover files and records relating to some 5.1 million individuals (1.7 million on active duty, 1.8 million on reserve, and 1.6 million retired). Most of those records are not available in a full-text computer data base, and a search would therefore require hand-processing of millions of pages. Moreover, the records are not in a single location; they may be found anywhere in the world that the Armed Forces are found. It would require an enormous expenditure of financial and human resources just to set up a program for complying with the record-search requirement.^{20/}

The September 30 order does not end with requiring the identification of files and records "based on sexual orientation"; it also prohibits the Department from "creating or

^{20/} In the court of appeals, Meinhold did not dispute that the injunction appears to require the massive search of records described in the text. Instead, he suggested that the defendants could temporarily avoid contempt sanctions by developing a program for the records search. See Meinhold's Opp. to Gov't's Emergency Motions Under Rule 27-3, etc., at 11 n.6. That passing suggestion is scant assurance for the thousands of civilian and military personnel who will have custody of records over the period of months (perhaps a year or more) that proceedings are pending in the Ninth Circuit (and then, perhaps, in this Court). In any event, even the burden of putting such a plan in place is staggering. See Dorn Decl. at ___ (App. W, infra). *Myth - no gyps*

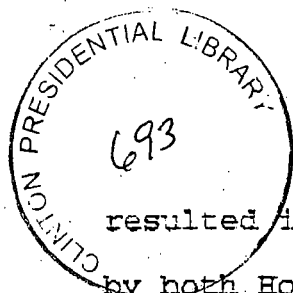


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maintaining" such records. Many basic files are covered by the order: enlistment records, which previously required servicemembers to disclose whether they were homosexual; medical records, including the records of mental health professionals; legal assistance and defense counsel records, including attorney-client communications; security records, including reports on background investigations required for security clearance; and chaplaincy records. Many of those records might contain information on a servicemember's sexual orientation, and therefore could be subject to destruction under the vaguely worded prohibition on the maintenance or creation of records "based on sexual orientation in the absence of proven sexual conduct." App. E, infra, 2. Those records, however, are vital to the proper management and deployment of military personnel. If the documents were destroyed, they would be irretrievably lost. A stay therefore is justified to prevent the issue of the validity of the document-destruction provision in the injunction from becoming moot on appeal, John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, Circuit Justice), and to prevent the irreparable injury that loss of the documents would entail.

C. THE PUBLIC INTEREST AND THE BALANCE OF THE
EQUITIES WEIGH HEAVILY IN FAVOR OF A STAY

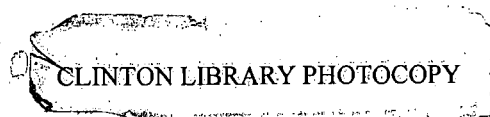
The public debate on the issue of homosexual conduct by members of the Armed Services has been prolonged, ^{and} intense, and ~~divisive~~. It has consumed the attention of the Commander-in-Chief, other military leaders, and Congress. That process has

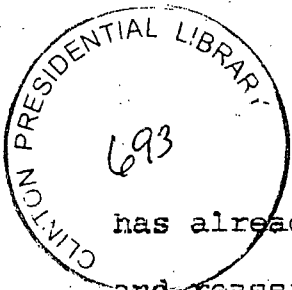


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resulted in the adoption of a policy by the President, approved by both Houses of Congress, that embodies a considered judgment by military officers and the political Branches regarding the appropriate accommodation between a matter of personal privacy and the overriding national interest in ensuring military readiness. That policy and the military judgment that underlies it are owed the utmost deference by the courts, and the policy is presumptively constitutional. Cf. Walters, 473 U.S. at 319. Correspondingly, an injunction that peremptorily bars implementation of such a policy in the military context -- adopted by the President and approved by both Houses of Congress based on an extensive legislative record -- must be presumed to cause irreparable injury. Cf. Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (Rehnquist, Circuit Justice), motion to vacate stay denied, 469 U.S. 877 (1984). The public has a strong interest in having the President's new policy regarding homosexual conduct in the Armed Forces implemented forthwith, so as to preserve the confidence of members of the Armed Forces and the public in the ability of their elected and military officers to address the governance of the Armed Forces, a power vested in the Executive and Legislative Branches by the Constitution. U.S. Const. Art. I, § 8, Cls. 12-14, Art. II, § 2, Cl. 1.

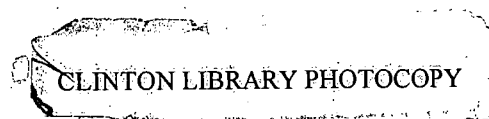
Moreover, the irreparable harm that would result from denial of a stay far outweighs any cognizable harm that might result from the granting of a stay. Meinhold, the only named plaintiff,

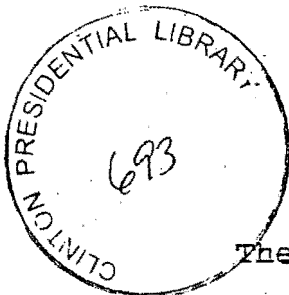




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has already been granted complete relief. He has been reinstated and reassigned to his previous position, and we do not, in this application, seek a stay of the injunction insofar as it grants him that relief. Therefore, if a stay is granted, Meinhold will suffer, at most, a delay in the vindication of his generalized and abstract interest in the nationwide scope of the injunction -- relief that he has no standing to obtain. Any potential for harm to other servicemembers, ~~such as those against whom separation proceedings are pending~~, should not weigh in favor of a stay, because they are not parties to the suit; because the injunction may actually harm other servicemembers and enlistees by inducing statements and conduct that would violate military policy and lead to discharge; because any potential for harm to any other servicemember if a stay is granted is speculative until final action has been taken against that member; and because at that point each such servicemember may seek relief on his or her own behalf. In short, the public interest and balance of the equities strongly favor a stay of the district court's broad injunctions, which were wholly beyond its power to enter.





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CONCLUSION

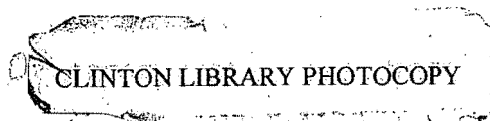
The January 29 and September 30, 1993, orders of the United States District Court for the Central District of California should be stayed pending appeal, insofar as they grant relief to anyone other than respondent Meinhold and ^{with respect to} require destruction of ~~records, including records~~ pertaining to Meinhold.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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OCTOBER 1993



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. memo	Bernard Nussbaum and Clifford Sloan to President William J. Clinton re: Meinhold Gays-in-the-Military Decision (2 pages)	10/29/1993	P5
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COLLECTION:

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

FOLDER TITLE:

Gays in the Military - Meinhold #2 [1]

Kelly Hendren
2006-0227-F
kh580

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]

- 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]

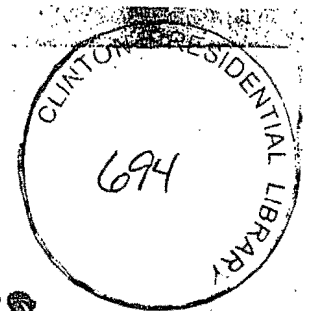
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THE PRESIDENT HAS SEEN //



THE WHITE HOUSE

WASHINGTON

October 29, 1993 OCT 29 P7:

Re: Meinhold
Re: Nussbaum
Re: Sloan

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM ^{BN}
COUNSEL TO THE PRESIDENT

CLIFFORD M. SLOAN ^{CMS}
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Meinhold gays-in-the-military decision

The Supreme Court today issued a stay of the injunction in the Meinhold case, insofar as it applies to anybody besides Meinhold. (A copy of the Supreme Court's order is attached).

Although Meinhold brought the case only on his own behalf, the district court issued a nation-wide injunction, and the Court of Appeals refused to narrow it. On Tuesday, October 26, the Solicitor General filed a request for emergency relief on the ground that the injunction was preventing implementation of the new policy and that the extension of the injunction beyond Meinhold personally was a clear legal error.

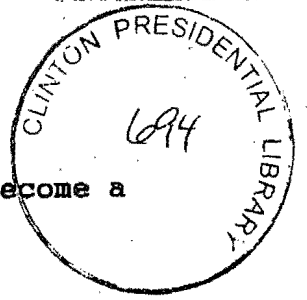
The Supreme Court's order rests on a narrow procedural ground about the scope of an injunction in a case brought by an individual. It should not be read as a ruling on the constitutional merits of Meinhold's claim. The distinction that the Court drew (applicability to Meinhold, as opposed to applicability to other people); the case that it cited (Heckler v. Lopez); and the swiftness and unanimity of the order all highlight the narrow procedural character of the order.

The Solicitor General's application to the Supreme Court also requested a stay of the injunction to the extent that it required destruction of documents relating to Meinhold. The Court refused to stay that part of the injunction, but suggested that the government could comply by filing the documents under seal with the district court.

The Meinhold case on the merits with respect to Meinhold himself remains pending in the Court of Appeals and is scheduled for argument in December.

The way is now clear for implementation of the new policy. It is possible that we will not issue the new regulations until the DOD authorization bill (with the Nunn language on gays-in-the-military as one provision) emerges from conference. Although we have not publicly stated that the regulations will wait for

the legislation, we do not want the new regulations to become a target while the legislation remains in conference.



Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. draft	Volker Keith Meinhold v. United States Department of Defense Reply Brief for the Appellants (26 pages)	10/12/1993	P5	695
002. draft	United States Department of Defense v. Volker Keith Meinhold Emergency Application for a Stay Pending Appeal (25 pages)	11/11/1993	P5	696
003. draft	Volker Keith Meinhold v. United States Department of Defense Reply Brief for the Appellants (26 pages)	10/13/1993	P5	697

COLLECTION:

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

FOLDER TITLE:

Gays in the Military - Meinhold #2 [4]

Kelly Hendren

2006-0227-F

kh581

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

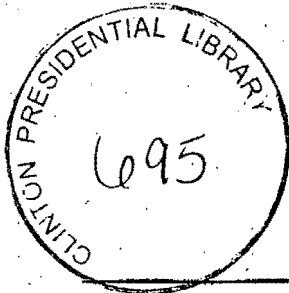
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

FRANK W. HUNGER
Assistant Attorney General

TERREE A. BOWERS
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-55242

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

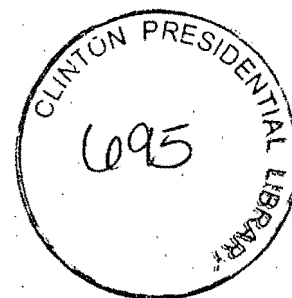
v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

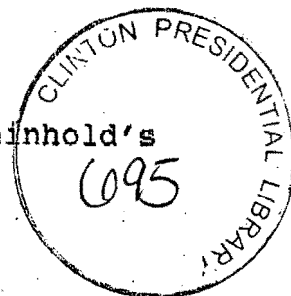
Defendants-Appellants.

REPLY BRIEF FOR THE APPELLANTS

This brief responds to the arguments Meinhold has presented in defense of the district court's injunction entered on January 29, 1993. Point I will show that Meinhold's claim that exhaustion of his administrative remedy would have been futile is inconsistent with the dispute he raises regarding the scope of the regulatory definition of "homosexual." Point II will then show that controlling decisions of this Court and the Supreme Court foreclose Meinhold's claim that the district court could properly decide his constitutional claim because further proceedings would have been required to dispose of his nonconstitutional estoppel claim. Even if the equal protection claim were properly presented, Point III will show that the military's former policy excluded homosexuals based upon their past homosexual acts or their propensity to commit future homosexual acts, and that this policy should be sustained under the applicable rational basis standard of review. Finally, Point IV will demonstrate that, even if it were otherwise proper, the district court's injunction is plainly overly broad insofar as



it extends to "any person," rather than being limited to Meinhold's own discharge.



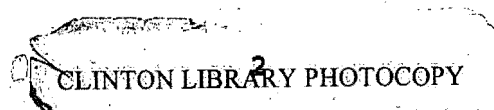
I.

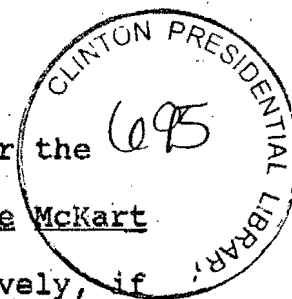
CONTRARY TO MEINHOLD'S ARGUMENT, EXHAUSTION WOULD NOT HAVE BEEN FUTILE BECAUSE HE CONTESTS THE SCOPE OF DOD'S REGULATORY DEFINITION OF "HOMOSEXUAL."

Our opening brief, see Gov't Br. 12-18, demonstrated that the district court should have dismissed Meinhold's complaint pending exhaustion of intramilitary remedies. Exhaustion was particularly appropriate given Meinhold's own statement that "the equal protection claim is [not] central to this case" and it "need not even be reached" because the nonconstitutional arguments "are determinative of the outcome of this action." Plaintiff's Response to Defendants' Application for a Stay of Proceedings at 3, 5 (Oct. 20, 1992).

Meinhold defends the district court's holding that exhaustion would have been futile. See Meinhold Br. 7-9. At the same time, however, Meinhold disputes which categories of persons fall within the regulatory definition of "homosexual" so as to be dischargeable. As our opening brief explained, see Gov't Br. 21-24, DOD's regulations apply to those who either have engaged in past homosexual acts or who by their statements indicate a propensity to engage in future homosexual acts. Meinhold argues for a much more expansive construction, contending that the regulations "mandate[] the discharge of all gay and lesbian service members solely on the basis of their status . . . regardless of their conduct." See Meinhold Br. 11.

Meinhold's two arguments are incompatible. Exhaustion cannot be held to be futile when the administrative process could have



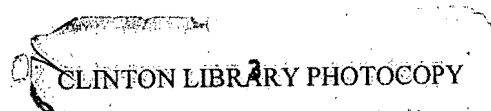


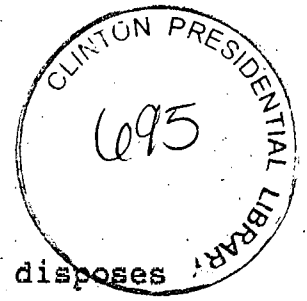
provided a definitive agency resolution of any dispute over the construction of the regulation as applied to Meinhold. See McKart v. United States, 395 U.S. 185, 194-195 (1969). Alternatively, if Meinhold is correct that exhaustion would have been futile, it is only because he does not dispute that he falls within DOD's regulatory 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 indeed be an admission that he commits, or will likely commit, homosexual acts. In any event, Meinhold cannot both: (1) dispute that he falls within 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.

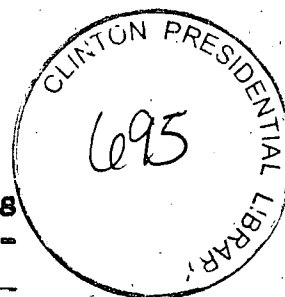




9-10. The doctrine against deciding constitutional issues unnecessarily cannot be so easily evaded.

Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944), disposes of Meinhold's claim. There the Court stated: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." 323 U.S. at 105. The Court held that the court of appeals had improperly reached the constitutional issue of whether a state tax violated the Commerce Clause. The Supreme Court remanded the case to the district court with the direction to hold the case until a proceeding could be brought in state court to resolve the issues regarding the construction of the state statute and its validity under the state constitution. Thus, Spector Motor Co. dispositively rejects Meinhold's argument that a court can properly decide the federal constitutional issue simply because further proceedings would be necessary to resolve the other issues. See also New York Transity Auth. v. Beazer, 440 U.S. 568, 582-83 (1979); Erickson v. United States, 961 F.2d 1299, 1302 (9th Cir. 1992).¹

¹ This same doctrine required the district court to dispose of Meinhold's claim under the Administrative Procedure Act before reaching the constitutional issue. Meinhold, however, appears to have abandoned his APA claim by arguing in his brief, see Meinhold Br. 8, 9 n.7, that the procedural error he alleged would not affect the outcome of the Navy discharge proceeding. Plainly, Meinhold cannot continue to press his APA claim and at the same time urge this Court to skip over the merits of that claim to reach the constitutional issue.



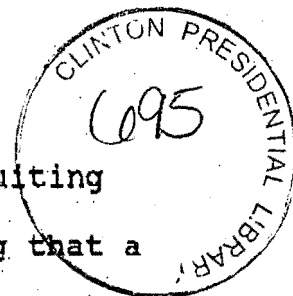
III.

THE DISTRICT COURT ERRED IN HOLDING THAT THE MILITARY'S FORMER POLICY REGARDING HOMOSEXUALS VIOLATES EQUAL PROTECTION.

Even assuming that the constitutional issue were properly before it, the district court erred in holding that the military's former policy, which is set forth in DOD Directive 1332.14, see Gov't Br. Addendum 1, violates equal protection. In responding to our brief on this issue, Meinhold makes basically two arguments. First, as indicated in Point I above, he disputes our construction of the Directive as directed toward persons who have committed or are likely to commit homosexual acts, arguing instead that the policy is directed toward homosexual status unrelated to conduct. Second, Meinhold argues that, so construed, the policy is invalid because it lacks the necessary rational basis. We address each point in turn.

A. DOD's Former Policy Excluded Persons Who DOD Concluded Have Committed Or Were Likely To Commit Homosexual Acts.

1. Meinhold does not contest DOD's authority to discharge service members who commit proscribed sexual acts, nor could he in light of binding precedent. See Solorio v. United States, 483 U.S. 435 (1987); Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981), cert. denied, 454 U.S. 864 (1981). As this Court held in Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981): "In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for



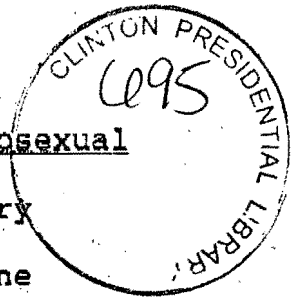
long periods of time, and the possible benefit to the recruiting effort," the Navy acted within its discretion in concluding that a blanket-discharge policy for homosexual conduct was necessary to preserve military effectiveness.

Meinhold attempts to avoid the settled law on this issue by arguing that, because he was discharged based solely upon his statement that he was a homosexual, rather than on evidence of specific homosexual acts, the former policy was directed to homosexual orientation unrelated to conduct. See Meinhold Br. 10-18. His argument, however, misconstrues DOD's policy.

As we explained in our opening brief, see Gov't Br. 21-24, the pertinent classification challenged in this case is persons who the military has reasonably concluded have committed or are likely to commit homosexual acts. DOD's interpretation of its own regulation is reasonable and must be accepted as the basis for the constitutional analysis. "Any other approach would not be testing the [policy] in light of the purposes [DOD] sought to achieve." Rostker v. Goldberg, 453 U.S. 57, 75 (1981).²

DOD's construction is plainly consistent with the language of the Directive. The Directive states: "The presence in the military environment of persons who engage in homosexual conduct or who, by

² Meinhold incorrectly asserts, see Meinhold Br. 17-18, that DOD is advancing a newly minted regulatory interpretation that finds no support in the administrative record or the district court proceedings. Meinhold's own counsel advised the administrative board that DOD's "policy is directed towards persons who engage in homosexual conduct, or who, by their statements demonstrate a propensity to engage in homosexual conduct." [Tr. 15]. Similarly the government repeatedly advised the district court that DOD's regulation targets persons who commit, or have a propensity to commit, homosexual acts. [Cite].

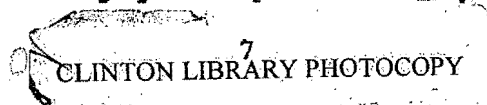


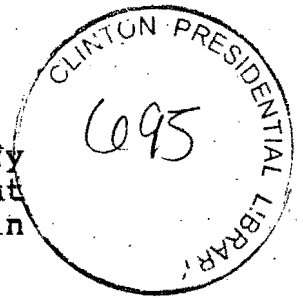
their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14.H.1.a (emphasis added). The Directive provides for the separation of any service member who "has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual." Id. 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 accord it 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





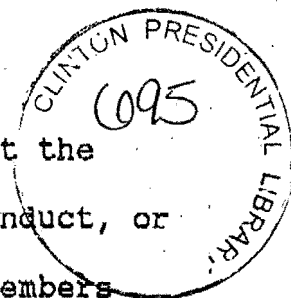
this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future.

Ben-Shalom, 881 F.2d at 464.³

In the instant case, Meinhold admitted that he was homosexual. Pursuant to the regulations, that admission 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 challenge to her discharge based on her admission of homosexuality. This Court reversed, holding that Pruitt could state an equal protection claim on a theory that the military's policy was based on homosexual

³ DOD's policy provides 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 departure 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, as evidenced by homosexual "desire" or "intent"; 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 (Br. at 11-12), this exception does not mean that the policy discriminates solely on the basis of homosexual status. Rather, it is wholly consistent with the principle that the military will not retain persons, regardless of their status, 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 upon grounds of policy.") (internal quotation marks omitted).

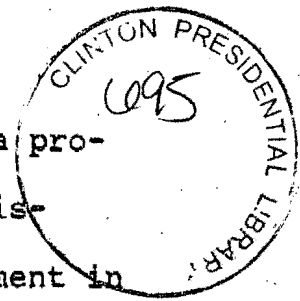


status wholly unrelated to conduct. The Court observed that the military is "not discharging members just for homosexual conduct, or even primarily for homosexual conduct. It is discharging members because of their status as homosexuals." 963 F.2d at 1163.

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 does not foreclose accepting DOD's reasonable construction of its regulations here because Pruitt did not consider whether the regulation required the discharge of members based solely on sexual status unrelated to conduct.⁵ Thus, notwithstanding his admission of homosexuality, if

⁴ 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.

⁵ See Miller v. California Pacific Medical Center, 991 F.2d 536, 541 (9th Cir. 1993) (decisions that do not consider or discuss 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, 952 F.2d 1066, 1071 n.3 (9th Cir. 1991) (same).



Meinhold had shown that he did not commit, and did not have a propensity to commit, homosexual acts, he would not have been discharged pursuant to the challenged policy. Third, the statement in Pruitt is not binding here because it 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.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).

Of course, not everyone of a particular sexual orientation will necessarily act on that orientation. But it is rational for military authorities to presume that, absent contrary evidence, a person who states without qualification that he is a homosexual is

⁶ United States v. Stanley, ___ U.S. ___, ___ (1987) (no holding can be broader than the facts before the court); Kastigar v. United States, 406 U.S. 441, 454 (1972) (language unnecessary to the court's decision is not binding authority).

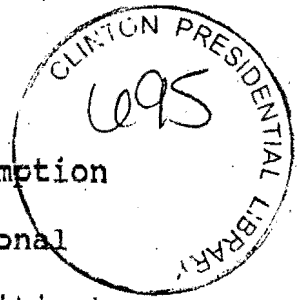
likely to commit homosexual acts.⁷ It would be ironic, to say the least, to hold that precepts of individual liberty required DOD to initiate an unavoidably intrusive investigation into the intimate details of a service member's personal life rather than accept his statements at face value and act on the basis of reasonable, and un rebutted, 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.

1. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Heller v. Doe, 61 U.S.L.W. 4728, 4730 (1993) (quoting FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993)). Classifications sub-

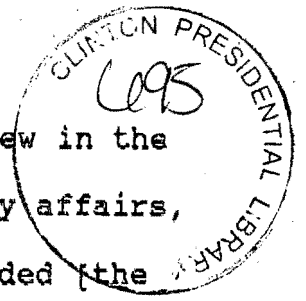
⁷ See Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1074; Steffan v. Cheney, ___ F. Supp. ___, ___ (D.D.C. 19___) (appeal pending). Cf. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 778-789 (1990) (rebuttable presumptions are valid when "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it'").



jected to rational basis review are accorded "a strong presumption of validity," and they must be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller, 61 U.S.L.W. at 4730. The Government "has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" Id. (quoting Beach Communications, 113 S. Ct. at 2102). "'[T]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it,' whether or not the basis has a foundation in the record." Id. at 4730 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). Finally, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends [and despite the fact that] 'in practice [the classification] results in some inequality.'" Id. at 4730 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970), and Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).⁸

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 this policy. See Gov't Br. 25 n.10. Nevertheless, 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.

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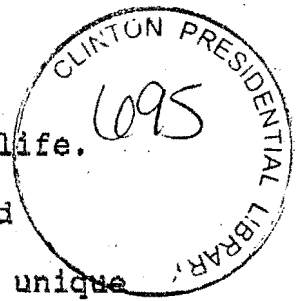


This case involves application of rational-basis review in the context of matters involving "national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded [the Political Branches] greater deference." Rostker, 453 U.S. at 64-65. When promulgating rules for the governance 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.

2. DOD's 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).

⁸(...continued)

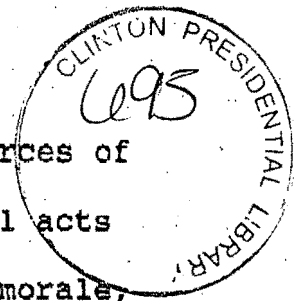
Meinhold now contends, see Meinhold Br. 36, that the Government's declarations should not have been considered because they were not offered in opposition to his motion for summary judgment. This contention is insubstantial. The declarations were offered in support of our own motion for summary judgment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



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. States, 483 U.S. 435, 439-41 (1987); Chappell v. Wallace, 462 U.S. 296, 300 (1983).

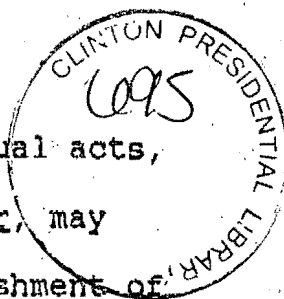
Military professionals have concluded that in light of the unique duties of the military and its specialized society, the longstanding prohibition against homosexual conduct in the military



context is necessary, and that the presence in the Armed Forces of persons who demonstrate a propensity 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.

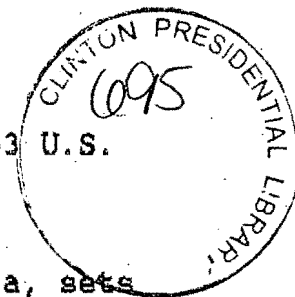
Rationality plainly permits those with responsibility for the military to prevent or remedy circumstances that they conclude would adversely affect military preparedness. "[N]othing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to 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 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. Because the military may 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.

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; Ben-Shalom, 881 F.2d at 465-66. The policy at issue affects persons 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. In addition, this Court has held: "[Homosexual behavior] is not an immutable 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

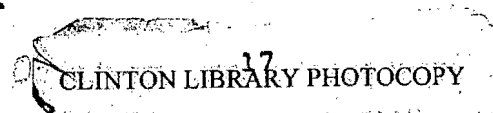


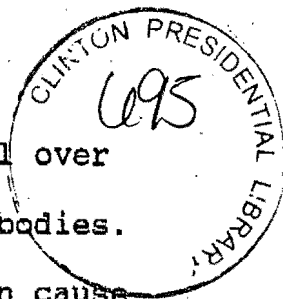
other contexts. See Goldman, 475 U.S. at 507-10; Rostker, 453 U.S. at 66; Parker, 417 U.S. at 756.⁹

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 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, whether rightly or wrongly, find to be disturbing. See Beller, 632 F.2d at 812; Declaration of Ass't Secretary of Defense Jehn, ER 54-55; Declaration of Rear Admiral Gallo, ER 69, 71. 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.

Second, the military could consider what it determined were significant concerns to be considered relating to privacy. In our

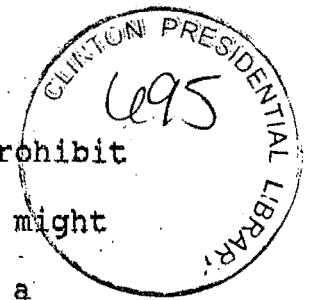
⁹ Meinhold does not challenge DOD's policy to the extent it applies to the class of homosexuals who have committed homosexual acts. Rather, he asserts that some members of the class of homosexuals should be exempt from DOD's policy; namely, those members for whom DOD has no evidence (other than an admission of homosexuality) of homosexual acts. This assertion is incorrect. Given the legitimate reasons underlying DOD's policy, equal protection does not require DOD to adopt the special rule urged by Meinhold for that sub-class of homosexuals. See New York Transit Auth., 440 U.S. at 590-92.





society, individuals are entitled to exercise strict control over circumstances that may lead to the sexual viewing of their bodies. Being viewed while naked by a member of the opposite sex can cause significant discomfort and embarrassment. Accordingly, 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 deeply held societal values relating to modesty and decorum. DOD could rationally conclude that the presence in the military environment of persons with a known propensity to commit homosexual acts would be a disruptive intrusion into the privacy of personnel of the same sex who may object to the possibility of the sexual viewing of their bodies. See Declaration of Ass't Secretary of Defense Jehn, ER 55; Declaration of Rear Admiral Gallo, ER 69-70. In the military, this concern is especially acute 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

¹⁰ Meinhold erroneously asserts, see Meinhold Br. 26, that this 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." To the contrary, this concern is based on DOD's reasonable conclusion that service members -- like other members of society -- wish to exercise some control over those circumstances that may give rise to the sexual viewing of their bodies, even when that viewing is passive and nonthreatening.

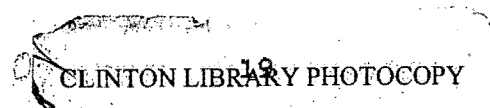


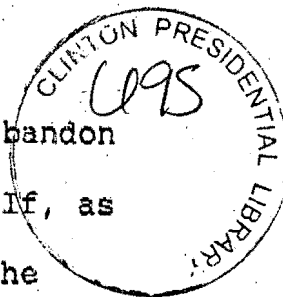
DOD also rationally concluded that a ban that did not prohibit service by those who are likely to engage in homosexual acts might adversely affect retention and recruitment, which could have a serious impact on our all-volunteer military force. See Beller, 632 F.2d at 812; Declaration of Ass't Secretary of Defense Jehn, ER 54; Declaration of 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 nevertheless argues that this Court, guided by the opinions of his expert witnesses and articles that are critical of the military's policy, should hold that DOD's policy is irrational. See Meinhold Br. 24-27. Meinhold's argument ignores the Supreme Court's admonition in Goldman, 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

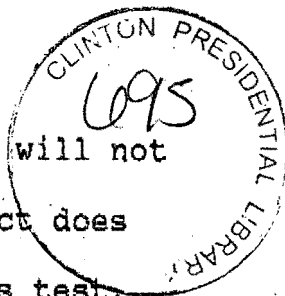
¹¹ As we stated in our opening brief, see Gov't Br. 28-29, this Court may also take notice of the testimony given during extensive hearings before Congress when it examined the military's policy regarding homosexuals. See Hearing Before The Senate Committee On Armed Services To Receive Testimony On DOD 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 lengthy and intense national debate on the subject involved in this case.





officials, and they are under no constitutional mandate to abandon their considered professional judgment." 475 U.S. at 509. 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, then a fortiori the Constitution does not require the military to accommodate homosexual conduct in the face of its view that such conduct would detract from military effectiveness.

Moreover, to accept Meinhold's assertions, and those of his expert witnesses, 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. The Supreme Court also has recognized that DOD is entitled, in the exercise of its broad constitutional authority over the military, "to focus on the question of military need rather than 'equity.'" Id. at 80. The instant policy reflects DOD's views as to how to maintain military preparedness and effectiveness. Meinhold's invitation to substitute the views of his experts for "the considered professional judgment" of the appropriate military officials must be rejected. Goldman, 475 U.S. at 509.

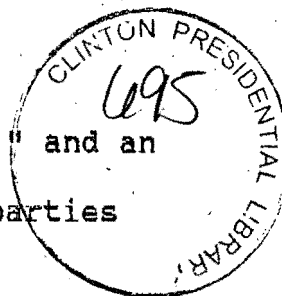


Of course, all of the concerns underlying DOD's policy will not apply to all service members in all instances. But that fact does not mean that the policy fails to satisfy the rational basis test. See Beller, 632 F.2d at 808-09 n.20. Rather, DOD's means of implementing the policy in question satisfies the rational relation test because legitimate policy reasons support both a military decision to exclude from service individuals who engage in homosexual acts, and an implementing regulatory scheme that reasonably infers prohibited acts from a member's admission of homosexuality. Meinhold has certainly failed to satisfy his burden of negating every conceivable rational basis that could support DOD's policy. See Beach Communications, 113 S. Ct. at 2102. Therefore, assuming that the constitutional issue had been necessarily presented to the district court, that court erred in holding that the policy violates equal protection.

IV.

IN ANY EVENT, THE DISTRICT COURT'S INJUNCTION IS OVERLY BROAD INsofar AS IT EXTENDS BEYOND MEINHOLD'S OWN DISCHARGE.

Our opening brief demonstrated that the district court's injunction conflicts with the controlling precedents of both the Supreme Court and this Court insofar as it enjoins the discharge or denial of enlistment of "any person," rather than being limited to Meinhold's own discharge. See Gov't Br. 31-40. Although Meinhold defends this nation-wide injunction in this non-class action, see Meinhold Br. 42-45, his argument cannot be reconciled with Bresgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987), where this Court held: "Where relief can be structured on an individual basis, it



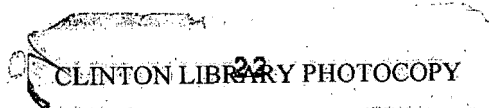
must be narrowly tailored to remedy the specific harm shown," and an injunction should not extend beyond giving the "prevailing parties the relief to which they are entitled."¹²

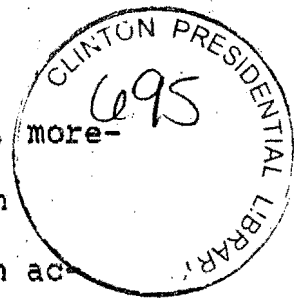
Meinhold offers no colorable reason for extending injunctive relief beyond him. Despite his assertion now that he "consistently challenged the policy's application to all gay men and lesbians," see Meinhold Br. 43, the only injunctive relief he specifically requested in his amended complaint was to "enjoin Defendants from continuing to separate Meinhold from the Navy" ER 32. Having failed to seek or obtain class certification pursuant to Federal Rule of Civil Procedure 23, Meinhold may not assert the rights of other persons or obtain injunctive relief on their behalf. See Zepeda v. United States INS, 753 F.2d 719, 727-30 & n.1 (9th Cir. 1983).¹³

¹² Notably, the district court's sweeping order not only invalidated DOD's former policy, it also obstructs implementation of the President's subsequently announced interim policy on homosexuality, as well as a new policy -- framed by the Executive and Legislative Branches following a comprehensive six-month review -- that DOD is prepared to implement this month. The Constitution vests the Political Branches with "plenary" authority to make decisions regarding the "composition" of the military. See Chappell, 462 U.S. at 301; Rostker, 453 U.S. at 65. Separation of powers principles require that the Judicial Branch permit the Political Branches, in the first instance, to determine suitability criteria for military service. Only after the new policy has been applied to individual service members would it be appropriate for the courts to decide challenges to its constitutionality. This provides an independent reason for reversing the injunction to the extent it confers relief on persons other than Meinhold.

¹³ 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 Bressal; (2) in conflict with United States v. Mendoza, 464 U.S. 154 (1984); and (3) has not been subsequently fol-

(continued...)





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).

Meinhold relied upon these same assertions in seeking to have
the government held in contempt for violating the injunction. The
district court declined to hold that the government had violated its
injunction, although it issued an amended injunction. 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 supplemental brief.

¹³ (...continued)

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.

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In any event, any objectionable "conduct 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.), the court on September 28, 1993, relying on the nationwide effect of the injunctive order issued here, preliminarily enjoined the discharge of the individual plaintiff. 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. For example, in Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), the Supreme Court state that, rather than deciding initially whether the challenged zoning ordinance was "facially invalid," it would first inquire whether the application of the ordinance "in the circumstances here deprives respondents of the equal protection of the laws." Id. at 447 (emphasis added). "This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." Id. Here, rather than following the "preferred course of [constitutional] adjudication" and inquiring first whether the application of DOD's policy to Meinhold "in the

(continued...)

CONCLUSION

For the foregoing reasons, as well as those discussed in our opening brief, this Court should vacate the district court's judgment of January 29, 1993, and remand with instructions to dismiss Meinhold's complaint pending exhaustion of his administrative remedy. Alternatively, this Court should vacate and remand with instructions to defer adjudication of the constitutional issue pending resolution of the nonconstitutional estoppel issue. Alternatively, this Court should reverse the district court's entry of summary judgment for Meinhold and remand for entry of judgment in favor of DOD on the equal protection issue. Alternatively, this Court should vacate the injunctive order to the extent it goes beyond enjoining Meinhold's own discharge.

Respectfully submitted,

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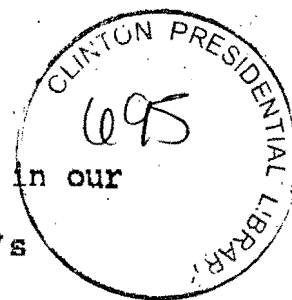
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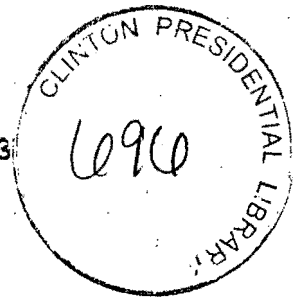
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circumstances here deprive[d] [him] of the equal protection of the laws," id., the court precipitously issued a broad constitutional judgment, declared DOD's policy facially invalid, and entered a nation-wide injunction. The court's extension of relief to persons other than Meinhold was serious error and should be reversed.



draft -- 10/11/93

No. A-____



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES DEPARTMENT OF DEFENSE, ET AL., APPLICANTS

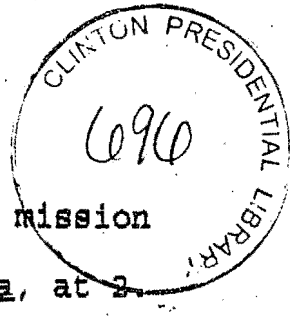
v.

VOLKER KEITH MEINHOLD

EMERGENCY APPLICATION FOR A STAY PENDING APPEAL
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the Department of Defense and the Secretary of Defense, respectfully applies for a stay of the orders entered by the United States District Court for the Central District of California (Hatter, J.) on January 28 and September 30, 1993, pending appeal of those orders to the United States Court of Appeals for the Ninth Circuit.

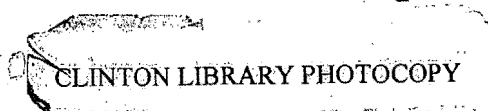
In this action brought by an individual challenging his discharge from the United States Navy for homosexuality, the district court granted a nationwide injunction that bars the Department of Defense from discharging, denying enlistment, and taking certain other actions against any person "based on sexual orientation," except in cases involving "proven sexual conduct --

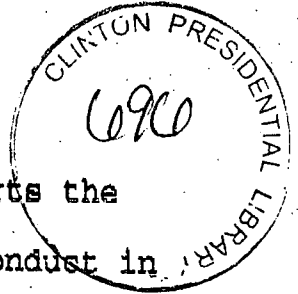


if such conduct is proven to interfere with the military mission of the armed forces of the United States." App. H, infra, at 2. The injunction also prohibits the Department from maintaining or creating "any record of file * * * based on sexual orientation," with the same exception for "proven sexual conduct." Ibid. (emphasis added).

The court clearly erred with respect to issues of great importance. The nationwide injunction entered in this non-class action conflicts with decisions of numerous courts of appeals holding that an injunction may not be broader than necessary to provide relief to the parties before the court. In addition, the order involves the court in the management and discipline of military personnel, a responsibility which, as this Court has recognized, is confided by the Constitution to the political branches and in which courts have little competence. Moreover, the district court's decision on the merits conflicts with decisions upholding the military's treatment of homosexual conduct by servicemembers.

The district court's order will cause irreparable harm unless it is stayed pending appeal. First, it requires the Department to identify and destroy all records "based on sexual orientation." Second, it hampers the investigation and processing of servicemembers suspected of homosexual conduct that cannot be "proven" under the vague standard in the order. Third, it encourages servicemembers to circumvent established administrative procedures for addressing matters such as



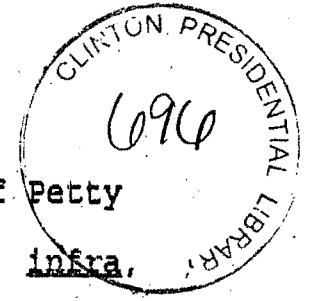


harassment based on sexual orientation. Fourth, it thwarts the implementation of the President's Policy on Homosexual Conduct in the Armed Forces. Fifth, it creates grave uncertainty regarding acceptable conduct by servicemembers, such that servicemembers may make statements regarding their homosexual conduct or take other actions that they believe are permitted under the order but that are the basis for discipline or discharge under the President's Policy and pending legislation.^{1/}

STATEMENT

1. In May 1992, the plaintiff, Volker Keith Meinhold, announced on a television broadcast that he is a homosexual.

^{1/} Appended to this application are the First Amended Verified Complaint for Equitable Relief and Injunction (App. A, infra); the January 28, 1993, Order and Judgment of district court granting summary judgment and a permanent injunction in favor of Meinhold (App. B, infra); the January 28, 1993, Amended Opinion of the district court ruling on cross-motions for summary judgment (App. C, infra); the February 19, 1993, Order of the district court denying the government's motion for clarification or, in the alternative, for stay pending appeal (App. D, infra); the March 12, 1993, Order of the court of appeals denying the government's emergency motion for a stay pending appeal (App. E, infra); the September 22, 1993, Order of the district court ordering the Secretary of Defense and others to appear to show cause why they should not be held in contempt (App. F, infra); the September 22, 1993, Order of the court of appeals denying the government's emergency motion for summary reversal and, in the alternative, for a stay of the district court's injunction (App. G, infra); the September 30, 1993, Amended Order and Judgment of the district court (App. H, infra); the September 30, 1993, Transcript of the hearing before the district court on the show cause order (App. I, infra); the October 8, 1993, order of the court of appeals denying the government's outstanding motions (App. J, infra); the July 19, 1993, Memorandum from the Secretary of Defense regarding "Policy on Homosexual Conduct in the Armed Forces" (App. K, infra); DOD Directive 1332.14 (App. L, infra); October 1, 1993, Memorandum from Assistant Secretary of Defense Edwin Dorn (App. M, infra) [also insert apps. for bills and affidavits].

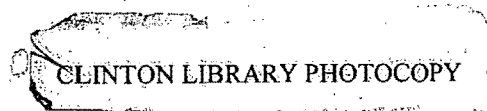


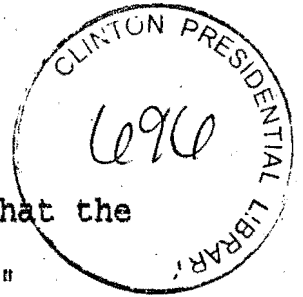
App. C, infra, at 1-2. At that time, Meinhold was a Chief Petty Officer on active duty in the United States Navy. App. A, infra, at 8. Military regulations then in effect barred service by "persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct." App. L, infra, at _____. The Navy convened an administrative discharge board to assess Meinhold's continued suitability for service under those regulations. The board concluded, based on Meinhold's televised statement, that his discharge was required under the regulations. On August 12, 1992, Meinhold received an honorable discharge. App. A, infra, at 11-12; App. C, infra, at 1-2.

Meinhold filed his complaint in this action on October 6, 1992. The complaint alleged that his discharge violated, inter alia, the "equal protection guarantees" of the Fifth Amendment. App. A, infra, at 16.^{2/} The suit was not brought as a class action, and Meinhold did not seek relief on behalf of anyone other than himself. Instead, Meinhold sought a declaration that the regulations under which he was discharged are unconstitutional and an injunction requiring his reinstatement. App. A, infra, at 17.

On January 28, 1993, the district court granted summary judgment in favor of Meinhold. Without addressing either of

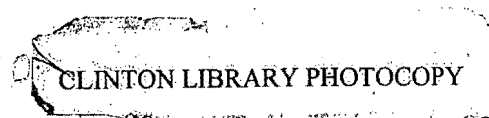
^{2/} The complaint also alleged violations of the Administrative Procedure Act, 5 U.S.C. 551 et seq., "traditional principles of equitable estoppel," and the Bill of Attainder Clause of the Constitution, Art. I, § 9. App. A, infra, at 12-16.

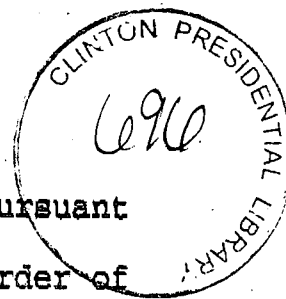




Meinhold's non-constitutional arguments, the court held that the "Department of Defense's policy banning gays and lesbians" violated the equal protection component of the Fifth Amendment. App. C, infra, at 2-6. The court issued an order "rescind[ing]" Meinhold's discharge, as Meinhold had requested. The order also went much further. It permanently enjoined the Department of Defense "from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interfered with the military mission of the armed forces of the United States." App. B, infra, at 2 (emphasis added). Nothing in the court's opinion even purported to justify the nationwide scope of the injunction. See App. C, infra, at 1-6.

2. The next day, January 29, 1993, the President directed the Secretary of Defense to undertake a comprehensive review of the military's policy regarding homosexuals. At the same time, the President directed that an interim policy be in effect until July 15, 1993. The interim policy modified existing policy in two ways. First, based on the recommendation of the Joint Chiefs of Staff, the interim policy provided that new recruits would not be questioned about homosexuality during the enlistment process. Second, the interim policy authorized the Attorney General to suspend the discharge of, and transfer to standby reserve status, any servicemember who was subject to separation based solely on his or her acknowledgement of homosexuality. S. Rep. No. 112, 103d Cong., 1st Sess. 268 (1993).

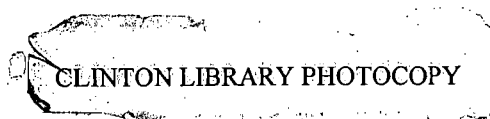


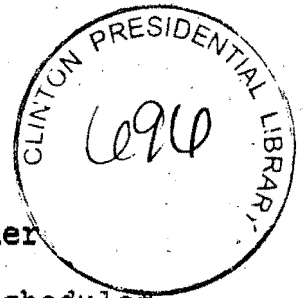


The government filed a motion in the district court pursuant to Fed. R. Civ. P. 59(e) asking the court to clarify its order of January 28, 1993, to specify that the Department could, consistently with that order, implement the President's interim policy. In the alternative, the government asked the court to stay its order pending appeal to the extent that the order granted relief other than as to Meinhold. The court denied the motion on February 17, 1993. App. D, infra.

3. On March 3, 1993, the government filed a notice of appeal from the district court's orders of January 28, 1993, in the United States Court of Appeals for the Ninth Circuit. That same day, the Government filed an emergency motion asking the Ninth Circuit to stay the district court's order pending appeal, to the extent it conferred relief on persons other than Meinhold.

On March 12, 1993, the Ninth Circuit denied the motion. It recognized that "there is a legitimate dispute as to whether the permanent injunction entered by the district court should extend beyond Meinhold." App. E, infra. It nonetheless denied relief because it discerned no conflict between the injunction and the interim policy. In particular, it determined that the Department of Defense could, consistently with the injunction, transfer to reserve servicemembers who had acknowledged being homosexual to standby reserve status, because "transfer to standby reserve is not a discharge from military service." Ibid.



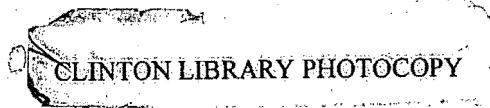


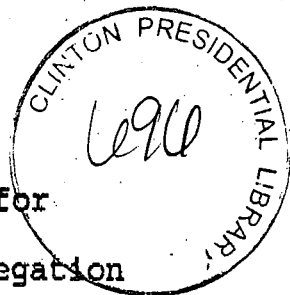
The government's appeal of the district court's order proceeded to briefing. Oral argument on the appeal is scheduled for December 1993.

4. On July 19, 1993, the President announced a new policy regarding homosexual conduct by members of the armed forces. App. K, infra. The policy is based on an exhaustive six-month review of existing policy by the Secretary of Defense in consultation with the Joint Chiefs of Staff, the acting secretaries of each department of the military, and the Department of Justice. 7/20/93 Tr. of Hearing Before the Senate Comm. on Armed Services 15-17 (testimony of Secretary of Defense Les Aspin); see also id. at 22-24 (testimony of General Colin Powell).

Briefly, the policy addresses three areas: accession, discharge, and investigations. With regard to accession, the policy provides that applicants for military service will not be asked if they are homosexual, but they will be told that homosexual conduct by servicemembers is prohibited. App. K, infra, at 4. The policy further provides that "[t]he military will discharge members who engage in homosexual conduct, which is defined as a homosexual act, a statement that the member is homosexual or bisexual, or a marriage or attempted marriage to someone of the same gender." Ibid. With regard to investigations, the policy provides that no investigations or inquiries will be conducted solely to determine a servicemember's sexual orientation. Commanders will initiate an investigation or

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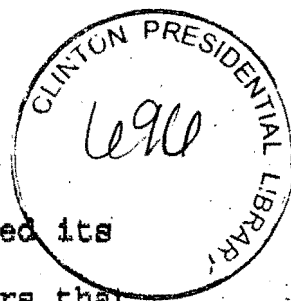




inquiry when there is credible information that a basis for discharge or disciplinary action exists; however, an allegation or statement by another that a servicemember is a homosexual, alone, is not grounds for either a criminal investigation or a commander's inquiry. Ibid. The directive announcing the policy stated that the Secretaries of the Military Departments and responsible officials in the Office of the Secretary of Defense were to implement the policy by October 1, 1993. Id. at 3.

5. On September 7, 1993, the government filed an emergency motion in the Ninth Circuit seeking partial summary reversal, or, in the alternative, a stay pending appeal of the injunction to the extent that it confers relief on persons other than Meinhold. In support of the motion, the government explained that the injunction barred implementation of the President's new policy. On September 21, 1993, the Ninth Circuit denied the motion without written opinion and directed that the appeal be scheduled for oral argument in December 1993. App. G, infra. On September 30, 1993, the government filed an emergency motion for reconsideration with a suggestion for reconsideration en banc.

6. Also on September 30, 1993, the district court held a hearing on its order of September 22, 1993, (App. F, infra) directing officials in the Department of Defense to appear and show cause why they should not be held in contempt for violating the injunction entered on January 28. At the hearing, Meinhold argued that the government had violated the injunction by implementing the President's new policy as to persons other than

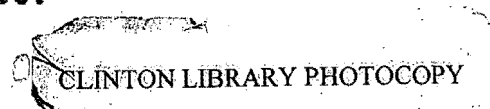


Meinhold. See App. I, infra, at 8-12. The court indicated its willingness to entertain claims by non-party servicemembers that the Secretary was violating its injunction. Id. at 31. It declined, however, to make a finding of contempt. Id. at 37.

Instead, the district court issued an amended order broadening the injunction entered on January 28. App. H, infra. The amended order, like the order of January 28, purports to grant injunctive relief to the 5.1 million servicemembers worldwide and to all persons seeking to become servicemembers. The amended order enjoins the Department from taking any of the following actions "based on sexual orientation in the absence of proven sexual conduct -- if such conduct is proven to interfere with the military mission of the armed forces of the United States":

- (1) "discharging, changing enlistment status or denying enlistment to any person";
- (2) "creating or maintaining * * * any record or file, including, but not limited to, lists, evaluations, reports, classifications, and designations, whether official or unofficial, at any level of command, of any member of the armed forces of the United States"; and
- (3) "any actions whatsoever, * * * against gay or lesbian service members, or prospective service members, that in any way affects, impedes, interferes with, or influences their military status, advancement, evaluation, duty assignment, duty location, promotion, enlistment or reenlistment."

App. H, infra. The district court stated at the September 30 hearing that it would punish future violations of its new and broader injunction with fines "at a minimum of \$10,000 per day." App. I, infra, at 36.





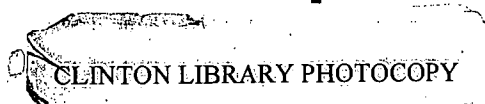
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7. The Government filed a notice of appeal from the amended order and judgment on the day that it was entered, September 30, 1993. On October 1, 1993, the Government filed: (1) an emergency motion, with suggestion for initial consideration en banc, for partial summary reversal, or a stay pending appeal, of the portion of the district court's September 30, 1993, amended order and judgment that afforded relief to persons other than Meinhold; and (2) an emergency motion for an immediate stay of the amended order and judgment pending disposition of the motion for partial summary reversal or stay pending appeal.^{3/}

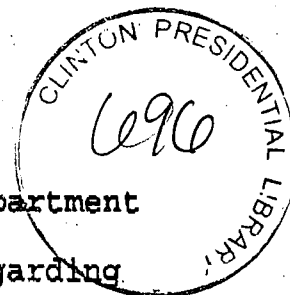
On October 8, 1993, the Ninth Circuit issued an order (App. J, infra) denying all of the government's outstanding motions.^{4/}

^{3/} The government also filed a supplemental memorandum in support of its motion for reconsideration of its motion for partial summary reversal or a stay of the district court's January 28, 1993 order, informing the court of appeals of the district court's newly entered amended order and judgment. In addition, the Government filed a motion for consolidation of its appeals from the January 28, 1993, order and the September 30, 1993, amended order and judgment. On October 6, 1993, the court of appeals granted the motion to consolidate the appeals.

^{4/} The October 8, 1993 order of the court of appeals denied the government's motion for reconsideration of the court's September 22, 1993 order (which had denied the Government's motion for partial summary judgment or a stay pending appeal of the district court's January 28, 1993 injunctive order to the extent that order conferred relief on persons other than Meinhold); rejecting the government's suggestion for reconsideration en banc of that motion; denying the government's motions for an immediate stay and for partial summary reversal or a stay pending appeal, of the portion of the district court's September 30, 1993, amended order and judgment that extended relief to persons other than Meinhold; and rejecting the government's suggestion for en banc consideration of its motions concerning the district court's September 30, 1993, amended order and judgment.



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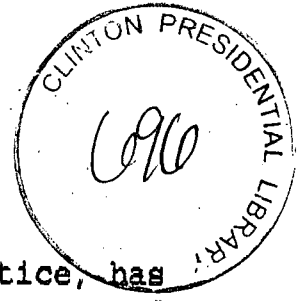
8. But for the district court's injunction, the Department of Defense would implement the President's new policy regarding homosexual conduct in the armed forces by October __, 1993. That policy has essentially been codified in bills passed by the House of Representatives and the Senate. The passage of those bills followed extensive hearings in which the congressional committees received testimony from military leaders, military historians, sociologists, and citizens. Each bill includes a list of findings, including the following finding:

The presence in military units of persons who, by their acts or statements, demonstrate a propensity to engage in homosexual acts, would create an unacceptable risk to the high standards of morale, good order, and discipline, and unit cohesion that are essential to effective combat capability.

App. __, infra. The committees recognized that that finding, and the resulting policy set forth in the bills, conflicts with the district court's decision in this case. S. Rep. No. 112, supra, at 285-286; H.R. Rep. No. ---, 103d Cong., 1st Sess. __ (1993). The committees observed, however, that the district court's decision is "not consistent with the decisions of other federal courts that have considered the [Department of Defense] policy." S. Rep. No. 112, supra, at 286; see also H.R. Rep. No. __, supra, at __. To comply with the injunction, Assistant Secretary of Defense Edwin Dorn issued a memorandum on October 1, 1993, directing the military services to end all discharges or other adverse action against any service members or recruits "based solely on his or her homosexual orientation or statements of homosexuality." App. M, infra.

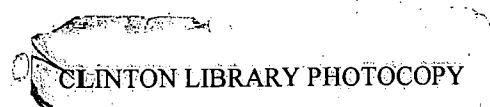
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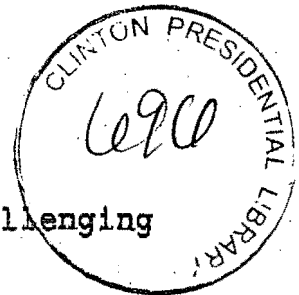
ARGUMENT



It is well settled that this Court, or a single Justice, has authority under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, to stay a district court order pending appeal to the court of appeals. See U.S. Department of Justice v. Rosenfeld, 111 S.Ct. 2846 (1991); Bureau of Economic Analysis v. Long, 450 U.S. 975 (1981); Heckler v. Redbud Hospital Dist., 473 U.S. 1308 (1985) (Rehnquist, Circuit Justice); Heckler v. Lopez, 463 U.S. 1328 (1983) (Rehnquist, Circuit Justice); R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice § 17.13 (6th ed. 1986). An application for a stay in these circumstances calls for a weighing of (1) the probability that the courts below were in error; (2) whether irreparable injury may occur absent a stay; and (3) the public interests that may be affected. See Republican State Central Comm. v. Ripon Society, 409 U.S. 1222, 1224 (1972) (Rehnquist, Circuit Justice); see also California v. American Stores Co., 492 U.S. 1301 (1989) (O'Connor, Circuit Justice); John Doe Agency v. John Doe Corp., 488 U.S. 1306 (1989) (Marshall, Circuit Justice). Those factors strongly support a stay in this case.

1. The district court's nationwide injunction violates fundamental principles governing the permissible scope of injunctive relief. As this Court and numerous courts of appeals have recognized, an injunction may be no broader than necessary to afford relief to the parties before the court. The injunction conflicts with those decisions. Thus, there is an overwhelming



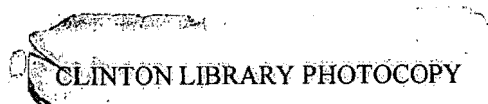


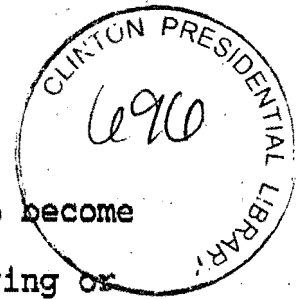
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probability that the government will be successful in challenging the scope of the injunction on appeal.

This Court has stated that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). A leading treatise similarly states: "Injunctive relief * * * cannot be granted to persons who are not before the court." 7 J. Moore, J. Lucas & K. Sinclair, Moore's Federal Practice ¶ 65.17, at 65-167 (2d ed. 1993). In order for a court to grant relief to persons other than the named plaintiffs, the court must properly certify a class action under Fed. R. Civ. P. 23. Otherwise, "[w]henever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases." Zepeda v. United States Immigration & Naturalization Serv., 753 F.2d 719, 730 n.1 (9th Cir. 1983). "[S]uch broad authority has never been granted to individual plaintiffs absent certification of a class." Ibid.; accord, e.g., Bresgal v. Brock, 843 F.2d 1163, 1170-1171 (9th Cir. 1987).

Under these principles, the district court's injunction is plainly overbroad. Meinhold is the only plaintiff in this case. He did not bring this suit as a class action. Moreover, the injunctive relief he sought, a rescission of his discharge, was solely for his own benefit. The injunction nonetheless purports to grant relief for the benefit of the 5.1 million members of the



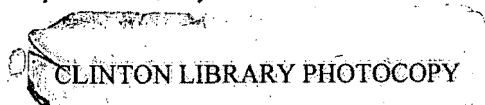


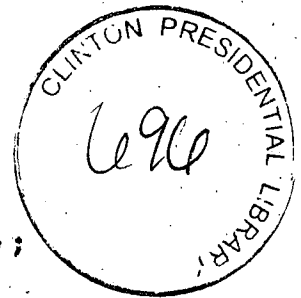
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United States armed services and all persons who seek to become servicemembers. It enjoins the defendants from discharging or denying enlistment to "any person," and from creating or maintaining "any file or record," based on sexual orientation, except in cases of "sexual conduct * * * proven to interfere with the military mission of the armed force of the United States." App. A, infra, at _____. This breathtakingly broad order far exceeds what was necessary to provide Meinhold with relief.

What's
Contact:

In analogous circumstances, at least three other circuits have invalidated injunctions granting relief to nonparties. In Lever Brothers Co. v. United States, 981 F.2d 1330, 1338 (1993), the D.C. Circuit vacated an injunction to the extent that it barred the Customs Service from enforcing a regulation as to all foreign goods, and not merely those of the plaintiff's foreign affiliates. In Brown v. Trustees of Boston Univ., 891 F.2d 337, 361 (1989), cert. denied, 496 U.S. 937 (1990), the First Circuit vacated that portion of a district court order that enjoined a university from discriminating on the basis of sex with respect to the appointment, promotion, and tenure of all faculty members, and not just the plaintiff. Finally, in Everhart v. Bowen, 853 F.2d 1532, 1538-39 (1988), rev'd on other grounds, 494 U.S. 83 (1990), the Tenth Circuit vacated a statewide injunction barring the Social Security Administration from enforcing a regulation that was held invalid as applied to a single disability claimant. See also, e.g., Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875, 887-91, modified on other grounds, 809 F.2d





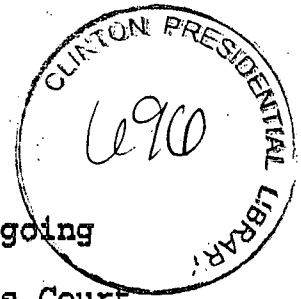
979 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988); Professional Ass'n of College Educators v. El Paso County Community College Dist., 730 F.2d 258, 273-74 (5th Cir.), cert. denied, 469 U.S. 881 (1984); Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974); Tape Head Co. v. RCA Corp., 452 F.2d 816, 819 (10th Cir. 1971).^{5/}

In Brown, the First Circuit agreed with the university's argument that an injunction in a non-class action prohibiting sex discrimination against all faculty members would improperly "embroil the courts in the university's internal affairs, allowing faculty members to circumvent administrative procedures by simply invoking the contempt jurisdiction of the district court whenever a dispute arose." 891 F.2d at 361. Similar considerations apply with even greater force here. The district

^{5/} In Soto-Lopez v. New York City Civil Service Comm'n, 840 F.2d 162, 168 (2d Cir. 1988), the Second Circuit held that an injunction benefiting nonparties was appropriate, reasoning:

when it has been held unconstitutional to deny benefits to otherwise qualified persons on the ground that they are members of a certain group, the [defendant local governmental] officials have the obligation to cease denying those benefits not just to the named plaintiffs but also to all other qualified members of the group.

The Second Circuit's holding cannot be squared with United States v. Mendoza, 464 U.S. 154, 162 (1984), in which this Court held that a lower court decision in one case brought by individual plaintiffs is not binding upon the Government "in a case involving a litigant who was not a party to the earlier litigation." Moreover, Soto-Lopez involved an unusual procedural posture not present here; the Second Circuit issued its decision following a remand from this Court, which had resolved the merits issue in a decision that was, of course, binding nationwide. Finally, the Second Circuit has not relied on Soto-Lopez in later decisions regarding the proper scope of injunctions. For those reasons, Soto-Lopez provides no support for the district court's order.

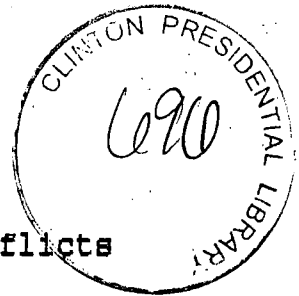


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court's injunction directly involves the court in the ongoing management and discipline of military personnel. As this Court has observed with respect to the "complex, subtle, and professional decisions as to the composition * * * and control of a military force," however, it is "difficult to conceive of an area in which the courts have less competence." Rokster v. Goldberg, 453 U.S. 57, 65 (1981). The Court's decisions accordingly reflect "concern" for the disruptive influence of allowing members of the military to circumvent administrative procedures by seeking judicial relief against their superiors. Chappell v. Wallace, 462 U.S. 296, 302-304 (1983). The district court's injunction flouts these concerns, as is clear from the court's expressed willingness to entertain claims by nonparties that the Department has violated the injunction. App. I, infra, at 31.

Meinhold has argued in the court of appeal that a nationwide injunction was justified because it is necessary to afford him effective relief. See Brief for the Appellee in No. 93-55242 (9th Cir.), at 44; cf. Brown, 891 F.2d at 361. However, thousands of employment discrimination cases involving both civilian and military employees are resolved each year by the federal courts in which the individual plaintiff is provided complete relief by an injunction limited solely to that individual. Meinhold's case is no different.^{5/}

^{5/} Meinhold has also argued that the scope of the injunction was justified by his request for declaratory relief stating that the regulations under which he was discharged are

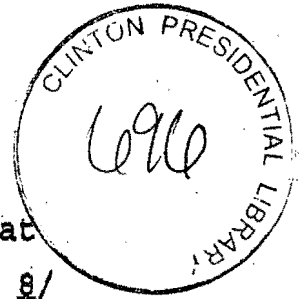


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2. The district court's decision on the merits conflicts with the decisions of all five circuits, including the Ninth Circuit, that have addressed equal protection challenges to military discharges under the regulations prohibiting homosexual conduct by servicemembers.^{7/} Those decisions recognize that courts must defer 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); see also Department of Navy v. Egan, 484 U.S. 518, 527-530 (1988) (courts must show "utmost deference" to "[p]redictive judgment[s] by Executive Branch in matters relating to the military"). In particular, the courts of appeals have

unconstitutional on their face. See Br. for the Appellee in No. 93-55242 (9th Cir.), at 43. That argument ignores a crucial difference between injunctive and declaratory relief. Under United States v. Mendoza, 464 U.S. 154 (1984), a declaration that the Navy's regulations are invalid would be binding only as between the Navy and Meinhold; it would not have subjected the defendants to contempt sanctions for implementing those regulations as to other servicemembers. See Steffel v. Thompson, 415 U.S. 452, 471 (1974); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155 (1963). Meinhold himself recognized this difference when, in the district court, he argued that defendants should be held in contempt for actions involving other servicemembers. App. I, infra, at 8-12.

^{7/} High Tech Gays v. Defense Indus. Clearance Off., 895 F.2d 563, 570-578 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 463-466 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1075-1077 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Dronenburg v. Zech, 741 F.2d 1388, 1391-1398 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); see also Schowengerdt v. United States, 944 F.2d 483, 489-490 (9th Cir. 1991) (rejecting substantive due process challenge), cert. denied, 112 S. Ct. 1514 (1992); Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980) (same), cert. denied, 452 U.S. 905 (1981).



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deferred to the determination of the Executive Branch that homosexual conduct is incompatible with military service.^{8/}

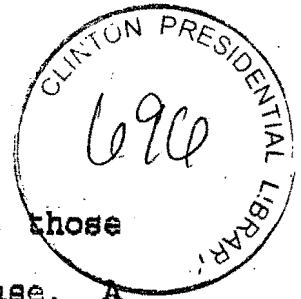
The district court expressly rejected that determination. App. C, infra, at 5. Because the district court's decision conflicts with the decision of every court of appeals to consider the issue, it is very likely to be reversed on appeal.

3. The district court's decision, unless stayed pending appeal, will cause irreparable injury. The injury stems from the vague, sweeping language in the injunction barring the defendants from Department of Defense from discharging or denying enlistment to any person, or creating or maintaining any record or file, "based on sexual orientation in the absence of * * * sexual conduct * * * proven to interfere with the military mission of the armed forces of the United States." App. H, infra, at 2-3. The injury take five distinct forms.

a. First, the order requires the Department of Defense and the Navy to undertake a massive search to identify and destroy all records "based on sexual orientation," except those involving "proven sexual conduct." App. H, infra, at 2. The burdensomeness of that requirement cannot be overstated.

Because the order encompasses "any member of the armed forces of the United States" (ibid.), the required search would have to cover files and records on some 5.1 million servicemembers (including 1.7 million on active duty, 1.8 million

^{8/} High Tech Gays, 895 F.2d at 577-578; Ben-Shalom, 881 F.2d at 466; Woodward, 871 F.2d at 1076-1077; Dronenburg, 741 F.2d at 1398; see also Bella, 632 F.2d at 810-812.



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on reserve, and 1.6 million retired). For the most part, those records are not available in a full-text computer data base. A search of the records would therefore require hand-processing of perhaps millions of pages. Moreover, the records are not in a single location; they may be found anywhere in the world that the armed forces are found. Thus, it would require an enormous expenditure of money and human resources just to set up a program for complying with the record-search requirement of the injunction.^{2/}

The district court's order does not end with requiring the identification of files and records "based on sexual orientation"; it also requires their destruction. The destruction of military personnel records plainly constitutes irreparable injury warranting this Court's intervention. Many basic records are covered by the court's order: enlistment records, which previously required servicemembers to disclose whether they were homosexual; medical records, including the records of mental health professionals; legal assistance and defense counsel records, including attorney-client communications; security records, including reports on background investigations required for security clearance; and chaplaincy

^{2/} In the court of appeals, Meinhold did not dispute that the injunction could be read to require the massive search of records described in the text. Instead, he suggested that the defendants could temporarily avoid contempt sanctions by developing a program for the records search. See Meinhold's Opp. to the Gov't's Emergency Motions Under Rule 27-3, etc., at 11 n.6. As discussed in the text, however, even the burden of putting such a plan in place is staggering.

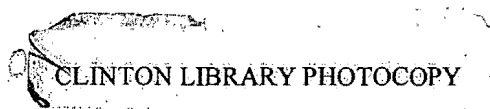


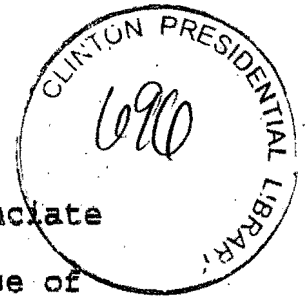
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records. Many of these records might contain information on a servicemember's sexual orientation and therefore could be subject to destruction under the district court's vaguely worded prohibition on the maintenance or creation of records "based on sexual conduct in the absence of proven sexual conduct." Those records, however, are vital to the proper management and deployment of military personnel.

b. The injunction also impairs the ability of defendants to investigate and process servicemembers suspected of homosexual conduct.

For one thing, the injunction appears to set an unattainable standard for initiating investigations of persons suspected of homosexual conduct. At the outset of such an investigation, it often is unclear whether the suspect has engaged in "sexual conduct * * * proven to interfere with the military mission of the armed forces of the United States." App. H, infra, at 2-3. Yet the district court's order may be read to require such proof before defendants can initiate and document an investigation. So read, the order squarely conflicts with the President's new policy, which authorizes the initiation of an investigation or inquiry based on "credible information" that a servicemember has engaged in homosexual conduct. App. J, infra, at 2, 4. The apparent conflict between the President's policy and the court's order with regard to initiating an investigation has already generated considerable uncertainty among commanders. [cite to affidavit].

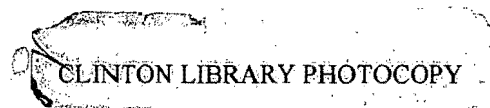


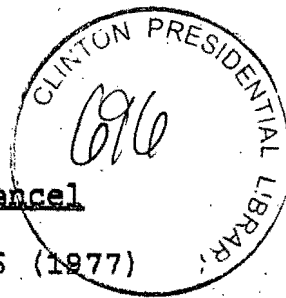


The President's policy and the courts order also enunciate different standards for discharging a servicemember because of homosexual conduct. The court's order requires "sexual conduct * * * proven to interfere with the military mission of the armed forces of the United States." App. H, infra, at 2-3. The President's policy authorizes discharge for "homosexual conduct," defined as "a homosexual act, a statement by the servicemember that demonstrates a propensity to intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." App. K, infra, at 2. It is far from clear that these standards are the same. Under the President's policy, for example, "[t]he government is not required to prove in each individual case that a service member will not remain celibate or otherwise to prove adverse impact on a specific unit." S. Rep. No. 112, supra, at 284. It is unclear whether such proof is required under the district court's order.

Because of the apparent differences between the President's policy and the district court's order with regard to the standards for investigating and processing servicemembers suspected of homosexual conduct, the validity of every such investigation and proceeding is in doubt while the order is in effect. [cite affidavit re nos. of homosexual discharges]

c. As discussed above, this Court's decisions evince particular "concern with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into





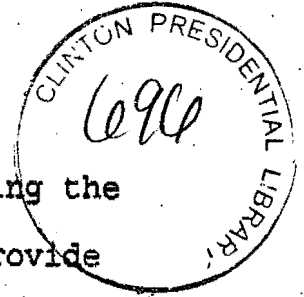
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court." Chappell v. Wallace, 462 U.S. at 304, quoting Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting), quoting in turn United States v. Brown, 348 U.S. 110, 112 (1954). The district court's order flouts that concern. The order purports to grant relief to "any person" with respect to discharges, denial of enlistment, the maintenance and creation of records, and "any action whatsoever, against gay or lesbian service members, or prospective service members, that in any way affects, impedes, interferes, or influences their military status, advancement, evaluation, duty assignment, duty location, promotion, enlistment or reenlistment based upon their sexual orientation in the absence of proven sexual conduct." App. H, infra, at 2-3. The sweeping breadth of this relief threatens to convert the district court into a specialized tribunal asserting worldwide jurisdiction over persons with claims against defendants based on sexual orientation. Indeed, the district court has indicated its willingness to entertain those claims. App. I, infra, at 31.

Those claims should be initially channeled through the administrative procedures established for processing grievances by servicemembers, and not through this district court. Congress provided for those procedures in 10 U.S.C. 938.^{10/} Each of

^{10/} 10 U.S.C. 938 provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint



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the military departments has issued regulations implementing the statute. Of particular relevance here, the regulations provide redress to servicemembers who believe that they have been mistreated because of their sexual orientation. [insert cites].

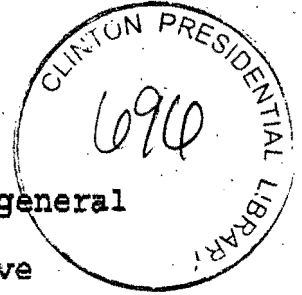
d. Because the district court's order enunciates standards for investigating and discharging persons for homosexual conduct that differ from the standards enunciated in the President's new policy, the order thwarts the implementation of the President's policy. The Secretary of Defense has been forced to suspend implementation of the policy while the order is in effect. Absent the order, the Secretary stands ready to implement the policy by October __, 1993. [cite affidavit]

The President's policy is the result of an exhaustive review by the Secretary and other high-level officials of the Executive Branch, including the Joint Chiefs of Staff. Those officials consulted extensively with members of Congress, military officers and enlisted personnel, and they considered "a huge outpouring of mail from the American people on all sides of this issue."

7/20/93 Hearing Before the Sen. Comm. on Armed Servs., supra, at 22 (testimony of Gen. Powell). The resulting policy reflects a carefully crafted compromise on an extraordinarily sensitive

to the officer exercising court-martial jurisdiction over the officer against whom it is made. The officer exercising court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

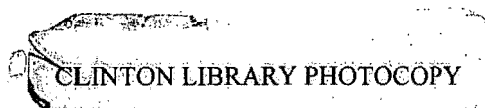
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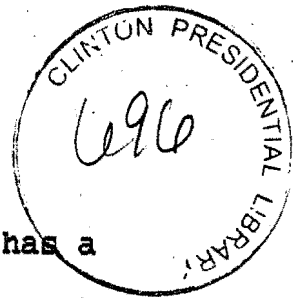


issue of great importance to both servicemembers and the general public. It has, moreover, been codified in bills that have passed each House. See Apps. ___ and ___, *infra*. The policy thus bears the clear stamp of approval of the politically accountable Branches. Its implementation should not be thwarted by a single district court in a non-class action.

e. The district court's order threatens the very persons whom it purports to benefit with irreparable injury, because it creates considerable uncertainty regarding the standards for proper conduct by homosexual servicemembers and prospective servicemembers. For example, the order could be read to prohibit the Navy from discharging a servicemember who acknowledged that he was a homosexual unless the Navy was able to establish that his acknowledgement of homosexuality would "interfere with the military mission of the armed forces of the United States." App. H, *infra*, at 2-3. That conduct, however, could provide a basis for discharge under the President's policy under certain circumstances. Thus, the order may well embolden individuals to make statements or engage in other conduct that they believe is permitted under the order but that is a basis for discharge under the President's policy.

4. The public interest and the balance of the equities weigh heavily in favor of a stay of the district court's order. The public debate on the issue of homosexual conduct by members of the armed services has been prolonged, intense, and divisive. It has consumed the attention of the President, as Commander-in-





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Chief, other military leaders, and Congress. The public has a strong interest in having the debate resolved sooner rather than later -- so that other pressing issues of national importance may receive due attention -- and by the democratic processes rather than by court order -- so as to prevent undermining the confidence of the public and servicemembers in the ability of their elected and military officials to address the governance of the armed forces, which is vested in the Executive and Legislative Branches by the Constitution. U.S. Const. Art. I, § 8, cls. 12-14, Art. II, § 2, cl. 1.

Moreover, the irreparable harm to the government, innocent citizens, and the public that will result from denial of a stay far outweighs the harm to Meinhold that will result from a stay. Meinhold has been granted complete relief already; he has been reinstated and reassigned to his previous position. Therefore, he will suffer, at most, a delay in the vindication of his asserted, generalized interest in the nationwide scope of the injunction.

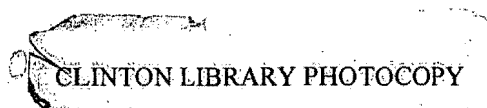
CONCLUSION

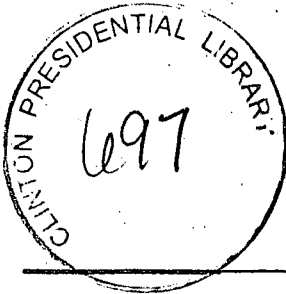
The application for a stay of the January 28, 1993, and September 30, 1993, orders of the United States District Court for the Central District of California should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1993





10/13/93
DRAFT

No. 93-55242

Cliff
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

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Dep't of the Navy

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-55242

VOLKER KEITH MEINHOLD,

Plaintiff-Appellee,

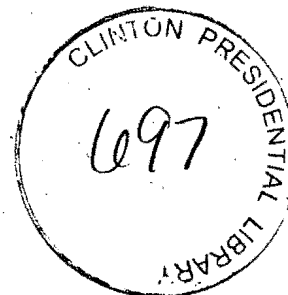
v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Defendants-Appellants.

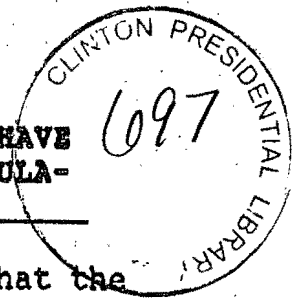
REPLY BRIEF FOR THE APPELLANTS

This brief responds to the arguments Meinhold has presented in defense of the district court's injunction entered on January 29, 1993. Point I will show that Meinhold's claim that exhaustion of administrative remedies would have been futile is inconsistent with his contention regarding the scope of the regulatory definition of "homosexual." Point II will then show that controlling decisions of this Court and the Supreme Court foreclose Meinhold's claim that the district court could properly decide his constitutional claim before disposing of his nonconstitutional estoppel claim. Even if the equal protection claim were properly presented, Point III will show that the military's former policy excluded homosexuals based upon their past homosexual acts or their propensity to commit future homosexual acts, and that this policy should be sustained under the applicable rational basis standard of review. Finally, Point IV will show that, even if it were otherwise proper, the district court's injunction is plainly overbroad insofar as it extends to "any person," rather than being limited to Meinhold's own discharge.



I.

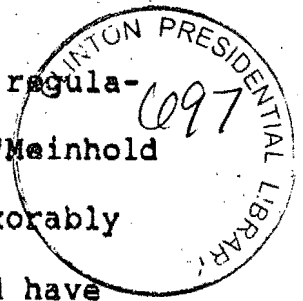
CONTRARY TO MEINHOLD'S ARGUMENT, EXHAUSTION WOULD NOT HAVE BEEN FUTILE BECAUSE HE CONTESTS THE SCOPE OF DOD'S REGULATORY DEFINITION OF "HOMOSEXUAL."



Our opening brief, see Gov't Br. 12-18, demonstrated that the district court should have dismissed Meinhold's complaint pending exhaustion of intramilitary remedies. Exhaustion was particularly appropriate given Meinhold's own statement that "the equal protection claim is [not] central to this case" and it "need not even be reached" because the nonconstitutional arguments "are determinative of the outcome of this action." Plaintiff's Response to Defendants' Application for a Stay of Proceedings at 3, 5 (Oct. 20, 1992).

Meinhold defends the district court's holding that exhaustion would have been futile. See Meinhold Br. 7-9. At the same time, however, Meinhold disputes which categories of persons fall within the regulatory definition of "homosexual" so as to be dischargeable. As our opening brief explained, see Gov't Br. 21-24, DOD's regulations apply to those who either have engaged in past homosexual acts or who by their statements indicate a propensity to engage in future homosexual acts. Meinhold argues for a much more expansive construction, contending that the regulations "mandate[] the discharge of all gay and lesbian service members solely on the basis of their status . . . regardless of their conduct." See Meinhold Br. 11.

Meinhold's two arguments are incompatible. Exhaustion cannot be held to be futile when the administrative process could have provided a definitive agency resolution of any dispute over the construction of the regulation as applied to Meinhold. See McKart v. United States, 395 U.S. 185, 194-195 (1969). Alternatively, if Meinhold is correct that exhaustion would have been futile, it is



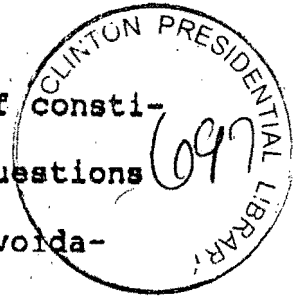
only because he does not dispute that he falls within DOD's regulatory definition of "homosexual." In his brief, he states: "Meinhold has repeatedly acknowledged that he is gay. It follows inexorably that exhaustion of administrative remedies in the Navy would have resulted in ~~Meinhold's discharge~~." Meinhold Br. 7. This statement may ~~indeed be an admission~~ that he commits, or will likely commit, homosexual acts. In any event, ~~Meinhold cannot both:~~ (1) dispute that he falls within 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



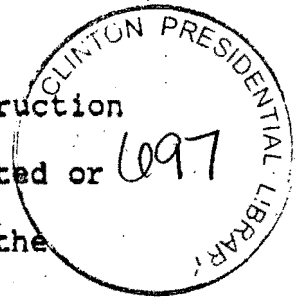
doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." 323 U.S. at 105. The Court held that the court of appeals had improperly reached the constitutional issue of whether a state tax violated the Commerce Clause. The Supreme Court remanded the case to the district court with the direction to hold the case until a proceeding could be brought in state court to resolve the issues regarding the construction of the state statute and its validity under the state constitution. Thus, Spector Motor Co. dispositively rejects Meinhold's argument that a court can properly decide the federal constitutional issue simply because further proceedings would be necessary to resolve the other issues. See also New York Transit Auth. v. Beazer, 440 U.S. 568, 582-83 (1979); Erickson v. United States, 961 F.2d 1299, 1302 (9th Cir. 1992).¹

III.

THE DISTRICT COURT ERRED IN HOLDING THAT THE MILITARY'S FORMER POLICY REGARDING HOMOSEXUALS VIOLATES EQUAL PROTECTION.

Even assuming that the constitutional issue were properly before it, the district court erred in holding that the military's former policy, which is set forth in DOD Directive 1332.14, see Gov't Br. Addendum 1, violates equal protection. In responding to our brief on this issue, Meinhold makes basically two arguments.

¹ This same doctrine required the district court to dispose of Meinhold's claim under the Administrative Procedure Act before reaching the constitutional issue. Meinhold, however, appears to have abandoned his APA claim by arguing in his brief, see Meinhold Br. 8, 9 n.7, that the alleged procedural error would not affect the outcome of the Navy discharge proceeding. Plainly, Meinhold cannot continue to press his APA claim and at the same time urge this Court to skip over the merits of that claim to reach the constitutional issue.

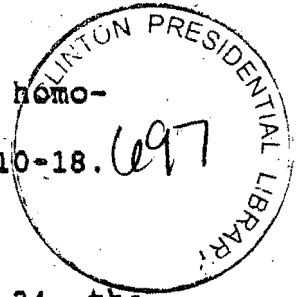


First, as indicated in Point I above, he disputes our construction of the Directive as directed toward persons who have committed or are likely to commit homosexual acts, arguing instead that the policy is directed toward homosexual status unrelated to conduct. Second, he argues that, so construed, the policy is invalid because it lacks the necessary rational basis. We address each point in turn.

A. DOD's Former Policy Excluded Persons Who DOD Concluded Have Committed Or Were Likely To Commit Homosexual Acts.

✓ 1. Meinhold does not contest DOD's authority to discharge service members who commit proscribed sexual acts, nor could he in light of binding precedent from the Supreme Court, this Court, and other courts of appeals. See, e.g., Solorio v. United States, 483 U.S. 435 (1987); Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981), cert. denied, 454 U.S. 864 (1981); Gov't Brief at 27-28 (citing cases). As this Court held in Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981): "In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to the recruiting effort," the Navy acted within its discretion in concluding that a blanket-discharge policy for homosexual conduct was necessary to preserve military effectiveness.

✓ Meinhold attempts to avoid the settled law on this issue by arguing that, because he was discharged based solely upon his statement that he was a homosexual, rather than on evidence of



specific homosexual acts, the former policy was directed to homosexual orientation unrelated to conduct. See Meinhold Br. 10-18. His argument, however, misconstrues DOD's policy.

As we explained in our opening brief, see Gov't Br. 21-24, the pertinent classification challenged in this case is persons who the military has reasonably concluded have committed or are likely to commit homosexual acts. DOD's interpretation of its own regulation is reasonable and must be accepted as the basis for the constitutional analysis. See Stinson v. United States, 113 S. Ct. 1913, 1919 (1993). "Any other approach would not be testing the [policy] in light of the purposes [DOD] sought to achieve." Rostker v. Goldberg, 453 U.S. 57, 75 (1981).²

DOD's construction is plainly consistent with the language of the Directive, which states: "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 (emphasis added). The Directive provides for the separation of any service member who "has stated that he or she is a homosexual or bisexual unless there is a further

² Meinhold incorrectly asserts, see Meinhold Br. 17-18, that DOD is advancing a newly minted argument that finds no support in the administrative record or the district court proceedings. However, Meinhold's own counsel advised the administrative board that DOD's "policy is directed towards persons who engage in homosexual conduct, or who, by their statements demonstrate a propensity to engage in homosexual conduct." [Tr. 15] (emphasis added). Similarly, the Government advised the district court that Meinhold was discharged because he declared he was a homosexual. [cite]. The regulations therefore mandated his discharge unless he showed that he was not homosexual within the meaning of the regulations; that is, unless he showed that he did not commit, or have a propensity to commit, homosexual acts. See DOD Directive 1332.14.

finding that the member is not a homosexual or bisexual."

Id. 697

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. ✓

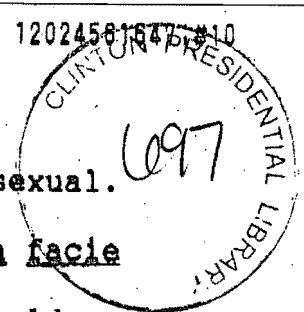
The Seventh Circuit and the Federal Circuit have both correctly held, contrary to Meinhold's argument, that the Directive targets past and prospective homosexual conduct. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068,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

[he] 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. [homosexual]

Ben-Shalom, 881 F.2d at 464.³

[homosexual orientation],

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- (continued...)



stated

In the instant case, Meinhold ~~admitted~~ that he was homosexual.

statement

Pursuant to the regulations, that ~~admission~~ constituted prima facie

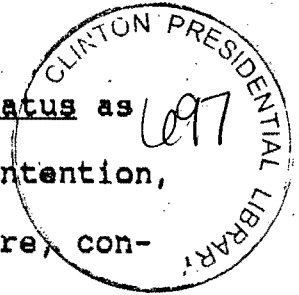
-- but rebuttable -- evidence that Meinhold engaged in, or would likely engage in, homosexual acts. Meinhold's failure to rebut the regulatory presumption mandated his discharge.

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 upon grounds of policy.") (internal quotation marks omitted).



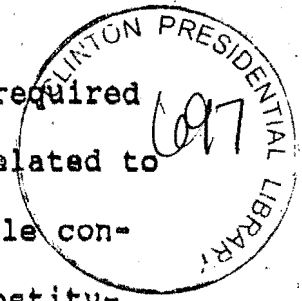
ual conduct. It is discharging members because of their status as homosexuals." 963 F.2d at 1163. Contrary to Meinhold's contention, this statement does not foreclose the Court from holding here, consistent with the regulatory language and DOD's reasonable construction, that the pertinent regulatory 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 to the court's decision is not binding authority).

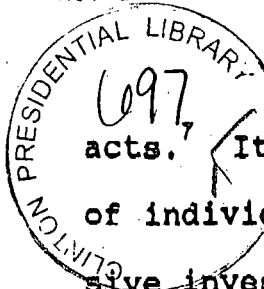


protection analysis nor considered whether the regulation required the discharge of members based solely on sexual status unrelated to conduct.⁶ Finally, this Court should accept DOD's reasonable construction of its own regulation to avoid passing on the constitutionality of a non-existent policy urged 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. ^{Instead,} "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).⁵

Of course, not everyone of a particular sexual orientation will necessarily act on that orientation. ^{Instead,} ~~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 ~~entirely~~ 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, 952 F.2d 1066, 1071 n.3 (9th Cir. 1991) (same).



acts.

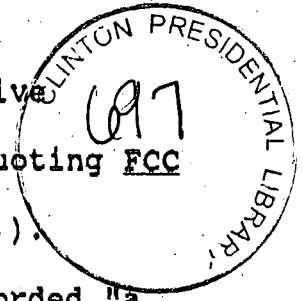
It would be ironic, to say the least, to hold that precepts of individual liberty required DOD to initiate an unavoidably intrusive investigation into the intimate details of a service member's personal life rather than accept his statements at face value and act on the basis of reasonable, and unrebutted, 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.

1. Meinhold's equal protection 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

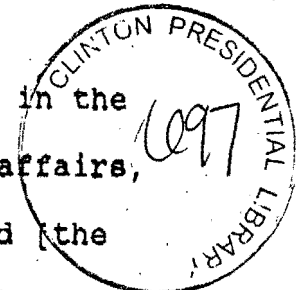
⁷ See Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1074; Steffan v. Cheney, 780 F. Supp. 1, ___ (D.D.C. 1991) (appeal pending). Accord High Tech Gays v. DISCO, 909 F.2d 375, 380 (9th Cir. 1990) (Canby, joined by Norris, JJ., dissenting from denial of rehearing en banc), (observing that persons 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] fact . . . until the adversary disproves it'").



courts to judge the wisdom, fairness, or logic of legislative choices." Heller v. Doe, 61 U.S.L.W. 4728, 4730 (1993) (quoting FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993)). Classifications subjected to rational basis review are accorded "a strong presumption of validity," and they must be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller, 61 U.S.L.W. at 4730. The Government "has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" Id. (quoting Beach Communications, 113 S. Ct. at 2102). "'[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." Id. at 4730 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). Finally, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends [and despite the fact that] 'in practice [the classification] results in some inequality.'" Id. at 4730 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970), and Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).⁸

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 this policy. See Gov't Br. 25 n.10. Nevertheless, DOD satisfied the heightened evidentiary requirements of Pruitt by submitting record evidence to support its policy. See Gov't Br. 26-27. The

(continued...)



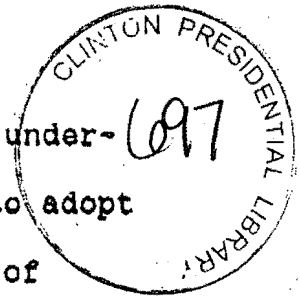
Significantly, this case involves rational-basis review in the context of matters involving "national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded [the Political Branches] greater deference." Rostker, 453 U.S. at 64-65.

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~~ ^{individuals} 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 insubstantial. The declarations were offered in support of our own motion for summary judgment and that motion opposed Meinhold's motion.

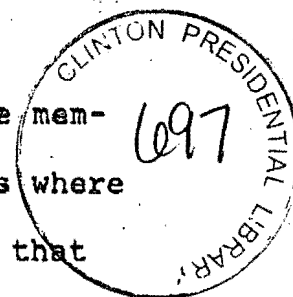


incorrect. As we show below, given the legitimate reasons underlying DOD's policy, equal protection does not require DOD to adopt the special exemption urged by Meinhold for that sub-class of homosexuals. See New York Transit Auth., 440 U.S. at 590-92.

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.

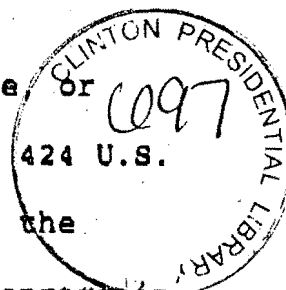
Success in combat requires military units that are characterized by high morale, good order, discipline, and a degree of unit cohesion that is unparalleled elsewhere. Unit cohesion, in turn, involves building bonds of trust and mutual respect among individual service members that make the unit as a whole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

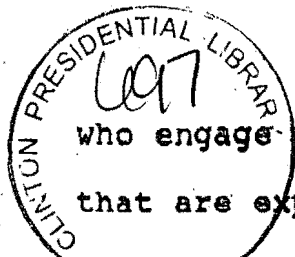
Rationality plainly permits those with responsibility for the military to prevent or remedy circumstances that they conclude would adversely affect military preparedness. "[N]othing in the Constitution . . . disables a military commander from acting to avert what



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.

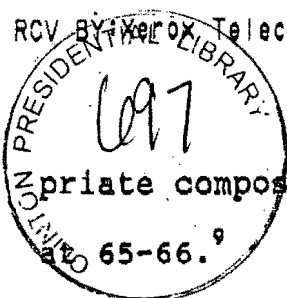
Indeed, the military's interest in determining who might engage in future homosexual acts while in the military is ^{similar} ~~substantially identical~~ to its interest in determining who has engaged in past homosexual acts. In both cases, the classification of "homosexuals" consists of persons who 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} ~~it unquestionably~~ discharge members in the former category, it ^{so too} ~~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.

DOD's policy ^{in this unique military context} 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. Ben-Shalom, 881 F.2d at 465-66. ^{See also} The policy at issue affects persons



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. ^{Behav. or cannot be} In addition, ^{said to be wholly immutable in the same sense that applies to characteristics} this Court has held: "[Homosexual behavior] is not an immutable ^{such as race and gender, see} characteristic." ^{Woodward, 871 F.2d 1076, 944} 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.

3. ^{whose statements reveal} 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 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 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 appro-

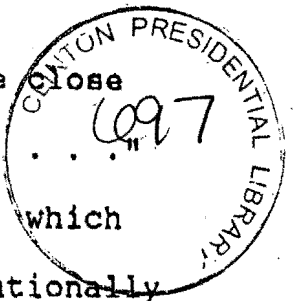


appropriate composition of the military services. See Rostker, 453 U.S.

65-66.⁹

Second, the military could consider what it determined were ^{In the unique military context,} significant concerns relating to privacy. ~~In our society, individuals are entitled to exercise strict control over circumstances that may lead to the viewing of their unclothed bodies. Being viewed while naked by a member of the opposite sex can cause significant discomfort and embarrassment. Accordingly, 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 deeply held societal values relating to modesty and decorum. DOD could rationally conclude that the presence in the military environment of persons with a known propensity to commit homosexual acts would be a disruptive intrusion into the privacy of personnel of the same sex who may object to the viewing 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.~~ ^{that they are being viewed as sex objects} ^{because of fear or embarrassment} ^{who have committed or are likely to} ^{See DOD Directive 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 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 lengthy and intense national debate on the subject involved in this case.



acute in the military given the "potential . . . of possible confinement aboard ships or bases for long periods of time"¹⁰ 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

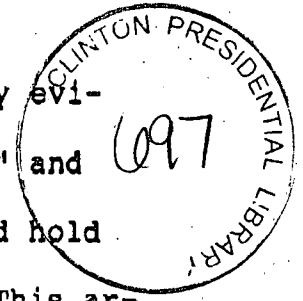
DOD also rationally concluded that a ban that did not prohibit service by those who are likely to engage in homosexual acts might adversely affect retention and recruitment, which could have a serious impact on our all-volunteer military force. See Beller, 632 F.2d at 812; Decl. Ass't Secretary of Defense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

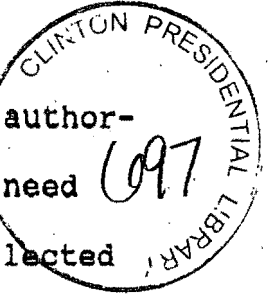
We note, moreover, that the rational-basis test does not require DOD to adopt a policy that reflects the least restrictive alternative for military service by homosexuals. [cite] Thus, in designing its homosexual policy, DOD was permitted to consider the "feasibility and adverse budgetary impact of constructing separate berthing and sanitary areas" for homosexual service members. See Decl. Rear Admiral Gallo, ER 70.

Does
this
help
?



Mainhold 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} ~~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, id. at ___, ^{So too} ~~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. The Supreme Court also has recognized that



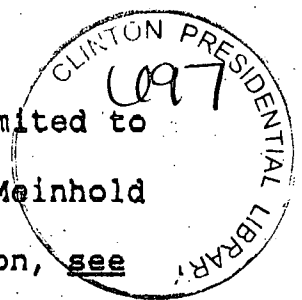
DOD is entitled, in the exercise of its broad constitutional authority over the military, "to focus on the question of military need rather than 'equity.'" Id. at 80. The challenged policy reflected DOD's views as to how to maintain military preparedness and effectiveness. Meinhold's invitation to substitute the views of his experts for "the considered professional judgment" of the appropriate military officials must be rejected. Goldman, 475 U.S. at 509.

Of course, it is possible that not all of the concerns underlying DOD's policy will apply to all service members in all instances. But that fact does not mean that the policy fails to satisfy the rational basis test. See Beller, 632 F.2d at 808-09 n.20. Rather, DOD's means of implementing the policy in question satisfies the rational relation test because legitimate policy reasons support both a military decision to exclude from service individuals who engage in homosexual acts, and an implementing regulatory scheme that reasonably infers prohibited acts from a member's admission of homosexuality. Meinhold has failed to satisfy his burden of negating every conceivable rational basis that could support DOD's policy. See Beach Communications, 113 S. Ct. at 2102. Therefore, assuming that the district court properly addressed the constitutional issue, it erred in holding that DOD's former policy on homosexuals in the military violates equal protection.

IV.

IN ANY EVENT, THE DISTRICT COURT'S INJUNCTION IS OVERLY BROAD INsofar AS IT EXTENDS BEYOND MEINHOLD'S OWN DISCHARGE.

Our opening brief demonstrated that the district court's injunction conflicts with the controlling precedents of both the Supreme Court and this Court insofar as it enjoins the discharge or

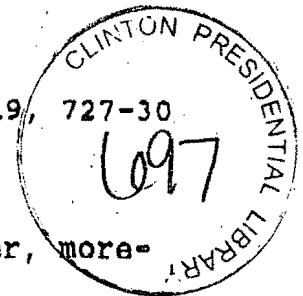


denial of enlistment of "any person," rather than being limited to Meinhold's own discharge. See Gov't Br. 31-40. Although Meinhold defends this nation-wide injunction in this non-class action, see Meinhold Br. 42-45, his argument cannot be reconciled with Bresgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987), where this Court held: "Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown," and an injunction should not extend beyond giving the "prevailing parties the relief to which they are entitled."¹¹

Meinhold offers no colorable reason for extending injunctive relief beyond him. Despite his assertion now that he "consistently challenged the policy's application to all gay men and lesbians," see Meinhold Br. 43, the only injunctive relief he specifically requested in his amended complaint, see ER 32, was to "enjoin Defendants from continuing to separate Meinhold from the Navy" Having failed to seek or obtain class certification pursuant to Federal Rule of Civil Procedure 23, Meinhold may not assert the rights of other persons or obtain injunctive relief on

¹¹ Notably, the district court's sweeping order not only invalidated DOD's former policy, it also obstructs implementation of the President's subsequently announced interim policy on homosexuality, as well as a new policy -- framed by the Executive and Legislative Branches following a comprehensive six-month review -- that DOD is prepared to implement this month. The Constitution vests the Political Branches with "plenary" authority to make decisions regarding the "composition" of the military. See Chappell, 462 U.S. at 301; Rostker, 453 U.S. at 65. Separation of powers principles require that the Judicial Branch permit the Political Branches, in the first instance, to determine suitability criteria for military service. Only after the new policy has been applied to individual service members would it be appropriate for the courts to decide challenges to its constitutionality. This provides an independent reason for reversing the injunction to the extent it confers relief on persons other than Meinhold.

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

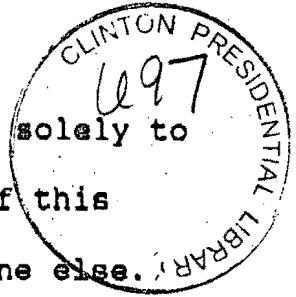


Extending injunctive relief beyond Meinhold is improper, moreover, because he can be accorded full relief by an injunction tailored solely to him. That "Meinhold's mere presence as an acknowledged gay man is a violation of Navy policy" is beside the point. See Meinhold Br. 44. If Meinhold believes that 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. Mendoza, 464 U.S. 154 (1984); and (3) has not been subsequently followed 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.

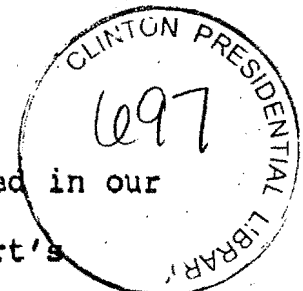
¹³ Meinhold relied upon these same assertions in seeking to have the Government held in contempt for violating the injunction. The district court declined to hold that the government had violated its injunction, although it issued an amended injunction. We have appealed that new injunction. Pursuant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



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.

CONCLUSION

For the foregoing reasons, as well as those discussed in our opening brief, this Court should vacate the district court's judgment of January 29, 1993, and remand with instructions to dismiss Meinhold's complaint pending exhaustion of his administrative remedy. Alternatively, this Court should vacate and remand with instructions to defer adjudication of the constitutional issue pending resolution of the nonconstitutional estoppel issue. Alternatively, this Court should reverse the district court's entry of summary judgment for Meinhold and remand for entry of judgment in favor of DOD on the equal protection issue. Alternatively, this Court should vacate the injunctive order to the extent it goes beyond enjoining Meinhold's own discharge.

Respectfully submitted,

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OCTOBER 1993

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Bernard Nussbaum and Clifford Sloan to President William J. Clinton re: New York Times editorial (3 pages)	09/20/1993	P5	698
002. memo	Accession Policy and Separation Policy (4 pages)	n.d.	P5	699
003. memo	Clifford Sloan to Bruce Lindsey re: Fact Sheet (2 pages)	07/16/1993	P5	700
004. memo	Anthony Steinmeyer to Mark Levy re: Assessment of Our Litigating Position in the Military Homosexual Cases (17 pages)	12/09/1993	P5	701

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Cliff Sloan
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FOLDER TITLE:

Gays in the Military - New Policy

Kelly Hendren
2006-0227-F
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Presidential Records Act - [44 U.S.C. 2204(a)]

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- 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]

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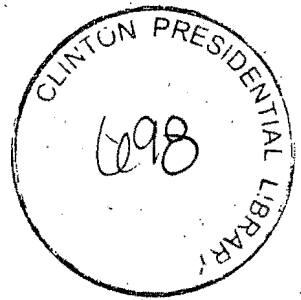
Freedom of Information Act - [5 U.S.C. 552(b)]

- 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]



THE WHITE HOUSE
WASHINGTON

September 20, 1993



MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM
COUNSEL TO THE PRESIDENT

CLIFFORD M. SLOAN
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:

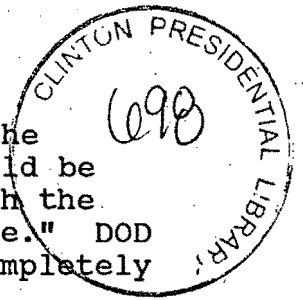
1. "[T]he Senate tepidly endorsed Mr. Clinton's order to stop asking all recruits about homosexuality, but stressed that the Secretary of Defense could reinstate the questioning at any time."

* 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."

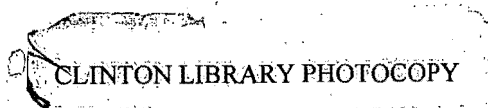
* The Nunn legislation includes a legislative finding about "unacceptable risk." ("The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the armed forces' high standards of morale, good order, and discipline, 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.

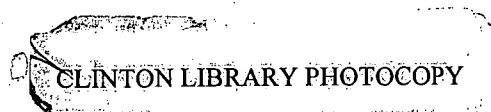
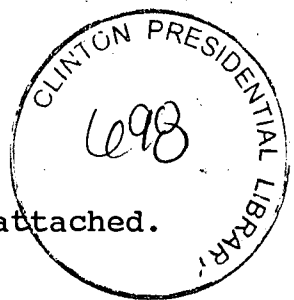
2. "The directive, at least, barred 'inquiries or investigations solely to determine a member's sexual orientation.' - Senator Nunn's proposal wipes out any such limitation."

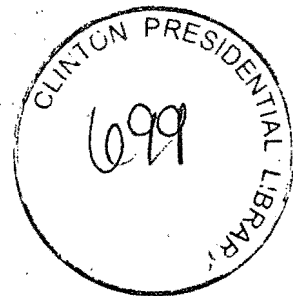
* This statement is incorrect. The Nunn legislation is silent on investigations. DOD plans to proceed with the investigative guidelines outlined in the July 19 policy.

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.





I. ACCESSION POLICY

Existing provisions:

"8. Provisions Related to Homosexual Conduct

a. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct (as defined in subsection b., below). Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

b. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

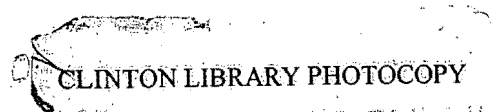
Proposed revisions:

Option 1:

"8. Provisions Related to Homosexual Conduct

a. A person's sexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct (as defined in subsection b., below). Applicants for enlistment, appointment, or induction shall not be asked or required to state whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to state whether they have engaged in homosexual conduct, unless credible independent information is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

b. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *



Option 2:

"8. Provisions Related to Homosexual Conduct

a. Sexual orientation is considered a personal and private matter. Applicants for enlistment, appointment, or induction shall not be asked or required to state whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to state whether they have engaged in homosexual conduct (as defined in subsection b, below), unless credible independent information is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

b. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

Option 3:

"8. Provisions Related to Homosexual Conduct

a. It is DoD policy to judge a person's suitability to serve in the Armed Forces on the basis of his or her conduct and ability to meet required standards of duty performance and discipline, not on the basis of his or her mere status or mental state, which are personal and private.

b. Applicants for enlistment, appointment, or induction shall not be asked or required to state whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to state whether they have engaged in homosexual conduct (as defined in subsection b, below), unless credible independent information is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

c. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

II. SEPARATION POLICY

Existing provisions:

"H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subsection b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct, as defined above.

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

Proposed revisions:

Option 1:

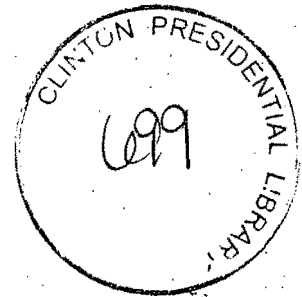
"H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subsection b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is not a bar to continued service unless manifested by homosexual conduct, as defined above.

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *



Option 2:

"H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subsection b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter.

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

Option 3:

"H. Homosexual Conduct

1. Basis

a. It is DoD policy to judge a person's suitability to serve in the Armed Forces on the basis of his or her conduct and ability to meet required standards of duty performance and discipline, not on the basis of his or her mere status or mental state, which are personal and private. A member who engages in homosexual conduct is subject to separation from the Military Services under the terms set forth in subsection b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's status or mental state, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.

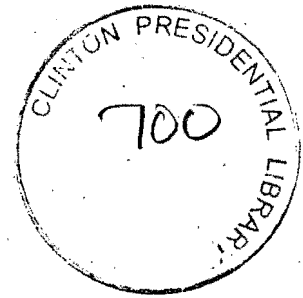
b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *



THE WHITE HOUSE
WASHINGTON

July 16, 1993



MEMORANDUM FOR BRUCE LINDSEY

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

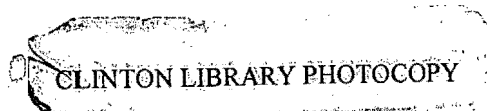
1. A possible insert to the fact sheet regarding the rebuttable presumption would be:

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.

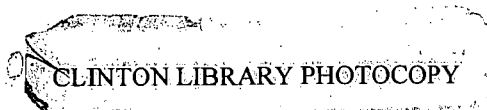
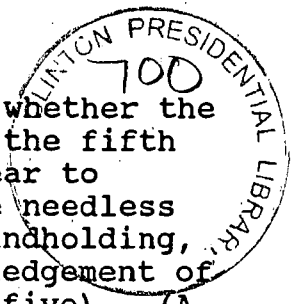
2. Conforming changes about the impact of statements will have to be made in the sections on (1) "Discharge Policy," (2) "Investigations" (1st and 4th paragraphs), and (3) "The Prohibition of Statements" (the paragraph regarding the finding of federal courts).

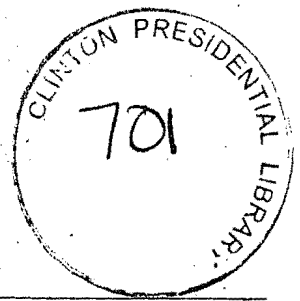
3. Two other points that occur to me on review of the policy and memorandum:

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).





Washington, D.C. 20530

December 9, 1993

MEMORANDUM

To: Mark I. Levy

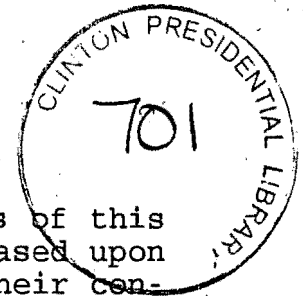
From: Anthony J. Steinmeyer *ajf*

Re: Assessment of Our Litigating Position in the Military Homosexual Cases

This memorandum will analyze the relative strengths and weaknesses of our arguments in the military homosexual cases, particularly in light of the D.C. Circuit's recent adverse decision in Steffan v. Aspin, No. 91-5409 (D.C. Cir. Nov. 16, 1993). Each of the various issues will be discussed first as they have been litigated under the old policy and then as they will arise under the new policy. As will be discussed, the new policy will eliminate or reduce some of the problems we have faced with respect to the old policy; in other respects the problems under the new policy will remain the same.

All decisions so far have held or acknowledged that the military can validly prohibit homosexual acts both on and off post during both on and off duty hours. Cf., Solorio v. United States, 483 U.S. 435 (1987) (holding that military's court-martial jurisdiction extends to heterosexual crimes against civilians committed by off-duty service members off post). This point is also made clear in the new statute. Moreover, no court yet has questioned the military's broad definition of "homosexual acts" to include not only sodomy (which is a criminal offense for all military personnel, 10 U.S.C. 925), but any "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." DOD Directive 1332.14(H)-(1)(b)(3). Indeed, the D.C. Circuit in Steffan appears (somewhat surprisingly) to have accepted the broad definition, which is repeated in the new statute. Undoubtedly, there will be future challenges to the military's authority to regulate off-post, off-duty consensual homosexual conduct, and to the prohibition of noncriminal acts, such as hand holding, dancing, or kissing, between homosexuals. The focus of the litigation so far, however, has been upon service members who state that they are homosexual, but as to whom the military presents no proof of specific homosexual acts.

STATUS VERSUS CONDUCT DISTINCTION

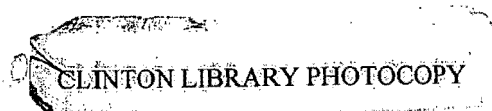


1. Old Policy. A major issue in all recent cases of this type has been whether the old policy excluded persons based upon their status as homosexually oriented persons or upon their conduct, either past homosexual acts or the likelihood that they would commit such acts in the future. The former policy provided: "The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332.14(H)(1)-(a). The Directive provided for the separation of any service member who "has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual." Id. at 1332.14(H)(1)(c)(2). "Homosexual" was defined as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." Id. at 1332.14(H)(1)(b)(1).

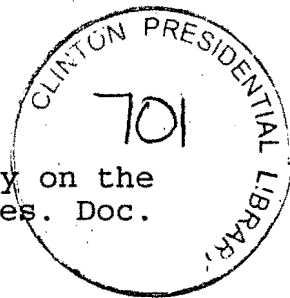
The Ninth Circuit's panel decision in Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988), vacated, 875 F.2d (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990), was the first decision to hold that this Directive targeted homosexual orientation, not conduct. On that basis the panel held the old policy violated equal protection, but that decision was vacated by the en banc court, which awarded Sgt. Watkins relief on the ground that the Army was estopped from discharging him because it had long known that he was a homosexual.

After Watkins, we argued that the old policy was directed against past conduct and the propensity of future conduct, not status. Our position was adopted by the Seventh and Federal Circuits. 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 n.6 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).

Recently, however, the D.C. Circuit and two district courts in the Ninth Circuit have held that the old policy targeted status. Steffan v. Aspin, No. 91-5409 (D.C. Cir. Nov. 16, 1993) (slip op. 14-15); Meinhold v. United States Dept. of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993), appeal pending, No. 93-55242 (9th Cir.); Dahl v. Secretary of the Navy, 830 F. Supp. 1319, 1334-1335 (E.D. Cal. 1993), appeals pending, No. 93-16844 & 93-16898 (9th Cir.). In addition, the Ninth Circuit in Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), also stated that under the old policy members were discharged "because of their status as homosexuals." This statement arguably should not be controlling in Meinhold because, inter alia, it was made in the context of the First Amendment distinction between speech and conduct. On the equal protection issue, Pruitt reached no final resolution, but merely remanded for further proceedings. Shortly after he assumed office, President Clinton de-



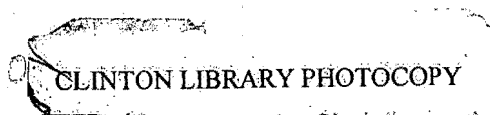
scribed the former policy as one excluding persons "solely on the basis of sexual orientation * * * ." 29 Weekly Comp. Pres. Doc. 109 (Jan. 29, 1993).

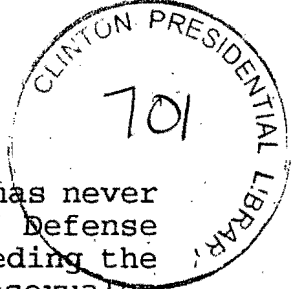


Before these recent cases and the President's statement, we had a reasonable argument that the former policy targeted conduct, not status. The difficult term in DOD Directive 1332.14 is "desires." That is, a service member who "has stated that he or she is a homosexual" will be discharged "unless there is a further finding that the member is not a homosexual * * * ." Id. at 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. at 1332.14(H) (1) (b) (1). The terms "engages in" and "intends to engage in" have not presented litigation difficulties, but opponents of the old policy centered their attack upon the word "desires," arguing that the military was proceeding against people based solely upon their thoughts unrelated to any conduct. In adopting this position, the Steffan court also relied upon the fact that a service member can avoid discharge for committing a homosexual act, provided that he shows, among other things, that he does not "desire * * * to engage in homosexual acts." DOD Directive 1332.14(H) (c) (1) (e). This provision, the court concluded, showed that heterosexuals could be retained, but those having a homosexual orientation would not, where both engage in the same conduct.

In responding to the status-conduct issue, we had three analytically sound arguments that "desires" should be construed narrowly to reach only those persons who are likely to commit homosexual acts. First, that restricted construction would harmonize "desires" with the requirement in the Directive for a "propensity to engage in homosexual conduct." Second, the narrow construction would minimize the constitutional difficulty presented by a broad construction. Finally, an agency's construction of its own regulations is entitled to deference, even if that construction is first presented in the litigation context. United States v. Lario-noff, 431 U.S. 864, 872-873 (1977).

The test case that would distinguish between the narrow and broad construction of "desires" is the case we have called the "celibate homosexual." That person is one who would truthfully say that, if he or she had sex with anyone, it would be with someone of the same gender, but the person has not had and will not have -- at least while in the military -- sex with anyone. The issue would then be whether that person is a "homosexual" within the military's definition of that term. The answer would depend on how broadly one construes "desires to engage in * * * homosexual acts." We have taken the position that a celibate homosexual does not "desire" to commit homosexual acts and so would not be discharged. Meinhold and Steffan argue that there was no such exception for celibate homosexuals and that such persons "desire" to commit homosexual acts, even though they will never act on that desire.



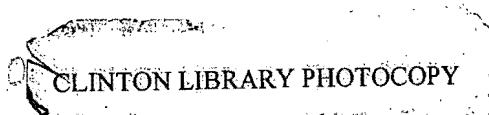


In practice, an actual case of a celibate homosexual has never arisen, so far as we are aware. Thus, the Department of Defense never authoritatively resolved in an administrative proceeding the issue of whether its former policy excluded celibate homosexuals. Moreover, no person facing discharge as a homosexual was, so far as we know, ever informed that he or she could avoid discharge by showing celibacy. Instead, the limiting construction of "desires" was developed only in our briefs and arguments in litigation. In challenging our construction, Meinhold and Steffan cited statements by the President and other Executive Branch officials that indicated that the old policy excluded persons based upon their status, not conduct. These statements weigh against our limited construction of "desires."

All four of the courts to address this issue recently have rejected our construction of the Directive. For example, the Steffan court gave "desires" a broad construction by equating "desires" and "thoughts" and, on that basis, held the Directive unconstitutional. Slip op. 13-15. Somewhat inconsistently, it also accepted our representation that celibate homosexuals would not be discharged. Id. at 13. On balance, therefore, we can expect difficulty in attempting to persuade future courts that the old policy targeted conduct, not status, even though our position on this issue has some analytical support.

2. New Policy. The central point of the new policy as announced by Secretary Aspin on July 19, 1993, is to establish a policy based upon conduct, not status. Secretary Aspin's policy memorandum stated: "Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct." The new statute, which the President signed into law on November 30, eliminates "desires" from the definition of "homosexual." It defines "homosexual" as "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian.'" 10 U.S.C. 654(f)(1) (emphasis added). The substitution of the term "propensity" for "desires" supports our position that the new policy is aimed at conduct, not status. We note, however, that the new statute does not expressly include any provision comparable to Secretary Aspin's July 19 memorandum that "homosexual orientation is not a bar to service * * *."

Whether the new statute ends the status-conduct controversy will depend on the implementing regulations to be adopted by the Department of Defense. Those regulations can be expected to define or shed light on the meaning of "propensity to engage in" in a way that either links that term closely to future conduct or permits a more expansive definition reminiscent of "desires" in the old policy. The regulations also can pick up the above-quoted language from Secretary Aspin that is not in the new statute.



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INFERRING CONDUCT FROM A STATEMENT OF HOMOSEXUALITY

1. Old Policy. The Seventh Circuit in Ben-Shalom accepted our argument that the military could reasonably infer past or future homosexual acts by a person who stated that he was a homosexual. It held that 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." 881 F.2d at 460-461.

In contrast, the D.C. Circuit in Steffan expressly found that it was irrational for the military to presume that a service member who states that he or she is homosexual will commit homosexual acts, particularly because those acts are prohibited. Slip op. 15-18. The D.C. Circuit relied upon a criminal entrapment case, Jacobson v. United States, 112 S. Ct. 1535, 1542 (1992), where the Supreme Court held:

Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it.

Jacobson is distinguishable, however, because in that criminal context, the government had the burden of "prov[ing] beyond reasonable doubt that the defendant was disposed to commit the criminal act * * *." Id. at 1540.

In the noncriminal context, the Supreme Court has held that neither Merit System Protection Board nor the courts can review the Executive Branch's "predictive judgment" as to whether to deny a security clearance necessary for employment as a civilian defense worker. Department of Navy v. Egan, 484 U.S. 518, 529 (1988). Egan also held that such predictive judgments can be based upon factors other than the applicant's past conduct. Id. at 528-529. We have a reasonable argument that Egan, rather than Jacobson, is more closely analogous to the decision as to whether a person who states that he or she is a homosexual should be retained in the military. In view of the constitutional issue presented, however, we have not contended that Egan precludes judicial review entirely in military homosexual cases; instead, we have argued that the military's determination is entitled to the utmost deference.

The conflict between Ben-Shalom and Steffan as to whether the military can reasonably infer past or future acts based upon a statement of homosexual status can reasonably be characterized as a dispute over the meaning of "desires" in the old policy. Ben-Shalom accepted our view that "desires" is equivalent to "propensity to engage in homosexual conduct." 881 F.2d at 464. Steffan equated "desires" with "thoughts" (slip op. 15), thereby defining it more expansively. Obviously, the reasonableness of the military's inference of conduct is substantially affected by whether

the inference is based upon a "propensity" for conduct or merely "thoughts."

Moreover, contrary to the Steffan court's implication, the law frequently relies upon a person's "thoughts." For example, the recent "hate-crimes" case, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993), held that the First Amendment does not bar using a defendant's statement to infer that the battery he committed was racially motivated and therefore subject to an enhanced sentence. Dawson v. Delaware, 112 S. Ct. 1093, 1097 (1992), held that even though "one's beliefs and associations" are protected by the First Amendment, they can nevertheless be admitted as evidence at a criminal sentencing procedure if they are relevant to that proceeding. Accordingly, there is nothing unusual or improper about using one's statement of homosexuality as evidence that one is likely to commit homosexual acts.

The Steffan court's holding that it is irrational for the military to infer that a person who states that he is homosexual will engage in homosexual acts is also arguably contrary to common experience. In the real world, when persons state that they are homosexuals, they mean that they engage in homosexual acts. As Judge Reinhart stated in his dissent in Watkins, "To pretend that homosexuality * * * is unrelated to sexual conduct borders on the absurd." 847 F.2d at 1361, n. 19. In addition, the plaintiffs in the class action challenging the new policy, Doe v. Aspin, Civ. Act. No. 93-1519 (D.D.C.), state in their complaint (§ 23) that "virtually no lesbian or gay servicemember can ever honestly meet" the burden of rebutting the presumption of acts based upon a statement that she or he is homosexual. For all the legal debate over "celibate homosexuals," the military has never actually encountered such a case, so far as we have been able to determine.

Indeed, Steffan himself has reportedly admitted that he committed homosexual acts with other midshipmen while he was midshipman. See Washington Times, p. A1 (Nov. 25, 1993). In this litigation, the district court initially dismissed Steffan's suit after he refused to answer questions at his deposition regarding whether he committed homosexual acts during or after his service at the Academy. He refused to answer these questions on grounds of relevance and his Fifth Amendment privilege against self-incrimination. In its first Steffan decision, the D.C. Circuit reversed the dismissal, holding that whether or not Steffan had committed homosexual acts was irrelevant because the Navy had not sought to prove such conduct when it recommended his discharge, but instead had relied solely upon Steffan's statement that he was a homosexual. Steffan v. Cheney, 920 F.2d 74 (D.C. Cir. 1990).

The Steffan decisions are vulnerable on this point. The first decision held that Steffan did not have to answer whether he committed homosexual acts while at the Academy, even though his answer would have confirmed the reasonableness of the inference of such

acts that the Navy drew from Steffan's statement that he is a homosexual. The second decision then held that this inference is irrational, despite the fact that it was correct in Steffan's case.

Thus, we have a reasonable argument based upon common sense that the military can reasonably infer future homosexual conduct from a person's statement of homosexuality. Moreover, the old policy should survive rational-basis review even if it were to exclude a few celibate homosexuals, together with those homosexuals who have engaged, or are likely to engage, in homosexual acts.

Rational-basis review does not require a perfect fit between the legitimate end to be served -- here the exclusion of practicing homosexuals -- and the means chosen to achieve that end. See Heller v. Doe, 113 S. Ct. 2637, 2643 (1993). Applying this principle, the Supreme Court upheld a transit authority's blanket regulation barring the hiring of all former heroin addicts receiving methadone treatment, even though it accepted the finding of the district court that some methadone users could safely perform some transit jobs. New York City Transit Auth. v. Beazer, 440 U.S. 568, 589-593 (1979).

On the issue of predicting conduct based upon statements, as well as other issues raised in military homosexual cases, the courts should give great deference to the judgments of the President, Congress, and military leaders. As the Supreme Court has repeatedly emphasized, the doctrine requiring deference to military decisions rests upon strong foundations. First, the mission of our armed forces -- to defend our national security in combat if necessary -- is uniquely important and demanding. Second, the Constitution entrusts the control of the military to the President and Congress. Third, the military is a unique community apart from civilian society, and its personnel are subject to restraints that civilians are not. Courts are ill-equipped to judge the impact of their decisions upon military discipline, morale, and unit cohesion. See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981).

2. New Policy. The elimination of the word "desires" and its replacement with "propensity to engage in" in the revised definition of "homosexual" strengthen our argument under the new policy that the military can reasonably infer that one who states that he is a homosexual will likely commit homosexual acts. In addition, the new policy's express "rebuttable presumption" should also support that argument, depending upon how that presumption is implemented in the new regulations.

Nevertheless, Steffan does raise a question about the validity of the new policy. Steffan held:

[W]e find that the Secretary's "propensity" argument, which presumes that "desire" will lead to misconduct, is

illegitimate as a matter of law. It cannot provide a rational basis for the DOD Directives. [slip op. 18.]

As discussed above, this holding rests upon the Steffan's expansive construction of "desires," which equates that term with "thoughts." The new policy does not draw any inference from "desires" and eliminates it from the definition of "homosexual."

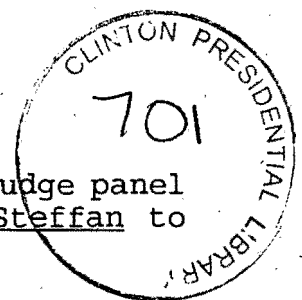
Despite these distinctions, the district courts in the D.C. Circuit may hold that Steffan is controlling on this issue. Under both the old and the new policies, a statement of homosexuality leads to the inference of past acts or the propensity to engage in future acts. To be sure, the member is now expressly given the opportunity to rebut that inference, whereas under the old policy, we argued that that opportunity was implicit. Some courts, particularly those in the District of Columbia, may hold that Steffan is controlling and that the new policy is invalid insofar as it, like the old policy, infers a propensity to commit homosexual acts from a statement of homosexuality.

At the same time, however, the Steffan court explicitly limited its holding to the old policy and expressly declined to address the new policy. Slip op. 6. In addition, the premise of the ruling is that the old policy was based on status and orientation, not conduct, and in that context it was irrational to infer a likelihood of future conduct. In those circumstances, we are entitled to take the panel at its word and not assume that Steffan condemns the new policy. While it could go either way, there is a significant chance that a different panel of the D.C. Circuit would hold that Steffan is not controlling on the new policy when such a case actually arises.

We can also argue that Steffan is not controlling for cases in the D.C. Circuit because the court's finding has been superseded by the new statutory findings. The statute now expressly provides that a service member "shall be separated" upon stating that he or she is a homosexual "unless there is a further finding * * * that the member * * * is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. 654(b)(2). This provision is supported by the express statutory finding that "persons who demonstrate a propensity or intent to engage in homosexuals acts * * * create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. 654(a)(15).

Such legislative findings of fact are entitled to the utmost deference by the courts, even in constitutional cases. See, e.g., Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985). Deference is especially warranted in the military personnel context. Rostker v. Goldberg, 453 U.S. 57, 80 (1981). Nevertheless, we cannot ignore the possibility that the district

courts in the District of Columbia and any future three-judge panel of the D.C. Circuit may hold that they are bound by Steffan to invalidate the new policy.

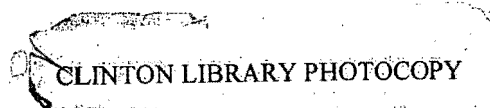


STANDARD OF REVIEW: RATIONAL BASIS OR HEIGHTENED SCRUTINY

1. Old Policy. One issue that has faded in prominence in the recent cases is whether courts are to review the military's policy using a rational-basis test or some form of heightened scrutiny. At least for cases involving homosexual acts, the courts of appeals uniformly held that the rational-basis test applies. E.g., Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984). Ben-Shalom and Woodward also applied the rational-basis test to cases involving service members who stated that they were homosexual but where there was no evidence of specific homosexual acts. Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992), then applied what it called an "active" rational-basis test. Under this test, the government was required to support its policy with objective record evidence to be weighed by the district court on remand.

In a recent case that did not involve the military or homosexuals, Heller v. Doe, 113 S. Ct. 2637 (1993), the Supreme Court clarified the rational-basis standard. The Court held that such review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Id. at 2642 (quoting FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993)). Classifications subjected to rational-basis review are accorded "a strong presumption of validity," and they must be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Id. at 2642. Thus, the classification "must be upheld * * * if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. at 2101. The government "has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" Ibid. (quoting Beach Communications, 113 S. Ct. at 2102). "'[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." Id. at 2643 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). Finally, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends," and "'in practice [the classification] results in some inequality.'" Ibid. (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970), and Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

The district courts in both Dahl and Meinhold applied a rational-basis test, but held that the former policy was invalid



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under that test. Dahl also held that the "active" rational-basis test of Pruitt did not survive Heller. 830 F. Supp. at 1326. The D.C. Circuit in Steffan held that it was unnecessary to decide "whether homosexuals, as defined solely by orientation, comprise a 'suspect' or 'quasi-suspect' class," because it, too, concluded that the former policy lacked any rational basis. Slip op. 10. Thus, no recent court has held that any form of heightened scrutiny applies, but the three most recent decisions have all held the old policy invalid under the rational-basis test.

2. New Policy. The same arguments that led courts to reject heightened scrutiny of the old policy will all apply to the new policy as well. In addition, to the extent that the new policy is more clearly tied to conduct, rather than status, we will have an even stronger argument for rational-basis review, as Steffan indicates. The deference owed to the new statute and the legislative findings upon which it is based will also strongly support our position that the new policy has the necessary rational basis.

WHETHER EXCLUSION OF HOMOSEXUALS CATERS TO PREJUDICE

1. Old Policy. We defend the rationality of the old policy basically on grounds of promoting unit cohesion, discipline, and morale, and protecting the privacy interests of heterosexual service members. We do not contend that Meinhold or Steffan -- who had outstanding military records -- or homosexuals generally cannot perform their duties satisfactorily, except insofar as their presence in a unit causes problems because of the heterosexuals' reaction to them. On this basis, Steffan held that all of our supporting rationales are impermissible under Palmore v. Sidoti, 466 U.S. 429 (1984), and City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), because the government is catering to the prejudices of heterosexuals in excluding homosexuals. The Steffan court and the district court in Meinhold compared the military's exclusion of homosexuals to its exclusion of blacks in the 1940's.

This comparison dismisses any objection to homosexuals based upon moral grounds. Particularly in the early cases upholding the old policy, the courts relied upon what they perceived to be the moral objections of a majority in our society to homosexual conduct. E.g., Dronenburg v. Zech, 741 F.2d 1388, 1397-1398 (D.C. Cir. 1984); Beller v. Middendorf, 632 F.2d 788, 811-812 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Similarly, in upholding a state's criminal sodomy statute in a civilian case, the Supreme Court rejected the claim "that majority sentiments about the morality of homosexuality should be declared inadequate." Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

We have deliberately refrained from arguing that homosexual conduct is immoral, and we have not expressly argued that the underlying reason why homosexuals interfere with unit cohesion and

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raise privacy concerns is that many heterosexual service members object to homosexuals based upon moral grounds. We have argued that "many members of the military services find [homosexual conduct] to be disturbing." Reply Br. in Meinhold 17. We also rely upon the uniform body of precedents holding that the military can exclude persons who engage in homosexual conduct, but we have not examined the bases of those precedents.

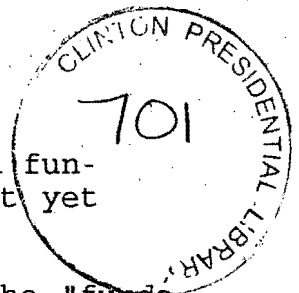
If, however, the morality issue is eliminated -- as the Steffan, Dahl, and Meinhold courts have eliminated it -- then the question arises whether in the long run any disparate treatment of homosexuals can be justified because of the objections of third parties. In our Steffan and Meinhold briefs, we have defended the policy based upon the operational concerns of the military. Military leaders defended the new policy on that same ground in their testimony before Congress on the recent statute. The argument is that the military is entitled to take action to prevent disruption to unit cohesion and to protect the privacy concerns of the majority without taking sides on the moral debate over homosexuality and without psychoanalyzing the basis for the objections to homosexuality to determine whether they rest upon prejudice, acceptable social mores, or some other basis.

Similar objections regarding unit cohesion and privacy, however, were made in the 1940's against racial integration of the military. No one would today contend that those concerns, even if factually well-founded, would justify racial discrimination. The means to deal with racial tensions is through training and discipline to foster racial integration. For the government to train its military troops to accept homosexuals in the barracks, however, would be to take sides on the morality issue where the objection to homosexuals is based upon moral grounds.

We have argued that racial discrimination is different than disparate treatment based upon homosexual conduct. First, racial discrimination is directly addressed in the post-Civil War amendments to the Constitution. The text and history of the Constitution, therefore, provide grounds for ending differential treatment based on race that are not present for matters of sexual conduct. Second, as General Powell stated:

Unlike race or gender, sexuality is not a benign trait. It is manifested by behavior. While it would be decidedly biased to assume certain behaviors based on gender or membership in a particular racial group, the same is not true for sexuality. We have successfully mixed rich and poor, black and white, male and female, but open homosexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and

well-being of the force. It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.



S. Rep. 103-112, 103d Cong., 1st Sess. 281 (1993). The "fundamental issues" to which General Powell alludes, however, are in large measure the morality issues.

Finally, it bears emphasis that it was the President who ordered the desegregation of the military, not, as here, the courts imposing a requirement that the President, the Congress, and the military all agree would impair the military mission. The enactment of the new statute shows that Congress and the Executive Branch do not consider disparate treatment of those who engage in or are likely to engage in homosexual acts to be similar to racial discrimination.

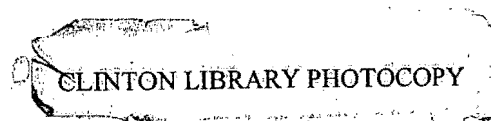
Both Palmore and Cleburne pose difficulties for us in defending the military's exclusion of homosexuals despite the incontestably legitimate operational concerns of the military regarding unit cohesion, discipline, morale, and privacy. In Palmore, the Supreme Court reversed on equal protection grounds an order awarding custody of a child to her father after the mother married a man of a different race. Applying strict scrutiny, the Court held that, despite the possible injury to the child from racial prejudice in society:

The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

466 U.S. at 433.

The same principle was applied in a rational-basis case in Cleburne. There the Supreme Court held that "irrational prejudice" or "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding," could not provide the rational basis necessary to sustain a city's requirement for a special use permit for a home for the mentally retarded. 473 U.S. at 448, 450. Although Heller can be read as endorsing a less restrictive view of the rational-basis test than Cleburne, Heller does not provide support for contending that these anti-discrimination holdings of Palmore and Cleburne no longer apply.

We have several responses to Palmore and Cleburne. First, as the Supreme Court noted in Cleburne, it was not part of the zoning board's function to ensure that neighbors get along or work well together as a team. By contrast, that is a central responsibility of the military. Therefore, while "mere negative attitudes" are not cognizable in a zoning proceeding, the military must be able to address such attitudes in a reasonable manner.



Second, insofar as the military's policy was directed at conduct, rather than status, it cannot fairly be characterized as catering to prejudice. That is particularly true with respect to homosexual conduct that is criminal, that is, conduct that constitutes either sodomy or indecent acts. 10 U.S.C. 925, 933, 934. Further, many of society's customs regarding sexual matters, such as the prohibition against public nudity, may be difficult to defend entirely upon rational grounds. That should not mean that a court can properly hold such customs unconstitutional as catering to prejudice.

Third, at least some of the opposition to homosexual conduct is based upon religious views, social mores, and privacy concerns. These cannot be fairly dismissed as mere prejudice.

Finally, even if some part of the opposition to homosexuals in the military is based upon prejudice, the military still faces an operational concern that it needs to address. Because the maintenance of unit cohesion and discipline and morale are so important, the military should have wide latitude in addressing the problem presented by homosexuals, even if a psychoanalyst might determine that part of the opposition to homosexuals rests upon the prejudice of others.

Even if some of the objections to homosexuals in the barracks did reflect prejudice, the privacy concerns appear to be based upon social customs that cannot be dismissed as prejudice. Certainly, the military can refrain from integrating men and women in the same sleeping, shower, and toilet facilities. The privacy concerns there would not be fully addressed if the military told the women that not all men would stare at them, very few men would attack them sexually, and those that did would be punished. Nor is the desire of either sex to be separated from the other based upon hostility to the other sex. Admittedly, there are distinctions between the male/female and the heterosexual/homosexual situations, but under the rational-basis test and the deference owed to military personnel decisions, it should be for the military, not the courts, to determine whether these distinctions should lead to a different result in the two cases. Thus, Steffan's dismissal of these privacy concerns in the heterosexual/homosexual situation as mere "irrational fears and stereotypes" (slip op. 22) is vulnerable to attack.

We can also attempt to address Palmore and Cleburne by posing other, morally neutral examples in which the military can exclude persons whose presence disrupts unit cohesion based upon the reaction of the others in the unit. The military can exclude those who state that they are racists, religious bigots, or communists. See Orloff v. Willoughby, 345 U.S. 83 (1953) (upholding the denial of an officer's commission to someone who refused to state whether or not he had been a member of the Communist Party); Blameuser v. Andrews, 630 F.2d 538 (7th Cir. 1980) (upholding the exclusion of a

white supremacist from officer training program). These analogies may be subject to the argument that they are distinguishable because in these examples the person's beliefs prevent him performing his military duties satisfactorily or from leading or obeying others in the racially and religiously diverse military. In contrast to homosexual cases, the disruption of military cohesion, discipline, and morale in these examples does not rest entirely, or perhaps even primarily, upon the objections of others.

Distinguishing Palmore and Cleburne based upon the military setting is, of course, subject to limitation. Despite the deference owed to the military, we would not contend that courts are powerless to reverse military decisions that catered to other forms of prejudice, such as racial or religious biases.

Thus, we do have responses to Steffan's holding that, by discharging homosexuals, the military is catering to the prejudice of others in a manner that is impermissible under Palmore and Cleburne. Whether those responses are sufficiently strong to prevail, however, is not clear. This point will remain a major focus of future litigation.

2. New Policy. These same problems will apply to defending the new policy inasmuch as the unit cohesion, discipline, morale, and privacy rationales apply equally to both. Because the new policy is more plainly directed to conduct than status, we will gain the benefit of the uniform body of precedent that the military can discharge persons who commit homosexual acts. Where the discharge is based upon a statement of homosexuality and the presumption of future homosexual acts is not rebutted, however, we will face the same kind of argument that the military is catering to the prejudice of heterosexuals. In the longer term, we can expect courts to re-examine the precedents allowing the discharge of persons who commit homosexual acts where the military cannot show a nexus between those acts and the performance of military duties. Cf., Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (requiring such a nexus to support discharge of federal civilian employee).

FIRST AMENDMENT ISSUES

1. Old Policy. Some service members who were discharged under the old policy based upon their statements that they were homosexual argued that the First Amendment barred taking adverse action against them for what they said. Two courts of appeals rejected that argument. Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992); Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). These courts held that such persons were being discharged because the statement of homosexuality was "an act of identification" and "it is the identity that makes [a person] ineligible for military service, not the speaking of it aloud." Pruitt, 963 F.2d at 1163, quoting, Ben-Shalom, 881 F.2d at 462.

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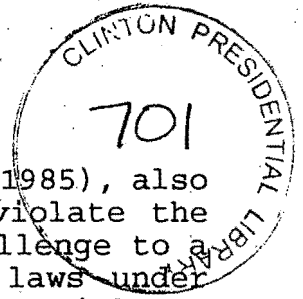
The rationale of these courts does not take into account our position that "celibate homosexuals" were not excluded under the old policy. Under our position, it is not correct that all persons having a homosexual identity were excludable. Nevertheless, after the decisions of the Seventh and Ninth Circuits, homosexual service members, such as Steffan, Meinhold, and Dahl, emphasized the equal protection issue and abandoned the First Amendment issue.

If the First Amendment issue arises again under the old policy, we have several reasonable defenses. First, the policy does not bar speech about homosexual issues generally or debate about the military's policy. The only speech affected by the policy is the act of identifying oneself as a homosexual. As Dawson v. Delaware, 112 S. Ct. 1093, 1097 (1992), and Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993), show, statements can be used as evidence even though they pertain to beliefs or associations protected by the First Amendment. Here the military should be able to use the statement, "I am a homosexual" as evidence that the person has committed or will likely commit acts which all courts have acknowledged the military can prohibit.

2. New Policy. We can anticipate First Amendment challenges to the new policy. Indeed, First Amendment claims are the primary causes of action alleged in the class action in the district court in the District of Columbia challenging the new policy. Doe v. Aspin, Civ. Act. No. 93-1519 (D.D.C.).

Analytically, the same arguments available in defending First Amendment challenges to the old policy will be equally available to us under the new policy. We can expect, however, that litigants will argue that Ben-Shalom and Pruitt assumed that the old policy excluded all homosexuals, so that the statement "I am a homosexual" was tantamount to admitting ineligibility for military service. Under the new policy, not all homosexuals are excluded. Service members who state that they are homosexual will, however, be excluded unless they can rebut the presumption of acts. Litigants will point to the fact that, if there are two homosexuals in a military unit who are alike in every other respect, but one states that he is a homosexual, he will face a discharge proceeding while the other one will not. Litigants will argue that the new policy is directed against the content of the speech, rather than the conduct inferred from the speech. That argument will certainly be made in the District of Columbia because Steffan held that no conduct can be inferred from an admission of being a "homosexual," at least where that term was defined to include one who only "desires" to commit acts.

To respond to these arguments, we will argue that statements of homosexuality, even though protected by the First Amendment, can still be properly used as evidence of homosexual acts. As discussed above, the Supreme Court's decisions in Mitchell and Dawson support that argument.



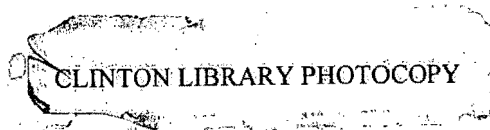
In addition, Wayte v. United States, 470 U.S. 598 (1985), also supports our argument that the new policy does not violate the First Amendment. Wayte rejected a First Amendment challenge to a passive enforcement policy of the selective service laws under which only those persons who reported themselves as having violated the law, or who were reported by others, were prosecuted. Wayte claimed that he was prosecuted solely because he was vocal in his opposition to the draft. Our opponents, however, may attempt to distinguish Wayte. They may argue that the statement of homosexuality causes the service member to change from the class of homosexuals who are not excluded to the class of those who are, unless they rebut the presumption of acts. Wayte's speech did not constitute part of the offense. His offense was knowingly failing to register for the draft. In response to this purported distinction, we can reply that speech is not the excludable offense for the homosexual either. Rather, speech is only evidence of conduct, just as Wayte's speech activity, i.e., his reporting his refusal to register to the authorities, was evidence that he had knowingly failed to register.

The First Amendment issues will blend into equal protection claims. In either context, our success will depend upon our being able to articulate a reasonable basis for distinguishing between those homosexuals who will be excluded from those who can remain in the military.

OTHER EQUAL PROTECTION ISSUES

1. Old Policy. Initially, the old policy was viewed as excluding all homosexuals. After Watkins, we refined our position in subsequent litigation by arguing that the old policy targeted conduct, not status. That led to the concession that not all homosexuals would be excluded; celibate homosexuals could serve. The Steffan court turned this concession against us by stating (slip op. 22) that our willingness to allow celibate homosexuals "casts doubt upon the seriousness of" our rationale that the presence of homosexuals in a unit will invade the privacy of heterosexual service members. We have a reasonably strong response to that holding. Not discharging celibate homosexuals is the price paid for a policy based upon conduct, not status. The countervailing interests in having a conduct-based policy would justify this exception even assuming the privacy concerns were identical. Moreover, it is not at all clear that the privacy concerns are identical with respect to celibate and non-celibate homosexuals.

2. New Policy. Steffan shows that we will face a myriad of claims that the new policy draws irrational lines between those homosexuals who can serve and those who cannot. Where precisely the lines will be drawn under the new policy will, of course, depend upon the implementing regulations that are now being drafted. Likely illustrations of the line-drawing claims we will confront include: (1) a person who everyone in the barracks thinks is a



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homosexual can serve, but if he states that he is a homosexual, he can be excluded; (2) a person who goes to a gay bar regularly can serve, but if he is seen holding hands with another person of the same gender, he can be excluded; and (3) a person generally thought to be a homosexual can serve, but someone who stated long before he sought enlistment that he was a homosexual will probably be excluded (depending upon the new regulations), even if he convincingly states that he will fully comply with the new policy while he is in the military.

In these, and countless other instances, we will be forced to defend lines drawn on the basis of small differences. Any program that is a compromise between two logically polar positions presents that kind of line-drawing problem at the margins. Many Supreme Court precedents have sustained lines drawn in close cases applying the rational-basis test. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), is particularly helpful to us. In that case, the Court upheld a federal regulation against sleeping in Lafayette Park in a case brought by demonstrators who intended to call attention to the problem of the homeless. It rejected the dissent's approach (468 U.S. at 309-312) that, since the regulations permitted 24-hour vigils and tents (and even people in tents with closed eyes), the government could not justify drawing the line at sleeping.

Thus, while we will almost surely face numerous equal protection challenges of the line-drawing type, those challenges are inevitable in programs of this kind. Supreme Court precedents will support us in defending these cases, so long as we can articulate any rational basis for the line drawn.

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Kelly Hendren
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RESTRICTION CODES

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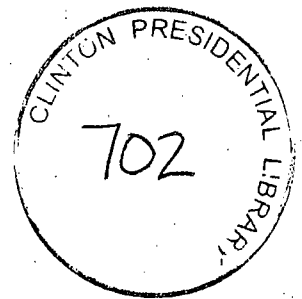
Freedom of Information Act - [5 U.S.C. 552(b)]

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



July 19, 1993

MEMORANDUM FOR THE PRESIDENT

FROM:

Joe Reno
THE ATTORNEY GENERAL

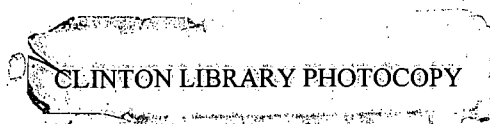
RE:

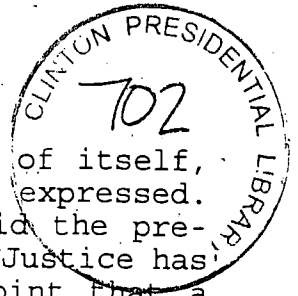
DEFENSIBILITY OF THE NEW POLICY ON HOMOSEXUAL
CONDUCT IN THE ARMED FORCES

The Supreme Court has repeatedly stated that the courts must review decisions by the President and by military commanders deferentially, taking into account the separate nature and special needs of military society. As a consequence, it is possible to justify in the military setting constraints on individual liberty and choice that might be invalid in civilian society. Because of the extraordinary deference paid by the courts to military service, we are confident that the new policy proposed by the Secretary of Defense will be upheld against constitutional challenge. Moreover, the proposed policy (hereafter, "the policy") that the Secretary of Defense has submitted changes earlier policy in three respects that should improve the ability of the Department of Justice to defend the policy in court.

First, the policy changes the premises on the basis of which questions involving the service of homosexuals in the military are to be resolved. The policy reiterates the prior Defense Department view that "homosexuality is incompatible with military service because it interferes with the factors critical to combat effectiveness." However, the policy adopts a new position that sexual orientation is a private matter and is not a bar to service "unless manifested by homosexual conduct." Under the policy, therefore, the military would be directed to judge an individual's suitability for service on the basis of conduct, and homosexual conduct (but not an unmanifested orientation) would be grounds for separation from service. We can be confident that the prohibition on acts that everyone would regard as explicitly sexual would be sustained under existing case law.

Second, the policy implements the distinction between "status" and "conduct" that you drew in your January 29 directive. Most important in this regard is the treatment of statements of homosexuality or bisexuality as creating "a rebuttable presumption that the service member is engaging in homosexual acts or has a propensity or intent to do so." First Amendment problems would





arise if the policy proscribed certain speech, in and of itself, because of disapproval of the content or the viewpoint expressed. This approach provides much clearer authority than did the pre-January policy for the argument that the Department of Justice has been making persuasively to the courts up to this point that a member who credibly disproved any intent or propensity to commit physical acts would not be subject to separation. The new policy suggests a meaningful opportunity to rebut the presumption flowing from statements of homosexuality. As a consequence, the Department of Justice will be better able to argue that the policy is not directed at speech or expression itself, and that any burdens in those respects are incidental to the achievement of an important governmental interest.

Third, the policy would substantially change pre-January investigative policies. Applicants for military service would not be questioned about their sexual orientation or behavior. Investigations would no longer be conducted for the sole purpose of determining an individual's sexual orientation. Commanders will initiate investigations only where there is credible evidence of "homosexual conduct." This change will make decisions made under the policy appear fairer, more even-handed, and conduct-based, and therefore easier to defend.

