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Administrative Law and Procedure - Armed Services - Military Discharge

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ADMINISTRATIVE LAW AND PROCEDURE—ARMED SERVICES—MILITARY DISCHARGE—The United States Court of Appeals for the District of Columbia has held that a determination of whether the discharge of a homosexual serviceman was arbitrary, capricious, or unlawful cannot be made by a reviewing court without a reasoned explanation by the Air Force of what "unusual circumstances" will permit exception to their general policy of separating homosexuals.

Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978)

In March, 1975, Technical Sergeant Leonard Matlovich informed the Secretary of the Air Force that he was a homosexual,[1] and requested that the Air Force provision which relates to the discharge of homosexuals be waived.[2] This disclosure precipitated an investigation by the Air Force Office of Special Investigation. At this inquiry, Matlovich provided information as to his homosexual activities.[3] Upon completion of the investigation, the Air Force convened an involuntary administrative discharge proceeding against Matlovich because of his admitted homosexual activities.[4] At the discharge hearing,[5] Matlovich stipulated that he had committed homosexual acts during his current period of enlistment.[6] Based largely upon this stipulation, the Discharge Board found that Matlovich had committed homosexual acts during his current

1. Matlovich v. Secretary of the Air Force, 591 F.2d 852, 853 (D.C. Cir. 1978). Matlovich's letter also stated that his sexual preferences would not interfere with his military functions, and that he considered himself fully qualified to continue in the service. He cited his twelve years of capable service to support this view. Brief for Appellant at 3.

2. AIR FORCE MANUAL (Change 4 1970) 39-12, ¶ 2-103 [hereinafter cited as AFM] provides in relevant part: "Homosexuality is not tolerated in the Air Force. Participation in a homosexual act . . . is considered serious misbehavior whether the role of a person in a particular act was active or passive . . . ."

3. 591 F.2d at 854. Matlovich informed an investigative agent that his first homosexual experience occurred in 1973; that all of his activities were consensual and with persons over 21; and that such activities took place when he was off duty and off base. He also stated that his homosexual partners had included two other members of the Air Force, neither of whom had worked for him. Brief for Appellees at 3-4.

4. 591 F.2d at 854. The discharge board was convened under the authority of AFM, *supra* note 2, 39-12, ¶ 2-104(b)(1), which governs discharge proceedings based on admitted homosexual conduct. Brief for Appellant at 4.

5. The administrative discharge board is appointed to render findings based upon the facts of the case and to recommend either retention or discharge. The Board must state the reasons for the type of separation or discharge that it recommends. 32 C.F.R. § 41.3 (1978).

6. 591 F.2d at 854. Matlovich also presented evidence as to his own service in the Air Force. This evidence demonstrated that he had received the Bronze Star, Purple Heart, two Air Force Commendation Medals, and a Meritorious Service Medal. The evidence also showed that he had at all times been given the highest possible ratings by his superiors in all aspects of his performance. *Id.* at 854 n.4.

enlistment and recommended that he be given a general discharge for unfitness.[7] After reviewing the record of the proceeding, Matlovich's commanding officer agreed with the Discharge Board's recommendation that Matlovich be discharged, but determined that an honorable discharge would be more appropriate.[8]

On the day before the Secretary of the Air Force was to order his discharge,[9] Matlovich filed an action in the United States District Court for the District of Columbia[10] seeking a temporary restraining order against his discharge, as well as injunctive and declaratory relief against the Air Force on the ground that its policy toward homosexuals was unconstitutional.[11] The temporary restraining order was denied and Matlovich was discharged on October 22, 1975.[12] Two days later, he petitioned the Air Force Board for the Correction of Military Records, seeking review of the Discharge Board's decision.[13] While this petition was pending, he also amended his complaint in the district court, seeking reinstatement rather than injunctive relief.[14] After the Air Force Board upheld Matlovich's discharge,[15] the proceedings resumed in the district court.[16] The Air Force stipulated that it had in the past retained homosexuals on active duty.[17] Both parties then moved

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7. *Id.* at 854. *See* 32 C.F.R. § 41.3(1) (1978), which explains the classifications of administrative separations. Homosexuality, as a category of unsuitability or unfitness, can warrant an Honorable or General Discharge. 32 C.F.R. § 41.7(g) (1978).

8. 591 F.2d at 854. Under Defense Department regulations, Matlovich's commanding officer was acting as the discharge authority and was authorized to take final action with respect to the type of discharge. 32 C.F.R. § 41.3(i) (1978). He also had the authority to upgrade the board's recommendation pursuant to 32 C.F.R. § 41.5(d)(2) (1978). See note 6 *supra* for the reasons which led the commanding officer to upgrade Matlovich's discharge.

9. 591 F.2d at 854 & n.3.

10. Matlovich v. Secretary of the Air Force, No. 75-1750 (D.D.C., July 19, 1976).

11. 591 F.2d at 854. The relief requested by Matlovich is authorized by 5 U.S.C. § 703 (1976), which provides that declaratory and injunctive relief are available forms of relief from administrative action.

12. 591 F.2d at 854.

13. *Id.* This board processes and considers applications for the correction of military records under the authority of 32 C.F.R. § 865.1 (1978). Its function is to determine the existence of error or injustice. *See* 32 C.F.R. § 865.2(b) (1978).

14. *See* Brief for Appellant at 5-6.

15. 591 F.2d at 854. Specifically, the Air Force Board for the Correction of Military Records found that no injustice had been committed against Matlovich, that the administrative discharge board had not been arbitrary or capricious in recommending his discharge, and that there was a rational basis for the homosexual discharge provision. Brief for Appellant at 6.

16. 591 F.2d at 854. The proceedings in the district court had been stayed pending the completion of military review. *See* Brief for Appellees at 7.

17. 591 F.2d at 854. The parties also stipulated that the Air Force has no active program to identify and discharge homosexuals, that Air Force enlistment and re-enlistment

for a summary judgment in the district court. In granting the Air Force's motion, the court reasoned that there was no constitutional right to engage in homosexuality; that the Air Force policy regarding homosexuals was rational; and that the Discharge Board's decision was supported by the record.[18] Matlovich appealed to the United States Court of Appeals for the District of Columbia.

In a unanimous decision,[19] the court vacated the decision of the district court and remanded the case to the Air Force for further proceedings.[20] The court refused to reach the constitutional issues raised by the parties,[21] choosing instead to decide the case upon narrower grounds. Judge Davis, writing for the court, noted an Air Force regulation which provided for exceptions to the general policy of separating homosexuals,[22] but due to the inadequacy of the record, found it impossible to determine why the Air Force had refused to apply this exception in Matlovich's case.[23] Judge Davis further stated that the Air Force had failed to adequately distinguish Matlovich's case from others in which the Air Force had retained homosexuals in the service.[24] The court determined that the general nature of the retention provision was inadequate since it did not specify what circumstances the Air Force deemed necessary in order to retain a homosexual. Without such specificity, Judge Davis found it impossible to ascertain whether an abuse of discretion had occurred in Matlovich's case. The court opined that in order to permit a meaningful judicial review of a discretionary administrative decision, it is necessary for an agency to provide an adequate indication of the grounds upon which its decision is predicated.[25]

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forms in use for several years were revised to delete questions asking if the enlistee has "homosexual tendencies" or has committed homosexual acts, and that for several years the Air Force has placed known homosexual gathering places off limits to servicemen. Brief for Appellees at 8.

18. 591 F.2d at 854 (citing district court's oral opinion granting appellee's motion for summary judgment).

19. Judge Davis, sitting by designation, authored the opinion of the court, and was joined by Chief Judge Wright and Judge Robinson.

20. 591 F.2d at 861.

21. *Id.* at 855. *See also* Brief for Appellees at 9a and Brief for Appellant at 1-2, both of which treat the constitutionality of the Air Force discharge policy toward homosexuals as the primary issue.

22. 591 F.2d at 855. *See* AFM, *supra* note 2, 39-12, ¶ 2-103(b), which provides: "It is the general policy to discharge members of the Air Force who fall within the purview of this section. Exceptions to permit retention may be authorized only where the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised."

23. 591 F.2d at 855.

24. *Id.*

25. *Id.* at 857. The court relied upon such decisions as Citizens to Preserve Overton

Judge Davis found additional support for this line of reasoning in the Defense Department[26] and Air Force regulations[27] on administrative discharge procedures, since both regulations require a reasoned explanation from the Air Force any time that detrimental action is taken.[28] Judge Davis concluded that it is the duty of the court to enforce any regulatory requirement which calls for a meaningful explanation of an administrative decision.[29] Since the Air Force's regulations contemplate the retention of homosexuals if "unusual circumstances" exist, the court held that proper administrative procedure requires a reasoned explanation any time that the retention alternative is rejected.[30]

The *Matlovich* decision represents the first time that the United States Air Force has been required by a reviewing court to articulate the circumstances under which it will retain an admitted homosexual.[31] By premising the decision on what it perceived to be the minimum requirements of administrative procedure, the court continued the questionable practice of supplementing the basic requirements of the Administrative Procedure Act (APA).[32] The APA provides that each

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Park v. Volpe, 401 U.S. 402 (1971) (post hoc rationalizations are not an adequate basis for review of agency action); SEC v. Chenery Corp., 332 U.S. 194 (1947) (a court should not be compelled to speculate as to the theory underlying the agency's action); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (an administrative officer must articulate the standards which guide his discretion).

26. 32 C.F.R. §§ 41.1-.13 (1978) delineates the policy, reasons, and procedure to be employed when administratively separating enlisted personnel.

27. AFM, *supra* note 2, 39-12 governs separations granted for unsuitability, unfitness, misconduct, resignation or for the good of the service.

28. 591 F.2d at 858-59.

29. *Id.* at 860.

30. *Id.*. In remanding to the Air Force, the court gave the Air Force the choice of clarifying its policy on homosexuality by either conducting adjudications or utilizing rulemaking procedures. *Id.* at 861. A rulemaking procedure is used to promulgate policy standards, but an adjudication is a trial-type procedure utilized to decide disputed facts in particular cases. The difference lies mostly in the mode of proceeding by the agency. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:2 (2d ed. 1979).

31. *See also* Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978), a companion case to *Matlovich*. In *Berg*, the court vacated a summary judgment previously granted in favor of the Navy against appellant Berg, who was also discharged for his homosexual activity. Berg admitted to homosexual activity before and during his Navy service, but denied the specific homosexual incident for which he was accused. Berg was an officer, and unlike Matlovich, he had received an other-than-honorable discharge.

32. For cases that supplement the APA, *see, e.g.*, National Resources Defense Council v. EPA, 478 F.2d 875, 881 (1st Cir. 1973) (courts may go beyond the basic APA requirements when additional information is necessary to determine whether agency action is in accordance with law); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 & n.18 (D.C. Cir. 1972) (fairness may require more than the APA minimum standards).

government authority is subject to judicial review[33] except where statutes prohibit review or when agency action is committed to agency discretion by law.[34] The APA further provides that a reviewing court may set aside agency findings, actions, or conclusions which do not meet certain standards, including those determinations that are arbitrary, capricious, or an abuse of discretion,[35] contrary to a constitutional right,[36] or in excess of statutory authority.[37] Additionally, the APA requires an agency to provide a statement of findings and conclusions, along with the reasons or basis for them, on all material issues of fact, law, or discretion.[38]

While the APA now governs the manner in which the review of most administrative decisions is conducted, the review of military decisions was formerly viewed as committed to agency discretion and beyond judicial review. The Supreme Court declined for many years to review internal administrative military decisions. Illustrative of this view is *Reaves v. Ainsworth*,[39] where the Court held that the discharge of an officer by a physical disability evaluation board, which was acting within the scope of its lawful powers, could not be reviewed or set aside by the courts, since the federal courts had no authority to regulate the Armed Forces. Under the *Reaves* doctrine, appropriate boards within each branch of the service had the ultimate review of military actions. *Reaves* was of particular import in that it appeared to exempt "military tribunals" from judicial review based upon the special considerations peculiar to the military. At the same time, the decision did not altogether preclude review for compliance with statutory authority.[40] Following *Reaves*, the Supreme Court for a time demonstrated an unwillingness to exercise jurisdiction over such matters,[41] and in *Patterson v. Lamb*,[42] declined to determine if the courts had the power to review or control the military's actions in fixing the type of discharge

33. The APA excludes several enumerated categories, including courts-martial and military commissions, from judicial review. *See* 5 U.S.C. § 701(b)(1)(F) (1976).

34. *Id.* § 701(a)(2).

35. *Id.* § 706(2)(A).

36. *Id.* § 706(2)(B).

37. *Id.* § 706(2)(C).

38. *Id.* § 557.

39. 219 U.S. 296 (1911).

40. *Id.* at 306-07.

41. *See, e.g.*, Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (orderly government requires that the judiciary be scrupulous not to interfere with legitimate Army matters); Creary v. Weeks, 259 U.S. 336, 344 (1922) (proceedings in lawfully constituted military tribunals, acting within the scope of lawful authority, cannot be reviewed or set aside by civil courts).

42. 329 U.S. 539, 542 (1947).

granted. The Court's policy toward the reviewability of military discharge decisions was somewhat refined in *Harmon v. Brucker*,[43] which held that federal courts do have the authority to rule on the validity of military administrative action where statutory authority has been exceeded. While *Harmon* did not explicitly utilize the provisions of the APA in its ruling, military discharges have been held to be reviewable under the Act.[44]

Although military discharges, as well as conventional administrative decisions, are now reviewable under the APA, the courts have responded in a more deferential manner in their review of discharges and other internal military affairs than they have in reviewing routine administrative decisions. That the Supreme Court has been willing to afford a broader discretion to internal military affairs is pointed out in *Orloff v. Willoughby*,[45] and, more recently, in *Parker v. Levy*.[46] In these decisions, the Court indicated that the military's specialized role in our society warranted a less stringent application of traditional legal principles, and therefore, a greater degree of judicial restraint was appropriate when reviewing an internal military activity, whether it be a court-martial proceeding or a request for discharge.[47] Consistent with this principle, lower court rulings have sharply limited judicial review. In limiting its task to determining if the service regulations can reasonably bear the imputed construction, the court in *Nelson v. Miller*[48] suggested that the primary authority for the interpretation of regulations lies with the service's appellate system. Similarly, in

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43. 355 U.S. 579, 582 (1958).

44. *See* Etheridge v. Schlesinger, 362 F. Supp. 198, 200-01 (E.D. Va. 1973); Garmon v. Warner, 358 F. Supp. 206, 208 (W.D.N.C. 1973). *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (1958 & Supp. 1970); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES (1976 & Supp. 1978); Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 24-25 (1975). *But see* Suter, *Judicial Review of Military Administrative Decisions*, 6 HOUS. L. REV. 55, 57-60 (1968), which disputes the idea that the APA was intended to provide the standard of review for military activities of any kind.

45. 345 U.S. 83 (1953); *see* note 41 *supra*.

46. 417 U.S. 733, 743 (1974) (the military is, by necessity, a specialized society separate from civilian society).

47. Given the importance that the Court accorded to the distinctions between military and civilian life, and the impact that this has had on judicial review of military administrative activity, it would be necessary to take note of and follow these precedents in deciding a case in this area. The *Matlovich* decision contains no discussion of these concepts.

48. 373 F.2d 474, 480 (3d Cir.), *cert. denied*, 387 U.S. 924 (1967).

Amato v. Chafee,[49] the court noted that where the discharge was considered by the appropriate review board, the judiciary's function was limited to insuring that the pertinent regulations were followed. Further, *Mindes v. Seaman*[50] held that the courts should review internal military separations only for deprivations of constitutional rights or violations of regulations or statutes.

Given the unique position the military occupies in our society, and the broad range of discretion normally afforded internal military affairs by the courts, it is somewhat incongruous that the *Matlovich* court focused upon administrative law cases which are of doubtful relevance. While guidelines for judicial review of agency action are provided by the APA,[51] case law has also played an important role in the development of review standards. Although the decisions cited by the *Matlovich* court serve to clarify the function of the courts in reviewing administrative activity, it is clear that they also provide for judicial review which surpasses the limited bounds normally applied to military administrative decisions.[52] The utilization of decisions such as *Environmental Defense Fund v. Ruckelshaus*,[53] which held that an administrative officer must articulate the standards which govern his discretionary decisions in as much detail as possible, demonstrates that the court did not adequately distinguish between typical agency action and military administrative activity. While the court goes on to discuss military discharge review very briefly,[54] this superficial treatment does little to quell the suspicion that the court failed to grasp the important

49. 337 F. Supp. 1214, 1217 (D.D.C. 1972). For examples of other cases in which courts have held that review is available in order to determine if regulations were violated, see Hodges v. Calloway, 499 F.2d 417 (5th Cir. 1974) and Van Bourg v. Nitze, 388 F.2d 557 (D.C. Cir. 1967).

50. 453 F.2d 197, 201 (5th Cir. 1971). *See also* Crawford v. Cushman, 531 F.2d 1114, 1120-21 (2d Cir. 1976) (there is no basis for judicial deference to the military which precludes review for violations of regulations or constitutional claims).

51. *See* notes 35, 36, & 37 and accompanying text *supra*.

52. *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (review to determine if agency action is unwarranted by the facts is authorized when the agency fact finding procedures are inadequate); SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947) (a court need not guess at the theory underlying agency action); Standard Rate & Data Serv., Inc. v. United States Postal Serv., 584 F.2d 473, 482 (D.C. Cir. 1978) (there must be reasoned findings for the agency action); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (a reviewing court might intervene not only in procedural problems but also if the agency has not genuinely engaged in reasoned decision-making).

53. 439 F.2d 584, 596, 598 (D.C. Cir. 1970) (an administrative officer must articulate the standards which govern his discretionary decisions in as much detail as possible).

54. Matlovich v. Secretary of the Air Force, 591 F.2d at 859, 860.

difference between review of internal military affairs and that of other administrative agencies, and therefore, that they may have exceeded the bounds of such review.

Moreover, several of the cases relied upon by the *Matlovich* court typify the efforts of the lower federal judiciary to expand the scope of review under the APA.[55] These endeavors have not been favorably received by the United States Supreme Court. The Court worked to curb this trend in *United States v. Allegheny Ludlum Steel Corp.*[56] by holding that the APA establishes the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures, limiting the judicial scope of review to determining if the reasons for the rule were rationally supported. More recently, in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council,*[57] it was found that the validity of agency determinations must stand or fall on the findings made, judged by the agency's administrative record. These holdings not only illustrate the Court's desire to limit judicial review, but also demonstrate that appropriate review is based upon the findings that have been made. Had the *Matlovich* court followed the spirit of *Vermont Yankee*, it would have been required to reach the constitutional issues presented.[58] Instead, the court interpreted the service's own regulations, found that they had not been complied with, and then ordered the Air Force to explain the basis for its action. The court's interpretation of the regulations, as well as its application of the facts to those regulations, evinces a fundamental misunderstanding of the appropriate policy considerations.

In its evaluation of the Air Force and Defense Department regulations, the court viewed these regulations as calling for a meaningful explanation of the administrative decision. To be sure, Defense Department regulations do call for the Administrative Discharge Board of each branch of the service to maintain a record of the proceedings, and to include the findings and recommendations of the Board in that record. If a discharge is recommended, the Discharge Board must provide a specified reason for its recommendation.[59] Particular reasons for discharge are specified in the Defense Department rules[60] and homo-

55. *See* 591 F.2d at 857, where the court relies upon such decisions as *Environmental Defense Fund v. Ruckelshaus*, discussed in note 53 *supra*, and *Greater Boston Television Corp. v. F.C.C.*, discussed in note 52 *supra*.

56. 406 U.S. 742, 756 (1972).

57. 435 U.S. 519, 549 (1978).

58. *See* text accompanying note 57 *supra*.

59. 32 C.F.R. § 41.5(b) (1978).

60. *Id.* § 41.7.

sexual tendencies are considered to be a category of unsuitability warranting separation.[61] The unsuitability is based solely upon the homosexual tendency itself, and is sufficient of itself to constitute a "reason" for discharge. Similarly, a Discharge Board appointed pursuant to Air Force regulations serves as a fact-finding body whose purpose is to arrive at findings of fact and to recommend action based upon those findings.[62] Recommendations are to be appropriate and consistent with the findings as well as the laws, regulations, policies, and customs of the service.[63] To equate such a function with an explicit requirement of reasons, as is suggested by the *Matlovich* court, ignores the distinction between facts and reasons. A principled reading of the applicable regulations uncovers the clear-cut policy that homosexuality is not tolerated in the Air Force, and that the general policy is to discharge members who fall within that category.[64] A recommendation that Matlovich be discharged on the basis of homosexuality, as indeed was the case here, is consistent both with the policies and customs of the Air Force, as well as with the "findings" of the Discharge Board. In fact, the Discharge Board's role as a fact-finder in this case was severely limited due to Matlovich's stipulation of his homosexuality.[65] The Board had only to apply this stipulation to the Air Force regulations to determine that the stipulated activity fell squarely within a discharge category.[66] This stipulation made it possible for the Board to exercise its discretion as to which regulation it chose to employ.[67] Therefore, it is difficult to understand the court's inability to determine whether an abuse of discretion had occurred in this situation. Arguably, the burden rested with Matlovich to prove that unusual circumstances existed which justified his retention.[68] Contrary to the court's findings, the exceptions which allow for retention are well-defined, although admittedly narrow.[69] Unlike a vague regulation, one

61. *Id.* § 41.7(g)(3).
62. *Id.* § 41.3(h).
63. *Id.* § 866.13.
64. *See* notes 2 & 22 *supra*.
65. 591 F.2d at 854.
66. AFM, *supra* note 2, 39-12, ¶ 2-103; *see* note 2 *supra*.
67. *See* notes 2 & 22 *supra* and note 69 *infra*.
68. *But see* 591 F.2d at 860, where the court appears to reject this argument.
69. AFM, *supra* note 2, 39-12, ¶ 2-103 provides in relevant part:

> (c) Intoxication has grown to be one of the most common excuses presented by individuals confronted with evidence of commission of homosexual acts. Such excuse may be extenuating in a given case, but in itself does not constitute a basis for an exception to the general discharge policy. Additionally, an exception is not warranted simply because the airman has extensive service, since

that is narrowly drawn can be clear in its command. Indeed, the narrowness of the retention exception is in itself indicative that the general policy of the Air Force is to discharge known homosexuals. Moreover, the possibility that unusual circumstances existed in Matlovich's case was considered to some degree and discarded by the military during its discharge proceedings.[70]

By refusing to consider the constitutional issues presented in the *Matlovich* case, the court forced an artificial construction of the Air Force and Defense Department regulations, and erroneously concluded that the Air Force did not follow its own regulations in discharging Matlovich. In so doing, the court violated basic principles of both administrative law and judicial review. The end result is a holding of little value. The court should have determined the essence of the case—the constitutionality of discharging a serviceman who has admitted to homosexual acts in violation of service regulations.[71] Had the court done so, it would have resolved the dispute between the parties and clarified the status of the homosexual serviceman. The court's failure to resolve the constitutional issues ensures only that further litigation will follow, and clearly illustrates that the avoidance of constitutional issues in such a manner constitutes improper judicial review.

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such person is expected to set an example of high moral standards.

(d) An exception may be considered in a case involving participation prior to entry in the Air Force provided it is established that youthful curiosity was involved, that there is no current pattern of homosexuality, and that the airman's ability has not been compromised.

70. *See* Brief for Appellees at 29-31.

71. For examples of cases which did reach the constitutional issues, see Martinez v. Brown, 449 F. Supp. 207 (N.D. Cal. 1978) (mandatory exclusion of homosexuals from the military is irrational, capricious, and violates due process) and Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977) (U.S. Navy's policy of mandatory discharge of homosexuals violates due process).