

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LIEUTENANT COLONEL JANE ABLE, :
PETTY OFFICER ROBERT HEIGL, :
FIRST LIEUTENANT KENNETH OSBORN, :
SERGEANT STEVEN SPENCER, :
LIEUTENANT RICHARD von WOHL, and : CIVIL ACTION
SEAMAN WERNER ZEHR, : NO. _____
:
Plaintiffs, :
:
-against- : AFFIDAVIT OF
:
UNITED STATES OF AMERICA :
and WILLIAM J. PERRY, SECRETARY OF :
DEFENSE, in his official capacity, :
:
Defendants. :
-----X

STATE OF NEW YORK)
: ss. :
COUNTY OF NEW YORK)

DAVID H. BRAFF, being duly sworn, deposes and
says:

1. I am a member of the firm of Sullivan &
Cromwell, and I am duly admitted to the Bar of the State of
New York and this Court. I am counsel to the plaintiffs in
this action and fully familiar with the facts and
circumstances set forth below.

2. I submit this affidavit in support of
plaintiffs' motion for a temporary restraining order and a
preliminary injunction. There has been no prior application
for the same or any similar relief.

3. In this action, plaintiffs seek (i) a declaration that Section 571 of the National Defense Authorization Act for Fiscal Year 1994 (the "Act") (the "Policy Concerning Homosexuality in the Armed Forces") and regulations promulgated by the Secretary of Defense thereunder (the "DOD Regulations") are unconstitutional, and (ii) an order permanently restraining enforcement of these provisions. A copy of the complaint (which is expected to be served and filed no later than March 7, 1994) is attached as Exhibit A. A copy of the Act is attached as Exhibit B.

4. The DOD Regulations were announced by then-Secretary of Defense Les Aspin on December 22, 1993, to become effective at a later date. A copy of the DOD Regulations as issued in a Department of Defense news release is attached as Exhibit C. The DOD Regulations as proposed were modified by the current Secretary, William J. Perry, and were implemented by the service branches and became effective on March 1, 1994. Copies of the pages of the DOD Regulations with modifications, provided to us today by the government, are attached as Exhibit D.

5. In July 1993, all but one of the plaintiffs in this action were among service members who commenced an action in the District Court for the District of Columbia, Doe v. Aspin, No. 93-Civ. 1549, asserting constitutional and statutory claims (which differed from those asserted in this case) regarding an interim policy expressed in a directive

concerning the service of gay men and lesbians in the armed forces issued by Secretary Aspin.

6. Shortly after the filing of the--complaint in the Doe case, and as a consequence thereof, an investigation was commenced against at least one of the plaintiffs, Sergeant Steven Spencer. (Documents relevant to the investigation of Sergeant Spencer are attached hereto as Exhibit E.)

7. Within a few weeks of the filing of the complaint in the Doe action, it became clear the Congress was considering enacting legislation that would supersede the Aspin directive which was the subject of that action. With the concurrence of counsel for the plaintiffs in the action, counsel for the government (the same counsel representing the defendants here) obtained an extension of time to answer or move with respect to the complaint.

8. Subsequently, Congress passed legislation concerning the service of gay men and lesbians in the armed services, and the parties in the Doe case filed a Joint Motion for Further Enlargement of Time (the "Joint Motion"), later granted, which extended the Doe defendant's time to respond to the complaint until "20 days after the [Act] bec[ame] law or the President vetoe[d] that legislation."

9. In both instances described in paragraphs 7 and 8 above, counsel for the Doe plaintiffs conditioned their accession to the government's request on an express

agreement not to commence or continue separation or discharge proceedings against any of the plaintiffs.

10. Following the President's signature of the Act (which was substantially more restrictive than the Aspin directive) and the realization that the Act required new regulations to be promulgated to implement its terms, counsel for the parties in the Doe action agreed to dismiss that action without prejudice. Once again, counsel for the plaintiffs in that case (which included all but one of the plaintiffs here) conditioned their agreement on an explicit undertaking from the government to refrain from commencing proceedings against the plaintiffs pending publication of regulations implementing the Act. The DOD Regulations were published on or about December 22, 1993, to become effective at a later date.

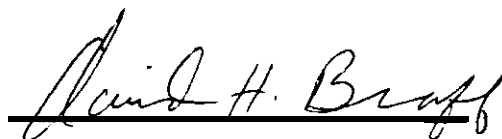
11. The DOD Regulations -- in modified form -- were implemented without public announcement on March 1, 1994. Throughout the period between the dismissal of the Doe action and March 2, counsel for the parties repeatedly discussed (i) the timing and circumstances under which plaintiffs would commence a new action to challenge the constitutionality of whatever new policy regarding the treatment of lesbians and gay men in the armed services might emerge, and (ii) the possibility of an agreement -- similar to that maintained in the Doe action -- to permit plaintiffs to bring such a challenge without risk that they

would be investigated, subject to other punitive or adverse treatment and discharged solely as a consequence of the fact that they identified themselves as lesbian or gay in doing so.

12. On March 2, at the request of counsel for the defendants, plaintiffs' counsel provided defendants' counsel with the names of all of the named plaintiffs in this action who had also been plaintiffs in the Doe case so that the government could finalize discussions with the service branches about a possible agreement of the type described above that would protect the plaintiffs at least until the Court could address plaintiffs' preliminary injunction motion. Within hours, counsel for the government telephoned plaintiffs' counsel to report that the government had learned nothing of concern with respect to the individuals identified, but nonetheless would not agree not to commence proceedings against, or otherwise "process," those individuals under the DoD Regulations prior to the Court's ruling on plaintiffs' preliminary injunction motion.

13. With the filing of this complaint, each named plaintiff has identified himself as gay. Given this fact and the requirements imposed by the Act and the DoD Regulations, unless the Court grants plaintiffs injunctive relief, each named plaintiff's respective commanding officer will be obligated to proceed according to the terms of the Act and the DoD Regulations, and there is every reason to

believe that each named plaintiff will be the subject of prompt, intrusive investigation and stands to be irreparably injured by a variety of other punitive or adverse professional or personal actions, with discharge and an end to their military careers to follow.



David H. Braff

Sworn to before me this
4th day of March, 1994


Notary Public

MADELINE MORALES
Notary Public, State of New York
Qualified in Kings County
No. 4932115
Certificate Filed in New York County
Commission Expires June 20, 1994