

NOTES

FIRE AT WILL: THE CIA DIRECTOR'S ABILITY TO DISMISS HOMOSEXUAL EMPLOYEES AS NATIONAL SECURITY RISKS

In the mid-1970's, the media contained many allegations of Central Intelligence Agency ("CIA" or "Agency") misconduct.¹ As a result of the charges in the media, as well as numerous congressional investigations into CIA conduct, Congress increased the amount of oversight it exercised over the conduct of Agency business.² Congress eventually codified the terms of the increased oversight in the Intelligence and Oversight Act of 1980, which requires the CIA Director to keep congressional oversight committees "fully and currently informed of all intelligence activities."³ The

¹ TASK FORCE ON INTELLIGENCE AND COUNTER INTELLIGENCE, ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, OVERSIGHT AND ACCOUNTABILITY OF THE U.S. INTELLIGENCE AGENCIES: AN EVALUATION 1 (1985) [hereinafter TASK FORCE ON INTELLIGENCE AND COUNTER INTELLIGENCE].

² *Id.*

³ In the pertinent part, the Intelligence and Oversight Act of 1980 provides:

(a) Reports to Congressional Committees of current and proposed activities

To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall —

(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman

activities about which the CIA Director must inform Congress include all CIA covert action operations.⁴

The one area, however, in which Congress has not exercised any control over the CIA Director's actions is Agency employment policies. Section 102(c) of the National Security Act permits the CIA Director to dismiss any employee when the Director deems that employee's dismissal "necessary or advisable in the interest of the United States."⁵ When exercising the discretion permitted under this section of the National Security Act, the CIA Director "deems" homosexuals security risks and dismisses them from the Agency.⁶

Because Congress chose not to focus their attention on the CIA's discriminatory employment policies when it formulated its most recent oversight legislation for the CIA, a homosexual employee dismissed by the Agency cannot rely on this legislation for any assistance. Rather, a homosexual dismissed by the CIA must look to the courts for redress of the Agency's discrimination. In a lawsuit against the CIA, a dismissed homosexual employee can

and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;

(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

50 U.S.C. § 413 (1982).

⁴ TASK FORCE ON INTELLIGENCE AND COUNTER INTELLIGENCE, *supra* note 1 at 12.

⁵ In the pertinent part, the National Security Act of 1947 provides:

Notwithstanding the provisions of section 652 of Title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interest of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

50 U.S.C. § 403(c) (1982).

⁶ See *Webster v. Doe*, 108 S. Ct. 2047, 2049 (1988) (the CIA fired a covert electronics technician after he disclosed his homosexuality); see also D. PHILLIPS, *SECRET OPERATIONS: HOW TO BE A FEDERAL INTELLIGENCE OFFICER* (1984). When discussing the qualifications to become a CIA agent, Phillips stated that "[h]omosexuals continue to be considered security risks in most intelligence agencies and are not hired if homosexual tendencies are spotted during security reviews."

Id. at 74.

allege several causes of action. One cause of action a homosexual employee may allege is that his or her dismissal from the Agency violates one of the employment protection statutes previously enacted by Congress to protect federal government employees from arbitrary dismissal.⁷ Additionally, a homosexual employee could challenge his or her dismissal from the CIA by alleging that the Director's actions violated the employee's rights under the fifth amendment to the United States Constitution.⁸

The CIA Director can successfully defend against a homosexual plaintiff's lawsuit brought pursuant to one of the federal employment protection statutes. In past decisions, federal courts have held that these statutes do not apply to the CIA.⁹ Recently, the United States Supreme Court put the matter to rest by stating that the Administrative Procedure Act ("APA") does not restrict the CIA Director's discretion to dismiss employees under section 102(c) of the National Security Act.¹⁰

Along with the statutory claims, homosexual plaintiffs can allege that their dismissal from the CIA violated their fifth amendment constitutional rights to either due process or equal protection.¹¹ In such a suit, a homosexual plaintiff can contend that the right of privacy includes homosexual conduct, that private homosexual conduct is a fundamental right, or that homosexuals constitute a suspect class.¹² If the court agrees with any of these conten-

⁷ See, e.g., Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1982); Veteran's Preference Act, 5 U.S.C. §§ 815-69 (1958) (current version at 5 U.S.C. §§ 2108, 3305(b), 3311-16, 3351, 3363, 7701 (1982)); Civil Service Reform Act of 1978, 5 U.S.C. §§ 7501-04, 7511-14 (1982).

⁸ See, e.g., *Watkins v. U.S. Army*, 847 F.2d 1329, 1335 (9th Cir. 1988) (homosexual plaintiff alleged that his discharge from the Army violated his fifth amendment right to equal protection), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989); *Beller v. Middendorf*, 632 F.2d 788, 807 (9th Cir. 1980) (homosexual plaintiff alleged his discharge from the Navy violated his fifth amendment right to due process), *cert. denied*, 452 U.S. 905 (1981).

⁹ See, e.g., *Neely v. CIA*, 27 FEP Cases 82, 85 (D.D.C. 1982) (court stated that the CSRA did subject the CIA to the protections offered by the Act), *aff'd*, 744 F.2d 878 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985); *Rhodes v. United States*, 156 Ct. Cl. 31, 36 (1962) (court stated that neither the VPA nor the CSA limits the CIA director's authority under section 102(c)).

¹⁰ See *Webster*, 108 S. Ct. at 2053 (Court held that the APA does not apply to CIA employment decisions).

¹¹ See, e.g., *Watkins*, 847 F.2d at 1335 (homosexual plaintiff alleged that his discharge from the Army violated his fifth amendment right to equal protection); *Beller*, 632 F.2d at 807 (homosexual plaintiff alleged his discharge from the Navy violated his fifth amendment right to due process). Although the fifth amendment to the United States Constitution contains no equal protection clause, government discrimination can still violate the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

¹² See *Watkins*, 847 F.2d at 1345. In order to be a suspect class, a group must be the

tions, then the court will review the homosexual plaintiff's constitutional claim under the strict scrutiny standard.¹³ Using this standard, in order for the court to rule that the Agency's dismissal of the homosexual employee was constitutional, the CIA's actions must be necessary to further a compelling state interest.¹⁴ If, however, the court does not agree with any of the homosexual employee's contentions, then the court will use the lowest standard of constitutional review when deciding the constitutionality of the Agency's action. Under this standard, in order for the court to declare the dismissal constitutional, the Agency's dismissal of a homosexual employee only needs to be rationally related to a legitimate government interest.¹⁵

When a homosexual employee uses these constitutional claims to challenge his or her dismissal from the Agency, the CIA Director has two types of defenses available. First, the CIA Director can challenge the homosexual plaintiff's contentions regarding the classification of homosexual conduct as a fundamental right or the classification of homosexuals as a suspect class, and assert that the court should not review the Agency's dismissal of a homosexual employee under a heightened scrutiny standard. In at least one circuit and the United States Supreme Court, courts have agreed with the arguments that a court should not review discrimination against homosexuals under a heightened scrutiny standard, either because homosexuals are not a suspect class or because homosexual conduct does not merit inclusion in the right of privacy.¹⁶ If a court agrees with the CIA Director that a homosexual employee's claims do not merit any heightened scrutiny, then the CIA Director need only demonstrate that the dismissal of a homosexual passes the lowest level of constitutional scrutiny. The CIA Director should be

subject of historical discrimination, the discrimination must be unfair, and the group must lack political power. *Id.* at 1345-48.

¹³ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Court used strict scrutiny to review a statute that infringed upon the fundamental right to marriage); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (Court used strict scrutiny to review a statute that infringed upon the notions of privacy surrounding the marriage relationship); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (regulation that discriminates against a suspect class receives strict scrutiny).

¹⁴ See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

¹⁵ See *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Fleming v. Nestor*, 363 U.S. 603, 611 (1960); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2 (2d ed. 1988).

¹⁶ See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (Court held that the right to privacy does not include homosexual conduct); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (court stated that homosexuals do not comprise a suspect class).

able to do this because the federal courts have traditionally accepted arguments advanced by the federal government that homosexuals detract from the efficiency of the agency that employs them.¹⁷

If a court agrees with the homosexual plaintiff's contentions that either private homosexual conduct represents a fundamental right or homosexuals comprise a suspect class, then the court will review the employee's dismissal under a heightened scrutiny standard.¹⁸ In this situation, the CIA Director must resort to the second level of defense against a homosexual employee's constitutional claims. The CIA Director must argue that the dismissal of homosexual employees is necessary to accomplish a compelling state interest. The circuits are split as to whether the dismissal of homosexual employees in the intelligence gathering agencies is in fact necessary to protect the national security, because homosexuals represent security risks.¹⁹ Thus, the CIA Director can challenge a homosexual employee's constitutional claims on two levels.

Another possible defense that the CIA Director may use against a homosexual plaintiff's claims involves arguing that the CIA's employment decisions are the type of cases that courts traditionally decline to review.²⁰ Under this argument, the court would not even consider the constitutional claims, but rather would decline to hear the case entirely. Although it is not a majority position, this argument has support on the United States Supreme Court.²¹ Thus, in a lawsuit brought by a dismissed homosexual employee, the CIA Director may defend against both the plaintiff's statutory and con-

¹⁷ See, e.g., *Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969) (court noted that homosexuality evidenced an unstable personality unsuited for certain kinds of work); *Dew v. Halaby*, 317 F.2d 582, 588 (D.C. Cir. 1963) (court deferred to agency opinion which held that homosexuality demonstrated a lack of character, stability, and responsibility), *cert. dismissed*, 379 U.S. 951 (1964).

¹⁸ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Court used strict scrutiny to review a statute that infringed upon the fundamental right to marriage); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (Court used strict scrutiny to review a statute that infringed upon the notions of privacy surrounding the marriage relationship); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (regulation that discriminates against a suspect class receives strict scrutiny).

¹⁹ See *Watkins v. U.S. Army*, 847 F.2d 1329, 1350-52 (9th Cir. 1988) (court stated that Army's regulations requiring the service to discharge homosexuals are too loosely tailored to further a compelling state interest), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989); *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980) (court states that Navy regulations requiring the service to discharge homosexuals have a close relationship to an important federal government interest), *cert. denied*, 452 U.S. 905 (1980).

²⁰ See *infra* notes 32-43 and accompanying text for a discussion of the types of cases that courts traditionally decline to review.

²¹ See *Webster v. Doe*, 108 S. Ct. 2047, 2059 (1988) (Scalia, J., dissenting).

stitutional claims, or argue that the case is the type which the court should not hear at all. Therefore, the CIA Director has at least three levels of defenses that he or she may use to defeat the constitutional and statutory claims brought by a homosexual defendant.

The courts have apparently closed the door on any hopes a homosexual plaintiff might have of making a successful statutory challenge to his or her dismissal from the CIA under section 102(c). Additionally, all indications are that the CIA Director will be successful with at least one of his constitutional arguments, which will be enough to defeat a homosexual plaintiff's constitutional claims. In the courts, homosexuals have little chance of successfully challenging their dismissal by the federal government.²² On more than one occasion, the courts have revealed their animosity toward homosexuals by using stereotypes and flawed logic to defeat homosexual's claims.²³

Concurrently, the courts have revealed their admiration for the intelligence agencies. Courts have broadly interpreted employment protection statutes in order to exempt the CIA Director's employment decisions from coverage.²⁴ Additionally, the courts have recognized the protection of national security information available to CIA employees as a compelling state interest.²⁵ Moreover, the courts have deferred to the judgment of the intelligence agencies that their actions are necessary to protect this compelling state interest.²⁶

²² R. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* (1988). When analyzing a homosexual's chance of success in challenging the government, Mohr noted:

The typical judicial strategy is now to say, even in national security cases, that homosexuality is not per se a bar to some opportunity for a gay litigant (say custody or a security clearance), but then, in the end, to find the litigant's homosexuality fully dispositive anyway—even going so far as to pose dilemmas with no escape for the gay litigant.

Id. at 210.

²³ See *infra* notes 278–93 and accompanying text for a discussion of the flawed logic used by courts in their constitutional analysis of a homosexual litigant's claim.

²⁴ See *infra* notes 261–77 and accompanying text for a discussion of the broad interpretation given by the Supreme Court to the APA's exemptions in order to shield the CIA from judicial review under the APA.

²⁵ See, e.g., *CIA v. Sims*, 471 U.S. 159, 175 (1985) (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980)) (Court held that protecting the secrecy of important national security information represents a compelling state interest); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (Court held that the government has a compelling interest in protecting the secrecy of national security information).

²⁶ See, e.g., *Sims*, 471 U.S. at 179 (Court noted that the CIA Director was familiar with the "whole picture" while judges are not); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (court noted that the executive has unparalleled expertise in foreign policy while the judiciary lacks expertise in that area), *cert. denied*, 454 U.S. 1144 (1982).

Thus, when defending against a homosexual plaintiff's constitutional claims, any or all of the arguments advanced by the CIA Director have a good chance of success because of courts' low regard for homosexuals and high regard for the intelligence agencies.

This note analyzes the deference given to the CIA Director by the courts, allowing him or her to fire homosexual employees as national security risks. Section I provides an overview of the types of government actions that the courts have traditionally declined to review.²⁷ Section II examines the CIA Director's possible defenses when a homosexual employee challenges his or her dismissal in court.²⁸ Section II discusses the statutory and constitutional claims that a homosexual could bring against the Agency as a result of an adverse employment decision.²⁹ Section II also examines the compelling state interest represented by the protection of sensitive national security information in the possession of the CIA.³⁰ Section III analyzes how the courts' attitudes toward both the CIA and homosexuals inevitably lead to the CIA's victory in employment discrimination cases brought by homosexuals.³¹

I. OVERVIEW OF THE TRADITIONAL JUDICIAL DEFERENCE TO EXECUTIVE OR LEGISLATIVE AUTHORITY

Historically, the United States Supreme Court has declined to review actions undertaken by either the executive or legislative branches of the federal government pursuant to powers granted to them in the United States Constitution.³² The Court has declined to review such actions because it stated that a specific grant of power in the Constitution excludes the judiciary from exercising authority in that arena.³³ Additionally, the Court has stated that it lacks sufficient expertise to decide on the wisdom of actions taken by the

²⁷ See *infra* notes 32-43 and accompanying text.

²⁸ See *infra* notes 44-249 and accompanying text.

²⁹ See *infra* notes 49-190 and accompanying text.

³⁰ See *infra* notes 191-244 and accompanying text.

³¹ See *infra* notes 250-329 and accompanying text.

³² See *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Colegrove v. Green*, 328 U.S. 549, 554 (1946). Traditionally, courts have also declined to review other types of government action, but these situations are beyond the scope of this note. See Redish, *Judicial Review and the "Political Question"*, 79 Nw. U.L. Rev. 1031 (1985) for a discussion of the "Political Question" doctrine, under which some courts hold that some questions are non-justiciable because they present issues of constitutional law that the political branches of the government can resolve more effectively.

³³ *Colegrove*, 328 U.S. at 554.

other branches when operating in their assigned spheres.³⁴ Thus, when exercising a power granted to them by the Constitution, the executive and legislature traditionally operate without judicial oversight.

The United States Supreme Court has held that it is inappropriate to act in an area that the Constitution assigns to another branch of the federal government. It has also ruled that courts lack the requisite expertise to make judgments in these areas. In the 1973 case of *Gilligan v. Morgan*, the United States Supreme Court declined to review the regulations governing the Ohio National Guard both because the Constitution assigned this function to the legislature and because the courts have no competency to review such matters.³⁵ In *Gilligan*, several full-time students and officers of the student government at Kent State University in Ohio alleged that in May of 1970, the National Guard violated students rights of free speech and assembly during a period of civil unrest on and around the campus.³⁶ As relief, the students asked the *Gilligan* Court to assume what amounted to regulatory jurisdiction over the Ohio National Guard.³⁷

The *Gilligan* Court stated that article one, section eight, clause sixteen of the United States Constitution explicitly assigns to Congress the responsibility of organizing, arming, and disciplining the militia, now the national guard.³⁸ The *Gilligan* Court also noted that control of the military requires complex and professional decision making.³⁹ With regard to the control of the military, the *Gilligan* Court stated that it is "difficult to conceive of an area of government in which the courts have less competence."⁴⁰ Through its decision not to review the training and mission of the Ohio National Guard,

³⁴ *Gilligan*, 413 U.S. at 10.

³⁵ *Id.* at 11-12.

³⁶ *Id.* at 3.

³⁷ *Id.* at 5.

³⁸ *Id.* at 6; see also *Colegrove v. Green*, 328 U.S. 549, 554 (1946). In *Colegrove*, three voters residing in Illinois congressional districts with much larger populations than the other Illinois districts brought suit against the Illinois Governor and Secretary of State to restrain an election because Illinois congressional districts lacked the compactness of territory and equality of population mandated by the Reapportionment Act of 1911. *Colegrove*, 328 U.S. at 550. The United States Supreme Court noted that article one, section eight of the United States Constitution gives Congress exclusive authority to secure fair representation by the states in the House of Representatives. *Id.* at 554. As a result, the Court concluded that when Congress fails to ensure that a state contains proportional districts, the clear intent of the framers of the Constitution excludes the judiciary from entering the situation. *Id.*

³⁹ *Gilligan*, 413 U.S. at 10.

⁴⁰ *Id.*

the *Gilligan* Court demonstrated that the judiciary believes it lacks sufficient expertise to make decisions in areas in which the Constitution designates another branch as the preeminent authority.

Therefore, when the United States Constitution grants authority to a branch of the federal government other than the judiciary, the courts decline to review the actions taken by the branch in the exercise of this power.⁴¹ The courts refuse to review these actions both because the court believes it lacks the expertise to judge the wisdom of the action, and because a constitutional grant of power to a specific branch excludes the judiciary from acting in this area.⁴² As a result, the courts traditionally refuse to review the actions of another branch of the federal government when that branch acts pursuant to a constitutional grant of power.⁴³

II. DISCUSSION OF THE CIA DIRECTOR'S POTENTIAL DEFENSES AGAINST CLAIMS BY DISMISSED HOMOSEXUAL EMPLOYEES

Because Congress has not included CIA employment practices as one of the Agency activities that it supervises, a homosexual employee dismissed by the Agency as a result of his or her sexual orientation must use the courts to obtain a remedy against the Agency. In the lawsuit against the CIA, a homosexual employee may allege that the dismissal was a violation of a federal employment protection statute,⁴⁴ a violation of the employee's constitutional rights,⁴⁵ or a violation of the employee's both statutory and constitutional rights.⁴⁶

⁴¹ See, e.g., *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Colegrove v. Green*, 328 U.S. 549 (1946).

⁴² See, e.g., *Gilligan*, 413 U.S. at 10; *Colegrove*, 328 U.S. at 554.

⁴³ See, e.g., *Gilligan*, 413 U.S. at 6; *Colegrove*, 328 U.S. at 554. See also *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). The United States Supreme Court held in *Oetjen* that the United States Constitution commits the conduct of the foreign relations of our government to the Executive and the Legislature. *Id.* at 302.

⁴⁴ See, e.g., Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1982); Veteran's Preference Act, 5 U.S.C. §§ 815-69 (1958) (current version at 5 U.S.C. §§ 2108, 3305(b), 3311-16, 3351, 3363, 7701 (1982)); Civil Service Reform Act, 5 U.S.C. §§ 7501-04, 7511-14 (1982).

⁴⁵ See, e.g., *Watkins v. U.S. Army*, 847 F.2d 1329, 1335 (9th Cir. 1988) (homosexual plaintiff alleged that his discharge from the Army violated his fifth amendment right to equal protection), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989); *Beller v. Middendorf*, 632 F.2d 788, 807 (9th Cir. 1980) (homosexual plaintiff alleged his discharge from the Navy violated his fifth amendment right to due process), *cert. denied*, 452 U.S. 905 (1981).

⁴⁶ See, e.g., *Webster v. Doe*, 108 S. Ct. 2047, 2050 (1988) (a homosexual employee fired by the CIA alleged that the dismissal was a violation of the APA as well as a violation of his constitutional rights).

The CIA Director has three levels of arguments that he or she can use to defend against the lawsuit of a dismissed homosexual employee. First, the CIA Director can defend against the allegation that the employee's dismissal violated a federal employment protection statute. The Director can do this by arguing that none of these statutes abridges the CIA Director's discretion to dismiss homosexual employees.⁴⁷

On the second level, the CIA Director can defend against the homosexual plaintiff's constitutional claims. On the third level, the CIA Director can argue that the court should not even hear any of the homosexual plaintiff's claims because the CIA Director's actions under section 102(c) represent the kind of actions that the courts traditionally do not review.⁴⁸ Thus, the CIA has a series of defenses available against a homosexual plaintiff's claim that his or her dismissal from the CIA violated his or her constitutional and statutory rights.

A. *Inapplicability of Employee Protection Statutes to the CIA*

A homosexual may challenge an adverse employment action by the CIA Director under a number of employment protection statutes.⁴⁹ The CIA can defend itself from such challenges, however, because the courts have held that none of the employment statutes that have been the subjects of litigation limit the Director's power to dismiss employees in the interest of national security.⁵⁰ The courts have exempted the CIA from the Veteran's Preference Act ("VPA"), the Civil Service Act ("CSA"), the Civil Service Reform Act ("CSRA"), and the Administrative Procedure Act ("APA").⁵¹ As a result, the courts have foreclosed a homosexual employee's oppor-

⁴⁷ See, e.g., *Neely v. CIA*, 27 FEP Cases 82, 85 (D.D.C. 1982) (court stated that the CSRA did subject the CIA to the protections offered by the Act), *aff'd*, 744 F.2d 878 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985); *Rhodes v. United States*, 156 Ct. Cl. 31, 36 (1962) (court stated that neither the VPA nor the CSA limits the CIA director's authority under section 102(c)).

⁴⁸ See *Webster v. Doe*, 108 S. Ct. 2047, 2059 (1988) (Scalia, J., dissenting).

⁴⁹ Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1982); Civil Service Reform Act of 1978, 5 U.S.C. §§ 7501-04, 7511-14 (1982); Veteran's Preference Act, 5 U.S.C. §§ 851-69 (1958) (current version at 5 U.S.C. §§ 2108, 3305(b), 3311-16, 3351, 3363, 7701 (1982)).

⁵⁰ See *Webster*, 108 S. Ct. at 2053 (Administrative Procedure Act); *Neely v. CIA*, 27 FEP Cases 82, 85 (D.D.C. 1982) (Civil Service Reform Act), *aff'd*, 744 F.2d 878 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985); *Rhodes v. United States*, 156 Ct. Cl. 31, 36 (1962) (Veteran's Preference Act).

⁵¹ *Webster*, 108 S. Ct. at 2053; *Neely*, 27 FEP Cases at 85; *Rhodes*, 156 Ct. Cl. at 36.

tunity for statutory relief from an adverse CIA employment decision.

Since the early 1960s, the courts have strictly interpreted employment protection statutes so as to exempt CIA employment decisions from those statute's coverage. In 1962, the United States Court of Claims in *Rhodes v. United States* held that neither the VPA nor the CSA impaired the CIA Director's power to dismiss employees pursuant to section 102(c).⁵² In *Rhodes*, a document analyst with a high security clearance claimed that the CSA and the VPA limited the Director's ability to dismiss him.⁵³ The *Rhodes* court noted that numerous cases had given the federal government as an employer the right to dismiss its employees at any time as long as no statute or regulation limited that right.⁵⁴ The *Rhodes* court held that the dismissal violated no CIA regulation and stated that the statute under which the Director fired the plaintiff, section 102(c) of the National Security Act, grants the Director absolute rights.⁵⁵ By holding that neither the VPA nor the CSA limits the Director's ability to dismiss employees, the *Rhodes* court established that no statute in force as of 1962 superseded section 102(c).

As Congress passed new employment protection statutes, the courts continued to interpret them so as not to limit the CIA Director's discretion to dismiss employees under section 102(c). In

⁵² *Rhodes v. United States*, 156 Ct. Cl. 31, 36 (1962).

⁵³ *Id.* at 33. If, at the time of the *Rhodes* decision, an employee qualified for protection under the Veteran's Preference Act, then the Act, as it existed at that time, provided:

No permanent or indefinite preference eligible, who has completed a probationary or trial period in the civil service, or in any establishment, agency, bureau, administration project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing

5 U.S.C. § 863 (1958). With regard to positions exempt from the protections that the VPA offered to preference eligibles at the time of the *Rhodes* decision, the Act provided:

Nothing contained in this chapter is intended to apply to any position in or under the legislative or judicial branch of the Government or to any position or appointment which by the Congress is required to be confirmed by or made with the advice and consent of the United States Senate; *Provided, however* that the provisions of this chapter shall apply to appointments under sections 31a, 31b, and 39 of Title 39.

5 U.S.C. § 869 (1958) (emphasis in original). *But see* *Andrus v. Clover Constr. Co.*, 446 U.S. 608 (1980). The *Andrus* Court held that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus*, 446 U.S. at 616-17.

⁵⁴ *Rhodes*, 156 Ct. Cl. at 36.

⁵⁵ *Id.*

1978, Congress passed the Civil Service Reform Act ("CSRA"), which provided additional protections to federal government employees. Under the CSRA, Congress created the Merit Systems Protection Board ("MSPB") and granted it authority to determine whether certain federal employment actions resulted from illegal discrimination.⁵⁶ In the 1981 case of *Neely v. CIA*, the United States District Court for the District of Columbia ruled that the CSRA also fails to limit the CIA Director's discretion over employee dismissal.⁵⁷ In *Neely*, a former CIA employee filed a petition with the MSPB appealing her discharge from the CIA.⁵⁸ The district court noted, however, that the CSRA's own terms explicitly exclude the CIA and a number of other federal entities from censure under the Act.⁵⁹ In support of this determination, the district court cited the MSPB's own determination that the CSRA does not impair any authority established in the National Security Act.⁶⁰ By holding that the terms

⁵⁶ *Neely v. CIA*, 27 FEP Cases 82, 85 (D.D.C. 1981), *aff'd*, 744 F.2d 878 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985). In the relevant section, the Civil Service Reform Act provides that:

(a) The Merit Systems Protection Board shall —

(1) hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order; . . .

5 U.S.C. § 1205 (1982).

⁵⁷ *Neely*, 27 FEP Cases at 86.

⁵⁸ *Id.* at 84.

⁵⁹ *Id.* at 84. The *Neely* court based its holding on 5 U.S.C. § 2302(a)(2)(C) (1982) which provides:

(C) "agency" means an Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, but does not include —

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principle function of which is the conduct of foreign intelligence or counterintelligence activities;

5 U.S.C. § 2302(a)(2)(C) (1982) (emphasis added).

⁶⁰ *Neely*, 27 FEP Cases at 85. The Board justified its decision on 5 U.S.C. § 2305 (1982), which provides:

No provision of this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in Section 102 of the National Security Act of 1947 . . . , the Central Intelligence Agency Act of 1949 . . . , the Act entitled "An Act to provide certain administrative authorities for the National Security Agency, and for other purposes" . . .

5 U.S.C. § 2303(a)(2)(C) (Supp. II 1986).

of the CSRA explicitly exempt the CIA from the terms of the statute, the *Neely* court established that the CSRA leaves untouched the CIA Director's authority to dismiss employees as national security risks.⁶¹

The *Neely* court also concluded, however, that Equal Employment Opportunity Commission ("EEOC") regulations, promulgated pursuant to Title VII, apply to the CIA.⁶² The *Neely* court noted that the plaintiff had set EEOC procedures in motion when she sent a letter to the CIA notifying the Agency of her complaint.⁶³ As a result, the *Neely* court noted that the plaintiff's complaint should have gone through the EEOC grievance system.⁶⁴ Thus, although the *Neely* court held that the CSRA failed to apply to the CIA, it did hold that in a case of employment discrimination, the CIA must work within the informal grievance system of the EEOC.

In addition to interpreting the CSRA, the courts have also determined whether the Administrative Procedure Act ("APA") limits the CIA Director's discretion to dismiss employees. In the 1988 case of *Webster v. Doe*, the United States Supreme Court held that the APA has no effect on the CIA Director's ability to dismiss employees pursuant to section 102(c).⁶⁵ In *Webster*, the CIA's Office

⁶¹ See *Neely*, 27 FEP Cases at 85.

⁶² See *id.* at 87-89. See also 42 U.S.C. § 2000e-4 (1982). The EEOC offers no help to a homosexual who is the victim of employment discrimination, however, because its terms only apply to unlawful employment practices committed against an individual because of that person's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1982). Courts have held that discrimination against homosexuals is not sex discrimination, and thus the statute offers homosexuals no protection. See, e.g., *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 332 (9th Cir. 1979).

⁶³ *Neely*, 27 FEP Cases at 88-89.

⁶⁴ See *id.* at 87-88. Title VII empowers the EEOC to prevent any unlawful employment practice as follows:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion

42 U.S.C. § 2000e-5(b) (1982).

⁶⁵ *Webster v. Doe*, 108 S. Ct. 2047, 2053 (1988).

of Security had determined that a covert electronics technician represented a threat to security due to his homosexuality.⁶⁶ As a result, the Director fired the employee under section 102(c).⁶⁷ The employee alleged, among other things, that his firing represented a violation of section 706 of the APA because it was arbitrary and capricious, as well as an abuse of discretion.⁶⁸ The *Webster* Court noted that the APA allows a person who is affected by the action of any federal government agency to obtain judicial review of that action.⁶⁹ The Court, however, also observed that section 701(a)(1) and section 701(a)(2) of the APA limited the availability of judicial review under the Act.⁷⁰ The *Webster* Court noted that section 701(a)(1) concerns situations where statutes preclude judicial review,⁷¹ and that it applies whenever Congress expresses an intent to prohibit judicial review.⁷²

Although the *Webster* Court held that section 701(a)(1) does not apply to the CIA because there is no specific statutory expression of Congress' intent to preclude judicial review of CIA actions, the Court also held that section 701(a)(2) does exempt the CIA Director's power to dismiss employees under section 102(a) of the National Security Act from judicial review under the APA.⁷³ The *Web-*

⁶⁶ *Id.* at 2049.

⁶⁷ *Id.* at 2049-50.

⁶⁸ *Id.* at 2050.

⁶⁹ *Id.* at 2051. In the relevant section, the APA provides:

§ 706 Scope of Review

To the extent necessary to decision, and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law; . . .

5 U.S.C. § 706 (1982).

⁷⁰ *Webster*, 108 S. Ct. at 2051. In the relevant section, the APA provides that, "[t]his chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1982).

⁷¹ *Webster*, 108 S. Ct. at 2051.

⁷² *Id.* (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)).

⁷³ *Webster*, 108 S. Ct. at 2053.

ster Court stated that section 701(a)(2) applied when agency action is committed to agency discretion by law.⁷⁴ Following prior precedents,⁷⁵ the Court concluded that section 701(a)(2) applied if Congress, although not specifically precluding judicial review, writes a statute in such a way "that a court would have no meaningful standard against which to judge the agency's exercise of discretion."⁷⁶ Looking to the language of section 102(c), the *Webster* Court noted that the statute provides a reviewing court with no basis on which to assess a CIA termination decision.⁷⁷ The Court therefore concluded that the language of section 102(c) commits the dismissal of employees to Agency discretion by law.⁷⁸

Additionally, the *Webster* Court concluded that the National Security Act as a whole vests the Director of the CIA with very broad discretion.⁷⁹ In support of this conclusion, the *Webster* Court stated that national security depends on the reliability and trustworthiness of CIA employees.⁸⁰ By holding that section 102(c) provides a reviewing court with no judicially manageable standards for judging the Director's exercise of discretion, the *Webster* Court established that the terms of the APA exempt the CIA Director's employment decisions from judicial review under the Act.

Therefore, with the exception of Title VII, which offers no assistance to homosexuals,⁸¹ none of the litigated statutory limits on a federal government agency's ability to deal with its employees applies to the CIA. The *Rhodes* court held that neither the VPA nor CSA limits the CIA Director's authority under section 102(c).⁸² Also, the *Neely* court stated that the terms of the CSRA specifically exempt

⁷⁴ *Id.* at 2051.

⁷⁵ *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

⁷⁶ *Webster*, 108 S. Ct. at 2052 (quoting *Heckler*, 470 U.S. at 830); see *Volpe*, 401 U.S. 402, 410 (1971).

⁷⁷ *Webster*, 108 S. Ct. at 2052; see also *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (court held that a court reviewing an agency's actions under the APA should look to an agency's formal and informal policy statements as well as statutes to locate judicially manageable standards).

⁷⁸ *Webster*, 108 S. Ct. at 2052.

⁷⁹ *Id.* (citing *CIA v. Sims*, 471 U.S. 159, 168-69 (1985)).

⁸⁰ *Id.*

⁸¹ Title VII offers no help to a homosexual who is the victim of employment discrimination because its terms only apply to unlawful employment practices committed against an individual because of that person's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1982). Courts have held that discrimination against homosexuals is not sex discrimination, and thus the statute offers homosexuals no protection. See, e.g., *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 332 (9th Cir. 1979).

⁸² *Rhodes v. United States*, 156 Ct. Cl. 31, 36 (1962).

the CIA Director from the protections offered by the Act.⁸³ Moreover, the *Webster* Court stated that the terms in the APA, which exclude certain federal government actions from judicial review, include the CIA Director's employment decisions.⁸⁴ Therefore, a homosexual has no statutory recourse when dismissed from the CIA as a national security risk.

B. *Availability of Constitutional Review of the CIA Director's
Employment Decisions*

Although the CIA Director need not comply with the standards governing employment decisions outlined by Congress in employment protection statutes,⁸⁵ the Director may not dismiss employees in violation of their constitutional rights.⁸⁶ The United States Supreme Court has stated that precluding an employee's constitutional claims that arise as a result of an adverse government employment decision presents a serious constitutional problem.⁸⁷ As a result, even though they may not pursue relief under federal employment protection statutes, homosexual employees discharged by the CIA may still pursue a claim against the CIA Director for a violation of their constitutional rights.⁸⁸

Despite the Supreme Court's holding in *Webster* that section 701(a) of the APA may preclude judicial review of claims made under the APA, the *Webster* Court also held that section 701(a)(2) does not preclude review of colorable constitutional claims.⁸⁹ In addition to the violations of the APA that the plaintiff alleged in *Webster*, he also claimed that the Director's termination of his employment violated his constitutional rights of property, liberty, and privacy as protected by the first, fourth, fifth, and ninth amend-

⁸³ *Neely v. CIA*, 27 FEP Cases 82, 85 (D.D.C. 1982), *aff'd*, 744 F.2d 878 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985).

⁸⁴ *Webster v. Doe*, 108 S. Ct. 2047, 2053 (1988).

⁸⁵ Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1982); Veteran's Preference Act, 5 U.S.C. §§ 851-69 (1958) (current version at 5 U.S.C. §§ 2108, 3305(b), 3311-16, 3351, 3363, 7701 (1982)); Civil Service Reform Act of 1978, 5 U.S.C. §§ 7501-04, 7511-14 (1982).

⁸⁶ *Webster*, 108 S. Ct. at 2053.

⁸⁷ *Id.*

⁸⁸ *See id.* at 2054.

⁸⁹ *Id.* at 2053; *see Padula v. Webster*, 822 F.2d 97, 101 (D.C. Cir. 1987); *see also Local 2855 AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 580 (3d Cir. 1979). The Third Circuit listed three situations where a court may still review an agency action committed to agency discretion by law: the court may entertain charges that the agency lacked jurisdiction; the court can decide if impermissible influences occasioned the agency's decision; and the court can review an agency decision that violates the Constitution.

ments, as well as violating his right to procedural due process and equal protection of the laws guaranteed by the fifth amendment.⁹⁰

The *Webster* Court ruled that the United States District Court may review a constitutional claim based on an individual discharge from the CIA.⁹¹ The *Webster* Court reasoned that a "serious constitutional question" arises if a court construes a federal statute to deny any judicial forum for a "colorable constitutional claim."⁹² In order to ensure that such a constitutional question does not arise, the *Webster* Court required a court to find a clear expression of congressional intent before holding that a statute precludes judicial review of constitutional claims.⁹³ The *Webster* Court noted that nothing in section 102(c) of the National Security Act indicated that Congress intended to preclude constitutional claims arising from the Director's exercise of discretion under that section.⁹⁴ As a result, the *Webster* Court remanded the case for further proceedings on the constitutional issues.⁹⁵ By remanding the case to the United States District Court, the *Webster* Court established that a plaintiff can still obtain review of constitutional claims even if the APA denies that person judicial review of a statutory claim.

Because he disagreed with the majority's holding regarding the jurisdiction of the APA, Justice Scalia dissented in *Webster*.⁹⁶ In his dissenting opinion, Justice Scalia stated that section 701(a)(2) exempts even constitutional claims from review.⁹⁷ Justice Scalia concluded that section 701(a)(2) precludes judicial review in those areas that the common law traditionally exempted from judicial oversight, such as the political question doctrine and official immunity.⁹⁸ Justice Scalia based his conclusion on the language of section 701(a), by contrasting section 701(a)(1) where *statutes* preclude judicial review, with section 701(a)(2), which exempts agency action from review when there is no *law* to apply.⁹⁹ Because the APA uses the

⁹⁰ *Webster*, 108 S. Ct. at 2050. The employee could bring his action under the fifth amendment because the fifth amendment protects individuals against an invasion of their civil liberties by only the federal government. *Feldman v. United States*, 322 U.S. 487, 490 (1944).

⁹¹ See *Webster*, 108 S. Ct. at 2054.

⁹² *Id.* at 2053.

⁹³ *Id.* (citing *Johnson v. Robinson*, 415 U.S. 361, 373-74 (1974)).

⁹⁴ *Webster*, 108 S. Ct. at 2054.

⁹⁵ *Id.*

⁹⁶ *Id.* at 2055 (Scalia, J., dissenting).

⁹⁷ *Id.* (Scalia, J., dissenting).

⁹⁸ *Id.* at 2056 (Scalia, J., dissenting).

⁹⁹ *Id.* (Scalia, J., dissenting) (emphasis in original).

precise term "statutes" in one section and the more general expression "law" in the other, Justice Scalia reasoned that the term "law" means the common law of judicial review of agency action.¹⁰⁰

In his dissent in *Webster*, Justice Scalia also argued that his interpretation of section 701(a)(2) resolves a contradiction in the APA.¹⁰¹ Justice Scalia noted that section 701(a)(2) disallows judicial review when an action is "committed to agency discretion," yet section 706 allows a court to set aside an agency action as an "abuse of discretion."¹⁰² Using Justice Scalia's interpretation, in which section 701(a)(2) exempts agency action "of the sort that is traditionally unreviewable" from the provisions of the APA, the Act keeps certain types of agency actions out of the court, and still allows a court to overturn an action as an abuse of discretion, if the lawsuit is appropriately before the court.¹⁰³

Justice Scalia concluded that section 102(c) of the National Security Act comprises the type of agency action committed to agency discretion "by law" within the meaning of section 701(a)(2).¹⁰⁴ In reaching his conclusion, Justice Scalia analyzed the text of section 102(c) and found strong language committing employment decisions to the discretion of the CIA Director.¹⁰⁵ Justice Scalia also based his argument on the fact that national security, and therefore the CIA, represent an area of "predominant executive authority and of traditional judicial abstention."¹⁰⁶

In his dissent in *Webster*, Justice Scalia also disagreed with the majority's conclusion that all constitutional violations must have a judicial remedy.¹⁰⁷ In support of his argument, Justice Scalia cited several instances where a court may refuse judicial review of a constitutional claim.¹⁰⁸ Justice Scalia asserted that the Supreme Court has found some claims beyond judicial review because they contain "political questions."¹⁰⁹ Justice Scalia also pointed to the

¹⁰⁰ *Id.* (Scalia, J., dissenting).

¹⁰¹ *Id.* at 2057 (Scalia, J., dissenting).

¹⁰² *Id.* (Scalia, J., dissenting).

¹⁰³ *Id.* (Scalia, J., dissenting).

¹⁰⁴ *See id.* at 2060 (Scalia, J., dissenting).

¹⁰⁵ *Id.* at 2060 (Scalia, J., dissenting).

¹⁰⁶ *Id.* (Scalia, J., dissenting).

¹⁰⁷ *Id.* at 2059 (Scalia, J., dissenting).

¹⁰⁸ *Id.* at 2058-59 (Scalia, J., dissenting).

¹⁰⁹ *Id.* at 2058. Under the "political question" doctrine, the courts hold that certain questions are non-justiciable because they present issues of constitutional law that the political branches of the government can resolve more effectively. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U.L. Rev. 1031 (1985).

doctrine of sovereign immunity which, among other things, allowed the sovereign to take property under lawful authority without compensating the owner.¹¹⁰ Additionally, Scalia cited the doctrine of equitable discretion, which permits a court to refuse to grant relief where that relief impairs the public interest, even if a constitutional claim provides the basis for that relief.¹¹¹ In his dissenting opinion in *Webster*, Justice Scalia advocated an interpretation of the APA that denies a plaintiff constitutional review of an agency action if the action is the type that courts traditionally decline to review.

Notwithstanding Justice Scalia's dissent, the majority in *Webster* held that a plaintiff may bring a constitutional claim against the CIA for termination of his employment.¹¹² By holding that a serious constitutional question would arise if a court denied a plaintiff constitutional review, the majority in *Webster* established that a court must still hear constitutional challenges to agency actions, even though a term of an employment protection statute precludes judicial review.¹¹³ Should the United States Supreme Court eventually choose to adopt the interpretation of the APA argued by Justice Scalia, however, then a court could not review the CIA Director's employment decisions, even on constitutional grounds.¹¹⁴

C. *Constitutional Challenges to a Homosexual Employee's Dismissal from a Government Agency*

Because the majority in *Webster* held that the APA does not preclude constitutional review, a homosexual plaintiff has the ability

¹¹⁰ *Webster v. Doe*, 108 S. Ct. 2047, 2059 (1988) (Scalia, J., dissenting). In his dissenting opinion, Justice Scalia noted that, since the passage of the Tucker Act, the sovereign could no longer take property under lawful authority without compensating the owner. *Id.* In the relevant section, the Tucker Act provides:

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded upon the constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages for cases not sounding in tort. For the purposes of this paragraph, an express or implied contract with the Army and Air Force exchange Service, the Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 149(a)(1) (1982).

¹¹¹ *Webster*, 108 S. Ct. at 2059 (Scalia, J., dissenting).

¹¹² *Id.* at 2054.

¹¹³ *Id.* at 2053.

¹¹⁴ *Id.* at 2056 (Scalia, J., dissenting).

to challenge his dismissal from the CIA on constitutional grounds. Homosexuals can challenge their dismissal by the CIA Director as a violation of their fifth amendment rights to substantive due process and equal protection of the laws.¹¹⁵ In order to apply the strict scrutiny standard to a substantive due process challenge, the reviewing court must first acknowledge that private consensual homosexual conduct either represents a fundamental right in and of itself, or that it merits inclusion in the fundamental right of privacy.¹¹⁶ Courts have held that private consensual homosexual conduct does not represent a fundamental right.¹¹⁷ Likewise, the Supreme Court has held that the right of privacy does not include private homosexual conduct.¹¹⁸ Thus, a court would review the constitutionality of the employee's dismissal using the minimum rationality standard, under which the Director's actions only need to be rationally related to a legitimate government objective.¹¹⁹

A court can still review a regulation that discriminates against homosexuals under strict scrutiny if the reviewing court considers homosexuals a suspect class.¹²⁰ The courts are split on the question of whether homosexuals are a suspect class.¹²¹ In order for a court to uphold a discriminatory regulation under the strict scrutiny standard, the government must demonstrate that the regulation is necessary to achieve a permissible state objective.¹²²

Courts have employed these standards when reviewing a homosexual employee's claim that his or her dismissal from a federal

¹¹⁵ See, e.g., *Watkins v. U.S. Army*, 847 F.2d 1329, 1335 (9th Cir. 1988) (homosexual plaintiff alleged that his discharge from the Army violated his fifth amendment right to equal protection), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989); *Beller v. Middendorf*, 632 F.2d 788, 807 (9th Cir. 1980) (homosexual plaintiff alleged his discharge from the Navy violated his fifth amendment right to due process), *cert. denied*, 452 U.S. 905 (1981).

¹¹⁶ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Court used strict scrutiny to review a statute that infringed upon the fundamental right to marriage); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (Court used strict scrutiny to review a statute that infringed upon the notions of privacy surrounding the marriage relationship).

¹¹⁷ See, e.g., *Dronenburg v. Zeck*, 741 F.2d 1388, 1396 (D.C. Cir. 1980) (no fundamental right to private homosexual conduct).

¹¹⁸ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (Court held that the right to privacy does not include homosexual conduct).

¹¹⁹ See *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Fleming v. Nestor*, 363 U.S. 603, 611 (1960); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2 (2d ed. 1988).

¹²⁰ *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (regulation that discriminates against a suspect class receives strict scrutiny).

¹²¹ *Watkins v. U.S. Army*, 847 F.2d 1329, 1349 (9th Cir. 1988) (homosexuals are a suspect class), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (homosexuals are not a suspect class).

¹²² *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

government agency violated the employee's constitutional rights. In the 1969 case of *Norton v. Macy*, the United States Court of Appeals for the District of Columbia overturned the dismissal of a homosexual employee on substantive due process grounds.¹²³ In *Norton*, the National Aeronautics and Space Administration ("NASA") attempted to discharge a homosexual budget analyst for immoral conduct and for possessing character traits that made him unsuitable for further federal government employment; NASA alleged that the employee's homosexuality created the potential for embarrassment to the agency.¹²⁴ The *Norton* court ruled that substantive due process eliminates the federal government's ability to dismiss its employees arbitrarily and capriciously.¹²⁵ Thus, the *Norton* court stated that a finding of immoral conduct only justifies a dismissal if the immoral and indecent acts of the employee have "some ascertainable deleterious effect on the efficiency of the service."¹²⁶

The *Norton* court then cited three instances in which an employee's homosexual conduct impairs the efficiency of a government agency.¹²⁷ First, the court noted that homosexuals might jeopardize the security of classified communications due to their susceptibility to blackmail.¹²⁸ Second, the court stated that homosexuality may evidence an unstable personality, unsuitable for certain types of work.¹²⁹ Lastly, the court noted that an employee's offensive overtures on the job might cause negative reactions on the part of either fellow employees or members of the public who come into contact with a homosexual employee during the performance of his or her official functions.¹³⁰

The *Norton* court also found, however, that if the only effect of the employee's homosexuality is to cause embarrassment to the agency, as NASA alleged, then the conduct fails to effect sufficiently

¹²³ *Norton v. Macy*, 417 F.2d 1161, 1167 (D.C. Cir. 1969).

¹²⁴ *Id.* at 1163.

¹²⁵ *Id.* at 1164.

¹²⁶ *Id.* at 1165.

¹²⁷ *Id.* at 1166.

¹²⁸ *Id.*

¹²⁹ *Id.* But see Siegelman, *Kinsey and Others: Empirical Input in MALE AND FEMALE HOMOSEXUALITY: PSYCHOLOGICAL APPROACHES* 44 (L. Diamant ed. 1987). Before reviewing the empirical studies comparing the adjustment of homosexuals and heterosexuals, Siegelman stated that "most of the empirical research conducted with non-clinical samples . . . found that male homosexuals are as well adjusted as male heterosexuals." *Id.* at 44. Additionally, Siegelman stated that "[t]he majority of empirical studies of adjustment concurred that female homosexuals were not different than female heterosexuals." *Id.* at 49.

¹³⁰ *Norton*, 417 F.2d at 1166.

the efficiency of the service.¹³¹ The *Norton* court reasoned that allowing this rationale permits the agency to enforce a majoritarian code of conduct and thereby offend liberty, privacy, and diversity.¹³² Consequently, because the *Norton* court overturned NASA's decision to dismiss the employee, it established that dismissing a homosexual employee because that employee's sexual orientation causes embarrassment to a government agency is an arbitrary and capricious dismissal in violation of the due process clause.

Conversely, in the 1980 case of *Beller v. Middendorf*, the United States Court of Appeals for the Ninth Circuit denied a homosexual's substantive due process challenge to his discharge from the United States Navy.¹³³ The *Beller* court held that, under the circumstances presented in the case before it, the substantive due process claim failed because the right of privacy fails to protect homosexual conduct.¹³⁴ In *Beller*, the plaintiff sought an injunction barring the Navy from discharging him after he admitted his homosexuality during a background check for a "top secret" security clearance.¹³⁵

The *Beller* court outlined the two due process standards under which courts review government regulations.¹³⁶ The *Beller* court held that if a government regulation restricts conduct that lacks a "foundation in the continuing traditions of our society" or has no connection with interests acknowledged as private and protected, then a court applies the lowest level of constitutional scrutiny, which is the minimum rationality standard.¹³⁷ The court stated that under this standard, the government only needs to demonstrate a rational

¹³¹ See *id.* at 1167.

¹³² *Id.* at 1165.

¹³³ *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). The plaintiff in *Beller* also alleged that the Navy regulations violated his procedural due process interests in property and liberty. *Id.* at 805-07. The *Beller* court concluded that the Navy regulations violated neither interest. *Id.* The *Beller* court reasoned that the regulations violated no property interest of the plaintiff because they did not create an expectation of continued Naval service sufficient to constitute a property interest. *Id.* at 805. Additionally, the *Beller* court held that the plaintiff's discharge failed to violate his liberty interest because the Navy discharged him for homosexuality and not unfitness. The discharge papers said nothing about homosexuality, thus imposing no stigma on the plaintiff. *Id.* at 806-07.

¹³⁴ *Id.* at 810.

¹³⁵ *Id.* at 794-95. The *Beller* case was one of three cases heard concurrently by the Court of Appeals for the Ninth Circuit. *Id.* at 792. All three cases had the same broad outline: the Navy discharged an enlisted person with a fine performance record after he or she admitted engaging in homosexual acts, conduct prohibited by Navy regulations. *Id.*

¹³⁶ See *id.* at 808.

¹³⁷ *Id.* at 808.

relationship between its regulation and a legitimate government interest to receive judicial approval.¹³⁸ The court noted that a reviewing court uses the stricter standard, the compelling state interest test, when the government regulation "seriously intrudes into matters which lie at the core of interests deserving due process protection."¹³⁹ The *Beller* court held that the case currently before it fell somewhere between these two standards.¹⁴⁰ The *Beller* court noted that in the future, a homosexual plaintiff may be able to make a substantial constitutional challenge to some of the government restrictions on private homosexual conduct.¹⁴¹ The *Beller* court held, however, that the Navy's regulations barring homosexuals do not amount to an instance where the state used its criminal processes to enforce a moral precept.¹⁴² Thus, the *Beller* court established that, in the case before it, the right of privacy did not include private homosexual conduct. At the same time, the court also established that restrictions against private homosexual conduct deserve an undetermined level of heightened scrutiny.

In addition to holding that Navy restrictions on private homosexual conduct deserved judicial review under heightened scrutiny, the *Beller* court held that the Navy regulations in question had a close relationship to an important federal government interest.¹⁴³ The *Beller* court stated that a substantive due process review of a federal government regulation involved a balancing of the individual interest infringed, the degree of infringement, the government interest furthered, and the feasibility of a more narrow alternative.¹⁴⁴ The *Beller* court noted that, in the case before it, military necessities outweighed the infringement of constitutional rights by Navy regulations.¹⁴⁵ The court also concluded that the Navy regulations which disqualified homosexuals from service had a rational relationship to military discipline, because a substantial number of Navy personnel base their feelings toward homosexuals on moral precepts.¹⁴⁶ This attitude creates tension and hostility toward hom-

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 810.

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *Id.* at 807.

¹⁴⁵ *Id.* at 811.

¹⁴⁶ *Id.* at 811-12.

osexuals and impairs a homosexual's ability to command respect.¹⁴⁷ Additionally, the *Beller* court decided that requiring the Navy to evaluate each homosexual's case before discharging that particular serviceman would be impractical.¹⁴⁸ Through its holding that the Navy can discharge homosexuals, the *Beller* court established that a rational relationship to a military necessity outweighs the right to private homosexual conduct.

Unlike *Beller*, in which the court reviewed a military discharge under the due process clause of the fifth amendment, in the 1988 case of *Watkins v. United States Army*, the United States Court of Appeals for the Ninth Circuit reviewed a constitutional challenge to a military discharge under fifth amendment equal protection principles.¹⁴⁹ The *Watkins* court held that homosexuals comprise a suspect class and thus regulations affecting them deserve strict scrutiny.¹⁵⁰ In order to pass the strict scrutiny standard, a discriminatory government regulation must be necessary for the achievement of a permissible state objective.¹⁵¹

In *Watkins*, the Army initially inducted the plaintiff despite his admissions of homosexuality. In 1981, however, the Army passed new regulations disqualifying all homosexuals and discharged the plaintiff as a result.¹⁵² The *Watkins* court noted that the United States Supreme Court precedent that declined to protect homosexual conduct under the right of privacy did not foreclose the possibility of reviewing discrimination against homosexuals under fifth amendment equal protection principles.¹⁵³ The *Watkins* court stated that, in order for a group to merit consideration as a suspect class, it must be the subject of historical discrimination;¹⁵⁴ the discrimi-

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 810.

¹⁴⁹ *Watkins v. U.S. Army*, 847 F.2d 1329, 1335 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989). The plaintiff in *Watkins* also contended that his discharge from the Army was an arbitrary and capricious firing in violation of the APA, as well as a violation of his first amendment rights. *Id.* at 1334. The *Watkins* court rejected the plaintiff's contentions of an arbitrary and capricious discharge because he failed to allege that the regulations discharging homosexuals violated the APA. *Id.* The *Watkins* court also rejected the plaintiff's first amendment contentions because the Army discharged personnel pursuant to its regulations because of their homosexual orientation rather than for their admissions of homosexual acts. *Id.* at 1337.

¹⁵⁰ *Id.* at 1349.

¹⁵¹ *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

¹⁵² *Watkins*, 847 F.2d at 1330-32.

¹⁵³ *Id.* at 1340; *see Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). In *Hardwick*, the United States Supreme Court held that private consensual homosexual sodomy is not a fundamental right protected by the Federal Constitution. *Id.* at 191.

¹⁵⁴ *Watkins*, 847 F.2d at 1345.

nation against the group must be unfair;¹⁵⁵ and the group must lack political power.¹⁵⁶

The *Watkins* court applied the three factors to homosexuals, held that homosexuals satisfy all of the necessary criteria and granted homosexuals suspect class status.¹⁵⁷ The court stated that homosexuals historically suffered discrimination because they face discrimination equal to that encountered by groups already treated as suspect classes.¹⁵⁸ Also, the *Watkins* court concluded that homosexuals encounter unfair discrimination because the Army bases its rationale for discharging homosexuals on prejudice.¹⁵⁹ Additionally, the *Watkins* court stated that homosexuals lack political power because they comprise a discrete and insular minority.¹⁶⁰ By granting homosexuals suspect class status, the *Watkins* court established that a reviewing court must subject any rule discriminating against homosexuals to strict scrutiny under fifth amendment equal protection principles.

In order to pass strict scrutiny, the *Watkins* court held that a federal government regulation must be necessary to promote a compelling state interest.¹⁶¹ The *Watkins* court separated the Army's justifications for its regulations that disqualify homosexuals into two types.¹⁶² The court held that the first type of justification contained no compelling state interest,¹⁶³ and that the regulations at issue had no relationship to the second type of justification, which did contain a compelling state interest.¹⁶⁴ The *Watkins* court stated that the first type of justification, in which the Army argued that a soldier's homosexuality affects morale and discipline because other Army personnel hate homosexuals, illegitimately caters to private biases.¹⁶⁵ The *Watkins* court held that "notions of majoritarian morality" cannot serve as a compelling state interest.¹⁶⁶

¹⁵⁵ *Id.* at 1345-46. The *Watkins* court stated that unfairness embodied three factors. First, society defines the class by a trait bearing no relation to the members' ability to perform or contribute to society. Second, society saddles the class with unique disabilities because of prejudice or unfair stereotypes. Third, society defines the class by an immutable trait. *Id.*

¹⁵⁶ *Id.* at 1348.

¹⁵⁷ *Id.* at 1345-49.

¹⁵⁸ *Id.* at 1345.

¹⁵⁹ *See id.* at 1346-47.

¹⁶⁰ *Id.* at 1348-49.

¹⁶¹ *Id.* at 1349.

¹⁶² *Id.* at 1350-52.

¹⁶³ *Id.* at 1351.

¹⁶⁴ *Id.* at 1352.

¹⁶⁵ *Id.* at 1350.

¹⁶⁶ *Id.* at 1351.

The *Watkins* court stated that the second type of justification advanced by the Army in defense of its regulations contained two compelling state interests, military discipline and security against blackmail. The court held, however, that the Army tailored its regulations too narrowly to advance these interests.¹⁶⁷ The court rejected the Army's argument that its regulations promoted military discipline because disqualifying homosexuals eliminates the possibility of a superior officer developing a relationship with another soldier.¹⁶⁸ The *Watkins* court observed that the Army does have a compelling interest in preventing sexual relationships between officers and their subordinates; however, the *Watkins* court also stated that the Army's regulations were too narrow to advance this interest because they only addressed the problem in terms of homosexuals and made no mention of heterosexual relationships between officers and subordinates.

The *Watkins* court also noted that the Army has a compelling interest in the prevention of blackmail. The court observed, however, that the Army's regulations barring homosexuals failed to address this interest because only secretive homosexuals are susceptible to blackmail, whereas the regulations only discharged admitted homosexuals.¹⁶⁹ By holding that the exclusion of homosexuals from the Army has no rational relationship to either military discipline or security, the *Watkins* court established that a regulation discriminating against homosexuals must have a close and definite relationship to a compelling state interest in order to survive judicial review under strict scrutiny.

In the 1987 case of *Padula v. Webster*, the United States Court of Appeals for the District of Columbia also considered the merits of granting homosexuals suspect class status.¹⁷⁰ The *Padula* court, however, refused to grant homosexuals this status.¹⁷¹ In *Padula*, the Federal Bureau of Investigation ("FBI" or "Bureau") refused to employ the plaintiff as a special agent due to her homosexuality.¹⁷² Although she did not flaunt her homosexuality, the plaintiff maintained an open, unembarrassed attitude about it; consequently, her family, friends, and co-workers all knew of her orientation.¹⁷³ The

¹⁶⁷ *Id.* at 1352.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

¹⁷¹ *Id.*

¹⁷² *Id.* at 99.

¹⁷³ *Id.*

Padula court pointed out that Supreme Court and circuit court precedents deny homosexual conduct constitutional protection because the right of privacy does not protect such conduct¹⁷⁴ and because there is no fundamental right to engage in such conduct.¹⁷⁵ The court ruled that these precedents foreclosed the possibility of homosexuals achieving suspect class status.¹⁷⁶ The *Padula* court conceded that both of these precedents only addressed privacy issues and did not expressly consider whether homosexuals constitute a suspect class.¹⁷⁷ The court noted, however, that declining to recognize a privacy right to engage in homosexual sodomy "seemed" to regard the question of whether homosexuals are entitled to suspect class status as settled.¹⁷⁸ The court noted that the United States Supreme Court permits the states to criminalize homosexual conduct. The court further stated that homosexual conduct defines the class of homosexuals. The *Padula* court concluded that awarding suspect class status to a class defined by potentially criminal conduct was anomalous.¹⁷⁹

As an additional reason for concluding that homosexuals fail to merit consideration as a suspect class, the *Padula* court noted several justifications for discrimination against homosexuals.¹⁸⁰ The *Padula* court held that the United States Supreme Court bases its identification of certain groups as suspect classes on the implicit notion that invidious discrimination against the particular class is plainly unjustifiable.¹⁸¹ With respect to homosexuals, however, the *Padula* court noted at least two instances in which the FBI can justify discrimination.¹⁸² First, the *Padula* court stated that roughly half of the states criminalize homosexual conduct; consequently, employing homosexual agents undermines the law enforcement credibility of the Bureau because FBI agents must work in all fifty states.¹⁸³ Also, the *Padula* court noted that the FBI could rationally conclude that public dislike for homosexuals renders them susceptible to black-

¹⁷⁴ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (the United States Supreme Court held that the right of privacy does not extend to private homosexual sodomy).

¹⁷⁵ *Dronenburg v. Zeck*, 741 F.2d 1388, 1396 (D.C. Cir. 1984) (the court held that it is impossible to conclude that homosexual conduct is a fundamental right).

¹⁷⁶ *Padula*, 822 F.2d at 103.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 103-04.

¹⁸¹ *Id.* at 103.

¹⁸² *Id.* at 104.

¹⁸³ *Id.*

mail to protect either their partners or themselves, an especially important concern for the FBI because it works in counterintelligence.¹⁸⁴ Because the *Padula* court both interpreted prior precedents to foreclose homosexuals' ability to receive consideration as a suspect class, and stated two valid justifications for discriminating against homosexuals, it established that homosexuals do not merit status as a suspect class.

Thus, the courts have traditionally ruled in favor of the federal government when a homosexual challenges an employment decision on constitutional grounds.¹⁸⁵ When reviewing a homosexual's claim that a dismissal by the federal government infringes upon his fifth amendment right to substantive due process, the courts have held that the right to privacy does not include private homosexual conduct.¹⁸⁶ Additionally, courts have held that no fundamental right to engage in private consensual homosexual conduct exists.¹⁸⁷ The courts are split, however, on the issue of whether homosexuals constitute a suspect class.¹⁸⁸ Should the majority of courts choose to follow the Ninth Circuit and consider homosexuals a suspect class, then the courts would require the federal government to justify its regulations discriminating against homosexuals as necessary to promote a compelling state interest.¹⁸⁹ Should the majority of courts not grant homosexuals suspect class status, however, then the courts would only require the federal government to justify regulations that discriminate against homosexuals in terms of some government purpose in order to pass judicial scrutiny, which is the minimum rationality standard.¹⁹⁰

D. National Security as a Compelling State Interest

Should the courts choose to review the CIA Director's discriminations against homosexuals using either a heightened scrutiny or

¹⁸⁴ *Id.*

¹⁸⁵ See *Padula*, 822 F.2d at 103; *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

¹⁸⁶ See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (privacy does not include homosexual sodomy).

¹⁸⁷ See *Dronenburg v. Zeck*, 741 F.2d 1388, 1396 (D.C. Cir. 1984).

¹⁸⁸ See *Watkins v. U.S. Army*, 847 F.2d 1329, 1349 (9th Cir. 1988) (court held that homosexuals qualify as a suspect class), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (court held that homosexuals do not merit suspect class status).

¹⁸⁹ *Watkins*, 847 F.2d at 1349.

¹⁹⁰ *Padula*, 822 F.2d at 104.

strict scrutiny standard, the question still remains whether the CIA can identify a compelling state interest. Furthermore, under the strict scrutiny standard, the discrimination must also have a close and definite relationship to that compelling state interest. Traditionally, the courts have considered national security, and more specifically the security of information possessed by the CIA, a compelling state interest.¹⁹¹ Additionally, the courts have deferred to the judgment of national security officials that a sufficiently close relationship exists between their actions and the protection of national security.¹⁹²

Courts consider the protection of the national security a compelling state interest. In the 1980 case of *Snepp v. United States*, the United States Supreme Court permitted the CIA to infringe on an American citizen's first amendment rights in the interest of national security.¹⁹³ In *Snepp*, a former CIA agent published a book about Agency activity in South Vietnam without first submitting the manuscript to the Agency for pre-publication review.¹⁹⁴ While still employed by the CIA, Snepp signed an agreement providing that he would not publish any material relating to Agency activities, either during or after his employment with the CIA without specific prior approval of the Agency. Additionally, Snepp made a concurrent promise not to disclose classified information without authorization.¹⁹⁵

In 1979, the United States Court of Appeals for the District of Columbia ruled in *United States v. Snepp* that Snepp breached his contract with the CIA and granted the CIA an injunction against future violations. The court of appeals refused, however, to establish a constructive trust and thereby award the profits of Snepp's book to the federal government, because Snepp had a first amendment right to publish unclassified information.¹⁹⁶ Both Snepp and the government appealed, and the United States Supreme Court granted certiorari to review the judgment.¹⁹⁷

¹⁹¹ See *CIA v. Sims*, 471 U.S. 159, 175 (1985) (quoting *Snepp v. United States*, 444 U.S. 501, 509 n.3 (1980)); *Snepp v. United States*, 444 U.S. 501, 509 n.3 (1980).

¹⁹² See *Korematsu v. United States*, 323 U.S. 214, 218 (1944); *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

¹⁹³ *Snepp v. United States*, 444 U.S. 507, 509-10 (1980); see also *McGehee v. Casey*, 718 F.2d 1137, 1143 (D.C. Cir. 1983) (the CIA censored an ex-agent's manuscript after he submitted it to the Agency for approval).

¹⁹⁴ *Snepp*, 444 U.S. at 507-08.

¹⁹⁵ *Id.* at 508.

¹⁹⁶ *Id.* at 509-10. See *U.S. v. Snepp*, 595 F.2d 926 (D.C. Cir. 1979).

¹⁹⁷ *Snepp*, 444 U.S. at 507.

The United States Supreme Court reversed the court of appeals and, in *Snepp v. United States*, held that establishing the constructive trust provided the best solution because of both the importance of maintaining the secrecy of national security information,¹⁹⁸ and the inadequacy of awarding damages to the federal government.¹⁹⁹ The Court held that the federal government has a compelling state interest in protecting both the secrecy of important national security information, and the appearance of confidentiality, which is essential to the effective operation of the intelligence service.²⁰⁰ Additionally, the Court stated three reasons why damages provide an inadequate remedy for the federal government.²⁰¹ First, a court could only establish damages through speculation.²⁰² Second, nominal damages amount to a hollow alternative that fails to deter future violations of the promise.²⁰³ Lastly, punitive damages are both speculative and unusual.²⁰⁴ By creating a constructive trust for the benefit of the government, the *Snepp* Court established that the protection of CIA sources and information represents a compelling state interest.

In addition to considering the protection of CIA sources a compelling state interest, the courts also consider the protection of all information possessed by the CIA to be a compelling state interest. In the 1985 case of *CIA v. Sims*, the United States Supreme Court held that the CIA Director need not divulge intelligence sources as required by the Freedom of Information Act ("FOIA") if revealing the sources compromises the national security.²⁰⁵ In

¹⁹⁸ *Id.* at 512.

¹⁹⁹ *Id.* at 514-16.

²⁰⁰ *Id.* at 509 n.3. The *Snepp* Court noted that the United States District Court for the District of Columbia and the Circuit Court for the District of Columbia both held that even the publication of unclassified material can harm national security interests. *Id.* at 511-12. The *Snepp* Court stated that the CIA has a broader understanding than an individual employee of what revelations may expose classified information and confidential sources. *Id.* at 512.

²⁰¹ *Id.* at 514.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 514. The *Snepp* Court also noted that a damage trial involved probing into the CIA's highly confidential affairs. *Id.* at 514-15.

²⁰⁵ *CIA v. Sims*, 471 U.S. 156, 181 (1985). In the relevant section, the FOIA provides:

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees, (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3) (1982).

Sims, the plaintiffs filed suit under the FOIA, requesting the names of institutions and individuals who performed research for a CIA project entitled operation MKULTRA.²⁰⁶ The CIA contended that exemption 3 to the FOIA, which protects matters specifically exempted from disclosure by statute,²⁰⁷ permitted the CIA not to divulge intelligence sources and methods pursuant to section 102(d)(3) of the National Security Act.²⁰⁸

The United States Court of Appeals for the District of Columbia held that only sources which would not provide information without a CIA guarantee of confidentiality constituted protected information sources under section 102(d)(3).²⁰⁹ Thus, according to the court of appeals, only sources that require a guarantee of confidentiality deserve exemption from disclosure under the FOIA.²¹⁰ The United States Supreme Court granted certiorari and held that the plain meaning of section 102(d)(3) indicates that the section represents the type of statute that exemption 3 of the FOIA intended to protect from disclosure.²¹¹ The *Sims* Court stated that any

²⁰⁶ *Sims*, 471 U.S. at 163. Operation MKULTRA involved the research and development of chemical, biological, and radiological materials capable of employment in clandestine operations to control human behavior. *Id.* at 161-62 (citing SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. NO. 755, 94th Cong., 2nd Sess. Book I, 1, 389 (1976)).

²⁰⁷ *Sims*, 471 U.S. at 163. In the relevant section, the FOIA provides:

(b) This section does not apply to matters that are —

...

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material withheld; . . .

5 U.S.C. § 552(b)(3)(B) (1982).

²⁰⁸ *Sims*, 471 U.S. at 164. In the relevant section, the National Security Act provides:

(d) Powers and Duties

For the purpose of coordinating the intelligence activities of the several government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council —

...

(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, . . . And *provided further*, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure; . . .

50 U.S.C. § 403(d)(3) (1982).

²⁰⁹ *Sims*, 471 U.S. at 164.

²¹⁰ *Id.*

²¹¹ *Id.* at 167.

and all CIA information sources represent important national security information because they offer foreign intelligence services a clue to the CIA's sources and methods of operation.²¹² In rejecting the court of appeals' interpretation of section 102(d)(3), the *Sims* Court also stated that potential intelligence sources will discontinue their availability if they know that judges "who have little or no background in intelligence gathering" can order their identity revealed after determining that the CIA's promise of confidentiality to the source was unnecessary.²¹³ By holding that exemption 3 of the FOIA permits the CIA to withhold information about intelligence sources, the *Sims* Court established that the revelation of any CIA source represents a potential threat to national security.

Consequently, the protection of all information possessed by the CIA is a compelling state interest. In order to pass a heightened scrutiny test, however, the CIA must also demonstrate that its dismissal of homosexual employees is necessary to protect this compelling state interest. In the arena of national security, courts often defer to the judgment of the government agencies as to whether their actions further a compelling state interest. In the 1944 decision of *Korematsu v. United States*, the United States Supreme Court ruled that actions taken to protect the nation from espionage and sabotage during wartime justified discrimination against a specific racial class.²¹⁴ In *Korematsu*, American citizens of Japanese descent challenged their convictions for remaining in a "military area" despite the 1942 orders of the Commanding General of the Western Command, which excluded all persons of Japanese ancestry from that area.²¹⁵ The *Korematsu* Court held that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect and hence subject to the most rigid scrutiny.²¹⁶ The *Korematsu* Court stated that "nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety could constitutionally justify" the measures.²¹⁷ The

²¹² *Id.* at 176-77. The *Sims* Court noted an example: if a foreign intelligence service knew the CIA subscribed to an obscure but publicly available Eastern European technical journal, it would thwart the CIA's efforts to exploit the journal's value. *Id.* at 177.

²¹³ *Id.* at 176.

²¹⁴ *Korematsu v. United States*, 323 U.S. 214, 219 (1944); see also *Hirabayashi v. United States*, 320 U.S. 81 (1943) (an American citizen of Japanese ancestry challenged his conviction for violating the military commander's curfew).

²¹⁵ *Korematsu*, 323 U.S. at 215-16.

²¹⁶ *Id.* at 216.

²¹⁷ *Id.* at 218.

Korematsu Court stated that it deferred to the judgment of the military authorities that the large Japanese population on the west coast included disloyal members, and thus represented a threat of espionage and sabotage.²¹⁸ Because the military authorities found it impossible to separate loyal Japanese Americans from disloyal, the *Korematsu* Court ruled that the exclusion of all Japanese Americans from the west coast bore a definite and close relationship to the prevention of the threat.²¹⁹ Although commentators have criticized the Supreme Court's holding in *Korematsu*,²²⁰ the case demonstrates that courts will defer to the judgment of the military authorities that their actions are necessary to protect the national security.

More recently, the United States Court of Appeals for the Fourth Circuit also deferred to the judgment of an intelligence agency in an investigation involving national security. In the 1980 case of *United States v. Truong Dinh Hung*, the Fourth Circuit held that an executive agency could use unwarranted electronic surveillance while investigating the foreign intelligence aspect of national security.²²¹ In *Truong*, the FBI monitored the defendant's communications in order to determine whether he obtained and transmitted classified information to the Vietnamese delegation during the 1977 Paris negotiations between the United States and Vietnam.²²²

The *Truong* court stated three reasons for having a foreign intelligence exception to the warrant requirement.²²³ First, the *Truong* court noted that the compelling needs of the executive in the area of foreign intelligence justify the exception.²²⁴ In the area of foreign intelligence, the *Truong* court stated that executive action requires speed, stealth, and security, and that procedural hurdles delay the executive's ability to respond to situations, both limiting the executive's flexibility and increasing the chance of information leaks.²²⁵ Second, the *Truong* court noted the executive's unparalleled

²¹⁸ *Id.*

²¹⁹ *See id.*

²²⁰ *See, e.g.,* Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945); *see also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-6, 16-22 (2d ed. 1988).

²²¹ *United States v. Truong Dinh Hung*, 629 F.2d 908, 917 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

²²² *Truong*, 629 F.2d at 911-12.

²²³ *Id.* at 913-14.

²²⁴ *Id.* at 913.

²²⁵ *Id.*

expertise in foreign policy matters and stressed that the judiciary's inexperience in this area renders it incompetent to judge the importance of the information to the United States and to make a decision regarding probable cause.²²⁶ Lastly, the *Truong* court cited the fact that the constitution designates the executive branch as the pre-eminent authority in the arena of foreign affairs.²²⁷ By recognizing the compelling needs of the executive in the area of national security, the *Truong* court established the foreign intelligence exception to the warrant requirement.

The *Truong* court also set forth certain requirements that the executive agency must fulfill in order to use the foreign intelligence exception to the warrant requirement. Because allowing electronic surveillance compromises privacy interests, the court carefully limited this exception to the fourth amendment.²²⁸ In order for a court to relieve the federal government of the restrictions of the fourth amendment, the *Truong* court concluded that the object of the search must be a foreign agent or the agent's collaborators.²²⁹ The *Truong* court reasoned that the search of a foreign agent or its collaborators presents the greatest need for "speed, stealth, and secrecy" and requires subtle judgments regarding national security.²³⁰ Additionally, the *Truong* court held that the executive agency must conduct the search primarily for intelligence reasons.²³¹ The *Truong* court recognized the impossibility of limiting the exception to surveillance conducted exclusively for intelligence reasons, because intelligence investigations give rise to criminal charges, such as espionage.²³² The *Truong* court also recognized, however, that in a criminal investigation, a court is entirely competent to make the

²²⁶ *Id.* at 913-14.

²²⁷ *Id.* at 914.

²²⁸ *Id.*

²²⁹ *Id.* at 915. But see the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-11 (1982). In the relevant section, the Foreign Intelligence Surveillance Act provides:

(a)(1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this chapter to acquire foreign intelligence information for periods up to one year if the Attorney General certifies in writing under oath that —

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; . . .

50 U.S.C. § 1802 (1982).

²³⁰ *Truong*, 629 F.2d at 915.

²³¹ *Id.*

²³² *Id.* at 915-16.

usual determination of probable cause.²³³ By allowing a foreign intelligence exception to the fourth amendment, the court in *Truong* demonstrated that a court will defer to an executive agency's judgment that certain information is important to foreign policy matters.

In addition to deferring to the judgment of the FBI about what information is important to the foreign policy of the United States, the courts defer to the CIA's judgment as to whether information is important to national security. In the 1983 case of *McGehee v. Casey*, the United States Court of Appeals for the District of Columbia held both that the CIA's system of classifying and censoring secret information is constitutional, and that a court reviewing whether the CIA properly classified certain information as "secret" should give deference to the CIA's reasons why the information is so classified.²³⁴ In *McGehee*, the CIA classified certain portions of a former CIA agent's manuscript as "secret" and censored those portions of the text.²³⁵ The *McGehee* court stated that the two factors that a court must consider when determining whether government censorship of its employees' free speech violates the first amendment are: first, whether the restrictions on speech protect a "substantial government interest unrelated to free speech,"²³⁶ and second, whether the restrictions are sufficiently narrow to restrict only the speech that will harm the government interest.²³⁷ The court concluded that the censorship of "secret" information did protect the substantial government interest of national security, an interest unrelated to free speech.²³⁸ Additionally, the court concluded that the censorship of only the "secret" information was narrow enough to censor only that information which would harm national security if revealed.²³⁹

In *McGehee*, the former CIA agent also contended that the information that the Agency censored was improperly classified as

²³³ *Id.* at 915.

²³⁴ *McGehee v. Casey*, 718 F.2d 1137, 1140 (D.C. Cir. 1983). "Secret" information includes any information which, if disclosed, could "reasonably be expected to cause serious damage to the national security." *Id.* at 1143 (quoting Exec. Order No. 12,065, 3 C.F.R. 190, 191 (1979)). Subsequent to *McGehee*, Executive Order Number 12,356 revoked Executive Order Number 12,065 and imposed a different national security information classification and access scheme. Exec. Order No. 12,356, 47 Fed. Reg. 14,874, 14,884 (1982) reprinted in 50 U.S.C. § 401 app. at 51-56 (1982). The definition of "secret" information, however, remains the same. *Id.* at 14,875.

²³⁵ *McGehee*, 718 F.2d at 1140.

²³⁶ *Id.* at 1142 (quoting *Brown v. Glines*, 444 U.S. 348, 354 (1980)).

²³⁷ *Id.* at 1143 (quoting *Brown v. Glines*, 444 U.S. 348, 355 (1980)).

²³⁸ *Id.*

²³⁹ *Id.*

"secret."²⁴⁰ The *McGehee* court held that the CIA properly classified the censored portions of the ex-agent's article as "secret."²⁴¹ The court stated that, when reviewing CIA information classification decisions, a trial court should require the CIA to explain why the information is classified as "secret" by listing specific reasons describing the connection between the information and national security.²⁴² The court added that a trial court should defer to CIA judgment as to what information is important in the field of intelligence gathering.²⁴³ The court also stated, however, that because it is the task of the trial court to protect individual rights, the court should be sure that the CIA reasons for their classification are rational and logical.²⁴⁴ Thus, in *McGehee*, the United States Court of Appeals for the District of Columbia established that a trial court should defer to the CIA's judgment as to what information amounts to "secret" information and can consequently be censored.

Therefore, the courts have held that national security constitutes a compelling state interest.²⁴⁵ More specifically, the courts have ruled that the confidentiality of CIA information sources and techniques is a compelling state interest.²⁴⁶ Under strict scrutiny, however, in order for the federal government to use the compelling state interest of national security as a justification for discriminating against homosexuals, it must demonstrate that the discrimination has at least a rational relationship to this compelling state interest.²⁴⁷ The courts have stated that they lack expertise in the field of national security,²⁴⁸ and thus have held that national security agencies can make a determination that a sufficiently close relationship exists.²⁴⁹ Thus, a homosexual has little chance of challenging the CIA Director on constitutional grounds under either a heightened scrutiny or strict scrutiny standard.

²⁴⁰ *Id.* at 1140.

²⁴¹ *Id.*

²⁴² *Id.* at 1148.

²⁴³ *Id.* at 1149.

²⁴⁴ *Id.*

²⁴⁵ *See, e.g.*, *CIA v. Sims*, 471 U.S. 156, 175 (1985) (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980)); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980).

²⁴⁶ *See Sims*, 471 U.S. at 175 (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3); *Snepp*, 444 U.S. at 509 n.3.

²⁴⁷ *See Beller v. Middendorf*, 632 F.2d 788, 808 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

²⁴⁸ *See Sims*, 471 U.S. at 176; *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-14 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

²⁴⁹ *See, e.g.*, *Truong*, 629 F.2d at 915.

III. A HOMOSEXUAL PLAINTIFF'S POOR CHANCES OF SUCCESSFULLY CHALLENGING HIS OR HER DISMISSAL FROM THE CIA IN COURT

Section 102(c) of the National Security Act of 1947 grants the Director of the Central Intelligence Agency discretion to fire any employee if the Director deems the dismissal necessary or advisable in the interest of the United States.²⁵⁰ A homosexual employee whom the Director discharges pursuant to section 102(c) because the Director deems the employee's homosexuality a threat to national security stands little chance of successfully challenging the Director's actions in court on either constitutional grounds or under an employment protection statute.

In analyzing whether an employment protection statute limits the Director's discretion to dismiss employees, the courts demonstrate their admiration for the CIA by either declaring the Director's power under section 102(c) superior to other statutes, or by placing section 102(c) outside the jurisdiction of the employment protection statute.²⁵¹ As a result of the courts' high opinion of the CIA, a homosexual plaintiff has little chance of receiving any job security through any of these employment protection statutes.

If a homosexual challenges his dismissal by the Director on constitutional grounds, the courts review the Director's discrimination against homosexuals using only a heightened scrutiny standard, rather than the more stringent strict scrutiny standard, because of their underlying dislike for homosexuals.²⁵² The CIA can easily demonstrate a compelling state interest that outweighs the heightened scrutiny because the courts recognize the protection of almost all information possessed by the CIA as a compelling state interest.²⁵³ Additionally, the courts will defer to the judgment of the Director that a sufficiently close relationship exists between any protective measures taken by the Director and the security of sen-

²⁵⁰ 50 U.S.C. § 403(c) (1982). See *supra* note 5 for the text of § 102(c) of the National Security Act of 1947.

²⁵¹ See, e.g., *Webster v. Doe*, 108 S. Ct. 2047, 2053 (Court held that § 701(a)(2) of the APA exempts the CIA from review under the Act); *Neely v. CIA*, 27 FEP Cases 82, 85 (D.D.C. 1982) (court held that § 2302(a)(2)(ii) of the CSRA exempts the CIA from review under the Act), *aff'd*, 744 F.2d 878 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985); *Rhodes v. United States*, 156 Ct. Cl. 31, 36 (1962) (court held that the CIA Director's power under § 102(c) is superior to any other statute).

²⁵² See *Beller v. Middendorf*, 632 F.2d 788, 809 (9th Cir. 1980) (court held that standard for reviewing a homosexual's equal protection argument is somewhere between minimum rationality and strict scrutiny), *cert. denied*, 452 U.S. 905 (1981).

²⁵³ See *CIA v. Sims*, 471 U.S. 156, 176-77 (1985).

sitive intelligence information.²⁵⁴ Due to the courts' underlying dislike for homosexuals and overt admiration for the CIA, a homosexual has little chance of defeating the CIA Director's exercise of discretion under section 102(c) on constitutional grounds.

Even if the courts choose to follow the lead of the Ninth Circuit and recognize homosexuals as a suspect class, raising the level of scrutiny does not guarantee victory for a homosexual challenging his dismissal by the CIA Director.²⁵⁵ First, the court might decide that dismissing a homosexual employee is necessary to protect the national security and therefore hold the dismissal constitutional under even the strict scrutiny standard. Second, the courts' admiration for the CIA and distaste for homosexuals might lead them to adopt the interpretation of the APA argued by Justice Scalia in his dissent in *Webster v. Doe*.²⁵⁶ Although Justice Scalia's reading of the APA provides courts with more guidance when deciding if an agency action falls within the jurisdiction of the APA, that guidance will also lead courts to deny constitutional review of the Director's exercise of employment discretion under section 102(c).²⁵⁷

Therefore, the CIA has a wealth of defenses at its disposal if a homosexual challenges his dismissal from the Agency. The courts have held that the Agency is immune from attack under employment protection statutes.²⁵⁸ The courts also hold for the government in constitutional attacks because they believe homosexuals threaten the national security.²⁵⁹ Moreover, should a grant of suspect class status strengthen a homosexual's constitutional case against the CIA, the Agency may urge the courts to adopt the interpretation of the APA set forth in Justice Scalia's dissent in *Webster*, which denies all judicial review of the CIA Director's employment decisions made pursuant to section 102(c).²⁶⁰

²⁵⁴ See *Korematsu v. United States*, 324 U.S. 214, 218 (1944).

²⁵⁵ See *Watkins v. U.S. Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989).

²⁵⁶ See *Webster v. Doe*, 108 S. Ct. 2047, 2059 (1988) (Scalia, J., dissenting).

²⁵⁷ See *Webster*, 108 S. Ct. at 2063 (Scalia, J., dissenting).

²⁵⁸ See, e.g., *Webster*, 108 S. Ct. at 2053 (Court held that § 701(a)(2) of the APA exempts the CIA from review under the Act); *Neely v. CIA*, 27 FEP Cases 82, 85 (D.D.C. 1982) (court held that § 2302(a)(2)(ii) of the CSRA exempts the CIA from review under the Act), *aff'd*, 744 F.2d 878 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985); *Rhodes v. United States*, 156 Ct. Cl. 31, 36 (1962) (court held that the CIA Director's power under § 102(c) is superior to any other statute).

²⁵⁹ See, e.g., *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (prevention of black-mail); *Beller*, 632 F.2d at 811 (military necessities).

²⁶⁰ See *Webster*, 108 S. Ct. at 2055 (Scalia, J., dissenting).

A. Statutory Claims

A homosexual has almost no chance of successfully challenging his dismissal from the CIA under an employment protection statute.²⁶¹ The courts have held that any statute which potentially grants a homosexual relief does not offer protection to CIA employees.²⁶² The methods used by the courts when holding that the CIA is exempt from these employment protection statutes demonstrate the courts' partiality for the Agency. If the employment protection statute specifically exempts the CIA from its coverage, then the courts have used the proper method of statutory analysis.²⁶³ If the statute makes no mention of the CIA, however, then the courts have declared the Agency exempt without any supporting authority.²⁶⁴

In *Rhodes v. United States*, when a CIA employee claimed that the Veteran's Preference Act limited the CIA Director's power to terminate his employment,²⁶⁵ the United States Court of Claims held that no statute superseded section 102(c)'s grant of employment discretion to the Director.²⁶⁶ Under the provisions of the VPA at the time of the *Rhodes* decision, the VPA covered all executive branch employees, which would presumably include the CIA.²⁶⁷ Without any statutory authority, the *Rhodes* court incorrectly declared that the Director's employment decisions were "absolute" and therefore exempt from the jurisdiction of the VPA. By placing the CIA Director's employment decisions outside the jurisdiction of the VPA, the *Rhodes* court demonstrated its partiality for the Agency.

If the employment protection statute specifically exempts the CIA from its coverage, however, the courts use the correct method of applying the statute in order to deny a plaintiff's claim of a discriminatory discharge by the CIA. In *Neely v. CIA*, the United States District Court for the District of Columbia exempted the CIA from the jurisdiction of the Merit Systems Protection Board ("MSPB") because the Civil Service Reform Act ("CSRA") specifically excluded the Agency from the statute's coverage.²⁶⁸ The *Neely*

²⁶¹ See e.g., *Webster*, 108 S. Ct. at 2053 (no review under the APA); *Neely*, 27 FEP Cases at 85 (no review under the CSRA); *Rhodes*, 156 Ct. Cl. at 36 (no review under the VPA).

²⁶² See *Webster*, 108 S. Ct. at 2053; *Neely*, 27 FEP Cases at 85; *Rhodes*, 156 Ct. Cl. at 36.

²⁶³ See *Andrus v. Clover Constr. Co.*, 446 U.S. 608, 616, 616-17 (1980).

²⁶⁴ See *Rhodes*, 156 Ct. Cl. at 36.

²⁶⁵ *Id.* at 33.

²⁶⁶ *Id.* at 36.

²⁶⁷ 5 U.S.C. § 869 (1958). See *supra* note 53 for the text of § 869 listing the exclusions which applied to the VPA at the time of the *Rhodes* decision.

²⁶⁸ *Neely*, 27 FEP Cases at 85. See *supra* note 60 for the relevant portion of the CSRA.

court did not use the same method as the *Rhodes* court, which automatically held that the employment protection statute failed to include CIA employees. Rather, the *Neely* court correctly looked to the terms of the CSRA and found that the Act specifically exempted the CIA from its jurisdiction. Thus, the *Neely* court demonstrated that when an employment protection statute specifically exempts the CIA from its jurisdiction, then the courts properly look to the language of the statute.

Like the *Neely* court, the United States Supreme Court in *Webster v. Doe* looked to the terms of the statute in question, in this case the Administrative Procedure Act ("APA"), to determine if the APA provided CIA employees with protection against arbitrary and capricious employment decisions by the Director.²⁶⁹ The APA, however, contains no term that specifically exempts any executive agency from its jurisdiction.²⁷⁰ Instead, the APA uses only general terms that exempt agencies from judicial review if the agency action "is committed to agency discretion by law."²⁷¹ For the *Webster* Court to conclude that this exemption includes the CIA, it had to hold that Congress wrote section 102(c) in such broad terms that no standards against which to judge the CIA Director's exercise of employment discretion were available.²⁷² Section 102(c) provides that the Director can only dismiss employees in the interest of national security.²⁷³ Despite its lack of detailed standards with which to review the Director's actions, section 102(c) at the very least establishes as a standard that a dismissal must be in the interest of national security.²⁷⁴ The *Webster* Court incorrectly held, however, that section 102(c) provided it with no standards against which to judge the CIA Director's dismissal of a homosexual employee, and thus ruled that under the APA, a court cannot review the Director's exercise of employment discretion.²⁷⁵ By exempting the CIA from

²⁶⁹ See *Webster*, 108 S. Ct. at 2051-53.

²⁷⁰ 5 U.S.C. § 701(a) (1982). See *supra* note 70 for the relevant portion of the statute.

²⁷¹ 5 U.S.C. § 701(a)(2) (1982). See *supra* note 70 for the relevant portion of the statute.

²⁷² See *Webster v. Doe*, 108 S. Ct. 2047, 2052 (1988).

²⁷³ 5 U.S.C. § 403(c) (1982). See *supra* note 5 for the full text of § 102(c) of the National Security Act of 1947.

²⁷⁴ See *Webster*, 108 S. Ct. at 2057 (Scalia, J., dissenting) (Justice Scalia stated that section 102(c) establishes standards for the exercise of the Director's dismissal power, prohibiting dismissals made out of personal vindictiveness or because the Director wants to give the job to his cousin); *Doe v. Casey*, 796 F.2d 1508, 1517-18 (D.C. Cir. 1986), *cert. granted sub nom. Webster v. Doe*, 108 S. Ct. 2047 (1988) (court held that section 102(c) provided a standard, allowing the Director to dismiss employees only in the interest of national security).

²⁷⁵ *Webster*, 108 S. Ct. at 2052.

the jurisdiction of the APA, the United States Supreme Court once again demonstrated courts' partiality towards the CIA.

Therefore, a homosexual cannot rely on employment protection statutes such as the VPA, the CSRA, or the APA when challenging his or her dismissal from the CIA.²⁷⁶ Courts have held that none of these statutes offers any protection to CIA employees.²⁷⁷ Moreover, the methods by which some courts exempt the Agency from the jurisdiction of these statutes demonstrate courts' deference to the CIA Director's decisions. As a result, a homosexual must use constitutional avenues if that employee wishes to challenge his or her dismissal from the CIA successfully.

B. Constitutional Challenges

Although the courts foreclose a homosexual from statutorily obtaining review of a dismissal by the CIA Director, they still allow constitutional review of the CIA Director's exercise of discretion.²⁷⁸ Homosexuals, however, also stand very little chance of succeeding in their constitutional challenges. The courts generally find merit in the reasons asserted by the federal government as justification for dismissing a homosexual despite the fact that stereotypes, prejudice against homosexuals, and some questionable logic underlie these reasons.²⁷⁹ Also, the courts have ruled that a sufficient connection exists between the dismissal of a homosexual and the furtherance of a compelling state interest.²⁸⁰ As a result, the CIA can successfully defend its employment decisions against a constitutional challenge made by a homosexual plaintiff by asserting that the dismissal furthers the compelling state interest of national security.

In *Norton v. Macy*, the United States Court of Appeals for the District of Columbia permitted the stereotype of homosexuals as mentally ill to influence its decision.²⁸¹ In its decision, the *Norton*

²⁷⁶ See *Webster*, 108 S. Ct. at 2053 (no judicial review of the CIA under the APA); *Neely v. CIA*, 27 FEP Cases 82, 85 (D.D.C. 1982) (no Merit System Protection Board review of the CIA under the CSRA), *aff'd* 744 F.2d 878 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985).

²⁷⁷ See *Webster*, 108 S. Ct. at 2053; *Neely*, 27 FEP Cases at 85; *Rhodes v. United States*, 156 Ct. Cl. 31, 36 (1962).

²⁷⁸ In *Webster*, the Court held that a serious constitutional question would arise if the Court construed a statute to deny a colorable constitutional claim. *Webster*, 108 S. Ct. at 2053.

²⁷⁹ See, e.g., *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987); *Beller v. Middendorf*, 632 F.2d 788, 811-12 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969).

²⁸⁰ See *Padula*, 822 F.2d at 104; *Beller*, 632 F.2d at 811.

²⁸¹ *Norton*, 417 F.2d at 1166.

court incorrectly agreed that homosexuals detract from the efficiency of their employer because they fail to demonstrate character, stability and responsibility.²⁸² By holding that homosexuals lack the stability to hold certain types of federal government employment, the *Norton* court demonstrated that courts recognize inaccurate stereotypes of homosexuals as valid.

The *Norton* court also identified another way in which homosexuals present a threat to the efficiency of a government agency. According to the *Norton* court, homosexuals represent a potential security leak due to their susceptibility to blackmail.²⁸³ This new justification contains a severe logical flaw, however. The *Norton* court ignored the fact that the federal government must first discover an employee's homosexual orientation before it can fire the employee due to his susceptibility to blackmail. Potential blackmailers might have leverage over secretive homosexuals; however, it is not secretive homosexuals that the government dismisses as a potential target for blackmail. The government only dismisses known homosexual employees as potential blackmail targets, not those homosexuals that actually are blackmail targets. Prospective blackmailers have no leverage over an employee whose sexual orientation is known to the government. When formulating the thesis that homosexuals present potential targets for blackmail, the court of appeals allowed its personal prejudices to interfere with its powers of logical reasoning.

Using similarly flawed logic, in *Beller v. Middendorf*, the United States Court of Appeals for the Ninth Circuit allowed society's prejudice toward homosexuals to defeat a due process challenge.²⁸⁴ In *Beller*, writing for the majority, Judge (now Justice) Kennedy agreed that a Naval regulation which discriminates against homosexuals has a rational relationship to the compelling government interest of military discipline because many Navy personnel maintain prejudices against homosexuals, which creates tension and hostility in the ranks and impairs a homosexual's ability to command respect.²⁸⁵ Through the majority holding, Judge Kennedy allowed the military to codify society's prejudice against homosexuals in its regulations. Judge Kennedy seemed to ignore, however, the fact that many members of society also maintain prejudices toward

²⁸² *Id.*; see Siegelman, *Kinsey and Others: Empirical Input in MALE AND FEMALE HOMOSEXUALITY: PSYCHOLOGICAL APPROACHES* 44 (L. Diamant ed. 1987).

²⁸³ *Norton*, 417 F.2d at 1166.

²⁸⁴ See *Beller v. Middendorf*, 632 F.2d 788, 811-12 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

²⁸⁵ *Id.*

blacks and women. According to Judge Kennedy's rationale, the Navy could also promulgate regulations discharging all blacks and women because such a regulation has a rational relationship to the compelling interest of military discipline, due to the fact that bigoted enlisted personnel might fail to obey a black or female officer. Certainly, Judge Kennedy had no intention of justifying a racist or sexist regulation through his holding in *Beller*; however, in his zeal to find a compelling government interest that outweighs the heightened scrutiny merited by private homosexual conduct, Judge Kennedy allowed his powers of logic to lapse.

Even beyond the flawed logic of *Beller* and *Norton*, in *Padula v. Webster*, the Court of Appeals for the District of Columbia demonstrated its willingness to stretch logic to its limits in order to permit the FBI to discriminate against homosexuals.²⁸⁶ The *Padula* court held that the FBI could discriminate against homosexuals due to the fact that public dislike renders homosexuals susceptible to blackmail to protect themselves or their partners.²⁸⁷ Thus, the *Padula* court expanded the blackmail argument that it had previously made in *Norton*. Perhaps the *Padula* court believed it remedied the logical flaw in the blackmail argument by pointing out that potential blackmailers could still obtain leverage over a federal government employee even if the federal government knew of the employee's orientation, because the employee's partner may still maintain secrecy about her sexual orientation. This argument assumes, however, that the partner also keeps her sexual orientation a secret, not always a valid assumption. Additionally, the argument seems to assume that only homosexuals present potential targets for blackmailers; whereas, in reality blackmailers can obtain equal leverage against heterosexual adulterers who wish to protect themselves or their partners. Therefore, in attempting to salvage the blackmail argument by expanding its scope, the *Padula* court unintentionally included an invalid premise.

Perhaps knowing of the faulty reasoning used by the courts that had handed down decisions in this area, the United States Court of Appeals for the Ninth Circuit granted homosexuals suspect class status in *Watkins v. U.S. Army*.²⁸⁸ As a result, the court used the strict scrutiny standard in reviewing the Army's justifica-

²⁸⁶ See *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987).

²⁸⁷ *Id.* at 104 (emphasis added).

²⁸⁸ *Watkins v. U.S. Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989).

tions for discharging homosexuals.²⁸⁹ Under the strict scrutiny standard, the government regulation must be necessary for the achievement of a permissible state objective.²⁹⁰ According to the *Watkins* court, none of the Army's rationales bore a close relation to a compelling government interest.²⁹¹ The *Watkins* court identified the logical flaws in both the prejudice argument as used earlier by the same court in *Beller* and the blackmail argument as advanced in *Norton*. Due to the errors in logic contained in the two arguments supported by earlier courts, the *Watkins* court correctly pointed out that neither justification is tailored narrowly enough to overcome strict scrutiny.²⁹² When applying a strict scrutiny analysis to Army regulations that discriminate against homosexuals, the *Watkins* court carefully considered the logic behind each of the Army's justifications for the regulations. As a result, the *Watkins* court granted the plaintiff relief on the basis of his constitutional claims.

Thus, the courts' acceptance of arguments advanced by the federal government to justify discrimination against homosexuals reveals their determination to deny homosexuals constitutional relief. If the courts became a little less anxious to accept the federal government's rationales as valid, the courts might realize that stereotypes and flawed logic form the basis for the blackmail argument in *Padula* and the prejudice argument in *Beller*. Upon granting homosexuals suspect class status, the *Watkins* court carefully scrutinized the federal government's reasons for discriminating against homosexuals and discovered the flaws.²⁹³ No other court uses the strict scrutiny standard, however, thereby permitting flawed justifications for discrimination to obtain precedential value.

As indicated in *Beller*, courts acknowledge that discrimination against homosexuals merits some form of heightened scrutiny.²⁹⁴ Additionally, the *Watkins* court granted homosexuals suspect class status and thereby reviewed discriminations under a strict scrutiny standard.²⁹⁵ Under either the strict scrutiny or heightened scrutiny standard, a compelling state interest must justify any federal government regulation that discriminates against homosexuals.²⁹⁶

²⁸⁹ *Id.*

²⁹⁰ *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

²⁹¹ *Watkins*, 847 F.2d at 1349.

²⁹² *Id.* at 1352.

²⁹³ *Id.* at 1350-52.

²⁹⁴ See *Beller v. Middendorf*, 632 F.2d 788, 809 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

²⁹⁵ *Watkins*, 847 F.2d at 1349.

²⁹⁶ *Watkins*, 847 F.2d at 1349 (court held that in order to pass the strict scrutiny test, a

Courts recognize that national security, especially foreign intelligence, represents a very compelling state interest.²⁹⁷ The courts demonstrate extreme deference to the intelligence agencies by allowing an intelligence agency to abridge constitutional rights on its unilateral decision that national security justifies its actions.²⁹⁸ Generally, the courts hold spies in high regard and permit them to do whatever they believe national security requires.

In *Snepp v. United States*, a case dealing with national security in a slightly different context, the United States Supreme Court established that national security comprises a compelling state interest.²⁹⁹ More specifically, the *Snepp* Court correctly held that the compelling state interest of national security includes the protection of CIA information sources and methods.³⁰⁰ In the later holding of *CIA v. Sims*, however, the United States Supreme Court established that anything having to do with the CIA by definition meant national security.³⁰¹ The *Sims* Court held that the protection of any information possessed by the Agency, even the magazines to which it subscribed, represents a compelling state interest.³⁰² If the CIA alleges that a homosexual employee can expose any information about the Agency whatsoever, perhaps as little as the titles of the magazines in the CIA's waiting room, then the Agency can demonstrate to a reviewing court that the employee's dismissal furthers a compelling state interest.

In addition to acknowledging that national security constitutes a compelling state interest, the courts also require that the agency's action bears a close relationship to protection of national security.³⁰³ *Korematsu v. United States* demonstrates that, in the arena of national security, the courts uphold a federal government agency's determination that a close relationship exists between its actions and the

regulation must further a compelling government interest); *Beller*, 632 F.2d at 810 (court held that the importance of the government interest furthered is a factor in deciding whether a regulation outweighs the heightened scrutiny granted to homosexuals).

²⁹⁷ *CIA v. Sims*, 471 U.S. 159, 175 (1985).

²⁹⁸ *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (court relied on the judgment of the military authorities that their actions were necessary to protect the national security).

²⁹⁹ *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980).

³⁰⁰ *Id.*; see also *McGehee v. Casey*, 718 F.2d 1137, 1139 (D.C. Cir. 1983) (court stated that CIA Director Admiral Stansfield Turner testified that the revelation of information sources in ex-CIA agent McGehee's article made several information sources "nervous").

³⁰¹ See *Sims*, 471 U.S. at 176-77.

³⁰² See *id.*

³⁰³ See *Watkins v. U.S. Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989); see also *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

national security.³⁰⁴ In *Korematsu*, the United States Supreme Court deferred to the questionable judgment of the military authorities that the Japanese-American population of the west coast contained disloyal members and no method existed to separate disloyal from loyal citizens.³⁰⁵ In *McGehee v. Casey*, however, the United States Court of Appeals for the District of Columbia questioned the practice of granting total deference to the opinion of the Agency.³⁰⁶ The *McGehee* court correctly stated that despite the CIA's duty to protect the national security, the judiciary must protect individuals rights.³⁰⁷ Should a court that is reviewing the CIA's dismissal of a homosexual employee under section 102(c) choose to take the same approach as the *McGehee* court, then it will make sure that the reasons listed by the Agency for dismissing the employee are rationally and logically related to national security.³⁰⁸ In contrast, if that same court instead chooses to use the *Korematsu* method, then the CIA only needs to assert that its actions are necessary to protect the confidentiality of national security information.³⁰⁹

Like the Supreme Court's *Korematsu* opinion, the opinion of the United States Court of Appeals for the Fourth Circuit in *Truong* demonstrates that the courts trust the executive to exercise good faith in foreign policy decisions.³¹⁰ The *Truong* court allowed the FBI to conduct warrantless searches, based upon the Bureau's assurance that these searches further the national security.³¹¹ Unlike the courts, Congress recognized the potential for abuse in this system and subsequently to the *Truong* opinion, passed the Foreign Intelligence Surveillance Act.³¹² Although Congress wished to continue the legitimate use of warrantless searches for national security purposes, it also sought to curb violations of citizens' fourth amendment rights, which the executive could justify merely by making the assertion that national security necessitated the searches.³¹³ Unless

³⁰⁴ *Korematsu*, 323 U.S. at 218.

³⁰⁵ *Id.*

³⁰⁶ See *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983).

³⁰⁷ *McGehee*, 718 F.2d at 1149.

³⁰⁸ See *id.* at 1148-49.

³⁰⁹ See *Korematsu*, 323 U.S. at 218.

³¹⁰ See generally *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

³¹¹ *Truong*, 629 F.2d at 915.

³¹² 50 U.S.C. §§ 1801-11 (1982). See *supra* note 229 for the text of the relevant section of the Foreign Intelligence Surveillance Act.

³¹³ *United States v. Megahey*, 553 F. Supp. 1180, 1184 (E.D.N.Y. 1982) (quoting S. REP. No. 604 95th Cong. 2nd Sess., pt. 1 at 7 (1977)), *aff'd*, 729 F.2d 1444 (2d Cir. 1983).

Congress passes a similar piece of legislation regarding the CIA Director's powers under section 102(c) of the National Security Act, courts will continue to defer to the Director's judgment that CIA employment practices regarding homosexuals further the protection of classified information.

The courts agree that national security represents a compelling state interest.³¹⁴ Additionally, courts defer to the judgment of executive agencies that their actions bear a close relationship to national security.³¹⁵ Thus, a court can find that discrimination against a homosexual by the CIA bears a close relationship to the furtherance of a compelling state interest based solely on the assurances of the CIA. The Foreign Intelligence Surveillance Act curbed the abuses perpetrated by the executive under the foreign intelligence exception to the warrant requirement. Unless Congress passes some statute, similar to the Foreign Intelligence Surveillance Act, which curbs the potential for Agency abuse under section 102(c) the CIA can continue to fire homosexuals based on its own findings that homosexuals represent a threat to national security.

C. Justice Scalia's Dissent in *Webster v. Doe*

Should the courts choose to follow the lead of the Ninth Circuit in *Watkins* and grant homosexuals suspect class status, then the compelling state interest represented by the security of classified information might not satisfy the strict scrutiny standard.³¹⁶ As a result, a homosexual stands a chance of successfully challenging his or her dismissal from the CIA under fifth amendment equal protection principles. The CIA Director, however, still has ammunition at his or her disposal to defeat homosexuals' claims of employment discrimination. The courts' hostility towards homosexuals, as evidenced by their willingness to accept the federal government's justifications for discharging homosexuals as rational, might lead the courts to adopt Justice Scalia's interpretation of the Administrative Procedure Act, which denies judicial review of all of the employ-

³¹⁴ See *CIA v. Sims*, 471 U.S. 159, 175 (1985) (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980)).

³¹⁵ See *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

³¹⁶ In *Korematsu v. United States*, the Supreme Court ruled that only apprehension by the proper military authorities of the gravest imminent danger to the public safety could constitutionally justify discrimination against a single racial group. *Korematsu*, 323 U.S. at 218 (1944).

ment decisions made by the Director under section 102(c) of the National Security Act.³¹⁷

In his dissent in *Webster v. Doe*, Justice Scalia analyzed section 701(a)(2) of the APA, which denies judicial review under the Act to all agency actions committed to agency discretion by law.³¹⁸ According to Justice Scalia's reading of section 701(a)(2), it exempts all agency actions of the sort that the courts traditionally refuse to review from judicial scrutiny under the terms of the APA.³¹⁹ As examples of the sort of issues that are traditionally beyond judicial review, Justice Scalia identified political questions, sovereign immunity, and official immunity, among others.³²⁰ Justice Scalia's interpretation runs counter to the United States Supreme Court's previous decisions interpreting section 701(a)(2) as denying judicial review where Congress wrote the statute governing the situation in such a broad manner that a court has no meaningful standards against which to judge the agency's action.³²¹ Unlike the Court's previous holdings regarding the scope of section 701(a)(2), Justice Scalia's interpretation of the Act permits a reviewing court to use legal precedents for guidance as to whether the action is exempt from judicial review under the APA. If those legal precedents state that the action is of the type which courts traditionally refuse to review,³²² then the courts should not review the action under the APA, even if it is a constitutional claim.

On the other hand, the majority's interpretation of section 701(a)(2) permits a court to deny review where it finds no standard to judge the agency's actions.³²³ Thus, a reviewing court may choose to find no standards in a statute that might in fact provide some guidance. For example, in *Webster* the Court chose to find no standard in section 102(c) even though the statute states that the dismissal must advance the interest of national defense.³²⁴ Under Justice Scalia's interpretation, however, precedent decides whether the challenge to agency action involves a traditionally unreviewable

³¹⁷ *Webster v. Doe*, 108 S. Ct. 2047, 2060 (1988) (Scalia, J., dissenting).

³¹⁸ *Id.* (Scalia, J., dissenting).

³¹⁹ *Id.* at 2057 (Scalia, J., dissenting).

³²⁰ *Id.* at 2056 (Scalia, J., dissenting).

³²¹ *Id.* at 2052; see also, *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

³²² See *supra* notes 214-19 and accompanying text for a discussion of the types of actions which the courts traditionally refuse to review.

³²³ See, e.g., *Heckler*, 470 U.S. 821 (1985); *Volpe*, 401 U.S. 402 (1971).

³²⁴ *Webster*, 108 S. Ct. at 2052.

agency action and should therefore not be reviewed by a court.³²⁵ Justice Scalia's reading of section 701(a)(2) provides the reviewing courts with more guidance than the majority's standard, although using Justice Scalia's standard would guide more courts toward denying review. Using the interpretation of section 701(a)(2) advanced by Justice Scalia in his dissent in *Webster*, a court would exempt an agency's actions from judicial review under the APA if legal precedents established the action as one which the courts traditionally decline to review. Thus, although using Justice Scalia's standard would provide more certainty, it would also deny constitutional review if the action is of the type which the courts have traditionally declined to review.

Unfortunately, the employment decisions of the CIA represent the type of agency actions which courts traditionally refuse to review. In *Oetjen v. Central Leather Co.*, the United States Supreme Court held that the Constitution commits the conduct of foreign relations to the executive and legislative branches of the government.³²⁶ This holding, coupled with the United States Supreme Court's holding in *Gilligan v. Morgan*, which demonstrated that a Constitutional grant of power to one branch of the federal government prevented the judiciary from reviewing the exercise of that power, establishes that the CIA's actions are of the type which the courts traditionally refuse to review.³²⁷ The Court's holding in *Gilligan* also demonstrated that when a branch of the federal government has expertise in making the kind of decision that a plaintiff wishes to review, a court defers to the judgment of the experts.³²⁸ Courts already acknowledge the expertise of the CIA in the area of foreign intelligence. Thus, the CIA's decisions about the conduct of their intelligence gathering activities embody the type of actions that courts traditionally refuse to review due to lack of expertise.

Should the courts wish to permit the CIA to continue to discriminate against homosexuals, or anyone for that matter, then Justice Scalia's interpretation of section 701(a)(2) of the APA provides the court with a method. Justice Scalia's dissenting opinion in *Webster* denies judicial review under section 701(a)(2) if the courts traditionally refused to review the agency action in question.³²⁹

³²⁵ *Id.* at 2057 (Scalia, J., dissenting).

³²⁶ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

³²⁷ See *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973); see also *Colegrove v. Green*, 328 U.S. 549, 554 (1946).

³²⁸ *Gilligan*, 413 U.S. at 10.

³²⁹ *Webster v. Doe*, 108 S. Ct. 2047, 2057 (1988) (Scalia, J., dissenting).

Although Justice Scalia's interpretation provides a much less subjective standard to the courts, it permits the CIA to engage in wholesale discrimination in its employment practices. If the courts continue to demonstrate their admiration for the CIA and also maintain their dislike for homosexuals, then they may resort to Justice Scalia's interpretation of the APA to permit their favorite agency's discrimination against homosexuals despite the grant of a suspect class to homosexuals.

IV. CONCLUSION

Unless the courts change their attitudes about both homosexuals and the CIA, then a homosexual plaintiff has no chance of successfully challenging his dismissal from the Agency. Courts revealed their dislike for homosexuals by failing to hold in favor of homosexuals raising constitutional challenges to the loss of their employment with the federal government. The courts based these rulings on stereotypes of homosexuals as unstable, society's prejudice toward homosexuals, and the logically flawed argument that homosexuals might reveal sensitive information through blackmail. Until the courts recognize these bases as illegitimate, the federal government can continue to discriminate against homosexuals.

The courts reflect their positive attitude about the CIA in their holdings which permit the Agency to protect all information in its possession. The courts must realize that they are responsible for the protection of individual rights in this country. In order to exercise this responsibility properly, the courts must determine that on occasion, individual rights outweigh the protection of certain information possessed by the Agency. Until the courts begin to regard the CIA with less reverence, a homosexual has only a small chance of successfully challenging his or her dismissal by the Agency. Congress can provide CIA employees with some protection from the absolute employment discretion of the CIA Director by modifying section 102(c) of the National Security Act to provide a reviewing court with some standards against which to judge the Director's discretion. Until either Congress or the courts take action, however, the CIA Director can fire homosexual employees at will.

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