WHO'S BEEN SLEEPING IN YOUR BED? AN ANALYSIS OF THE GOVERNMENT'S APPROACH TO THE SEXUAL ORIENTATION OF ITS EMPLOYEES*

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The United States Supreme Court recently granted certiorari in *Doe v. Casey*[1] to consider whether the decision by the Director of the Central Intelligence Agency (CIA) to discharge an employee based solely on sexual orientation is judicially reviewable.[2] The discharged employee petitioned[3] to have the court determine whether the employee was entitled to a statement of reasons for the CIA's determination, but certiorari was not granted on that issue.[4] Both questions, however, arise out of a broader and more difficult issue: when may the government legally discharge an employee because he or she is a homosexual?

This Note reviews the judicial decisions regarding employment terminations of homosexual persons in both private and governmental contexts. It then examines rulings of the lower courts in *Doe v. Casey*,[5] a recent case concerning an employee of a government agency dealing with sensitive national security information. Finally, it evaluates the existing policy framework that the Supreme Court may use in its upcoming decision.

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* Subsequent to the writing of this Note, an opinion was issued by the Ninth Circuit addressing many of the arguments presented here. In *Watkins v. United States Army*, No. 85-4006 (9th Cir. Feb. 10, 1988), Judge Norris, writing for the majority, held that the Army ban on homosexuals was unconstitutional. The court ruled that the regulations requiring the exclusion of persons based on status as a homosexual violated equal protection. In reaching this decision, the court held that homosexual persons constitute a suspect class. Applying the strict scrutiny standard of review, the court held that the regulations were not necessary to promote a legitimate, compelling governmental interest. *See infra* note 74 and accompanying text.

1. Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986), *cert. granted sub nom.* Webster v. Doe, 107 S. Ct. 3182 (1987).

2. In the petition for certiorari filed for the CIA, the question presented reads: "Is decision of Director of Central Intelligence to discharge officer or employee of Central Intelligence Agency pursuant to director's authority under section 102(c) of National Security Act judicially reviewable under Administrative Procedure Act?" Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986), *petition for cert. filed sub nom.* Gates v. Doe, 55 U.S.L.W. 3670 (U.S. Feb. 6, 1987) (No. 86-1294).

3. Doe v. Casey, 796 F.2d 1580 (D.C. Cir. 1986), *petition for cert. filed sub nom.* Doe v. Gates, 55 U.S.L.W. 3702 (U.S. Mar. 9, 1987) (No. 86-1442).

4. The question presented reads: "Is Central Intelligence Agency employee who has been discharged on ground that his homosexuality creates security risk entitled to statement of reasons for CIA's determination, where there has been no claim or showing that disclosure of reasons would compromise security?" *Id.*

5. 601 F. Supp. 581 (D.D.C. 1985), *rev'd*, 796 F.2d 1508 (D.C. Cir. 1986), *cert. granted sub nom.* Webster v. Doe, 107 S. Ct. 3182 (1987).

LEGAL SETTING

Both the private and governmental sectors may be examined to determine trends in decisions involving homosexual employees. Additionally, the governmental sector can be divided into three categories: civil service employees, teachers, and employees of the military and other agencies dealing with national security.

An analysis of the trends in decisions involving homosexual employees, provided in the following sections, reveals two main principles. First, the government is held to a higher standard of job-relatedness in its employment decisions than are private employers, and second, the first principle is essentially meaningless when applied to employment in the military and national security sectors.

Employees in the Private Sector

Private employees have traditionally had little protection against arbitrary terminations.[6] This treatment is consistent with the courts' general practice of deferring to the decisions of employers[7] and of considering terminations for any reason a legitimate exercise of business power and choice.[8] Employees have found their only protection in contractual provisions[9] or in the Constitution when a clearly established constitutional right has been violated.[10] For example, discharged employees have brought claims under a variety of theories, including the first amendment right to freedom of religion and freedom of association, and the fourteenth amendment right to equal protection.[11]

Employee challenges to dismissal involving first amendment violation arguments have been met with varying results. In *Dorr v. First Kentucky National Corp.*,[12] the Sixth Circuit held that an employee may have a cause of action when discharged for involvement in a church-affiliated organization advocating equal rights for homosexuals.[13] This opinion has been withdrawn,[14] however, and the court has not yet made a disposition on the

6. Payne v. Western Alt. R.R., 81 Tenn. 507, 519-20 (1884) (employers entitled to discharge employees for good cause, no cause, or a "cause morally wrong"), *rev'd on other grounds sub nom.* Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). This principle is clearly stated in Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part I*, 10 U. DAYTON L. REV. 459, 464 (1985); E. BOGGAN, M. HAFT, C. LISTER & J. RUPP, THE RIGHTS OF GAY PEOPLE 21 (1975) (hereinafter E. BOGGAN).

7. *See, e.g.*, Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 335-36 (1982).

8. *Id.*

9. *See, e.g.*, Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825-26 (1980); E. BOGGAN, *supra* note 6, at 22.

10. E. BOGGAN, *supra* note 6, at 22.

11. In Gay Law Students Ass'n v. Pacific Tel. & Tel., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979), the court required the defendant to meet constitutional standards since the state had granted the utility a monopolistic status. Private employees may show that the conduct of an employer violates constitutional rights by proving that the conduct was sufficiently related to governmental activities and that the "discriminatory conduct was arbitrary and capricious." E. BOGGAN, *supra* note 6, at 22.

12. 796 F.2d 179 (6th Cir. 1986) (withdrawn) (on file with ARIZONA LAW REVIEW).

13. *Dorr*, 796 F.2d at 179.

14. Rehearing *en banc* granted and opinion vacated. *Id.*

merits of the case. In a recent state decision,[15] the Massachusetts Supreme Court held that the Christian Science Monitor was legally entitled to discharge a lesbian employee.[16] The court based its decision on the absence of a written employment contract, and on the fact that nothing in the United States or Massachusetts constitutions prohibited terminations because of homosexuality.[17] This holding presents an interesting twist. It rests on the underlying assumption that the first amendment would be violated if the defendants were penalized for their religious belief that homosexuality is a sin demanding repentence.[18]

Cases have also been brought under the first amendment which allege right of association violations. For example, in *DeSantis v. Pacific Telephone & Telegraph*,[19] the plaintiff's argument of interference with associational rights was dismissed by the court with the mere statement that the homosexual relationship is not otherwise protected and therefore no constitutional violation was found.[20] This result has been the general rule for cases brought on the theory of a violation of associational rights.[21]

In addition to the first amendment arguments, discharged employees have challenged terminations asserting equal protection[22] and Title VII arguments. In a case arising in the private employment context, the Supreme Court of California said that because of the monopolistic status of a public utility, action by such a utility constitutes "state action" and as a result it must comply with equal protection requirements.[23] The court ruled that California law precludes the state from excluding homosexuals, as a class, from employment opportunities.[24] Furthermore, the court noted, state law requires a showing that an individual's homosexuality renders him unfit for the job.[25] The court began from the premise that arbitrary discrimination in any form violates equal protection principles, and concluded that a public utility that arbitrarily discriminates against homosexuals may be subject to legal liability.[26] The court added that precedent has established equal pro-

15. Madsen v. Erwin, 481 N.E.2d 1160 (1985).

16. *Id.* at 1166.

17. *Id.* The court held that the "Monitor, as Madsen's employer, had the right to terminate Madsen's employment." *Id.* In addition, the court stated that Madsen "failed to demonstrate that she was deprived of her civil rights" under the state statute, since the employer had the right to discharge her. *Id.*

18. *Id.* The court stated that "[e]ntanglement of the defendants in such litigation would involve the court in a review of an essentially ecclesiastical procedure whereby the Church reviews its employees' spiritual suitability for continued employment." *Id.* The freedom of religion holds a "preferred position" in the "pantheon of contitutional rights," and this, to the court, justified the termination. *Id.* at 1165. Similarily, in a recent "church trial" case, a lesbian minister was suspended from her ministerial duties after being found guilty of breaking Methodist law. Starr, *A Methodist on Trial*, NEWSWEEK, Sept. 7, 1987, at 62.

19. 608 F.2d 327 (9th Cir. 1979).

20. *DeSantis*, 608 F.2d at 331.

21. *See, e.g.*, E. BOGGAN, *supra* note 6, at 21.

22. Claims have been brought under both federal and state equal protection clauses. *See infra* notes 23-27 and accompanying text.

23. Gay Law Students Ass'n v. Pacific Tel. & Tel., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979). The court emphasized that they were not questioning an employer's right to exercise legitimate business judgement. *Id.* at 474-75, 595 P.2d at 602, 156 Cal. Rptr. at 24.

24. *Id.* at 467, 595 P.2d at 597, 156 Cal. Rptr. at 19.

25. *Id.*

26. *Id.* The court stated "we begin from the premise that both the state and federal equal

tection as a California state constitutional provision applicable to homosexuals as well as all other persons.[27]

In contrast, the courts have generally held that terminations based on sexual orientation are not prohibited by Title VII.[28] In *DeSantis*,[29] the Court of Appeals for the Ninth Circuit held that Title VII's "sex" discrimination clause does not cover terminations based on sexual orientation.[30] The court characterized the plaintiff's efforts as an attempt to "bootstrap" the protection of Title VII; in this manner the court indicated a reluctance to recognize rights of homosexuals.[31]

The traditional approach of deference to the decisions of private employers has, however, been tempered in some cities, counties and states by statutes or executive orders prohibiting discrimination based on sexual orientation.[32] To date, over fifty cities[33] and the state of Wisconsin have enacted anti-discrimination statutes, making it a violation to discriminate against an individual on the basis of sexual orientation.[34] In addition, some governors have accomplished the same purpose by executive order.[35] Furthermore, the general anti-discrimination statutes of some states have been interpreted to include disparate treatment of homosexuals, even though sexual orientation is not specifically listed as a factor.[36] Thus, while courts have pointed to a

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protection clauses clearly prohibit the state or any governmental entity from arbitrarily discriminating against any class of individuals in employment decisions." *Id.* This premise has not been as easily accepted by other courts. *See, e.g.*, Madsen v. Erwin, 395 Mass. 715, 481 N.E.2d 1160 (1985).

27. Gay Law Students Ass'n v. Pacific Tel. & Tel., 24 Cal. 3d 458, 467, 595 P.2d 592, 597, 156 Cal. Rptr. 14, 19 (1979). In the words of the court, the "past decisions of this court establish that this general constitutional provision applies to homosexuals as well as to other members of our polity." *Id.*

28. Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1098, 1101 (N.D. Ga. 1975); W. OUTTEN & N. KINIGSTEIN, THE RIGHTS OF EMPLOYEES 136 (1983) (hereinafter W. OUTTEN).

29. 608 F.2d 327 (9th Cir. 1979). *See supra* notes 19-20 and accompanying text.

30. 608 F.2d at 329-30. The court added that homosexuals do not constitute a class entitled to equal protection. *Id.* at 333.

31. *Id.* at 331.

32. Rivera, *supra* note 6, at 486-90. Additionally, three bills advanced to amend the Civil Rights Act to prohibit discrimination based on sexual orientation were presented to the 94th Congress and seven were presented to the 95th Congress. None of these bills passed, however. *See* Holloway v. Arthur Anderson Co., 566 F.2d 659, 662 n.6 (9th Cir. 1977). A bill is currently being considered which would prohibit discrimination based on sexual orientation. Civil Rights Amendment Act of 1987. H.R. 709, 100th Cong., 1st Sess. (1987).

33. Section 17-12(b) of the Tucson City Code provides that it is an unlawful act for "an employer, because of. . .sexual or affectional preference. . .to refuse to hire or employ any person or to bar or to discharge from employment such person, or to discriminate against such person in compensation or in terms, conditions or privileges of employment." TUCSON, AZ., CODE § 17-12(b)(1974).

34. W. OUTTEN, *supra* note 28, at 136. *See, e.g.*, TUCSON, AZ., CODE § 17-12(b)(1974); DISTRICT OF COLUMBIA CODE § 1-2512(a)(1981). In a recent District of Columbia case, the district court held that the plaintiff should be allowed to amend her complaint to allege discrimination based on sexual orientation. Green v. ABC, 647 F. Supp. 1359 (D.D.C. 1986). The court stated that they could not say the plaintiff would be unable to make out a claim for discrimination under the District of Columbia Human Rights Act making it illegal to discriminate on the basis of sexual orientation. *Id.* at 1368.

35. Rivera, *supra* note 6, at 486-89.

36. For example, California's Unruh Act has been held to prohibit discrimination based on sexual orientation. Curran v. Mount Diablo Council of the Boy Scouts of Am., 147 Cal. App. 3d 712, 734, 195 Cal. Rptr. 325, 339 (Cal. App. 2 Dist. 1983) (expulsion from Boy Scouts on basis of homosexuality violates Unruh Act), *appeal dismissed*, 468 U.S. 1205 (1985); Hubert v. Williams, 133 Cal. App. 3d Supp. 1, 5, 184 Cal. Rptr. 161, 164 (Cal. App. 2 Dist. 1982) (landlord's arbitrary discrimination against lesbian a violation of the Act).

lack of legislative initiative as a ground for ruling against homosexuals in wrongful termination cases, this will no longer be possible in some jurisdictions.

Wrongful termination claims by homosexual employees in the private sector have generally been unsuccessful. However, this rule is inoperative when the employee has been able to rely on a first amendment freedom of religion argument[37] or when the employer can be tied closely to the government and its conduct is considered "state action" subject to equal protection restraints.[38] Yet the trend of unsuccessful suits is continuing in spite of legislative initiative to the contrary[39] and despite an overall willingness of courts to recognize terminations as wrongful when made for reasons unrelated to job performance.[40]

Governmental Employees

In examining the three governmental employment areas of civil service, teaching, and the military and other positions dealing with national security, the emerging trends contrast with the trend in the private employment context. In general, the government is held to a higher standard of job-relatedness in its employment decisions than are private employers.

a. *Civil Service Employees*

Early case law supported the termination of homosexuals employed by the government regardless of whether the homosexual conduct interfered with the employee's ability to perform his or her duties or affected the efficiency of the agency or service.[41] Courts, however, began to require some connection between the alleged conduct and job ability, at least in the civil service context.[42] In *Norton v. Macy*,[43] the Court of Appeals for the District of Columbia held that the private homosexual acts of a civil service employee were insufficient to justify dismissal. The court reasoned that unless the Civil Service Commission could show a "reasonably foreseeable, specific connection" between the potentially embarrassing conduct of an employee and the efficiency of the service,[44] dismissal was improper.

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37. *See supra* notes 12-14 and accompanying text.
38. *See supra* notes 23-27 and accompanying text.
39. *See supra* notes 32-34 and accompanying text.
40. *See supra* notes 7-10.
41. Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), *cert. denied*, 393 U.S. 1041 (1969). The court held that dismissing a post office employee for homosexual acts was proper in the interest of the efficiency of the service. As stated by the court:

> The fact that appellant committed acts is not in dispute. Counsel for appellant, however, argue at great length, and with considerable ability, that homosexual acts constitute private acts upon the part of such employees, that they do not effect the efficiency of the service, and should not be the basis of discharge. This contention is not accepted by this Court.

Id. at 318. *See also* Scott v. Macy (unpublished opinion) (District Court for the District of Columbia approved Civil Service exclusion of a homosexual based on "immoral conduct"), *rev'd*, 349 F.2d 182 (D.C. Cir. 1965).
42. Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968). *See also infra* notes 43-47 and accompanying text.
43. 417 F.2d 1161 (D.C. Cir. 1969).
44. *Norton*, 417 F.2d at 1167. The court found that since "the record before us does not sug-

Four years after *Norton*, the District Court for the Northern District of California decided *Society for Individual Rights, Inc. v. Hampton*.[45] The court ordered the reinstatement of an employee fired because of his homosexuality.[46] The court reached this conclusion in spite of the government's argument that the employment of homosexual persons may bring the agency into public contempt, reducing the efficiency of the service.[47] Thus, the government may no longer operate under a policy of mandatory exclusion of homosexuals. This rule has continued to be applied in cases involving civil service employees.[48]

b. *Teachers*

In cases involving the termination of homosexual teachers, the courts have followed a pattern similar to that in the civil service context. Courts, in early cases, gave no relief to teachers who were terminated because of their sexual orientation.[49] Courts operated under a presumption that homosexual teachers have adverse effects on the development of children and provide negative role models.[50] This presumption of unsuitability persisted,[51] despite sociological data to the contrary.[52] Some courts, however, have held that homosexuality is not itself a sufficient justification for the dismissal of a teacher.[53]

In *Burton v. Cascade School District Union High School No. 5*,[54] the Ninth Circuit conceded that the dismissal of a high school teacher because

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gest any reasonable connection between the evidence against him and the efficiency of the service, we conclude that he was unlawfully discharged." *Id.* at 1162. The court added that the "agency cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying 'shame.'" *Id.* at 1168.

45. 63 F.R.D. 399 (N.D. Cal. 1973).

46. *Id.* at 402.

47. *Id.* at 401. The court stated that the argument that employing homosexual persons would bring contempt upon the agency was "specifically rejected" in *Norton*. *Id.* As the *Norton* court held, the agency must show "some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service" to support a dismissal as "promoting the efficiency of the service." *Norton*, 417 F.2d at 1167-68.

48. Rivera, *supra* note 6, at 486. Recently, the Court of Appeals for the Ninth Circuit has held that a civil servant working for the Navy has a potential right of privacy to be free from warrantless searches. A search of the employee's desk revealed letters and photographs which suggested that he was homosexual. Relying on this evidence, the Secretary of the Navy threatened to discharge the employee based on homosexuality. Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1336 (9th Cir. 1987). *See also* Ashton v. Civiletti, 613 F.2d 923, 928 (D.C. Cir. 1979) (FBI employee cannot be discharged from the job merely for admission of homosexuality—government needs to show a problem with job performance since non-probationary FBI employees are led to believe they can be fired only for job-related reasons). *But see* Singer v. United States Civil Serv. Comm'n, 530 F.2d 247 (9th Cir. 1976) (dismissal of openly-gay employee was proper and not in violation of the employee's first amendment rights), *vacated*, 429 U.S. 1034 (1977).

49. Rivera, *supra* note 6, at 514-17.

50. *Id.* at 515.

51. *See generally id.*

52. As stated in one journal, people "do not 'choose' to be homosexual any more than they 'choose' to be heterosexual." *Overview: The Multiple Roots of Homosexul Behavior*, in HOMOSEXUAL BEHAVIOR 15 (J. Marmor ed. 1980). Furthermore, modeling appears to be irrelevant in sexual orientation, since homosexuals generally are raised in heterosexual families and most role models in the American culture are heterosexual. *Id.*

53. *See infra* notes 54-56 and accompanying text.

54. 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975).

she was a practicing homosexual was improper.[55] The lower court noted that a statute allowing the school board to dismiss a teacher for immorality has no requirement of a "nexus" between the immoral conduct and the employee's teaching performance, and hence presents constitutional problems.[56]

In a university case, however,[57] a graduate assistant was transferred from a teaching position to a research position even though all of her supervisors opposed the transfer. The school authorities were informed that the graduate assistant was involved in a lesbian relationship with an adult student. The student was not and had not been in any of the graduate's classes. The court held that the plaintiff was not discriminated against "illegally."[58] Furthermore, the court added that the university had not violated any of the plaintiff's constitutionally protected rights.[59] Thus, while teachers have not been afforded much protection, there are decisions such as *Burton* which recognize the impropriety of using sexual orientation as a basis for termination.

c. *Military Personnel and Employees Involved with National Security*

Governmental employees, while generally given greater job security than private employees,[60] are afforded almost no protection when their positions are in the military or another branch of the government responsible for national security, such as the CIA or FBI.[61] Claims by the government that an individual should be discharged because of homosexuality have been approved by the courts in all but a few situations.[62] A presumption of unsuita-

55. *Id.* at 852. The court nevertheless refused to require the district to reinstate the plaintiff and instead ordered damages, stating that reinstatement was an "extraordinary equitable remedy" not required under the facts of the case. *Id.* at 853.

56. Burton v. Cascade School Dist. Union High School No. 5, 353 F. Supp. 254, 255 n.1 (Or. 1973), *aff'd*, 512 F.2d 850 (9th Cir. 1975). The appellate court, however, stated in a footnote that they were not ruling on whether a school could refuse to give a teaching position solely on the basis of homosexual inclinations. *Burton*, 512 F.2d at 854 n.5.

57. Naragon v. Wharton, 572 F. Supp. 1117 (M.D. La. 1983), *aff'd*, 737 F.2d 1403 (1984).

58. *Id.* at 1124. Apparently the discrimination is not unconstitutional.

59. *Id.*

60. *See supra* notes 6-59 and accompanying text.

61. The Central Intelligence Agency and the Federal Bureau of Investigation are the two most well-known non-military divisions of the federal government which deal with national security. E. BOGGAN, *supra* note 6, at 61. A California district court case, however, approved the dismissal of a service member only after determining that his homosexual relationship was affecting his ability to perform in service. Doe v. Chafee, 355 F. Supp. 112 (N.D. Cal. 1973). The court stated that "in this case, the sole question is whether there has been a *showing* in petitioner's military record of a nexus between his homosexual activity and the quality of his military service." *Id.* at 114 (emphasis added). In noting the petitioner's own statement that his relationship affected his service, the court concluded that the "nexus between his conduct, his military record and his performance was therefore *established* and it cannot be said that the Navy's action was arbitrary, capricious, or *unsupported by substantial evidence*." *Id.* at 115 (emphasis added). This court's presumption that a nexus between the homosexual conduct, military record and performance must be proven rather than assumed has not been shared by the majority of courts.

62. For example, in Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978), the court required the reinstatement of an individual discharged because of his homosexuality. That decision, however, rested on the existence of an Air Force regulation allowing the retention of homosexuals if an exception existed. *Id.* at 857-58. The court required the military to provide a "reasoned explanation" for the discharge and explain why the discharged individual did not fit within one of those exceptions. *Id.* at 859. As the court noted, "there is no valid reason why a statement cannot

bility persists when a governmental employee involved with national security is homosexual. The attitude of the military toward homosexuals is apparent not only in the treatment such persons have been given,[63] but also in statements both in military regulations and instructions and in military case decisions.[64] A homosexual, as defined by one judge in a court-martial case, is a person who has a "morbid sexual passion" for one of the same sex.[65] This demonstrates the beliefs and prejudices existing in the military arena in spite of the military's own evidence to the contrary.[66]

Despite this attitude, a trend began in the late 1970s of requiring the military to demonstrate the unfitness of each particular servicemember. Implicit in this new trend was a disapproval of a policy mandating exclusion of all homosexuals.[67] This trend includes *Matlovich v. Secretary of the Air Force*,[68] a decision requiring the military to explain why an individual faced with discharge for homosexuality should not be retained. An Air Force regulation provided for the retention of service members under "unusual circumstances," and the court placed the burden on the military to demonstrate why the particular individual did not fit within one of the exceptions created by the regulation.[69]

This trend, however, was reversed beginning with *Woodward v. Moore*.[70] In *Woodward*, the District Court for the District of Columbia held that release of a Navy reservist, based on the reservist's admission of homosexual "tendencies" and on the reservist's mere association with homosexu-

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be given which will show the reviewing court that improper considerations were not taken into account." *Id.* at 860. *See also infra* notes 67-69 and accompanying text.

63. *See* Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part II*, 11 U. DAYTON L. REV. 275, 287 (1986). As Rivera states, in "no other arena of American life has discrimination against gays been so systematic and systemic as in the armed forces." *Id.* at 287. Furthermore, "[e]limination of gay persons in the military has been an official policy since 1943 and continues as the policy to this day." *Id.* (Citations omitted.) *See also* United States v. Newak, 15 M.J. 541 (A.F.C.M.R. 1982) (lieutenant sentenced to six years hard labor for engaging in off-base, consensual sodomy and other minor offenses).

64. *See, e.g.*, SECNAVINST 1900.9A (paragraph 4.a of this "Policy for the Separation of Members of the Naval Service by Reason of Homosexuality" states that members "involved in homosexuality are military liabilities who cannot be tolerated in a military organization. . . .Their prompt separation is essential."); *Newak*, 15 M.J. 541; United States v. Doherty, 17 C.M.R. 287 (1954).

65. *Doherty*, 17 C.M.R. at 294.

66. In 1957, the U.S. Navy issued a report accepting as fact the results of the Kinsey study that approximately ten percent of all males were homosexual, and stated that "no intelligence agency. . .adduced any factual data" to support their opinion that homosexual persons were security risks. Crittenden, *Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals*, U.S. Navy (Dec. 21, 1956-Mar. 15, 1957). Despite this finding by a military board appointed precisely to investigate homosexuality and its effect on military service, the courts and military itself refuse to acknowledge these discoveries.

67. Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977), *rev'd*, 632 F.2d 788 (9th Cir. 1980). The *Saal* court held that the Navy's mandatory exclusion policy for homosexuals without an evaluation of fitness to serve is "irrational and capricious and thus in violation of the Fifth Amendment." *Id.* at 203.

68. 591 F.2d 852 (D.C. Cir. 1978).

69. *Matlovich*, 591 F.2d at 858. *See also supra* note 62. Additionally, this trend included a holding requiring the Army to reinstate a reservist discharged based on her status as a lesbian. ben-Shalom v. Secretary of the Army, 489 F. Supp. 964, 977 (E.D. Wis. 1980), *aff'd in part, vacated in part*, 776 F.2d 1049 (7th Cir. 1985) (mem.), *case transferred*, 807 F.2d 982 (Fed. Cir. 1986). The Army, however, refused to obey that order. *See infra* note 76.

70. 451 F. Supp. 346 (D.D.C. 1978).

als, was not discriminatory.[71] And, in 1980, *Beller v. Middendorf*[72] reversed the earlier holding that the Navy's exclusion of homosexuals was improper.[73]

In continuation of this policy, the Tenth Circuit stated that homosexuality is a permissible ground for discharging an individual based on unsuitability.[74] Additionally, the District of Columbia Circuit held that the Navy policy of mandatory discharge for homosexual conduct is constitutional and is rationally related to a legitimate purpose.[75] This most recent shift in the trend persisted until the challenge in *Doe v. Casey*.[76]

DOE V. CASEY: WHERE IS THE COURT HEADING?

In *Doe v. Casey*[77] the Supreme Court will have the opportunity to reverse the trend of judicially approved discrimination against homosexuals, thus allowing a move to a policy requiring demonstration of unfitness. Although *Doe* involves an employee in the national security arena, a holding demanding a job-related reason for termination and disapproving of questionable presumptions would impact not only the military and security divisions of government, but other areas of government employment as well. Additionally, this decision could impact employees in the private sector.[78]

In *Doe* the plaintiff was an employee of the Central Intelligence Agency for nine years. In 1982, John Doe voluntarily disclosed his homosexuality to a CIA security officer. In response Doe was placed on administrative leave pending investigation. After two days of extensive polygraph examination, Doe was told he had answered all questions truthfully. Doe's answers suggested no security violations; rather, he had answered that he had not had sexual relations with any foreign nationals and had not disclosed classified information to any sexual partners. In spite of this, Doe was told approximately two months later that the "circumstances of his homosexuality" posed a security threat; Doe was given no specific explanation for that determination.[79] Doe was asked to resign but refused. Casey, the Director of the CIA, terminated Doe's employment by invoking section 102 of the National

71. *Woodward*, 451 F. Supp. at 348.

72. 632 F.2d 788 (9th Cir. 1980).

73. *Beller*, 632 F.2d at 812. The court, in reversing *Saal*, 427 F. Supp. 192, stated that in "view of the importance of the military's role, the special need for discipline and order in the service," and potential problems, the Navy's "blanket rule requiring discharge of all who have engaged in homosexual conduct" is rationally related to its purpose, even if broader than necessary. *Id.* at 812.

74. Rich v. Secretary of the Army, 735 F.2d 1220, 1225 (10th Cir. 1984). The court cited Army Reg. 635-200 ch. 13, § 13-4(d), allowing discharge for homosexuality.

75. Dronenberg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

76. 601 F. Supp. 581 (D.D.C. 1985), *rev'd*, 796 F.2d 1508 (D.C. Cir. 1986), *cert. granted sub nom.* Webster v. Doe, 107 S. Ct. 3182 (1987). Even more recently, a decision by the Court of Appeals for the Seventh Circuit required the Army to comply with a 1980 order to reinstate an individual discharged for professing her lesbianism. ben-Shalom v. Secretary of the Army, 826 F.2d 722, 724 (7th Cir. 1987).

77. 796 F.2d 1508 (D.C. Cir. 1986), *cert. granted sub nom.* Webster v. Doe, 107 S. Ct. 3182 (1987).

78. For example, courts may look to a trend of requiring job-relatedness in high-security areas and conclude that such a requirement should exist when no security concerns are present, despite the general practice of giving deference to the decisions of private employers.

79. Doe v. Casey, 796 F.2d 1508, 1512 (D.C. Cir. 1986).

Security Act. Section 102(c) allows termination when the Director deems it "necessary or advisable in the interests of the United States."[80]

The district court granted the plaintiff's motion for summary judgment, ordering the CIA to reinstate Doe and provide procedural due process.[81] It ruled that the CIA failure to inform Doe of why his homosexuality posed a security risk prevented Doe from having a meaningful opportunity to contest the basis of his termination, and that, as a result, Doe had been denied procedural due process.[82]

On appeal, the court of appeals held that the Director's decision to terminate Doe's employment was judicially reviewable.[83] The court concluded, however, that the termination required further explanation only if the CIA policy was one of firing all homosexual employees. The court stated that although the Supreme Court had ruled that homosexual conduct was not constitutionally protected, the propriety of discrimination by the federal government against individuals on the sole basis of sexual orientation was not decided. The court added that if the CIA had a policy of banning all homosexuals from employment, a justification would be required explaining how this position is defensible under section 102.[84] However, if the Director intended to discharge Doe for no stated reason, or if the Director intended to discharge Doe individually as "necessary or advisable in the interests of the United States" and an opportunity to contest that allegation was given, then, the court concluded, Doe had not been wrongfully discharged.[85] The case was remanded to the district court for a finding of fact concerning the reason for dismissal, but certiorari was granted prior to any lower court determination.[86]

A holding by the Supreme Court that the Administrative Procedure Act (APA) does not preclude judicial review would impliedly affirm the holding of the District of Columbia Court of Appeals by acknowledging the

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80. Section 102(c) of the National Security Act provides that "the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. § 403(c)(1982).

81. Doe v. Casey, 601 F. Supp. 581, 590 (D.D.C. 1985).

82. *Id.* at 586-87. As the court noted:

> In reviewing Director Casey's actions, the basic inquiry is whether the plaintiff was afforded procedural due process—namely: was he given adequate notice of agency action, was he informed of the rationale of the agency's final decision or at least a statement of reasons; was he given an opportunity to respond or to comment or was he given a hearing where he could address the agency's rationale and present his position and defenses? The answers to these questions as reflected in the record show that plaintiff Doe was not afforded such opportunities and indeed, at no time was there a recognition of such rights.

Id. (Citations omitted.)

83. Doe v. Casey, 796 F.2d 1508, 1517 (D.C. Cir. 1986). *See also infra* notes 106-112 and accompanying text.

84. The court stated that the Supreme Court has not reached "the difficult issue of whether an agency of the federal government can discriminate against individuals merely because of sexual *orientation*." Doe v. Casey, 796 F.2d 1508, at 1522 (emphasis in original). The court recognized this while acknowledging that homosexual conduct had been held to not be constitutionally protected in Bowers v. Hardwick, 106 S. Ct. 2841 (1986), and in Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984). *Doe*, 796 F.2d at 1522.

85. *Doe*, 796 F.2d at 1522, 1524.

86. *Id.* at 1524. *See also supra* notes 1-2 and accompanying text.

appellate court's right to decide the merits of the case.[87] The appeals court holding would then stand and the case would go back to the district court where the CIA would be required to explain why, if such a policy is found to exist, a ban on the employment of all homosexuals is necessary. This would be the first step toward requiring a causal connection between the alleged reason for dismissal and the employee's job performance. The way the Court decides *Doe*, however, may depend on the policy arguments that have been presented in the past.

POLICY CONSIDERATIONS

Various private and governmental policy considerations have been used by the courts in decisions involving the discharge of homosexual employees. In the private sector, the policy of protecting employers' business decisions has, to some extent, been replaced by a policy of holding employers to a standard of good faith. In many jurisdictions, this standard is heightened by statutes or ordinances which prohibit terminations based on an employee's sexual orientation.[88]

Similarily, in the context of the civil service and state and local employment, courts are becoming less willing to accept blanket statements that the homosexual status of an employee has a detrimental effect on job performance or ability.[89] These decisions, however, appear to carry little weight when the employee is a member of the armed services or is otherwise involved with national security as discussed above.

The claims traditionally made for national security concerns are that homosexual employees are subject to blackmail,[90] and that homosexuals cause disruptions among personnel.[91] Additionally, the government claims that forcing an agency to explain why the termination of a homosexual employee is necessary for security reasons might require the divulging of certain national secrets.[92] An evaluation of these claims is revealing.

The first claim is that homosexual employees are more susceptible to blackmail than are heterosexual employees.[93] Yet, if homosexuality was

87. The District of Columbia Court of Appeals held in *Doe* that the APA did not preclude review by the courts. *Doe*, 796 F.2d at 1513. The Court could, however, affirm the court of appeals' holding that judicial review is appropriate but reverse on the substantive conclusions.

88. *See supra* notes 32-36 and accompanying text.

89. *See supra* notes 42-48 and accompanying text.

90. Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986) (Buckley, J., dissenting). The dissenting judge did not agree "that an intelligence agency is even arguably precluded from adopting a policy banning the employment of members of any class which *the Director* might deem to be more susceptible to blackmail than the average." *Id.* at 1533 (emphasis added).

91. *See, e.g.*, Dronenberg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

92. Doe v. Casey, 601 F. Supp. 581, 589-90 (D.D.C. 1985). The district court noted that "because of the facts and sensitive nature of some Agency personnel decisions, they should be shielded from full public scrutiny." But the court goes on to recognize that:

> [T]he record at this point does not reflect or even suggest that overriding national security concerns are at stake or that affording the plaintiff Doe the relief he seeks, might disclose matters that would place at risk such concerns and interests. In sum, the state of this record does not support the government's position that the DCI [Director of Central Intelligence] should have carte blanche authority and limitless discretion, free of judicial review.

Id. at 589-90.

93. Doe v. Casey, 796 F.2d 1508, 1533 (D.C. Cir. 1986) (Buckley, J., dissenting). *See also supra* note 90.

considered to be an impermissible factor in employment decisions, it would not be a classification sufficient to allow blackmail.[94] A homosexual employee would pose no greater risk of blackmail than any other employee who has a skeleton in his or her closet.[95] Furthermore, the employee in *Doe* was openly homosexual and blackmail was not a consideration. If an employee's homosexuality could not be used as a basis for dismissal and the employee was open about his or her sexual preference, there would be no basis from which to threaten exposure. Additionally, heterosexual employees are no less susceptible to blackmail than homosexual employees if they get involved in relationships that truly do threaten national security.

The second claim presented by the government is that allowing homosexuals to serve as officers or agents of the federal government may cause disruptions and unease in the respective services.[96] This claim is made most frequently in the military context.[97] However, many government employees, including members of the military, are protected from arbitrary discrimination even though their presence or involvement may cause conflict.[98] For example, black service members are not excluded from service merely because they are black, even though their admission may cause conflicts with other racial groups within the service.[99] Furthermore, although sexual relations may occur between heterosexuals in the service, this possibility alone is not sufficient to exclude one sex from military service.[100] Thus, the fact that some service members may have intense hatred toward homosexuals or the fact that two homosexual servicemembers may engage in consensual sexual relations should, in all fairness, not be sufficient to justify the exclusion of homosexuals from the military.

Additionally, the assumption that homosexuality is necessarily detrimental to the efficiency of the service is contrary to evidence.[101] This as-

94. The basic premise of blackmail is that release of the information would have detrimental effects. Without the threat of job loss, exposure of an individual's sexual orientation would be less of a ground for blackmail.

95. Even if an individual's homosexuality is not a known fact, he or she is no more susceptible to blackmail than any other employee with a hidden secret. This "secret" could be an elicit heterosexual affair or any other fact that the employee wished to remain private.

96. Dronenberg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984). *See also* Beller v. Middendorf, 632 F.2d 788, 811 & n.22 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981); Dept. Def. Directive No. 1332.14, encl. 3, § H.1.a. (1982) (the presence of homosexuals in the military "seriously impairs the accomplishment of the military mission" and "adversely affects the ability of the Military Services to maintain discipline, good order, and morale").

97. *See, e.g., Dronenberg*, 741 F.2d at 1398.

98. Miller v. Rumsfield, 647 F.2d 80, 88-89 (9th Cir.) (Norris, J., dissenting), *cert. denied*, 454 U.S. 855 (1981).

99. *Id.*

100. *Id.* at 89.

101. II U.S.A.F. J.A.G. BULL., Nov. 1960, at 20. That bulletin stated that the "service records of homosexuals disclose generally that homosexuality per se has no relationship to ability to perform good military service." *Id.* Additionally, history reveals that some armies were created to specifically consist of homosexual lovers with the view that lovers would fight more zealously to protect each other. The Spartan and Theban armies were organized this way. "The celebrated Theban Band, long supposed invincible, consisted of pairs of lovers fighting side by side." D.J. WEST, HOMOSEXUALITY 24 (1967). As philosophized in SYMPOSIUM, "if there were only some way of contriving that a state or an army should be made up of lovers and their loves, they would be the very best governors of their own city. . .and when fighting at each other's side, although a mere handful, they would overcome the world." PLATO, SYMPOSIUM 167 (B. Jowett trans. 1942).

sumption is the product of stereotypes and prejudices created centuries ago.[102] For example, one judge appears to take judicial notice of the "fact" that homosexuals would almost inevitably harm morale and discipline within the military.[103] He states that the Navy is not required to produce data or to prove what is demonstrated by "common sense and common experience."[104] He then goes on to describe the possible negative effects of a homosexual, cross-rank relationship, such as the creation of fairness problems in dealings between superiors and the lower ranks.[105] These effects, however, are indistinguishable from the effects of cross-rank heterosexual relationships. Furthermore, under the facts in *Doe*, no disruption in the service was ever even alleged by the government. If such a disruption did exist, it should be amenable to proof and, in addition, would supply an independent ground for termination separate from mere sexual orientation.

The third and final claim that has been relied upon in justifying dismissals based upon sexual orientation is that requiring the government to explain why a particular homosexual presents a security risk would involve the potential disclosure of national secrets.[106] This claim is somewhat unique to CIA employee discharges because of the National Security Act.[107] While section 102 of the Act[108] cloaks the Director with broad discretionary powers in employment decisions, that power is not absolute.[109]

Any action by a government official is subject to the limitations of the United States Constitution.[110] The power of any individual charged with protecting and ensuring national security arguably must be broad. Yet, that power does not extend to arbitrary decisions that are unconstitutional or that involve actions in excess of statutory authority.[111] The Director does not have complete unchecked discretion; some level of judicial review is appropriate.[112] The fact that the decisions of the Director are to be given great weight and only limited judicial review does not provide a sufficient justification to allow terminations without cause or for an improper cause. As is evidenced by the facts of *Doe*, such discretion would allow terminations

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102. *See, e.g., infra* note 105.

103. Dronenberg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

104. *Id.*

105. *Id.* In addition, Judge Bork states that homosexual relationships are "deleterious to morale and discipline," make interaction "uncomfortable where the relationship is sexually ambigious," generate "dislike and disapproval" among those finding homosexuality "morally offensive," and enhance "the possibility of homosexual seduction." *Id.* As noted by Judge Norris, however, "intolerance" should be an impermissible basis for dismissal, and none of the factors are unique to homosexual relationships. Miller v. Rumsfield, 647 F.2d 80, 88 (9th Cir.) (Norris, J., dissenting), *cert. denied*, 454 U.S. 855 (1981).

106. Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir. 1986).

107. 50 U.S.C. §§ 401-432 (1982 & Supp. III 1985). Section 102 of the Act allows employee terminations in the Director's discretion. 50 U.S.C. § 403(c)(1982). *See supra* note 80 and accompanying text.

108. 50 U.S.C. § 403(c)(1982).

109. Doe v. Casey, 796 F.2d 1508, 1518-19 (D.C. Cir. 1986). The court concluded that judicial review was not precluded, but a decision by the director should stand as long as it is not "arbitrary" or "capricious." *Id.* at 1517, 1521.

110. *Id.* at 1517-18 & n.27.

111. *Id.* at 1518. The court added that "section 102(c) terminations cannot be a result of the mere whim of the Director." *Id.*

112. *Id.* at 1517. As the court noted, "the Director's discretion is not absolute." *Id.* at 1518.

without giving persons terminated any meaningful opportunity to contest the allegations supporting the termination decision.

The claim that national secrets could potentially be disclosed if the government were required to explain why a discharged homosexual, or any discharged employee, presented a security risk has two basic flaws. First, it assumes the government is unable to prove that an employee is a security risk without proving what specific information was released by the person. Affidavits of witnesses and other evidence could be used to show that communications were made regarding various subjects without stating the content of those communications.[113]

Second, the rationale requires that the employing agency or some officer of that agency be given complete discretion with no possibility of judicial review.[114] Absolute discretion, however, is beyond the degree of power given to such agencies.[115] To allow an agency the complete authority and ability to terminate an employee without providing a meaningful and substantive reason[116] is to allow the government to operate under a system of secret rules known and implemented by only a select few.

CONCLUSION

In *Doe v. Casey* the Supreme Court will have the opportunity to clarify the ambiguities[117] existing in the area of employment rights for homosexuals. An examination by the Court of employment trends in the private and governmental sectors as well as a critical analysis of the justifications traditionally given for denying protection to homosexuals is long overdue. The time is ripe for a pronouncement by the Supreme Court that the government must prove a causal relationship between an alleged reason for employment termination and job performance, even when the alleged reason is the em-

113. Additionally, a judge may review incriminating evidence in camera.

114. Doe v. Casey, 796 F.2d 1508, 1517 (D.C. Cir. 1986).

115. *See supra* notes 109-112 and accompanying text.

116. *Doe*, 796 F.2d at 1524. A "substantive reason" should include more than the mere allegation of homosexuality. To be truly "substantive," the alleged reason for dismissal should allow the employee to respond and rebut any negative inferences. A broad allegation arguably does not afford such a "meaningful opportunity," although the court of appeals in *Doe* finds it sufficient. *Id.*

117. *See* Justice Brennan's dissent to the majority's denial of a petition for writ of certiorari in Rowland v. Mad River Local School Dist., 470 U.S. 1009 (1985). He points out:

> This case raises important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences. Petitioner, a public high school employee, "was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason." Because determination of the appropriate constitutional analysis to apply in such a case continues to puzzle lower courts and because this Court has never addressed the issues presented, I would grant certiorari and set the case for oral argument.

Id. (Brennan, J., dissenting) (citations omitted). Additionally, the dissenting opinion in the Sixth Circuit's ruling emphasizes that "the nationwide debate on homosexuality and the rights or lack thereof of homosexuals" is "a debate of far greater significance than the majority opinion recognizes." Rowland v. Mad River Local School Dist., 730 F.2d 444, 453 (6th Cir. 1984) (Edwards, J., dissenting), *cert. denied*, 470 U.S. 1009 (1985). Furthermore, as pointed out by the district court in *Doe*, the constitutional claims asserted in that case "present difficult and unsettled issues of law, made even more uncertain by shifting views of appellate tribunals." Doe v. Casey, 601 F. Supp. 581, 590 (D.D.C. 1985).

ployee's sexual preference.[118] As one judge so aptly phrased it, "I find no language in the Constitution of the United States which excludes citizens who are bisexual or homosexual from its protection."[119]

118. Private employers could, then, follow the government's example and refuse to base their employment decisions on an individual's sexual orientation.

119. Rowland v. Mad River Local School Dist., 730 F.2d 444, 452 (6th Cir. 1984) (Edwards, J., dissenting), *cert. denied*, 470 U.S. 1009 (1985).