

BRIEFING NOTE FOR THE MINISTER AND THE ASSOCIATE MINISTER

SUBJECT RECENT DECISION OF UNITED STATES NINTH CIRCUIT  
COURT RESPECTING HOMOSEXUALITY IN THE UNITED STATES  
ARMY

PURPOSE

1. The aim of this Briefing Note is to provide information with respect to a recent decision of the United States Court of Appeals for the Ninth Circuit which held the United States Army's ban on homosexuals to be unconstitutional.

BACKGROUND

2. In August 1967, at the age of 19, Perry Watkins enlisted in the United States Army, at which time he admitted to having homosexual tendencies on the pre-induction medical form. Nonetheless he was considered "qualified for admission". He served fourteen (14) years in the Army with superior ratings on his performance. He was permitted to re-enlist in 1971 and in 1974 and his application for re-enlistment in October 1979 was also accepted. Staff Sergeant Watkins' homosexuality was always common knowledge and the United States Army, in support of their decision in 1981 to discharge/not re-enlist him, never claimed that his sexual orientation or behaviour interfered in any way with military functions.

3. In 1981, the United States Army promulgated new regulations which required that all homosexuals be disqualified from service without regard to the length or

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quality of their military service. Watkins was notified that he would be discharged and denied re-enlistment because of his homosexuality. Watkins challenged the Army's actions and the new regulations in Court. He was unsuccessful in his action before a United States District Court; but he appealed that decision to a higher court, being the Ninth Circuit Court of the United States Court of Appeals.

4. On 10 February 1988, the Ninth Circuit Court of the United States Court of Appeals, which was a court consisting of three judges, held in a 2 to 1 decision;

"We hold that the Army's regulations violate the constitutional guarantee of equal protection of the laws because they discriminate against persons of homosexual orientation, a suspect class, and because the regulations are not necessary to promote a legitimate compelling governmental interest. We thus reverse the District Court's rulings denying Watkins' motion for summary judgment and granting summary judgment in favor of the Army, and remand with instructions to enter a Declaratory Judgment that the Army Regulations A.R. 635-200, Chapter 15, and A.R. 601-280, paragraph 2-21(c), are constitutionally void on their face, and to enter an injunction requiring the Army to consider Watkins' re-enlistment application without regard to his sexual orientation ..."

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5. There are twelve United States Circuit Courts, of which the ninth, which covers inter alia California, Nevada, Arizona, Oregon and Washington, is one. Decisions conflicting with the Watkins case have been rendered by other courts of equivalent status, including a previous decision of the Ninth Circuit Court itself.

ANALYSIS

6. There are two avenues of appeal open to the United States Army in light of the decision:

- a. a direct appeal to the United States Supreme Court subject to successful application for leave to appeal to that Court, although this application must be made within thirty (30) days from the date of the Ninth Circuit Court's decision; or
- b. an application, within fourteen (14) days from the date of the Ninth Circuit Court's decision, to that same Court to have the matter re-heard by the Court "en banc", which would consist of a full court of nine to eleven judges.

The latter avenue is presumed to be the preferred route as this would leave the door open for subsequent appeal to the

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United States Supreme Court if the United States Army was unsuccessful in its appeal before the Ninth Circuit Court en banc.

7. The decision as to whether or not application for leave to appeal will be filed rests solely with the United States Solicitor General, who will receive submissions and recommendations from the United States Army and the Department of Defence, in consultation with the United States Department of Justice. Although it is understood that the United States Army wishes the matter to be appealed, the Solicitor General has not as yet announced any decision respecting either an appeal or the forum in which such appeal would take place. However, the request for an extension, to 25 March 1988, of the time limit for giving notification to the Ninth Circuit Court respecting the intention to appeal was recently filed by the Department of Justice on behalf of the United States Army.

RECOMMENDATIONS

8. The Director of Personnel Legal Services will monitor any action with respect to an appeal to be taken by the United States Army in the Watkins case.

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