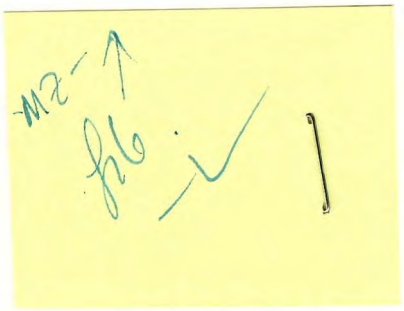
THE WHITE HOUSE

WASHINGTON

November 19, 1987



MEMORANDUM FOR REBECCA RANGE

FROM: LINAS KOJELIS

SUBJECT: DFP Kennedy update

Ethnics

1. Laszlo Pasztor of the National Federation of American Hungarians plans to lobby full time of behalf of the Kennedy nomination.

2. Anna Chennault, newly elected chairman of the National Republican Heritage Groups Council, has pledged her support for the Kennedy nomination. We are working to arrange meetings for her with Sen. Baker, Frank Donatelli and you.

3. Mailings have been sent out to 1600 ethnics and conservatives.

Hispanics

1. A meeting for the National Hispanic Bar Association has been set up with Senator Baker on November 30th. This organization has been asked by LULAC and other major Hispanic groups to recommend a position on the Kennedy nomination.

2. Mailings sent out to 1500 Hispanics.

3. Kennedy material in briefing packet for 130 Cuban American leaders on 11/20.

Jewish

1. Max met with the president of the National Council of Jewish Women, a liberal Jewish women's group. They have not taken a position on the Kennedy nomination yet, and are inclined to stay out of the process this time.

2. The number two man at the equally liberal Union of American Hebrew Congregations told him the same thing. Max is therefore confident in predicting no significant Jewish opposition to the nomination.

Matt
Fyi

THE WHITE HOUSE

WASHINGTON

November 6, 1987

MEMORANDUM FOR TOM GRISCOM

FROM: REBECCA G. RANGE Rebecca

SUBJECT: Weekly Report on Public Efforts to Support Judge Ginsburg

The following is a review of OPL's activities for the week of November 2, 1987:

ETHNIC COMMUNITY

Projects

Mailings: Mailing (Ginsburg bio, talking points, President's remarks at nomination) went out to all of our ethnic mailing lists -- 1,600 constituents.

Reaction/Support

Polish Americans: Al Mazewski, President of the Polish American Congress, is cool to the nomination. (He was very supportive of Bork.) We are requesting a meeting for him with Senator Baker on November 10 to allow the Senator to make a personal pitch.

Ethnic Republicans: Enthusiastic about Ginsburg nomination. Culvahouse, Donatelli and Lavin addressed them on October 30, and Connie Horner addressed them on November 1. They passed a resolution in support of Ginsburg on November 1 and issued a press release. They will begin contacting Republican Senators by mail and with phone calls. The National Republican Heritage Groups Council, which consists of 300 delegates representing 12,000-15,000 members is disseminating information on Ginsburg through newsletters.

East European groups: Are taking a wait and see attitude. Want to know his position on the Soviet Union, and deportations of people to the Soviet Union.

Asian American Community: We have already received the support of the Asian American Voters Coalition which represents 15 National Asian-Pacific organizations, 5.5 million Asian Americans throughout the U.S. We are asking them to send letters and call Congressional Members and they are already disseminating information to their members across the country.

HISPANIC COMMUNITY

Projects

Mailing: Mailing (Ginsburg bio, talking points, President's remarks at nomination) went out to all of our Hispanic mailing lists -- 1,100 constituents.

Reaction/Support

Hispanic Community: The initial reaction has been neutral in the Hispanic community with LULAC, The National Hispanic Bar Association, and other major groups assuming a "wait and see" attitude. We should have an excellent opportunity to get their support in the next couple of weeks. At the present, we have been talking with Oscar Moran from LULAC requesting their support and Ken Duberstein will meet with Mr. Moran on Friday. If LULAC does support the Ginsburg nomination, a domino effect with other major Hispanic organizations following suit is possible.

Hector Barreto, president of the Hispanic Chamber is out of the country for the next two weeks, but most likely will support the Ginsburg nomination.

The Mexican and American Foundation will send a letter of support next Tuesday, November 10.

JEWISH COMMUNITY

Projects

Mailing: Mailing (Ginsburg bio, talking points, President's remarks at nomination) went out to all of our Jewish mailing lists -- 2,100 constituents.

Reaction/Support

Jewish Community: The initial reaction to the nomination in the Jewish community was very much a wait and see attitude. The community is very much in the dark about where the Judge stands on crucial issues. We have begun to inform them, though, and will continue doing so. An influential mailing went out this week. Also, Senator Baker spoke briefly with the leaders of the National Jewish Coalition regarding the nomination. In addition Jewish meetings are being arranged for November 10th.

BUSINESS COMMUNITY

Projects

Announcement Ceremony: We coordinated all the invitations for the announcement ceremony and approximately 70 Washington business leaders attended.

Fact Sheet Mailing: We mailed Judge Ginsburg's bio and fact sheet to 300+ key business contacts.

Presidential Letter Bork/Ginsburg: A Presidential letter was sent thanking key business supporters of Judge Bork and also asking for their help on Judge Ginsburg. This included the CEO's who met with the President and Senator Baker in the Cabinet Room.

Agency Briefing on Ginsburg: Arranged a briefing for Public Liaison and Public Affairs people at the agencies on Judge Ginsburg. Also coordinated with Political and Intergovernmental Affairs.

Speakers were A.B. Culvahouse and Brad Reynolds. The group of approximately 35 also received the handout materials.

Business Strategy Meeting: Hosted a small meeting with some of our staunchest supporters to discuss a business strategy on Judge Ginsburg. The group will help us identify CEO's who might be helpful. They asked us for --

-- Key OMB issues Ginsburg impacted.
-- Ginsburg business clients.
-- Other CEO's Ginsburg knows.

Reaction/Support

We received some encouragement that the U.S. Chamber may endorse Ginsburg. Ollie Delchamps was invited by Political Affairs to attend tomorrows briefing -- we will try to put him in the holding room to tie down the Chamber endorsement, legislative alert, etc.

BLACK COMMUNITY

Projects

Mailings: Mailed Judge Ginsburg's bio and fact sheet to 44 Black Administration political appointees, 87 members of the Council of One Hundred, and a cross-section of 116 Black Ministers.

Media Relations: Provided the Office of Media Relations with a list of blacks who could be helpful in media activities in support of Judge Ginsburg.

Reaction/Support

National Family Institute: Met with Kay James, who pledged to lend the support of her pro-life group in any way in which she can be helpful. She has held private conversations with various black profamily leaders and some calls have been made.

CONSERVATIVES/DOMESTIC COMMUNITY

Projects

Announcement Ceremony: Leaders from our conservative groups were invited to the East Room announcement and received the fact sheet and biographical information on Ginsburg.

Mailings: Mailed the fact sheet and biographical information to all of our constituents with a brief note.

New mailing with updated information to all our constituents with a brief note explaining that we would do our best to keep them informed of the latest developments.

WH Meetings: Held a briefing on November 2 in the Roosevelt Room for conservative leaders, updated information was given out.

Have scheduled three additional Roosevelt Room briefings for November 9th, 17th, and 24th from 4:00 - 5:00 p.m. Frank Lavin and Chris Cox have been invited.

Arranged for 10 of our constituents to attend a Presidential briefing on Friday, November 6.

Talked with Pat McGuigan and arranged to attend all 721 Groups meetings.

Christian Broadcasting Network: Will attend and cover briefing on November 6. They will do a feature story on the nomination shortly.

Reaction/Support

National Right to Life: Met with Senator Hatch, Congressman Hyde on prolife issue and Ginsburg.

They will be publishing their support of Ginsburg and alleviating any prolife fears in their newsletter which will come out on Friday, November 6 (circulation 300,000).

Indicated their support of Ginsburg on their telephone hotline which began on Tuesday, November 3.

Moral Majority/Liberty Federation: Was part of a lobbying delegation who met with Senator Boren on November 6.

Prepared and is distributing a letter to all Senators urging a speedy confirmation.

Dr. Falwell read a statement on "Larry King Live" supporting Judge Ginsburg.

Ad Hoc Committee for Life: Putting together their newsletter this week with a major article on Ginsburg (circulation 20,000).

Interviewed with the New York Daily News.

Family Research Council: They are putting together state coalitions to facilitate the dissemination of information. Use them when we have targeted states.

VETERANS

Reaction/Support

American Legion Auxilliary: They can only get involved "unofficially" but can help by mailing out info packs to their offices in specific states of targeted members as soon as they are provided with target states.

WOMEN

Projects

With Cabinet Affairs and other political appointments, we developed a list of 40 key women in 14 states. Each have been called and sent informational packages on Gingsburg. Many of these women will attend the Presidential 450 event on Friday, November 6. They have been asked to write op-eds, talk to the media, and to publicly speak in favor of the nomination. These 40 key women have also been asked to help further identify and organize other activist women in their individual states.

A mass mailing of informational packages on Ginsburg was completed this week and sent to leaders of 96 national women's organizations.

Mail Final Pull

THE WHITE HOUSE

WASHINGTON

October 2, 1987

MEMORANDUM FOR HOWARD H. BAKER, JR., CHIEF OF STAFF TO THE PRESIDENT

FROM: REBECCA G. RANGE, DEPUTY ASSISTANT TO THE PRESIDENT AND DIRECTOR OF PUBLIC LIAISON

SUBJECT: Summary of Constituent Support/Activity on the Bork Nomination

Group Endorsement

AGUDATH ISRAEL:

* resolution in favor. Press release being carried in (9/22) widely circulated Jewish papers. More activities being planned.

AMERICAN COALITION FOR LIFE:

* called 4000 grassroots activists to mobilize telephone trees, expect to have called 30,000 by mid-August;
* gearing up for extensive promotional campaign with their "Adopt a Congressman" program;
* visited 80 Senators;
* hand delivered 4000 constituent letters on Bork to Senate offices;
* have visited all Senators twice;
* gearing up for a renewed push through October.

AMERICAN CONSERVATIVE UNION:

* mailing to members across the country;
* gearing up for extensive promotional campaign, have already begun visiting Members;
* participated in debate, covered by C-SPAN, with People for the American Way, National Abortion Rights Action League, the NAACP, the Heritage Foundation, and Moral Majority;
* sent letter to 3000 Southern Baptist pastors in Alabama.

AMERICAN FARM BUREAU FEDERATION:

* Board endorsed Bork nomination;
* President Kleckner sent letters to all state directors;
* photo with the President will be run in weekly newsletter (9/25).

AMERICAN LATVIAN ASSOCIATION:

* urged pro-Bork letters to Senators in their newsletter (9/22)

ASSOCIATION OF WALL AND CEILING INDUSTRIES:

* Endorsed Judge Bork's nomination and its president, Joe Baker, sent letters to 80 additional associations asking for their support. Also sent letters to key Senators. (9/22)

ASSOCIATED BUILDERS AND CONTRACTORS:

* Officially endorsed the Bork nomination in its August 31, 1987 newsletter and encouraged their members to contact their Senators. (9/22)
* are also sending letters to the Hill and calling key Senators.

ASSOCIATED GENERAL CONTRACTORS:

* President, Dana Heutis, sent out 1000 letters to their "key contact" list strongly encouraging support for Judge Bork. Will also do targeted phone calls.

ASIAN AMERICAN VOTERS COALITION:

* Represents Chinese, Indo, Korean, and Vietnamese-Americans.

CAPTIVE NATIONS ORGANIZATION OF ARIZONA:

* letters and phone calls to Senator DeConcini (9/22)

CHRISTIAN ACTION COUNCIL:

* article/updates in newsletter and legislative alerts;
* placed on CAC hotline -- callers get a quick synopsis of bill as a priority issue;
* continued priority issue in newsletters, hotline, etc.;
* brought key CAC leaders in from swing states for personal visits with Senators.

[CAC is a national organization; circulation of their newsletter is about 50,000. Legislative alerts go to about 1000 activists across the country.]

CONCERNED WOMEN FOR AMERICA:

* 340 members of CWA's leadership will be on the Hill in support of Bork Thursday afternoon. (9/22)
* The President will be addressing the CWA convention on Friday and remarks on Bork are expected. (9/22)
* activated all state chapters;
* enclosing one page fact sheet on Bork in all mailings;

CONCERNED WOMEN FOR AMERICA: (continued)

* urging their members to call/write their Senators;
* urging each of their members to contact 5 additional people and encourage them to get involved in the nomination;
* report on Bork in August newsletter;
* running newspaper ads in Arizona and Pennsylvania and setting up Western Union hotlines for mailgram responses to Senators;
* have requested to testify at hearings;
* prepared two op-eds, one for August and one for September;
* Beverly LaHaye, President of CWA, testified before the Committee on September 30;
* preparing an editorial Board mailing; and
* arranged a meeting with Senator Heflin and a large coalition of businessmen on September 3;
* will deliver 76,000 petitions in support of Bork, which they have gathered over the past 3 weeks to the Hill. (10/2)

[CWA is a conservative women's organization with over 500,000 members nationwide.]

CITIZENS FOR AMERICA

* special mailing and newsletter to members; (9/22)
* radio spots and newspaper ads in all target states; (9/22)
* targeted 20 key cities in the South;
* prepared special pro-Bork posters which will be posted in target cities;
* preparing ads on buses in target cities;
* may target major donors for special mailings.

EAGLE FORUM:

* article on Bork nomination for mailing.
* Phyllis is doing articles on the nomination.
* Will be visiting Senators prior to the hearing.

[Eagle Forum is a national organization with 80,000 members and chapters in every state. The mailings go to about 1000 key activists and state leaders who then use the information as needed.]

EVANGELICAL LEADERS:

* Ronald A. DeJohn, Editor of "The Evangelist" a publication of the Jimmy Swaggart Ministries, is preparing an article on Bork for possible publication in that magazine.
* Mr. Page Patterson, President of Criswell College, reports that he has spoken to several groups of Southern Baptist pastors about the Bork nomination and has encouraged them to call their Senators.

EVANGELICAL LEADERS: (continued)

* The Public Affairs Committee of the Southern Baptist Convention, elected by the SBC to represent its 14.6 million members on First Amendment concerns, passed a resolution supporting the nomination of Bork.

FAMILY RESEARCH COUNCIL:

* Set up teams of people to visit key Senators; and
* sent mailing on Bork to all Senators.

FOCUS ON THE FAMILY:

* Dr. Dobson taped 30 minute interview with Gary Bauer (9/22) on Bork September 18 to be aired September 22.
* preparing article on Bork for magazine;
* cover the Bork nomination in monthly newsletter; and
* will be airing two radio broadcasts on the Bork nomination, one in late August and one in September.

[Focus on the Family is a 30 minute daily radio program in 930 markets across the country with an audience of 4 million.]

FREE CONGRESS FOUNDATION:

* article on Bork in Family Protection Report; and
* will be taking the lead in organizing other conservative organizations.

[FPR circulates to about 1000 profamily activists across the country.]

HERITAGE FOUNDATION:

* television and radio spots.
* Bruce Fein was quoted in a Sunday, Washington Post business section article on How the Bork nomination would affect business; and
* Gordon Jones wrote an article addressing the argument that conservatives used the same arguments, currently being used by liberals, during the Ginnsberg, Mikva nominations.

HISPANIC:

* an editorial was written by Rudy then translated and (9/22) mailed out to over 400 Hispanic Spanish publications.

HISPANIC BUSINESSMEN'S COUNCIL OF SOUTHERN CALIFORNIA:

* Expressed support;
* Manuel Sepulveda, President, wrote an editorial to the Los Angeles Times, which has not been printed.

INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION, INC.:

* Executive Director John Bellizzi reports he is requesting to testify on behalf of Bork at the confirmation hearings.

KNIGHTS OF COLUMBUS:

* Passed resolution at its national convention;
* 1.4 million members contacted with request that they write their senators.

LIBERTY FEDERATION:

* delivered 22,000 letters supporting Bork to Senate Judiciary Committee Members. (9/22)
* article in August newsletter;
* contacting key pastors; and
* gearing up for extensive promotional campaign;
* brought in a delegation to make personal visits to key Senators the week of 9/28-10/2.

[Circulation of "Liberty Report" is about 700,000; readership is estimated at over 2 million.]

NATIONAL ASSOCIATION OF EVANGELICALS:

* requested to testify for Judge Bork. (9/22)
* provide regular updates in individual and church editions of monthly newsletter:
* will be taping radio broadcasts on the nomination;
* special mailings to denominational leaders;
* spoke on the Bork nomination at the Conservative Baptist Annual Convention to over 4000 attendees; and
* Bob Duggan, Executive Director, will be interviewed on "VOX POP" (Voice of the People), a daily talk show in 35 major radio markets September 8.

[NAE has an estimated individual membership of 5 million. They represent 46,000 churches and 41 denominations across the country. The individual edition of their newsletter has a circulation of about 80,000, the church edition has a circulation of about 200,000.]

NATIONAL ASSOCIATION OF PRO-AMERICA:

* Have set up teams of people to go visit key Senators.

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS:

* sent two letters to their 45,000 members supporting Judge Bork and asking them to contact senators. One from President Dirk Van Dongen and one from Chairman, Lou Dehmlow. (9/22)

NATIONAL HISPANIC ASSOCIAITON OF CONSTRUCTION ENTERPRISES:

* Expressed group support in a letter to the President;
* also sent letter to its 27,000 members.

NATIONAL JEWISH COALITION:

* Supports nomination;
* sent letter to its members and to senators.

NATIONAL HUNGARIAN AMERICAN FEDERATION:

* letter and phone calls to Pennsylvania and New Jersey (9/22) delegations.

NATIONAL LAW ENFORCEMENT COUNCIL:

* 10 members are scheduled to testify on Bork on (9/22) September 22.
* mailing on the Bork nomination to the National Presidents and Executive Directors of the 15 council organizations which will reach over 300,000 law enforcement officers across the country;
* excerpts from the President's address (7/29) to the Council have been included in 20 law enforcement publications; and
* Fraternal Order of Police is urging its 187,000 members to write their representatives in support of the Bork nomination.

NATIONAL RIGHT TO LIFE:

* mailed "urgent" legislative alert to members calling (9/22) the Bork vote "too close to predict" and urging them to contact their Senators.

MEXICAN-AMERICAN FOUNDATION:

* Expressed support;
* press release sent to Hispanic press.
* Group will provide letter of support.

MEXICAN-AMERICAN OPPORTUNITY FOUNDATION:

* Issued statement supporting Judge Bork.

MEXICAN AMERICAN ORGANIZATION OF TEXAS:

* Supports the nomination of Judge Bork;
* sent press release to its 10,000 members.

ORDER SONS OF ITALY IN AMERICA:

* will meet with the President on September 24. (9/22) Marlin should promote the meeting to White House Press, afterward. Will issue press release.
* determining potential Congressional visits. (9/22)
* Passed resolution supporting Judge Bork.

POLISH AMERICAN CONGRESS:

* letter and phone calls to Senator Dixon (9/22)

SAVE OUR SCHOOLS:

* Prepared article for their journal, which goes out to all their supporters;
* will be visiting Senators before the hearings begin; and
* prepared and mailed a packet of information on Bork to Senators.

721 COALITION:

* meets weekly to take action items on the nomination.

[721 is the conservative law enforcement/judicial reform coalition group.]

UKRAINIAN CONGRESS COMMITTEE OF AMERICA:

* letter to target Senators (9/22)

UNITED FAMILIES OF AMERICA:

* Set up teams of people to visit key Senators;
* major mailing to all their contributors; and
* mailing to all Senators.

U.S. CHAMBER OF COMMERCE:

* are running favorable commentaries on their daily and weekly TV news shows and will do a BIZNET segment if they get an Administration speaker. (9/22)
* President Dick Lesher is asking individual Board members for support. He also sent a two-page press release on Judge Bork to all members and 700 newspapers. (9/22)

U.S. HISPANIC CHAMBER OF COMMERCE:

* Issued statement of support to its 100,000 members;
* press release was given to the White House for distribution to the Hispanic media.

WASHINGTON DATELINE:

* Mailing of Bork information to all Senators.

OTHER:

* Mailing to approximately 3000 religious leaders and media to notify them of availablity of six radio actualities has resulted in about 600 calls daily.

Individual Endorsement

LOU DEHMLOW, CHAIRMAN, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS:

* Mailing under his signature to 45,000 members requesting they contact their senators.

DIRK VAN DONGEN, PRESIDENT, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS:

* Also sent letter to members urging support.

DICK LESHER, PRESIDENT, U.S. CHAMBER OF COMMERCE:

* Asking Board members to individually support Judge Bork;
* Chamber is working behind the scenes.

PAUL OREFFICE, CHAIRMAN & CEO, DOW CHEMICAL:

* Agreed to submit op-ed piece.

RICHARD MADDEN, CHAIRMAN & CEO, POTLACH CORPORATION:

* Agreed to submit op-ed piece.

JOHN JONES, PRESIDENT, ASSOCIATED BUILDERS AND CONTRACTORS:

* Agreed to submit op-ed piece.

ROGER SMITH, CHAIRMAN & CEO, GENERAL MOTORS:

* op-ed ran in the Wall Street Journal August 21 and was (9/22) mailed with his cover letter to 190 CEO members of the Roundtable asking for support.
* Mr. Smith has also asked the 30 members of the BRT Policy (9/22) Committee for support and agreed to personally call key Senators.
* Op-ed ran in Wall Street Journal, August 25, 1987;
* op-ed ran in Detroit Free Press, August 26, 1987;
* sent copies to members of the Business Roundtable.

SMALL BUSINESS

JAMES HERR, PRESIDENT -- HERR FOODS, PENNSYLVANIA:

* has written letters to Senators Specter and Heinz and has (9/22) spoken with other business owners urging their support. He will place a call to Senator Specter this week.

JOSEPH CASTILLO, CHAIRMAN OF THE ARIZONA DELEGATION TO THE WHITE HOUSE CONFERENCE ON SMALL BUSINESS:

* has written to Senator DeConcini and is urging other business leaders to weigh in. Mr. Castillo knows DeConcini very well. (9/22)

GAY KRUGLICK, MEMBER OF THE RNC'S SMALL BUSINESS ADVISORY COUNCIL AND OWNER OF EARL'S ACADEMY OF BEAUTY IN ARIZONA:

* will contact Senator DeConcini and urge others to do so. (9/22)

JULIUS DALPIAZ, CHAIRMAN OF THE NORTH CAROLINA DELEGATION TO THE WHITE HOUSE CONFERENCE ON SMALL BUSINESS:

* has written Senator Sanford and is mobilizing other North Carolina businessmen to do the same. He is also contacting business owners and executives in Georgia and Alabama. He urged southern business leaders attending a regional small business meeting in Atlanta to contact their Senators. (9/22)

DWIGHT REED, RETIRED PRESIDENT OF THE NATIONAL SOFT DRINK ASSOCIATION:

* contacting Senators Specter, Heinz, Heflin, Shelby, and Hollings, Senators that he knows well. He is urging other business people to do so. (9/22)

WILLIAM STONE:

* wrote to Senators Ford and McConnell as Chairman of the Kentucky delegation to the White House Conference on Small Business. (9/22)

BILL BROCK, GOVERNOR HUNT'S SMALL BUSINESS REPRESENTATIVE:

* has urged numerous business people in Alabama to weigh in with Heflin and Shelby. (9/22)

Beller v. Middendorf

In Beller v. Middendorf, three former members of the Navy challenged the constitutionality of Navy regulations providing for the discharge of those who engage in homosexual activities. Judge Kennedy, writing for a unanimous three-judge panel of the United States Court of Appeals for the Ninth Circuit, rejected that challenge and upheld the constitutionality of the regulations.

Judge Kennedy first examined whether the court had jurisdiction to hear the case, and concluded that it did. He then held that the Navy's discharge of the three plaintiffs had not deprived them of "liberty" or "property" under the due process clause of the United States Constitution, rejecting the first of their two constitutional claims. His discussion of the second claim -- that discharging a member of the service for homosexual acts violates a constitutionally based "right to privacy" -- has attracted special attention.

He began by noting that judicial scrutiny of a government regulation to determine whether it violates a right to privacy "involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals." He continued:

> We recognize, as we must, that there is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right of privacy.
>
> There is substantial authority to the contrary, however. The Supreme Court has issued a summary affirmance of a lower court decision denying a challenge to a state criminal statute prohibiting sodomy as applied to private consensual homosexual conduct. Some commentators, in an effort to limit the holding, have attempted alternate explanations. Most federal courts, on the other hand, have understood the holding to be that homosexual conduct does not enjoy special constitutional protection under the due process clause.

After surveying the relevant case law, Judge Kennedy wrote:

> In light of the above authorities, we can concede arguendo that the reasons which led the Court to protect certain private decisions intimately linked with one's personality, see, e.g., Roe v. Wade, and family living arrangements beyond the core nuclear family suggest that some kinds of government regulation of private consensual homosexual

> behavior may face substantial constitutional challenge. Such cases might require resolution of the question whether there is a right to engage in this conduct in at least some circumstances. The instance cases, however, are not ones in which the state seeks to use its criminal processes to coerce persons to comply with a moral precept even if they are consenting adults acting in private without injury to each other. Instead, these appeals require an assessment of a military regulation which prohibits personnel from engaging in homosexual conduct while they are in the service. We conclude, in these cases, that the importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outwiegh whatever heightened solicitude is appropriate for consensual private homosexual conduct.

Judge Kennedy emphasized that "[t]he nature of the employer -- the Navy -- is crucial to our decision. . . . In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts. . .we conclude that at the present time the regulation represents a reasonable effort to accommodate the needs of the Government with the interests of the individual."

Judge Kennedy stressed that he was not offering any personal view on the desirability of the Naval regulation at issue. As he explained in one of the concluding paragraphs of his opinion:

> Upholding the challenged regulations as constitutional is distinct from a statement that they are wise. The latter judgment is neither implicit in our decision nor within our province to make. We note that the Navy's current regulations permit at least some flexibility in dealing with discharge of homosexuals, while the regulations before us do not. We are mindful that the rule discharging these plaintiffs is a harsh one in their individual cases, but we cannot under the guise of due process give our opinion on the fairness of every application of the military regulation. It should be plain from our opinion that the constitutionality of the regulations stems from the needs of the military, the Navy in particular, and from the unique accommodation between military demands and what might be constitutionally protected activity in some other contexts.

AG 1 Dennis R. BELLER, Plaintiff-Appellant,
v.
The Honorable J. William MIDDENDORF, Secretary of the Navy, et al., Defendants-Appellees.

James Lee MILLER, Plaintiff-Appellant,
v.
Donald H. RUMSFELD, Secretary of Defense, et al., Defendants-Appellees.

Mary Roseann SAAL, Plaintiff-Appellee,
v.
J. William MIDDENDORF, Secretary of the United States Navy, in his official capacity, Defendant-Appellant.

Nos. 77-1354, 77-1671 and 77-2461.

United States Court of Appeals, Ninth Circuit.

Submitted Nov. 8, 1978.

Decided Oct. 23, 1980.

Rehearing Denied in No. 77-1354 Nov. 21, 1980.

Actions were brought challenging constitutionality of navy regulations providing for discharge of those who engage in homosexual activities. The United States District Court for the Northern District of California, William W Schwarzer, J., 427 F.Supp. 192, rendered partial summary judgment for plaintiff, and appeal was taken. Combined therewith were appeals from the United States District Court for the Northern District of California, George B. Harris, Senior District Judge, in two similar cases. The Court of Appeals, Kennedy, Circuit Judge, held that: (1) sovereign immunity did not bar claims for equitable relief; (2) Court of Claims did not have exclusive jurisdiction over nonmonetary claims; (3) cases were not moot; (4) discharge proceedings and ultimate separations did not deprive plaintiffs of a property interest without due process; (5) Navy's action in granting honorable discharges did not deprive plaintiffs of a liberty interest; and (6) regulation did not violate substantive due process although it may have been broader than necessary to accomplish some of the Navy's goals.

Two judgments affirmed; third judgment reversed.

1. Federal Courts ⇐332

It was not essential to district court's jurisdiction under federal question statute that amount in controversy exceed $10,000 in actions brought against Secretary of Navy, Secretary of Defense and others in their official capacities by navy enlistees challenging, as violative of Fifth Amendment, navy regulations providing for discharge of those who engage in homosexual activities. 28 U.S.C.A. § 1331; U.S.C.A. Const. Amend. 5.

2. United States ⇐125(9)

Unless sovereign immunity has been waived or does not apply, it bars equitable as well as legal remedies against the United States.

3. United States ⇐125(30)

Amendment to Administrative Procedure Act waived sovereign immunity for discharged navy enlistee's action, as brought under federal question jurisdiction statute, seeking nonmonetary relief from Secretary of the Navy in his official capacity for alleged violation of plaintiff's Fifth Amendment rights in separating her under navy regulation providing for discharge of those who engage in homosexual activities. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331; U.S.C.A.Const. Amend. 5.

4. United States ⇐125(24)

Sovereign immunity principles apply in an action against a federal official in his official capacity brought under federal question jurisdiction statute seeking monetary relief such as back pay or damages for lost promotional opportunities when the damages will be paid from government funds rather than the officer's personal funds. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331.

5. Records ⇐31

Where during routine investigation to upgrade security clearance of navy enlistee it was discovered that he had had contacts with homosexual groups following enlistment, which information was forwarded to Naval Investigative Service, disclosure of such information by NIS to commanding officer of the installation was proper and did not violate Privacy Act; likewise, there was no violation of Act's requirement that an agency inform the individual who provided information of the principal purposes for which such information is intended to be used and routine uses thereof, although such information was used in subsequent discharge proceedings. 5 U.S.C.A. §§ 552a, 552a(b)(1), (e)(3).

6. United States ⇐125(30)

Sovereign immunity had been waived as to discharged navy enlistee's claims for nonmonetary relief in his action against Secretary of the Navy and the latter's codefendants in their official capacities, specifically, to prohibit defendants from discharging plaintiff in alleged violation of his statutory and constitutional rights and an order directing defendants to expunge from service records and other files any reference to administrative board proceedings or separation of plaintiff as a homosexual. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331; U.S.C.A. Const. Amend. 5.

7. Federal Courts ⇐1139

A district court does not lose jurisdiction over a claim against United States for nonmonetary relief since because it may later be the basis for a money judgment; however, such does not necessarily mean that a district court has jurisdiction over a back pay claim in excess of $10,000 if the court finds the relief sought is essentially or primarily nonmonetary. 5 U.S.C.A. § 702.

8. Federal Courts ⇐1139

Court of claims did not have exclusive jurisdiction over nonmonetary claims asserted by discharged navy enlistees against Secretary of the Navy and Secretary of Defense and other government officials in their official capacities based on alleged violation of plaintiffs' Fifth Amendment rights in discharging them for engaging in homosexual activities. 28 U.S.C.A. §§ 1331, 1491; U.S.C.A.Const. Amend. 5.

9. Federal Courts ⇐221

The district court had federal question jurisdiction of action by navy enlistee against Secretary of Defense and other officials in their official capacity seeking injunction restraining defendants from discharging him under Navy regulation governing discharge of those who engage in homosexual activity or awarding him a less than honorable discharge. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331; U.S.C.A.Const. Amend. 5.

10. Federal Courts ⇐13

Suits challenging navy regulation providing for discharge of those who engaged in homosexual activities would not be dismissed as moot on ground that enlistment terms of all three plaintiffs had expired, that the court could not order the Navy to accept reenlistment applications and that no remedy was available even assuming discharge proceedings were invalid, as plaintiffs probably had a damage claim under Tucker Act, even if such was ultimately determined to be without merit; in passing on mootness issue, reviewing court considered case as if damage claim had been pled, notwithstanding that in view of ultimate holding no point would be served by permitting plaintiffs to amend. 28 U.S.C.A. §§ 1346, 2401, 2402; U.S.C.A.Const. Amend. 5.

11. Federal Courts ⇐13

Even if district court had no jurisdiction over any damage claims on behalf of plaintiffs who were discharged from the Navy for engaging in homosexual activities, requests for nonmonetary relief were not moot, notwithstanding that enlistment terms had expired or principle that the Navy could not be ordered to accept reenlistment applications, since as result of the allegedly constitutionally infirm regulations and procedures plaintiffs claimed to have been injured in various ways, including stigmatization without a hearing, injury to fu-

ture employment prospects and ban on further military employment. 28 U.S.C.A. § 1331; U.S.C.A.Const. Amend. 5.

12. Armed Services ⇐22

Navy enlistees who were separated for engaging in homosexual activities were not required to exhaust administrative remedies by applying for reenlistment and, on rejection, seeking review before Board for Correction of Naval Records before bringing action complaining of alleged violation of their constitutional rights as focus of the suit was on constitutionality of Navy's actions in discharging plaintiffs and not constitutionality of regulations prohibiting acceptance of enlistment applications from homosexuals and even if reenlistment practices were at issue, it was plain that any reenlistment application would be completely futile. 10 U.S.C.A. § 1552; 28 U.S.C.A. § 1331; U.S.C.A.Const. Amend. 5.

13. Constitutional Law ⇐251

Due process clause of the Fifth Amendment includes equal protection components, and Fifth Amendment equal protection claims are treated the same as Fourteenth Amendment equal protection claims. U.S.C.A.Const. Amends. 5, 14.

14. Federal Courts ⇐924

General rule is that a reviewing court will apply to a case a new rule that has intervened between its pending decisions and the original controversy; however, such new rule may be meaningfully applied only to situations in which the new rule might yield a different result.

15. Federal Courts ⇐924

Although since initiation of lawsuit challenging regulation under which plaintiffs were discharged for engaging in homosexual activities the Navy issued a new set of instructions and regulations governing discharge of homosexuals, remand for reconsideration under the new regulations was not required since plaintiffs would still have been discharged under the new regulations. U.S.C.A.Const. Amend. 5.

16. Constitutional Law ⇐278.6(1)

Discharge proceedings and ultimate separation of navy enlistees for violating policy against homosexual activities did not deprive plaintiffs of a "property interest" without due process, as navy regulations and practices create no reasonable expectation of continued employment once a person is determined to fall within the categories described in the applicable regulations; unless the Navy as a substantive matter may not discharge all homosexuals, or unless it must consider factors in addition to homosexuality, there is not basis for inferring any expectation of continued service sufficient to constitute a constitutional property interest. U.S.C.A.Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

17. Constitutional Law ⇐255(2)

Where plaintiffs, who were separated from the Navy for engaging in homosexual activities, either admitted or were found in a predischarge hearing to have engaged in the acts which allegedly imposed a stigma on them and were allowed to introduce evidence in support of arguments that the Secretary should exercise his discretion to retain them and under applicable regulations there was nothing more about which to have a hearing, plaintiffs' liberty interests were protected by hearings afforded them. U.S.C.A.Const. Amend. 5.

18. Constitutional Law ⇐278.6(1)

Plaintiffs, who were discharged from the Navy for engaging in homosexual activities, were not denied procedural due process on ground that they received the stigma of "unfitness" for retention and never received a hearing on such issue; real stigma imposed by Navy's action was the charge of homosexuality, not the fact of discharge or some implied statement that the individual was not sufficiently needed to be retained, especially as regulations did not make fitness of the particular individual a factor in the discharge decision. U.S.C.A.Const. Amend. 5.

19. Constitutional Law ⇐255(2)

Navy's separating enlistees, with honorable discharges, for engaging in homosexual activities deprived the enlistees of no constitutionally protected liberty interest as nowhere on separation papers given plaintiffs was there any indication of reasons for the discharge and documents allegedly likely to be examined by future employers would contain no reason for the discharge. U.S.C.A.Const. Amend. 5.

20. Constitutional Law ⇐255(2)

That facts underlying navy enlistees discharge for engaging in homosexual activities were disclosed publicly during course of litigation did not affect conclusion that plaintiffs, who had been given an honorable discharge at expiration of their enlistment term, were not deprived of a constitutionally protected liberty interest, although a discharge under less than honorable conditions before expiration of the current term of enlistment might present different considerations. U.S.C.A.Const. Amend. 5.

21. Constitutional Law ⇐252.5

If consensual private homosexual conduct were found to be a consensual right, such would be subject to prohibition only to further compelling state interests, with category used or burden imposed required to be a necessary, or the least restrictive, way to promote such interests. U.S.C.A.Const. Amend. 5.

22. Constitutional Law ⇐251.2

Substantive due process scrutiny of a government regulation involves the case-by-case balancing of the nature of the individual interest allegedly infringed, importance of the government interest furthered, degree of infringement, and sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals. U.S.C.A.Const. Amends. 5, 14.

23. Constitutional Law ⇐251.3

When conduct, either by virtue of its inadequate foundation in the continuing traditions of society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, analysis under the substantive due process clause perceives in much the same way as analysis under the lowest tier of equal protection scrutiny and rational relation to a legitimate government interest will normally suffice to uphold the regulations. U.S.C.A.Const. Amends. 5, 14.

24. Constitutional Law ⇐251.3

Where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, the compelling state interest test employed in equal protection cases may be used to describe the appropriate due process analysis. U.S.C.A.Const. Amends. 5, 14.

25. Constitutional Law ⇐278.6(1)

Due process clause does not require the government to show with particularity that the reasons for the general policy of discharging homosexuals from the Navy exists in a particular case before discharge is permitted; individual hearings might be appropriate on an equal protection theory when the grounds for discharge implies a classification subject to a heightened standard of scrutiny or when the regulations condition discharge on exercise of protected activities. U.S.C.A.Const. Amends. 5, 14.

26. Constitutional Law ⇐278.6(1)

Although substantive due process tests used in analyzing navy regulations providing for discharge of those who engage in homosexual activities proceeds on a case-by-case basis, it does not necessarily require the government, in each case involving changing norms, to show that the reasons for the regulation apply in the particular case; instant suit involved neither middle-tier equal protection analysis nor a situation where the only alternative means available to satisfy the government's goals consistent with due process was an individual showing of unfitness. U.S.C.A.Const. Amends. 5, 14.

27. Constitutional Law ⇐278.6(1)

Due process was not violated by navy regulation providing for discharge of those

who engage in homosexual activities while in cases of drug abuse such abuse is but one factor in determining ultimate disposition; fact that Navy's choice of categorization was overinclusive and underinclusive did not mean that the regulations challenged violated due process as Navy could rationally conclude that homosexuality presented problems sufficiently serious to justify a policy of mandatory discharge while other grounds for discharge did not. U.S.C.A. Const. Amends. 5, 14.

28. Armed Services ⇐21

Although one does not surrender his or her constitutional rights on entering the military, constitutional rights must be viewed in light of the special circumstances and needs of the armed forces and regulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities. U.S.C.A. Const. Amends. 1, 5, 14.

29. Constitutional Law ⇐278.6(1)

Although Navy's blanket rule requiring discharge of those who engage in homosexual conduct is perhaps broader than necessary to accomplish some of its goals, in view of the importance of the military's role, special need for discipline and order in the service, potential for difficulties arising out of possible close confinement aboard ships or bases for long periods and possible benefit to recruiting efforts, the regulation represents a reasonable effort to accommodate the needs of the government with the interests of the individual and does not violate substantive due process; importance of government interests outweighed whatever heightened solicitude was appropriate for consensual private homosexual conduct. U.S.C.A.Const. Amends. 5, 14.

Richard P. Fox, Los Angeles, Cal., for Beller.

John Vaisey, San Francisco, Cal., for Miller.

James L. Browning, Jr., San Francisco, Cal., on brief; Harland F. Leathers, Washington, D.C., Mary C. Dunlap, San Francisco, Cal., for Middendorf.

Appeal from the United States District Court for the Northern District of California.

Before BROWNING and KENNEDY, Circuit Judges, and CHRISTENSEN,* District Judge.

KENNEDY, Circuit Judge:

Although the factual and procedural settings of these three consolidated appeals differ, the broad outlines are similar: an enlisted person in the Navy, with an otherwise fine performance record, admitted engaging in homosexual acts, conduct prohibited by Navy regulations. Following proceedings before an administrative discharge board and review by the Secretary of the Navy, each was ordered discharged. Plaintiffs raise constitutional challenges to the Navy's regulations and proceedings. We recognize that to many persons the regulations may seem unwise, but if that be the case the political branches of the Government, which most certainly are on notice of the controversy here or in similar cases, have the right and the prerogative to declare a different policy. Our role is more confined. We are limited to determining whether or not the Constitution prohibits the Navy from adopting the rule before us. We cannot say that constitutional limitations have been exceeded here, and therefore we do not find the regulation is invalid.

We first state the relevant facts of each case, relying extensively on the respective district court opinions.

I

Saal

Plaintiff Mary Saal enlisted in the United States Navy on December 17, 1971. Following training she was assigned as an air

* Honorable A. Sherman Christensen, Senior United States District Judge for the District of Utah, sitting by designation.

traffic controller at Alameda Naval Air Station. In January, 1972, she entered into a three-year enlistment contract. In March, 1973, after an investigation by the Navy into plaintiff's activities, she signed a statement admitting homosexual relations with another Navy member assigned to the Air Operations Department. Thereafter, administrative proceedings to separate plaintiff were instituted pursuant to Navy regulations. An administrative discharge board was convened on July 6, 1973, and, after a hearing, it recommended on the basis of plaintiff's admitted homosexual activity that she should be separated from the service with a general discharge. At the hearing Saal admitted to having had homosexual relations since her March statement and indicated that she intended to continue her homosexual relationship.

This action was filed on July 27, 1973, seeking injunctive relief to prevent the Navy from discharging plaintiff for her homosexual activity as well as damages for back pay and lost promotional opportunities. In August, 1973, the district court granted preliminary injunctive relief staying the discharge pending a decision on the merits. In November, 1973, the Chief of Naval Personnel notified plaintiff that he had directed her separation with a general discharge, although the discharge remained stayed by court order. In January, 1974, defendant moved for summary judgment contending that (1) plaintiff had failed to exhaust her administrative remedies, (2) the administrative hearing accorded plaintiff satisfied due process, and (3) the discharge was lawful. On July 10, 1974, the district court denied the motion, rejecting the first contention and holding that the other two contentions were not ripe for disposition by summary judgment.

With the term of her enlistment contract nearing its end, plaintiff in September, 1974 submitted a written request for extension to her commanding officer in accordance with Navy regulations. The commanding officer, aware of the pending litigation and not wanting to take action which might affect it, forwarded the request without recommendation to the Chief of Naval Personnel, the final authority in such matters, and asked for advice. On December 12, 1974, the Chief of Naval Personnel replied by denying plaintiff's request for extension and ordering her separation with an honorable discharge upon expiration of her enlistment. The prior directive ordering her discharge by reason of unfitness was cancelled and her discharge was "characterized as warranted by the average performance evaluation marks which have been earned during her period of service." At the same time, plaintiff was assigned a reenlistment code of RE-4, which designates a person as ineligible for reenlistment.

Plaintiff's enlistment expired on January 6, 1975. Defendant immediately moved to dismiss this action as moot. By order dated August 19, 1975, the district court granted the motion, lifted the prior stay order (thereby permitting issuance of an honorable discharge to plaintiff), but gave plaintiff leave to file an amended complaint. On August 22, 1975, plaintiff was discharged from the Navy. On September 15, 1975, she filed her first amended complaint in which she contended she was deprived of due process by reason of having been rendered ineligible for reenlistment under Instruction 1900.9A. In the amended complaint plaintiff sought declaratory, injunctive, and monetary relief. The district court granted partial summary judgment for Saal, holding due process required that plaintiff's application for extension of service or reenlistment receive the same consideration as that of other Navy personnel similarly situated without reference to policies or regulations substantially mandating exclusion or processing for discharge of persons who engage in homosexual activity. *Saal v. Middendorf*, 427 F.Supp. 192 (N.D. Cal.1977).

Miller

Plaintiff James Miller, currently a Yeoman Second Class, enlisted in the Navy in February, 1965. He had reenlisted twice, the most recent reenlistment being in 1972 for a period of six years. As a result of an unrelated incident, a Naval Investigative

Service (NIS) inquiry began in 1975, and in an interview with the NIS investigator, after being advised of his rights, plaintiff admitted that he had participated recently in homosexual acts with two Taiwanese natives while he was stationed in Taiwan. Pursuant to orders issued prior to the institution of the NIS investigation, plaintiff was transferred to the USS ORISKANY at Alameda, California. He served on board for over one year and was given a Secret clearance by his commander, who had knowledge of the NIS investigation.

On April 12, 1976, a hearing board was convened to consider Miller's discharge for homosexuality. The board heard testimony from the NIS investigator, several witnesses as to Miller's good character and service in the Navy, and Miller on his own behalf. It found that plaintiff had admitted to committing homosexual acts during his assignment in Taiwan, but nevertheless recommended, by vote of two to one, that plaintiff be retained in the Navy. The dissenting member of the board voted that plaintiff be administratively discharged under honorable conditions.

Plaintiff was subsequently examined by the Senior Medical Officer who found that despite plaintiff's admitted homosexual episodes, he did not appear to be "a homosexual," and that he found no evidence of psychosis or neurosis. The medical officer recommended retention. The convening authority, the Commanding Officer of the USS ORISKANY, then forwarded the board proceedings to the Chief of Naval Personnel and recommended that plaintiff be retained in the Navy.

The Assistant Director of the Enlisted Performance Division recommended that plaintiff be separated with a General Discharge under honorable conditions by reason of misconduct, for his admitted participation in in-service homosexual acts. That recommendation was approved by the Assistant Secretary of the Navy and plaintiff was then scheduled for separation on June 23, 1976.

On that date, Miller brought suit in the district court, asking that his discharge be restrained and in the alternative that he be given not less than an honorable discharge. The Chief of Naval Personnel subsequently ordered Miller separated with an honorable discharge, but this discharge was stayed by the district court until, relying largely on its decision in *Beller*, it granted summary judgment for the Navy. This court, however, stayed Miller's discharge pending disposition of this appeal. Miller has been retained in the Navy pursuant to this court's order. He currently works for the Commanding Officer, Enlisted Personnel, Treasure Island. His commanding officer there requested that the Navy retain him.

Miller has tried to reenlist; the Navy denied his application.

Beller

Plaintiff Dennis Beller enlisted in the United States Navy in 1960. On August 29, 1972, he reenlisted for a six-year term. In the latter part of 1975 plaintiff was informed that the Navy desired to upgrade his security clearance to permit him access to "Top Secret" information. During the course of a routine background investigation of plaintiff, Navy personnel discovered that plaintiff had had contacts with homosexual groups since entering the Navy.

This information was forwarded to the Naval Investigative Service. Plaintiff provided investigators a sworn statement which recited in pertinent part:

> Regarding my sexual activities I first engaged in sexual activity with males after my enlistment in the Navy. Since that time I have engaged in sex with males. I would not like to name any people that I have been engaged with. I have and do beliv [*sic*] myself to be bisexual. I have been President of the Monterey Dons Motorcycle Club for 2 years. I have been in the Gilded Cage, Rightous [*sic*] Ram, known to be gay bars.

An administrative discharge board was thereupon convened to consider plaintiff's possible administrative discharge by reason of unfitness. The board recommended an honorable discharge based upon unfitness.

This recommendation was forwarded to the Chief of Naval Personnel, who ordered plaintiff discharged on December 18, 1975. Beller brought suit in the district court, seeking an injunction preventing the Navy from involuntarily discharging him, an injunction directing the Navy to expunge from service records and all other files maintained on Beller any reference to the administrative board or his separation from the Navy as a homosexual, declaratory relief to the effect that he is serving under a valid enlistment contract, and damages for violation of the Privacy Act. The district court granted a temporary restraining order preventing discharge, but eventually it denied plaintiff's motion for a preliminary injunction and entered judgment for the Navy. The Navy then separated Beller with an honorable discharge based upon unfitness. Since discharge, Beller has remained a civilian. He has not applied for reenlistment.

II

The delays inherent in securing appellate review, and the shifting, at times seemingly inconsistent, position of the Navy with regard to several issues in this case, have combined to produce several difficult threshold issues. We address these issues in the context of Saal's case and then apply our analysis to Beller and Miller.

Saal

A. *Subject Matter Jurisdiction*

1. *The District Court's Opinion*

In its motion for summary judgment, the Navy argued that the district court lacked jurisdiction because the amount in controversy did not exceed $10,000. In the alternative, the Navy contended that if the damages sought by Saal did exceed $10,000, the Court of Claims had exclusive jurisdiction. *See* 28 U.S.C. § 1491.

The district court held Saal had alleged with sufficient certainty that the amount in controversy exceeded $10,000. It also held that it had jurisdiction over all of her various claims for relief under 28 U.S.C. § 1331, since "plaintiff's claim arises under the Fifth Amendment of the Constitution." The court noted that *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), supported a right of action for damages under the fifth amendment and were "authority for the existence of jurisdiction here." 427 F.Supp. at 196 n.2.[1] In granting partial summary judgment for Saal, however, the court addressed itself only to Saal's requests for declaratory and injunctive relief. *See* 427 F.Supp. at 203. It stated, "The present record does not permit disposition of [Saal's] claim for damages and other relief." *Id.* at 195.

2. *The Jurisdictional Amount Requirement*

[1] The congressional abolition of the jurisdictional amount requirement for suits brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity applies to this case.[2] Therefore, it is not essential to the district court's jurisdiction under 28 U.S.C. § 1331 that the amount in controversy exceed $10,000. *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607–08 n.6, 98 S.Ct. 2002, 2005–2006, 56 L.Ed.2d 570 (1978). *See also National Treasury Employees Union v. Campbell*, 589 F.2d 669, 677 & n.19 (D.C.Cir.1978), and cases cited therein. Although it is unnecessary for us to address the issue fully, mandamus jurisdiction might also be appropriate in these cases, *see benShalom v. Secretary of the Army*, 489 F.Supp. 964, 969–970 (E.D.Wis. 1980), and cases cited therein.

1. The panel opinion in *Davis* was subsequently reversed, *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc). That opinion was reversed by the Supreme Court, which implied a cause of action for damages under the fifth amendment. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

2. We hold below that the defendant Middendorf is being sued in his official capacity, *see* pp. 796 797 *infra*.

3. *Sovereign Immunity*

[2] As the court said in *Neal v. Secretary of the Navy*, 472 F.Supp. 763, 770 (E.D.Pa.1979), "[t]he legal principles which define the contours of the doctrine of sovereign immunity are far from clear." In general, "[t]he United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941). *See also United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). Unless sovereign immunity has been waived or does not apply, it bars equitable as well as legal remedies against the United States. *Jaffee v. United States*, 592 F.2d 712, 717 n.10 (3d Cir. 1979) citing (*Malone v. Bowdoin*, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962)); *Midwest Growers Co–op Corp. v. Kirkemo*, 533 F.2d 455, 465 (9th Cir. 1976). *See generally* K. Davis, Administrative Law Treatise ch. 27 (1958 & Supp.1970); K. Davis, Administrative Law of the Seventies ch. 27 (1976 & Supp.1980); 1 Moore's Federal Practice ¶ 0.65[2.–1 to 2.–3] (2d ed. 1979); C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3655 (1976).

Saal's suit is against defendant Middendorf in his official capacity.[3] We must first determine whether sovereign immunity bars Saal's claims for equitable relief.

In *Glines v. Wade*, 586 F.2d 675 (9th Cir. 1978), *rev'd on other grounds sub nom. Brown v. Glines*, 440 U.S. 957, 99 S.Ct. 1496, 59 L.Ed.2d 769 (1980), plaintiff Glines, a Captain in the Air Force Reserves on active duty, violated a regulation requiring him to obtain approval from his commander before circulating petitions on Air Force bases. As a result of his unauthorized activities, Glines was removed from active duty and reassigned to the standby reserves, with adverse financial consequences. This court concluded the regulations violated Glines' first amendment rights. It then held that "the district court was correct in declaring the regulations void, enjoining their enforcement, and ordering Glines reinstated in a status that is consistent with his status before he was relieved from active duty." 586 F.2d at 681. The court held that sovereign immunity did not bar the district court from awarding this nonmonetary relief:

> [In] actions claiming that a government official acted in violation of the Constitution or of statutory authority ... Congress has either waived sovereign immunity or the doctrine does not apply. 5 U.S.C. § 702; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689–91, 69 S.Ct. 1457, 1461–1462, 93 L.Ed.2d 1628 (1949); *Hill v. United States*, 571 F.2d 1098, 1102 (9th Cir. 1978); 14 Wright, Miller, and Cooper, Federal Practice and Procedure § 3655 (Supp.1977).

586 F.2d at 681.

[3] The waiver of sovereign immunity found by the court was an amendment to the Administrative Procedure Act. The amendment provided in part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. In *Hill v. United States*, 571 F.2d 1098 (9th Cir. 1978), an action

3. Saal sued the Secretary of the Navy, first John Chaffee and then Middendorf, in his official capacity and sought equitable relief from the Secretary in his official capacity. She sought, *inter alia*,

> a permanent injunction, enjoining defendant and his agents from depriving plaintiff of the opportunity to apply for reenlistment despite the fact of her homosexual conduct, requiring that defendant and his agents review said application and act upon it on the merits of plaintiff's service performance record, and requiring that all records concerning the homosexuality-based discharge proceedings against plaintiff either be destroyed or permanently sealed and prevented from being distributed to any person.

brought in the district court under the Tucker Act, 28 U.S.C. § 1346(a), this court held that the waiver of sovereign immunity expressed in section 702 applied retroactively to actions brought in the district court under 28 U.S.C. § 1346(a). We construe the decisions in *Glines* and *Hill* as holding that section 702 waives sovereign immunity for Saal's action brought under 28 U.S.C. § 1331 seeking nonmonetary relief for violation of her fifth amendment rights. We recognize the division of authority on the question whether and under what circumstances section 702 waives sovereign immunity in actions brought under 28 U.S.C. § 1331. *Compare Jaffee v. United States, supra*, and *Neal, supra*, (waiver) *with Estate of Watson v. Blumenthal*, 586 F.2d 925 (2d Cir.1978) *and Sharrock v. Harris*, 473 F.Supp. 1173 (S.D.N.Y.1979) (no waiver). *See also National Treasury Employees Union, supra*, 589 F.2d at 673 n.7 (waiver) (dicta). Although the *Glines* decision admittedly did not address the sovereign immunity issue in as much detail as the courts in *Jaffee* or *Watson*, we think it states the controlling law of this circuit. We therefore affirm the district court's determination that it had jurisdiction over Saal's claims for nonmonetary relief under 28 U.S.C. § 1331.

Our conclusion is consistent with *Lee v. Blumenthal*, 588 F.2d 1281 (9th Cir. 1979), where the plaintiff sought a writ of mandamus to compel the Secretary of the Treasury to redeem certain bonds controlled by the Second Liberty Bond Act. 31 U.S.C. §§ 752, 754(b). The court viewed the plaintiff's lawsuit as essentially one for money damages arising from a contract dispute and concluded that the Court of Claims had exclusive jurisdiction over the action since a judgment over $10,000 was sought. *See also Watson, supra*. The court's brief discussion of 5 U.S.C. § 702 and *Hill, supra*, is best understood as recognizing that section 702 was not intended to disturb the existing limitations on district court jurisdiction imposed by the Tucker Act. We do not interpret *Lee* to hold that section 702 was not a waiver of sovereign immunity in actions properly brought under section 1331.

In light of our holding, we find it unnecessary to address whether the language in *Glines* and *Larson*, stating that sovereign immunity does not apply where the plaintiff claims "that a government official acted in violation of the Constitution," 586 F.2d at 681, would provide an alternate ground, independent of 5 U.S.C. § 702, for finding sovereign immunity inapplicable to Saal's nonmonetary claims.[4] At least one commentator has viewed the decisions in this area as hopelessly inconsistent, *see* K. Davis, Administrative Law Treatise ch. 27 (1958 & Supp.1970); K. Davis Administrative Law of the Seventies ch. 27 (1976 & Supp.1980), and we decline to attempt a reconciliation here.

[4] As we noted before, the district court granted summary judgment only on Saal's claims for nonmonetary relief.

4. In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), the Court examined the doctrine of sovereign immunity when equitable relief is requested. Sovereign immunity concerns are implicated by injunctions directed against federal officers, said the Court, since "[i]n each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign." 337 U.S. at 688, 69 S.Ct. at 1460. In the context of actions seeking nonmonetary relief, the Court indicated that sovereign immunity did not apply where the officer acted unconstitutionally. 337 U.S. at 690–91, 69 S.Ct. at 1461–1462.

The Court also stated that even where an officer acts unconstitutionally, sovereign immunity applies "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Id.* at 691 n.11, 69 S.Ct. at 1462. The distinction between injunctions which merely order cessation of conduct and those which require affirmative action of the sovereign or disposition of sovereign property, however, has not always been applied when injunctive or declaratory relief has been sought. *See, e. g., Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959). *See also De Lao v. Califano*, 560 F.2d 1384, 1391 (9th Cir. 1977); *Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969) (interpreting *Larson* and footnote 11). As we conclude in the text, our holding regarding 5 U.S.C. § 702 makes resolution of the many issues created by *Larson* and its progeny unnecessary.

There may be several difficult issues with regard to whether sovereign immunity bars Saal's claims for monetary relief. Since that aspect of her case is not before us, however, we do not resolve them on this appeal.[5]

Beller

[5] Plaintiff Beller also sued Middendorf and his codefendants in their official capacities. Like Saal, Beller alleged that the amount in controversy exceeded $10,000 and that jurisdiction was proper under 28 U.S.C. § 1331. He also claimed the district court had mandamus jurisdiction, 28 U.S.C. § 1361. Beller requested damages only with regard to his action brought under the Privacy Act, 5 U.S.C. § 552a. The district court granted summary judgment to the Navy on this claim, and we affirm.[6]

[6] Beller requested an injunction prohibiting the defendants from discharging

5. *Bivens* and its progeny, *see, e. g., Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), which hold implicitly that sovereign immunity does not bar damages actions against federal officials in their individual capacity for violation of a person's constitutional rights, do not overcome the sovereign immunity barriers to plaintiffs' damages claims. The *Bivens* line of cases holds only that sovereign immunity is inapplicable when either damages or equitable relief, *see Davis, supra*, 442 U.S. at 246 n.24, 99 S.Ct. at 2277; *Midwest Growers Co-Op Corp. v. Kirkemo*, 533 F.2d 455, 465–66 (9th Cir. 1976) (equitable relief against individual federal officials), will be had from the federal official personally; they do not hold that sovereign immunity is waived in cases where relief will come from the sovereign. *See Davis v. Passman*, 544 F.2d 865, 877 (5th Cir. 1977), *aff'd in part, vacated in part*, 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd and remanded on other grounds*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *American Ass'n of Commodity Traders v. Department of the Treasury*, 598 F.2d 1233 (1st Cir. 1979). *Cf. Butz v. Economou*, 438 U.S. 478, 505, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978); *Duarte v. United States*, 532 F.2d 850, 851 (2d Cir. 1976); *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146, 1155–56 (4th Cir. 1974); *Dean v. Gladney*, 451 F.Supp. 1313, 1320 (S.D. Tex.1978).

The district court in *Neal v. Secretary of the Navy*, 472 F.Supp. 763 (E.D.Pa.1979), in an action brought under 28 U.S.C. § 1331 seeking back pay and injunctive relief for violation of the plaintiff's fifth amendment due process rights, held that sovereign immunity did not bar the plaintiff's damages claim. *Cf. Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 930–32 (10th Cir. 1975). The district court's interpretation of *Dugan v. Rank*, 372 U.S. 609, 621–22, 83 S.Ct. 999, 1006–1007, 10 L.Ed.2d 15 (1963), and *Larson, supra*, appears somewhat dubious, as these cases hold no more than an officer's unconstitutional acts can be made the basis for suits seeking equitable relief against the officers, *see Dugan, supra*, 372 U.S. at 622, 83 S.Ct. at 1007; *Larson, supra*, 337 U.S. at 686–91, 69 S.Ct. at 1459–1462.

We recognize that this circuit has apparently not construed *Larson* and *Dugan* to bar all actions in which recovery will come from the public treasury. *See, e. g., De Lao v. Califano, supra*, 560 F.2d at 1391; *Washington v. Udall, supra*. On the other hand, some decisions have held sovereign immunity a bar to actions seeking money damages in contexts where equitable relief might have been permitted. *See, e. g., Denton v. Schlesinger*, 605 F.2d 484 (9th Cir. 1979); *Glines v. Wade*, 586 F.2d 675 (9th Cir. 1978), *rev'd on other grounds sub nom. Brown v. Glines*, 440 U.S. 957, 99 S.Ct. 1496, 59 L.Ed.2d 769 (1980); *Jaffee v. United States*, 592 F.2d 712, 717 (3d Cir. 1979). *See also Hoopa Valley Tribe v. United States*, 596 F.2d 435, 436–37 (Ct.Cl.1979). Since the posture of this case does not require us to resolve these issues definitively, we simply reaffirm that sovereign immunity principles apply in an action against a federal official in his official capacity brought under 28 U.S.C. § 1331 seeking monetary relief such as back pay or damages for lost promotional opportunities when the damages will be paid from government funds rather than the officer's personal funds. *See Penn v. Schlesinger*, 490 F.2d 700, 704–05 (5th Cir. 1973), *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (en banc), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976). *Cf. Marcus Garvey Square v. Winston Burnett Construction Co.*, 595 F.2d 1126 (9th Cir. 1979) (interpreting "sue or be sued" provision of 12 U.S.C. § 1702).

6. The Privacy Act provides in part that no agency shall disclose a record without prior written consent of the individual to whom it pertains unless disclosure is "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C. § 552a(b)(1). Disclosure by the NIS to Captain Ward, as Commanding Officer of the installation, was entirely proper. The commanding officer is responsible for the "safety, well-being and efficiency of his entire command." 32 C.F.R. § 700.702(a). *See Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). *See also* 32 C.F.R. § 701.107(b)(1) (implementing regula-

him in violation of his statutory and constitutional rights and also an order directing defendants to expunge from his service records and all other files any reference to his administrative board proceedings or separation from the Navy as a homosexual. The congressional waiver of sovereign immunity in these circumstances, *see* pp. 795–796 *supra*, is sufficient to give the federal courts jurisdiction over Beller's claims for nonmonetary relief.

[7, 8] In the district court the Navy argued that the court had no jurisdiction because plaintiff's action was merely one for breach of his enlistment agreement, and jurisdiction lay exclusively in the Court of Claims since the claims exceeded $10,000. The court rejected this argument, holding that the "primary relief" sought by Beller was nonmonetary. We can assume arguendo that a district court does not lose jurisdiction over a claim for nonmonetary relief simply because it may later be the basis for a money judgment. *See, e. g., Melvin v. Laird*, 365 F.Supp. 511 (E.D.N.Y.1973). This does not necessarily mean that a district court has jurisdiction over a back pay claim in excess of $10,000 if the court finds the relief sought is "essentially" or "primarily" nonmonetary, and we doubt that cases such as *Mathis v. Laird*, 483 F.2d 943 (9th Cir. 1973), stand for such a principle. *Cf. Glines, supra.* Beller, however, did not seek back pay damages in excess of $10,000 for violation of his enlistment agreement. We think *Glines v. Wade* controls our disposition of this issue and requires a holding that the Court of Claims does not have exclusive jurisdiction over the nonmonetary claims of Beller, Saal, and Miller. The cases before us more closely resemble *Glines* than *Denton v. Schlesinger*, 605 F.2d 484 (9th Cir. 1979), where the plaintiffs sought $350,000 damages and full reinstatement because their termination from the military allegedly violated their contract, statutory, and constitutional rights. Beller did not seek damages, and the grounds which the court in *Denton* gave for finding *Glines* distinguishable, *see id.* at 486 n.4, apply equally to this case.

Miller

[9] Miller's action was also brought pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1361. In the proceedings below Miller did not seek damages or back pay (possibly because he has been retained in the Navy pursuant to this court's order), and his complaint did not request declaratory relief. Miller did, however, seek an injunction "restraining respondents from discharging petitioner from the United States Navy, or awarding him a less than Honorable Discharge." In light of what we have already said above and the possibility of awarding meaningful injunctive relief, which we discuss below, we conclude the district court had jurisdiction pursuant to section 1331 of Miller's action.

B. *Mootness*

[10] In all three appeals the Navy contends there is no case or controversy and that the suits should be dismissed as moot. Its argument is essentially this: (a) the enlistment terms of all three plaintiffs have expired; (b) neither Saal nor Beller has applied for reenlistment after being discharged; (c) even if they, like Miller, had applied for reenlistment, the district court cannot order the Navy to accept those reenlistment applications; (d) thus, even assuming the discharge proceedings were invalid for some reason, the district courts at this point are unable to provide a remedy and any adjudication regarding the Navy's rea-

tions). Captain Ward had a need for information disclosing a ground for discharging someone under his command.

Neither was there a violation of 5 U.S.C. § 552a(e)(3), which requires the agency to inform the individual asked to provide information of the principal purposes for which the information is intended to be used and the routine uses which may be made of the information. When Beller volunteered the information regarding his sexual practices he was being questioned in detail by the Naval Investigative Service, albeit originally in connection with a check for a top secret security clearance. Beller must have known that information which disclosed grounds for being discharged could be used in discharge proceedings.

sons for refusing to permit Saal and Beller to reenlist would be premature; and (e) thus, there is no controversy capable of being decided by the courts. We disagree with the Navy. Although the facts in each of the appeals before us differ, with regard to mootness we conclude they are sufficiently similar so that separate consideration is unnecessary.

For purposes of determining whether this appeal is moot, we note that the plaintiffs probably have a damages claim under the Tucker Act for less than $10,000 which they could maintain in the district court, *see VanderMolen v. Stetson*, 571 F.2d 617 (D.C. Cir.1977), even if those claims were ultimately determined to be without merit. In light of our holding below that the Navy did not act unconstitutionally in discharging these plaintiffs, no point would be served by permitting plaintiffs to amend their complaints. In passing on mootness, however, we consider the case as if such claims had been pled in the district court. When so considered, this appeal is not moot. *See Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8–9, 98 S.Ct. 1554, 1559–1560, 56 L.Ed.2d 30 (1978); *Bituminous Coal Operators' Ass'n v. U.M.W.*, 585 F.2d 586, 599 (3d Cir. 1978).

[11] Even if the district courts have no jurisdiction over any damages actions by these plaintiffs, we still conclude that their requests for nonmonetary relief are not moot. As a result of regulations and procedures challenged as constitutionally infirm, the plaintiffs claim they were injured in various ways: for example, they were subject to stigma as being unfit for military service, allegedly without a hearing on this question; they were given a reenlistment code which prevented them from continuing employment in the military; and the discharge and accompanying materials in their personnel records may injure their employment prospects. These injuries, if proven, are of a continuing nature; they did not expire with plaintiffs' term of enlistment. In a somewhat analogous context, this circuit has held that the possibility of being recalled to active duty, even when there is no evidence of imminent recall, is sufficient to prevent an action challenging the military's refusal to discharge the plaintiff as a conscientious objector from being moot. *Taylor v. Claytor*, 601 F.2d 1102 (9th Cir. 1979); *Bratcher v. McNamara*, 448 F.2d 222 (9th Cir. 1971). The possible continuing injuries noted above are, we think, sufficient to justify our conclusion that a live case or controversy exists in all three appeals.[7] *See also Brown v. Board of Bar Examiners*, 623 F.2d 605, 607–608 (9th Cir. 1980) (appellate review of order requiring that applicant be permitted to take bar examination cannot practically be obtained before the exam; therefore, case not moot). *Cf. Berg v. Claytor*, 591 F.2d 849 (D.C.Cir. 1978); *Matlovitch v. Secretary of the Air Force*, 591 F.2d 852 (D.C.Cir.1978) (jurisdiction asserted over claims similar to plaintiffs' here).

7. We have some doubt whether these appeals are all within the capable of repetition yet evading review doctrine, *see Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). The doctrine might be inapplicable if we were to view strictly the requirement that "there [be] a reasonable expectation that the same complaining party would be subjected to the same action again," 423 U.S. at 149, 96 S.Ct. at 348. We note that Miller has twice attempted to reenlist and Saal applied for an extension of her enlistment, but, strictly viewed, the action in question here pertains to discharge, not enlistment. On the other hand, as the Court recently said:

> Although later developments may have "reduce[d] the practical importance of this case" for the parties, it cannot be said that "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (Quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 364 (1968)).

St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 537–38, 98 S.Ct. 2923, 2927–2928, 57 L.Ed.2d 932 (1978). The Court's conclusion that "[w]e cannot assume that petitioners will not re-enter the market in some fashion," *id.* at 538, 98 S.Ct. at 2928, although reached in a different factual context, also applies in these appeals. *See also Brown v. Board of Bar Examiners*, 623 F.2d 605, 607–608 (9th Cir. 1980) (requirement of reasonable expectation that same complaining party be subject to same action in future not strictly applied).

We reject the Navy's argument that no declaratory or injunctive relief capable of being granted by the courts would be responsive to the constitutional violations alleged by the plaintiffs. We are aware of the principle that the military cannot be forced to accept a reenlistment application, *O'Callahan v. United States*, 196 Ct.Cl. 556, 451 F.2d 1390 (1971). Even if correct, however, this doctrine does not foreclose various other kinds of injunctive or declaratory relief discussed above and by the district courts in these cases.

C. *Exhaustion of Administrative Remedies*

[12] The Navy maintains that Saal's and Beller's complaints should have been dismissed because they failed to exhaust administrative remedies. Saal and Beller, say the Navy, should have applied for reenlistment and upon rejection sought review before the Board for Correction of Naval Records (BCNR). *See* 10 U.S.C. § 1552; 32 C.F.R. § 723. The principal authority relied upon by the Navy is *Champagne v. Schlesinger*, 506 F.2d 979 (7th Cir. 1974), where the court required an enlisted person discharged under Instruction 1900.9A for homosexuality to seek review before the BCNR before challenging the constitutionality of his discharge in a district court. The court interpreted the relevant regulations to allow the BCNR to consider the validity of plaintiff's discharge and to recommend to the Secretary of the Navy appropriate relief, including reinstatement and back pay.

Our focus in this case is on the constitutionality of the Navy's actions in discharging the plaintiffs, not the constitutionality of Navy regulations prohibiting acceptance of enlistment applications from homosexuals. The Navy's arguments regarding the prematurity of the plaintiffs' challenges to those practices are therefore inapposite. Even if the Navy's reenlistment practices were before us, the record makes it plain that any reenlistment application by Saal and Beller would be completely futile.

There is some tension between the holding in *Champagne* and this circuit's decisions in *Glines v. Wade*, *supra*, and *Downen v. Warner*, 481 F.2d 642 (9th Cir. 1973), which hold exhaustion of BCNR remedies unnecessary before challenging regulations principally on constitutional grounds. Our own precedents control. In any event, our interpretation of the applicable Navy policies differs from that in *Champagne*. We understand Navy policy to require discharge of members who have engaged in homosexual conduct, subject only to a power of discretionary retention vested in the Secretary which is unrelated to the BCNR's function. In light of our understanding, it would serve no purpose for the plaintiffs to pursue such administrative remedies. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522 (1975); *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) (suggesting that administrative agency may not pass upon constitutional challenges to statutes).

III

[13] The due process questions presented by the actions of the Navy are both sensitive and complex. We must consider interrelated issues of procedural due process, substantive due process, and to a lesser extent what one commentator has labeled "structural due process," *see* Tribe, *Structural Due Process*, 10 Harv.C.R.-C.L.L.Rev. 269 (1975), and equal protection.[8]

A. *The Navy's Policy Regarding Discharge of Homosexuals*

[14, 15] To evaluate the constitutionality of the Navy's conduct, it is necessary to determine what the Navy's policy regarding discharge of homosexuals really is. The

8. The due process clause of the fifth amendment includes equal protection components, and fifth amendment equal protection claims are treated the same as fourteenth amendment equal protection claims. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 1228, 43 L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3, 95 S.Ct. 572, 573, 42 L.Ed.2d 610 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954).

policy of the Secretary which was applied to the plaintiffs begins: "Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization.... Their prompt separation is essential." Inst. 1900.9A. We conclude that this instruction and the applicable regulations make discharge of known homosexuals mandatory, subject only to a kind of executive discretion vested in the Secretary which is unrelated to the fitness of any particular individual.[9]

Since 1974, in *Champagne v. Schlesinger, supra*, the Navy in litigation has maintained that its regulations do not require discharge of all homosexuals. It claims that the regulations, which are quoted at length below, require that homosexuals only be *processed* for discharge; the discharge board can recommend retention, and the Secretary has discretion to retain a known homosexual where he considers it appropriate.

In *Berg v. Claytor, supra*, the Court of Appeals for the District of Columbia Circuit

9. Since these lawsuits were initiated, the Navy has issued a new set of instructions and regulations governing the discharge of homosexuals. These regulations provide for limited retention of homosexuals. They state in part:

> A homosexual act is bodily contact with a person of the same sex with the intent of obtaining or giving sexual gratification.
>
> . . . . .
>
> Any member who solicits, attempts, or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale.
>
> . . . . .
>
> A member who has solicited, attempted, or engaged in a homosexual act on a single occasion and who does not profess or demonstrate proclivity to repeat such an act may be considered for retention in the light of all relevant circumstances. Retention is to be permitted only if the aforesaid conduct is not likely to present any adverse impact either upon the member's continued performance of military duties or upon the readiness, efficiency, or morale of the unit to which the member is assigned either at the time of the conduct or at the time of processing according to the alternatives set forth herein.

SECNAV Instruction 1900.9C. The Navy has taken the position in writing that these regulations do not apply retroactively to the plaintiffs in this case.

The issuance of SECNAVINST 1900.9C raises the general principle of appellate procedure by which a reviewing court will apply to a case a new rule that has intervened between its pending decision and the original controversy. *Fusari v. Steinberg*, 419 U.S. 379, 387–89, 95 S.Ct. 533, 538–539, 42 L.Ed.2d 521 (1975); *Bradley v. School Board*, 416 U.S. 696, 710–21, 94 S.Ct. 2006, 2015–2021, 40 L.Ed.2d 476 (1974); *Richardson v. Wright*, 405 U.S. 208, 92 S.Ct. 788, 31 L.Ed.2d 151 (1972); *Thorpe v. Housing Authority*, 393 U.S. 268, 281–83, 89 S.Ct. 518, 525–526, 21 L.Ed.2d 474 (1969). This rule may be meaningfully applied, however, only to situations in which the new rule might yield a different result; the case of none of the individuals here presents this possibility. Both Beller and Saal have admitted to homosexual acts with various persons. Brief for Appellee (Saal) at 3; Appellant's (Beller's) Opening Brief at 3. The threshold criteria for discretionary retention under the new regulation are "a homosexual act" "on a single occasion"; the two criteria are conjunctive. The case of Miller is closer but no less clear. He has at various times denied being homosexual and expressed regret or repugnance at his acts. Nevertheless, no part of the record in his case, either alone or in combination with any other part, suggests the possibility of our remanding his case for consideration under SECNAVINST 1900.9C. Miller does not himself appear to have suggested that he met the criteria of 1900.9C. If we were to ignore all but the record evidence most favorable to Miller, application of 1900.9C to Miller would still be prevented by his admission at his hearing to at least two homosexual acts on two separate occasions:

> I had had an experience once before . . . then these two boys came along and we just had the experiences.

Record at 38. *See* Appellant's (Miller's) Opening Brief at 3.

The clarity of the record on this point obviates the need for us to consider how *Thorpe* and similar cases might apply to Miller, which would involve, for example, the question of determining whether SECNAVINST 1900.9C might be applied retroactively to anyone. *See Bradley, supra*, (discussing factors governing retroactivity). *Compare* letter from H. Leathers, Dept. of Justice, to R. Fox, attorney for D. Beller (May 18, 1978) *and* letter from R. Adm. C. McDowell, Dep. Judge Advocate General, to H. Leathers, Dept. of Justice (Apr. 28, 1978), *reprinted in* App. A. to Appellant's (Beller's) Response to the Appellees' Suggestion that the Appeal Should be Dismissed as Moot (1900.9C not retroactive) *with* Declaration of R. J. Woolsey, Acting Sec. of the Navy, (Sept. 14, 1979) in *Berg v. Claytor*, Civ. No. 76–944 (D.D.C.) (finding 1900.9C inapplicable to *Berg* for failure to satisfy criteria, not discussing whether inapplicable for additional reason of nonretroactivity).

accepted the Navy's explanation of its policy but remanded the case to the Secretary for a fuller explanation of why the Secretary decided not to retain the plaintiff. *Cf. Gayer v. Schlesinger*, 490 F.2d 740 (D.C.Cir. 1973) (interpreting security clearance regulations). With all respect, we cannot agree with that court's view of the applicable regulations.

The Secretary's policy regarding homosexuals states:

> Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In developing and documenting cases involving homosexual conduct, commanding officers should be keenly aware that members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct. Their prompt separation is essential.

SECNAVINST 1900.9A. The Navy's Personnel Manual prescribes several grounds on which enlisted persons "may be separated by reason of misconduct." BUPERSMAN § 3420185. Homosexual acts, various sexual offenses, and sale or trafficking in drugs are the only categories where the regulations provide, "Processing for discharge is mandatory." The regulations governing other grounds for discharge by reason of misconduct permit various ways for a member to rehabilitate himself or to demonstrate that because of other reasons he should be retained.[10] The regulations also provide that members may be discharged by reason of unfitness on similar grounds, and the plaintiffs here were discharged under the unfitness regulations. Homosexual acts (and conduct labelled "sexual perversion") are singled out with the directive, "Processing for discharge is mandatory," while some form of individual consideration or rehabilitation is provided for in connection with other grounds.[11] The

10. For example, discharge by reason of misconduct is permitted for

> Frequent involvement of a discreditable nature with civil and/or military authorities; an established pattern for shirking; an established pattern showing dishonorable failure to pay just debts, and/or dishonorable failure to contribute support to dependents, *provided the member has been given a reasonable opportunity to overcome his/her deficiencies subsequent to official notification . . . [T]he member shall be notified of his/her deficiencies and shall be counseled in regard thereto.* (emphasis added)

BUPERSMAN 3420185(1)(a). Similarly, with regard to discharge by reason of drug abuse not involving sale or trafficking, "[c]onsideration for either discharge or retention will be predicated upon an evaluation of the member in the context of the whole man concept, *i. e.*, the member's admitted or proven drug abuse will be considered as only one factor in determining ultimate disposition." *Id.* at (1)(c).

11. *See* BUPERSMAN 3420220. That section provides in part:

> Members may be recommended for discharge by reason of unfitness for:
> a. Frequent involvement of a discreditable nature with civil or military authorities.
> b. An established pattern for shirking.
> c. An established pattern showing dishonorable failure to pay just debts.
> d. An established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents.
> e. Homosexual acts. Processing for discharge is mandatory. (See SECNAVINST 1900.9 series for controlling policy and additional action required in cases involving homosexuality.)
> f. Sexual perversion, other than above, including but not limited to lewd and lascivious acts, sodomy, indecent exposure, indecent acts with or assault upon a child, or other indecent acts or offenses. Processing for discharge is mandatory.
> g. Drug abuse, the illegal, wrongful or improper use, possession, sale, transfer, or introduction on a military installation of any narcotic substance, marijuana, or dangerous drug, when supported by evidence not attributed to a urinalysis administered for identification of drug users and not attributable to the member's volunteering for treatment under the exemption program. Discharge of a member for drug abuse shall not be effected until the member has completed a 30-day period of counselling commencing when the member reports his drug abuse or when the member is formally warned by civil or military authorities that he is suspected of drug abuse. Except for drug exemption cases, drug abuse cases normally shall be investigated by the Naval Investigative Service as required in SECNAVINST 6710.1 series. Consideration for either discharge or retention will be predicated upon an evaluation of the member in the context of the whole man

category for homosexual acts explicitly refers to INST. 1900.9 as an expression of the controlling policy.

The district courts in *Saal* and *Martinez v. Brown*, 449 F.Supp. 207 (N.D.Cal.1978), concluded the regulations required discharge of a person found to be homosexual. Both courts noted that the Navy was given the opportunity to demonstrate that it retains some known homosexuals and to articulate the factors which influence the Secretary's decision in such cases. The Secretary in these cases was either unable or unwilling to do so.[12] Other indications in the records of the cases before us support the conclusion that "as applied, the regulations require the mandatory discharge of those found to be homosexuals or to have engaged in homosexual conduct." *Martinez, supra*, 449 F.Supp. at 212.[13]

We can agree with the Navy that one kind of discretion is permitted by the regulations. The Secretary urges that he has broad discretion to retain a homosexual if the individual is of extraordinary value to the Navy. One explanation proffered by the Secretary in *Beller* suggests that the fitness of the individual to serve and the likelihood that retaining the individual will impair the efficiency of the service are considered by the Secretary. In his brief, the Secretary states:

> [T]he decision of whether or not to discharge or retain a serviceman involves a high degree of military discretion and judgment. The decision is based on a balance that only the military can strike, and the individuality of each decision makes guidelines impossible. What must be weighed is the need of the service for the specific attributes and talents that the particular serviceman possesses and the effect on the military of the loss of the services of that individual, against the actual or probable detriment that retention of the individual would have upon

concept, i. e., the member's admitted or proven drug abuse will be considered as only one factor in determining ultimate disposition.
h. Unsanitary habits.
4b. Processing for discharge by reason of frequent involvement of a discreditable nature with civil or military authorities, an established pattern for shirking, an established pattern showing dishonorable failure to pay just debts, and/or dishonorable failure to contribute support to dependents, shall not be initiated until the member has been given a reasonable opportunity to overcome his deficiencies. When it is determined that a member may come within the purview of these specific categories, the member shall be notified of his deficiencies and shall be counseled in regard thereto. If no improvement is forthcoming within a reasonable time, the member shall be processed in accordance with the provisions of this article.

12. *See Martinez v. Brown*, 449 F.Supp. 207, 211 (N.D.Cal.1978); *Saal v. Middendorf*, 427 F.Supp. 192, 197 (N.D.Cal.1977).

13. As the court in *Saal* noted, 427 F.Supp. at 197 n.3, comments of the discharge board during Saal's hearing suggest the board considered the crucial issue to be whether Saal had engaged in homosexual acts and that fitness evidence was not relevant. The discharge board also seemingly was instructed by the Navy counsel that it had no discretion to retain Saal if it found she had engaged in homosexual acts. In response to an interrogatory from Miller, the Navy had an opportunity in the district court to demonstrate that in the past it exercised discretion to retain enlisted persons found to be homosexuals. The Navy instead claimed that Miller's question was ambiguous, and summary judgment was entered before the Navy responded to Miller's more precisely worded question:

> Interrogatory No. 30: If, as the Navy and the Secretary of Defense represented to the United States Court of Appeals for the Seventh Circuit in *Champagne*, supra, the discharge or separation from the Navy is not mandatory, how many exceptions have been made over the past five years? In other words, how many members of the Navy, identified as "homosexuals" have been retained in the Navy?
> Answer No. 30: The use of the term "identified" makes this question impossible to answer. The term is imprecise. More information is needed.

Captain C. R. Ward, the commanding officer who convened the discharge board in *Beller*, responded in the following way to plaintiff's interrogatories:

> *Interrogatory No. 25*: The basis for the purported discharge of the plaintiff is for "unfitness." In what way is the plaintiff "unfit"?
> *Answer No. 25*: He is an admitted homosexual.
> *Interrogatory No. 26*: Are all "homosexuals" "unfit" for duty in the Navy?
> *Answer No. 26*: Yes.

the military in general, and the effectiveness of the individual in particular.

As developed further in this and other cases, however, *see, e. g., Berg, supra*, 436 F.Supp. at 81, 591 F.2d at 850–51; *Matlovich, supra*, 591 F.2d at 856–61, an individual with an otherwise fine service record will not be retained unless the Secretary concludes his record marks him as being highly unusual or especially valuable to the Navy. This kind of consideration does not contemplate evaluating the fitness of an individual to continue military service.

For our purposes, therefore, the applicable Navy practices may be summarized as follows: the Secretary will discharge a person found by a discharge board to have engaged in homosexual acts covered by the regulations. The Secretary has discretion to retain a person in rare instances, but these instances are unrelated to the fitness to serve of the particular individual or the reasons why the Navy in general discharges homosexuals.[14]

B. *Procedural Due Process*

In determining whether the procedures followed by the Navy in processing the plaintiffs for discharge violated the requirements of procedural due process, the threshold inquiry is whether the plaintiffs were deprived of an interest in property or liberty. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

1. *Property Interest*

[16] The discharge proceedings and ultimate separations did not deprive plaintiffs of a property interest without due process. The district court in *Berg* stated the reason succinctly:

> [U]nder Navy policy there can be no doubt that committing homosexual acts while in the Navy is cause for termination. Plaintiff has admitted to having performed homosexual acts while in the Service. Having admitted there was cause for dismissal, plaintiff's expectation of continued employment has been extinguished. Thus he had no property interest . . . .

436 F.Supp. at 81. The Navy regulations and practices create no reasonable expectation of continued employment once a person is determined to fall within the categories described in the applicable regulations. *See, e. g., Austin v. United States*, 206 Ct.Cl. 719, 723, *cert. denied*, 423 U.S. 911, 96 S.Ct. 215, 46 L.Ed.2d 274 (1975); *Neal v. Secretary of the Navy, supra*, 472 F.Supp. at 781–85; *Knehans v. Alexander*, 566 F.2d 312, 314 (D.C.Cir.1977), *cert. denied*, 435 U.S. 995, 98 S.Ct. 1646, 56 L.Ed.2d 83 (1978). *Cf. Tennessee v. Dunlap*, 426 U.S. 312, 96 S.Ct. 2099, 48 L.Ed.2d 660 (1976). Therefore, unless the Navy as a substantive matter may not discharge all homosexuals, or unless it must consider factors in addition to homosexuality in its decision, questions we discuss below, we see no basis for inferring any expectation of continued service sufficient to constitute a constitutional property interest. *See generally Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). *See also benShalom v. Secretary of the Army, supra*, at 971. *Cf. Wehner v. Levi*, 562 F.2d 1276 (D.C.Cir. 1977).[15]

2. *Liberty Interest*

More difficult is the question whether the Navy's conduct deprived the plaintiffs of a

14. We note some slight confusion among the discharge boards regarding their discretion to recommend that an admitted homosexual be retained. The board in Miller's case recommended retention 2–1, and the discharge board in *Berg* was instructed that it had discretion to recommend retention, 591 F.2d at 851. The board in Saal's case was apparently told it had no discretion to recommend retention based on fitness, and the convening authority in Beller's case thought all homosexuals unfit. These discrepancies are of no constitutional significance. Any errors made in instructing the boards would operate to the benefit of the plaintiffs. The boards did permit introduction of evidence relevant to whether the individual should be retained. Finally, the ultimate decision to retain rests with the Secretary. *See Berg, supra*, 436 F.Supp. at 81.

15. We think our conclusion is consistent with the analysis of the district court in *Saal*, 427 F.Supp. at 199 n.6.

protected liberty interest. The principles governing our analysis are contained in several leading cases, and we will not repeat them again. *See, e. g., Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976); *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Roth, supra*; *Perry, supra*. *See also Graves v. Duganne*, 581 F.2d 222 (9th Cir. 1978); *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361 (9th Cir. 1976).

If the Navy's charges of homosexuality were false, made public, and followed by discharge, we can assume a deprivation of liberty would occur. In such a case the Navy's action "might seriously damage [the person's] standing and associations in his community" and would impose "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Roth, supra*, 408 U.S. at 573, 92 S.Ct. at 2707.

[17] In the cases before us, however, the plaintiffs either admitted or were found in a predischarge hearing to have engaged in the acts which allegedly imposed a stigma on them. The plaintiffs were allowed to introduce evidence to support their arguments that the Secretary should exercise his discretion to retain them. Under the applicable regulations, there was nothing more about which to have a hearing. Still putting aside the substantive questions whether the Navy may discharge all homosexuals or whether it must consider additional circumstances particular to the individual case, the reasoning of *Codd v. Velger* compels a conclusion that the plaintiffs' liberty interests were protected by the hearings they received. *See also Graves v. Duganne, supra*, 581 F.2d at 224.

[18] Plaintiffs contend also they received the stigma of "unfitness" for retention, and that they never received a hearing on the issue. In the context of these cases, we reject this argument. The mere fact of discharge from a government position does not deprive a person of a liberty interest. *See, e. g., Roth, supra*, 408 U.S. at 574 n.13, 92 S.Ct. at 2707; *Ventetuolo v. Burke*, 596 F.2d 476, 483 (1st Cir. 1979); *Knehans v. Alexander, supra*, 566 F.2d at 314; *Mazaleski v. Treusdell*, 562 F.2d 701, 712–14 (D.C. Cir.1977); *Stretten, supra*, 537 F.2d at 366; *Lieberman v. Gant*, 474 F.Supp. 848, 858 (D.Conn.1979). The real stigma imposed by the Navy's action, moreover, is the charge of homosexuality, not the fact of discharge or some implied statement that the individual is not sufficiently needed to be retained. *Cf.* Tribe, *supra*, 10 Harv.C.R.–C.L.L.Rev. at 282–83 n.42. This is especially true since the regulations do not make fitness of the particular individual a factor in the decision to discharge.

[19, 20] The plaintiffs' admission of homosexual acts, and the fact that hearings on the subject were allowed, serve to dispose of the procedural due process claims. We note in addition that the deprivation of liberty claims based on the fact that the reasons for discharge will become public seems to us without merit in any event. Albeit in apparent response to the initiation of litigation, plaintiffs were given an honorable discharge. The Navy contends that nowhere on the separation papers given to the plaintiffs is there any indication of the reasons for the honorable discharge. Assuming arguendo that a discharge under less than honorable conditions imposes a stigma, *see* Lunding, *Judicial Review of Military Administrative Discharges*, 83 Yale L.J. 33, 33–41 (1973), the fact of an honorable discharge on its face seems to impose no stigma on the recipient. Plaintiffs contend the permanent records on file with the Navy contain the reenlistment code RE–4 and the reasons for their discharge. This information, contend plaintiffs, forecloses them from obtaining jobs with any other government agencies. The district court in *Berg* found, "There is no code or symbol connected with any papers or explanations available to prospective employees [*sic*] or the public that identify the reasons underlying the honorable discharge." 436 F.Supp. at 80 n.2. The court in *Saal* disagreed, reasoning that the reasons for Saal's dis-

charge and her reenlistment code were "necessarily reflected in her service record," and that the Navy had "compelled disclosure of her otherwise private sexual activity." 427 F.Supp. at 198. We have been directed to no evidence indicating that the plaintiffs' service records are likely to impose stigma upon them or make it more difficult for them to seek post–discharge employment. According to the Navy, the documents likely to be examined by future employers would contain no reason for the honorable discharge. On this record, we cannot conclude that the Navy's action has deprived the plaintiffs of a liberty interest.[16] *See Bishop v. Wood, supra. See also Knehans, supra*, 566 F.2d at 314; *Lyons v. Sullivan*, 602 F.2d 7, 11 n.6 (1st Cir.), *cert. denied*, 444 U.S. 876, 100 S.Ct. 159, 62 L.Ed.2d 104 (1979); *benShalom, supra*, at 972; *Ventetuolo v. Burke*, 470 F.Supp. 887, 895–96 (D.R.I.1978), *aff'd*, 596 F.2d 476 (1st Cir. 1979).

C. *Substantive Due Process*

[21] Plaintiffs' ultimate contention is that the Navy's regulations violate substantive guarantees inherent in the due process clause. We decide at the outset that this case does not require us to address the question whether consensual private homosexual conduct is a fundamental right, as that term is used in equal protection[17] and some due process cases.[18] If we were to answer in the affirmative, it would follow that the conduct in question is subject to prohibition only to further compelling state interests and that the category used or burden imposed by the regulation must be a necessary, or the least restrictive, way to promote those interests. To formulate the issue in those terms would reflect, we think, a misunderstanding of proper substantive due process analysis.

These appeals were not presented to us as implicating a suspect or quasi–suspect classification. The attacks, rather, were based on the claim that the conduct prohibited by the regulation was protected as an aspect of the fundamental right of privacy. Substantive due process, not equal protection, was the basis of the constitutional claim, and we address the case in those terms.

[22] The rather formal three–tier analysis of the Court's recent equal protection decisions differs somewhat from its less categorical approach when questions of substantive due process are involved. Recent decisions indicate that substantive due process scrutiny of a government regulation involves a case–by–case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals. *See Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *id.* at 396, 98 S.Ct. at 686 (Stewart, J., concurring in the judgment) (citing *Williams v. Illinois*, 399 U.S. 235, 260, 90 S.Ct. 2018, 2031, 26 L.Ed.2d 586 (1970) (Harlan, J., concurring in the result)); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977) (plurality opinion).[19]

[23–27] Although the Court's approaches to equal protection and due process cases differ, there are important analytic and rhetorical similarities in the doc-

16. That the facts are disclosed publicly in the course of this litigation does not affect our conclusion. A discharge under less than honorable conditions before expiration of a person's current term of enlistment, such as that originally awarded by the Navy to these plaintiffs, might present different considerations. We acknowledge some uncertainty regarding the public disclosure of the allegedly stigmatizing information. Were this issue crucial to our disposition, we might remand for a factual determination by the district court.

17. *See, e. g., Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

18. *See, e. g., Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973).

19. The kind of all–or–nothing substantive due process approach exemplified by the district court in *Berg, supra*, which asks simply whether homosexual conduct is protected as a fundamental right, does not, we think, reflect the complexity of the Court's analysis.

trines. When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. At the other extreme, where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis. *See, e. g., Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 497, 85 S.Ct. 1678, 1688, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring); *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). *See generally Developments in the Law–The Constitution and the Family*, 93 Harv.L.Rev. 1156, 1166–82, 1193–97 (1980).[20]

20. The district courts, the Government, and the plaintiffs advance other due process and equal protection theories which require brief discussion. The due process clause does not require the Government to show with particularity that the reasons for the general policy of discharging homosexuals from the Navy exist in a particular case before discharge is permitted. In requiring the Government to act rationally as an employer, some courts have required the Government to demonstrate in discharge proceedings not only that the plaintiff falls within the general category which the applicable regulations list as grounds for discharge, but also that the particular plaintiff is unfit or unsuitable for continued employment. *See, e. g.*, cases cited in Tribe, *supra*, § 15-13, at 941–42 n.3; *Norton v. Macy*, 417 F.2d 1161 (D.C.Cir.1969); *benShalom, supra*, at 976; *Society for Individual Rights v. Hampton*, 63 F.R.D. 399 (N.D.Cal. 1973), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975); *Martinez, supra*; *Saal, supra*; *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 156 Cal.Rptr. 14, 595 P.2d 592 (1979). *See generally* Tribe, *Structural Due Process, supra*; Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L.Rev. 445 (1977). Such individual hearings might be appropriate on an equal protection theory when the grounds for discharge employ a classification subject to a heightened standard of scrutiny such as gender, *see, e. g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976), or when the regulations condition discharge on the exercise of protected activities, *see, e. g., United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973). *Cf. benShalom, supra* (Army regulations requiring discharge of persons expressing homosexual tendencies, as well as engaging in homosexual conduct, violate first amendment and due process clause; sexual personality and preference, as opposed to conduct, are protected by constitution right of privacy). *See generally* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv.L.Rev. 1534 (1974). *Compare, e. g., Upshaw v. McNamara*, 435 F.2d 1188 (1st Cir. 1970) (upholding under rational basis test state regulation permitting exclusion of all felons pardoned on grounds other than innocence from city police department) *with, e. g., Smith v. Fussenich*, 440 F.Supp. 1077 (D.Conn.1977) (apparently faulty application of rational relation scrutiny). Under the analysis described in our opinion, individual treatment in some circumstances might be required by substantive due process, depending on the outcome of the balancing test. This case, however, involves neither middle tier equal protection analysis nor a situation where the only alternative means available to satisfy the Government's goals consistent with due process is an individual showing of unfitness. *Cf. Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (rational relation test applied in equal protection challenge to mandatory retirement age for police force). While the substantive due process test we describe in the text does proceed on a case-by-case basis, it does not necessarily require the Government in each case involving changing norms to show that the reasons for the regulation apply in the particular case. Cf. *Murgia, supra*, 427 U.S. at 317-27, 96 S.Ct. at 2568-2573 (Marshall, J., dissenting) (equal protection analysis); *Crawford v. Cushman, supra*, 531 F.2d at 1125 (same); Tribe, *Structural Due Process, supra*.

As a purported application of so-called rational relation scrutiny, some of the above courts have, we think, misunderstood the meaning of rationality in the Court's due process cases. Nearly any statute which classifies people may be irrational as applied in particular cases. *See Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). Discharge of the particular plaintiffs before us would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead be-

The case before us lies somewhere between these two standards. We recognize, as we must, that there is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right of privacy. *See, e. g.*, L. Tribe, American Constitutional Law § 15–13 (1978 & Supp.1979) and authorities cited therein. *See also Symposium: Sexual Preference and Gender Identity*, 30 Hastings L.J. 799 (1979); Gerety, *Redefining Privacy*, 12 Harv.C.R.–C.L.L.Rev. 233, 280–81 (1977); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 Fordham L.Rev. 1281 (1977); Wilkinson & White, *Constitutional Protection for Personal Lifestyle*, 62 Cornell L.Rev. 563 (1977); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 Mich.L.Rev. 1613 (1974). *See generally* Comment, *Out of the Closet, Out of a Job: Due Process in Teacher Disqualification*, 6 Hastings Const.L.Q. 663 (1979); Von. Beigel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee*, 6 Human Rights 23 (1977); Siniscalco, *Homosexual Discrimination in Employment*, 16 Santa Clara L.Rev. 495 (1976); Comment, *A Homosexual's Legal Dilemma*, 27 Ark.L. Rev. 687 (1973).

There is substantial authority to the contrary, however. The Supreme Court has issued a summary affirmance of a lower court decision denying a challenge to a state criminal statute prohibiting sodomy as applied to private consensual homosexual conduct. *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *aff'g* 403 F.Supp. 1199 (E.D.Va. 1975) (three judge court). Some commentators, in an effort to limit the holding, have attempted alternate explanations, *see, e. g.*, L. Tribe, *supra* § 15–13 at 943.[21] *See also* benShalom, *supra*, at 975–976; *New York v. Onofre, summarized in* App.Div., 424 N.Y. S.2d 566 (1980) (N.Y.Sup.Ct.). Most federal courts, on the other hand, have understood

cause the general policy of discharging all homosexuals is rational. *See Berg, supra*, 436 F.Supp. at 80.

In *Massachusetts Board of Retirement v. Murgia, supra*, the Court held that strict scrutiny should not be applied to the classification of age, even though "the treatment of the aged in this nation has not been wholly free of discrimination." 427 U.S. at 313, 96 S.Ct. at 2566. The Court then concluded that the state's mandatory retirement policy rationally furthered legitimate goals. *Id.* at 315–16, 96 S.Ct. at 2567–2568. The case involved an equal protection challenge to the Government's action, and we find its result consistent with the court's later development of due process doctrine. Our conclusion is also consistent with *Singer v. United States Civil Service Commission*, 530 F.2d 247 (9th Cir. 1976), *vacated in light of new position of the Government*, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 744 (1977), which held that the Civil Service may not summarily discharge a person without some showing that his or her homosexual conduct is in some way likely to impair the efficiency of the Civil Service. The case did not, however, hold that the Government must always conduct an individualized hearing on fitness before a homosexual may be discharged from any government employment.

In addition to pursuing an analysis which we held above to be erroneous, the district court in *Saal* also appeared to declare due process violated because some other groups subject to discharge were not required to be discharged. *See* 427 F.Supp. at 201–02. Some personnel are given a second chance to "overcome his/her deficiencies subsequent to official notification," BUPERSMAN 3420185a. Those found to have engaged in drug abuse are to be evaluated "in the context of the whole man concept," and the fact of drug abuse "will be considered as only one factor in determining ultimate disposition." *Id.* at c. Giving someone a second chance to overcome his or her deficiencies is not at all the same as requiring fitness of the individual to be considered. In any event, the fact that the Navy's choice of categorization is overinclusive and underinclusive does not mean that the regulations violate due process, as we discuss in the text. The Navy could rationally conclude that homosexuality presented problems sufficiently serious to justify a policy of mandatory discharge while other grounds for discharge did not.

21. Professor Tribe argues that the holding of *Doe* might be only that no prosecution was threatened and therefore any adjudication of the merits was premature, *see Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). One appellate court in New York has apparently adopted this interpretation of *Doe*, *see New York v. Onofre, supra*.

the holding to be that homosexual conduct does not enjoy special constitutional protection under the due process clause. *See, e. g., DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (homosexuals cannot claim protection under 42 U.S.C. § 1985(3); homosexuals not members of suspect or quasi–suspect class); *id.* at 334 (Sneed, J., concurring and dissenting) (after *Doe*, consensual homosexual behavior not characterized as fundamental right); *J. B. K., Inc. v. Caron*, 600 F.2d 710 (8th Cir. 1979), *cert. denied* 444 U.S. 1016, 100 S.Ct. 667, 62 L.Ed.2d 645 (1980) (anti–prostitution statute violates no fundamental rights); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976) (dicta) (university may regulate homosexual conduct of students, or homosexual conduct which substantially disrupts operation and discipline of school); *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.) (en banc), *cert. denied*, 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 585 (1976) ("[*Doe*] necessarily confined the constitutionally protected right of privacy to heterosexual conduct . . ."); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir.), *cert. denied*, 430 U.S. 982, 97 S.Ct. 1678, 52 L.Ed.2d 377 (1976) (dicta) (first amendment does not require newspaper to run advertisement arguably soliciting illegal homosexual conduct); *In re Nemetz*, 485 F.Supp. 470 (E.D.Va.1980) (consensual private homosexual relations may be basis for denying petition for naturalization because of lack of good moral character; Virginia's sodomy statute upheld in *Doe*); *Wilson v. Swing*, 463 F.Supp. 555 (M.D.N.C.1978) (adulterous conduct not protected by either first amendment or due process clause). *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65–68, 93 S.Ct. 2628, 2639–2641, 37 L.Ed.2d 446 (1973). *Cf. Zablocki v. Redhail, supra*, 434 U.S. at 396–403, 98 S.Ct. at 686–690 (Powell, J., concurring in the judgment). *But see New York v. Onofre, supra* (sodomy statute unconstitutional as applied to consenting homosexuals). *Cf. Carey v. Population Services International*, 431 U.S. 678, 688 n.5, 97 S.Ct. 2010, 2017, 52 L.Ed.2d 675 (1977) (plurality opinion) (whether and when constitution prohibits state regulation of private consensual sexual behavior among adults unsettled); *benShalom, supra* (homosexual tendencies or personality protected).

In light of the above authorities, we can concede arguendo that the reasons which led the Court to protect certain private decisions intimately linked with one's personality, *see, e. g., Roe, supra*, and family living arrangements beyond the core nuclear family, *see, e. g., Zablocki, supra*, suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge. *See, e. g., Doe v. Commonwealth's Attorney, supra*, 403 F.Supp. at 1203–05 (Merhige, J., dissenting). Such cases might require resolution of the question whether there is a right to engage in this conduct in at least some circumstances. The instant cases, however, are not ones in which the state seeks to use its criminal processes to coerce persons to comply with a moral precept even if they are consenting adults acting in private without injury to each other. Instead, these appeals require an assessment of a military regulation which prohibits its personnel from engaging in homosexual conduct while they are in the service. We conclude, in these cases, that the importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct.

[28] The nature of the employer–the Navy–is crucial to our decision. While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces. As the Court said in *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974), the military is "by necessity, a specialized society separate from civilian society." Military services "must insist upon a

respect for duty and a discipline without counterpart in civilian life." *Schlesinger v. Councilman*, 420 U.S. 738, 757, 95 S.Ct. 1300, 1312, 43 L.Ed.2d 591 (1975); *Department of the Air Force v. Rose*, 425 U.S. 352, 367–68, 96 S.Ct. 1592, 1602, 48 L.Ed.2d 11 (1976). Regulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities. *See, e. g., Brown v. Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980). *See also Sherwood v. Brown*, 619 F.2d 47 (9th Cir. 1980). Thus, for example, a quasi–military entity such as a police department may constitutionally limit the hair length of its officers. *Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976).

There are multiple grounds for the Navy to deem this regulation appropriate for the full and efficient accomplishment of its mission. The Navy can act to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own. The Navy, moreover, could conclude rationally that toleration of homosexual conduct, as expressed in a less broad prohibition, might be understood as tacit approval.

An affidavit from the Assistant Chief of Naval Personnel, quoted in the accompanying footnote, outlines the Navy's reasons for its policy.[22] The Navy "perceive[s] that homosexuality adversely impacts on the effective and efficient performance of the mission of the United States Navy in several particulars." The Navy is concerned about tensions between known homosexuals and other members who "despise/detest homosexuality"; undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands; and possible adverse impact on recruiting. These concerns are especially serious, says the Navy, where enlisted personnel must on occasion be in confined situations for long periods.

We agree with the district courts in *Saal* and *Berg* that "the concerns have a basis in fact and are not conjectural." *Berg, supra*, 436 F.Supp. at 80. Despite the evidence that attitudes towards homosexual conduct have changed among some groups in society, the Navy could conclude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homo-

22. The affidavit states in part:

> It is considered that administrative processing is mandatory. This is because it is perceived that homosexuality adversely impacts on the effective and efficient performance of the mission of the United States Navy in several particulars.
>
> (a) Tensions and hostilities would certainly exist between known homosexuals and the great majority of naval personnel who despise/detest homosexuality, especially in the unique close living conditions aboard ships.
>
> (b) An individual's performance of duties could be unduly influenced by emotional relationships with other homosexuals.
>
> (c) Traditional chain of command problems could be created, i. e., a proper command relationship could be subverted by an emotional relationship; an officer or senior enlisted person who exhibits homosexual tendencies will be unable to maintain the necessary respect and trust from the great majority of naval personnel who despise/detest homosexuality, and this would most certainly degrade the individual's ability to successfully perform his duties of supervision and command.
>
> (d) There would be an adverse impact on recruiting should parents become concerned with their children associating with individuals who are incapable of maintaining high moral standards.
>
> (e) A homosexual might force his desires upon others or attempt to do so. This would certainly be disruptive.
>
> (f) Homosexuals may be less productive/effective than their heterosexual counterparts because of:
>
> (1) Fear of criminal prosecution;
>
> (2) Fear of social stigmatization;
>
> (3) Fear of loss of spouse and/or family through divorce proceedings as a result of disclosure;
>
> (4) Undue influence by a homosexual partner.

sexual to command the respect necessary to perform supervisory duties. During the discharge hearings of the plaintiffs, various members who testified on their behalf indicated that while the plaintiffs' homosexuality did not impair the efficiency of the Navy, a member's homosexual conduct might in other circumstances cause difficulties, especially aboard a ship. Similarly, the other concerns expressed by the Navy might not apply in any particular case, but do have some basis in fact. These considerations are adequate to sustain the regulation in its military context.

[29] The Navy's blanket rule requiring discharge of all who have engaged in homosexual conduct is perhaps broader than necessary to accomplish some of its goals, as the somewhat narrower regulation now in effect suggests. In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts, however, we conclude that at the present time the regulation represents a reasonable effort to accommodate the needs of the Government with the interests of the individual.

Upholding the challenged regulations as constitutional is distinct from a statement that they are wise. The latter judgment is neither implicit in our decision nor within our province to make. We note that the Navy's current regulations permit at least some flexibility in dealing with discharge of homosexuals, while the regulations before us do not. We are mindful that the rule discharging these plaintiffs is a harsh one in their individual cases, but we cannot under the guise of due process give our opinion on the fairness of every application of the military regulation. It should be plain from our opinion that the constitutionality of the regulations stems from the needs of the military, the Navy in particular, and from the unique accommodation between military demands and what might be constitutionally protected activity in some other contexts.

We reject the other arguments of the plaintiffs in these cases as without merit. The judgments in *Beller* and *Miller* are affirmed. The judgment of the court in *Saal* is reversed.

UNITED STATES of America, Plaintiff-Appellee,

v.

Paul Joseph HARMON, Defendant-Appellant.

No. 78-3523.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 7, 1980.

Decided Nov. 12, 1980.

Defendant was convicted before the United States District Court for the Central District of California, Manuel L. Real, J., of drug offenses, and he appealed. The Court of Appeals held that: (1) double jeopardy clause does not bar retrial when reversal is based on improper admission of evidence; (2) although convictions were required to be reversed because of improper receipt of evidence obtained pursuant to invalid wiretap order, the court was not required to examine the sufficiency of the properly-admitted evidence and bar a retrial on double jeopardy grounds if the admissible evidence was insufficient to prove guilt; and (3) it was not error to admit evidence and instruct jury on flight at time or primary offense, notwithstanding that a separate substantive charge of bail jumping, based on the same flight, was pending.

Reversed.

THE WHITE HOUSE

WASHINGTON

November 23, 1987

MEMORANDUM FOR ADMINISTRATION SPOKESPERSONS

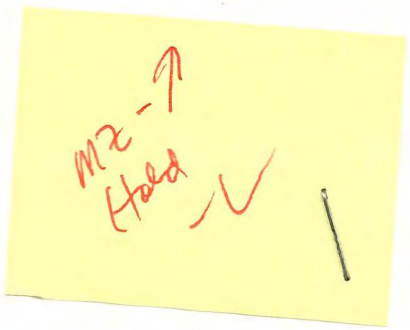
FROM: MARION C. BLAKEY
DIRECTOR OF PUBLIC AFFAIRS

SUBJECT: Judge Kennedy's Record on Criminal Justice and Judicial Restraint

Attached for your information and use are additional talking points that discuss in detail the record of Judge Anthony M. Kennedy on criminal justice and judicial restraint issues.

If you have any questions concerning these materials, please feel free to contact the White House Office of Public Affairs at (202) 456-7170.

Thanks very much.



November 20, 1987

WHITE HOUSE TALKING POINTS

JUDGE KENNEDY AND CRIMINAL JUSTICE

- Judge Kennedy has participated in hundreds of criminal law decisions during his tenure on the Ninth Circuit Court of Appeals. "In that time," President Reagan has said, "he's earned a reputation as a courageous, tough, but fair jurist."

- Throughout his career on the bench, Judge Kennedy has faithfully applied the Constitution and the criminal law in a manner that recognized a balance between society's need to protect innocent victims and the procedural rights of defendants.

- Judge Kennedy's decisions reflect his belief that law enforcement activities must be reasonable and that the right of a criminal defendant under the Constitution to receive a fair trial must be protected vigorously.

- However, his judicial decisions likewise reflect his firm committment to vindicating the victims of crime and protecting the rights of society from vicious criminals.

Judge Kennedy's Decisions

- In Judge Kennedy's view, mistakes by law enforcement officers that do not represent willful misconduct and do not affect the fairness of a defendant's trial are not grounds for releasing criminals to renew their war on society. In one of the most important criminal law cases of this decade, the Supreme Court agreed with Judge Kennedy that a "good-faith exception" to the exclusionary rule should be recognized in certain circumstances. Judge Kennedy had argued in a dissenting opinion that evidence in a drug case should not have been suppressed where the police officers had acted in good faith and had reasonably relied upon a search warrant, issued by an impartial magistrate, that was later found to be invalid (U.S. v. Leon, 1983).

- Judge Kennedy has supported the use of the death penalty. In Neuschafer v. Whitley, (1987) an inmate murdered another inmate and was sentenced to death by the state. The murderer sought relief in federal court. When the case first came before Judge Kennedy, he sent it back to the lower court to make sure that a statement by the murderer was properly in evidence in his state trial. When the lower court determined that it was, Judge Kennedy then upheld the imposition of the death sentence.

(Criminal Justice, continued)

- Applying common sense to the law, Judge Kennedy ruled against a criminal defendant's claim that documents sitting on the dashboard of a stolen vehicle were not in plain view (U.S. v. Hillyard, 1982).

Drug Trafficking

- Supreme Court decisions will have a vital impact on the success of the Nation's crusade against illegal drugs. Judge Kennedy has issued a number of rulings that are likely to be critical in our efforts to counter illegal drug trafficking.

- Judge Kennedy has upheld tough sentences against drug dealers. He upheld a life sentence without parole for a drug manufacturer and dealer. Although the conviction was for a first offense, Judge Kennedy noted the defendant had expanded his drug manufacturing operations while free on bail, directed the operation from his jail cell after his bail was revoked, and shown no remorse for his crimes. Judge Kennedy upheld the maximum sentence imposed by the lower court (U.S. v. Stewart, 1987).

- International cooperation is essential in combatting international drug cartels, and in U.S. v. Peterson (1987), Judge Kennedy held that American officials may assume the constitutional validity of the actions of foreign governments cooperating in anti-drug ventures. Judge Kennedy affirmed a conviction obtained on the basis of evidence received from Phillipine narcotics agents with whom American law enforcement officials were acting in a joint anti-drug venture.

Respect for Law Enforcement Officials

- Judicial activists have in the past elevated the rights of criminals over the right and responsibility of society to protect citizens from violent crime. Often this has been the result of unjustified and unrealistic suspicion toward law enforcement officials on the part of judges -- suspicion Judge Kennedy does not share.

- Judge Kennedy's respect for law enforcement officials and his sensible and balanced perspective on the criminal justice process is reflected in his concurring opinion in Darbin v. Nourse (1981). There, he wrote separately to emphasize the narrowness of the holding in the case and commented:

(Criminal Justice, continued)

> "Were a juror to announce that most law officers, by reason of their profession and their oath, are trustworthy and honest but that similar respect cannot be accorded to prisoners, I should be gratified, not shocked. Those principles are consistent with a responsible citizenship and are not a ground to challenge the juror for cause."
>
> --- Judge Anthony Kennedy
> Darbin v. Nourse, 664 F.2d 1109 (1981)

Criminal Justice in the Balance

- Criminal cases make up the largest single category of cases heard by the Supreme Court. These cases also have the most immediate impact on our citizens. Supreme Court decisions will determine:
  - -- Whether convicted murderers may receive the death penalty (Last term, the constitutionality of the death penalty was sustained by a single vote -- that of Lewis Powell, whose seat Judge Kennedy has been nominated to fill);
  - -- Whether the rights of victims will be considered, as well as the rights of accused and convicted criminals; and
  - -- Whether court-created rules will help -- or hinder -- the search for truth in criminal trials.
- The Supreme Court's criminal law cases are particularly vital to the poor, women, the aged, and minority groups, who are disproportionately victimized by crime and who have the greatest interest in fair and effective law enforcement. When our criminal justice system fails, these Americans are the first to suffer.
- In October 1987, the Bureau of Justice Statistics reported the rate of violent crime dropped 6.3 percent in 1986. Since 1981, the rate of violent crime has fallen 20 percent. Seven million fewer crimes occurred in 1986 than in the peak crime year of 1981.
- This hard-won progress must be allowed to continue. Nearly one-third of the Supreme Court's time is taken up with matters of criminal justice. Judge Kennedy's nomination presents America with the opportunity to continue our progress in the war against crime.

November 20, 1987

WHITE HOUSE TALKING POINTS

JUDGE KENNEDY AND JUDICIAL RESTRAINT

- Judge Kennedy would interpret the law, not invent it. He believes that the role of the judge in our democratic society is faithfully to apply the law as established under the Constitution and as enacted by the people's elected representatives, not to substitute his own personal preferences as to desirable social policy.

- Judge Kennedy's philosophy of judicial restraint is amply demonstrated in the more than 400 opinions he has authored on the United States Court of Appeals for the Ninth Circuit.

Judges are not Legislators

- Judge Kennedy refused to make new law in the area of comparable worth. He authored a unanimous panel opinion that reversed a finding of sex discrimination against the State of Washington based on a "comparable worth" theory. While observing that "the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so," he held that Title VII of the Civil Rights Act did not support a court-imposed comparable worth remedy (AFSCME v. State of Washington, 1985).

- In Schreiber Distributing Co. v. Serv-Well Furniture Co. (1986), the court upheld a plaintiff's right to bring a civil suit under the Racketeer Influenced and Corrupt Organizations (RICO) Act. In a concurring opinion, Judge Kennedy strongly suggested that application of civil RICO to this kind of case improvidently expanded federal power over business in an intrusive and disruptive way, but concluded nonetheless that "we are required to follow where the words of the statute lead."

- Similarly, in U.S. v. Bell (1984), Judge Kennedy's opinion for a unanimous panel noted that a poorly drafted statutory exception to jurisdiction could be remedied only by the Congress and not by the courts.

- Judge Kennedy's scholarly dissent in Oliphant v. Schlie (1976) further demonstrates his commitment to judicial restraint. In that case, a majority of the court concluded that an Indian tribe had jurisdiction over a non-Indian for violations of tribal law on the reservation. Judge Kennedy's contrary view, supported by a thorough analysis of the history and text of the treaties and federal legislation relating to Indian reservations, later prevailed in the Supreme Court.

(Judicial Restraint, continued)

The Power of Government

- As a practitioner of judicial restraint, Judge Kennedy has vigorously enforced provisions of the Constitution that allocate governmental powers and protect individual rights.

- In one of the most important constitutional cases of our time, Chadha v. INS (1980), Judge Kennedy held a provision authorizing a one-house legislative veto to be invalid. In so doing, he properly restricted his analysis to the text and structure of the Constitution. His decision in the case was affirmed in a landmark ruling of the Supreme Court.

- Judge Kennedy's decisions also reflect due regard for the role of states in our Federal system. Dissenting in Ostrofe v. Crocker (1982), he argued that the law of wrongful discharge was a matter of state concern and that Federal antitrust laws were not intended to supercede state regulation of employer-employee relations.

- In CBS v. United States District Court, Judge Kennedy authored a unanimous panel opinion ordering a district court to unseal pre-trial documents sought by CBS relating to the criminal prosecution of John DeLorean's co-defendant. In that opinion he stated: "We begin with the presumption that the public and the press have a right of access to criminal proceedings and documents filed therein."

Style of Decision making

- Rather than draw larger conclusions and reach decisions that affect persons not actually before the court, Judge Kennedy's general approach to judging is to focus on the specific issues presented, to avoid constitutional issues where possible, and to follow precedent.

- For example, in U.S. v. Boatwright (1987), Judge Kennedy's opinion for a unanimous panel reversed a defendant's conviction but declined to give the exclusionary rule the broad reading urged by the parties. Noting that such a reading would go beyond that required by relevant binding precedent, Judge Kennedy formulated a narrower rule for the case at hand -- a rule that would prevent evidence of criminal activity from being excluded unnecessarily in other cases.

THE WHITE HOUSE

WASHINGTON

December 3, 1987

MEMORANDUM FOR REBECCA RANGE

FROM: LINAS KOJELIS

SUBJECT: Kennedy update, 11/27-12/3

JEWISH

-- Talking to Jewish leaders to determine if a meeting between Kennedy and Jewish leaders is needed or would be helpful to the nomination.

HISPANIC

-- Mexican American Foundation will release a statement supporting Judge Kennedy today. This represents one of the largest social service programs in California.

-- Waiting on decision from the National Hispanic Bar Association. They met with A.B. Culvahouse and Senator Baker this week. They are leaning toward supporting, but no decision has been made.

-- Still waiting for a decision from LULAC.

ASIAN

-- Asian American Voters Coalition mailed out information supporting Judge Kennedy to its 6,000 members.

ARAB

-- The Arab American Professional Business Association will issue a statement of support today.

JUDGE ANTHONY M. KENNEDY

THE PRESIDENT'S NOMINEE TO THE SUPREME COURT

Overview

- Judge Anthony Kennedy, President Reagan's nominee to the Supreme Court, is an experienced and impartial jurist. His twelve years of service on the U.S. Court of Appeals for the Ninth Circuit, together with his experience in private practice, make him an outstanding nominee to the United States Supreme Court.

- He received his undergraduate degree at Stanford University in 1958 and attended the London School of Economics during his senior year. He received his law degree from Harvard University.

- From 1961 to 1963, Judge Kennedy was an associate at the firm of Thelen, Marrin, Johnson & Bridges in San Francisco, California. From 1963 to 1975, he practiced in Sacramento, first as a sole practitioner and then as a partner with the firm of Evans, Jackson & Kennedy.

- In 1975, President Ford appointed Judge Kennedy to sit on the United States Court of Appeals for the Ninth Circuit, where he now ranks among the most senior active judges on the bench.

  -- Judge Kennedy has participated in over fourteen hundred decisions and authored over four hundred opinions.

  -- Popular with colleagues of all political persuasions, Judge Kennedy has built a reputation for being fair, openminded and scholarly.

- Judge Kennedy's long and outstanding career in the law has demonstrated that he has the experience and wisdom to be a great Justice of the Supreme Court.

WHITE HOUSE TALKING POINTS

Noteworthy Opinions Authored by Judge Anthony Kennedy

- In Chadha v. Immigration and Naturalization Service, Judge Kennedy authored the unanimous opinion holding the legislative veto to be unconstitutional, concluding that it was a "prohibited legislative intrusion upon the Executive and Judicial branches." This decision was later affirmed by the United States Supreme Court.

- In Neuschafer v. Whitley, Judge Kennedy upheld the death sentence of a Nevada prison inmate convicted of strangling another inmate while serving a life-without-parole term for the rapes and murders of two teenagers. He wrote that there was "no valid constitutional or federal objection to the imposition of the capital sentence" on the defendant.

- In United States v. Mostella, Judge Kennedy rejected a challenge to a bank robbery conviction based on the trial judge's alleged undue involvement in questioning witnesses. Judge Kennedy wrote that the Judge's "extensive nonpartisan questioning, without more, does not require reversal."

- In United States v. Cavanagh, Judge Kennedy authored a unanimous opinion upholding the legality of the FBI's electronic surveillance of a former Northrop engineer who had been convicted of attempting to sell secrets about the Stealth bomber program to the Soviet Union.

- In Adamson v. Ricketts, Judge Kennedy dissented from the majority's holding overturning the death penalty for the man who confessed to killing Arizona Republic reporter Don Bolles with a car bomb in 1976. The majority, reversing the conviction, held that Arizona officials violated defendant Adamson's double-jeopardy rights. When Adamson violated the terms of his plea-bargain agreement, by which he was convicted of second-degree murder in exchange for agreeing to testify against his alleged accomplices, Arizona tried him for first degree murder. In a strongly-worded dissent, Judge Kennedy called the majority's holding "artificial" and said that "it gives the defendant a windfall. . .in what should have been a simple case of the making of a bargain and the failure to keep it." The Supreme Court reversed the majority opinion, substantially adopting the reasoning of Judge Kennedy's dissent.

(Noteworthy opinions, continued)

- In United States v. Leon, Judge Kennedy dissented from the majority's holding, which affirmed the suppression of evidence in a drug case and refused to recognize a "good-faith" exception to the exclusionary rule where police officers act in reasonable reliance on a search warrant which, though issued by an impartial magistrate, is later found to be invalid. In a dissent adopted on appeal by the Supreme Court, Judge Kennedy strongly objected to the holding: "One does not have to read many cases involving illegal drug traffic before it becomes clear exactly what was going on at the residences described by the officer's affidavit. . . . Whatever the merits of the exclusionary rule, its rigidities become compounded unacceptably when courts presume innocent conduct when the only common-sense explanation for it is on-going criminal activity."

- In United States v. Harvey, Judge Kennedy would have granted rehearing of a case where the court had thrown out a man-slaughter conviction because the results of a pre-arrest blood alcohol test had been admitted as evidence. Judge Kennedy noted that the officers involved had acted in good faith and that the defendant's blood had to be tested at once or the alcohol content would have diminished while the officers waited for a warrant.

- In United States v. Sherwin, Judge Kennedy held that pornographic materials seized by federal officers could be admitted into evidence at the defendant's trial on charges relating to transportation of obscene materials.

- In Barker v. Morris, Judge Kennedy held admissible sworn videotaped testimony of a member of the Hell's Angels motorcycle gang who had witnessed other gang members commit two brutal murders. The witness had died prior to trial, and had agreed to give the testimony only when he learned that he was dying. Judge Kennedy's holding that use of such testimony did not violate the Constitution has since been used as a precedent to permit the use of videotaped testimony in cases involving child abuse.

- In American Federation of State, County and Municipal Employees v. State of Washington, Judge Kennedy authored a unanimous panel opinion reversing a district court judge who had found discrimination by Washington State against its female employees on the basis of a "comparable worth" theory. While acknowledging that "the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so," the court held that the existing law did not support a court-imposed comparable worth remedy.

(Noteworthy opinions, continued)

- In Fisher v. Reiser, Judge Kennedy authored a majority opinion holding that Nevada's decision to grant cost-of-living increases to workers' compensation beneficiaries who continued to reside in Nevada but not to those who live outside the state did not violate the constitutional rights of out-of-state beneficiaries. "We are reluctant to impose upon states fiscal burdens that are not coterminous either with their taxing power or their general jurisdiction."

- In Beller v. Middendorf, Judge Kennedy authored a unanimous opinion upholding the constitutionality of Navy regulations providing for the discharge of those who engage in homosexual activities. "In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts, we conclude that at the present time the regulation represents a reasonable effort to accommodate the needs of the government with the interests of the individual."

- In CBS v. United States District Court, Judge Kennedy authored a unanimous panel opinion ordering a district court to unseal pre-trial documents sought by CBS relating to the criminal prosecution of John DeLorean's co-defendant. "We begin with the presumption that the public and the press have a right of access to criminal proceedings and documents filed therein."

- In Koch v. Goldway, Judge Kennedy authored a unanimous opinion dismissing a lawsuit claiming the former mayor of Santa Monica slandered her political opponent by suggesting the opponent was wanted for Nazi war crimes. He concluded the statement was one of opinion, not fact, and could therefore not be the basis for a libel suit. "It is perhaps unfortunate that the legal category of opinion, which sounds, and often is, a dignified classification for the pursuit of honest and fair debate, must also be used to describe statements such as the one at issue here, which, in reality, is nothing more than a vicious slur. The law of defamation teaches, however, that in some instances speech must seek its own refutation without intervention by the courts. In this case, if the mayor chose to get in the gutter, the law simply leaves her there."

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 11, 1987

REMARKS BY THE PRESIDENT
UPON NOMINATION OF
JUDGE ANTHONY KENNEDY
AS SUPREME COURT JUSTICE

The Briefing Room

11:30 A.M. EST

THE PRESIDENT: It's not just in fulfillment of my constitutional duty, but with great pride and respect for his many years of public service, that I am today announcing my intention to nominate United States Circuit Judge Anthony Kennedy to be an Associate Justice of the Supreme Court.

Judge Kennedy represents the best tradition of America's judiciary. His career in the law, which has now spanned the better part of three decades, began following his graduation from Stanford University and Harvard Law School.

When he joined a prominent San Francisco law firm later, after the death of his father -- who was himself a well-respected attorney in Sacramento -- Tony Kennedy took over his father's law practice. He devoted himself to a wide range of matters including tax law, estate planning and probate, real estate law, international law and litigation.

In 1965 he began a teaching career on the faculty of the McGeorge School of Law at the University of the Pacific. He has been teaching continuously since that time as a professor of constitutional law.

In 1975 President Ford appointed him to the United States Court of Appeals, where he has established himself as a fair but tough judge who respects the law. During his 12 years on the nation's second highest court, Judge Kennedy has participated in over 1400 decisions and authored over 400 opinions. He's a hard worker and, like Justice Powell, whom he will replace, he is known as a gentleman.

He's popular with colleagues of all political persuasions. And I know that he seems to be popular with many senators of varying political persuasions as well.

I guess by now it's no secret that Judge Kennedy has been on the very shortest of my short lists for some time now. I've interviewed him personally and, at my direction, the FBI, the Department of Justice and the Counsel to the President have concluded very extensive preliminary interviews with him.

Judge Kennedy's record and qualifications have been thoroughly examined. And before I submit his formal nomination to the Senate, a full date -- update of his FBI background investigation will have been completed.

Judge Kennedy is what in -- many in recent weeks have referred to as a true conservative -- one who believes that our constitutional system is one of enumerated powers -- that it is we, the people who have granted certain rights to the government -- not the other way around. And that unless the Constitution grants a power to the federal government, or restricts a state's exercise of that power, it remains with the states or the people.

Those three words, "We, the people," are an all-important reminder of the only legitimate source of the government's authority over its citizens. The preamble of the Constitution, which begins

with these three powerful words, serves also as a reminder that one of the basic purposes underlying our national charter was to ensure domestic tranquility. And that's why the Constitution established a system of criminal justice that not only protects the individual defendants, but that will protect all Americans from crime as well.

Judge Kennedy has participated in hundreds of criminal law decisions during his tenure on the Ninth Circuit Court of Appeals. In that time he's earned a reputation as a courageous, tough, but fair jurist. He's known to his colleagues and to the lawyers who practiced before him as diligent, perceptive, and polite. The hallmark of Judge Kennedy's career has been devotion -- devotion to his family, devotion to his community and his civic responsibility, and devotion to the law.

He's played a major role in keeping our cities and neighborhoods safe from crime. He's that special kind of American who's always been there when we needed leadership. I'm certain he will be a leader on the Supreme Court.

The experience of the last several months has made all of us a bit wiser. I believe the mood and the time is now right for all Americans in this bicentennial year of the Constitution to join together in a bipartisan effort to fulfill our constitutional obligation of restoring the United States Supreme Court to full strength. By selecting Anthony M. Kennedy, a superbly qualified judge whose fitness for the high court has been remarked upon by leaders of the Senate in both parties, I have sought to ensure the success of that effort.

I look forward, and I know Judge Kennedy is looking forward, to prompt hearings conducted in the spirit of cooperation and bipartisanship. I'll do everything in my power as President to assist in that process.

And now I believe that Judge Kennedy has a few words to say.

JUDGE KENNEDY: Thank you, Mr. President. By announcing your intention to nominate me to the Supreme Court of the United States, you confer a singular honor, the highest honor to which any person devoted to the law might aspire. I am most grateful to you. My family, Mary and the children, also express their deep appreciation for your reposing this trust upon us.

When the Senate of the United States receives the nomination, I shall endeavor to the best of my ability to answer all of its questions and to otherwise assist it in the discharge of its constitutional obligation to determine whether to give its advice and full consent to the appointment.

I share with you, Mr. President, and with each member of the Senate an abiding respect for the Supreme Court, for the confirmation process, and for the Constitution of the United States, which we are all sworn to preserve and to protect.

Thank you, Mr. President.

Q Mr. President --

Q Mr. President --

THE PRESIDENT: No -- it's limited, and I think you know that, to two questions -- Helen first and then Terry.

Q Mr. President, throughout this whole process, Senator Hatch says there have been a lot of gutless wonders in the White House. Do you know who they are, who he is referring to, why he would say such a thing since he is such a devoted conservative?

THE PRESIDENT: Helen, when these ceremonies here this morning are over, I'm going to try to find out where he gets his information because, you know something, I haven't been able to find

a gutless wonder in the whole place.

Q Do you know why he was so upset?

THE PRESIDENT: I don't know. I don't know, unless he's been reading the paper too much.

Q Mr. President, you said that Judge Kennedy is popular with people of all political persuasions. What happened to your plan to give the Senate the nominee that they would object to just as much as Judge Bork?

THE PRESIDENT: Maybe it's time that I did answer on that, where that was said and why -- and it was humorously said. I was at a straight party organization affair, a dinner. And when I finished my remarks, which were partisan, a woman, down in front, member there, just called out above all the noise of the room, "What about Judge Bork?" And she got great applause for saying that. And then, the questions came, was I going to give in and try to please certain elements in the Senate? And I made that -- intended to be facetious answer to her. And so, as I say, it was -- sometimes you make a facetious remark and somebody takes it seriously and you wish you'd never said it, and that's one for me.

Q Mr. President --

THE PRESIDENT: I said only two questions now. And I want to -- I want Judge Kennedy's family to come up here.

Q Can't you take some more questions, sir?

THE PRESIDENT: What?

Q Can't you take some more questions?

Q Can't you take one or two more, Mr. President?

Q Just one or two?

THE PRESIDENT: No, because there would be no such thing as just one or two.

Q Judge Kennedy, can we ask you, are you concerned about this intense scrutiny that seems to go to a Supreme Court nominee now?

JUDGE KENNEDY: I'm looking forward to the scrutiny that the Senate should give any nominee in its discharge of its constitutional duty.

Q And you're not concerned about how you stand up, sir?

Q Judge Kennedy, are you worried or upset that you are, in effect, the third choice for this seat?

JUDGE KENNEDY: I'm delighted with this nomination. (Laughter.)

Q Mr. President, why didn't you nominate Judge Kennedy the first time?

MR. FITZWATER: Thank you very much.

Q Well, Marlin --

Q Would you like to answer that, sir?

Q -- to pre-selected reporters.

Q That's a good question, Marlin.

Q Can't the President answer for himself?

Q Do you like where the dollar is --

THE PRESIDENT: I -- all three. We came down to a final three and that all three were so close and so well-qualified, you could have almost thrown a dart going by that decision.

Q Mr. President, do you believe that the Senate Democrats may try to stall this nomination in order to prevent you from being able to fill that seat?

THE PRESIDENT: I'm counting on Pete Wilson here to see that doesn't happen.

Q Mr. President --

Q Did you cave into the liberals, Mr. President? Some conservatives are saying you caved into the liberals, appointing someone who can be confirmed, but not appointing someone who is going to turn the Court around.

THE PRESIDENT: When the day comes that I cave in to the liberals, I will be long-gone from here. (Laughter.)

Q Judge Kennedy, did they ask you if you'd ever smoked marijuana? Judge Kennedy?

Q Did you ever smoke marijuana?

Q Did they ask you?

JUDGE KENNEDY: They asked me that question and the answer was, no, firmly, no.

Q Mr. President, do you think conservatives, sir, will back this nominee? You know, Senator Helms, at one point, is alleged to have said, "No way, Jose," to Judge Kennedy.

THE PRESIDENT: We'll find out about that in the coming days ahead.

Q How can you be confident of the background check by Attorney General Edwin Meese's Justice Department when he blew the last one? (Laughter.)

THE PRESIDENT: He didn't blow the last one. We were talking the last time about a man who had been confirmed and who had been investigated four times for positions in government.

Q Are you going to fire the FBI --

Q Who did blow it?

Q Do you blame Ginsburg for not telling --

Q Mr. President, who do you blame?

THE PRESIDENT: I can't, Andrea.

Q Mr. Meese or Mr. Baker?

Q Do you think the Russians are stalling on an INF agreement, sir? There's a story that -- (laughter) -- there's a story that --

THE PRESIDENT: Bye. (Laughter.)

THE PRESS: Thank you.

END 11:40 A.M. EST

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 11, 1987

President Reagan announced today that he would nominate Judge Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court. The President believes that Judge Kennedy's distinguished legal career, which includes over a decade of service as a federal appellate judge, makes him eminently qualified to sit on our nation's highest court.

Judge Kennedy, who is 51 years old, was born in Sacramento, California. He received his undergraduate degree at Stanford University in 1958, attending the London School of Economics during his senior year. He received his law degree from Harvard University in 1961. He has also served in the California Army National Guard.

From 1961 to 1963, Judge Kennedy was an associate at the firm of Thelen, Marrin, Johnson & Bridges in San Francisco, California. He then returned to Sacramento to pursue a general litigation, legislative and business practice, first as sole practitioner and then, from 1967 to 1975, as a partner with the firm of Evans, Jackson & Kennedy. Since 1965, he has taught constitutional law part-time at the McGeorge School of Law at the University of the Pacific.

In 1975, President Ford appointed Judge Kennedy to sit on the United States Court of Appeals for the Ninth Circuit, where he now ranks among the most senior active judges on the bench. Judge Kennedy has participated in over fourteen hundred decisions and authored over four hundred opinions, earning a reputation for fairness, open-mindedness and scholarship. He has been an active participant in matters of judicial administration. Judge Kennedy has earned the respect of colleagues of all political persuasions.

Judge Kennedy and his wife Mary reside in his hometown of Sacramento. They have three children, Justin, Gregory and Kristin.

Judge Kennedy represents the best traditions of America's judiciary. The President urges the Senate to accept this nomination in the spirit in which it is being made, and fill the vacancy that continues to handicap the vital work of the Supreme Court.

# # #