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JUDGE  
ADVOCATE GENERAL

MEMORANDUM

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1745-42-7 (CPCSA)

09 May 91

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DEFENCE OF CF POLICY  
ON SEXUAL ORIENTATION

1. Counsel from the Department of Justice interviewed me on 13 Apr 91 in preparation for the defence, later this year, of the CF policy on sexual orientation. The interview focused on the evolution of the CF policy, its present status and the rationale for it. Before the interview, I was uneasy about the policy; as a result of the interview, I have grave concerns about its defensibility in law.

2. As you are aware, there are features of the Dwyer and Douglas cases that do not reflect well on the CF and which, by themselves, may give us difficulty in court. However, my immediate concern is whether or not we have a policy that permits us to enter a defence with any reasonable, even slight, chance of success. If we do not, I am obliged to inform ADM(Per) as soon as possible.

3. Two aspects of the policy give me the greatest discomfort but I do not know the proper weight to put on them:

- a. Although I have spent a fair amount of time studying the policy and the various amplifying statements and documents surrounding it, I am still unable to say exactly what the policy is. Some terms are not defined (eg; homosexual acts); there is an element of ambiguity in the policy; the resulting uncertainty provides potential for inconsistent application of the policy; and the status of some policy-related documents is unclear. Obviously, if I have difficulty understanding the policy, service members to whom the policy applies, and who do not have ready access to some of the policy documents, must find it almost incomprehensible. One of my concerns is the extent to which this lack of clarity is prejudicial to our case.

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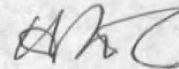
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- b. A second matter of concern, slightly different from the first, is the rather ad hoc nature of the policy, based as it is on a variety of statements, memoranda and other documents, some of which are of dubious authority. Does the existing patchwork policy presentation meet legal requirements?

4. In my position as CPCS A I have a particular responsibility for the CF policy and I wish to advise ADM(Per) on the probable outcome should the present cases come to trial. Before doing so, I would like to have your comments on the extent to which the policy meets accepted standards for clarity, approval and presentation and the likely consequences, should you consider that it falls short of those standards, for the policy defence. Naturally, I would appreciate any additional comments you might have on the subject.



H.T. Porter  
RAdm  
CPCS A  
992-2743

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