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MEMORANDUM TO J. MICHAEL KELLY
Counselor to the Attorney General

2 JAN 1979

Re: DCID 1/14 Adjudication Policy and Guidance--
Homosexuality as Basis for Denial of Access
to SCI

This office has reviewed for legality the section of the proposed "DCID 1/14 Adjudication Policy and Guidance," that would provide guidance to individuals charged with determining whether to issue approvals for access to sensitive compartmented information (SCI) with respect to "Homosexuality and Sexual Perversion." Under the proposed guidelines:

SCI access should not be granted when the subject is an admitted homosexual or when the evidence indicates the likelihood of homosexual acts in the future.

We conclude that, in the absence of an articulated rational nexus between the per se denial of access to homosexuals and the protection of SCI, a denial of access based on admitted homosexuality alone would not withstand judicial scrutiny. The government may, however, review the particular conduct of individual applicants and deny access to SCI to homosexuals whose individual behavior suggests a rational basis for the denial of access.

Because government protection of SCI is manifestly a compelling interest, access may lawfully be denied in any particular case based on individual conduct, a negative assessment of which is rationally related to the goal of protecting SCI. This rule would apply even to individual conduct in a constitutionally protected area, e.g., marriage to a foreign agent, if the judgment of potential compromise has an articulable rational basis. As written, however, the rule with respect to admitted homosexuals excludes case-by-case analysis, and must be defended as a per se bar. No justification for

imposing such a bar would seem to exist, especially in view of the guidelines' approach with respect to all other criteria, which in nearly every case leaves some leeway for individualized assessment and discretion. 1/

Federal courts have repeatedly held, with respect to federal regulations governing personnel decisions, that the operation of such regulations must manifest some "rational nexus" with the objectives of government service. Doe v. Hampton, 566 F. 2d 265, 272-3 (D.C. Cir. 1977); Norton v. Macy, 417 F. 2d 1161 (D.C. Cir. 1969); Scott v. Macy, 349 F. 2d 182 (D.C. Cir. 1965), opinion after remand, 402 F. 2d 644 (D.C. Cir. 1968); Dew v. Halaby, 317 F. 2d 582 (D.C. Cir. 1963), cert. denied, 379 U.S. 951 (1964). The rational nexus requirement has been imposed as a matter of federal "administrative common law," although the Due Process Clause of the Fifth Amendment, especially as it incorporates standards of equal protection developed under the Fourteenth Amendment, Hampton v. Mow Sung Wong, 426 U.S. 88, 100 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976), would also appear to proscribe administrative discriminations not predicated on some demonstrable rational basis. The D.C. Circuit Court of Appeals has acknowledged the applicability of the rational relation test in the context of security clearance decisions. Gayer v. Schlesinger, 490 F. 2d 740 (D.C. Cir. 1973).

The proposed guidelines would establish an automatic disqualification for admitted homosexual candidates. Such a regulation, to withstand scrutiny, must be rational both as a policy towards homosexuals, and with respect to the discriminations made in the guidelines between homosexuality and other forms of sexual conduct or unlawful behavior. As the guidelines are written, a candidate's heterosexual relationships and

1/ In some instances, room for judgment is inherent in the nature of the criterion itself, e.g., disloyalty, financial irresponsibility, psychosis. In other instances, some discretion is permitted expressly by the guidelines; note that a prior conviction for a serious offense, even a sexual offense, is not a per se bar to access.

conduct may, in a particular case, be the basis for denial of access. Similarly, conviction for a criminal offense may result in a negative adjudication. However, in no case other than admitted homosexuality do the proposed criteria create an irrebuttable presumption that aberrant sexual conduct or unlawful conduct renders an individual an unacceptable security risk. No basis for this discrimination appears in the proposal, which elaborates at some length, in describing the adjudicative process, see pp. 2-3, the need for case-by-case analysis.

Although no court has squarely decided the question, the language of D.C. Circuit opinions makes it highly unlikely that an executive agency's determination that homosexuality is per se immoral would establish a sufficient rational basis for the regulation, especially given the leeway afforded by the guidelines for discretion in other areas of presumptive immorality. In Norton v. Macy, 417 F. 2d 1161 (D.C. Cir. 1969), the court overturned a civil service employee's dismissal that had been predicated in part on the employee's alleged homosexual conduct. The court squarely rejected the contention that the asserted immorality of homosexual relationships established an adequate basis for discharging employees under Civil Service regulations. Id., 417 F. 2d at 1165-66. Although the court was there interpreting the statutory requirement for discharge only for cause, its language was not so limited. Similarly, in Scott v. Macy, 349 F. 2d 182 (D.C. Cir. 1965), the court said with respect to a candidate for federal employment, who had been rejected because of his homosexuality:

The Commission excluded appellant from public employment because it concluded that he had engaged in "immoral conduct." ...The stigmatizing conclusion was supported only by statements that appellant was a "homosexual" and had engaged in "homosexual conduct." These terms have different meanings for different people. They therefore require some specification. The Commission must at least specify the conduct it finds "immoral" and state why that conduct related to "occupational competence or fitness," especially since the Commission's action involved the gravest consequences.

Id., 349 F. 2d at 184-5 (footnotes omitted).

The reported decision most closely in point factually with respect to SCI access is Gayer v. Schlesinger, 490 F. 2d 740 (D.C. Cir. 1973), in which the court overturned three Department of Defense decisions to revoke the security clearances of defense contractor employees because of their homosexuality. The court did not reach the question whether the Department could lawfully have established homosexuality as a bar to security clearances, 2/ finding instead that no such rule existed within the department and requiring de novo individualized determinations based only on questions permissibly asked of employees under Executive Order 10865, 3 C.F.R. [1959-1963 Comp.] 398, as amended, 3 C.F.R. at 83 (1972). The court said in interpreting a Department of Defense regulation substantially similar to the description of "Adjudicative Process" in the proposed DCID guidelines, 32 C.F.R. §155.4(e) (1972) 3/:

What is required is that every application for clearance must be considered in its particular

2/ The District Court had interpreted the Department of Defense criteria and practice as establishing a bar, and voided the bar as irrational for lack of any rational connection between homosexuality per se and the ability to safeguard classified information. Wentworth v. Laird, 348 F. Supp. 1153, 1155 (D.D.C. 1972).

3/- The conduct described in § 155.5 may, in the light of all the surrounding circumstances, be the basis for denying or revoking a clearance. The conduct varies in implication, degree of seriousness and significance depending upon all the factors in a particular case. Therefore, the ultimate determination must be an overall common sense one based upon all the information which may properly be considered under this part including, but not limited to, such factors as the following: The seriousness of the conduct, its implications, its recency, the motivations for it, the extent to which it was voluntary and undertaken with knowledge of the circumstances involved and, to the extent that it can be estimated and is appropriate in a particular case, the probability that it will continue in the future.

32 C.F.R. § 155.4(e) (1972).

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factual setting As in other decisions of importance the bearing of particular conduct upon an issue to be decided must be left to a rational appraisal based on relevant facts. The determination in these cases of security clearance is a judgmental one based on "over-all common sense," and is to be explained in such manner that a reviewing court may be able to discern whether there is a rational connection between the facts relied upon and the conclusions drawn.

Gayer v. Schlesinger, 490 F. 2d at 750-1 (footnote omitted). Such individualized "rational appraisals" would be as lawful and appropriate with respect to homosexual candidates for SCI clearance as they are with respect to Department of Defense contractor employees. Conversely, in the absence of an articulated rational basis for a bar, we conclude that a court would find individualized consideration for SCI access compelled by the case-by-case approach elaborated in the preamble sections of the adjudication guidelines, as well as by the "rational nexus" test discussed above.

We have no doubt that in a particular case, the sexual history or practice of an admitted homosexual, like the sexual behavior of a given heterosexual, may reflect adversely on his or her stability or discretion, and can provide the basis for a denial of SCI access. Furthermore, a rational basis for denial exists where the subject objects to the disclosure of his homosexuality to his family or close associates, since he would presumably be more susceptible to blackmail or to similar duress. We conclude, however, that case-by-case analysis is necessary, and that the regulations should be revised to permit such discretion. An addendum proposing such a revision is attached.

Larry A. Hammond
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Attachment

ADDENDUM

PROPOSED REVISIONS OF GUIDELINES ON HOMOSEXUALITY AND COHABITATION

Substitute for paragraph 2:

2. In examining cases involving alleged or admitted acts of homosexuality or sexual perversion, it is essential to consider the degree to which those acts reflect on the stability, character, and discretion of the subject. The adjudicator should consider whether the acts involved were transitory or indicative of the subject's continuing pattern of behavior. SCI access should be denied when in light of all available evidence concerning the subject's history of sexual behavior, it appears that his or her access to SCI would pose a risk to the national security. Admitted or alleged homosexuality, or the likelihood of future homosexual acts, in and of themselves, are not bars and do not constitute bases for security disapproval, but may be considered as factors in determining an individual's susceptibility to undue influence or duress.