

Plaintiff, Lt. Paul G. Thomasson, USN, respectfully submits this Statement of Undisputed Material Facts in support of his motion for summary judgment in this action and hereby states that the record before the Court establishes the following:

NATURE OF THE ACTION

1. This is an action for declaratory and injunctive relief against Defendants, who are officers of the United States government, for unlawfully discharging Lt. Thomasson from active duty in the United States Navy, after more than nine years of outstanding achievement and exceptional military performance, solely on the basis of his statement that he is gay.

PARTIES

2. Plaintiff Paul G. Thomasson is a commissioned lieutenant on active duty in the United States Navy, who is currently stationed at the Bureau of Naval Personnel ("BUPERS") in Arlington, Virginia. Lt. Thomasson is also a resident of Arlington, Virginia. See Compl. ¶ 4.

3. Defendant William J. Perry is Secretary of Defense. Defendant Perry has ultimate responsibility for supervising, promulgating, and implementing the regulations that govern military service in all branches of the United States armed forces and for ensuring the legality of all military policies and procedures. In this connection, Defendant Perry is responsible for enforcement of the federal law governing military service by homosexuals, as embodied in the National Defense Authorization Act of 1994 (10 U.S.C. § 654), as well as for the promulgation and implementation of all regulations and procedures that govern the conditions of military service by homosexual men and women. Defendant Perry maintains his office at, and conducts his official duties from, the Pentagon in Arlington, Virginia. See Compl. ¶¶ 5-6.

4. Defendant John H. Dalton is Secretary of the Navy. Defendant Dalton has overall responsibility for the United States Navy and for the conditions, terms, and procedures that

govern Lt. Thomasson's service in the Navy. In addition, Defendant Dalton is directly responsible for the final decision to discharge or retain any naval servicemember on grounds of homosexuality. Defendant Dalton maintains his office at, and conducts his official duties from, the Pentagon in Arlington, Virginia. See Compl. ¶¶ 7-8.

MATERIAL FACTS

A. THE EVOLUTION OF THE POLICY

5. Before 1981, there was no uniform national policy regarding military service by homosexuals. The policy varied among the different service branches. However, no branch required the mandatory discharge of a servicemember solely on the basis of his or her status as a homosexual or his or her statement that he or she is a homosexual. Rather, there was always discretion to retain a servicemember depending on the facts of the individual case. See, e.g., V Rec. T3D, ¶ 4 (Korb Declaration).

6. In 1982, Dr. Lawrence Korb, who was then Assistant Secretary of Defense, drafted and promulgated a single policy, which was implemented throughout the armed forces, to ensure uniformity in application. See id., ¶¶ 4-5. This policy was never intended to authorize the military to discharge a servicemember solely on the basis of homosexual status or a mere verbal acknowledgment of that status, wholly divorced from any evidence of forbidden conduct. See id., ¶¶ 7-8.

7. Nonetheless, in the succeeding months, numerous commanding officers in the armed forces began to apply the policy to servicemembers who simply stated that they were gay or lesbian, and since 1982, several thousand servicemembers have been discharged from the military for mere and honest admissions of their sexual orientation. See Compl. ¶ 11.

8. On January 28, 1993, a federal court in California "permanently enjoined [the Department of Defense] from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission." Meinhold v. Department of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993), aff'd in part and rev'd in part, 34 F.3d 1469 (9th Cir. 1994).

9. The Meinhold decision was apparently consistent with the views of then-Secretary of Defense Les Aspin, who testified before the Senate Armed Services Committee that same month that, for the good of the service, "out of the closet" homosexuals "ought to be able to serve" in the military. PSJ Ex. C at 162 (undated hearing transcript).

10. On the following day, January 29, 1993, President Clinton referred favorably to the Meinhold decision and announced during an afternoon press conference that he intended to eliminate the military's policy of prohibiting gay men and lesbians from serving. Specifically, the President explained that he had instructed Secretary Aspin to draft an Executive Order "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States." PSJ Ex. D; see also id. E.

11. On or about February 3, 1993, Secretary Aspin announced that, pursuant to the President's instructions, the military's exclusionary policy would be re-examined. Secretary Aspin explained that a final decision on lifting or modifying the ban would be made by Executive Order on or about July 15, 1993. See Compl. ¶ 14.

12. During the succeeding months, Secretary Aspin appointed two study groups to analyze the policy. First, he commissioned the National Defense Research Institute of the RAND Corporation, a highly respected research organization, to conduct a wide-ranging and detailed

examination of the policy. See VI Rec. T4A (RAND Report). In a subsequent letter to Senator Sam Nunn, Chairman of the Senate Armed Services Committee, Secretary Aspin indicated that the RAND study was "intended to provide an *objective* source of information" on the issue. PSJ Ex. F (May 4, 1993) (emphasis added).

13. Second, on April 5, 1993, Secretary Aspin called for the formation of a Military Working Group ("MWG") from within the service branches "to develop and assess alternative policy options to meet the President's requirements." VI Rec. T4G at 1705. Previously, Secretary Aspin had been reluctant to appoint such a group because, as he explained, "the question is, well, who is on [the group], and then, you know, you decide the issue by who is on the group." PSJ Ex. C at 160. Nonetheless, the MWG was promptly formed with hand-picked officers from each of the various service branches, and Lieutenant General John P. Otjen was eventually selected as its Chairman. See Pl. Sel. Dep. Ex. at Tab B (Otjen Deposition).

14. The RAND commission conducted an exhaustive study and analysis of the policy itself, various legal considerations, relevant military and public opinion, the nature and social history of sexual orientation, and the experiences of both foreign militaries and the most analogous domestic institutions (such as police and fire departments). See VI Rec. T4A (RAND Report).

15. The RAND commission ultimately concluded that:

Only one policy option was found to be consistent with the findings of [its] research, with the criteria of the Presidential memorandum, and to be logically and internally consistent. That policy would consider sexual orientation, by itself, as not germane to determining who may serve in the military.

Id. at 0872.

16. The MWG, which based its principal conclusion on anecdotes and opinion testimony from servicemembers and others, concluded otherwise. See Pl. Sel. Dep. Ex. at Tab B, at

192-94 (Otjen Deposition); VI Rec. T4G at 1707 (MWG Summary Report). It concluded that "the presence of open homosexuals in a unit would, in general, polarize and fragment the unit and destroy the bonding and singleness of purpose required for effective military operations." Id. at 1709.

17. Thus, in its summary report, which it issued on July 1, 1993, the MWG offered the initial formulation of what ultimately became the new policy. See id. at 1717-19.

18. On November 30, 1993, with the Administration's prior support and approval, Congress enacted the National Defense Authorization Act of 1994. For the first time in the nation's history, this Act codified into federal statutory law a nationwide policy regarding military service by homosexuals: the so-called "Don't Ask, Don't Tell, Don't Pursue" policy. See VII Rec. T5A ("Policy Concerning Homosexuality in the Armed Forces," codified at 10 U.S.C. § 654).¹

19. Under this new statutory policy, a servicemember's mere statement that he or she is a homosexual is, without more, a sufficient ground for the discharge of that servicemember. See 10 U.S.C. § 654(b)(2) ("A member of the armed forces shall be separated from the armed forces . . . if [there is an approved finding] [t]hat the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further [approved] finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.").

20. A servicemember who states that he or she is a homosexual can avoid discharge only if he or she rebuts a statutory presumption. The servicemember must "demonstrate[] that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or

¹ Copies of the statute and an excerpt of some of its key language are attached hereto as Exhibits A and B, respectively.

intends to engage in homosexual acts." Id.

21. The statute does not define the terms "propensity" or "intends" as used in the foregoing quoted provision, nor does it indicate what types of evidence or what level of showing might suffice to rebut the statute's presumption. See 10 U.S.C. § 654.

22. The statute defines "homosexual act" to include:

- (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
- (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

10 U.S.C. § 654(f)(3).

23. On December 22, 1993, the Department of Defense ("DoD") announced that it was issuing new directives to give effect to the new statutory policy. See VII Rec. T5G (DoD News Release). The Department explained that the new directives "are fully consistent with the National Defense Authorization Act for Fiscal Year 1994." Id. at 1810.

24. In describing its new directives to the public, DoD explained, in part, that "[s]eparation policy has been revised to emphasize that DoD judges the suitability of persons to serve in the Armed Forces on the basis of conduct, not sexual orientation." Id. at 1811 (emphasis in original). Secretary Aspin further advanced this theme to the public at his news conference that afternoon:

[T]he statements which can be a basis for discharge are those that demonstrate a propensity, or intent to engage in [homosexual] acts. Now there are two changes here [from the previous policy]. One, we've eliminated the word "desire" to emphasize that the statement must be one that shows a likelihood to engage in acts. That is done in the statute as well as in our policy. We've also defined "propensity" as more than abstract preference or desire, and defined it in terms of a likelihood that the person would act. Again, it's a very conduct-based policy.

VII Rec. T5I at 1821.

25. The suggestion that the new policy is "conduct-based" is also furthered by a policy statement embodied in the directives themselves. As set forth in DoD Directive No. 1332.30, this policy statement provides that:

It is DoD policy to . . . [s]eparate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to (1) [e]nsure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline [and] (2) [m]aintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

VII Rec. T5C at 1725 (emphasis added).

26. However, despite the foregoing protestations, the new DoD directives authorize the discharge of a servicemember solely on the basis of his or her statement that he or she is a homosexual -- without any further evidence or showing of any forbidden or unlawful conduct of any kind. See id. at 1731.²

27. In fact, the new DoD directives define the "statements" that they proscribe to be "conduct." Thus, the statement "I am gay" constitutes actionable "homosexual conduct." See id. at 1729, 1731. As DoD Directive No. 1332.30 provides:

HOMOSEXUAL CONDUCT

Homosexual conduct is grounds for separation from the Military Services under the terms set forth . . . below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. . . .

² An excerpt of some of the key language of the DoD Directive is attached hereto as Exhibit C.

Id. at 1730 (emphasis added).

28. Accordingly, an officer who states that he or she is a homosexual can avoid discharge under DoD Directive No. 1332.30 only if he or she rebuts the same presumption that is set forth in the statute. The officer must "demonstrate[] that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Id. at 1731.

29. DoD Directive No. 1332.30 does not define the term "intends" as used in the foregoing quoted provision. The Directive defines "homosexual acts" in precisely the same language as the statute. And although the term "propensity" is not defined in the statute, the Directive defines "propensity" as follows:

Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

Id. at 1728.

30. DoD Directive No. 1332.30 further provides that:

In determining whether an officer has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

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

(This list is not exhaustive; any other relevant evidence may also be considered.)

Id. at 1731.

31. The new DoD directives -- including DoD Directive No. 1332.30 -- officially took effect on February 28, 1994. See id. at 1723.

B. PRECIPITATING EVENTS

32. On March 1, 1994, the Chief of Naval Operations issued an administrative message that officially implemented the new DoD directives throughout the United States Navy. See VII Rec. T5J ("NAVADMIN 033/94").

33. On the following day, March 2, 1994, Lt. Thomasson delivered a letter to four Navy admirals for whom he has served at the Bureau of Naval Personnel ("BUPERS") to inform them that he is gay. See III Rec. T1B (Plaintiff's letter).

34. Lt. Thomasson wrote this letter for two reasons. First, he felt obligated, as a matter of principle and personal integrity, to inform his commanding officers and closest colleagues of his sexual orientation so that those who know him best and work with him might know this basic aspect of who he is, and so that he himself might stop "living the lie" of publicly pretending that he is a heterosexual. Second, Lt. Thomasson believed that the gag rule embodied in the new policy would perpetuate false stereotypes about gays and lesbians, and he thought that he might help to dispel such stereotypes by virtue of his own record, position, and conduct. See IV Rec. T2A (Plaintiff's Unsworn Statement to Board of Inquiry); PSJ Ex. G (Plaintiff's Decl.).

35. The four admirals to whom Lt. Thomasson addressed his letter were: (a) Vice Admiral Zlatoper, who was then Chief of Naval Personnel and is now Commander-in-Chief of

the Pacific Fleet; (b) Rear Admiral Gunn, who was then Assistant Chief of Naval Personnel for Military Personnel Policy and Career Progression ("PERS-2"); (c) Rear Admiral Ryan, the Assistant Chief of Naval Personnel for Distribution ("PERS-4"); and (d) Rear Admiral Konetzni, who was then Assistant Chief of Naval Personnel for Total Force Programming and Manpower ("PERS-5") and who has since succeeded Rear Admiral Gunn as PERS-2.

36. On March 9, 1994, Lt. Thomasson was notified that, solely on the basis of the statement in his letter that he is gay, the Navy decided to institute involuntary separation proceedings against him. See III Rec. T1D (notification letter). Lt. Thomasson was informed that a Board of Inquiry would be convened to hear his case and that he would be required "to show cause for retention in the Naval Service." Id.

37. Pursuant to this notification, Lt. Thomasson became the first servicemember in the nation to be processed for discharge, merely for his statements, under the new "Don't Ask, Don't Tell, Don't Pursue" policy.

38. On May 23, 1994, a Board of Inquiry composed of three Navy officers convened in a military courtroom at the Washington Navy Yard in Washington, D.C. to hear the Navy's case against Lt. Thomasson.

39. The Board heard two days of testimony and argument and received into evidence several volumes of materials relating both to Lt. Thomasson's record and to the Navy's policy on homosexuality. See I-VII Rec.

40. During its phase of the proceedings, the Navy acknowledged that Lt. Thomasson had attained an "enviable" service record. I Rec. Tr. at 0036, 0148. The Navy also acknowledged that there was no evidence that Lt. Thomasson had engaged in any "homosexual acts."

41. Instead, the Navy based its case against Lt. Thomasson on the proposition that his "statements" that he is gay constitute "homosexual conduct" within the meaning of the new policy. See I Rec. Tr. at 0034-35, 0145; see also VII Rec. T5J, ¶ 8(A).

42. In response, Lt. Thomasson submitted evidence of his service record, expert testimony regarding the meaning and nature of both homosexuality and the military's policy on homosexuality, and written and live testimony from 15 witnesses with whom he has served and worked over the course of his career. The Navy did not introduce any rebuttal evidence or dispute the substance of any of Lt. Thomasson's evidence.

43. The 15 fact witnesses who testified at the hearing included two admirals (who were among the four recipients of Lt. Thomasson's March 2 letter), two commanders, two lieutenant commanders, and two lieutenants, as well as several noncommissioned officers and enlisted men who have served closely with or directly under Lt. Thomasson. Each of these witnesses testified, without exception, to Lt. Thomasson's extraordinary talents, skills, character, and credibility. Each indicated a profound admiration and respect for the Lieutenant and a continued willingness to serve with him. Lt. Thomasson also gave a statement on his own behalf.

44. After less than two hours of deliberations, the Board of Inquiry unanimously recommended that Lt. Thomasson be honorably discharged. The Board concluded that Lt. Thomasson's statements fit the policy's prohibitive definition: they indicated that he "engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts." VII Rec. T5J, ¶ 3(E) ("NAVADMIN 033/94"), cited in I Rec. Tr. at 0170. The Board further concluded that Lt. Thomasson had failed to rebut "the presumption of homosexual conduct thereby raised." I Rec. Tr. at 0170.

45. In its official report of its findings, the Board stated that it had found "by a preponderance of the evidence" that Lt. Thomasson "ha[d] failed to demonstrate acceptable qualities of leadership . . . as evidenced by statements that he made which are conduct within the meaning of [NAVADMIN 033/94] and the presumption of homosexual conduct thereby raised is not rebutted." I Rec. B (emphasis added). The Board thus accepted the Navy's theory of the case.

46. On September 9, 1994, a three-member Board of Review convened to examine Lt. Thomasson's case. Neither Lt. Thomasson nor his counsel were invited to appear before this Board, which unanimously concurred, without comment, in the Board of Inquiry's prior recommendation. See I Rec. D.

47. On December 19, 1994, the Chief of Naval Personnel reported these administrative findings and recommendations to the Secretary of the Navy, Defendant Dalton, and advised Defendant Dalton to authorize Lt. Thomasson's involuntary separation. See I Rec. E.

48. On January 17, 1994, the Chief of Naval Personnel reported that the discharge recommendation had been approved. "[B]y direction of the President and pursuant to [Navy regulations]," he ordered that Lt. Thomasson be formally discharged during the month of February 1995. I Rec. F.

49. Lt. Thomasson's honorable discharge certificate has already been signed, but it has not yet been dated or delivered. See I [Rec.] G.

50. On February 27, 1995, Lt. Thomasson filed suit in this Court, seeking declaratory and injunctive relief to prevent his discharge on grounds that Defendants' policy violates his rights, both on its face and as applied, under the United States Constitution and the Administrative Procedure Act. At the same time, Lt. Thomasson moved for a temporary restraining

order and preliminary injunctive relief pending the outcome of this litigation. See Compl.; Pl. Mem. in Support of Req. for Immediate Relief.

51. On February 28, 1995, the Court entertained oral argument on Plaintiff's motion for immediate relief and, treating that motion as a motion for a preliminary injunction, enjoined Defendants, "from discharging the plaintiff from the United States Navy, until further Order of this Court." Thomasson v. Perry, No. 95-252-A (Feb. 28, 1995). The Court simultaneously established an expedited briefing schedule for summary judgment and set this matter for a hearing on the merits on April 7, 1995.

C. LT. THOMASSON'S NAVY CAREER

52. In his 9½ years in the Navy, Lt. Thomasson has worked with and for some of the United States military's highest-ranking officers, including the former Chairman of the Joint Chiefs of Staff, General Colin Powell; Army Lieutenant General Edwin S. Leland; Air Force Brigadier General C.V. Jones; and Navy Rear Admirals Lee F. Gunn, Norbert R. Ryan, Michael W. Bordy, Alexander J. Krekich, and Albert H. Konetzni, Jr.

53. Throughout his tenure, Lt. Thomasson has consistently received outstanding performance reviews, the highest commendations, and the strongest possible recommendations for early promotion to a command position. See III Rec. T1A.

54. Lt. Thomasson was commissioned as an ensign in the United States Navy on or about August 16, 1985, at the age of 23, after completing the Naval Reserve Officers Training Corps at Washington State University. See id.

55. His initial assignment in the Navy was to flight school in Pensacola, Florida, and Corpus Christi, Texas. He successfully completed flight training and received his "wings of

gold" in July 1987, when he was designated a Naval Aviator. See id.

56. In or about July 1987, Lt. Thomasson was posted to Moffett Field in San Jose, California, where he completed P-3 Fleet Replacement Training in VP-31, a Navy squadron. During his training with VP-31, Lt. Thomasson received a promotion to lieutenant junior grade. See id.

57. Lt. Thomasson was subsequently assigned to VP-9, an operational Fleet Squadron. In VP-9, he piloted the P-3 "Orion" aircraft, performing maritime patrol, surveillance, and anti-submarine warfare operations. See id.

58. In July 1988, Lt. Thomasson was deployed with VP-9 to Dhahran, Saudi Arabia, where he logged more than 500 hours of operational flight time in the Persian Gulf as part of "Operation Earnest Will," pursuant to which reflagged Kuwaiti tankers were escorted through the Gulf's hostile waters. During this assignment, he performed reconnaissance, battle damage assessment, and related missions. See id.

59. In September 1989, after his return to Moffett Field, Lt. Thomasson was promoted to the rank of full lieutenant. See id.

60. In 1990, Lt. Thomasson was deployed with VP-9 to Misawa, Japan, where he flew operational P-3 missions tracking the movements of Soviet submarines. See id.

61. In April 1991, Lt. Thomasson received a highly coveted assignment as an intern to the Joint Chiefs of Staff ("JCS") at the Pentagon, where he was assigned as a Strategic Planner in the Strategic Plans and Policy Directorate (J-5). While there, he possessed an extremely high security clearance, with routine access to top secret and "sensitive compartmentalized information." His duties at J-5 included the preparation of briefings on national military strategy for

use by General Colin Powell, Chairman of the Joint Chiefs, and other top military officers in Congressional testimony, press conferences, and speeches on crucial issues of military funding. See id.

62. During his assignment to the JCS, Lt. Thomasson was selected to prepare exhaustive briefings on military budget issues and force reductions for use by General Colin Powell and Secretary of Defense Richard Cheney, and he was asked to accompany and assist them during testimony before Congress. See id.

63. In or about May 1992, Lt. Thomasson was assigned to the Bureau of Naval Personnel ("BUPERS") as Administrative Assistant to Rear Admiral Bordy, Assistant Chief of Naval Personnel for Total Force Programming and Manpower ("PERS-5"). Lt. Thomasson remained in this post and served directly as Administrative Assistant for three other admirals who succeeded Admiral Bordy: Rear Admirals Gunn, Ryan, and Konetzni, respectively. See id.

64. In or about June 1994, after Lt. Thomasson had already stated that he is gay and after the Board of Inquiry had recommended that he be discharged, Rear Admiral Konetzni took Lt. Thomasson with him when the former was reassigned within BUPERS to serve as Assistant Chief of Naval Personnel for Military Personnel Policy and Career Progression ("PERS-2"). In connection with this post, Admiral Konetzni has overall responsibility for the continued oversight and implementation of the Navy's policy regarding military service by homosexuals. Lt. Thomasson has continued to serve Admiral Konetzni to the present day.

D. LT. THOMASSON'S PERFORMANCE IN THE NAVY

65. During his Navy career, Lt. Thomasson has consistently received the highest performance rankings among his peers in both operational and staff assignments, and he repeatedly has been described by his commanding officers as demonstrating the ideal qualities of a Naval officer with the potential to rise to the rank of admiral. See III Rec. T1A.

66. After only three months in VP-9 at Moffett Field (1987-88), then-Lieutenant Junior Grade Thomasson received extended praise from his commanding officer, Commander D.W. Stromquist, as "a hard-charging officer with absolutely unbounded potential," who was "effective under pressure," "highly capable, intensely dedicated and enthusiastic," with "excellent aviation skills" and who "sets the standard in behavior, military bearing and professional attitude." Id. at 0354.

67. Just three months later (1988), Commander Stromquist commended LTJG Thomasson's "unsurpassed leadership skills," "outstanding personal initiative," and his "quickly established strong reputation for dedication to excellence in every endeavor," concluding that he was "a totally professional Naval officer" and an "excellent command representative." Id. at 0356.

68. At the completion of Lt. Thomasson's overseas deployment to Dhahran, Saudi Arabia (1988-89), his then-commanding officer, Commander C.L. Weiss, described him as "hands down my best branch or division officer," who "has my complete trust and confidence." Praising Lt. Thomasson's ability to "evoke[] the absolute best from his personnel through active involvement, genuine concern, honesty, and forthright communication," Commander Weiss concluded that "no one is more dedicated or motivated than Paul Thomasson. [He is] destined for great things." Id. at 0358 (emphasis in original).

69. After returning to Moffett Field (1989), Lt. Thomasson received another exceptional review from Commander Weiss, who described him as a "superb aviator," "mature beyond his years," whose "level-headed judgment and situational awareness as a duty officer make him one of my most trusted watch standers." Noting Lt. Thomasson's "unmatched determination to take care of his people," Commander Weiss concluded that Lt. Thomasson "was the best personnel officer and division officer in the world," who "would rank among the top lieutenants in this or any command." *Id.* at 0360 (emphasis in original).

70. After another six months at Moffett Field under the command of Commander T.M. Feeks (1989-90), Lt. Thomasson's "[a]bsolutely unlimited command potential" earned his commanding officer's "strongest possible recommendation for accelerated promotion . . . and operational aviation command." According to Commander Feeks, "Lt. Thomasson is an incredibly talented officer whose performance has been brilliant. Nothing is beyond his grasp or capabilities." As an "exceptional leader . . . who possesses uncommon dedication to duty," Lt. Thomasson "defines the work ethic" and "routinely outperform[ed] many [lieutenant commanders]." *Id.* at 0362 (emphasis in original).

71. During his deployment to Misawa, Japan (1990), where he flew operational P-3 missions tracking Soviet submarines, Lt. Thomasson again earned the highest praise from Commander Feeks, who called him "an excellent tactical pilot" who is "exceptionally cool under pressure and exhibits the maturity of a much more senior officer." At this time, Lt. Thomasson was the only junior officer in the command selected to fill a department head position. According to Commander Feeks, "Lt. Thomasson continues to amaze -- there's literally nothing he cannot do." *Id.* at 0364 (emphasis in original).

72. At the conclusion of this overseas deployment (1990), Lt. Thomasson was awarded the "Navy Achievement Medal" by the Commander of the United States Seventh Fleet for outstanding performance as Head of the Tactics Department. Id. at 0381.

73. Lt. Thomasson was later selected from over 200 officers as the Navy League's 1990 "Junior Officer of the Year" for Moffett Field. Id. at 0382.

74. In his final eight months at Moffett Field (1990-91), Lt. Thomasson impressed his new commanding officer, Commander P.E. Hallowell, as "without a doubt, the most talented Junior Officer I have ever known." Commander Hallowell reported that Lt. Thomasson "has contributed more than any other individual to the spectacular achievements of this squadron." Lt. Thomasson was, in Commander Hallowell's view, "the squadron's preeminent tactical pilot" with "the most comprehensive understanding of the 'tactical picture' that I have witnessed," thereby becoming Commander Hallowell's "first choice for numerous high-visibility missions, VIP flights, exercises, and aircraft transfers." Id. at 0366.

75. During his assignment to the Joint Chiefs of Staff intern program (1991-92), Lt. Thomasson reported to Air Force Brigadier General C.V. Jones and Navy Rear Admiral Alexander J. Krekich. In his review, General Jones wrote that Lt. Thomasson was "one of the most professional interns I have observed during my two years on the Joint Staff, and is one of the best junior officers I have ever had the pleasure to command." Recognizing that Lt. Thomasson's duties had been identical to those of Navy captain-level officers, General Jones commended Lt. Thomasson as "articulate, dynamic and innovative," and concluded that he "is ready now for promotion to Lieutenant Commander." Id. at 0369.

76. Admiral Krekich similarly described Lt. Thomasson as "a super star -- one of

the Navy's future leaders" and "without a doubt . . . the top intern among a group of superlative junior officers assigned to the Joint Staff." In a handwritten note, Admiral Krekich added, "I would personally seek him out to serve with me again! Outstanding 'Flag Lieutenant' & 3 or 4 star material. Groom early." Id. at 0373 (emphasis in original).

77. At the conclusion of this JCS internship (1992), Admiral Krekich wrote that Lt. Thomasson was "ready for promotion to Lieutenant Commander now." Noting that Lt. Thomasson "stands out as a truly remarkable performer among a group noted for excellence," he stated that Lt. Thomasson performed "the work of a Commander and compete[d] toe-to-toe with them daily." Admiral Krekich concluded that Lt. Thomasson was "a true superstar, clearly ahead of his peers," and "a superb . . . complete officer." Id. at 0371 (emphasis in original).

78. While serving at the JCS, Lt. Thomasson was picked for his "excellent knowledge and outstanding military bearing" to prepare General Powell for Congressional testimony, and thereafter, he was awarded the Joint Service Commendation Medal for his "superlative performance" in that role. At the completion of his service with the JCS, Lt. Thomasson received a personal letter from General Powell thanking him for "contribut[ing] immeasurably to the success of the Joint Chiefs of Staff during a critical period in the Nation's history." "As a result of your efforts," General Powell wrote, "the Chiefs and I were better able to carry out our responsibility of providing military advice to the President and the Secretary of Defense." Id. at 0393.

79. Lt. Thomasson's recent assignment with BUPERS (1992-93) has elicited similar commendations. He received a particularly outstanding review from Admiral Gunn, for whom he worked directly as Administrative Assistant, who described him as "[o]ne of the two best [lieutenants] I have seen, ever! My top pick for early selection to [lieutenant commander]." Praising

every aspect of Lt. Thomasson's performance, Admiral Gunn called him "a winner who will continue to be a front runner in the Navy of the future." Id. at 0377 (emphasis in original).

80. After fourteen months of Lt. Thomasson's service under his supervision (1992-93), Admiral Gunn concluded that "Lieutenant Thomasson is a man of action and a true 'front runner' who should be groomed for the most senior leadership in tomorrow's Navy. In the meantime, if you are in your right mind, you want Paul Thomasson working for you." Lt. Thomasson earned Admiral Gunn's "strongest possible recommendation for immediate promotion to Lieutenant Commander (he should be the very first among his peers to be selected for promotion), operational command at the earliest opportunity. . . . Lt. Thomasson has genuine flag potential." Id. at 0379 (emphasis in original).

81. Even after learning that Lt. Thomasson is gay, Admiral Gunn agreed to submit a supportive declaration for submission to his Board of Inquiry. He wrote that Lt. Thomasson "contributed to my success and that of my department to a degree that is far beyond what would normally be expected of an officer of his age and seniority. His judgment and good sense are far beyond his years and he applied his multiple talents in his work and in support of the Navy outside of the workplace." IV Rec. T2F at 0523.

82. In Lt. Thomasson's second-most recent fitness report (1993-94), Admiral Ryan, who succeeded Admiral Gunn as PERS-5, again recommended him for accelerated promotion to lieutenant commander, for operational aviation command, and for "assignment to only the most challenging billets." Admiral Ryan reported that Lt. Thomasson's performance "continues to be singularly outstanding" and that his "capacity for work is unlimited." By demonstrating "superior abilities and strong moral character," Lt. Thomasson earned Admiral Ryan's "complete trust and

confidence." The Admiral further noted that "Lt. Thomasson's stellar performance is underscored by pride, personal involvement, and commitment" and, in a handwritten note, he concluded that "Paul is as well-rounded and competent as any [lieutenant] in the Navy. Has flag potential." III Rec. T1A at 0395 (emphasis in original).

83. Lt. Thomasson's performance and the performance of his unit have not diminished in any respect since he first acknowledged that he is gay on March 2, 1994, and since that time, Lt. Thomasson has received nothing but the utmost support from his seniors and juniors alike. See PSJ Ex. G, ¶¶ 6-8 (Plaintiff's Decl.); PSJ Ex. H-M. In fact, after learning that Lt. Thomasson is gay, Admiral Konetzni, the Admiral for whom Lt. Thomasson currently serves, actually increased his responsibilities by putting him in charge of administering the Navy's Selective Early Retirement ("SER") Boards for Fiscal Year 1995 -- a duty with a wide-ranging impact on the careers of men and women throughout the Navy. See id. ¶ 7.

84. According to Admiral Konetzni, Lt. Thomasson's performance in this important task, and throughout the past year, has remained outstanding. In a fitness report that he submitted on February 28, 1995, the day after Lt. Thomasson filed this action, Admiral Konetzni rated Lt. Thomasson's performance an "A" in all applicable categories -- the highest possible rating. See PSJ Ex. A (fitness report covering February 1, 1994 through January 31, 1995). In his written comments, Admiral Konetzni stated that:

Lieutenant Thomasson is a superb young officer who has contributed significantly to the success of this organization and of the Navy. Meets every challenge with unrivaled ability, superb judgment, and unique vision. Volunteers for everything.

Id. (emphasis in original).

85. In addition, in a direct refutation of any possible suggestion that

Lt. Thomasson's sexual orientation has had any deleterious affect on his unit or other servicemembers, Admiral Konetzni -- whose fitness report does not even mention the fact that Lt. Thomasson is gay -- observed that the Lieutenant "[c]ommands the respect of his subordinates and seniors alike through honesty, integrity, and forthright communication. Clearly on the fast-track to success in this, or any, organization." Id. (emphasis in original).

86. Admiral Konetzni's fitness report further describes and commends Lt. Thomasson's performance in four specific areas. For example, the report notes that Lt. Thomasson was the Admiral's own choice to coordinate the entire 1995 SER Board process and that he "[p]erformed magnificently in this extremely high-visibility and high-risk assignment" to the point that it was "lauded by senior Navy leadership as the best-run SER process to date." Id.

87. Similarly, Admiral Konetzni noted that, as his own personal Administrative Assistant, Lt. Thomasson "kept me on-track and solved problems quickly;" the Admiral "trusted [him] implicitly to have the right answer, the first time." Id. Admiral Konetzni also noted that Lt. Thomasson was "[r]equested by name to produce the Chief of Naval Personnel's written statement for Congressional testimony" and that he "once again set [a] new standard for style and presentation." Id.

88. In closing, Admiral Konetzni stated that:

Lieutenant Thomasson is one of the finest young officers I have ever had the pleasure to serve with. Clearly ready now for positions of increased responsibility. His contributions to the Navy and BUPERS have been exceptional. He should be a first choice for Lieutenant Commander! For his sustained superb performance, he has earned my strongest possible recommendation for command ahead of his peers, service college selection, and joint duty. Continue to challenge him with the most difficult assignments, he will excel!

Id. (emphasis in original).

89. All of those who have served directly with Lt. Thomasson over the past year, either as his direct superiors or subordinates, have similarly praised his performance and abilities and indicated their continued willingness to serve with him. For example, Senior Chief Yeoman James McGuffin, a 21-year enlisted man with extensive overseas and shipboard experience, has stated that Lt. Thomasson is "the consummate military professional." PSJ Ex. K, ¶ 4. "In all dealings, with the most junior of personnel to flag officers, Lt. Thomasson always maintains outstanding professionalism." Id. In fact, Senior Chief McGuffin "consider[s] [him]self fortunate to have worked with [Lt. Thomasson] and [he] would volunteer any time to work for him again, whether it be on shore or at sea. The military needs fine young naval officers of Lt. Thomasson's caliber." Id.

90. Like Senior Chief McGuffin, Petty Officer James Broughton, who also has served directly with Lt. Thomasson over the past year, has admitted that he was "shocked" when Lt. Thomasson first told him that he is gay. PSJ Ex. H, ¶ 5; see also PSJ Ex. K, ¶ 4 (McGuffin Decl.) (admitting same). However, Petty Officer Broughton "decided to stick with the decision [he] had made prior to knowing of Lt. Thomasson's disclosure" to volunteer to work in Lt. Thomasson's office, and now he is "glad [he] did." PSJ Ex. H, ¶ 5. According to Petty Officer Broughton, the knowledge that he has gained in computers from Lt. Thomasson "is invaluable," and he is "now considering a career change in computers." Id. In sum, Petty Officer Broughton has observed that Lt. Thomasson "was always professional towards me;" in his opinion:

[Lt. Thomasson] is the best [lieutenant] in the Navy. . . . His sexual orientation [has] had no adverse effect on myself or to the Navy. With so few good naval officers, the Navy should definitely keep LT. PAUL THOMASSON.

Id.

91. Commander Thomas Lisowski, an Annapolis graduate and surface warfare officer with over 19 years of Navy experience, has served on six Navy ships. He too has stated that Lt. Thomasson "has not had an adverse effect within the division;" on the contrary, he is extraordinarily bright and cheerful and a definite asset to the division." PSJ Ex. J, ¶ 4(a) (emphasis added). Commander Lisowski "would be willing to serve with Lt. Thomasson at any duty station in the United States Navy." Id. ¶ 4(b). In his estimation:

[Lt. Thomasson] defines what a Navy Officer should be: Hardworking, devoted, clearly defined sense of goals with a clear focus and a personality that overcomes all obstacles without allowing the inevitable setbacks to disturb his overall cheerful outlook on life.

Id. ¶ 4(c). Indeed, Commander Lisowski "specifically asked for [Lt. Thomasson] to work with [his] division" after Lt. Thomasson disclosed his sexual orientation because, as he put it, he "had a definite need for [Lt. Thomasson's skills]," and Lt. Thomasson has been "singularly successful" in the work that he has performed for Commander Lisowski. Id. ¶¶ 5, 4(c).

92. Chief Petty Officer Jackie Rochefort has served on active duty in the Navy for 16 years. She has had overseas assignments, "stateside shore-tours at major commands," and four sea tours. PSJ Ex. L, ¶ 3. She too compliments Lt. Thomasson for leadership that "is exemplary in all respects" and for "training of the troops" that "far exceeds any other officers that [she has] served with [in] her career." Id. ¶ 4. Like Lt. Thomasson's other current colleagues, Chief Petty Officer Rochefort claims that Lt. Thomasson's sexual orientation "has had no adverse effect on [her] or [her] division," and she "would be honored to serve again with Lt. Thomasson, any time, anywhere." Id. ¶ 6. In fact, she notes that she has "served with other personnel on board ships and at shore bases who are gay," and she has found that sexual orientation "has nothing to do with the quality of the individual's job performance." Id.

93. Petty Officer Lois Johnson, who has also served with Lt. Thomasson during the past year, has similarly complimented his skills and attitude and notes the irrelevance of his sexual orientation. As she explains:

When I look at Lt. Thomasson I see an exemplary naval officer. My eyes don't go beyond into his orientation. My concerns are that the individual maintains [his] military bearing, and I can count on [him] to be a leader during peace time and time of war. I have the utmost respect for Lt. Thomasson no matter what his orientation is.

PSJ Ex. I, ¶ 5 (emphasis in original).

94. Lt. Thomasson's homosexuality is likewise "of no concern" to Commander Ann Stewart, who has served in the Navy for 17 years and who heads Lt. Thomasson's division today. PSJ Ex. M, ¶ 3. According to Commander Stewart, she was "completely impressed with [Lt. Thomasson's] professionalism, intellect and work ethic" from the first day that she met him, and she has "never had the opportunity to have such a talented officer work for [her]." Id. ¶ 4 (emphasis in original).

95. Commander Stewart flatly rejects the notion that Lt. Thomasson's sexual orientation has had any disruptive effect on the morale or performance of her unit:

More impressive than Lt. Thomasson's technical skills are his exceptional leadership qualities. During the time I have had the opportunity to observe Lt. Thomasson and his interaction with superiors, co-workers, and subordinates, he has demonstrated absolute dedication to duty, and exceptional ability to teach and motivate subordinates toward improving their technical and leadership abilities, and unquestionable loyalty to the Navy and the mission at hand. Lt. Thomasson selflessly devoted hundreds of hours above and beyond what would normally be expected to ensure the selective early retirement [process] was totally accurate, completely fair and conducted in absolute confidentiality.

Lt. Thomasson's sexual orientation never had any impact on his or his unit's performance on the job. I would welcome the opportunity to serve with Lt. Thomasson in any environment including foreign shore or sea duty,

because of my complete confidence in his professional ability and the positive influence he has had on the professional conduct of my unit's mission. I have personally observed Lt. Thomasson's extraordinary leadership and technical skills throughout my association with him during my assignment at the Bureau of Naval Personnel. He is an exceptionally competent officer.

There is no question in my mind that Lt. Thomasson could continue to serve the Navy, indeed the Navy needs people of Lt. Thomasson's capability, as an openly gay officer. I sincerely believe that knowledge of his individual worth and what he can contribute to the benefit of the Navy will surpass any reservations people may harbor regarding his sexual orientation. Lt. Thomasson is a respected professional in my division and I look forward to continuing to work with him.

Id. ¶¶ 5-7 (emphasis in original).

E. THE ADMINISTRATIVE DISCHARGE PROCEEDINGS

96. The Board of Inquiry convened to hear the evidence in Lt. Thomasson's case on May 23 and 24, 1994.

97. The Navy presented no evidence to the Board of any homosexual acts or any other forbidden conduct on the part of Lt. Thomasson. Nor did the Navy present any evidence of any incapacity or inability on the part of Lt. Thomasson. See I Rec. Tr.

98. The Navy proceeded against Lt. Thomasson solely on the basis of his statements that he is gay.

99. The only evidence that the Navy submitted regarding Lt. Thomasson's homosexuality were (a) his March 2 letter, and subsequent verbal confirmations, in which he stated that he is gay, (b) testimony about the existence of a "pink triangle" bumpersticker on his car, (c) testimony that he and his colleagues shared a cake, which his colleagues purchased for him, in acknowledgment of his "coming out," and (d) his membership in the Gay Men's Chorus of

Washington. See id.

100. The only witness that the Navy called before the Board was Rear Admiral Konetzni, who testified about receiving Lt. Thomasson's March 2 letter and about subsequently initiating the discharge proceedings.

101. On direct examination, Admiral Konetzni further testified that he did not reassign Lt. Thomasson after learning that he is gay, in part because he had read the RAND report and in part because he concluded that it would be unproductive to do so. Id. at 0047.

102. Admiral Konetzni stated that Lt. Thomasson "was a 4.0 performer. He was before he admitted his homosexuality, and he certainly was afterwards." Id.

103. On cross examination, the Admiral described Lt. Thomasson as "very honest," "a real professional," and "one of the finest young Lieutenants I've seen," and he stated that he had seen no change in the performance of his branch since Lt. Thomasson's announcement. Id. at 0049-50.

104. Admiral Konetzni also testified that he believed that Lt. Thomasson's acknowledgment of his sexual orientation was, for him, "an act of conscience" and "a moral thing to do." The Admiral stated:

I think that, as best as I could put it together, that he had this dilemma, and that was that he wanted to let the world know what he was, what he was. And I think that weighed upon him.

Id. at 0049.

105. After the Navy concluded its case, Lt. Thomasson put three additional witnesses on the stand: Commander George Hill, Lt. James Eisenzimmer, and Petty Officer Jack Trumbull.

106. Commander Hill was Lt. Thomasson's instructor pilot and supervisor in VP-9. He testified that Lt. Thomasson was "easily the best branch officer" in the squadron, who was very effective in commanding the respect of his subordinates. According to Commander Hill, Lt. Thomasson "had an ability to engender a cohesiveness of the unit and to get the people to feel that he cared about their well being, their professional development, and to focus them on the goals of the squadron." Id. at 0064.

107. Commander Hill, who later served as the Navy's Chief Test Pilot, further testified that Lt. Thomasson is "a good pilot" who he has "every confidence . . . can do whatever he is required to do as a pilot." Id. at 0063.

108. Drawing upon the experience of directly training and supervising "hundreds, perhaps thousands" of Navy lieutenants during the course of his career, Commander Hill testified that he considers Lt. Thomasson among the top five lieutenants that he has ever encountered. He stated that Lt. Thomasson's "extremely strong capabilities" afforded him "absolutely unlimited" potential in the Navy. Id. at 0063-64.

109. Lt. James Eisenzimmer, who has served at both Moffett Field and BUPERS simultaneously with Lt. Thomasson, similarly testified about a long-held respect for Lt. Thomasson.

110. Lt. Eisenzimmer testified that he first encountered Lt. Thomasson by reputation when the latter's squadron competed against his in the Moffett Field "Tactics Bowl," a competition that pits the tactics ability of various squadrons against each other. According to Lt. Eisenzimmer, Lt. Thomasson was viewed as "definitely the front runner in his squadron, because the wing commander knew . . . [his] work. . . . [Y]ou don't get that kind of rapport with a wing commander unless you're a professional . . . unless you've done some great things for the wing." Id.

at 0078-79.

111. At the time of the discharge hearing, Lts. Eisenzimmer and Thomasson worked together on a regular basis. Lt. Eisenzimmer testified that Lt. Thomasson's performance was widely regarded as "top notch. He's always doing the greatest job. . . . I work with or see the work of a lot of good officers, and I would rate Paul up there among the best. I mean top half-percent of all officers in the Navy." Id. at 0081.

112. Lt. Eisenzimmer further testified that his high regard for Lt. Thomasson was not affected by Lt. Thomasson's statements that he is gay. "I was surprised," he testified, "but I had no great reaction to it. I really didn't think about it that much after that." Others reacted similarly, according to Lt. Eisenzimmer; "It was just, 'Oh, gee, Paul's come out.' And it was an issue for a couple of days. . . ." Id. at 0086.

113. Lt. Eisenzimmer also testified that Lt. Thomasson's morale generally improved after he was open about his sexual orientation, and his professionalism as an officer was not compromised. As a former enlisted man who has served at sea, Lt. Eisenzimmer said that he would not hesitate to serve under Lt. Thomasson's command. He stated that "Lieutenant Thomasson will never do anything to disrespect the Navy uniform. . . . I just know Lieutenant Thomasson would never do anything to bring disrespect on himself and therefore would never give a junior an opportunity to dislike him because of his stature." Id. at 0085, 0088-89.

114. Petty Officer Jack Trumbull testified that he had worked in the same office at BUPERS, under the direction of Lt. Thomasson, for two years. He described Lt. Thomasson's performance in the office as "superb. As soon as he came to our office, you could notice the impact right away," in improving office efficiency. He testified that Lt. Thomasson effectively commanded

the respect of subordinates before he publicly stated his sexual orientation and Trumbull's respect for him as an officer has not changed since. Id. at 0095-97.

115. Petty Officer Trumbull stated that he was "shocked" to learn that Lt. Thomasson was gay and that, by virtue of his upbringing, he "really didn't think that there was a place for homosexuals in the Navy [b]ecause [he] didn't know a homosexual." However, he explained that Lt. Thomasson's revelation had an effect on his views:

I fell a victim to the stereotypes . . . just like certain races have stereotypes And now that I know Lieutenant Thomasson, once he's told me that he was homosexual, then my opinion . . . automatically changed. . . . [I]f he as a homosexual can perform the way he has in the past two years, I don't see any reason any other homosexual couldn't do the same.

Id. at 0097.

116. Petty Officer Trumbull further testified that Lt. Thomasson's openness about his sexual orientation would not prevent him from effectively commanding the respect of other subordinates:

[I]t's always going to be an uphill battle. Once you get to know how Lieutenant Thomasson is and you see how smart he is and you see how he does his job, it should be no problem afterwards. It is always going to be an uphill battle like when blacks first came in and women first came in the pioneers of it -- you know it's always an uphill battle, until they establish themselves.

Id. at 0098.

117. Eleven more of Lt. Thomasson's military and civilian colleagues -- spanning a broad range of positions, ranks, and personal backgrounds -- voluntarily submitted written testimony to the Board. These witnesses uniformly commended Lt. Thomasson's talents and performance and stated that they believed that his continued ability to perform and lead would be unaffected by his acknowledgment that he is gay. In fact, several indicated that the courage and honesty that he had

displayed by his decision to risk his career to do what he believed to be right earned him even greater respect. See IV Rec. T2B-T2L.

118. Admiral Gunn, who had worked on a daily basis with Lt. Thomasson before his announcement, indicated that Lt. Thomasson's performance remained excellent after the announcement. Referring to Lt. Thomasson's performance during a time period that spanned several months after he had acknowledged his homosexuality, Admiral Gunn wrote:

I had many opportunities to observe his work and, in fact many of the projects on which he worked were tied closely to those in my present role. It is my opinion the level and quality of his performance remained high. He continued to do a superb job during a period of great adjustment in the focus and size of the Navy.

IV Rec. T2F at 0524.

119. Commander Kristopher Don Kirk, who worked with Lt. Thomasson at both the JCS and BUPERS, noted that, although Lt. Thomasson's announcement "came as a surprise," there was "no adverse [e]ffect on office morale or daily routine," and he had "no problem continuing to work with Lieutenant Thomasson." Commander Kirk stated that, although some subordinates and seniors might react negatively toward Lt. Thomasson because he is gay, he "put those problems in the same category as race discrimination. If I were his superior, I would expect the same from Lt. Thomasson as I would from any subordinate." IV Rec. T2G at 0525.

120. At the time of her testimony, Lieutenant Commander Ellen S. Bristow, a manpower analyst on the staff of the Chief of Naval Operations, had worked daily with Lt. Thomasson since August 1992. She testified that Lt. Thomasson was "a consistently professional, conscientious, dedicated naval officer. His behavior was always appropriate." IV Rec. T2D at 0521.

121. Lieutenant Commander Bristow further reported that, "[o]ther than giving us

a new topic for discussion, there has been no change in the work environment since [Lt. Thomasson's] orientation announcement. I have detected no change in morale. My work relationship with Lieutenant Thomasson has not changed, nor have I noticed any change in his relationships with others." On the issue of Lt. Thomasson's relationship with subordinates after his "coming out," Lieutenant Commander Bristow found that Lt. Thomasson's "announcement does not appear to have affected his ability to command respect from [his subordinates]." Id.

122. Lieutenant Commander Tremont V. Parrino, M.D., a radiologist at the Naval Hospital, interacted with Lt. Thomasson while working as a flight surgeon for VP-9. He testified that Lt. Thomasson "established himself as a great officer and as an invaluable asset to the squadron," demonstrating "uncommon initiative, maturity, professionalism, and the rare ability to earn, and maintain, the respect of the enlisted personnel, his peers, and the senior officers." IV Rec. T2J at 0930.

123. Lt. Philip D. Brandt, who graduated from the U.S. Naval Academy and then served alongside Lt. Thomasson in VP-9, the JCS, and BUPERS, testified in glowing terms about Lt. Thomasson's tenure at VP-9. Lt. Brandt stated that Lt. Thomasson's "knowledge of every aspect of the squadron was unmatched, and everyone knew it." Viewing Lt. Thomasson as "a stand out among his professional peers," Lt. Brandt said that "[a]t times I even held a mild professional jealousy of his work ethic and ability to deal rationally with seemingly everyone up and down the chain of command." Lt. Brandt also indicated a healthy respect for Lt. Thomasson's relationship with his subordinates, remembering that he "could never match [Lt. Thomasson's] patience with squadron personnel. . . . His uncanny ability to find practical, rational approaches to problems made him extremely well-liked by enlisted members who sought counselling. He was recognized as a

level-headed officer who cared for the 'troops', and I believe he garnered greater respect from the enlisted ranks than any other officer in the squadron." IV Rec. T2C at 0519-20.

124. Lt. Brandt, whose career has tracked Lt. Thomasson's, testified that his "ability to work with [Lt. Thomasson] in the cockpit of an aircraft under any conditions remains unimpaired by this revelation. . . . As a patrol plane commander and mission commander, I want that type of person flying with me. In an operational environment, personal characteristics such as sexual orientation, religious affiliation, and right- or left-handedness are non-issues." Lt. Brandt also indicated that his respect for Lt. Thomasson was, in fact, bolstered by Lt. Thomasson's decision to "come out." He stated:

Moral courage is one of the hallmarks of the Naval profession that was dwelled on continuously during my four years at Annapolis. It is ironic that Lt. Thomasson, who did not attend that institution, displays the greatest level of moral courage that I have ever seen, and that it's for such courage that he risks separation from the Navy. . . . To dismiss this model officer, who has worked so hard for his country and who has never displayed an ounce of dishonorable or even questionable conduct, would seem to be a great disservice to Lt. Thomasson and to the Navy.

Id. at 0520.

125. Senior Chief Petty Officer Philip W. Anderson reported to BUPERS in August 1992 and worked with Lt. Thomasson thereafter. He testified that he quickly "developed a respect for [Lt. Thomasson] based on his sharp appearance, professional attitude, apparent managerial and computer skills, and ability to get the job done. . . . Never during the period that I have known Lt. Thomasson have I had occasion to question his loyalty, professionalism, or conduct." IV Rec. T2B at 0517.

126. Senior Chief Petty Officer Anderson, who indicated a strongly held religious belief that homosexual sex is "abnormal, immoral behavior," nonetheless wrote that

"Lt. Thomasson's sexual preference has nothing to do with me or with our professional relationship." He further reported that there were some initial jokes among the staff after Lt. Thomasson's announcement, but "people didn't really pay much attention after a few days and things, to me, appeared back to normal. There didn't seem to be any negative impact on morale as a result of his announcement." He further noted that Lt. Thomasson's announcement "did not have any impact whatsoever on my ability to work with him," and Lt. Thomasson "was just as professional and militarily correct as ever." Id.

127. Chief Yeoman Wade Morgan Stephens was assigned to BUPERS in August 1993 and has known Lt. Thomasson since that time. Chief Stephens has given eleven years of service, including two sea tours and one overseas tour of duty. He described Lt. Thomasson's performance before and after his announcement as "professional" and "beyond reproach." Despite a desire not to complicate life at sea "nor enforce new policies unpopular to my troops," Chief Stephens supported without reservation Lt. Thomasson's retention and stated his belief that subordinates will follow orders as trained and that Lt. Thomasson, "given time," would win complete acceptance from his subordinates. IV Rec. T2L at 0534.

128. At the time of his testimony, Yeoman Second Class William Goins, Lead Petty Officer in the secretariat for the Chief of Naval Personnel, had worked with Lt. Thomasson on a daily basis since November 1992. He recalled his interaction with Lt. Thomasson as "very professional. His conduct was of the highest caliber. He conducted himself with pride and dignity and all the qualities desired in a Naval Officer." IV Rec. T2E at 0522.

129. Petty Officer Goins reported that Lt. Thomasson's announcement had no effect on their interaction. He further testified that Lt. Thomasson's command effectiveness was not

impaired:

The announcement of Lt. Thomasson's orientation was a shock to myself and my crew. I was able to continue to work with Lieutenant Thomasson with no problems or hesitation. I believe the same could be said for my crew for they have not expressed any displeasure or discomfort in working with Lt. Thomasson.

I, personally, give Lt. Thomasson the same respect and loyalty that I demand of myself for all officers appointed above. I would have no problem or hesitation in working with or for Lt. Thomasson in any capacity, regardless of his position. . . .

Id.

130. At the time of his testimony, Yeoman Third Class Emmett O'Meara worked in the Chief of Naval Personnel's secretariat. He offered an enlisted man's view that Lt. Thomasson "has a talent that many other officers, and enlisted, could learn from." According to Petty Officer O'Meara, Lt. Thomasson's willingness to show personality while maintaining professionalism "lifts the morale of the office when he enters which in turn lifts the production level of our office. Sounds like a good leadership skill to me." IV Rec. T2I at 0528.

131. Petty Officer O'Meara, a self-described "26 year old white heterosexual male of conservative upbringing in a Catholic home," was "surprised" to learn that Lt. Thomasson is gay but testified that their interactions have not been affected and that Lt. Thomasson still commands respect. Further, Petty Officer O'Meara noted that Lt. Thomasson "still conducts himself in a very professional manner and even seems to be happier because now there is no mask involved." Petty Officer O'Meara also said that he admired and respected the "intestinal fortitude [that Lt. Thomasson] is displaying to do what he believes. . . . Because of what he is willing to put himself through it indicates to me that the Navy is fortunate to have him and would be even more fortunate to keep him!" Id. at 0528-29.

132. Richard John Mazur is a former Petty Officer and current civilian who

worked in BUPERS as a computer systems analyst for 13 years. He had worked in the next office from Lt. Thomasson since May 1992. He recalled a "change of attitudes in the front office that occurred immediately after Paul reported on board. The attitudes of the military staff and the interaction with civilian personnel became much more professional and the development of the military staff was promoted. . . . In my opinion, Paul Thomasson will be missed more by this division more than any other military person who has departed before him." IV Rec. T2H at 0526.

133. Mr. Mazur recalled no change in Lt. Thomasson's performance or "any lessening of respect by junior personnel towards him or his rank" after Lt. Thomasson's announcement. According to Mazur, the performance of the division "has improved from very good to almost perfect." Mazur testified, "In regards to military manners and professionalism, I do not feel Lt. Thomasson has an equal in [the division]. Having been in the Navy for over 4 years I would have been proud to have worked for this [lieutenant]. If you want an example of a superior Junior officer I will say you have to look no further than Paul Thomasson." Id. at 0527.

134. Ms. Pamela Staples Piasecki is a civilian who has worked with the Navy since 1980 and who is now assigned as a Management Analyst in BUPERS. She described Lt. Thomasson as "highly intelligent, efficient, a no nonsense and straight to the point type of officer" with "strong organizational skills" and breadth of knowledge with capability unmatched in the 10 years that she has worked in her current position. IV Rec. T2K at 0532.

135. Ms. Piasecki testified that the performance of Lt. Thomasson and the division has not been affected by his announcement, and she now has an even higher opinion of him:

To openly admit his homosexuality when he has so much to lose by his admittance, must have taken a great deal of courage. I can only imagine the amount of soul searching and despair he must have felt while making the decision to come out publicly. I feel that I am not alone in this belief. Not

only in this division, but throughout the entire building, I have heard everyone voice the same sentiments I have. One word stands out each time -- COURAGE.

Id.

136. Notwithstanding the foregoing, entirely unrebutted evidence of Lt. Thomasson's outstanding abilities, character, and record, the Board of Inquiry unanimously concluded that Lt. Thomasson should be discharged because he "ha[d] failed to demonstrate acceptable qualities of leadership . . . as evidenced by [his] statements [that he is a homosexual]." I Rec. B.

137. The Board also reached this conclusion despite Lt. Thomasson's own testimony about his reasons for disclosing his sexual orientation. Lt. Thomasson explained that he spoke up because he has done well in the Navy and is known personally by the very Admirals who have been charged with implementing the new "Don't Ask, Don't Tell, Don't Pursue" policy, and he concluded that "there could be few in a better position than [he] to help change the stereotypes and ignorance that ha[ve] created [the policy]." IV Rec. T2A at 0512. In addition, Lt. Thomasson stated that he felt that "everything the Navy itself had taught [him] -- honesty, courage, and personal integrity -- demanded that [he] stand up, in [his] own small way, to set the record straight." Id.

138. The Board also reached its conclusion despite the considerable and unrebutted expert testimony that Lt. Thomasson submitted.

139. For example, Lt. Thomasson submitted copies of six studies -- all of which have been commissioned over the years by the United States government itself -- on the subject of homosexuality in the military. See VI Rec. T4A-T4F. Each of these studies flatly disputes prevailing stereotypes and concludes that the available empirical evidence does not support the

general notion that homosexuals cannot serve honorably in the military. Each strongly questions the wisdom of maintaining a policy that excludes or discharges servicemembers solely on the basis of their sexual orientation. See id.

140. In addition, Lt. Thomasson submitted declarations from four expert witnesses: (a) Dr. Lawrence Korb, (b) Dr. Gregory Herek, (c) Dr. Lois Shawver, and (d) Dr. Robert Rankin. See V Rec. T3A-T3D.

141. Dr. Korb, who was Assistant Secretary of Defense during the first Reagan Administration, authored the nation's first uniform policy on military service by homosexuals, which was implemented in 1982. Dr. Korb testified that neither the policy that he wrote nor the current policy can rationally be applied to authorize the discharge of a servicemember solely on the basis of a statement that he or she is a homosexual. See V Rec. T3D, ¶¶ 7-11. In addition, Dr. Korb testified that there is no longer any rational justification for the military's ban against service by homosexuals, and he disputed the validity of each and every one of the rationales that historically has been advanced to defend the ban. See id., ¶¶ 12-27.

142. Dr. Herek -- who has devoted his career to the study of human sexuality, gender, and social attitudes about sexuality and gender -- testified that one's "psychological identity" as a homosexual or heterosexual "does not necessarily permit assumptions about his past or current sexual behavior, his propensity for future sexual behavior, or even his pattern of psychological attractions." V Rec. T3A, ¶ 5. Dr. Herek stated that an individual's sexual behavior may or may not correspond with (a) how he identifies himself to the public, (b) how he personally and privately thinks of himself, or (c) his psychological attractions or sexual desires. See id., ¶¶ 2-10. Dr. Herek also testified that the available empirical evidence contradicts many crude assumptions about

homosexuals and their abilities. See id., ¶¶ 11-28.

143. Dr. Lois Shawver is a clinical psychologist and an expert in the field of human sexuality. She has studied social attitudes toward sexuality and bodily modesty in a number of contexts, and her research has led to conclusions largely similar to Dr. Herek's. See V Rec. T3C.

144. Dr. Robert Rankin is an Associate Professor of Psychiatry and a retired Navy Captain with approximately 21 years of military service. He has served as a commanding medical officer on numerous ships and in numerous contexts, both peaceful and hostile. He testified that, in his experience, "homosexual servicemembers were some of the most effective and patriotic that I knew." V Rec. T3B, ¶ 9. He further stated that the knowledge that some fellow crew members were homosexual was widely held in the Navy and, in his experience, that fact "never caused any heterosexual servicemembers any anxiety nor did it interfere with their ability to perform the military mission." Id., ¶ 5. Dr. Rankin also disputed numerous stereotypical assumptions about gay and lesbian servicemembers and stated that, to the extent that they sought counseling from him, it was in order to deal with the pressure of serving under the military's own policy, and not to deal with any conflicts with their fellow servicemembers. See id., ¶ 3-4, 6-17.

145. Notwithstanding the foregoing, entirely unrebutted testimony, the Board of Inquiry concluded that Lt. Thomasson's statements indicated that he engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

146. The Board of Inquiry thus recommended Lt. Thomasson's involuntary discharge. The Board of Review concurred in that recommendation, and Defendant Dalton subsequently accepted that recommendation.

147. Defendant Dalton's decision to discharge Lt. Thomasson is final, and

Lt. Thomasson will be discharged unless this Court issues a countervailing order.

F. THE BASIS FOR HEIGHTENED SCRUTINY

148. Over the years, the Supreme Court has articulated five factors to consider in determining whether a particular legal classification is inherently suspect and therefore subject to heightened constitutional scrutiny. According to these five factors, laws that disadvantage a particular class or group of citizens merit heightened scrutiny when the group at issue:

- (a) has suffered a history of purposeful unequal treatment;
- (b) is defined by a characteristic that frequently bears no relation to the group's ability to perform or to contribute to society;
- (c) is defined by an immutable characteristic;
- (d) has been saddled with disabilities and is disadvantaged purely on the basis of prejudice and gross or inaccurate stereotypes; and/or
- (e) has been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

An examination of these five factors as applied to gay and lesbian Americans indicates that they are entitled to heightened constitutional scrutiny.

1. A History of Purposeful Unequal Treatment

149. As explained by Professor Michael S. Sherry -- who is perhaps the nation's leading historian to have expertise in both military history and the history of homosexuality in America -- the proposition that "gay and lesbian Americans have suffered a history of purposeful unequal treatment that continues through the present day" is "overwhelmingly supported by the historical record." PSJ Ex. Q, ¶ 2. In fact, this conclusion "is widely shared, generally accepted, and not controversial among qualified historians who have studied the subject." *Id.* ¶ 46.

150. Professor Sherry has traced the history of the treatment of homosexuals throughout American society and in the military context in particular. He explains that, as "[t]he concept of homosexual personhood -- which recognizes homosexual orientation as an aspect of identity," has developed over the years, legal classifications and regimes have steadily moved away from targeting homosexuals' sexual conduct, which some have historically perceived as deviant, toward targeting homosexuals *per se* as a class of persons. Id. ¶ 18; see also id. ¶¶ 16-45.

151. Professor Sherry notes that "[t]he institutional leader" in the formulation of a nationwide, federal policy against homosexuals *per se* "was -- and always has been -- the armed forces," and he notes that the military first formulated its discriminatory and exclusionary policy toward homosexuals during World War II. Id. ¶ 23.

152. The rationales that have been advanced to justify this exclusionary policy have not been consistent over time. The initial rationale -- that homosexuals are inherently weak, unstable, and unfit -- was gradually discredited. Likewise, the view that homosexuals have dubious loyalties and pose an inherent security risk rose to the fore but has since been discredited. Today, the military advances a "unit cohesion" rationale, which notably focuses not on any perceived inherent inability of homosexuals but rather on the perceived discomfort of heterosexuals toward homosexuals. See id. ¶¶ 23-24, 38-45.

153. In addition to the fact that inconsistent rationales have been advanced to support the policy, Professor Sherry notes that the policy itself has been inconsistently applied. See id. ¶¶ 25-30. In particular, the military has proven willing to overlook homosexuality when faced with "manpower shortages" during times of war and national need. Id. ¶ 26; PSJ Ex. B.

154. In short, as Professor Sherry has explained, the discriminatory treatment of

homosexuals -- both throughout American society at large and in the military in particular -- is undeniable. Laws and rules that disadvantage homosexuals have increasingly targeted them for their status as homosexuals as such, and not for any specific or forbidden conduct, and these laws and rules have been enforced in a particularly capricious and arbitrary manner. See id. ¶¶ 28-36, 46.

2. The Ability of Homosexuals To Perform or Contribute to Society and the Military

155. There is no longer any dispute that homosexuality *per se* has absolutely no bearing on an individual's ability to perform or to contribute, either to society at large or to the military mission in particular. See, e.g., Pl. Sel. Dep. Exc. at Tab A, at 33, 36, 175 & Ex. 1 (Rule 30(b)(6) deposition of Assistant Secretary of Defense Edwin Dorn). Lt. Thomasson's own professional record is powerful evidence of this fact. See III Rec. T1A (Plaintiff's Complete Fitness Reports and Commendations); PSJ Ex. A (Plaintiff's most recent fitness report).

156. Indeed, as Dr. Robert Spitzer, one of the psychiatric profession's leading diagnostic experts has explained, "under the prevailing psychiatric and psychological standards in use throughout the United States today, a homosexual orientation is not (and cannot properly be regarded as) a mental illness, disease, or incapacity in any way." PSJ Ex. R, ¶ 2. As he points out, "there is no sound psychiatric or psychological evidence to support the diagnosis of a homosexual orientation as a mental disorder or pathology, and it has been the official position of the American Psychiatric Association since 1973 that sexual orientation cannot properly be a basis for drawing meaningful mental or functional distinctions, on psychiatric grounds, among different individuals or groups of citizens." Id. ¶ 11; see also id. ¶¶ 12, 14-15 & Exs. 2-4.

157. Moreover, as Professor Sherry has noted, the military's current "unit cohesion" rationale for excluding known homosexuals from service is not even premised on any

perceived inability on the part of homosexuals but rather is predicated upon the perceived discomfort of heterosexuals. See PSJ Ex. Q, ¶ 42 (Sherry Decl.). Indeed, the policy expressly concedes that "[a] member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct," as that term is defined by the policy. IV Rec. T5C at 1730 (DoD Directive No. 1332.30).

3. The Immutability of Sexual Orientation

158. Current scientific research also establishes that a homosexual orientation is an immutable characteristic. This is apparent whether one looks at the issue from a mental health standpoint or from a biological standpoint.

159. For example, Dr. Robert Spitzer has explained that "under [the mental health professions'] current professional knowledge, [one may not] properly regard a homosexual orientation, in the ordinary case, as the exercise of volition or conscious choice or as a 'sexual preference.'" PSJ Ex. R, ¶ 2. On the contrary, "the overwhelming weight of reliable, empirically based psychiatric and psychological evidence on the subject of sexual orientation points to the fact that homosexuality, in and of itself, is not a matter of individual 'sexual preference' or an exercise of free will or choice but a deeply ingrained and fundamental aspect of an individual's personality and identity." Id. ¶ 13.

160. Dr. Simon LeVay, a leading biological researcher, has explained that a similar conclusion is compelled by the current state of scientific knowledge in genetics and biology. According to Dr. LeVay, "[g]enes alone are responsible for approximately one-half of the causation of a person's orientation as homosexual, bisexual, or heterosexual." PSJ Ex. O, ¶ 42. Moreover, to the extent that sexual orientation is not entirely genetic, it appears to be influenced "by biological

processes occurring before birth" and, perhaps in part, by environmental factors occurring "within the first one or two years of life." Id. ¶¶ 7-8.

161. In his own research, Dr. LeVay has documented an undeniable structural difference between heterosexual and homosexual men in the size of a certain portion of the brain "that is believed to play a key role in male-typical sex behavior." Id. ¶ 25; see also id. ¶¶ 26-29. Another team of researchers has recently located a gene "in a particular region on the X chromosome (the so-called Xq28 region) which predisposes to homosexuality in men." Id. ¶ 21. Studies of families and twins provides further support for the inference of a genetic basis by indicating that "homosexuality runs in families." Id. ¶ 15.

162. The immutability of sexual orientation is further established by the dismal record of "conversion therapy," efforts through which various scientists and therapists over the years have attempted (often through brutal means) to "convert" homosexuals to heterosexuality. See id. ¶¶ 30-39.

163. In short, "[t]here is no scientific reason to believe that life experiences, either at puberty or later, play any role in determining sexual orientation, nor that there is any voluntary choice to one's experiencing same-sex or opposite-sex attraction." Id. ¶ 8.

4. Disadvantages on the Basis of Prejudice and Stereotype

164. The historical record also overwhelming supports the conclusion that "as a class, [gay and lesbian Americans] have been saddled with societal disabilities and disadvantages purely on the basis of prejudice and gross and inaccurate stereotypes -- both in American society at large and, more specifically, in the more limited context of the American military." PSJ Ex. Q, ¶ 2. This conclusion is supported by the same "history of purposeful unequal treatment" that Professor Sherry has documented, and it is not a controversial proposition among qualified historians. See id. ¶ 46.

165. To cite just one pertinent example, according to Admiral Thomas Moorer -- a retired four-star Navy Admiral and former Chairman of the Joint Chiefs of Staff who served on a 1993 committee formed to influence the new policy -- homosexuals are "inherently promiscuous" and are involved in "a filthy, disease-ridden practice," as "[e]verybody knows." Pl. Sel. Dep. Exc. at Tab C, at 16, 19, 29-31. Moreover, according to Admiral Moorer, these are not just his views; they are widely shared in the top ranks of the military and were shared by the "many, many military people that were associated" with his advisory committee. Id. at 33; see also id. at 32-33.

5. Political Powerlessness

166. Finally, the factual record also establishes that gay and lesbian Americans are uniquely powerless -- even among minority groups -- to seek political redress through the majoritarian political process.

167. Professor Kenneth Sherrill, a political scientist who has studied the rise of group-based representative politics in the United States and the operation of the modern American political system, has reached precisely this conclusion. According to Professor Sherrill, "[l]esbians

and gay men are peculiarly disadvantaged in gaining access to the political process to redress their grievances through the national political mechanism." PSJ Ex. P, ¶ 41.

168. As Professor Sherrill explains, homosexuals represent a permanent, widely dispersed, and extremely small and outnumbered minority with little power or ability either to build or to join effective voter coalitions that might enhance and preserve their interests. In addition, because homosexuals are the targets of extreme social disapproval, they face extraordinarily powerful pressures not to identify themselves or step forward in the political arena. Moreover, because sexual orientation, unlike race or gender, is an invisible trait, many homosexuals who might otherwise be forced into the public's view (and the political fray) are able to pass silently as members of the heterosexual majority. The result of these pressures and phenomena is a powerful "spiral of silence" that represses the already insignificant political power of homosexuals well below their already small numbers. See id. ¶¶ 17-44.

169. The results of the dynamic that Professor Sherrill describes are evident from even a cursory glance across the American political landscape at the composition of government today. As Kathleen DeBold has pointed out, "openly gay or lesbian individuals constitute less than 1 in 5,000 (.02%) of elected officials nationwide" at all levels of government -- federal, state, and local. PSJ Ex. N, ¶ 4. Acknowledged gays and lesbians represent only 82 of the approximately 511,039 popularly elected officials in the United States today, and the vast majority of those 82 individuals serve at levels, indicating a clear lack of national political power. See id.

G. THE NEED FOR PERMANENT INJUNCTIVE RELIEF

170. Absent injunctive relief, Lt. Thomasson's discharge will result in the loss of his Navy career -- the only career that he has ever known or wanted -- and the corresponding loss of

numerous incidents and benefits of service to which he is otherwise entitled. He will lose the honor of his current position, his prospects for promotion, the satisfaction of serving his country and its ideals, and the professional rapport of his colleagues. See PSJ Ex. G, ¶ 10 (Plaintiff's Decl.).

171. Of immediate concern is the fact that, if Lt. Thomasson is discharged, his record cannot be presented to the promotion board that is scheduled to convene on May 9, 1995. That board represents his first opportunity for a promotion to the rank of lieutenant commander. Because he has a strong record, and because he has been uniformly recommended for early promotion ever since he attained the rank of lieutenant, there is a very high probability that he will be selected for promotion if his record is presented to the May 9 board. See id. ¶ 11.

172. In addition, if Lt. Thomasson receives a break in service and is not promoted this year, he will fall behind many others who entered the Navy during the same year that he did, and he will suffer a corresponding loss of fast-track stature in the competitive process by which future promotions and the most choice assignments within the Navy are determined. He would also lose the professional experience and prestige that would accompany a promotion. See id. ¶ 12.

173. Furthermore, if he is expelled from the Navy, Lt. Thomasson will be forced to seek a civilian job and, most likely, to admit to prospective employers both that he was involuntarily discharged and the circumstances surrounding his discharge. Being required to make such disclosures, when he has done nothing wrong, would be a source of personal embarrassment and humiliation. See id. ¶ 13.

174. Lt. Thomasson's discharge from the Navy would also confiscate a significant source of his pride and self-esteem. It would permanently tarnish his record and reputation, not only in the eyes of fellow servicemembers, but in the eyes of the civilian world as well. He would suffer the stigma of one who is deemed unfit to serve his country. See id. ¶ 14.

175. Finally, and perhaps most importantly, Lt. Thomasson's dismissal from the Navy would subject him to the indignity of being discharged simply for who he is -- not for anything that he has done or for any incapacity on his part. He has been subjected to discharge solely because of his status as a gay man and his honest acknowledgment of that status. A discharge on this basis is deeply disturbing, noncompensable, and contrary to the public interest. See id. ¶ 15.

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