

Document #7

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. Franklin Edward Kameny, *Petitioner* v. William M. Brucker, Secretary of the Army, et al., *Respondents*. Filed by Franklin E. Kameny.

June 17, 1959

Description: A copy of Franklin E. Kameny's petition for a writ of certiorari, denied by the Supreme Court in 1961. Kameny's petition was the first gay-related case brought to the Supreme Court after he was fired from the U.S. Army Map Service for engaging in "immoral conduct" as a practicing homosexual. The petition demanded equal citizenship and treatment for gay Americans, arguing that "Our government exists to protect and assist all of its citizens, not, as in the case of homosexuals, to harm, to victimize, and to destroy them."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 676

FRANKLIN EDWARD KAMENY, *Petitioner*

v.

WILBER M. BRUCKER, Secretary of the Army, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANKLIN E. KAMENY

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Pro Se

**Petition Denied.
Revolution Begun.**

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

The 50th Anniversary of Kameny at the Court:
Frank Kameny's Petition to the United States
Supreme Court

Franklin Edward Kameny, Petitioner
v.
Wilber M. Brucker, Secretary of the Army, et al.,
Respondents

Petition for a Writ of Certiorari
To the United States Court of Appeals
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Washington, D.C.

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Edited by: Charles Francis
Kameny Papers Project

A Legal Revolution for LGBT Americans

The 50th Anniversary

Introduction

When does a petition denied become a revolution? The answer is history's judgment. Gay civil rights pioneer Frank Kameny, in 1961, was denied his day before the Supreme Court, and no one noticed. He read about his rejection in a one-inch notice in the "Washington Star". However, in this 50th anniversary year of his petition for "cert", a request for a hearing before the Supreme Court, the judgment is final. Kameny's powerfully argued petition to the Court marked day one in a revolution of legal argumentation and law for a vast homosexual minority demanding equal citizenship.

"The Supreme Court denied the (Kameny's) petition and, as is customary, gave no reasons for the denial. Kameny's brief had fallen upon deaf ears. Yet the ideas in it were revolutionary and important. The brief was an announcement that the objects of the postwar antihomosexual Kulturkampf were insisting on equal citizenship - not just an easing of persecution. Such demands were virtually unprecedented. The federal government was unwilling even to tolerate "sex perverts," whom CSC (U.S. Civil Service Commission) official Kimball Johnson announced in 1960 would be "fired on the spot." Even the homophile groups of the 1950s (the Mattachine Society in Los Angeles and the Daughters of Bilitis) had pleaded only for tolerance but had not dared insist on full equality. Thus Kameny's petition went beyond both the government and the homophile positions, maintaining that tolerance was not enough; equal treatment was required."

William N. Eskridge, Jr., "The Birth of Gay Legal Equality Arguments",
New York University Annual Survey of American Law, 2001

Kameny described his petition to the Court with unusual modesty. At the time, he wrote in a letter, "I must apologize for the petition on two counts. First, I am not a lawyer. If you are one, my lack of formal legal training will be most strikingly evident to you, as you read the petition. Second, the petition was necessarily written in a certain degree of haste, in my spare time..." However, Kameny continued, "I am basically satisfied with the document. It has been seen where it should have been seen; my views have been heard where I want them to have been heard." (Seitz letter, 7/19/61).

Kameny's petition, the first gay-related case ever brought to the Court, was discovered among thousands of documents in Kameny's attic in Washington, D.C. It is now in the Library of Congress in the Kameny Papers archive, and will be exhibited for six months this year in the Jefferson Library itself, as part of the exhibition, "Creating the United States". This is a breathtaking ascent for a long-forgotten document that gave legal and philosophical voice to the LGBT American contemporary struggle for civil equality. The "Creating the United States" exhibition at the Library of Congress is about the founding documents themselves, The Declaration of Independence, the Constitution and the Bill of Rights—and how "they are living instruments that are central to the evolution of the United States" ("Creating the United States", Library of Congress). The exhibition shows how the guarantees and protections these documents enumerate have steadily been extended to ever more Americans. Kameny's petition—so long denied—now will be among the documents and epic stories that demonstrate our American evolution, from the abolition of slavery to the granting of the vote to women, to the Civil Rights movement.

Frank Kameny was fired from his job at the United States Army Map Service in 1957 when he was discovered to be homosexual. Unlike so many gay men and women who had been destroyed before by the U.S. government's ban on homosexual employment, Kameny fought for his job and security clearance. In 1959, former California Congressman Byron N. Scott agreed to take Kameny's case. The complaint was

filed in the US District Court for the District of Columbia on June 17, 1959, naming Kameny as Plaintiff and the Secretary of the Army and other Civil Service Commission personnel as Defendants. The Justice Department filed a motion for Summary Judgment, and the motion was granted. Kameny appealed to the US Court of Appeals and again lost.

Scott, to his credit, represented Kameny at the first two levels. “Not unreasonably, he decided to let me go it alone to the Supreme Court,” Kameny says. “So he gave me a sample Petition for a Writ of Certiorari and a set of the Court’s rules, and I proceeded to write my own. If I had any questions as I did from time to time, I simply called up the Supreme Court and said, “Now what do I do”?”

“I filed my petition at the end of January, 1961, and it was to my knowledge the first gay rights legal brief filed anywhere by anybody. And, I must say, after fifty years, it is still reading well,” Kameny said to a group of students in 2010 at American University in Washington, D.C.

After being denied his hearing by the Supreme Court, Kameny took it to a “‘court of last appeal’”. In a letter to a supporter, he wrote, “... for me personally, as well as an appeal for a New Frontier-type reconsideration of government attitudes and policy toward homosexuality, a copy of my petition, with a 3-page covering letter, went to President Kennedy.” (Letter to William Lambert, 7/24/61). Kennedy’s Assistant Attorney General responded that Kameny should take his fight to the Congress. Founding the Mattachine Society of Washington, D.C., he did so.

Yes, Kameny’s petition was denied, but who knew?

“The only item of publicity which I received, in the entire fight from firing through administrative procedures and up thru (sic) the courts, was a small paragraph dealing with the Supreme Court’s denial of certiorari, and that was buried amidst many columns dealing with other cases, and was seen by no one that I know”, Kameny wrote in a letter to raise funds. Kameny said he drew a lesson from this total vacuum of media interest (or spun it this way): “So it is possible to fight these things the whole way, without any of the publicity which many people so deeply fear.” (Seitz letter, 7/19/61) So 'keep on fighting', he was counseling them all.

Kameny, ever fearless, went it alone. He signed his petition "Frank Kameny, Pro Se", for oneself, without attorney, one American citizen.

Charles Francis
Kameny Papers Project
Washington, D.C.



Dr. Franklin E. Kameny

Petition for a Writ of Certiorari

By Franklin Edward Kameny, Pro Se

(Editor's Note: The following petition to the United States Supreme Court, submitted by Frank Kameny in 1961, has been edited to include all of the major legal arguments as well as the more rhetorical sections ("stench in the nostrils"), omitting arguments of procedure and fact from the original, sixty page document.)

Statement

This is an action, brought by petitioner, as Astronomer, to compel the Secretary of the Army to reinstate him in the position as Astronomer with the Army Map Service, from which he was dismissed on December 20, 1957, and to compel the Civil Service Commission to revoke its action of January 15, 1958, barring him from Federal employment.

Petitioner was hired by the Army Map Service on July 15, 1957, as an Astronomer, Grade GS-9. In applying for this position, he filled out the Government Form 57 (Application for Federal Employment. Question 33 on this form asks:

"Have you ever been arrested, charged, or held by Federal, State, or other law enforcement authorities for any violation of any Federal law, State law, a county or municipal law, regulation or ordinance?"

Petitioner responded to question 33 by indicating that the answer was "yes" and to 34 by:

"August 1956; Disorderly conduct; San Francisco; not guilty; charge dismissed."

The arrest referred to, occurred on August 29, 1956, while petitioner was briefly in the San Francisco area attending and delivering a paper at a meeting of the American Astronomical Society. The arrest occurred when petitioner, while in a public men's room, and without invitation or solicitation on his part, and without sexual response, had his penis momentarily touched by another man there. The contact was immediately repelled and terminated by the petitioner. The incident was witnessed by two police plainclothesmen, observing through a ventilation grill-work. Petitioner was in process of departing from the men's room, alone, when the arrest occurred. In the course of the arrest and booking, petitioner was told by police officers that if his plea were "Guilty", the matter would be quickly disposed of; if "Not Guilty", that he would probably have to remain in the San Francisco area for another week. This petitioner could not do, and so, at the trial the following morning, for much the same reasons of expediency as those for which the average citizen will almost always plead guilty to a traffic violation regardless of circumstances, petitioner entered a plea of "Guilty", was fined \$50.00, and placed under probation for six months.

Immediately subsequent to the trial, the probation officer informed petitioner that at the termination of his period of probation, he might apply to the court under Section 1203.4 of the California Penal Code....The rehearing was denied, and the court's judgment affirmed, without opinion, on August 31, 1960. Petitioner appeals now to this court.

Reasons for Granting the Writ

Preamble to Arguments

- (1) This case, involving matters never before examined by the courts, is one of extreme importance to a very large number of American citizens. A rough but probably fair estimate of the number of homosexuals in the United States, would have them making up 10% of our population at the very least--perhaps, at least some 15,000,000. This is a group comparable in size to the Negro minority in our country, and of roughly the same order of magnitude as the Catholic minority; a group of some 2 ½ times the size of the country's Jewish minority and comparable to the world's Jewish population. It is a group which, in this country, has borne and is bearing the brunt of a persecution and discrimination of a harshness and ferocity at least as severe as that directed against these other minorities, but which persecution instead of being mitigated and ameliorated by the government's attitudes and practices, has instead been intensified by them; a persecution and discrimination not one whit more warranted or justified than those against Negroes, Jews, Catholics or other minority groups. This entire large group, broadly and completely heterogeneous as it is, and having in common among its members, physically, intellectually, socially, economically, and otherwise, nothing at all save their homosexuality itself, is barred, in toto, from Federal employment.

It is because the government's policies, particularly in the field of employment, are of such direct and personal concern to so large a minority, that this court is asked to direct that this case, involving, in large measure, a challenge to these policies, be given a full hearing in all of its aspects and ramifications."

- (2) It has been argued, particularly in regard to the Army Map Service action, that the discretion of an appointing officer is not subject to adjudication; that as long as the prescribed rites, rituals, forms, and ceremonies of dismissal are conformed to, the substance and ground of the discharge are not subject to examination by the courts. The courts have upheld this policy on several occasions. It is time that this policy be re-examined and that the realities of the consequences of this policy be looked at with a critical and jaundiced eye.

The government is not just another employer, and discharge from government employment is not discharge from just another job. Appointing officers are subject to all of the failings of other human beings, including, among others, prejudice, personal ambition, submission to pressure by others, cowardice, emotion, and malice. Discharge from Federal employment, unlike other discharges, bears an official stamp, in the minds of the majority of citizens.

Petitioner has, by this discharge, and by this debarment been branded, publicly and (if they are not reversed) permanently, by the majesty of the United States Government, as a dishonest person, and as an immoral person, neither of which he is. And he has been so branded without a shred of fact to bear out the accusations, and, more important, without a chance to defend himself in an impartial hearing.

To say that the victims of actions of this sort, with all of the consequences of such actions, have no recourse in the courts is monstrous! It is possible, by a stroke of the pen, for one fallible appointing officer, through error, pressure, malice, prejudice, or irresponsibility, to destroy an employee's reputation and his good name, his career and his profession, and to deprive him, often permanently, of his livelihood, with no recourse on his part. That such a state of affairs should be allowed to persist, upon no grounds other than that Federal employment is supposedly a privilege and not a right, seems intolerable. In a government such as ours, any government official should be able to be held accountable and responsible for any of his actions---and especially for those of his actions which are directed at, and directly and personally affect, an individual citizen. That this is not so can lead to abuses of the worst sort--as in this case.

It would seem long overdue that the entire philosophy behind these policies of non-interference by the courts be re-examined....It is thus proper and, in the interest of justice imperative, that the Civil Service Commission's action also be considered by the Courts.

- (3) Petitioner wishes to call explicitly to the attention of the Court that in the present proceedings, the Court is not, necessarily, being asked to decide any of the issues raised by above or below. This is an appeal from respondents' motion for Summary Judgment, granted and affirmed by the lower courts. This court is asked, merely, to affirm that issues and questions of sufficient validity and gravity exist to warrant the granting of a full court hearing to the case in all of its aspects.

Petitioner's efforts to achieve justice have miscarried and have been thwarted by the refusal of the respondents and of the courts to face the pertinent issues squarely—or, in fact, to face them at all---and by their reliance upon technicalities and side issues, indicative either of a fundamental lack of sense of responsibility on these matters, or of a refusal to recognize their importance. It has become abundantly clear that as much as it is in the public interest that many questions and issues relating to homosexuality be dealt with by the government realistically, civilizedly, and directly, the government is not going to deal with these matters at all, in any fashion, (except by further attempts at repression) unless it is forced to do so. Therefore petitioner, in this petition, seeks to attack the problem at its roots and its sources, by challenging (in part, and within the framework of the circumstances of this case) the propriety, the legality, and the constitutionality of the government's practices, procedures, and policies in regard to the employment of homosexuals.

In World War II, petitioner did not hesitate to fight the Germans, with bullets, in order to help preserve his rights and freedoms and liberties, and those of others. In 1960, it is ironically necessary that he fight the Americans, with words, in order to preserve, against a tyrannical government, some of those same rights, freedoms and liberties, for himself and others. He asks this court, by its granting of a writ of certiorari, to allow him to engage in that battle.

The Civil Service Commission's Faulty Regulation

The Argument Against the Validity of the Commission's Regulation

Even were the Commission's action factually supported, and procedurally correct (as it is not) , however, the regulation under which the action is taken is invalid.

The regulation (5 C.F.R. 2.106 (a) (3)) indicates, as ground for a decision of unsuitability, "immoral conduct", not further specified.

But what is immoral conduct?

Petitioner asserts, flatly, unequivocally, and absolutely uncompromisingly, that homosexuality, whether by mere inclination or by overt act, is not only not immoral, but that for those choosing voluntarily to engage in homosexual acts, such acts are moral in a real and positive sense, and are good, right, and desirable, socially and personally. The regulation, as it stands, does not say petitioner nay to this assertion. In fact, upon examination, the regulation will be seen not to say anything at all.

Petitioner asserts that the San Francisco incident, in its entirety, did not involve or constitute immoral conduct. The regulation does not say him nay. The regulation says nothing to anyone.

A government employee is entitled to know, clearly, the regulations under which he works and is hired; a citizen is entitled to have the laws, statutes, and regulations which affect him set out in language sufficiently clear and explicit that he may know where he stands under them. This regulation is so broad and vague as to be meaningless. It cannot possibly convey to the employee the information and guidance which such regulations should convey, and which the employee has the right to expect them to convey.

There are those, and in no negligible number in this country, who consider dancing, drinking of alcoholic beverages in any quantity, however small, and other commonplace acts (even in some instances the drinking of tea and coffee) as immoral . There are those who consider nothing immoral which they can "get away with". There is a very widely-held body of opinion which takes a middle-ground view that any act which does not hurt or harm others or interfere with others against their will, is not immoral.

How is the citizen, reading this regulation to know where he stands? He cannot possibly know. The regulation is being interpreted at the whim and caprice of the Civil Service Commission officials. Will they, next year, term as immoral left-handedness, red-headedness, a liking for horse-meat steaks, or membership in either political party or in none at all ?

It may be argued that that which should govern is the prevailing standard of morality in our society. But this too, is far too vague to be implemented; the standards which exist in fact, and those to which lip-service is given are often quite different. Further this would deprive the Federal employee of his proper right to dissent in moral matters, as in all other matters. It imposes an odious conformity upon him.

The Argument Against the Constitutionality of the Civil Service Commission's Regulation

Even were the Civil Service Commission's action factually supported, and procedurally correct, and its regulation legally valid (as they are not), however, the regulation invoked here is unconstitutional under the First, Ninth and Tenth Amendments to the Federal Constitution.

Any decision as to morality and immorality is a matter of a citizen's personal opinion and his individual religious belief.

For the Commission—or any other agency or branch of the government—to declare a course of conduct immoral, and to act upon that declaration, is for it to attempt to tell the citizen what to think and how to believe. This the government may not do under the First Amendment to the Constitution.

Within the narrow framework of this particular argument (although certainly not from the broader viewpoint of this petition as a whole) the Commission's regulations may, if the Commission wishes, declare employees unsuitable upon grounds of homosexual acts per se, and if their nature and details are clearly specified, but it may not tell him that his acts, or any acts, are immoral.

For the government to subscribe, in this explicit fashion, to a particular definition of immoral acts is tantamount to its establishing certain religious beliefs and discarding or disowning others, and to setting up an implicit religious test for the holding of public employment. Granted that these beliefs may be those of a majority (albeit a diminishing majority) of the public, and granted that in certain cases (again, within the restricted framework of this argument only) the government may base specific law, statute and regulation upon such beliefs about morality, still, the government may not, by the First Amendment, take an explicit stand upon the immorality *itself* of certain acts.

The explicit substance and fabric of our government are written law, not morality, whatever may be the real or ostensible implicit basis beneath that law, and it is within the framework of legality and illegality, not morality and immorality, that the government must actually function. The Civil Service Commission has not done so, and is not doing so now.

Thus, the Commission's regulation, as it stands, is unconstitutional, in that, by establishing a tyranny over the mind of its citizen, it is inconsistent with and violates the provisions, stipulations, spirit, and intent of the First Amendment to the Federal Constitution.

Under the Ninth Amendment to the Constitution, "the enumeration of certain rights shall not be construed to deny or disparage others retained by the people".

Under the Tenth Amendment to the Constitution, "The powers not delegated to the United States by the Constitution....are reserved...to the people."

It is indisputable that the citizen has the right and the power to decide for himself, individually, what is moral and what is immoral (as distinguished, again, from what is legal and what is illegal). Nowhere in the Constitution is Congress, or any other branch, agency or officer of the Federal government given, directly or by implication, the power to decide what is and what is not moral and immoral.

Therefore (1) because the right of the individual citizen to decide for himself matters of morality is not explicitly granted (except under the First Amendment) but is not explicitly denied, and is therefore, under all circumstances retained by him, and (2) because the power to make such decision is not delegated to the United States, hence is reserved to the citizen, the Commission's regulation is unconstitutional in that it violates the stipulations, spirit, and intent of the Ninth and Tenth Amendments to the Federal Constitution.

This alone is sufficient to invalidate the Civil Service Commission's action. But we have:

The Civil Service Commission's Faulty Policies

The Argument That the Civil Service Commission's Policies Are Improperly Discriminatory.

Even were the Civil Service Commission's actions factually supported, and procedurally correct, and its regulation legally valid and constitutional (as they are not), however, the policies underlying its action and regulation are invalid because they are arbitrarily and capriciously discriminatory.

Homosexuality, as a state of being, is not illegal in the District of Columbia, where petitioner (and a high percentage of other Federal employees) is resident. (*Rittenour v. District of Columbia*, 163 A. 2d 558 (Mun. App. D.C. 1960)).

Further, many, if not most homosexual acts, actions, and activities (including among others, such homosexual, but not-strictly sexual acts as dancing and kissing between members of the same sex) are not illegal in the District of Columbia.

However, such acts—or even the simple state of being a homosexual, or, in fact, of sharing an apartment with a homosexual—which acts residents of the District of Columbia may (legally) freely perform—or in which state they may exist—without proper official legal censure or punishment, subject the Federal employee to the severe penalties of loss of employment, loss of career, and official designation as an immoral person.

This clearly makes of the Federal employee a second-class citizen, since, upon pain of severe penalty, he may not engage, in his own time, and in his own private life, in activities in which all other citizens of the District of Columbia may freely and legally engage, and, in fact, he may not even arrange his life, or exist in a state legal to all residents of the District.

The Argument of Reason

The citizen should be able to expect that the laws, regulations and policies under which he lives—particularly those which affect him individually and personally—will meet the test of reason. Not only are the Civil Service Commission's policies on homosexuality not pervaded by a discernible thread of reason, but they seem pervaded by a thread of madness. In their complete negation of the realities around us, they remind the observer of an excerpt from a nightmare of an inmate of a lunatic asylum. In their form and in their practice, they border upon, if they do not actually over-step the bounds of the psychopathic.

More important, in their being nothing more than a reflection of ancient primitive, archaic, obsolete taboos, they are an anachronistic relic of the Stone Age carried over into the Space Age—and a harmful relic!

What kind of people are these against whom our government is so viciously and uncompromisingly prejudiced?

Probably their most dominant characteristic is their utter heterogeneity. The public's image of the homosexual—like that of the Negro and the Jew—has little relationship to reality. Despite this common popular stereotype of a homosexual which would have him discernible at once, by appearance, mannerisms and other characteristics, these people run the gamut of physical type, of intellectual ability and inclination, and of emotional make-up, with no distinguishing marks or characteristics of any sort whatever except their homosexuality itself, and no outwardly evident ones at all, common to the group. The incredible amounts of time, effort, manpower and money wasted by the various government and military investigative agencies in trying to ferret out these people, and

the near-complete failure of their efforts to do so, will attest fully to the lack of distinguishing characteristics among homosexuals.

Physically the homosexual is often held to be of rather effeminate physique and mannerism. This is true in only a small percentage of cases and, in any case, effeminacy on the part of its workers, whether of physique or of mannerism, cannot logically be shown to decrease the efficiency of either the government service or of the individual worker. The range of physical types among homosexuals is not different from that among the population at large. Three of our society's foremost cultural symbols of rampant physical masculinity are football players, truck drivers, and members of the U.S. Marine Corps. The number of homosexual members of each of these groups is not insignificant.

Intellectually and emotionally, the homosexual group is completely heterogeneous. There are those who are brilliant, those who are dull, and in a majority who lie somewhere in between. There are those who are among the most stable members of the community, and those who are neurotic and psychotic, and a majority who fall somewhere between, as with the population at large. Kinsey questions the opinion that homosexual activity in itself provides evidence of a neurotic or psychopathic personality. The average homosexual is as well-adjusted in personality as the average heterosexual. Most important, the group is as heterogeneous in these respects as in all others, hence its members must be considered as individuals, and a mass debarment of the whole group is unreasonable.

Occupationally, the group is as diverse as it is in all other respects. We find in it members of the professions—doctors, dentists, lawyers, and teachers (and their students) at all levels; of the sciences—physicists, chemists, mathematicians and others; of the arts, both the creative and the performing—writers, composers, artists, musicians, actors and others, many exceedingly well known; of the clergy—Protestant ministers of all sects, Catholic priests, and Jewish rabbis; of the military in all services, at all ranks from private or equivalent to general or equivalent, in very large numbers; in politics and government—at every level—federal, state, and local—in every branch—legislative, executive and judicial—both elected and appointed; in business and finance; in management and labor; --there is not an occupational group of any sort, from ditch-digger to professor, from clerk to scientist, from private citizen to holder of high office, in which homosexuals are not present in appreciable numbers.

For the Civil Service Commission to declare that all of these citizens are ineligible for Federal employment, should they wish it, for no reason other than that they are homosexuals, is clearly unreasonable...there is no reasonable basis for barring homosexuals from Federal employment.

Having looked quickly at the group under question, and having seen no reasonable basis for debarment, let us examine the government's policies and practices in terms of the realities of the existing situation.

As much as government administrators, ostrich-like, choose not to face the facts, their discriminatory policies and practices have been statistically almost totally ineffective and, more important, will remain so.

The fact that this near-total ineffectiveness of the government's attempts to weed homosexuals out from Federal employment has not resulted in any noticeable inefficiency on this account in the government service is argument in itself against the necessity for such policies.

The lengths to which investigators go to track down those homosexuals who ultimately come to their attention is quite incredible. Nevertheless even the very government agencies engaged in the enforcement of the various regulations aimed at the persecution of, and discrimination against homosexuals have (for all the intense investigation to which their own personnel is subjected) their own share of homosexuals. It is not irrelevant to note that a standard source of wry humor among

homosexuals is the presence of homosexuals in the F.B.I., the various federal and military intelligence units and agencies, municipal vice squads, and other groups assigned often to the very task of ferreting out other homosexuals.

The Army Map Service, which was disturbed at the prospect that in hiring petitioner they might have been employing a homosexual, is not without its share of them, some of whose term of service can better be reckoned in decades rather than in years.

In fact, petitioner recently learned, informally, that Army Map Service personnel (and therefore, perhaps, many other government employees) were informed that if, because of homosexual activities, they found themselves subjected to blackmail for espionage purposes, they should report this at once to the security officers at the Map Service; than in so doing they would not endanger their jobs; that they could not be discharged on that account. This, of course, is an eminently sane, sensible, and rational course of action on the part of the Map Service (and is closely in line with a suggestion made by petitioner to the Department of Defense in August of 1959), but it leads to the ridiculous and utterly absurd situation wherein a homosexual working at the Map Service who is indiscreet enough to get himself into a position in which he is subjected to blackmail for espionage and then admits to the authorities at the Map Service that he is a homosexual, is perfectly secure in his job and is immune to adverse personnel action on this account, whereas the homosexual at the Map Service who never at any time comes into contact with foreign espionage agents, and may perhaps live in a very quiet, reserved life, is subject to dismissal if his homosexuality becomes known to the Map Service. Surely this is an abandonment of all pretense at a logical, rational, reasonable, sane, consistent policy! It should also be pointed out that by so instructing its personnel the Map Service is giving not only full recognition, but acceptance as well, to the fact that it has more than an insignificant number of homosexuals among its employees. This is hardly consistent with the basis upon which petitioner was discharged.

This is an indication, too, of the frantic, incoherent manner in which the government is thrashing around in futile efforts to seek piecemeal solutions, out of expediency, in order to avoid facing directly, coherently, systematically, and in an order fashion that which must be faced directly in principle, and for the facing of which the time has now arrived.

It has been argued that the mere presence of homosexuals in a government (or other) office is a disruptive influence, and a cause of friction among employees. The acknowledged extreme difficulty in identifying these people effectively refutes this argument. If it were true that homosexuals constitute a disruptive influence, the undisrupted government office would be a rarity.

The perpetuation of the present policy is made possible only by the certainty of its near-complete ineffectiveness. Thus the present policy serves to cast a pall of fear over a sizable segment of the Federal work force, to wreak immense hardship upon a small but significant number, and to turn away from the government many talented people who could contribute in no small degree (Petitioner has personally spoken to many such). It accomplishes little else and nothing useful. Such a policy can hardly be said to meet the test of reason.

Although the government's policies on homosexuals have long been in effect, their present harshness, the extreme measures used to effectuate and implement them, and much of the body of administrative and investigative procedure now in existence, date back, largely, to the unfortunate, so-called "McCarthy Era", and, specifically, to the recommendations of U.S. Senate Document No. 241, December 15, 1950, an interim report submitted to the Committee on Expenditures in the Executive Departments, by its Sub-Committee on Investigations (the "Hoey Committee"). The document is entitled "Employment of Homosexuals and Other Sex Perverts in Government". While, to a quick or uninformed reading, the contents and conclusions of this report may seem properly arrived at, supported by fact, and reasonable, a careful and informed reading will show it to be a mass of misstatement, misinformation, non sequiturs, prejudiced judgments (in the original sense of the word "prejudiced"), specious reasoning, sheer fabrication, and fallacy.

Much more important than that, however, is the sub-committee's own statement of its objectives in making its inquiry:

"To consider why (the employment of) homosexuals by the Government is undesirable...."

Not "whether", but "why" ? Naturally, since, as this statement indicates, the Committee had decided a priori, that the employment of homosexuals by the Government was undesirable, they would discover that it was indeed undesirable, and would supply some fallacious but superficially plausible-sounding rationalizations for their position. Equally naturally, and for reasons of the same utter lack of objectivity, those rationalizations, and the subcommittee's entire report, are not worth the paper upon which they are written. Yet, for a full decade, these rationalizations, arrived at by men with (by their own statement) closed minds, have been the guide for government policy and procedure in regard to the employment of homosexuals—as well as the basis for much vicious police activity in Washington and elsewhere in the country (e.g.: The nationwide practice of taking of fingerprints and the sending of them to the FBI's files in cases of even the most minor of offenses, or even in cases where individuals are detained for mere "investigations" or "suspicion" , if there is the slightest overtone of homosexuality involved; and the maintenance---as by the D.C. Police Department---of extensive lists of known and suspected homosexuals, for use by the Civil Service Commission. A study of the percentage of such "arrests" for "investigation" in Washington, D.C., in which possible homosexuality was a factor might perhaps prove illumination, as might a study of the amount of police activity and deployment of police manpower directed at simply adding names to lists of homosexuals. Much of the activity of the D.C. Police Department's so-called Morals Squad, and, in fact, according to an oral statement to petitioner by the Chief of the Squad, the very genesis of the Squad, or of its so-called perversion section, are in direct consequence of the report of the "Hoey Committee". Policies and procedures built upon a basis such as this cannot conceivably meet the test of reason.

In the instant case, petitioner's performance at his job, by statement of his supervisors at the Army Map Service, was not merely satisfactory, but superior. His training and specialization placed him in a category in which the supply of available manpower was and is smaller, by far, than the demand. His conduct, bearing, demeanor, and deportment while at work had been impeccable. Yet, in his letter of March 12, 1958 which in petitioner's experience with official documents is unparalleled in its concentration on one page of non-sequiturs, irrelevancies, and irrationalities, the Commanding Officer of the Map Service rejected petitioner's appeal on the ground that he was dismissed "to better promote the efficiency of the Federal Service." A greater departure from reason would be difficult to find !

Similarly, and for no apparent reason other than the very evident and manifest prejudices of the Civil Service Commission officials, petitioner, with no actual regard for considerations of government efficiency, was disqualified from Federal service for three years. This, too, can hardly be said to meet the test of reason.

The amount of time, effort, money, and manpower squandered in detecting and firing homosexual government employees is so great, and is so far out of proportion to any possible potential, actual, or alleged return or gain, that this alone vitiates the argument that such policies are intended to promote the efficiency of the Federal service. They contribute markedly to its inefficiency !

Not only are the government's present policies on homosexuality irrational in themselves, but they are unreasonable in that they are grossly inconsistent with the fundamental precepts upon which this government is based and with the entire body of its other current practices and policies, as well as with the recognized national aims and goals.

We may commence with the Declaration of Independence, and its affirmation, as an "inalienable right" that of "the pursuit of happiness". Surely a most fundamental, unobjectionable, and

unexceptionable element in human happiness is the right to bestow affection upon , and to receive affection from whom one wishes. Yet, upon pain of severe penalty, the government itself would abridge this right for the homosexual. It is a rather shabby and shoddy state of affairs for a citizen's retention of his job to be dependent upon his having to choose, as an object for his affections, someone acceptable to the Civil Service Commission officials, and their henchmen elsewhere in the government. That is what the present situation boils down to. And it is indeed a petty thing when the very government of the United States stoops to attempt to regulate the social life of its employees. A re-reading , by respondents, of the Declaration of Independence, with some careful thought given to its meaning, significance, and background, would be immensely valuable to them, and of enormous good to the nation!

In the sheer ferocity of its pursuit of homosexuals, the government could not possibly be farther from calm confidence (blind unreasoning hysteria would be a more apt description) or from the pursuit of truth and reason, or from the maintenance of a free society. In this field, dissent is suppressed to the point where it was indicated to petitioner, by government officials, that (1) even to take a civilizedly tolerant or unprejudiced attitude toward homosexuals and homosexuality would be enough to place a Federal employee under suspicion and lead to his being considered unsuitable, and (2) that petitioner's utterance of his perfectly proper, if controversial and dissenting view that a Federal employee's personal , outside-of-working hours life was "none of the Civil Service Commission's business" was looked upon as a heresy, and as a near-heinous crime, to which the Commission's officials objected quite as much as they did to what they believed to be the nature of his private life.

Our government exists to protect and assist all of its citizens, not, as in the case of homosexuals, to harm, to victimize, and to destroy them. Unfortunately, much of that portion of our present-day Federal bureaucracy which deals with the citizenry personally, has lost sight of this, and seems to look upon it as the goal of the good public servant to "get" as many citizens as possible. Insensately single-minded, they pursue their narrow, savage, backward policies, paying no heed to the needless havoc wrought upon the hapless citizens who are their victims. This is certainly true of portions of the Civil Service Commission staff, and it was certainly true in this case. This is obviously inconsistent with the basic principles upon which our government is said to rest.

In fields of anti-Negro, anti-Semitic, anti-Catholic, and other prejudice, the government has indeed recognized, and is playing fully and admirable its role as a leader of changes in attitude. In regard to the homosexual, the government is following—and following abjectly—an example of prejudice of the least admirable kind, with no effort to change its own attitudes, much less to stimulate changes of attitude elsewhere.

In the summer of 1960, Mr. Kimball Johnson, Chief of the Investigations Division of the Civil Service Commission, in publicly enunciating Commission policy stated that

"sex perverts will continue to be fired on the spot. The public would not condone any modification of CSC's rigid standards in handling such cases. "

But the public did not condone integration in Little Rock, in New Orleans, in the armed forces, and elsewhere. By court order and force of Federal troops, the public was made to accept it, willy-nilly, with our without condonation.

There will be no riots in the streets if homosexuals are no longer fired from the government service; no government buildings will be blown up; there will be no need to call out troops to protect

Federal employees; there will be no mass resignations or boycotts of the Federal service, or any other signs of protest analogous to those occurring in the South in regard to racial integration.

Yet the government will act against strongly (and violently) expressed public opinion in support of one minority, but will not act to support another minority, equally large and no less deserving, against what is little more than the government's own presumption of what the strength of public opinion might be.

There is no more reason or need for a citizen's sexual tastes or habits to conform to those of the majority than there is for his gastronomic ones to do so, and there is certainly no rational basis for making his employment, whether private or by the government, contingent upon such conformity.

Petitioner happens to enjoy horse meat steaks, a taste shared with him by a small number of fellow Americans, a taste against which most Americans are strongly prejudiced and will not condone (to the extent that the sale of such meat is prohibited in some cities) and which inspires repugnance and revulsion in large numbers of citizens, a taste which is legal, a taste which relates to his own personal life, and a taste which has nothing to do with the practice of Astronomy. Will the Civil Service Commission find him unsuitable to work as an Astronomer because of his taste, uncondoned by the public? Most unlikely. Yet, on the ground that he is a homosexual—a taste shared by a far higher number of citizens than for horse-meat, one which is legal, one which relates to his private life only, and one equally irrelevant to the practice of Astronomy, the Commission considers him disqualified to work as an Astronomer. Where is the reason, the logic, or the consistency in this? There is none.

It should be noted, too, that Mr. Johnson's statement shows clearly the complete falsity of the professed high-sounding reasons given by the Civil Service Commission (efficiency of the Federal services, etc.) to justify their position. As this statement indicates, their entire policy upon homosexuals is based upon supine, unresisting submission to what they consider to be popular prejudice.

The Civil Service Commission seems to be operating upon an economy of plenty in regard to trained manpower. It is widely recognized that the country is operating in an economy of scarcity. And yet, while, on the one hand, the government laments the shortage of technically trained personnel, on the other hand the Commission promiscuously discharges talented, trained—often highly trained—and highly competent personnel, frequently scarce and in the highest of demand and (as petitioner knows through personal conversation with physicists, mathematicians, and others) discourages the service of many others upon the flimsy basis of its disapproval of the manner in which they conduct their personal lives. It would seem that the government's left hand does not know what its right hand is doing. And the manner in which the Commission pursues its policies in this regard leads, often, to the complete professional destruction of the individuals involved, with a total loss to society and country, of their abilities and training—a loss which in its extent, is appalling, and is, of course, totally unnecessary. It would indeed be difficult to conceive of a more wanton and senseless waste of valuable and vitally-needed human resources.

Thus the Commission's policies and practices, both in general, and in the instant case, are grossly inconsistent with recognized national goals and desiderata in regard to the use of manpower and intellect."

The United States long ago disowned and abandoned slavery, peonage, and serfdom. Yet what else can one term an attempt by an employer to control an employee's life, acts, and associations during his own time, in ways which have no slightest relevance to his professional fitness, or personal performance or competence at the job? In hiring an employee, the government—or any employer in

this country, for that matter –does not buy him, and own him, body and soul. The government’s policies would seem to indicate that it is not convinced of this.

In its role as an employer, the government’s only proper concern is with the employee’s work and conduct during working hours, not at other times. It is not for the government-as-employer to attempt to intercede in the employee’s private affairs. These are matters between the employee himself and his conscience, and between him and his associates in such private life, but not between him and his employer.

Respondents’ policies are therefore inconsistent with this country’s long-standing policies and traditions upon individual freedom of association and action.

In summary, then, the government’s entire policy on homosexuals, and its practices, procedures, and regulations, and the clichés used to justify them, represent a complete abandonment of, and abdication from reason. This entire set of policies and practices is fraught with inconsistencies and irrationalities, and, by no stretch of imagination or pretense at the use of intellect, can they be said even to approach meeting the tests of reason, or of the promotion of the general welfare as prescribed in the Preamble to the Federal Constitution. Quite to the contrary, they violate all reason, and are strongly antagonistic to the interest of the general welfare.

The Argument Against the Constitutionality of the Civil Service Commission’s Policies and Practices

Even were the respondents’ actions factually supported and procedurally correct, their regulations legally valid and constitutional, and their policies properly non-discriminatory, and capable of meeting the test of reason (all of which they are not), however, the Commission’s action is invalid because it itself, and the policies upon which it is based are unconstitutional under the Fifth Amendment to the Federal Constitution.

The Civil Service Commission, by its policies, seeks to limit the freedom of action of an employee, in a fashion which, as has been shown in the argument preceding, is arbitrary and without basis in reason or in relevance to any possible proper objectives of the Commission or of the government.

The Commission’s policies against the employment of homosexuals constitute a discrimination no less illegal and no less odious than discrimination based upon religious or racial grounds, a personal discrimination which is, to borrow a phrase from *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) “so unjustifiable as to be violative of due process.”

Both the Civil Service Commission action and the Army Map Service action are based upon the mere suspicion that petitioner’s sexual activities and the direction of his affections may be different from those of the majority of citizens (Petitioner’s arguments and position in this petition would in no slightest degree be altered, were that suspicion proven unquestionably correct.)

In *Bolling v. Sharpe*, *supra*, this Court has said:

“Although the Court has not assumed to define ‘liberty’ with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.”

In this case, respondent is depriving petitioner of his liberty, under law, to compete for, accept, and hold government employment on the same basis as other citizens of the United States. No proper, reasonable governmental objective has been shown in this restriction, nor, by Argument 6 above, is it likely that any can be shown.

This argument applies, too, to the Army Map Service action. Petitioner was informed (Letter of December 10, 1957) that had the Map Service had full details of the arrest, he “might not have been

considered for appointment by this agency". In view of the fact that, however arrived at, the final verdict was "Not Guilty", this can mean only that the true basis for the Map Service action was identical with that for the Civil Service Commission action –solely and only a suspicion of homosexuality. ...Here too, a flat disqualification and a dismissal for homosexuality are deprivation of both liberty and property without due process of law.

The Supreme Court has held (*Bolling v. Sharpe, supra*), that "...equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." It follows that when a Federal agency's decision is challenged as personally discriminatory in violation of the due process clause of the Fifth Amendment, the courts must satisfy themselves, by going behind the agency finding to see whether it is without substantial support.

Hence respondents' actions in this case, and the policies upon which they are based, by which homosexuals are barred from Federal employment, are unconstitutional in that they violate the due process clause of the Fifth Amendment.

This alone is sufficient to invalidate the actions of both the Civil Service Commission and the Army Map Service.

Summary of Arguments

Respondents' case is rotten to the core. Respondents' case has been shown to fail factually and to be defective procedurally; the regulations upon which they base their case have been shown to be legally faulty, invalid, and unconstitutional; their policies have been shown to be improperly discriminatory, irrational and unreasonable, inconsistent and against the general welfare, and unconstitutional. The entire bases for respondents' actions in this and in similar cases have been shown to be arbitrary, capricious and without reasonable foundation.

Genuine issues of fact have been raised, as well as issues of law and statute, which are of deep concern to at least some 15,000,000 citizens, and possibly twice that number or more. These issues are of sufficient weight and gravity to warrant their being heard in full by the courts.

The government's regulations, policies, practices and procedures, as applied in the instant case to petitioner specifically, and as applied to homosexuals generally, are a stench in the nostrils of decent people, an offense against morality, an abandonment of reason, an affront to human dignity, an improper restraint upon proper freedom and liberty, a disgrace to any civilized society, and a violation of all that this nation stands for. These policies, practices, procedures, and regulations have gone too long unquestioned, and too long unexamined by the courts.

The government's entire set of policies and practices in this field is bankrupt, and needs a searching re-assessment and re-evaluation—a re-assessment and re-evaluation which will never occur until these matters are forced into the light of day by a full court hearing, such as is requested by this petition.

The time has come for the government to turn over a new leaf—nay, to open a new volume—in its treatment and handling of this question and of the citizens involved. This might well be achieved by this court by the simple expedient of granting petitioner his writ of certiorari.

Conclusion

For the foregoing reasons, set out in detail above; in the interest of justice for petitioner personally, and in order that he may pursue his fight for his proper rights, freedoms, and liberties, and for his career, his profession, his livelihood, his chance to contribute to society to the fullest extent of his ability, and his good name, against infamous, tyrannical, immoral and odious actions of his government; in the interest of the public at large and of the nation as a whole; and in the particular interest of a large minority of the citizenry, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Franklin E. Kameny
Pro se

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