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001. memo Tom Karr to John Holum re: Potential Challenge (17 pages)

01/10/1993

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Gays in the Military, 1993 - 1999 [3]

Kelly Hendren

2006-0227-F

kh584

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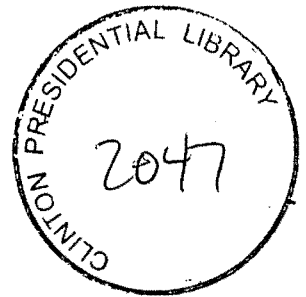
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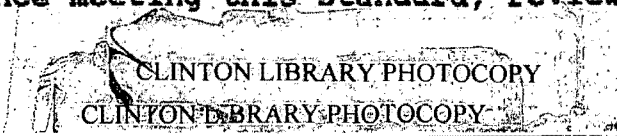
DATE: January 10, 1993
TO: John Holum
FROM: Tom Karr
SUBJECT: Potential Challenge to Standards of Behavior Focusing on Behavior's Effect on Good Order and Discipline.

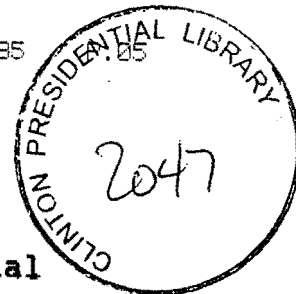
This memorandum addresses the constitutionality of potential military standards of behavior which, if implemented, would include restrictions of behavior based on the behavior's effect on good order and discipline. The implementation of such standards could lead to instances of application targeted at gays and lesbians -- for example, barring public displays of affection where it could be disruptive because of the environment in which it occurs, such as kissing between homosexuals at an NCO club.

DISCUSSION

I. Reviewability

Any adverse action taken against a member of the armed forces, of the basis of the kind of behavior described above, would almost certainly be reviewable in a court of law. Under the prevailing test, set forth in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), internal military matters may be reviewed if the plaintiff alleges violation of the Constitution, a federal statute, or a military regulation, and exhausts intraservice remedies. Once meeting this standard, reviewability depends upon





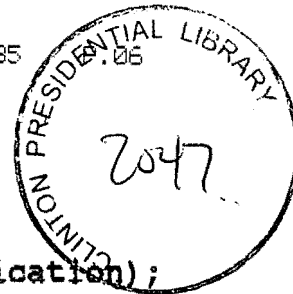
(1) the nature and strength of the claim, (2) the potential injury to plaintiff if review is refused, (3) the extent of interference with military functions, and (4) the extent to which military discretion is involved. Id. at 201-02. See also Watkins v. United States Army, 875 F.2d 699, 705 (9th Cir. 1989) (en banc), cert. denied, 111 S.Ct. 384 (1990). In general, federal courts have reviewed cases where plaintiffs claimed unconstitutional discrimination against them by the armed services on the basis of homosexuality (most often evidenced by homosexual acts). See pages 4-12, below.

II. Equal Protection Analysis

Because the standard of behavior envisioned here would appear to apply to public displays of affection by homosexuals, and not by heterosexuals, claims challenging such actions would most likely brought under as equal protection claims under the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that the equal protection claims brought against the federal government are cognizable under the Fifth Amendment).

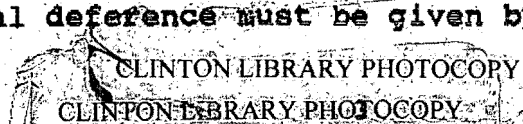
A. Standard of Review

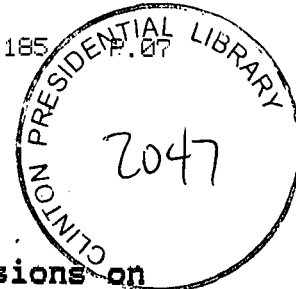
Any claim by a member of the armed services arguing that he or she was discriminated against due to sexual orientation or homosexual conduct should be judged under the lowest standard of review, the rational basis test. See Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989), cert. denied,



494 U.S. 1004 (1990) (homosexuality not a suspect classification); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571-74 (9th Cir. 1990). Under this test, the military's regulation of homosexual behavior need only be ~~rationaly related to a permissible governmental end to pass constitutional muster.~~ Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990), citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441-42 (1985). The Ninth Circuit, however, has noted that the review to be taken in such cases is an "active" rational review, looking to see "whether the government had established on the record a rational basis for discrimination." Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir. 1992), citing Cleburne; Buttino v. FBI, 801 F.Supp. 298, 307 (N.D.Cal. 1992).

Beyond applying the rational review standard, federal courts frequently state that they will give ~~special deference to policies promulgated by the military.~~ See, e.g., Ben-Shalom, 881 F.2d at 466; Berg v. Claytor, 436 F. Supp. 76, 80 (D.D.C. 1977), vacated on other grounds, 591 F.2d 849 (D.C. Cir. 1978) (noting the "extreme deference appellate courts have steadfastly given military procedures which were subject to constitutional attack"); Beller v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980) ("constitutional rights must be viewed in the light of the special circumstances and needs of the armed forces"). Thus, for example, in Woodward, where the court upheld the a discharge made pursuant to the Navy's policy on homosexuality, the court noted that "[s]pecial deference must be given by a court to the





military when adjudicating matters involving their decisions on ~~discipline, morale, composition~~ and the like, and a court should not substitute its views for the "considered professional judgment" of the military. 871 F.2d at 1077, citing, inter alia, Goldman v. Weinberger, 475 U.S. 503, 508 (1986); and Roster v. Goldberg, 453 U.S. 57, 65-66 (1981).

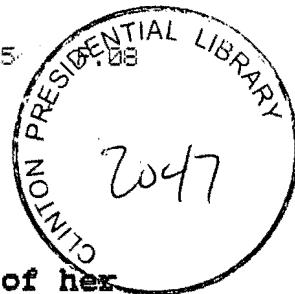
To summarize, any attack on the constitutionality of the potential policy discussed above will be scrutinized under ~~the more relaxed "rational basis" test~~, which the court may relax further in deference to the military. ~~However, as Pruitt notes, even under this relaxed standard the military would be required to proffer some evidence sufficient to establish the rational basis for the policy.~~

B. Past Application

1. Upholding Armed Services Regulations

The courts have generally found various armed services' policies on homosexual conduct, or even homosexual orientation, were sufficiently rational to pass constitutional muster. In Ben-Shalom, for example, the court upheld the voiding of the reenlistment of an Army sergeant who was an avowed lesbian. She

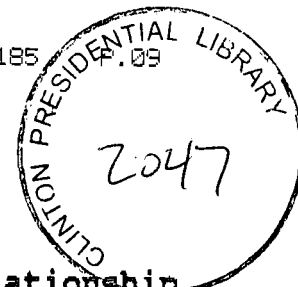
¹ The Pruitt court gave as an example of the requisite record evidence the material proffered in High Tech Gays. See 963 F.2d at 1166. In High Tech Gays the military had presented affidavits and expert testimony supporting its contention that the KGB targeted gays in the defense security field. See 895 F.2d at 574-78.



had been separated from the service in 1976 on the basis of her sexual orientation; the Army's efforts to deny her subsequent reenlistment, again on the basis of her homosexual status.² The Seventh Circuit held that "the Army satisfies [the rational basis] standard without any difficulty," as its regulation "clearly promotes a legitimate government interest." 881 F.2d at 464, 465. The court, in its limited explanation, reasoned that to overturn the regulation "'will have a disruptive effect upon military discipline'." Id. at 465, quoting Watkins, 875 F.2d at 736 (Hall, J., dissenting). See also Steffan v. Cheney, 780 F.Supp. 1 (D.D.C. 1991) (bar on homosexuals in Navy did not violate equal protection).

In an early equal protection challenge to a discharge for homosexual conduct, Hatheway v. Secretary of Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981), the Court upheld the constitutionality of selective use of Article 125 of the Uniform Code of Military Justice (which bars both opposite and same sex sodomy) against homosexuals. Applying a higher level of scrutiny than the rational basis test, the court held that the government had a compelling interest in maintaining a strong military force, and adopted the Beller court's judgment that "those who engage in homosexual acts severely compromise the government's ability to maintain such a force." Id. at 1382. Consequently, the court held that the selection of homosexual

² The trial court had also rejected the Army's contention that Ben-Shalom's acknowledgement of homosexuality constituted reliable evidence of propensity to engage in homosexual conduct. See id. at 458.



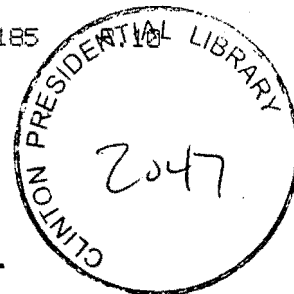
acts for Article 125 prosecution bears a substantial relationship to an important governmental interest. Id.; see also Rich v. Secretary of the Army, 735 F.2d 1220, 1228 (10th Cir. 1984) (Army policy of excluding homosexuals valid in light of Army's demonstration of a compelling governmental interest in maintaining the discipline and morale of the armed forces).

Later, in Dronenburg v. Zech, 741 F.2d 1388 (D.C.Cir.), reh'g denied, 746 F.2d 1579 (D.C.Cir. 1984), the District of Columbia Circuit, per Judge Bork, upheld the discharge of a officer who admitted that he was a homosexual and that he had repeatedly engaged in homosexual conduct in a barracks on base. The discharge was made pursuant to SEC/NAV Instruction 1900.9C, which provided that

[a]ny member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale.

741 F.2d at 1389. The Court held that this regulation plainly had a rational basis, writing:

The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale or discipline. The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate. This very case illustrates dangers of the sorts the Navy is entitled to consider: a 27-year-old petty officer had repeated sexual relations with a 19-year old seaman recruit. . . . Episodes of this sort are certain to be deleterious to morale and discipline, to call into question the even-handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and, it must be said, given the powers of military superiors over their



inferiors, to enhance the possibility of homosexual seduction.

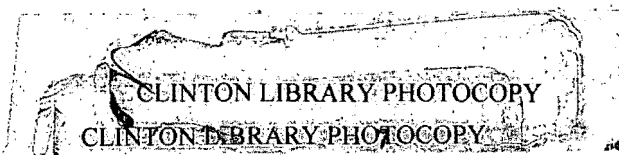
Id. at 1398. Quoting other portions of the regulation, the Court concluded the Navy policy requiring discharge of those engaging in homosexual conduct served legitimate state interests, such as maintaining discipline, good order and morale; fostering mutual trust and confidence among service members; insuring the integrity of the system of rank and command; recruiting and retaining members of the naval service; and preventing breaches of security. Id.³

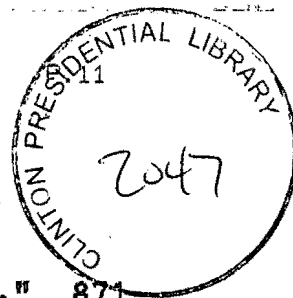
In Woodward, a Navy officer was released from active duty (and later passed over for promotion) after informing the Chief of Naval Personnel that "I am, and have been, since I became sexually aware, primarily homosexually oriented. . . . I

³ Similar reasoning underlies Beller, where a substantive due process claim was brought against the Navy's regulations on homosexual conduct. Using stricter scrutiny than the rational basis test, see 632 F.2d at 807-10, then-Judge Kennedy found "multiple grounds for the Navy to deem this regulation appropriate for the full and efficient accomplishment of its mission." Id. at 811. He wrote, "[t]he Navy can act to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different than our own." Id. He also accepted as based in fact the Navy's concerns of tensions between homosexuals and servicemen who detested homosexuality. It wrote that

the Navy could conclude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties.

Id. at 811.



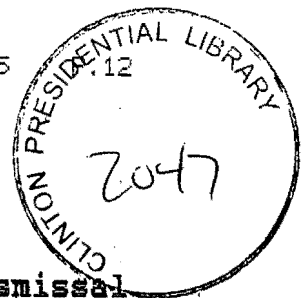


do, and will continue to, associate with other homosexuals." 871 F.2d at 1068. He was subsequently discharged when his six-year term of service had been completed. The Federal Circuit held that the Navy's application of its rule against homosexuality to Woodward's homosexual conduct⁴ did not violate equal protection. The court concluded that the Navy's policy on homosexuality is rationally related to a permissible end, liberally citing Dronenburg's reasoning. See id. at 1076-77.

2. Cases Finding Insufficient Justification

Recently, at limited number of courts have rejected many of the justifications which other courts said provided a rational basis for regulating homosexuality. In Pruitt v. Cheney, plaintiff Dusty Pruitt had attained the rank of captain in the Army. She left duty to seek ordination as a Methodist minister, but remained a reserve officer, and was notified that she would be elevated to the rank of major. Shortly before the promotion was to go through, however, Pruitt admitted in a Los Angeles Times article that she was lesbian. 963 F.2d at 1162. There was no record evidence of her engaging in homosexual conduct. Id. at 1163. Nonetheless the Army, based on her admission of homosexual status, withheld her promotion.

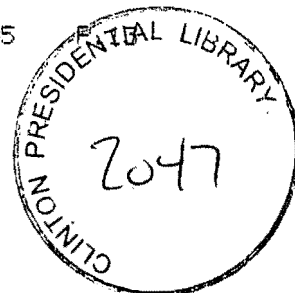
⁴ The Court noted that Woodward had also said that he "was attracted sexually to, or desired sexual activity with, members of his own sex," and that "since he knew no 'gay' officers he sought the company of 'gay' enlisted men." The Court concluded that "[w]hile acts of sodomy have not been expressly admitted by Woodward, in view of the above we need not address the factual situation where there is action based solely on 'status as a person with a homosexual orientation.'" Id. at 1074 n.6.



The Ninth Circuit reversed the trial court's dismissal of Pruitt's equal protection claim. The Court distinguished its earlier ruling in Beller on three grounds. First, it noted that Beller involved military discharges based upon homosexual conduct not status. Second, the court noted that, unlike in Beller, in the case before it there was no record evidence setting forth the rational relationship to a government interest. Third, the court noted that Beller involved a substantive due process question.⁵ Id. at 1165.

Finally, and more importantly, the court held that the primary justification which the military gave for its policy in Beller had subsequently been eroded by the Supreme Court. The Pruitt panel noted that the Navy in Beller had proffered as a justification its concern over tensions between known homosexuals and other service members who "despise/detest homosexuality." Id. at 1165, citing Beller, 632 F.2d at 611. It responded:

⁵ This ruling, however, ignores the fact that the same test is ultimately used in both substantive due process and equal protection cases involving homosexuality. Courts hearing substantive due process cases inquire if a fundamental right has been infringed, but in equal protection cases look to whether the group being discriminated against is a "suspect classification." However, for both non-fundamental rights (such as the right to engage in homosexual conduct) and non-suspect classifications (like homosexuals), courts then apply the rational basis test to see if the regulation is constitutional. Thus, while the Pruitt court correctly noted that Beller was a substantive due process case, it failed to observe that the rational basis test should have applied there as well, so that this was not a valid basis for distinguishing Beller (in fact, Beller applied a higher level of scrutiny than the rational basis test utilized in Pruitt. See note 3, supra). Pruitt likewise failed to note that Hatheway was an equal protection case, where the court upheld the regulation despite applying a higher level of scrutiny to it.

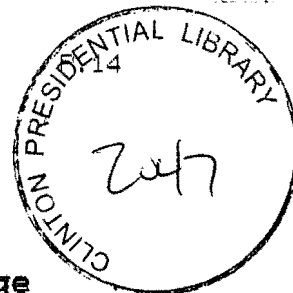


To the degree that Beller may thus have rested on prejudice of others against homosexuals themselves rather than on disapproval of specific acts of criminal conduct, its reasoning is undercut by Palmore v. Sidoti, 466 U.S. 429 (1985) [,where] the Supreme Court struck down a denial of custody of a child based on social disapproval of the interracial marriage of her mother. In so ruling, the Court said: "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." Id. at 433. . . . This principle is not confined to instances of racial discrimination reviewed under strict scrutiny. Cleburne, 473 U.S. at 448.

963 F.2d at 1165. The Court distinguished Hatheway, Dronenburg and Rich as (1) relying on a holding in Beller which was "undercut" by Palmore, and (2) involving cases of homosexual conduct, rather than status. See 963 F.2d at 1165 n.4. The Court also noted that the Woodward court, which had relied in part upon Beller, had failed to consider the effect of Palmore and Cleburne on Beller's reasoning. Id.⁶ The panel remanded the case to the trial court to allow the parties to develop a record on whether there was a rational basis for the regulation.

Some support for the Pruitt's reasoning can be found in Judge Norris's concurrence in the Watkins v. United States Army. There a majority of the full Ninth Circuit held that equitable estoppel principles barred the Army from revoking plaintiff's security clearance in 1979 based upon admissions of homosexual conduct which plaintiff made in 1968 and which the Army had twice

⁶ Pruitt, however, failed to discuss Ben-Shalom, which was also a post-Palmore case, and which also involved challenges to regulations based upon sexual orientation rather than conduct.

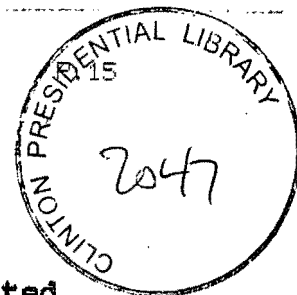


before considered and taken no action upon.⁷ However, Judge Norris (joined by Judge Canby) opined that the revocation violated equal protection, too. 875 F.2d at 711-31 (Norris, J., concurring). He distinguished Bowers v. Hardwick, 478 U.S. 186 (1986) (where the court held the criminalization of homosexual sodomy did not offend due process) on the ground that Hardwick involved conduct, whereas Watkins presented an "orientation case." Id. at 717. He added that Bowers involved a question of substantive due process, not equal protection, see id. at 716 and n. 9, and applied the strict scrutiny equal protection test. Id. at 718-20.⁸ He wrote that the Army regulations failed this test, proffering the same argument, based upon Palmore and Cleburne, that would later serve as the basis for the holding in Pruitt. See id. at 729-30. Notably, in Ben-Shalom the Seventh Circuit rejected Judge Norris' analysis. See 881 F.2d at 465.

Finally, a lower court recently held that "the Navy's regulations, which mandate the discharge of all homosexual

⁷ This en banc opinion was only the latest, and narrowest, opinions the Ninth Circuit has issued on Watkin's claim. In Watkins v. United States Army, 721 F.2d 687 (9th Cir. 1983), a panel rejected the estoppel claim later approved by the full court. In Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988), Judge Norris issued a panel opinion holding the Army's regulation against homosexuality applied to homosexual status rather than conduct, and violated equal protection, applying a strict scrutiny test. This opinion was amended at 847 F.2d 1329 (9th Cir. 1988), and was later vacated by the en banc opinion.

⁸ In using strict scrutiny, Judge Norris departed from a multitude of earlier cases using the rational basis test, which was also the test adopted in Pruitt. See pages 2-3, above; see also Padula v. Webster, 822 F.2d 97, 103 (D.C.Cir. 1987) (applying rational basis test to challenge to FBI policy excluding persons who engaged in homosexual conduct, stating that it was following Bowers v. Hardwick).



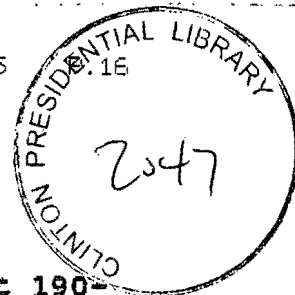
service members of the basis of their sexual status" violated equal protection because the Navy (which had its pleadings stricken by the court) showed no rational relationship between the regulation and its purported objective. See Meinhold v. United States Department of Defense, 1992 WestLaw 383351 at 3 (C.D.Cal. Nov. 10, 1992)⁹

3. Application To Contemplated Regulation

The constitutionality of the contemplated policy (i.e., barring on-base kissing or other public displays of affection by homosexuals) may hinge on whether such acts are deemed homosexual conduct rather than merely reflecting homosexual orientation. Courts appear to agree that homosexual conduct can be banned by the military. See pages 4-8, *supra*; cf. Pruitt, 963 F.2d at 1165.

While the activities the contemplated regulation addresses clearly are forms of behavior, it is less clear that they constitute "homosexual conduct" as that term has been used. In the relevant cases, "homosexual conduct" typically refers to homosexual carnal acts. Indeed, Judge Norris in Watkins noted that the underpinnings of the rule that the military can ban homosexual conduct draw upon Bowers v. Hardwick, where the Supreme Court held that the criminalization of homosexual sodomy did not violate any fundamental rights. See Watkins, 875 F.2d at

⁹ The court also held that this regulation constituted a bill of attainder in violation of Art. I, Section 9 of the Constitution. Id.



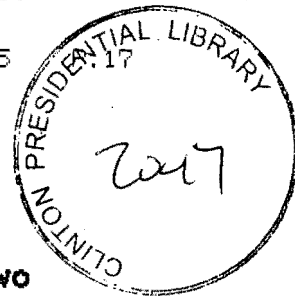
716 (Norris, J., concurring), citing Hardwick, 478 U.S. at 190-96. However, as the district court noted in High Tech Gays, "Hardwick does not hold, for example, that two gay people have no right to touch each other in a way that expresses their affection and love for each other." See 668 F.Supp. 1361, 1370 (N.D.Cal. 1987), aff'd in part, vacated in part, 895 F.2d 563 (9th Cir. 1990). Thus, to the extent Hardwick's reasoning provides the support for the ban on homosexual acts,¹⁰ it may not apply to the non-carnal acts at issue here.

Moreover, it is possible that a court could find that banning such non-carnal homosexual acts, even if limited to off-base circumstances, would amount to a distinction based upon sexual orientation. Judge Norris intimated as much in his Watkins concurrence. There he noted the Army's definition, and relied partly upon it in commenting that

[w]ith all the acts and statements that can serve as presumptive evidence of homosexuality under the regulations, it is hard to think of any ground for inferring homosexual orientation is not included. The fact remains, however, that homosexual orientation, not homosexual conduct, is plainly the object of the Army's regulations.

875 F.2d at 715 (Norris, J., concurring). Also, if the policy, or its application, does not proscribe similar public displays of

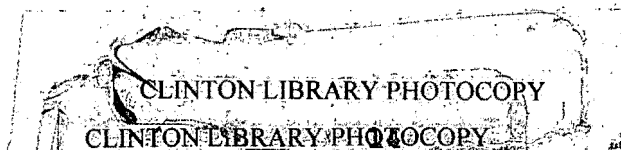
¹⁰ Current Army regulations, by defining "homosexual acts" as any "bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual satisfaction, Army Regulations 601-280, §2-21(c), already cover most of the acts which might fall under the contemplated regulation (a notable example is that the existing regulation would not cover non-contact dancing between service members of the same sex). Assumedly other services have similar definitions of what constitutes a "homosexual act."

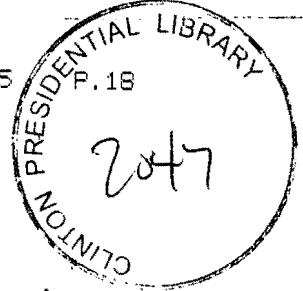


affection between non-gay same sex individuals (such as two heterosexual women kissing each other on the cheek in greeting, or two straight males hugging), it may be susceptible to a characterization that although it literally applied to acts, its invocation in reality turns on homosexual status. Of course, a difference in implementation that is deemed to be based on sexual orientation would be more susceptible to an equal protection challenge. See Pruitt, 963 F.2d at 1165; Watkins, 875 F.2d at 717 (Norris, J., concurring); Meinhold, supra.

Moreover, regardless of whether the contemplated policy is deemed to regulate homosexual conduct or sexual orientation, the courts appear split on whether the reasons which the armed services would likely proffer for justifying its policy suffice under the Constitution. The contemplated policy, as understood in this memorandum, aims to preserve morale, good order and discipline. The policy's animating concern would be that allowing homosexual public displays of affection in certain on-base settings would cause unrest among service members who find homosexuality immoral or otherwise disapprove of homosexuality.

Such a rationale would be accepted by some courts. The Supreme Court held in Hardwick that community notions of morality were sufficient to provide a rational basis for a statute. See 478 U.S. at 196; see also Barnes v. Glenn Theatre, Inc., 111 S.ct. 2456, 2468 (Scalia, J., concurring) (noting that in Hardwick





"[m]oral opposition to homosexuality . . . provided the rational basis").¹¹

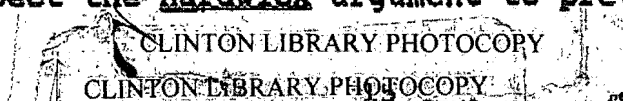
However, the Pruitt court squarely rejected this approach. It termed any moral opposition to homosexuality a "private bias," adding that under Palmore "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 963 F.2d at 1165.¹² See also

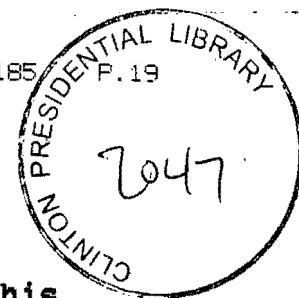
¹¹ Likewise, in Steffan, the court held Navy regulations against homosexual orientation did not violate equal protection. The court cited as a rational basis for the regulations Department of Defense Directive 1322.14 (January 28, 1982), which provided (insofar as it related to sexual orientation) that

[t]he presence in the military environment of persons who . . . , by their statements, demonstrate a propensity to engage in homosexual conduct, serious impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members, to ensure the integrity of the system of rank and command, to facilitate assignment and worldwide deployment of service members 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 security.

780 F.Supp. at 10. The court Pruitt as stressing the lack of evidence in the record demonstrating a rational basis for the offending regulation, while the Navy, by submitting the DOD Directive in Steffan, provided an adequate record of the rational basis. See id. at 11 and n. 20. The Steffan court also took judicial notice of the high incidence of HIV-positive men in the gay community, holding that the exclusion of homosexuals to further the health and welfare of the military was also sufficient justification. Id. at 13-16.

¹² Pruitt also to observe that Hardwick was decided after Palmore. Thus, to the Hardwick's ruling that the morals of the community can provide a rational basis conflicts with the Palmore holding that such private biases cannot provide a rational basis, one might expect the Hardwick argument to prevail.



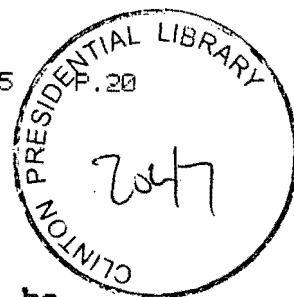


Buttino, 801 F.Supp. at 307 (following Fruitt). Under this reasoning, such "moral" opposition cannot be a rational basis for the regulation. Likewise, while the contemplated policy would also serve to protect homosexuals from resulting harassment by homophobes, homosexuals could argue that the proper response to such harassment is invocation of the standard procedures for punishing harassment. To guard against potential harassment by proscribing the homosexual conduct that would trigger it, albeit a nobly intended policy, would again impermissibly cater to the biases of service members who are biased against homosexuals.

CONCLUSION

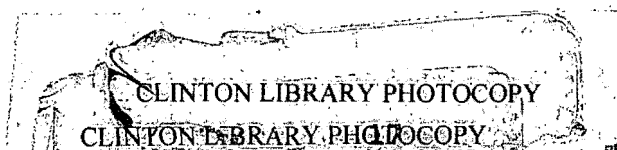
The weight of precedent favors upholding the contemplated policy in the face of an equal protection challenge. To the extent the policy can be implemented to regulate conduct rather than orientation, it should pass muster, as the courts have upheld regulations targeted at homosexual conduct (although those cases, unlike the policy here, addressed homosexual carnal acts). If the policy has elements that can be said to apply solely to sexual orientation, without regard to homosexual conduct, it would stand on less solid ground. Even the banning of homosexual orientation in the military, however, has been held to meet the rational basis test by some courts, and the weight of precedent also posits that moral opposition to homosexuality can provide the rational basis for such regulations.

It is conceivable, however, that a court could find the contemplated policy would violate equal protection. There are



plausible arguments that such a policy could be deemed to be based on orientation, not conduct, and courts recently reaching this question have largely held that distinctions based on homosexual orientation violate the equal protection guarantee. These courts, chiefly found in the Ninth Circuit, reject moral opposition to homosexuality as a rational basis for regulation. Their rule, extended to its logical limits, might also find a policy that regulates non-carnal homosexual conduct violates equal protection, if its justification is the antipathy of service members towards homosexuals. While this rule has not been invoked outside the Ninth Circuit, and seems to conflict with other precedent, other circuits may choose to adopt it.

T.J.K.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Joe Bouchard to Bob Bell re: McVeigh (1 page)	03/27/1998	P5
002. note	Handwritten Notes (34 pages)	01/25/1993	P5 2048

COLLECTION:

Clinton Presidential Records
National Security Council
Richard Beardsworth (Defense Policy)
OA/Box Number: 3154

FOLDER TITLE:

Gays in the Military, 1993 - 1999 [1]

Kelly Hendren
2006-0227-F
kh332

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

Res. Mtg w/ JCS - 1/25/93

Hope 1st of seven
 lot of diff. dec's during -
 budget
 f-p. dec's

Hope we have close cont. Mtg
 next mtg at Pent - talk some more about issue
 known from press is expr. your views on Gen. M
 - eager to hear

1st - ask Powell to outline gen. st. as to work
 we will do in subs mtgs, where
 then see Powell again

Tough calls to make on budg, whether
 we ever have a good baseline
 to mtg to disc. pers. issue

Powell

Pleasure to be here - look forward to
 Pent mtg

As Pres, C-in-C of exisite force

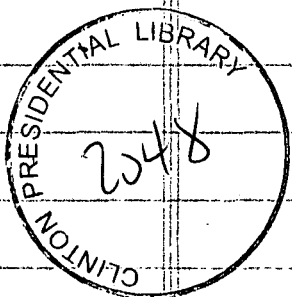
- best ever in peacetime
 - 20 yrs - we've come

drug

various probs

AVF

Stuck w/ it. Robt. Army,
 workers w/ Cong. Aspin to
 get well - all well,
 can accom. any task



3½ yrs ago recognize Cold War over - forced us
to rethink everything. Last 40 yrs
Mil + Civ (develop) came up w/ new appr.
Changed conceptual way of think. -

reg. crises

Last 3 yrs: 25% decline in 2/3
yrs. Major

1 million

500K active duty - brought out

250K Res - not successful

(Congress)

250K Civ

800 inst.

100 maj. papers killed (as
progr.)

800K jobs lost directly
(400K indirectly) Calif
TX - (will cut)

next yr, too -

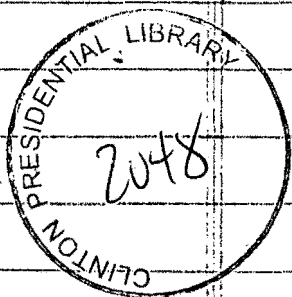
Goal - don't break force

Challenge: When we get to base force -
pressures to go lower

Our arg. - be careful > rate of
chg - faster can move w/out
breaking force - but sleep
during more (than C.W. -

Flag, symbolic, drug war

Give us time to work out any sleeper



No preconception - no dog in hunt -
 "do right role"

G-in-M

PC - How proceed?

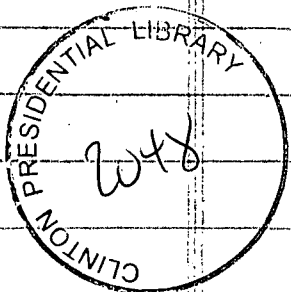
CP - Gave each make st. I'll go
1st

- we are here to serve try to also
 bring sol's - but also must
 give our advice

- We as Bp. of 6 feel strongly
 also people in field getting
 in touch - use for
 me to be straight shot -

- Tutorial as nature of service.
 mission is close & direct -
 killing - ship, rifle,
 plane - prepared to give
 life to death or for
 buddy - use for have

Teamwork to perf. mission
 Diff - recognized as diff
 long courts - UCMJ diff.
 Embedded deeply in
 psycho + cult - teamwork,
 cohesion,



also must refl. soc. - "people's
army" - voluntary army -
compete even for these people -

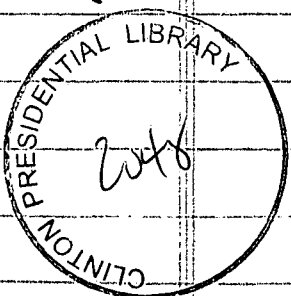
We disc. const. - height, wt,
age, play partners, drugs,
alcohol, fitness +
homo. Can fire for
things not suitable in civilian
life -

Assoc's in serv. not voluntary,
Ar. right to privacy
simply doesn't exist

Discipline of rules must be
reasonable. Barracks
different - like ghettos.

Homo. a prob for us - sodomy -
against UCMJ - 24 st's
of D.C. law contrary -
law given to us by Cong.
To go in this dir we're
not sure not refl. of
views of soc.

Always homo's in mil - but causes



for disch. Proud for those
who served

Why dis. - Law

- 2) Violates celebrity
- 3) reg. by cont.
- 4) creates discredence
- 5) dropped old distrust
of sec

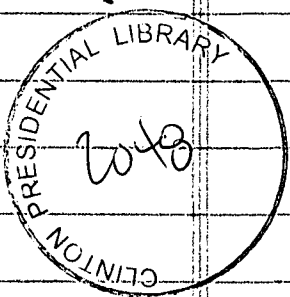
6) AIDS - med. prob

1700 in force tested
pos - we've parked
them - not depl.
Tx to VA once
manifeste

7) Privacy - most imp

How do we deal w/ pri' in
sit where you're told who
to room with. If Black
soldier, we say - you must
If female showed up, +
female said we
wd say "no" - mixing
gender

If homo shows up, do
we force assoc - is
it like gender diff or
ethnic prob.



What to feel Sgt

Not enough to dig rules, must
give guid on sit

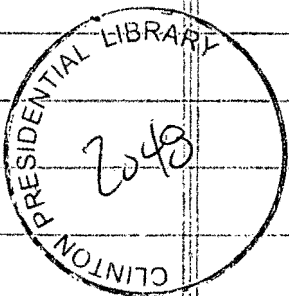
Many Amer parents have concerns,
about forced assoc -

immaturity of 18 yr - olds
Wives concerned about sit at
remote loc's

alt - create 4 diff genders -
not realistic - works against
cohesion

Not C.V. issue and is C.V. issue
We deny C.V. all time. Comparison
w/ blacks off base - benign
characteristics - Sexuality
is diff. P.R.'s is difference,
'cause if we say no diff
w/ homos then all benefits
must apply, can't have 2
classes - med care, so
promotion, schools etc

Arg - Lots of other crimes don't
UK - "absent parents" take
stronger line than us.
Crimes that let says in them

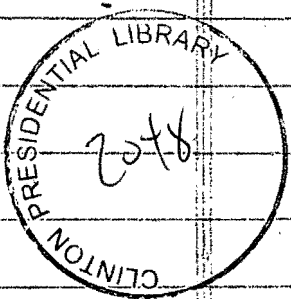


find ways to pressure them out or deny
promotions. we couldn't

Sum. - most contro. issue in
fore - make no moral
judg. myself, but think they
can best serve in other
areas

* [Boss sol - we stop asking - not
a cond. of entry - no clearance,
no witchhunting - as long
as our trust is apparent,
take some time after 1st step
to decide what is best

Sullivan - Howard you'd take time to
listen. you strengthen bond
of trust. should exist betw us -
essence of leadership. Enormous
mgt challenges in this period of
TX, but leadership more imp.
I'll take 260K mil + 100K
out of force over 4 yrs.
- all we's out of Jimmy,
- coming back from overseas
- deg'ing doctrine



- enormous disb. challenges -
hundreds Col's Maj's
Capt's being sep. invol.

Too say g-u-m issue underst -
it is the issue in USA -
everywhere I go comes up.

Maj. of USA - vast maj - opposed
to chg ban - If soldiers
here, they can

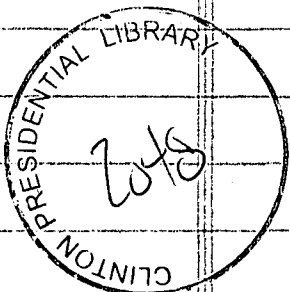
My rec - don't chg.
Understd your goal of chg status,
but frankly don't know
how when you get to 2^d,
3rd level g's

- If allowed to proc. publicly,
must tell jr. off's to do
- Believe dec. must be out
- What if straightet refuses
shower w/ gay - reprimand,
counsel, release

- Soldiers who's religious beliefs
think it is a sin -

Release - West Pt Cadets

- I undstd my rel. w/ you -
subordinate - You as C-in-C



have final say - I ask, however,
if you chg policy, you get out in
to part - in chg so we can expl
to ourselves what it means

My rec - do not chg - but if we
do, let them not decide -
then slippery slope

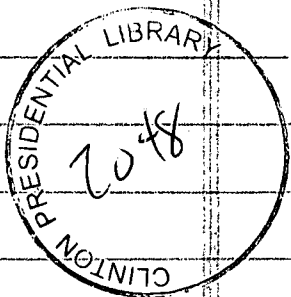
PC - Any obj. to no longer asking
entry g - d

Open Sull - Don't ask, don't decide
If decd., then release

Powell - Mindful of diff in
giving comm

PC - Come back to that

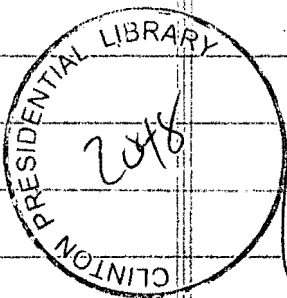
KELSO - Thanks for opp.
I'm rep of Amer. Sailors;
they can't petition - look
to us for edes by
- They have pretty strong views
in may be long shot
- life at sea: hard to find
privacy.



- Not practical to seg by sex, gender & diff ways
- US sailor vocally against chg
- Asked: "When are you going to hear my views?"
- No way to diff. betw. aroused gays & those that do not prob. pub
- A policy to admit, expect celebrities, then release those caught unworkable
- Severely disrupt mil
- Want to keep policy. Franks w/ recruitment if pol chg - retentem - morale prob.

ARF very imp - politically to us - can't go to any alt - we're dependent on vol's - must have environ. people would send child. to. No opp. to go to draft.

My rec - Tetam policy. If chg. I'd like to part. willing to stop asking, but not ready if they are aroused, still want opp to disch.



Ben Mundy - Thank you for opp

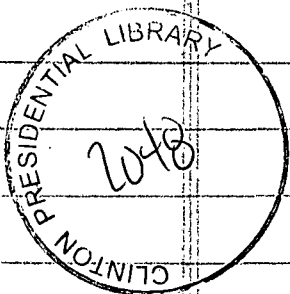
- we come today in 2 roles: we're receiving same input

- mil adv's to you (you are C-in-C) (your order alone can cause us to execute)

On this side of table 215 yrs of dealing w/ fuz, drugs, combat, garrisons, etc. etc. No there to flout that - want to make it 215 yrs + 6 days. Our job is to help you.

We also represent + serve those who serve incumbent on us to reflect their desires. To do so, I'll be as direct as I can ever be - hope it's our toughest nut- ever

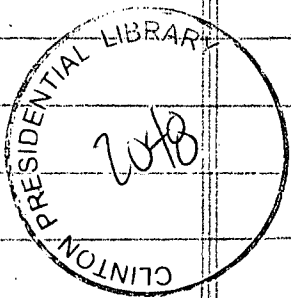
Per sp - 3.8M active/mil/gd mbrs. 2.8M family mbrs, as much a part as mil. - they



transfer, moves, little league schools.
 we look after them. $1\frac{1}{2}$ M veterans
 who write us, some get recalled. also
 reg. let's org's you go rightly addressing
 at ball. 6-8 M ($7\frac{1}{2}$ M have sent you ltrs opposing)
 Finally, mums + dads of soldiers. They
 pass to you ultimate auct for
 life + death

- Focus on unformed - your dec. sends
 them to war: dec over effectiveness
 of their org + what they are fighting
 for

- '66% USMC under 25 - impress-
 sionable age - need max.
 leadership - can swing either
 way - want right dir.;
 quality force. This isn't
 "From Here to Eternity" - smart,
 educated, bright. - 50%
 USMC married. Most of all
 they are loyal. No other
 constituency will have this
 degree of loyalty to you -
 We swear to obey your orders.
 We meditate that in others
 we'll not demo, org. black votes,



contribute to opponents. They are prone
of pride to serve - don't pay common -
Senate to service (6 men in locker
room of carrier) - do it for pride.

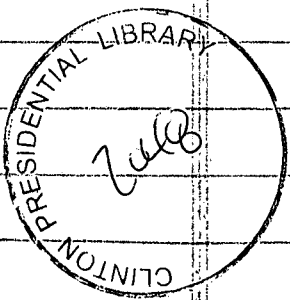
Are and must be a team. Teamwork
is, anything else, selflessness.
NFL losing team coach knows.

For all reasons also by others,
my firm, strong, const. belief
that those who admit to acts
unpl. in home behavior or
those who assoc. w/ gay
pride as "licentious, uncivilized,
by law or morality" (as
quoted by Gay B. Green
Nation guy when in parade)
- will have neg. effect -
doesn't matter what Bush
have done - we're the
role matters; we're the best

Need to
to proclaim: The gay -
same as - I'm 100%,
Nazi, racist

Fractures teamwork

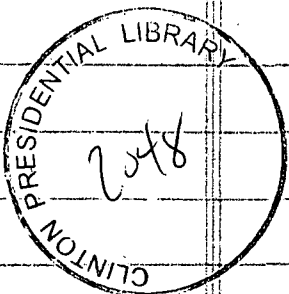
"I cannot act" Amer. doesn't accept.



- ① No a sit. of scope we are led to believe — Eric Schmitt — not so there are 10's thousands there.
- ② we do not have witchhunts in AF's. Past decade 4/100 1% of all disch. for usmc for homo. of all unavailability discharges — only 1 1/2% for disch.

Stacks of ltrs we've rec'd, art's, every form of comm — recount emotion. Parent's call to revoke waiver of auth for recruits already occurred. Ltrs saying: "my son will not vol" — worries no (effect on recruitment). My young lds have written prof. to me: "disband USMC before we suppose this dishonor" — emotion that high.

They simply don't agree to: immoral threat to health, intr. on priv's, & threat to effectiveness of org.



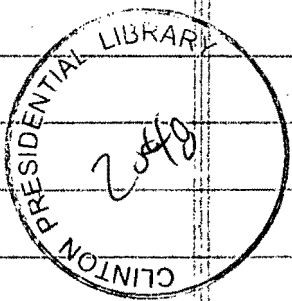
- If we must stop asking g or ok
- " " " " pursuing - ok

McPeak: I draw distinct betw:

- orient.
- status
- behavior

Think we're close on orient +
beh - orient: we can agree
to stay asking g. - know
homo's there - not 10^{ss}, not
zero. On behavior -
like Aspen prop. to come
up w/ code of cond. that
applies to all - off limits -
think we do that now -
we punish outrageous beh. -
in p.r. context we can
come out w/ something.

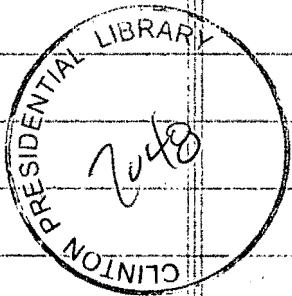
Status (revealed orientation) is
crunch issue - don't know
how to deal w/ it. - agree
when someone acquires homo
status in unit will work



against cohesion of unit - Rightly or
wrongly we disc. greatest gains
cause we feel differently

In A.F., we've been pretty good - because
we (Gr (dis)cup, jr off, NCOS)
got to work in affirm. way -
not cause Trumpian issues
ex. order - Don't see how
to that here - don't know
how we can promote reversal
of public attitudes.

Like idea of knowing it over
to Aspen - Co mo - like it
cause it portends it - gives
flex - don't think we'll
come up w/ anything - but
helps prepare Nation. Do
think it follow up - shouldn't
elig rule on states' courts
we do studies. But if elig
rule, it's a de facto admis.
you can give up prob we're
studying. Doubt about
courts' reaction. Courts
only focused on states
cases (not behavior) - all

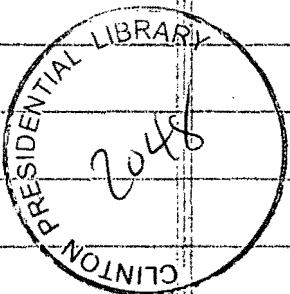


cases where someone disch. thing to
 get back in - one's come up
 doing to us to acknow. Linn, could
 work case by holding up case
 but bad idea - But if we hold
 up, we're saying we can back off on
 unit cohesion.

Here we can find middle ground
 But want you to know whatever
 you decide, I'll salute
 smartly. You'll have
 my support.

PC - Hear Jeremiah - get med's -
 Sen. Gore has q's
 Gore - "Spec 5"

Jeremiah - Dominates disc. of everyone -
 not just among us - big com-
 mander, church - every disc.
 we have - in my time never
 seen issue w/ this much
 resonance - overwhelming -
 dominant, recruiting
 Even aspects sign - costs well
 go up - cost of retention



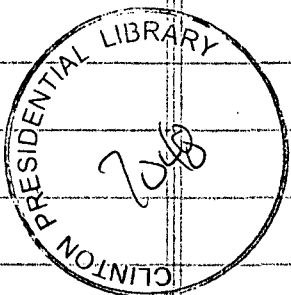
- 71% ^{who} wouldn't stay goes to 45% -
 not valid measure - Ex of
 dishy - but gives measure

Drug era analogy - until we got
 drugs out did rest of force
 agree to stay. As long as
 most and attention focus
 on drug prob, dishy denied
 to rest of force

Housing - ships, subs (already
 built w/ ~~up~~ ^{up} ~~down~~) barracks -
 cost aspect - mil. housing -
 cost of med. care

Econ direct cost as well as
 readiness impact

You are Civil. You deserve AF
 loyalty, 'because of built in
 trust & confidence. Just as
 they are teams, so are
 we - we must have confidence
 in each other. We are
 strongly supp. of what must be
 done but as we make dec
 Soldiers will die for country -
 their views des. to be heard.



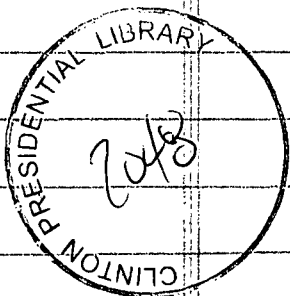
VP: Q's + tell you where I'm coming from.
Personal journey - recogn. analog to A.H.
diff; some parallels to 2

Q - What is your underlying theory
of homosexuality? Beh. character-
istic - choice (Powell's
words). Do you believe
that's case, or as maj. of
scientists there is a genetic
basis?

Paul: Don't know answer. Don't make
my case on that diff.

VP - For me, answer makes big diff.
If we had all science done, we'd
find maj. of homo's born w/
predispos. Also a continuum - some
on line. Assuming you have
soldier born w/ predispos. + patriotic,
no act in mil. that violates VENT,
if that person dep. due to status,
then that person in way is dis-
cuss against in way sum to black.

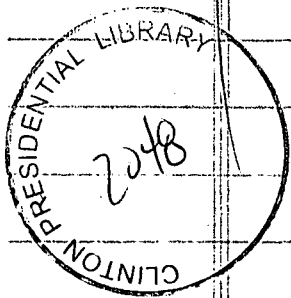
Tromen: Ex Order. Paul Chelf
quite strongly opposed - but



made it work despite this M. Peck.
 "rightly or wrongly" disc there
 If Jt. Chiefs opposed them, they
 still made it happen

Sullivan: pt on religious beliefs — I'm
 So Baptist — go to missionary
 church — quite aware of what
 you talk about — but don't
 know anyone whose religious
 beliefs keep them from
associating. own pers.
 beliefs diff. JS view
 is homo is matter of choice
 can lead more easily to
 view disc based on status
 is justified — not so if genetic
 Very diff sit

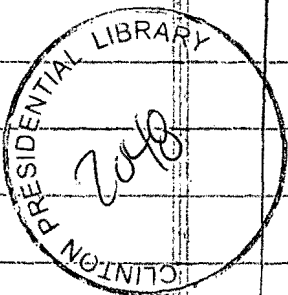
PC — Over it you to say where I'm coming from
 — whole thing on both sides cause we
 great discern. Men & women
 who patriotic served w/ dist —
 otherwise legibly conformist
 pers. in best sense — have
 friends gay — always a
 funny pos — bel. some born
 gay others not — job or



Sec is not to disc on basis of moral judgment - belief gay friends should be able to serve. This bothers me most - about status / beh - is privacy argument - all objections flow from what is inside other men + women in AF - what you feel about yourself in sit where you have no control over many things.

- When you back up from ays that I'll just separate myself and consider subs - argument that no letting us showers with men + women in same shower - arg. w/ friend - best arg. for not asking - no need to lie; gives dignity. Then back to states vs behavior, ~~only~~ behavior matters assuming no declaration.

What I honestly believe - there are people who love country enough, gay would be willing to adhere to being strict standards, but also asking to go next step + declare



Still believe I should keep commit-
 but should be willing to violate
 comm. as C - u - C - - nothing
 to undermine moral

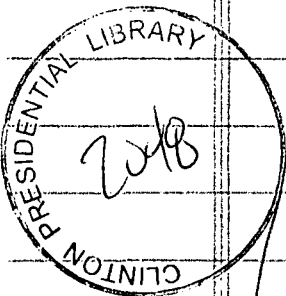
- Stop asking g
- Ask you to look at for
6 wks.

Legal g in court. Mr. Peak said
 stop kicking out with prejudice,
 but if we keep discharging,
 think courts will stop it
 anyway

Accept there are real, serious
 privacy, pers. morality
 issues - also think
 many gays willing to be
 held to highest std's
 Try to get there

Would like to stop asking g. take
 next 6 wks and try to
 answer g.

I am very mindful of my oath -
 have to try to be const.
 w) that oath.



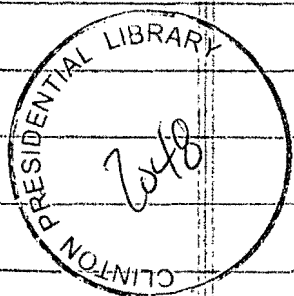
My view - we can work thru some
of these things, - in some
services better than
others - some git's better
than others.

Take 6 mos. stop asking q's -
legal sit will prob. grind to
halt. Will present you
some prob's - need to work
thru in next 24/48 hrs
what that means

Army Col. (media fig) - her best
friend mother of one of my
students. She would ~~have~~ have
gladly died for her country.

Like to have further app to disc,
explore. lot

Lot of supp in Cong for your pos -
if they are clever, and
they are, - can do things
they wouldn't do
anything for 6 mos.



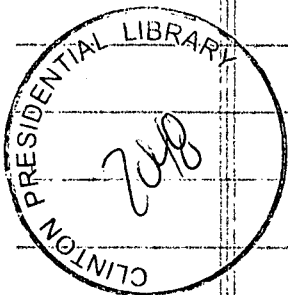
Mundy - whatever you do, very imp. you
 send pos. signal to loyal
 const. likely to be great
 reaction of "Betsy" among
 gay or gits -

PC - Do not cons. disqual conduct
 to be confined to sex. act.
 People I would like to
 keep wouldn't show up
 at Queen Naters parade
 (they'd show'd throughout
 Indus)

Jeremiah - Saw 2 gay couples
 dancing at Ball - Civilian
 environ - no exceptions -
 officers club, no.

PC - Absolutely - Never said
 anything to suggest that
 my dist. against status/
 beh goes well beyond
 sexual conduct. Practical
 matters diff

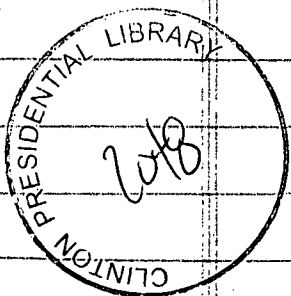
☆
 Powell - We need time to figure out
 what the rules are.



PC - Never thought of 3 dist's
 (McRak made) tell you said
 IT want to think about
 it. One thing impressed
 me over yrs who came to me
 + said they were gay war
 one's who really love
 country trying to conform
 Doesn't get into Queen Nation
 gay pride — May be a
 way to find distinctions

Day on table — people who
 do nothing next to me. but
 say they are gay

Jes - Suggestion: get someone outside
 here (Juskee) to call time
 out so Jt Chiefs don't
 have to call time out
 these guys must rep
 their Const's during Games —
 they lose cred if they
 suspend — But if
 Attorney Gen does call
 out, violates (time out),
 they are not NW. Defus
 Att Gen. willing.



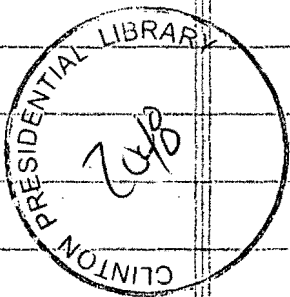
Mort Halpern checked.

2. Announcement out of this mty -
everyone watching - honest injus-
tice - must not look like they've
caved.

VP - What about truth? Very
frank & useful exch
of views

Pres - Character

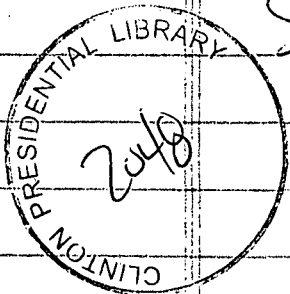
VP - Pres's intent that G. no
longer asked. Clump
agreed on that pt.
Related G's of him to
char. beh. + deal w/ status
will be studied for 6 wks.
Dial betw Clump + Pres
will cont - Sec Asper
dir to work w/ Clump to
find answers to G's raised
here. May 9 he pros
ceeding 6 wks up to
Justice Dept.



PC - we don't have to have a pos coming
out of us. Work out over 24 hrs
just say today "very galyep"
Chiefs came over, very
wup. w arg's they made"
Work out 31 next 24 hrs.

Ses - Got couple days here. Not
creased lightning, in Cng.
Helpful of day or two
before ann. made so impr
you took views under
adv's. Uet. 9 comes
down to - in 6 hrs and
disc. "whether" or "how"
My view - may be too close
to 3rd. - "we're disc.
"how" to decide "whether".
"these groups not yet
committed to "whether".
~~Chiefs~~ trying to set this
night.

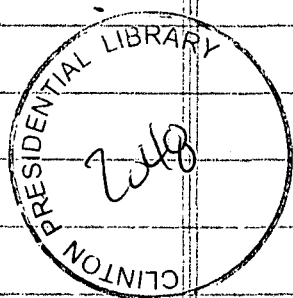
Smiley - For some time, some value
in phrases. Pres can't
say "whether" up for
grab.



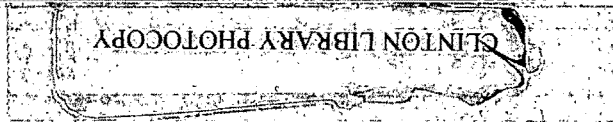
PC - Say - I asked you to study "how"
 you agreed. In your mind
 still say of "whether".
 If no "how", may
 we agree on "whether".
 You haven't given up -
~~we~~ haven't given up
 when Do we say "we
 agreed to stop asking of"
 (No). Most

I asked you to look at "how"
 you agreed - Issue of great
 concern for you
 You haven't agreed on
 "whether" - ^{you} hope
 if "how" is great
 as you think you'll
 persuade us on
 "whether"

Kelso - unconf. in being in
 disagreement



Powell - OK
 PC - But you are No prob.
 Locke of Pres' got in trouble
 for not allowing dissent



You'll go to Hell. Often asked
view - ok - just tell me
first.

VP - Kelsie has valid pt.
- See - in this mtg, you
did not ask them
to agree to agree or
disagree - just
study 9 -

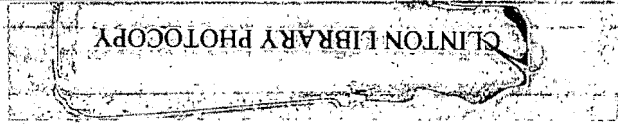
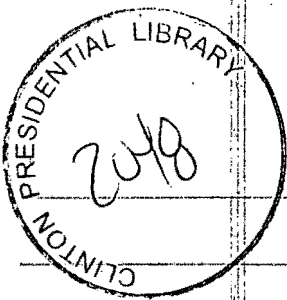
PC - Better way - my pos intact.

Fony - At ~~any~~^{of} day, you will
support.

George S - Imp to see you have
mutual respect. Gold

Les - yes.

* PC - Don't let media drive wedge.
I'm not doing this for you



GPS - doing it for people who are gay
and want to serve country,

Great mtg - hope we have
mtgs w/ easier subj's.

Powell - Guaranteed we'll always
tell you what we think.

Post mtg dis - VP office

PK - how went?

Jos - Excellent - most pt very strong -
care about their views - they
want to be helpful - we
can work this out -

PK - How do we do st. leaves my pos
intact?

MS - Comm - 3 things
- cannot keep

- Commit. of power
- Resp. C-in-C.

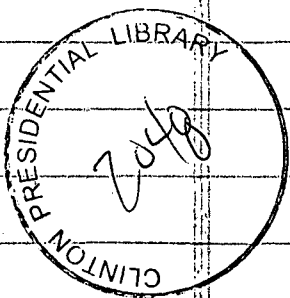
Sandy - Mistake to get $\frac{1}{2}$ way down road
to say what we'd do in 24 hr,

JS - Honest, cordial, helpful
exch. of views.

(yes)

Sandy - "Pres. ret. cent. to end disc
in way does not undermine
moral, cohesion, work of
mil. Chief spoke to
Pres about par. concerns.
He listened carefully.
Did not ask for agreement
or disagree

JP - Say - They exp. view of policy
to be decided, helpful to
exp. in more detail
"how" - Pres said
"before it's decided, want's



6 no disc

Les - tomorrow's hl. (no)

Sunday - no "if" word

63 -

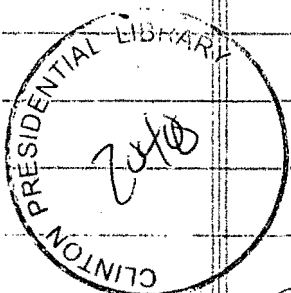
Les -

- Cordial, etc
- Pres not his commit to ending dis and want. moral
- chief dis: diff's concerns prob's
- more to follow

G.S. - Pres. listened, they said whatever the dec's they resp. his pos as C-in-Chief

PC - Good mtg
very honest & respectful exch
of views on both sides
- JT Chiefs

PC ~~63~~ - say "his d-m auth as C-in-C"



PC - Tomorrow - am I stop asking
9.

Sandy - prob is those declare.

PC - McPeak pos. very smart way he
said it. Stuff about
extremes h.s. - mid air
fluid

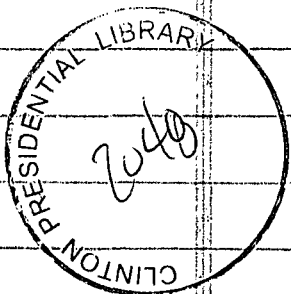
GS - (repeats text)

Disc. other issues

Bill - beginning, not end >
PC - no, tomorrow.

Tony - Can we get Colin to help out on Hill.

PC - when I heard Marne Ogen, I just
said - I have to give my
own view - Al Ruddy helped
with his view.



Mac - Today couldn't have gone better - but do not need to get sucked in too much on this.

VP - Thought Mundy borderline in his presentation - 215 yrs + 6 - comparison to Nazi -

PC - Obja to 215 yr hum. I

VP - yes

PC - Don't agree - thought it meant it well - did.

