

# Withdrawal/Redaction Sheet

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| DOCUMENT NO.<br>AND TYPE | SUBJECT/TITLE                                                                          | DATE       | RESTRICTION<br><b>COPY</b><br>P5 6078 |
|--------------------------|----------------------------------------------------------------------------------------|------------|---------------------------------------|
| 001. memo                | Appellate Memorandum in the Matter of Meinhold v. U.S. Department of Defense (9 pages) | 01/29/1993 |                                       |

### COLLECTION:

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

### FOLDER TITLE:

Gays in the Military, 1993 - 1999 [4]

Kelly Hendren  
2006-0227-F  
kh585

### 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).

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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]
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- 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]

*Group in the Military*  
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**APPELLATE MEMORANDUM IN THE MATTER OF  
Mainhold v. U.S. Department of Defense  
 U.S.D.C. Central District of California  
 No. CV-92-6044-TJH (January 29, 1993)**

**ARGUMENTS**

- I. The district court erroneously found that the homosexual exclusion policy, as it existed when plaintiff was discharged, deprived plaintiff of the protection of the Equal Protection Clause of the Fifth Amendment;
- II. The order of the district court is extremely broad and raises serious issues concerning the separation of powers and judicial intervention in the management of the military, and military personnel decisions.
- III. The district court failed to require the plaintiff to exhaust his administrative remedies before the Board for Correction of Naval Records (BCNR).

**Statement of Facts**

Plaintiff, Volker Keith Mainhold, is an Aviation Anti-Submarine Warfare Operator (AW1), a first class petty officer in the U.S. Navy. On May 19, 1992, he appeared on "ABC World News Tonight" and declared, "Yes, I am in fact gay." As a result, on May 20, 1992, plaintiff's commanding officer notified him that he was "being considered for an administrative discharge from the naval service by reason of homosexuality as evidenced by your declaration of being homosexual . . . .".

On June 29 and 30, 1992, an administrative separation board convened. After the presentation of evidence from both parties, the board found that plaintiff was a homosexual, and recommended his separation with an honorable discharge. Plaintiff was discharged from the naval service on August 12, 1992.

On October 6, 1992, without pursuing his administrative remedies before the BCNR, plaintiff commenced this action, raising the following allegations: 1) that there were procedural defects in his administrative separation proceedings; 2) the Navy was estopped from commencing the proceedings; 3) the Department of Defense homosexual exclusion policy amounted to a bill of attainder; and 4) the exclusion policy violated his right to equal protection of the law. As an adjunct to his complaint, plaintiff moved for a preliminary injunction to enjoin defendants "from continuing to separate Plaintiff from the Navy."

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On October 22, 1992, the district court denied defendant's ex parte application for a stay of proceedings pending completion of Supreme Court action in Pruitt v. Chanay, 963 F.2d 1160 (9th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 555 (1992). In addition, the court denied defendant's alternative motion for a 30-day extension of time to respond to plaintiff's 34-page memorandum of law in support of the motion for preliminary injunction.

Defendant filed a motion for summary judgment and a 56-page memorandum of law and an opposition to plaintiff's motion for preliminary injunction. Upon learning that its brief exceeded the local 35-page limitation, defendant filed, on November 5, 1992, an ex parte application to exceed the local page limitation. On the same date, plaintiff filed an ex parte motion for a continuance of defendant's motion for summary judgment and requested that defendant's brief be stricken for exceeding the local page limitations.

By order dated November 6, 1992, the court ordered defendant's memorandum stricken, granted plaintiff's motion for a preliminary injunction, and ordered plaintiff to be reinstated in the Navy. The court took these actions without conducting a hearing, and without reaching any findings of fact or conclusions of law.

Defendants then sought reconsideration and noticed an appeal to the Ninth Circuit. The district court denied reconsideration and issued limited findings of fact re the basis for a preliminary injunction. Defendants, realizing the existence of a Little Tucker Act claim, noticed an appeal to the U.S. Court of Appeals for the Federal Circuit. The defendants also moved to withdraw the appeal to the Ninth Circuit. Following oral argument, the Federal Circuit stayed proceedings pending decision by the Ninth Circuit regarding defendants' motion to withdraw their appeal.

On December 31, 1992, both parties moved for summary judgment in the district court. On January 29, 1993, the district court entered a judgment which granted plaintiff's motion for summary judgment, and denied defendants' motion for summary judgment. The court ordered that the "Department of Defense is permanently enjoined 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." (Opinion at p. 6). The court also rescinded plaintiff's discharge from the naval service.

On the same day, a Presidential Statement was issued which reflected an agreement between the President and Senate leader-

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ship. The Presidential Statement directs the Secretary of Defense to "conduct a review of the current Department of Defense policy that excludes homosexuals from military service and prepare a draft executive order based upon that review by July 15, 1993." Pending completion of the Secretary's review, the Presidential Statement provides that "[c]urrent Department of Defense personnel policies related to this issue will remain in effect" and that servicemembers will be processed for separation under "current cases and regulations related to homosexuality."

The provisions of the Presidential Statement are complemented by § 601 of the Family and Medical Leave Act of 1993 (the "Family Leave Act"), Pub. L. No. 103-3, 107 Stat. \_\_\_\_ (Feb 5, 1993). Section 601 expresses the "sense of Congress" that "[t]he Secretary of Defense shall conduct a comprehensive review of current departmental policy with respect to the service of homosexuals in the Armed Forces."

On February 12, 1993, the United States filed "Defendants' Ex Parte Application for Clarification, Alteration or Amendment of the Court's Order and Judgment or, in the Alternative, For a Stay Thereof." The purpose of the ex parte application was to permit the district court to conform its order to the limits of the Presidential Statement. On February 17, 1993, the district court entered an order denying the defendants' ex parte application.

#### Issues

1. Whether the district court abused its discretion when it issued a permanent injunction?
2. Whether the rescission of plaintiff's lawful discharge from the naval service represents an abuse of discretion?

#### Discussion

##### I. Plaintiff's Equal Protection Rights Were Not Violated

###### A. Standard of Review

Relying upon Pruitt v. Chanay, 953 F.2d 1150, 1155-57 (9th Cir. 1991) cert. denied, \_\_\_\_ U.S. \_\_\_\_, 113 S.Ct. 655 (1992), the district court held that "the Department of Defense must establish, through a factual record, that its policy is rationally related to its permissible goals." (Opinion at p. 3). The court continued by stating that it could not "merely defer to the 'military judgment' as the rationale for the policy," but that it must consider the "factual basis" underlying the military judgment. Id.

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The district court misapplied the standard as announced in Pruitt, if that standard, as discussed below, even remains the law in the Ninth Circuit. In Pruitt, the Ninth Circuit held that the military's policy on homosexuality could not be deemed "rational as a matter of law, without any justification in the record at all." 953 F.2d at 1166. Holding that the plaintiff's equal-protection challenge to the policy ought not to have been dismissed for failure to state a claim, the court of appeals remanded the case for "further appropriate proceedings," including "those directed toward determining" whether the policy "is rationally related to a permissible governmental purpose." Id. at 1167. The Pruitt decision does not require an independent factual basis for the exclusion policy, as the district court would have us believe.

**B. Whether Pruitt Remains The Law of the Ninth Circuit is Unclear**

In United States v. Harding, 971 F.2d 410 (9th Cir. 1992), the court of appeals held that the government need not create an evidentiary record in order to show that a statutory or regulatory classification possesses a rational basis. In Harding, an equal protection challenge to the differential treatment of crack and powder cocaine in the Sentencing Guidelines, the court of appeals stated:

In establishing a statutory classification, one need not, as Harding contends, supply empirical evidence to support a rational relationship. In fact, a "legislative body need not explicitly state its reasons for passing legislation so long as a court can divine some rational purpose."

971 F.2d at 412-13 (citation omitted; emphasis supplied).

Therefore, as Harding appears to relieve the government of any burden of establishing a factual basis to support a rational relationship for the exclusion policy, the district court erred in resting on the standard articulated in Pruitt. It must be noted that the district court was apprised of the standard announced in Harding but chose not to even discuss that standard in its opinion.

Further, four different courts of appeal have held that legitimate grounds exist to support the military's policy on homosexuals. Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Dronenburg v. Zach, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Woodward v. United States, 871 F.2d 1071 (Fed. Cir. 1989) cert. denied, 494 U.S. 1003 (1991). See also

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Seller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied 452 U.S. 905 & 454 U.S. 855 (1981). In the absence of a factual record to support the military's policy, the district court could and should have relied upon this impressive, and long standing series of precedents upholding the exclusion policy and rejected plaintiff's equal protection claim.

**C. Defendants Satisfied the Pruitt Evidentiary Standard**

In evaluating the "factual record" for the exclusion policy, the district court stated that the Department of the Navy relied solely on a report produced by the General Accounting Office (GAO) in March 1992, entitled: Defense Force Management: Statistics Related to DoD's Policy on Homosexuality (1992). Standing alone, the Defense Department's comments to the GAO report supply sufficient rationale for the exclusion policy. Further, the district court ignored additional evidence submitted by the defendants explaining the rationale for the policy. This evidence was submitted in the Reply Memorandum In Support of Defendants' Motion For Summary Judgment (Reply) and consisted of the following:

1. Declaration of Rear Admiral S. Frank Gallo, U.S. Navy, Deputy Chief of Naval Personnel;
2. Declaration of Christopher Jehn, the former Assistant Secretary of Defense for Force Management and Personnel; and
3. Declaration of Captain Gregory A. Markwell, U.S. Navy, the plaintiff's commanding officer who discussed the impact of plaintiff's presence in the squadron.

As detailed in the defendants' Reply, these declarations, in addition to the comments attached to the GAO report, provide an adequate factual basis to establish a rational basis for the exclusion policy. The court's failure to consider and discuss the declarations and other factual evidence is significant, especially when the court discussed at length and quoted favorably the opinions of opponents of the exclusion policy.

**II. The District Court Failed to Accord Proper Deference to Military Judgment and Usurped the Constitutionally Mandated Role of the Legislative and Executive Branches**

**A. Military Deference.**

In Pruitt, the court of appeals relied upon Goldman v. Weinberger, 475 U.S. 503, 507 (1986) and Roemer v. Goldberg, 453

U.S. 57, 64-68 (1981), for the proposition that when **COPY** whether or not a rational basis exists for the exclusion policy, a court must afford the military great deference in making this determination. As the statement of the exclusion policy makes clear, and is further supported in the factual evidence submitted, the rational basis underlying the policy is the professional military judgment of military leaders that the presence of homosexuals will have a detrimental impact on military effectiveness.

It is clear from the face of the opinion that the district court afforded no deference to military judgment, and, contrary to established precedent, substituted its own judgment for that of the military, its civilian leaders, and the Legislative and Executive branches. See, e.g., Orloff v. Willoughby, 345 U.S. 83, 94 (1953); ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); accord Chappell v. Wallace, 462 U.S. 296, 301 (1983); Goldman v. Weinberger, 475 U.S. at 507; accord Ben-Shalom, 881 F.2d at 462; Staffan v. Cheney, 733 F. Supp. 121, 125 (D.D.C. 1989), rev'd other grounds, 920 F.2d 74 (D.C. Cir. 1990).

#### B. Separation of Powers

The blatant abuse of judicial discretion by the district court raises crucial separation of powers issues. The Constitution contemplated that the Legislative Branch has plenary control over the rights, duties, and responsibilities in the framework of the Military Establishment, including regulations and remedies related to military discipline. See U.S. CONST. art. I, § 8, cls 12-14. The Supreme Court has long recognized that the judiciary is not to usurp the Constitutionally mandated control that the Congress and President hold over the military. See e.g., Orloff v. Willoughby, 345 U.S. at 97 ("Judges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon Congress and upon the President of the United States and his subordinates."); Gilligan v. Moran, 413 U.S. 1, 10 (1973) ("Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.") (emphasis supplied).

The district court's total disregard for these basic constitutional principles is especially revealed in light of the Statement of Department of Defense Policy Regarding Homosexuals

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In The Military promulgated by the White House on 29 January 1983 (White House Statement). The White House Statement does not reverse the existing homosexual exclusion policy. Rather, it merely suspends the discharge, but not the administrative processing, of homosexuals who identify themselves through statements, not conduct. The Department of Defense retains the ability to discharge homosexuals for conduct. Additionally, the White House Statement prohibits inquiring into the sexual orientation of potential recruits.

The district court's order, instead of merely addressing the appropriateness of the plaintiff's discharge and reinstatement, exceeds this simple issue and basically declares the exclusion policy unconstitutional and further enjoins the entire Department of Defense from discharging or denying enlistment to any person based on sexual orientation.<sup>1</sup> Further, the court's order prohibits the discharge of homosexuals who engage in criminal conduct in violation of Article 128 of the UCMJ, by requiring that the sexual conduct interfere "with the military mission of the armed forces . . .". It is obvious that this order, if permitted to stand, contradicts the legitimate role of the Congress and the President in the management of military discipline. Again, this judgment oversteps the bounds of judicial discretion and imposes itself into matters properly within the authority and control of the Legislative and Executive Branches.

### III. Plaintiff Failed to Exhaust His Administrative Remedies

In granting the permanent injunction, the district court held that "there were numerous procedural errors committed by the board of Naval officers convened for Meinhold's administrative discharge hearing, . . ." (Opinion at p. 2). Despite this finding, the court held that requiring plaintiff to exhaust his administrative remedies would be futile. *Id.*

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<sup>1</sup> The scope of the court's order is too broad. See Zapada v. United States INS, 753 F.2d 719, 726-28 (9th Cir. 1983) (Injunction must be limited to individual plaintiffs unless the district judge certifies a class of plaintiffs. District court erred in treating suit as a class action but not certifying the action as a class). Further, the court had no authority to review, let alone issue an order, concerning the issue of enlistment. See Carmichael v. Birmingham Sew Works, 738 F.2d 1126, 1136 (11th Cir. 1984) (Although injunctive relief may benefit nonparties as well as parties to the suit, the class benefitted must include the plaintiff. Otherwise, the injunctive relief is unnecessary to the "just disposition of the action.") Gregory v. Litton Systems, 474 F.2d 631, 634 (9th Cir. 1973).

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In this matter, plaintiff has failed to pursue relief before the BCNR. BCNR, composed of civilians, was established to provide for an independent review of actions taken by uniformed personnel, and is empowered to correct a serviceman's records where "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552. See, Chappell v. Wallace, 462 U.S. 296, 301-303 (1983). BCNR can specifically award back pay and reinstate an officer. 10 U.S.C. § 1552(c)(4). Review by BCNR would ensure a clear factual record for any subsequent judicial review, thereby alleviating the court's perceived need for further factual development.

Substantial case law supports the proposition that "a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." Guitard v. United States Secretary of the Navy, 967 F.2d 737, 740 (2d Cir. 1992); accord Muhammad v. Secretary of the Army, 770 F.2d 1494, 1495 (9th Cir. 1985); Von Hoffburg v. Alexander, 615 F.2d 633, 637 (5th Cir. 1980). The exhaustion doctrine applies with particular force to military-discharge cases. There, "[t]he imperatives concerning military discipline" require the "strict application" of the exhaustion doctrine and judicial insistence thereon "maintains the balance between military authority and the federal courts." Guitard, 967 F.2d at 740; Muhammad, 770 F.2d at 1495; Von Hoffburg, 615 F.2d at 637.

Accordingly, as plaintiff alleged, and the court found numerous procedural defects in the administrative discharge process, his claim is ripe for review by the BCNR. The BCNR can review plaintiff's arguments and evidence, and provide for a hearing as well as an opportunity to review and rebut all of the evidence. In essence, the BCNR would create a record that would be reviewable by a district court. Contrary to the court's findings, exhaustion in plaintiff's case would not be futile. (Opinion at p. 2). Simply because plaintiff's appeal to the BCNR "may, probably will, fail, but that does not make it futile; most appeals fail." Health Equity Resources Urbana, Inc. v. Sullivan, 927 F.2d 963, 965 (7th Cir. 1991). Therefore, the district court abused its discretion in failing to require plaintiff to exhaust his administrative remedies.

### Conclusion

As discussed above, we believe the district court has committed significant error. The court's opinion and broad order contradict current policy on homosexuals in the armed forces and violate the traditional role of the judiciary in cases involving military personnel decisions. Further, the court failed to follow the proper standard for reviewing administrative decisions

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in that it required the defendants to produce empirical evidence to support a rational basis. However, if this remains the proper standard, then the court committed error by not considering all of the factual evidence submitted by the defendants.

Furthermore, the court's decision holds, for perhaps the first time, that sexual orientation is protected under the Equal Protection Clause of the Fifth Amendment. Such a decision will have wide and sweeping impact on not just the military, but the civilian sector as well, e.g., challenges to state statutes barring homosexual teachers in public schools.

As a final matter, we realize that the underlying reason for plaintiff's discharge -- homosexuality -- is an emotionally charged issue. The key to this case, however, is not the reason for plaintiff's discharge. Rather, this case has broad potential application to all administrative-discharge cases. The court's opinion, its reasoning and the lack of deference demonstrated towards the military, impacts, arguably, all military personnel policies such as obesity, age, height, and other characteristics limiting an individual's ability to serve in the armed forces.

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| 001. letter              | Joe Bouchard to Bob Bell re: McVeigh (1 page) | 03/27/1998 | <div><div>COPY</div><div>P5 6077</div></div> |
| 002. note                | Handwritten Notes (34 pages)                  | 01/25/1993 | P5                                           |

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## NATIONAL SECURITY COUNCIL

3/27

Bob,

Putting McVeigh back on a sub is a terrible idea for many reasons, not the least of which is he would not be ~~publicly~~ public has received, his p and his lawsuit, him a "gay rights" has put his own s the gay cause ahead to his command shipmates. This

This is not  
McVeigh but  
Meinhold

Meinhold v DOD

The morale and cohesion of whatever sub he is put on will be destroyed. Navy must decide which crew it will sacrifice. Hopefully Navy can find a sub being decommissioned to put him on so an operational unit will not be ruined.

Joe