

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issues, volume 5, numbers 13 and 14, are reproduced in part below.

Management of Unexploded Ordnance, Munitions Fragments, and Other Constituents on Military Ranges

The Environmental Protection Agency's (EPA) Military Munitions Rule (implemented in August 1997) identifies when conventional and chemical munitions become wastes that are regulated under the Resource Conservation and Recovery Act (RCRA).¹ Wastes that are regulated under the RCRA must be handled under strict management standards for transportation, storage, treatment, and disposal. The EPA has delegated implementation of the RCRA to most states.² These states can impose more stringent regulations than the federal program. The Munitions Rule generally excludes unexploded ordnance (UXO) and munitions fragments on active and inactive ranges from coverage under the RCRA. Additionally, it postpones an EPA decision on whether to regulate these items on closed, transferring, and transferred (CTT) ranges until after the Department of Defense (DOD) completes its Range Rule.³

The DOD proposed the Range Rule in September 1997 and is currently reviewing comments received during the public comment period. The Range Rule sets forth the DOD's process for addressing UXO, munitions fragments, and other contaminants on ranges that are no longer needed to support the DOD's mission.⁴ Fundamental to the DOD's efforts, as well as to regulatory and public acceptance, is development of a risk model that integrates explosives safety and environmental concerns. The DOD expects to publish a final Range Rule this year.

While the DOD successfully persuaded the EPA that it is appropriate to exclude UXO and munitions fragments on active and inactive ranges from regulation under the RCRA, recent EPA comments suggest that the EPA may no longer support this approach. The EPA has indicated that UXO could become RCRA wastes after some unspecified period of time. This interpretation could subject active and inactive ranges to environmental regulations that make their continued use uncertain, at best, and impossible, at worst. Also, if UXO and munitions fragments on ranges are determined to be RCRA wastes, states may establish management standards that are more stringent than the current federal standards. Additionally, some elements within regulatory agencies and environmental groups have advocated that UXO on CTT ranges are "hazardous substances" under the comprehensive Environmental Response and Liability Act (CERCLA) and are, thereby, subject to release reporting and cleanup requirements outside of the DOD's control. As a result of such a designation, activists could seek to use the CERCLA to shut down range activities or, as proposed in current Superfund Reauthorization bills pending in Congress, seek fines and penalties for non-compliance. Although partnering initiatives with the EPA and other stakeholders continue, the Army must emphasize the critical role that ranges play in maintaining readiness. The Munitions Rule and the partnering efforts to draft a realistic, yet protective, Range Rule are designed to avoid overly restrictive regulations that will degrade readiness, while maintaining proper safeguards for human health and the environment.⁵ This is primarily a military readiness and training issue with environmental concerns, rather than an environmental issue with readiness and training concerns.

Recent DOD policy initiatives will likely draw additional attention to the issue. The Office of Secretary of Defense (OSD) has drafted guidance on Emergency Planning and Community Right to Know Act⁶ (EPCRA) Toxic Release Inventory (TRI) reporting for munitions used on active ranges. As a result, installations that previously had no reportable releases related to range activities may suddenly report significant releases into the environment from range activities. If the OSD finalizes the guidance, the first report will be due on 1 July 2000. The OSD's TRI guidance could attract attention to range

1. 42 U.S.C.A. §§ 6901-6992 (West 1998).

2. *See*, 42 U.S.C.A. §§ 6927, 6928.

3. 40 C.F.R. pt. 260, subpt. M (1997).

4. For example, formerly used defense sites or defense Base Closure and Realignment sites.

5. The munitions rule has successfully survived its initial legal challenge.

6. 42 U.S.C.A. §§ 11001 - 11050.

activities by characterizing range activities as releases of hazardous substances into the environment. The Army is developing data concerning actual emissions and residue from the firing of munitions so that installations will not overstate any such reporting. Due to the number of munitions in the inventory, and the nature of the testing, it will require several years to complete this effort. While the purposes and standards for reporting under the CERCLA and the EPCRA are different, the designation of munitions (or their constituents) as hazardous substances under one law will have a spillover effect into the other law's requirements.

The OSD has also drafted Department of Defense Instructions (DODI) that could require periodic clearance of UXO on active and inactive ranges, health risk characterizations, public outreach, and other actions. The services have non-concurred in the draft DODIs, but it is apparent that some level of information collection or response actions on active ranges may be a future requirement.

The cumulative result of these actions will be ever-increasing visibility of range operations to the public and pressure to monitor, if not reduce or curtail, operations that are perceived to impact the environment adversely. Efforts to coordinate responses to these potential challenges require the close cooperation of the environmental and operational communities.⁷ Major Egan.

Storage and Disposal of Non-DOD Owned Toxic and Hazardous Materials Update⁸

This note focuses on recent amendments to the Military Construction Authorization Act of 1985,⁹ (hereinafter the Act) which may affect installations that store non-DOD toxic or hazardous materials. The Act now provides three new statutory

exemptions that allow non-DOD (private and other agency) entities to store, treat, and dispose of non-DOD hazardous toxic and hazardous substances on DOD property.¹⁰ To promote timeliness, the Act delegates the approval process for instituting these exemptions down the chain of command.

The Act's pre-amendment requirements were particularly onerous for specific installations. These include facilities that are closing due to Defense Base Closure and Realignment Act (BRAC) actions, installations contracting for tenant services, and those engaged in privatizing installation maintenance, housing, or utility services.¹¹ The recent amendments, however, bring the Act in line with current management trends for DOD installations. First, Congress amended the statute to allow storage, treatment, or disposal of non-DOD toxic or hazardous materials that are used in connection with a DOD activity or with a service performed at a DOD installation for the benefit of the DOD.¹² Second, the Act now exempts the storage of non-DOD toxic or hazardous material generated in connection with the authorized and compatible use of a facility.¹³ Finally, the amended act allows, under contract agreement, the treatment and disposal of non-DOD toxic or hazardous material if it is required or generated in connection with a facility's authorized and compatible use.¹⁴

The Secretary of the Army has delegated approval authority for these exemptions to the Assistant Secretary of the Army (Installations, Logistics, and Environment).¹⁵ In limited circumstances, involving only the storage of non-DOD owned toxic and hazardous materials,¹⁶ the Secretary of the Army has further delegated the approval authority to Major Command Commanders, with authority to further delegate to a Flag-level Chief of Staff.¹⁷ To request sample exemption forms and memoranda for delegating authority, call the author at the Army ELD Office, (703) 696-696-1597, DSN 426-1597. Mr. Wendelbo.

7. This article was originally presented to the Chief of Staff of the Army for inclusion in his weekly summary. The weekly summary highlights issues of national importance to be distributed to all general officers.

8. See Environmental Law Division Note, *Storage and Disposal on Non-Department of Defense (DOD) Toxic and Hazardous Materials*, ARMY LAW., Mar. 1998, at 43.

9. Pub. L. No. 98-407, tit. VIII, pt. A § 805(a), 98 Stat. 1520 (codified at 10 U.S.C.A. § 2692 (West 1998)).

10. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-88 § 343 (1997).

11. 10 U.S.C.A. § 2692.

12. *Id.* § 2692(b)(1); National Defense Authorization Act § 343(b).

13. 10 U.S.C.A. § 2692(b)(9); National Defense Authorization Act § 343(d).

14. 10 U.S.C.A. § 2692(b)(10); National Defense Authorization Act § 343(e).

15. Memorandum, Secretary of the Army, subject: Delegation of Authority under Title 10 U.S.C.A. § 2692 (4 Aug. 1998).

16. 10 U.S.C.A. § 2692(b)(9).

17. Memorandum, Assistant Secretary of the Army (Installations, Logistics, and Environment), subject: Delegation of Authority under Title 10 U.S.C. § 2692 (3 Sept. 1998).

No RCRA Double Jeopardy

A recent district court case in Missouri provides some encouraging news for those installations struggling to satisfy two masters—the state and the federal EPA. The court rejected an argument by the EPA that it may take an administrative action when a state has already been delegated authority under the RCRA.¹⁸ The court held that the EPA cannot seek to take action against a state-regulated entity unless it also withdraws the state's authority to administer the RCRA. This is good news in the case where an installation is negotiating with a delegated state and suddenly the EPA files a complaint.

In *Harmon Industries, Inc. v. Browner*,¹⁹ the plaintiff (Harmon) was a manufacturer of safety equipment for the railroad industry. For fourteen years, Harmon's employees used organic solvents to clean equipment at one of its plants. Unknown to Harmon, every one to three weeks maintenance employees would throw used solvent residues out the back door of the plant. Over the years, about thirty gallons were dumped on the grounds. The discarded solvents were RCRA hazardous wastes.

In 1987, Harmon discovered what the employees were doing and ordered the practice to stop. Harmon then hired consultants to investigate the effects of the disposal. The report of the investigation concluded that contaminants were in the soil; however, there was no danger to human health. Harmon then reported the disposal to the Missouri Department of Natural Resources (MDNR). The EPA had authorized the MDNR to administer its own hazardous waste program under the RCRA. Since being authorized to administer a program, the EPA never withdrew the state's authority.

After meeting with Harmon, the MDNR oversaw the investigation and cleanup of the Harmon facility. The state approved a variety of investigations by Harmon concerning the health risks of the contamination. The costs of the studies were over \$1.4 million. Ultimately, the state approved a post-closure permit for the facility, which anticipated additional costs of over \$500,000 during a period of over thirty years.

In 1991, the state filed a petition against Harmon in the state court, along with a consent decree signed by both Harmon and the MDNR. The court approved the consent decree that specifically provided that Harmon's compliance with the decree constituted full satisfaction and release from all claims arising from allegations in the petition. The consent decree did not impose a monetary penalty.

Earlier, the EPA had notified the state that it should assess fines against Harmon. After the petition had been filed and approved by the state, the EPA filed an administrative com-

plaint against Harmon seeking over \$2 million in penalties. In its complaint, the EPA did not allege that the state had exceeded its authority. In addition, the complaint did not assert that the site posed a health risk, but merely demanded a fine. Harmon demanded a hearing. The administrative law judge (ALJ) found for the EPA on the substantive counts of the complaint but reduced the fine to \$586,716. Harmon appealed to the Environmental Appeals Board (EAB). The EAB affirmed the ALJ's findings. Harmon then brought the case to federal district court on the issue of the authority of the EPA to take an enforcement action where the state had already entered into a consent decree.

The court found for Harmon. The court concluded that the plain language of section 3006(b) of the RCRA provides that state enforcement programs operate instead of federal programs. As such, the concept of co-existing powers is inconsistent with the EPA's delegation of authority. Such a division of power was also anticipated in the memorandum of understanding (MOU) between the EPA and the state that defined each party's responsibilities. The MOU required the EPA to provide notice to the state prior to taking an enforcement action, even if the state elects not to act. Likewise, under the MOU, if the EPA recommends an assessment of fines, it must refer the matter to the state attorney general. According to the court, neither the agreement, nor the RCRA, gives the EPA authority to override the state once it determines an appropriate penalty. Section 3006(e) of the RCRA gives the EPA only the option of withdrawing authorization of a state's RCRA program. The EPA does not possess the option to reject part of a state's program or to censor a state's course of action on an incident-by-incident basis.

Although *Harmon* reflects the view of only one federal district court and is presently subject to appeal, it may prove quite useful for an installation environmental law specialist responding to an EPA complaint. The case should be cited as the basis for an affirmative defense in all enforcement actions where the state has taken any administrative action and the EPA subsequently files a complaint. Furthermore, although the case involved only the imposition of additional fines, it is not limited to these facts. Any action taken by the state to coerce compliance on the part of an installation should preclude similar enforcement by EPA. Unless the EPA specifically withdraws a state's authorization to administer the program, the EPA should not take independent action. Otherwise an installation does not know with whom it should negotiate during a state enforcement action. As the court noted in *Harmon*, such independent action by the EPA would be "schizophrenic" and result in uncertainty in the public mind. Major Cotell.

18. 42 U.S.C.A. §§ 6901- 6992 (West 1998).

19. 47 Env't Rep. Cas. (BNA) 1229, 1998 U.S. Dist. LEXIS 13751 (W.D. Mo., August 25, 1998).

Installations should not pursue *permits for on-site CERCLA remediation activities*. Permits are specifically excluded from the CERCLA, which states that no “federal, state or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite”²⁰ This exclusion is based on Congress’ recognition that cleanups under the CERCLA should be spared the delay, duplication, and additional costs involved in acquiring permits for remediation. Individuals who are uncertain about whether an activity is considered “onsite” or who have questions regarding the CERCLA’s permit exclusion should contact their environmental law specialist. Ms. Barfield.

Clean Air Act Enforcement Alerts

This note provides the latest on the doctrine of sovereign immunity as it relates to the Clean Air Act (CAA).²¹ It also updates readers on the EPA’s efforts to implement its authority to impose punitive fines on other federal agencies.

No Waiver of Sovereign Immunity—the Latest

The Air Force recently scored a significant CAA victory in a case decided by the U.S. District Court for the Eastern District of California. In *Sacramento Metropolitan Air Quality Management District v. United States*,²² the Sacramento District sought to enforce a punitive fine of \$13,050 against McClellan Air Force Base for violations of the base’s permitted natural gas usage limits. In granting the Air Force’s motion for summary judgment, the court closely followed Supreme Court precedent. The court held that the CAA does not waive sovereign immunity for punitive fines.²³ Hopefully, the *Sacramento* case signals a positive federal court trend toward resolving what has been a contentious issue for years.

The CAA’s federal facilities provision²⁴ contains a limited waiver of sovereign immunity regarding state, interstate, and local air pollution control laws. It requires federal agencies to comply with air pollution control programs “to the same extent as any nongovernmental entity.”²⁵ It also requires federal agencies to pay administrative fees and subjects them to the “process and sanctions” of air program regulatory entities.²⁶ For several years, federal court litigation has attempted to define the precise meaning of “process and sanctions.” The United States Supreme Court interpreted these terms when it examined the federal facilities provision of the Clean Water Act (CWA)²⁷ in *U.S. Department of Energy (DOE) v. Ohio*.²⁸ The Court found that this aspect of the CWA’s sovereign immunity waiver, which is virtually identical to the CAA’s waiver, did not subject federal facilities to “punitive fines” imposed as a penalty for past violations. In so holding, the court reasoned that the CWA did not contain a clear and unequivocal waiver of sovereign immunity. In contrast, the Court found that the CWA waived sovereign immunity for court-ordered “coercive fines” imposed to induce compliance with injunctions or other judicial orders designed to modify behavior prospectively.

In *U.S. v. Georgia Department of Natural Resources*,²⁹ a federal district court in Georgia formally extended the Supreme Court’s decision in *DOE v. Ohio* to the CAA. After applying the Supreme Court’s analysis, the *Georgia* court held that the CAA does not require federal agencies to pay punitive fines. A district court in Tennessee, however, reached a contrary result in *U.S. v. Tennessee Air Pollution Control Board*.³⁰ In *Tennessee* the court deviated from the U.S. Supreme Court’s analytical approach. The *Tennessee* case is currently pending appeal in the Sixth Circuit. In its written briefs and oral arguments to the Sixth Circuit, the United States argued that the CAA does not require federal agencies to pay punitive fines. In support of its argument, the United States emphasized the similarities between the CAA’s partial waiver of sovereign immunity and the partial waiver found in the CWA. The McClellan Air Force

20. 42 U.S.C.A. § 9621(e). See 40 C.F.R. § 300.4000(e) (1997) (discussing the NCP provisions for permits).

21. 42 U.S.C.A. §§ 7401-7671q.

22. CIV S-98-437 (E.D. Cal. Nov. 13, 1998).

23. *Id.*

24. 42 U.S. C. A. § 7418(a).

25. *Id.*

26. *Id.*

27. 33 U.S.C.A. §§ 1251-1387 (West 1998).

28. 503 U.S. 607 (1992).

29. 897 F. Supp. 1464 (N.D. Ga. 1995).

30. 967 F. Supp. 975 (M.D. Tenn. 1997).

Base case has joined the CAA sovereign immunity landscape as the third federal district court to consider this issue, and the second case to find that the CAA does not contain a waiver of immunity.

No Waiver of Sovereign Immunity—A Caution

The availability of sovereign immunity as a defense against punitive fines should only serve as a shield to fine payment (never as a sword against CAA compliance). Federal agencies must comply with all laws and regulations for air pollution control. As such, they are subject to payment of administrative fees and any court-imposed coercive fines. Where deficiencies are noted in a federal facility's air pollution control activities, the facility has the same obligation as nongovernmental entities to correct all infractions expeditiously. Federal facilities are not exempted from these responsibilities because they are not required to pay punitive fines.

Despite the foregoing, some state regulatory agencies insist that they cannot effectively regulate the various military services unless they are able to impose punitive fines. This, coupled with their view that Congress waived sovereign immunity for CAA fines, can create contentious negotiations. Consequently, installations that have established a poor "track record" with regulatory agencies can find it very difficult to resolve even minor infractions. Consistently demonstrating CAA compliance is the only effective way to dispel a state's perception that it is unable to regulate federal facilities. Sovereign immunity makes vigilance in CAA compliance essential to maintaining peace with the regulatory community.

EPA's New Authority to Assess Fines

In contrast to the U.S. position on sovereign immunity vis-à-vis state regulators, last year, the Department of Justice opined that the EPA has authority under the CAA to impose punitive fines against federal agencies.³¹ Since then, the EPA has pursued regulatory changes that will formally extend existing administrative hearing procedures to the EPA's CAA

enforcement actions.³² The EPA recently published guidance that instructs its regional counsels and air program directors to provide the same administrative procedures to federal agencies as apply to private entities.³³ The EPA's policy discusses the hearing and settlement procedures that are available. It also discusses the EPA's policies on compliance orders, criteria for penalty assessments, and its press release practice. The policy also indicates that federal agencies will have the opportunity to consult with the EPA Administrator prior to a CAA penalty becoming final, and explains how that right may be exercised. To date, the EPA has not exercised its new found penalty authority against an Army facility, nor has it initiated an enforcement action acting as the surrogate of a state air program regulatory agency. Lieutenant Colonel Jaynes.

Litigation Division Note

"Don't Ask, Don't Tell" Held Constitutional: Now What?

Introduction

*Able v. United States*³⁴ cleared the last major litigation challenge to the "don't ask, don't tell" policy.³⁵ The United States Court of Appeals for the Second Circuit, reversing a district court decision, held that the services did not violate the Equal Protection Clause of the Constitution by discharging a service member who engaged in homosexual conduct.³⁶

Six gay and lesbian service members brought suit in 1994 challenging the "don't ask, don't tell" policy. In 1995, the United States District Court for the Eastern District of New York held that the "statements provision"³⁷ of the policy violated the First and Fifth Amendments. The court, however, further held that the plaintiffs lacked standing to challenge the "acts prohibition"³⁸ of the policy as they only alleged that they had made statements expressing their sexual orientation.³⁹ On appeal, the Second Circuit reversed the portion of the district court's decision that held the "statements provision" of the policy was unconstitutional because it violated the First Amendment.⁴⁰ The Second Circuit, however, held that the district court erred in ruling that plaintiffs did not have standing to chal-

31. Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Judith A. Miller, General Counsel, Department of Defense, subject: Administrative Assessment of Civil Penalties under The Clean Air Act (July 16, 1997).

32. See 63 Fed. Reg. 9464 (1998) (to be codified at 40 C.F.R. pts. 22, 59) (revisions to existing rules proposed Feb. 25, 1998). The EPA has also resumed its CAA field citation program rulemaking. This was previously interrupted when the EPA asked the Department of Justice to resolve the DOD-EPA dispute over the EPA's authority to assess penalties. See also 59 Fed. Reg. 22776 (1994) (to be codified at 40 C.F.R. pt. 59) (proposed May 3, 1994).

33. Memorandum from Steven Herman, Assistant Administrator, to Regional Counsels and Air Program Directors, Environmental Protection Agency, subject: Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (Oct. 9, 1998) available at <<http://es.epa.gov/oeca/fedfac/policy/caaui8.pdf>>.

34. 155 F.3d 628 (2d Cir. 1998).

35. See 10 U.S.C.A. § 654(b) (1998).

36. *Able*, 155 F.3d at 636.

lunge the acts prohibition and remanded the case to the district court.⁴¹ In July 1997, the district court ruled that the “acts prohibition” portion of the policy was unconstitutional because it imposed unequal conditions on homosexuals in violation of the Equal Protection component of the Fifth Amendment.⁴²

The Second Circuit, in reversing the district court, found that the policy should be afforded a strong presumption of validity. The court, applying the rational basis test,⁴³ presumed the statute was constitutional and emphasized that the burden rests with the party attacking the legislation. The court found that the United States justified the prohibition on homosexual conduct on the basis that it promotes unit cohesion, enhances privacy, and reduces sexual tension.⁴⁴ The plaintiffs attacked each of these rationales as simply masking irrational prejudice against homosexuals.⁴⁵ In addition, the plaintiff’s argued the reasons were not rationally related to the Act’s prohibition on homosexual conduct.⁴⁶

The Second Circuit rejected both arguments. It found that the rationales proffered by Congress and by military authorities, which were supported by extensive findings set out in 10 U.S.C.A. § 654⁴⁷ itself, were sufficient to withstand the equal protection challenge.⁴⁸ The court dismissed the argument that irrational fear and prejudice toward homosexuals motivated the policy. The court found that the services legitimately imposed the prohibition to maintain unit cohesion and reduce sexual tension. Personal privacy concerns are valid considerations that distinguish the military from civilian life and go directly to the military’s need to foster “instinctive obedience, unity, commitment, and esprit de corps.”⁴⁹

The court also rejected plaintiffs’ argument that the stated rationale was not rationally related to the prohibition on homosexual conduct. The court cited extensive congressional hearings and deliberations that supported the policy.⁵⁰ Congress relied on testimony from military officers, defense experts, gay rights advocates, and other military personnel as well as reports

37. 10 U.S.C.A. § 654(b)(2). This section provides:

That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, 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.

Id.

38. 10 U.S.C.A. § 654(b)(1). This section provides:

That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

- (A) such conduct is a departure from the member’s usual and customary behavior;
- (B) such conduct, under all the circumstances, is unlikely to recur;
- (C) such conduct was not accomplished by use of force, coercion, or intimidation;
- (D) under the circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
- (E) the member does not have a propensity or intent to engage in homosexual acts.

Id.

39. *See* *Able v. United States*, 880 F. Supp. 968, 980 (E.D.N.Y. 1995).

40. *Able*, 155 F.3d at 636.

41. *Able v. United States*, 88 F.3d 1280, 1296 (2d Cir. 1996).

42. *Able v. United States*, 968 F. Supp. 850, 865 (E.D.N.Y. 1997).

43. In striking down the Act as failing to bear even a rational relationship to a legitimate governmental interest, the district court suggested that in reviewing statutes that discriminate on the basis of homosexuality heightened scrutiny would be appropriate. *Able*, 968 F. Supp. at 861-64. The Second Circuit, however, did not decide this issue because the plaintiffs asserted they were not seeking any more onerous standard than the rational basis test. Accordingly, the sole question before the court was whether the Act survives rational basis review.

44. *Able*, 155 F.3d at 634.

45. *Id.*

46. *Id.*

47. 10 U.S.C.A. § 654(a) (West 1998).

48. *Able*, 155 F.3d at 635.

49. *Id.* (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

by both houses of Congress explaining their conclusions.⁵¹ According to the court, several factors allowed the Act to withstand an Equal Protection challenge. The factors included: (1) the strong presumption of validity given to classifications under the rational basis test, (2) the special respect afforded to congressional decisions regarding military matters, (3) the testimony of numerous military leaders, (4) the extensive review and deliberation by Congress, and (5) the detailed findings set forth in the Act itself.⁵²

Now that the “don’t ask, don’t tell” policy has been upheld in every circuit where it has been challenged,⁵³ future court challenges will likely shift to other areas, such as whether sufficient evidence exists to separate a soldier.⁵⁴ Army regulations provide that homosexual conduct⁵⁵ is grounds for separation from the Army.⁵⁶ A statement by a soldier that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member’s sexual orientation, but because the statement indicates a likelihood that the member engages in, or will engage in, homosexual acts.⁵⁷ A soldier’s sexual orientation is not a bar to continued service unless he engages in homosexual conduct.

A soldier’s statement that he is homosexual or bisexual creates a rebuttable presumption that the soldier engages in, or intends to engage in homosexual acts. The soldier’s command must advise him of this presumption and give him the opportunity to rebut it.⁵⁸ The soldier bears the burden of rebutting the presumption.⁵⁹

In *Kindred v. United States*,⁶⁰ the Court of Federal Claims recently ordered the Navy to reinstate an officer because his board failed to address his rebuttal evidence. In an investigation into whether Mr. Kindred had sexually molested his stepdaughter, he revealed that he had engaged in a number of homosexual encounters four years before.⁶¹ The information was forwarded to his commander who convened a Board of Inquiry (BOI). At the BOI, Mr. Kindred admitted prior homosexual conduct, but denied molesting his stepdaughter.⁶² The BOI cleared Mr. Kindred of molesting his daughter, but recommended that the Navy discharge him for homosexual conduct.⁶³

After his discharge, Mr. Kindred brought suit alleging, in part, that the BOI had failed to consider the retention factors when recommending his discharge.⁶⁴ The court agreed, holding that the BOI had an obligation to evaluate and make findings concerning the retention factors. The court specifically looked

50. *Id.*

51. *Id.* See S. Rep. No. 103-112 (1993); H.R. Rep. No. 103-200 (1993).

52. The court further noted that in its previous opinion, it had held that the statements provision (section 654(b)(2)) “substantially furthers the government’s interest . . . in preventing the occurrence of homosexual acts in the military.” The court concluded that “if the acts prohibition of subsection (b)(1) is constitutional . . . the statements presumption of subsection (b)(2) does not violate the First Amendment.” *Able*, 88 F.3d at 1296. Because the court held the acts prohibition (section 654(b)(2)) is constitutional, then the prohibition on statements (section 654(b)(2)) is also constitutional. *Able*, 155 F.3d at 636.

53. See *Phillips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.), *cert. denied*, 136 L. Ed 2d 250, 117 S. Ct. 358 (1996); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir.), *cert. denied*, 139 L. Ed. 2d 12, 118 S. Ct. 45 (1996).

54. Future challenges to homosexual conduct separation could also be expected to attack matters such as the manner in which the investigation is conducted. See *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998).

55. Homosexual conduct includes homosexual acts, a statement by the soldier that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. U.S. DEP’T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, para. 15-2, (17 Oct. 1990) (IO3, 30 Nov. 1994)[hereinafter AR 635-200]; U.S. DEP’T OF ARMY, REG. 600-8-24, PERSONNEL-GENERAL: OFFICER TRANSFERS AND DISCHARGES (21 July 1995) [hereinafter AR 600-8-24]; see U.S. DEP’T OF DEFENSE, DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, para. E3.A1.1.8.1.1. (21 Dec. 1993) (C1, 4 Mar. 1994).

56. AR 600-8-24, *supra* note 55, para. 4-22; AR 635-200, *supra* note 55 para. 15-2.

57. AR 600-8-24, *supra* note 55, para. 4-22; AR 635-200, *supra* note 55 para. 15-2.

58. AR 600-8-24, *supra* note 55, para. 4-22(b)(2); AR 635-200, *supra* note 55, para. 15-3.

59. In rebutting the presumption, the following should be considered: (1) whether the soldier engaged in homosexual acts, (2) the soldier’s credibility, (3) testimony from others about the soldier’s past conduct, character and credibility, (4) the nature and circumstances of the soldier’s statement, and (5) any other evidence relevant to whether the member is likely to engage in homosexual acts. AR 600-8-24, *supra* note 55, para. 4-22(b)(2); AR 635-200, *supra* note 55, para. 15-3b.

60. 41 Fed. Cl. 106 (1998).

61. *Id.* at 110.

62. *Id.*

63. *Id.*

64. *Id.* at 111.

at the BOI's findings worksheet and found that there were no findings regarding retention. The court held that the "only conclusion one can draw from the report is that the BOI, after finding [Mr. Kindred] had committed 'misconduct,' did not consider the retention factors. Plainly, it did not make specific findings concerning any of them."⁶⁵ Since the record did not demonstrate that the BOI considered the retention factors, the court set aside Mr. Kindred's 1994 discharge and directed the Navy to reinstate him.⁶⁶

Though the *Kindred* case was decided under the old policy, the retention factors are virtually identical to those contained in the new policy. Counsel must ensure that BOIs specifically consider the retention factors when faced with such a case. The BOI findings should include whether the respondent raised the retention factors. If a service member raises a retention factor, the BOI's findings should specifically state whether the factor was accepted or rejected, and the reasoning behind its findings. If a BOI fails to do so, a court may set aside the separation. Major Meier.

65. *Id.* at 117-18.

66. The court did note that its decision, including reinstatement, did not preclude a reconvened BOI from addressing: (1) the charge of misconduct that constituted the basis for plaintiff's discharge, and (2) the retention factors. Significantly, the Navy later changed its officer separation guidance to clarify how and when a BOI should address retention. *Id.* at 121.