

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

Richard F. Richenberg, Jr.,

Plaintiff,

Civil Action No.: 8:CV95-393

v.

William J. Perry, Secretary of Defense, in his official capacity; and Sheila Widnall, Secretary of the Department of the Air Force, in her official capacity,

Defendants.

**AMENDED VERIFIED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff Captain Richard F. Richenberg, Jr., by and through his attorneys, alleges:

PARTIES

1. Plaintiff is a Captain in the United States Air Force. He is stationed at Offutt Air Force Base, Nebraska, and he resides in Omaha, Nebraska.

2. Defendant William J. Perry is Secretary of Defense. He is named here in his official capacity. In that capacity, he is ultimately responsible for supervising Capt. Richenberg's military service. He is also responsible for promulgating, implementing, supervising, and enforcing regulations that govern military service in all branches of the United States armed forces. In this connection, he is responsible for enforcement of the federal law governing military service by gay men and lesbians, as embodied in the National Defense Authorization Act for the Fiscal Year 1994, § 571 (10 U.S.C. § 654), and the regulations and procedures promulgated and implemented pursuant thereto.

3. Defendant Sheila Widnall is Secretary of the Department of the Air Force. She is named here in her official capacity. In that capacity, she is responsible for supervising Capt. Richenberg's military service. She is also responsible for promulgating, implementing, and enforcing regulations that govern conditions of service in the Air Force

for gay men and lesbians. Defendant Widnall, in addition, is directly responsible for the final decision to discharge or retain an Air Force service member who is gay or lesbian.

NATURE OF THE ACTION

4. This is an action for declaratory and injunctive relief challenging the constitutionality of the statute and regulations that govern the exclusion of lesbians and gay men from the United States Armed Forces. The plaintiff, Capt. Richenberg, has served in the United States Air Force for ten years, with an outstanding service record. He is now about to be discharged from the Air Force, pursuant to the challenged statute and regulations, solely on the basis of his statement that he is gay.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 2201 and 5 U.S.C. § 702.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), (e).

FACTS

A. The Act and the Regulations

7. Section 57' of the National Defense Authorization Act for the Fiscal Year 1994 was enacted in November 1993 and is entitled "Policy concerning homosexuality in the armed forces." See National Defense Authorization Act for the Fiscal Year 1994, § 571, 10 U.S.C. § 654 (Supp. V 1993) ("the Act"). The Act requires that "[a] member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense" if (1) "the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act," (2) "the member has stated that he or she is a homosexual or bisexual, or words to that effect," or (3) "the member has married or attempted to marry a person known to be of the same biological sex." Separation is required in the second instance "unless there is a further finding, made and approved in

accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.”

8. On 21 December 1993, the Department of Defense issued Directive 1332.30, relating to “Separation of Regular Commissioned Officers,” which took effect in February 1994. This Directive states that “[h]omosexual conduct is grounds for separation from Military Services,” and homosexual conduct includes not only homosexual “acts” but also “a statement by a member that demonstrates a propensity or intent to engage in homosexual acts.” Such a statement, according to Directive 1332.30, “creates a rebuttable presumption” that the member “engages in homosexual acts or has a propensity or intent to do so.” Directive 1332.30 states that “propensity” to engage in homosexual conduct means something “more than an abstract preference or desire to engage in homosexual acts” and “indicates a likelihood that a person engages in or will engage in homosexual acts.”

9. Directive 1332.30 further provides that in determining whether an officer has successfully rebutted the presumption described above, the military is to consider the following nonexclusive list of factors:

- (1) Whether the officer has engaged in homosexual acts;
- (2) The officer’s credibility;
- (3) Testimony from others about the officer’s past conduct, character, and credibility;
- (4) The nature and circumstances of the officer’s statement;
- (5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

10. In February 1994, the Department of the Air Force amended Air Force Regulation 36-2 (“AFR 36-2”), which contains its “Administrative Discharge Procedures.” These amendments were issued in compliance with the instructions contained in Secretary Aspin’s Memorandum and essentially repeat much of the information and procedures

contained in the Directive 1332.30. (AFR 36-2 and Directive 1332.30 are hereinafter collectively referred to as "the Regulations.")

11. The Act and the Regulations each draw a distinction between speech and behavior permissible for heterosexuals and speech and behavior permissible for Capt. Richenberg and other open homosexuals in the armed services. This distinction serves no legitimate and rational governmental or military interest but rather is based solely on the prejudices and presumed prejudices of heterosexual service members and civilians.

B. Capt. Richenberg's Military Record

12. In April 1985, after receiving a degree from Texas A&M University and attending graduate school at A&M, Capt. Richenberg entered the United States Air Force and enrolled in the Officer Training School, Lackland Air Force Base, Texas. He entered the Air Force because he believes that service in the defense of the United States is an honorable, patriotic calling.

13. Capt. Richenberg graduated near the top of his class at the Officer Training School, receiving his commission in July 1985.

14. After receiving his commission, Capt. Richenberg attended Undergraduate Navigator Training School at Mather Air Force Base, California. He completed training in February 1986 as a distinguished graduate, in the top ten percent of his class. His evaluator for this period recommended that Capt. Richenberg be promoted at the first opportunity, noting that Capt. Richenberg had "well above average officer qualities," was "a real team player," and had "set the example for both his peers and subordinates."

15. Capt. Richenberg also attended Electronic Warfare Officer Training School at Mather Air Force Base. An Electronic Warfare Officer operates sophisticated electronic intelligence equipment on aircraft. He completed this training in August 1986 as a distinguished graduate, first in his class. He was awarded the prestigious Deputy Commander for Operations Plaque, an award reserved for the most outstanding officer in

the class, based on academic performance, demonstrated expertise, professionalism, and leadership. He scored one hundred percent on three performance evaluations during training at Mather Air Force Base, and ninety-eight percent on a fourth. His evaluator during this training stated that Capt. Richenberg "must be tendered a regular commission." His evaluator also recommended that Capt. Richenberg be promoted and selected to attend Squadron Officer School in residence at Maxwell Air Force Base, Alabama. The evaluator noted that Capt. Richenberg could "personally take much of the credit for the outstanding achievements of his class" and that Capt. Richenberg "is clearly a superior leader, thinker and tactician."

16. On his first tour of duty as an Electronic Warfare Officer, Capt. Richenberg was stationed at Eielson Air Force Base, Alaska, from August 1986 to September 1989. During this time, Capt. Richenberg was evaluated by his superior officers with the highest possible rating in all measured categories. He was also recognized as the squadron's Electronic Warfare Officer of the Year, and, as a consequence, he was awarded the first leather flying jacket in his wing, a prestigious award, months before the other members of the wing received their jackets. He was also named his squadron's first Reconnaissance Crewmember of the Quarter in 1987 and he was selected by his wing commander as Model Officer for 1987.

17. While at Eielson, Capt. Richenberg was selected to attend the Central Flight Instructor Course at Castle Air Force Base, California, in recognition of his outstanding performance. Capt. Richenberg was chosen to be an in-flight evaluator while he was a lieutenant and before he had completed the instructor program. He was promoted to instructor, moreover, after only nine months, and he was the first lieutenant ever selected to work in Training Flight as a Subject Matter Expert.

18. At Eielson, Capt. Richenberg's "dedication and enthusiasm" were described by his evaluator in October 1988 as "vital to both his crew and our . . . Division." In his

August 1989 performance report, Capt. Richenberg's efforts were said to have "directly contributed to the Wing's rating of "Outstanding."

19. In 1989, Capt. Richenberg was transferred to Offutt Air Force Base, Nebraska, where, among other duties, he served as Squadron Executive Officer to the Commander. During his initial qualification training at Offutt, he maintained an academic average of 99.6 percent. He was selected to serve as his squadron's representative for a discussion of aircraft capabilities at the Canadian Forces School of Aerospace Studies. He was also selected as an instructor for Combat Crew Training School, after only seven months as an instructor, in recognition, again, of his outstanding ability.

20. During Operation Desert Shield and Operation Desert Storm, Capt. Richenberg was sent to the Persian Gulf area. There, he flew twenty-five combat missions, also known as "sorties." One of his most important achievements in Desert Storm was described in his performance report as follows: "First to locate and report an undetected threat system in the theater of operation. Collected a first time intercept of a weapon system with unknown digital guidance capabilities, allowing the exploitation of this signal by national agencies." The details of this are classified, but suffice it to say that Capt. Richenberg's actions saved lives.

21. After Desert Storm, Capt. Richenberg was transferred back to the United States and selected to attend Squadron Officer School. While at Squadron Officer School, he received a letter of excellence in August 1991 from Colonel Lance Lord, the school's Commandant, for excellence in writing, passed along with words of praise from Colonels William Manire and James Thomas, Jr., from Offutt Air Force Base.

22. After Squadron Officer School, Capt. Richenberg returned to Offutt Air Force Base. There, he was selected as the "top candidate" among sixty-five instructors for the Peace Sentinel VI Program. This Program, as described by Capt. Richenberg's evaluator on his 1992 performance report, was a "politically delicate program demanding only our most

talented officers to represent the United States to a foreign government." Capt. Richenberg's commander, Lieutenant Colonel David Bell, commented on that same performance report, that "[w]ithout question [Capt. Richenberg] is the only choice to lead the teams conducting programs of critical importance to U.S. foreign relations."

23. Capt. Richenberg received a letter of appreciation from Colonel Richard Annas, which was endorsed by Colonel William Manire, Colonel David Wolfe, and Lieutenant Colonel David Bell, as well as a letter of commendation from Brigadier General Lawrence Mitchell, for his participation in Colonel Annas's 1992 briefing and tour of the plane on which Capt. Richenberg flew. Colonel Annas wrote of the "outstanding professionalism, dedication, and desire to accommodate" that he encountered in Capt. Richenberg. Colonel Wolfe noted the "professionalism and expertise of Capt. Richenberg." On yet another occasion-after discharge proceedings had begun-Capt. Richenberg received a letter of appreciation from Brigadier General Thomas J. Keck, with Colonel David R. Wolfe adding his "personal 'well done,'" for Capt. Richenberg's "herculean effort" in organizing the ceremony inducting three Intelligence Squadrons into his wing.

24. During his service in the Air Force, Capt. Richenberg has received numerous decorations, including the Air Medal, the Aerial Achievement Medal, the Air Force Commendation Medal, and the Air Force Outstanding Unit Award with Valor Device.

25. On an Air Force Commendation Medal Justification Form submitted in 1993, Capt. Richenberg's group commander, Colonel David Wolfe, described Capt. Richenberg's abilities in the following terms: "superlative leadership abilities"; "excelled in training, motivating, and leading people"; and "a recognized expert in reconnaissance systems knowledge and instructional methodologies." When Capt. Richenberg's discharge process began, the Air Force cancelled the nomination for this award.

26. Throughout his service, Capt. Richenberg has also been involved in charitable events. This involvement began with his fund-raising activities for needy children while at

Electronic Warfare Officer Training at Mather Air Force Base, California, in 1985. It continued in Alaska when he became “the driving force,” according to his January 1988 performance report, behind the fund-raising activities of the local Association of Old Crows, which raised \$4,000 for handicapped children and adults in 1987. Later he became president of the local Association of Old Crows in Alaska and continued to organize fund raisers for the Alaska Crippled Children and Adults organization.

27. At Offutt Air Force Base, Capt. Richenberg-in addition to his demanding responsibilities as an instructor-organized a squadron fund-raiser to support a bone-marrow transplant for a wing member who had been diagnosed with leukemia. This event raised over \$4000 in one evening. In 1993 and 1994, Capt. Richenberg was also involved-despite his discharge proceedings-in the Annual Underprivileged Children’s Christmas Party. This event in 1993 enabled the Reconnaissance Crews Booster Club to provide 133 children with a total of \$17,500 worth of warm clothing.

C. Precipitating Events

28. In January 1993, Capt. Richenberg went to Texas to direct and manage an Electronic Warfare Technical Assistance Field Team before going to a new assignment in Saudi Arabia. There, in April 1993, Capt. Richenberg submitted a separation request asking to be allowed to leave the Air Force. He submitted this request because he had come to realize that he is gay. He wanted a life-long career in the Air Force, but he also knew that under the military regulations then in effect he could be forced out under less-than-honorable conditions if his sexual orientation became known. His request for separation was denied, because it was “not considered to be in the best interest of the Air Force.”

29. Following the denial of his request to separate, Capt. Richenberg wanted to remain in the Air Force but he felt that he had to tell his commanding officer about his sexual orientation. On or about 24 May 1993, Capt. Richenberg sent a letter to Lieutenant

Colonel David Bell, his squadron commander. Lieutenant Colonel Bell, in turn, showed the letter to Lieutenant Colonel David Trask, who was to take command of the squadron seven days later. At about this same time, between May and September 1993, Capt. Richenberg verbally stated to his friends and fellow officers, Capt. Kenneth L. Yaphe and Capt. Mark L. Fiengold, that he is gay.

30. After Colonel Bell received Capt. Richenberg's letter, Capt. Richenberg's assignment to Saudi Arabia was cancelled and he was reassigned back to Offutt. He was stripped of his "sensitive compartmented information" ("SCI") security clearance and, as a consequence, was removed from flying status. At Offutt, Capt. Richenberg was assigned to the Awards and Decorations program, where he has since built a new computer database, automated the program, and wrote new operating instructions for the program, all of which, because of Capt. Richenberg's successful efforts, have been sent to other units and other bases for their Awards and Decorations programs.

D. Board-of-Inquiry Proceedings

31. On 2 December 1993, an administrative Board of Inquiry recommended that Capt. Richenberg be discharged from the Air Force on the basis of his statement that he is gay. A few days before this recommendation, however, on 30 November 1993, Congress enacted a new law governing the exclusion of lesbians and gay men from service in the armed forces. Various regulations implementing this statute followed. As a consequence of this new body of law, the Secretary of the Air Force, pursuant to guidelines in a memo from Assistant Secretary of Defense Edwin Dorn, ordered that Capt. Richenberg be reprocessed for discharge.

32. A second Board of Inquiry, governed by the Act and the Regulations, was convened on June 20 and 21, 1994, to consider the discharge of Capt. Richenberg. During these proceedings, the Air Force submitted no evidence of any improper, prohibited, or homosexual conduct by Capt. Richenberg. The Air Force also did not present any evidence

of any incapacity or inability on the part of Capt. Richenberg. The Air Force proceeded against Capt. Richenberg solely on the basis of Capt. Richenberg's statements that he is gay.

33. In a sworn statement to the Board of Inquiry, Capt. Richenberg explained that when he made his statement that he is gay, he did not intend "to engage in prohibited conduct," nor did he "now intend to engage in prohibited conduct," nor did he, "in the future, intend to engage in prohibited conduct."

34. During the Board-of-Inquiry proceedings, Capt. Richenberg submitted extensive evidence of his impeccable service record, including performance evaluations, letters of commendation and appreciation, citations for awards, and affidavits of other officers with whom he served.

35. Capt. Kenneth Yaphe, a member of Capt. Richenberg's squadron, was called as a witness during the Board of Inquiry. He testified that Capt. Richenberg "is a model officer" with an "outstanding reputation"; that he would have no problem with or objection to flying with or sharing close quarters with Capt. Richenberg; that he had received "unsolicited remarks" from others who said that they "would rather work with Capt. Richenberg given his status than with others who are not homosexual"; and, that Capt. Richenberg's homosexuality would not affect the cohesiveness of their military unit.

36. Capt. Don Olds, Jr., also a member of Capt. Richenberg's squadron, testified that "Capt. Richenberg is extremely professional" and his high opinion of Capt. Richenberg did not change in any way upon learning that Capt. Richenberg is gay; that he would fly again with Capt. Richenberg; and, that he had no objection to or problem with sharing close quarters with Capt. Richenberg. Capt. Olds also testified that Capt. Richenberg's presence in his unit has not negatively affected cohesiveness or morale among the other members of the unit.

37. Capt. Mark Feingold, another member of Capt. Richenberg's squadron, testified that in spite of restricted duties Capt. Richenberg has still contributed to his unit.

He also testified that he would fly with Capt. Richenberg again and that he would share close quarters with him. In his affidavit to the Board, Capt. Feingold stated: "This man is a textbook example of the product the Air Force's officer training and PME programs try to create. I would proudly serve with him in any capacity, peer, superior or subordinate; military or civilian."

38. Capt. Ralph Ah Sam, a fourth member of Capt. Richenberg's squadron, testified that Capt. Richenberg continued to work well with others and to foster team work. He also stated that he would fly with Capt. Richenberg again and that he would have no problem with or objection to sharing close quarters with Capt. Richenberg.

39. Lieutenant Colonel David Trask, Capt. Richenberg's commanding officer, agreed that Capt. Richenberg had "performed [his] duties in an outstanding manner."

40. In the end, despite Capt. Richenberg's outstanding record, despite the testimony of witnesses that Capt. Richenberg is an asset to his unit, and despite Capt. Richenberg's sworn testimony that he has no intention of engaging in prohibited conduct, the Board of Inquiry, on 21 June 1994, issued its findings of fact and recommended that Capt. Richenberg be discharged-solely for his statements that he is gay and his status as a homosexual.

E. Exhaustion of Administrative Appeal

41. Following the Board of Inquiry's recommendation, an Air Force Board of Review determined that Capt. Richenberg had failed to establish that his retention on active duty is warranted. On information and belief, the Board of Review recommended to defendant Widnall that Capt. Richenberg be discharged.

42. Defendant Widnall has accepted the recommendation of the Board of Review and has ordered that Capt. Richenberg be discharged.

43. Capt. Richenberg has exhausted his administrative remedies and been ordered discharged from the Air Force.

F. Other Discriminatory Actions Before the Order for Discharge

44. Beginning with Capt. Richenberg's statement in May 1993 that he is gay and up to and including the date of this Complaint, the Air Force has taken several actions intended to derail Capt. Richenberg's career. The Air Force revoked Capt. Richenberg's flight status and security clearance and it no longer allows him access to equipment, materials, and information (e.g., technical manuals and computer simulations) used by other Electronic Warfare Officers.

45. On Capt. Richenberg's performance report for the period of January 1993 to January 1994, Capt. Richenberg was marked as "Does Not Meet Standards" in three of six categories. This was an extraordinary change from previous evaluations. An earlier draft of that performance report, which had already been signed by one of the three necessary commanding officers, had been marked as "Meets Standards" in all six categories. Lieutenant Colonel Trask admitted during the Board-of-Inquiry proceedings that the only reason that Capt. Richenberg was marked down was to reflect the fact that he stated he was gay.

46. During the administrative appeal from the recommendation of the Board of Inquiry, Capt. Richenberg received another performance report, for the period of January 1994 to January 1995. On this report, Capt. Richenberg was marked down again as "Does Not Meet Standards," in two of the six categories, despite positive written comments such as the statement that he is "an extremely capable and talented individual."

47. During his administrative appeal, Capt. Richenberg received two Promotion Recommendation Forms ("PRF")-one in 1994 and another in 1995-from his wing commander, Brigadier General Thomas J. Keck. On these PRFs, the wing commander stated "Do not promote at this time." There is no reason for these recommendations other than Capt. Richenberg's statement of homosexuality.

G. Irreparable Harm

48. Capt. Richenberg is suffering injury and will suffer further irreparable harm without immediate injunctive relief. Capt. Richenberg's discharge will—among other things—deprive him of his constitutional rights; derail his career; take away his livelihood and only means of earning a living; force him into the civilian job market where his training as an Electronic Warfare Officer has no civilian corollary; force him into the civilian job market suffering the stigma of an involuntary discharge based on his homosexuality, an irreparable affront to his personal dignity and professional reputation; leave him unemployed and with no income and dwindling assets with which to pursue this litigation of his constitutional rights, while the defendants, of course, have all the power and resources of the government; deprive him of the opportunity to hone his skills as an Electronic Warfare Officer and keep abreast of technological advances in his field; eliminate his opportunity for scheduled and anticipated promotions, along with a concomitant loss of medical benefits, retirement benefits, and other benefits; and, deprive him of the seniority, experience, and prestige that remaining in and promotion within the Air Force would bring to him.

49. In addition to the discharge, Capt. Richenberg is also suffering and will suffer irreparable harm, including discharge, as a result of the other discriminatory actions that the Air Force has taken against him since he stated that he is gay. The revocation and reduction of his flight status and security clearance, respectively, have, for nearly two years, severely limited Capt. Richenberg's experience and greatly compromised his ability to maintain and improve his skills. The two negative performance evaluations and the PRFs in his file effectively eliminate Capt. Richenberg's chances for regular, scheduled promotion, which, before his statement that he is gay, was all but certain to occur at the next promotion board in early 1996. If Capt. Richenberg is not promoted during the time period in which he is up for promotion, he could be discharged. A discharge in this manner would be solely as a consequence of his statement that he is gay.

COUNT I

Denial of Equal Protection of the Laws in Violation of the Fifth Amendment: Discharge and other Discriminatory Actions on the Basis of Homosexual Status

50. Capt. Richenberg incorporates his allegations contained in paragraphs 1 through 49 as though fully set forth herein.

51. By subjecting Capt. Richenberg to involuntary discharge proceedings, by taking other discriminatory actions against him before discharging him, and by discharging him from the Air Force, solely because he is gay, defendants have denied Capt. Richenberg equal protection of the laws on the basis of his status as a homosexual, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

COUNT II

Denial of Equal Protection of the Laws in Violation of the Fifth Amendment: Discharge and other Discriminatory Actions on the Basis of Homosexual Status and the Exercise of a Fundamental Right

52. Capt. Richenberg incorporates his allegations contained in paragraphs 1 through 51 as though fully set forth herein.

53. By subjecting Capt. Richenberg to involuntary discharge proceedings, by taking other discriminatory actions against him before discharging him and by discharging him from the Air Force, solely because he has stated that he is gay, defendants have denied Capt. Richenberg equal protection of the laws on the basis of his status as an open homosexual and on the basis of his exercise of his fundamental right to free speech, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

COUNT III

Denial of Equal Protection of the Laws in Violation of the Fifth Amendment: Application of a Presumption of Misconduct to Homosexuals

54. Capt. Richenberg incorporates his allegations contained in paragraphs 1 through 53 as though fully set forth herein.

55. By requiring Capt. Richenberg to rebut a statutory and regulatory presumption that he “engages in, attempts to engage in, intends to engage in, or has a propensity to engage in” prohibited conduct, solely because he is gay and has stated that he is gay, when no such presumption applies to heterosexuals or to statements acknowledging heterosexual orientation, defendants have denied Capt. Richenberg equal protection of the laws on the basis of his status as a homosexual, his status as a person known to be a homosexual, and his exercise of a fundamental right, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

COUNT IV

Denial of Equal Protection of the Laws in Violation of the Fifth Amendment: Discrimination on the Basis of Gender

56. Capt. Richenberg incorporates his allegations contained in paragraphs 1 through 55 as though fully set forth herein.

57. By subjecting plaintiff Richenberg to involuntary discharge proceedings, by taking other discriminatory actions against him before discharging him, and by discharging him from the Air Force, under authority of a statute and regulations that permits a woman to express an attraction for a man but forbids a man to do the same, defendants have denied Capt. Richenberg equal protection of the laws on the basis of his gender, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

COUNT V

Denial of Due Process in Violation of the Fifth Amendment: Inconsistent and Arbitrary Application of An Irrational, Unjust, and Irrebuttable Presumption of Misconduct

58. Capt. Richenberg incorporates his allegations contained in paragraphs 1 through 57 as though fully set forth herein.

59. By requiring Capt. Richenberg to rebut a statutory and regulatory presumption that he “engages in, attempts to engage in, intends to engage in, or has a propensity to engage in” prohibited conduct, solely because he has stated that he is gay, defendants have irrationally, illegitimately, and unjustly presumed that Capt. Richenberg is a lawbreaker, and have placed a burden of proof upon him, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

60. In addition, by requiring Capt. Richenberg to rebut a statutory and regulatory presumption that, as written and as applied, is not rebuttable, defendants have imposed an insurmountable burden on Capt. Richenberg, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

COUNT VI

Denial of Free Speech in Violation of the First Amendment: Discharge on the Basis of Statement about Sexual Orientation

61. Capt. Richenberg incorporates his allegations contained in paragraphs 1 through 60 as though fully set forth herein.

62. By subjecting Capt. Richenberg to involuntary discharge proceedings, by taking other discriminatory actions against him before discharging him, and by discharging him from the Air Force, under the authority of a statute and regulations that prohibit him from stating his sexual orientation and that classify such statements as actionable “conduct,” defendants have imposed and enforced a facially invalid, content-based, and viewpoint-

based restraint on free speech and association that lacks a compelling, articulated government purpose, in violation of the First Amendment to the United States Constitution.

63. By subjecting Capt. Richenberg to involuntary discharge proceedings, by taking other discriminatory actions against him before discharging him, and by discharging him from the Air Force solely on the basis of his statements that he is gay, defendants have abridged Capt. Richenberg's right to free speech and association, in violation of the First Amendment to the United States Constitution.

COUNT VII

Denial of Fundamental Right of Privacy in Violation of the First, Fifth, and Ninth Amendments: Discharge Solely on the Basis of One's Sexual Orientation

64. Capt. Richenberg incorporates his allegations contained in paragraphs 1 through 63 as though fully set forth herein.

65. By subjecting Capt. Richenberg to involuntary discharge proceedings and by discharging him from the Air Force solely on the basis of his sexual orientation, defendants have violated his fundamental right of privacy, in violation of the First, Fifth, and Ninth Amendments to the United States Constitution.

COUNT VIII

Legislative Punishment in Violation of Article I, Section 9, Bill of Attainder

66. Capt. Richenberg incorporates his allegations contained in paragraphs 1 through 65 as though fully set forth herein.

67. By directing the discharge of Capt. Richenberg and other service members known to have a homosexual orientation solely on the basis of their status as service members who are known to have a homosexual orientation, the Act and Regulations legislatively determine guilt and inflict punishment on those service members without a judicial trial.

68. The Act and Regulations thus constitute an unconstitutional bill of attainder; in violation of Article I, Section 9, of the Constitution of the United States.

COUNT IX

Violation of the Administrative Procedure Act

69. Capt. Richenberg incorporates his allegations contained in paragraphs 1 through 68 as though fully set forth herein.

70. Defendants have administratively defined Capt. Richenberg's statement that he is gay as "conduct"; concluded that his statement that he is gay indicates that he engages in, attempts to engage in, intends to engage in, or has a propensity to engage in prohibited conduct; and, required him to rebut a presumption that, as written and as applied, is not rebuttable.

71. By reason of these actions, among others, defendants have acted in a manner that is arbitrary and capricious, that is without reasoned explanation, that is not in accordance with law, that constitutes an abuse of discretion, that is contrary to constitutional rights, and that is contrary to the overwhelming weight of authority that was presented to the Board of Inquiry, in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

PRAYER FOR RELIEF

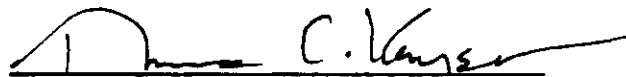
WHEREFORE, Capt. Richenberg prays for judgment in his favor and relief as follows:

- a. a declaration that his discharge is null and void;
- b. a temporary, preliminary, and permanent injunction ordering that he be reinstated to his position and full status in the Air Force, with all the benefits and incidents thereof, as if his discharge had never been ordered, including reinstating his flight status and SC1 security clearance;

- c. a temporary, preliminary, and permanent injunction ordering the defendants to reform all documents in his personnel file by deleting or expunging all references to his statements that he is gay and his status as a homosexual;
- d. a temporary, preliminary, and permanent injunction enjoining the defendants from taking any action adverse to him by reason of his status as a homosexual or statements about his sexual orientation, including denying him a promotion;
- e. a declaration that the Act is illegal and unconstitutional, both on its face and as applied in this case;
- f. a declaration that the Regulations, including Directive 1332.30 and AFR 36-2, are illegal and unconstitutional, both on their face and as applied in this case;
- g. a permanent injunction enjoining the defendants from enforcing the Act and the Regulations;
- h. allowable costs, disbursements, and reasonable attorneys' fees related to this action, including any cost and attorneys' fees pursuant to 28 U.S.C. § 2412; and,
- i. any additional relief that this Court deems just and proper.

Respectfully submitted, September 4, 1995,

ROBINS, KAPLAN, MILLER & CIRESI



Thomas C. Kayser (5415X MN)
Deborah J. Palmer (83665 MN)
Charles O. Lentz (168403 MN)
Randall Tietjen (214474 MN)
Jana Kramer (239392 MN)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402
(6 12) 349-8500

- and -

- 19 -

Susan Koenig-Cramer
Susan Koenig-Cramer (16540 NE)

510 Keeline Building
319 South 17th Street
Omaha, Nebraska 68102
(402) 346-1132

Lori L. Graesser
Lori L. Graesser (19814 NE)

510 Keeline Building
319 South 17th Street
Omaha, Nebraska 68102
(402) 346-1132

ATTORNEYS FOR PLAINTIFF RICHARD F. RICHENBERG, JR.

TRIAL SITE REQUEST: Pursuant to NELR 40.1, the plaintiff requests that this case be tried in Omaha, Nebraska.

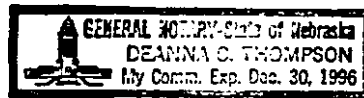
VERIFICATION

I, the plaintiff, Capt. Richard F. Richenberg, Jr., state that I have read the foregoing Amended Verified Complaint for Declaratory and Injunctive Relief and that the information and facts alleged therein are true and correct based on my knowledge and information available.

Richard F. Richenberg, Jr.
Capt. Richard F. Richenberg, Jr.

Subscribed and sworn to before me
this 5th day of September 1995.

Deanna C. Thompson
Notary Public




**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

Richard F. Richenberg, Jr.,)	
Plaintiff,)	8:CV95-393
v.)	
)	
William J. Perry, Secretary of Defense, in his official)	CERTIFICATE OF SERVICE
capacity; and Sheila Widnall, Secretary of the)	
Department of the Air Force, in her official capacity,)	
Defendants.)	
)	

The undersigned hereby certifies that a true and correct copy of the Summons; Complaint for Declaratory and Injunctive Relief; Amended Verified Complaint for Declaratory and Injunctive Relief; Notice of Motion and Motion for Temporary Restraining Order; Memorandum in Support of Plaintiffs Motion for a Temporary Restraining Order and Preliminary Injunction; Proposed Temporary Restraining Order; and Motion to appear Pro Hac Vice was sent by United States certified mail to William J. Perry, Secretary of Defense, U.S. Department of Defense Pentagon, Washington, D.C. 20301, Sheila Widnall, Secretary of the Department of the Air Force, Department of the Air Force, The Pentagon, Room 4E871, Washington, D.C. 20330, Janet Reno, United States Attorney General, Department of Justice, 10th St. and Constitution Ave. N.W., Washington, D.C. 20530; and hand-delivered to Thomas Monaghan, United States Attorney, 215 N. 17th Street, 7th floor, Federal Building, Omaha, NE 68102. In addition, the affidavits of Richard F. Richenberg, Jr, Thomas C. Kayser, Dr. Lawrence J. Korb, George Chauncey, Michael S. Sherry, Kenneth S. Sherrill, and Dr. Gregory M. Herek have been served by United States certified mail on counsel for the Defendants, Janet Reno and Thomas Monaghan.

Dated this 5th day of September, 1995.



Lori L. Graesser