U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

August 3, 1994

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: John A. Rogovin
Deputy Assistant Attorney General

SUBJECT: Pending Challenges to the Military's Policy on Homosexual Conduct.

PURPOSE: Update.

DISCUSSION:

As you requested, I am providing below the status of the pending cases that challenge the constitutionality of the military's policy on homosexual conduct. Each case is identified as "Old Policy," "Interim Policy," or "New Policy" depending on whether the version of the policy at issue in the case is the version that existed before the beginning of the Clinton Administration, the version that existed on an interim basis from January to November 1993, or the version that Congress adopted in November 1993. Each case is also identified as an "Acts" or "Statements" case depending on whether the plaintiff was discharged for committing homosexual acts or for making statements indicating a likelihood of doing so.

As you know, plaintiffs in these cases typically bring two main claims. The first is an equal protection claim. We defend this claim by arguing that the correct level of constitutional scrutiny in the military context is rational basis. (Please note that we do not take a position on what the proper level of scrutiny may be in the civilian context.) The rational basis standard is deferential; the court must uphold the statute "if there is any reasonably conceivable state of facts that could provide a rational basis for the [statutory] classification." Heller v. Doe, 113 S.Ct. 2637, 2642 (1993) (quoting Federal Communications Comm'n v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993)). In addition, the statutory classification "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Heller, 113 S. Ct. at 2643 (internal quotations omitted).

We also rely on a long line of Supreme Court precedent holding that courts must accord great deference to the Legislative and Executive Branches' decisions concerning the

governance and composition of the Armed Forces. See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986); Rostker v. Goldberg, 453 U.S. 57 (1981). Given this deferential standard of review, we argue that Congress and the military reasonably concluded that the policy is reasonably related to the several legitimate military interests, including the maintenance of unit cohesion and the protection of the privacy of servicemembers who often must live and work in close quarters. In several district court decisions (most recently the Cammermeyer decision), the district courts rejected our arguments, and held that the policy violates equal protection because each of the military's justifications is either unfounded or based solely on the prejudice of heterosexual servicemembers.

The second claim we typically see in these cases is an argument that the policy violates the First Amendment by prohibiting or punishing speech of a particular content, namely admissions of homosexuality. No court has ever ruled against us on the merits of this claim, although the district court in issuing a preliminary injunction in the Able case found that the plaintiffs had raised "serious questions" about the First Amendment. We defend the First Amendment challenges by arguing that the policy does not punish plaintiffs based on the content of their speech; rather, it uses their admissions of homosexuality as evidence that they engage in or are likely to engage in proscribed homosexual acts. The evidentiary use of speech does not violate the First Amendment. See, e.g., Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993).

Below is a short description of the cases:

1. Able v. Perry (E.D.N.Y.). New Policy/Statements Case brought by six gay or lesbian servicemembers. In April and June 1994, the court issued preliminary injunctions ("PI's") enjoining defendants from investigating, discharging or taking other adverse or punitive action against plaintiffs based on their "self-identification as gay or lesbian." Defendants' appeals of the PI's are pending, as is their motion to dismiss. Discovery has been stayed pending adjudication of defendants' motion to dismiss.

2. Meinhold v. U.S. Department of Defense (9th Cir.). Old Policy/Statements Case brought by Navy petty officer. In January 1993, the district court (C.D. Cal.) issued a decision holding the Old Policy violates equal protection. Defendants' appeal was heard by the Ninth Circuit in December 1993; we are waiting for a decision.

3. Steffan v. Perry (D.C. Cir.). Old Policy/Statements Case brought by midshipman at the Naval Academy. The decision of the district court upholding the Old Policy against equal-protection challenge was reversed by a panel of the D.C. Circuit,

but the opinion of the panel was vacated by the full court in January 1994 and rehearing en banc was ordered. Rehearing took place in May 1994; we are waiting for the decision of the full court.

4. Cammermeyer v. Perry (9th Cir.). Old Policy/Statements Case brought by colonel in the Washington Army National Guard. In June 1994, the district court (W.D. Wash.) issued a decision holding that the Old Policy is based on prejudice and, therefore, violates equal protection and substantive due process. Appellate proceedings have been stayed pending the decision of the Ninth Circuit in Meinhold. We attempted to stay Colonel Cammermeyer's reinstatement into the National Guard, but we were not successful.

5. Dahl v. Secretary of the U.S. Navy (9th Cir.). Old Policy/Statements Case brought by Navy enlisted man. In August 1993, the district court (E.D. Cal.) issued a decision holding the Old Policy to be based on prejudice and therefore to violate equal protection. Appellate proceedings have been stayed pending the decision of the Ninth Circuit in Meinhold.

6. Pruitt v. Perry (C.D. Cal.). Old Policy/Statements Case brought by Army Reserve officer. In a decision issued in 1991, the Ninth Circuit held that the Old Policy could not be upheld against equal-protection challenge unless defendants made an evidentiary showing that the policy had a rational basis. Proceedings on remand have been held in abeyance pending the decision of the Ninth Circuit in Meinhold.

7. Elzie v. Perry (D.D.C.). Interim Policy/Statements Case brought by Marine sergeant. In November 1993, the district court issued a PI enjoining plaintiff's transfer to the standby reserve, one of the options for the military under the Interim Policy.

8. Secora v. Fox (S.D. Ohio). Old Policy/Acts case brought by Air Force non-commissioned officer. In July 1994, the district court issued a decision upholding the Old Policy against equal-protection challenge as applied to servicemembers found to have committed homosexual acts.

9. Kindred v. Dalton (W.D. Wash.). Acts case brought by naval officer. In July 1994, the district court issued an order staying all proceedings pending the decision of the Ninth Circuit in Meinhold but providing that the stay of proceedings did not prohibit the plaintiff's discharge.

10. Walmer v. Department of Defense (10th Cir.). Old Policy/Acts Case brought by Army officer. In October 1993, the district court (D. Kans.) denied the motion of the plaintiff for a PI but extended a previously entered TRO to permit the plaintiff to seek appellate review. In April 1994, the 10th Circuit issued an order preserving the status quo pending review on the merits. Defendants filed their appellees' brief in July 1994.

11. Paniccia v. Department of Defense (D. Ariz.). Old Policy/Statements case brought by Air Force sergeant. The cross motions of the parties for summary judgment have been stayed pending the decision of the Ninth Circuit in Meinhold.

12. Thorne v. Department of Defense (D.D.C.). New Policy/Statements case brought by Navy officer. The case was originally an Interim Policy case, but the parties agreed in January 1994 to transfer the plaintiff from the inactive reserve to active duty, with the understanding that he would be processed for discharge under the New Policy. The discharge of the plaintiff under the New Policy has recently been recommended, but administrative processing has not been completed.

13. Philips v. Perry (W.D. Wash.). New Policy/Acts & Statements case brought by Navy enlisted man. The case was originally an Interim Policy/Statements case, but proceedings were held in abeyance after the motion of the plaintiff for preliminary injunctive relief was denied. The plaintiff was recently reprocessed for discharge as both an Acts and a Statement case under the New Policy; further proceedings are anticipated if the plaintiff's discharge goes forward.

Please let me know if you need any additional information. I can be reached at the office at (202) 514-5421 or at home at (202) 328-7737.

cc: Frank Hunger
Merrick Garland
Mike Vatis