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JOSEPH C. STEFFAN, APPELLANT v. LES ASPIN, SECRETARY
OF
DEFENSE, ET AL.

No. 91-5409

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA
CIRCUIT

1993 U.S. App. LEXIS 29521

September 13, 1993, Argued
November 16, 1993, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Columbia. (D.C. Civ. No. 88-3669).

COUNSEL: Marc Wolinsky argued the cause for appellant. With him on the briefs was Calvin Steinmetz.

Anthony J. Steinmeyer, Attorney, United States Department of Justice, argued the cause for appellees. With him on the brief were J. Ramsey Johnson, Acting United States Attorney, and E. Roy Hawkins, Attorney, United States Department of Justice.

On the brief for amici curiae The American Jewish Committee, et al., was David C. McBride.

On the brief for amicus curiae The American Association of University Professors were Robert C. Post, Scott L. Nelson, and Ann H. Franke. Mark D. Laponsky entered an appearance.

On the brief for amici curiae NOW Legal Defense and Education Fund, et al., were Deborah A. Ellis and Anne L. Clark.

On the brief for amici curiae The American Civil Liberties Union AIDS Project, et al., were Steven R. Shapiro and Arthur B. Spitzer.

JUDGES: Before: MIKVA, Chief Judge, WALD and EDWARDS, Circuit Judges. Opinion for the Court filed by Chief Judge MIKVA.

OPINIONBY: MIKVA

OPINION: MIKVA, Chief Judge: Joseph Steffan was, by all accounts, [*2] an exceptional midshipman as he prepared to graduate from the United States Naval Academy in 1987. Mr. Steffan's exemplary performance at the Academy had earned him numerous honors and the respect and praise of his superior officers. Most notably, he was selected in his senior year to

serve as Battalion Commander, one of the Academy's ten highest ranking midshipmen. But only six weeks before his expected graduation, the Academy forced Mr. Steffan to resign--denying him a degree and a commission in the Navy--after he truthfully answered, "Yes, sir" to a superior officer's question, "Are you a homosexual?" In dismissing Mr. Steffan, the Academy applied Department of Defense Directives instructing that "homosexuality is incompatible with military service," and mandating discharge of any servicemember who "has stated that he or she is a homosexual or bisexual, unless there is a further finding that the member is not a homosexual or bisexual." 32 C.F.R. Part 41, App. A §§ H.1.a, H.1.c(2). Mr. Steffan argues that his constructive discharge, based solely on his homosexual orientation, violates the equal protection component of the Fifth Amendment's Due Process Clause. He further argues that [*3] the truncated procedures the Navy used in effecting that discharge were arbitrary and capricious, violating both the equal protection component and the Administrative Procedure Act.

Because we find no rational basis for the Directives under which the Navy excluded Mr. Steffan solely because he truthfully admitted his sexual orientation, we hold that these Directives are facially unconstitutional. We need not and do not decide the alternative procedural claims because, under the plain mandate of the Directives, Mr. Steffan's discharge was inevitable and would have occurred under any procedures through which the Navy may have chosen to effectuate it.

I. Background

In February 1987, Joseph C. Steffan was one of the most promising students at the United States Naval Academy ("Academy"). He had received consistently outstanding marks for his leadership and military performance. By his sophomore year, his instructors considered him "gifted," an "outstanding performer" who had "exhibited excellent leadership." He was praised as an "asset to the Academy." In his junior year, Mr. Steffan was selected as the Regimental Commander of one half of his class. His stellar evaluations continued: [*4] Mr. Steffan was a "model for his classmates and subordinates," whose "training [was] best characterized by his constant dedication to superior performance." None questioned that he would "undoubtedly make an outstanding naval officer." In his senior year, Mr. Steffan was selected as Battalion Commander, one of the ten highest ranking midshipmen at the Academy. In this capacity, Mr. Steffan had direct command over one-sixth of the Academy's 4,500 midshipmen.

In addition to his outstanding military performance, Mr. Steffan also excelled at extracurricular activities. In his senior year, he served as President and Cantor of the Catholic Choir and as premier soloist of the Glee Club. In his junior and senior years he sang the National Anthem as a soloist on national television at the Army-Navy game, for which he earned a Citation

from the Superintendent of the Academy. It appeared that the sky was the limit for Mr. Steffan's career in the United States Navy.

But Joseph Steffan's promising military career was not to be realized. In February 1987, the Naval Intelligence Service ("NIS") received a report from the Academy alleging that Mr. Steffan had stated to another student that he was [*5] gay. The NIS commenced an investigation. When Mr. Steffan learned of the investigation, he asked an Academy Chaplain to intercede on his behalf with the Commandant of Midshipmen, Captain H.W. Habermeyer, in hopes that he would be allowed to graduate. The Chaplain was unable to convince Captain Habermeyer, who advised only that Mr. Steffan seek legal counsel. Several days later, Mr. Steffan himself approached Captain Habermeyer to request a meeting with the Superintendent. Captain Habermeyer asked him, "Are you willing to state at this time that you are a homosexual?" Mr. Steffan responded, "Yes, sir." He then asked Captain Habermeyer if he would be allowed to graduate. The Captain told him it was unlikely and asked him what he would do in that event. Mr. Steffan responded, "I guess I would have to leave the Naval Academy." Captain Habermeyer then informed Mr. Steffan that he would convene a Brigade Military

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Performance Board the next day and that he would arrange for a psychological evaluation.

At the Performance Board hearing, Mr. Steffan declined to present any evidence to show that he was not a homosexual. Captain Konetzni, the Deputy Commandant and presiding officer, stated that [*6] Mr. Steffan's performance at the Academy had been "outstanding." Captain Konetzni then asked Mr. Steffan, "I'd like your word, are you a homosexual?" Mr. Steffan responded, "Yes, sir." At that point, the hearing was terminated. After secret deliberations, the Board decided to change Mr. Steffan's military performance rating from an "A" to an "F", to suspend him from classes, and to recommend his discharge for "insufficient aptitude for commissioned service."

Based on this recommendation, an Academic Board was convened on April 1, 1987; after a hearing, it too recommended Mr. Steffan's discharge. Subsequently, Mr. Steffan met with the Conduct Officer, Major Funk, who advised him to resign. Major Funk noted that Mr. Steffan's discharge was a foregone conclusion and that it would necessitate a notation on the record of his homosexuality. Major Funk opined that Mr. Steffan's job prospects would suffer from such a notation. Mr. Steffan followed the Major's advice. On April 1, 1987, a mere six weeks before he was to graduate after nearly four years of exemplary performance, Mr. Steffan submitted his resignation from the Academy.

But on December 9, 1988, Mr. Steffan wrote to the Secretary [*7] of the Navy, asking that his resignation be withdrawn and that he be awarded his diploma. On February 9, 1989, based on the advice of the Superintendent of the Naval Academy, the Secretary denied that request. The sole stated basis of this denial was Mr. Steffan's status as a homosexual, as revealed by his un rebutted admission before the Performance Board.

Mr. Steffan filed this action on December 29, 1988. He claims that the defendants, the Secretary of Defense, the Secretary of the Navy, the Superintendent of the Naval Academy, and the Academy's Commandant of Midshipmen (collectively, "Secretary"), denied him the equal protection of the laws when they forced him to resign solely because of his homosexual orientation. In the alternative, Mr. Steffan alleges that the Secretary both denied him equal protection and violated the Administrative Procedure Act when the Academy truncated his discharge proceedings. His case has reached this Court on two prior occasions. On the first occasion, we reversed the district court's order dismissing this case for discovery violations when Mr. Steffan refused to answer questions in deposition designed to elicit whether he had engaged in any homosexual [*8] conduct. *Steffan v. Cheney*, 287 U.S. App. D.C. 143, 920 F.2d 74 (D.C. Cir. 1990). On the second occasion, in an unpublished opinion, we upheld the district judge's refusal to recuse himself for his prior references to gays and lesbians as "homos."

The district court entered summary judgment for the Secretary on December 9, 1991. In a lengthy opinion, the court explained, first, that the Academy's expedited procedures were not arbitrary and capricious, but were an "accommodation to an accomplished young man," who desired speedy resolution of his status. *Steffan v. Cheney*, 780 F. Supp. 1, 6 n.11 (D.D.C. 1991). Going on to evaluate the constitutionality of the military's gay ban, the court noted that Mr. Steffan was discharged because of his homosexual status, and not because of any homosexual conduct. *Id.* at 4-5. But it held that (1) homosexuals are not a suspect class, so regulations discriminating on the basis of homosexuality are subject only to rational-basis review, *id.* at 5-10; and (2) the military's gay ban bears a rational relation to the legitimate goals of "maintenance of discipline, [*9] morale, good order, a respected system of rank and command, ... morality and respect for the privacy interests of both officers and the enlisted," *id.* at 16, and to the goal (not raised by the Secretary) of preventing the spread of AIDS in the armed forces. *Id.* at 13-16. Mr. Steffan appeals from the entry of summary judgment.

II. Discussion

Mr. Steffan argues that the Navy constructively discharged him in violation of the equal protection component of the Fifth Amendment's Due Process Clause. The equal protection component imposes the same restrictions upon the federal Government that

* || the Fourteenth Amendment's Equal Protection Clause places upon the States. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975). Mr. Steffan challenges the regulations that were in effect when he resigned and when the Secretary of the Navy refused his request that he be allowed to graduate. The military's newly announced policy toward homosexuals in the armed forces was discussed at oral argument, but it is not at issue in this case. Both parties seem eager to have us resolve in advance the constitutionality [*10] of whatever guidelines the new regulations might ultimately prescribe. We decline their invitation. Mr. Steffan's appeal turns solely upon the legality of the regulations under which the military discharged him. Those regulations--and only those regulations--are properly before us in this case.

The regulations in effect at the relevant times were Department of Defense Directives 1332.14 and 1332.30, 32 C.F.R. Part 41, Appendix A ("DOD Directives" or "Directives"). They read, in part:

H. Homosexuality

1. Basis

a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording [*11] minimal privacy; to recruit and maintain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

b. As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts;

....

(3) A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following

approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service; [*12]

(d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

Mr. Steffan was forced to leave the Navy because of the last provision: he truthfully stated that he was a homosexual. Because of the Directives, Mr. Steffan no longer had a future in the United States Military Services, despite the Navy's prior opinion of him as one of its most promising midshipmen. Therefore, the district court held, and we agree, that Mr. Steffan's resignation, tendered after his superiors informed him of the consequences of refusing to resign, amounted to a "constructive discharge" under the DOD Directives. *Steffan v. Cheney*, 733 F. Supp. 115, 117-19 (D.D.C. 1989). Mr. Steffan resigned because he knew, and his superiors told him, that under the Directives admitting one's homosexual orientation [*13] was cause for dismissal. The Secretary denied Mr. Steffan's request to withdraw his resignation for the same reason. Therefore, the constitutionality of the Directives is the central issue in this case.

The Secretary's brief relies heavily upon the concept of "military deference" to sustain its Directives. And not without reason--for it is surely true that we accord great independence to decisions of the military branches in their areas of expertise. For example, the Supreme Court (as well as this Court) upheld a military prohibition on servicemembers wearing yarmulkes, because of the military's professed need for uniformity of dress. *Goldman v. Weinberger*, 475 U.S. 503, 508, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986) ("traditional outfitting

... encourages the subordination of personal preferences and identities in favor of the overall group mission."), affirming *Goldman v. Secretary of Defense*, 236 U.S. App. D.C. 248, 734 F.2d 1531 (D.C. Cir. 1984). This regulation would likely have been struck down as violative of the First Amendment in another context, but the Court deferred to the military's judgment that it had a compelling secular interest in uniformity. A strong and independent [*14] military is essential to the national security, and courts should not lightly overturn military judgments as to the best means of ensuring that security.

But contrary to the Secretary's implication, a court need not close its eyes to the dictates of the Constitution whenever the military is involved--not even when it professes a national security interest in its conduct. There is no "military exception" to the Constitution. Indeed, even when the Supreme Court has deferred to a military judgment, it has been careful to do so only within the confines of ordinary constitutional analysis. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 67, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981). This is particularly true for equal protection cases. When the military fails to accord individuals the equal protection of the laws, it treads upon an area of expertise that has long been conceded to the courts. In deciding such cases, therefore, courts should not stray from the boundaries of ordinary equal protection review. For example, faced with a claim that the military discriminates against African-Americans or women, the court should not fail to apply strict or intermediate scrutiny to the military's action. [*15]

See *Frontiero v. Richardson*, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973). Although the concept of military deference should lead a court to grant the benefit of the doubt to the Government's opinion that a "compelling" or "important" military interest exists (at least where there is a colorable claim of such an interest), the court should not hesitate to review the case with its customary thoroughness.

In this case, however, we decline to rule on whether a "compelling" or "important" state interest is necessary. This would depend, of course, on whether homosexuals, defined by their sexual orientation, are a "suspect" or "quasi-suspect" class accorded "heightened scrutiny" under equal protection review. This Court has only had occasion to rule on the suspect status of homosexuals as defined by homosexual conduct. *Padula v. Webster*, 261 U.S. App. D.C. 365, 822 F.2d 97 (D.C. Cir. 1987); *Dronenburg v. Zech*, 239 U.S. App. D.C. 229, 741 F.2d 1388 (D.C. Cir. 1984). In that context, we have noted the anomaly of according special protection to a class whose defining characteristic, homosexual conduct, can be made illegal. *Padula*, 822 F.2d at 103 [*16] (citing *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986)). This is a different case: the class at issue is defined by homosexual orientation, not conduct. The Secretary does not allege that Mr. Steffan ever engaged in homosexual conduct. Accordingly, the district court acknowledged that Mr. Steffan was discharged solely because of his status as a

homosexual. *Steffan v. Cheney*, 780 F. Supp 1, 5 (D.D.C. 1991) ("This is primarily a case about the plaintiff's status as a homosexual."). As we have previously noted, "whether an agency of the federal government can discriminate against individuals merely because of sexual orientation" remains an open question in this Circuit. *Doe v. Casey*, 254 U.S. App. D.C. 282, 796 F.2d 1508, 1522 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. Webster v. Doe*, 486 U.S. 592, 100 L. Ed. 2d 632, 108 S. Ct. 2047 (1988) (emphasis in original). It is that open question that we must begin to answer today in deciding the constitutionality of the military regulations applied to Mr. Steffan.

Nevertheless, we will leave unaddressed one important aspect of that question. We find it unnecessary [*17] to inquire whether homosexuals, as defined solely by orientation, comprise a "suspect" or "quasi-suspect" class. We need not decide, because we find that even if homosexuals are not accorded suspect status, the DOD Directives cannot survive constitutional scrutiny. A.
Rationality Review

Any governmental action that burdens individuals unequally but does not burden a "suspect class" need only survive "rationality," or "rational-basis" review. Rationality review requires that the action be "rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). This is not an exacting standard. Nor should it be: Every governmental action burdens some individuals more than others. Thus, a strict standard of review invalidating a large percentage of regulations based only on their differential impact or purpose would handcuff government in the name of equality. The Constitution neither requires nor permits courts to reach for a constitutional blunderbuss to resolve every equal protection challenge. Absent a burden upon a suspect class, the court's role is merely to ensure: (1) that the [*18] government has a legitimate purpose for distinguishing among the individuals affected; and (2) that the means chosen to effect that purpose bear some reasonable relation to it, and thus are not wholly arbitrary. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 61-64, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982). The government is under no obligation to justify its behavior; instead, before striking down a statute or regulation on rationality review the court must evaluate and find wanting any potentially legitimate grounds upon which to uphold the government's action. *Heller v. Doe*, 125 L. Ed. 2d 257, 113 S. Ct. 2637, 2642-43 (1993).

Although the court has a limited role under rationality review, that role remains significant as a bulwark against unreasonable and illegitimate restrictions. When individuals are deprived of the equal protection of the laws by a governmental actor for entirely arbitrary reasons, or for reasons that rest solely upon irrational and invidious prejudices against a class of people (whether or not a "suspect class"), a court should declare the government action unconstitutional even under

rational-basis review. *Cleburne*, 473 U.S. at 450. [*19] Otherwise, rationality review would be tantamount to no review at all--a result manifestly inconsistent with Supreme Court precedent. See, e.g., *Zobel*, 457 U.S. at 61-64; *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533-38, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973).

With these principles in mind, we must decide whether Mr. Steffan's unequal treatment was rationally related to a legitimate military purpose. We will begin by addressing the purposes articulated in the Secretary's brief. We will then proceed to discuss other possible rationales for excluding homosexuals from military service.

B. Propensity to Engage in Illegal Conduct

According to the Secretary's attorney, the primary purpose of the regulations is to exclude from the military those individuals who have a propensity to engage in unlawful conduct. The Directives define "homosexual" as "a person ... who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directives @ H.1.b(1). Those "homosexual acts" are forbidden to military servicemembers, and there is no dispute that laws forbidding such conduct are constitutional. By excluding those who "engage[] [*20] in, desire[] to engage in, or intend[] to engage in homosexual acts," the military claims it is excluding those with a "propensity" to engage in forbidden conduct, and it is that conduct--and not merely a person's orientation--that has a deleterious effect upon the morale of the armed forces. Accordingly, when a servicemember "has stated that he or she is a homosexual," he is admitting that he "engages in, desires to engage in, or intends to engage in" acts that are harmful to morale, and he will be dismissed from the military, "unless there is a further finding that the member is not a homosexual"--that is, unless the member's statement turns out to be false. DOD Directives @ H.1.c(2).

In this case, Mr. Steffan stated that he was a homosexual and thereafter resigned under pressure because he was led to understand that his mere homosexual orientation was sufficient to compel dismissal. His superiors never asserted that Mr. Steffan had engaged in homosexual conduct, and he never admitted to any. On its face, therefore, his discharge seems unrelated to any conduct--his statement revealed nothing more than a sexual orientation. But the Secretary argues that even if Mr. Steffan had [*21] a "homosexual orientation" he could have rebutted the presumption that he was a "homosexual" by showing that he did not "engage[] in, desire[] to engage in, or intend[] to engage in homosexual acts." To explain how this might be, counsel for the Secretary attempted at oral argument to draw a distinction between "attraction" and "desire." A person might be attracted to members of the same sex, and thus have a "homosexual orientation," yet that person might not "desire" to engage in homosexual conduct. Counsel for the Secretary described

individuals fitting this description as "celibate homosexuals." Oral argument was the first time this Court became aware of the "celibate homosexual" exception. Evidently, we are not alone: to the Secretary's knowledge, no servicemember seeking to remain in the military has ever invoked this purported defense. No reference to "celibate homosexuals," or to any supposed distinction between "attraction" and "desire," can be found in the Directives. Therefore, Mr. Steffan could hardly be expected to divine the existence of this "exception" either from the language of the Directives or from past practice. Nonetheless, we will concede for the purpose of [*22] argument that it is (at least semantically) possible that a person with a homosexual orientation might not be a "homosexual" under the Directives because that person lacked a "desire" to engage in prohibited conduct.

The Secretary's argument was designed to prove that the Directives are aimed entirely at rooting out homosexual conduct and not persons of homosexual orientation. Evidently, the Navy believes that the difference between "attraction" and "desire" determines whether a servicemember has a propensity to engage in misconduct, and it is only this misconduct, and not the mere presence of persons of homosexual orientation, that the Navy fears. The disingenuousness of this argument is plain from the face of the Directives. Even accepting the existence of the "celibate homosexual" defense, the Directives as a whole are far more concerned with status--with thoughts and desires--than with conduct. And, as we will discuss in detail below, a presumption of misconduct based solely on status is insupportable even under rationality review.

1. The plain meaning of the Directives.

From the face of the DOD Directives, it is plain that they primarily target homosexual status, [*23] and not homosexual conduct. Mr. Steffan was forced to resign under section H.1.c(2), which mandates dismissal of any servicemember who states that he or she is a homosexual unless there is a further finding that the servicemember is not, in fact, a homosexual. Section H.1.b(1) defines "homosexual" as someone "who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directives @ H.1.b(1).

Although this definition ultimately relies upon some connection to homosexual conduct, the primary focus of the Directives is not, in fact, the conduct itself, but the "desire" to engage in that conduct. This becomes clear when one compares section H.1.c(2), under which Mr. Steffan was discharged, with section H.1.c(1). Under c(1), a servicemember who actually engages in homosexual acts can escape discharge if he can show that "such conduct is a departure from the member's usual and customary behavior"; that it is unlikely to recur; that it was not coercive; that it will not harm the morale of the armed forces; and (most significantly) that "the member does not desire

to engage in or intend to engage in homosexual acts." DOD Directives @ H.1.c(1). For all intents [*24] and purposes, the servicemember must prove that he is not a "homosexual," as defined in section H.1.b(1), except that he happened to engage in homosexual conduct. If his thoughts are in accord with his conduct (if he "desires" to engage in homosexual acts), then he cannot escape dismissal.

As an example, imagine that two servicemembers engage in homosexual conduct. One is homosexual by orientation--that is, he "desires" to engage in homosexual acts. The other is heterosexual--that is, although he did engage in a homosexual act on this occasion, it was a departure from his usual practice and he does not "desire" to engage in any more such acts. Both servicemembers admit their conduct to their superiors; both truthfully represent their sexual orientations. Under section c(2), the homosexual servicemember will be discharged--period. But under c(1), the heterosexual servicemember stands a good chance of remaining in the military.

As this example illustrates, both c(1) and c(2) are aimed at the same thing: homosexual orientation. Whether the servicemember has engaged in homosexual conduct or has stated that he is a homosexual, he can escape dismissal by showing that he is a heterosexual. [*25] But he can never escape dismissal, once he truthfully admits his orientation or his conduct, if he "desires" to engage in homosexual acts. The Directives thus attack status, not conduct; and the status they are after is defined only by one's thoughts.

2. Status predicting conduct.

The Secretary's asserted rationale for the Directives can thus be stated as follows: a person who, by his own admission, "desires" to engage in homosexual conduct has a "propensity" to engage in repeated homosexual conduct (one assumes ~~"repeated"~~ conduct is the concern, because a single incidence does not automatically require dismissal under c(1)), and that person must be dismissed from the military as a prophylactic measure. As a factual matter, such a proposition--that a person who "desires" to engage in misconduct will do so--is hardly self-evident. Many of us "desire" in the abstract to do things and yet refrain from doing them simply because they are against the rules. Nonetheless, under rationality review, the Secretary need not show a perfect means-ends fit, but only a reasonable relation between the means (excluding persons of homosexual orientation) and the end (preventing homosexual [*26] conduct). Heller, 113 S. Ct. at 2643.

But there is no such rational relation here. Homosexual conduct is more than a practice discouraged by the military: it is grounds for discipline and sometimes (in the case of sodomy) a criminal act. Therefore, the Secretary's justification for the gay ban presumes that a certain class of persons will break the

law or the rules solely because of their thoughts and desires. This is inherently unreasonable. In a recent entrapment case the Supreme Court held that even a defendant's prior conduct did not demonstrate a propensity to engage in the exact same actions when they were later made illegal. "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it." *Jacobson v. United States*, 118 L. Ed. 2d 174, 112 S. Ct. 1535, 1542 (1992).

A conclusion as to future conduct is even less justifiable when based, not on past conduct, but on mere thoughts and desires. "[A] person's inclinations and 'fantasies ... are his own and beyond the reach [*27] of government....' " *Id.* (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67, 37 L. Ed. 2d 446, 93 S. Ct. 2628, (1973)). "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969) (government may not forbid private ownership of obscene materials in one's own home). By firing Mr. Steffan purely for his "inclinations and fantasies," the Secretary seeks to exercise this very power over the minds of those in the military.

The "constitutional heritage" to which Justice Marshall referred in *Stanley* is evident in the evolution of the law of treason. Under a statute of Edward III, it was a crime to "compass or imagine the Death of ... the King." Statute of Treasons, 25 Edw. III. This became the crime of "constructive treason," which was enforced against supposed "compassers" and "imagers" even in the absence of any overt act (other than mere words) or any conspiracy to carry out the regicide. See, e.g., *Case of Thomas Burdet*, 79 Eng. Rep. 706 (1477); *Trial of Sir John Perrot*, 1 How. St. Tr. 1315, 1318 (1592); [*28] *Trial of Thomas Hardy*, 24 How. St. Tr. 199, 894 (1794) (all cited in *Watts v. United States*, 394 U.S. 705, 709-10 & n.1, 22 L. Ed. 2d 664, 89 S. Ct. 1399 (1969) (Douglas, J., concurring)). See generally *Cramer v. United States*, 325 U.S. 1, 8-22, 89 L. Ed. 1441, 65 S. Ct. 918 (1945) (discussing the law of treason in England and America prior to the Constitutional Convention). Our Constitution expressly repudiates constructive treason. Article III, section 3 declares: "treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. Const. art. III, § 3 (emphasis added). These restrictions, limiting the definition of treason to certain discrete types of conduct and requiring an "overt act" for conviction, express the constitutional principle that a person's thoughts are his own--however distasteful they may be to the state.

These considerations were present even in the cases that

upheld the Smith Act's broad proscriptions of subversive [*29] activities. Despite the nation's fear of a supposed communist threat to overthrow the state, the Supreme Court never went so far as to allow individuals to be prosecuted merely for private communist sympathies. For example, in *Scales v. United States*, 367 U.S. 203, 221-24, 6 L. Ed. 2d 782, 81 S. Ct. 1469 (1961), the Court accepted as reasonable a construction of the Smith Act's "membership clause" that required for conviction proof of "active" membership in a communist-affiliated organization and a "specific intent" to overthrow the Government of the United States. Only with these limits did the Court uphold this provision, and it noted that a broader construction would render the statute's constitutionality doubtful. *Scales*, 367 U.S. at 222, 224; *Yates v. United States*, 354 U.S. 298, 318-20, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957). Under the Court's approved construction, a connection existed between membership in the organization and an overt act of conspiracy that sufficed to bring the statute "within established, and therefore presumably constitutional, standards of criminal imputability." *Scales*, 367 U.S. at 228. Similarly, [*30] in *Dennis v. United States*, 341 U.S. 494, 499-502, 95 L. Ed. 1137, 71 S. Ct. 857 (1951), the Court construed the subversive advocacy provisions of the Act as requiring both a specific conspiratorial intent to overthrow the Government of the United States at some future date, and active advocacy of (as opposed to a mere statement of support for) that position. Later, as the nation's fear of domestic communism waned, the Supreme Court reasserted its view that mere status--mere membership in a "subversive organization"--could not be sufficient grounds for a deprivation of rights, when the Court held unconstitutional a law that indiscriminately deprived Communist Party members of their passports. *Aptheker v. Secretary of State*, 378 U.S. 500, 509-11, 12 L. Ed. 2d 992, 84 S. Ct. 1659 (1964). Thus, although the subversive activity cases are not beloved of civil libertarians, even these cases manifestly stop short of allowing the kind of presumption that the Secretary claims in this case: a presumption of misconduct from mere status, in the absence of evil intent.

In the present case, of course, Mr. Steffan has not been convicted of treason, nor subversive advocacy, nor any other crime. But [*31] he has been denied something that equally qualified and less qualified individuals have enjoyed: the privilege of serving and defending his country in the armed forces. In cases analogous to those under the Smith Act, the Supreme Court has consistently held that government may not deny a job to an individual solely because of his status as a member of a "subversive organization," absent any specific intent to further unlawful action. *Elfbrandt v. Russell*, 384 U.S. 11,

17-19, 16 L. Ed. 2d 321, 86 S. Ct. 1238 (1966); *Wieman v. Updegraff*, 344 U.S. 183, 190-91, 97 L. Ed. 216, 73 S. Ct. 215 (1952). See also *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (government cannot fire non-policymaking employee solely because of political affiliation); *Branti v.*

Finkel, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980) (same); Rutan v. Republican Party of Illinois, 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990) (prohibition against discrimination based on political affiliation extends to employment decisions other than firing). Despite these warnings, the Secretary has accorded Mr. Steffan differential treatment solely because of the content of his thoughts, as revealed by [*32] his truthful statement that he is a homosexual. We think this is repugnant to the various common law and constitutional principles that guard the sanctity of a person's thoughts against government control, as expressed in the cases discussed above. A person's status alone, whether determined by his thoughts or by his membership in a certain group, is an inadequate basis upon which to impute misconduct. Accordingly, we find that the Secretary's "propensity" argument, which presumes that "desire" will lead to misconduct, is illegitimate as a matter of law. It cannot provide a rational basis for the DOD Directives.

C. Effect on Morale, Discipline, and Recruitment of Heterosexuals

The Secretary's argument that the Directives protect morale and discipline in the armed forces and aid recruitment of new soldiers goes beyond preventing homosexual conduct. The Secretary apparently also fears the impact that the mere presence of persons of homosexual orientation will have on these vital military interests. The Directives state, in part:

The presence in the military environment of persons who ... by their statements, demonstrate a propensity to engage in homosexual conduct, [*33] seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; ... [and] to recruit and retain members of the Military Services....

DOD Directives @ H.1.a (emphasis added) (see supra page 7 for the full text of @ H.1.a). The Secretary does not claim that homosexual servicemembers themselves will have poor morale or discipline, nor does he assert that they will intentionally sabotage the interests of the military. Instead, as the district court observed, the Secretary fears that these grievous consequences will arise because heterosexual soldiers will be appalled at the requirement that they serve alongside homosexuals. Steffan v. Cheney, 780 F. Supp. 1, 12-13 (D.D.C. 1991).

Under rationality review, the court must presume that the Secretary's fears are well-founded, even though we may have a higher opinion of the maturity of members of the armed forces than do their policymakers. But these fears are patently insufficient to justify a discriminatory policy, even under rationality review, because each depends solely [*34] upon the prejudice of third parties. Because third parties do not like

homosexuals, the argument runs, they will not wish to serve alongside them. Forcing them to serve with homosexuals will lower their morale, impair their discipline, and discourage them from enlisting. Similar objections were voiced by opponents of President Truman's 1948 executive order requiring racial integration of the armed forces. See *Dahl v. Secretary of United States Navy*, 1993 Westlaw 328364 at 8-9 (E.D. Cal. 1993) (quoting Defense Personnel Security Research and Education Center, *Nonconforming Sexual Orientations and Military Suitability* at 8-10 (1988)). But a cardinal principle of equal protection law holds that the government cannot discriminate against a certain class in order to give effect to the prejudice of others. Even if the government does not itself act out of prejudice, it cannot discriminate in an effort to avoid the effects of others' prejudice. Such discrimination plays directly into the hands of the bigots; it ratifies and encourages their prejudice.

In *Palmore v. Sidoti*, 466 U.S. 429, 80 L. Ed. 2d 421, 104 S. Ct. 1879 (1984), the Court overturned a state court's child custody order, [*35] which took the child away from her mother and delivered custody to the child's father solely because the mother had remarried to an African-American. The state court had not acted out of prejudice, but stated that its order was in the best interest of the child because of society's prejudice. Although the mother and father were equally fit parents, the state court reasoned that the child would be subject to discrimination in her community if she lived with parents of mixed races. The Supreme Court reversed. In a unanimous opinion, it held that even if the child's welfare would indeed be impaired by living with parents of mixed races, the court could not determine custody on that basis because such a decision would merely give effect to the prejudice of others--a result that the Constitution does not allow. "The Constitution cannot control such prejudices but neither can it tolerate them," the Court held. *Palmore*, 466 U.S. at 433.

Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical [*36] effects of private racial prejudice that they assume to be both widely and deeply held."

Id.

Although *Palmore* involved a "suspect class" and was decided under strict scrutiny, the Court extended its reasoning to rational-basis review in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). In *Cleburne*, the city had denied a zoning permit to construct a home for the mentally disabled in a residential neighborhood. One of the city's arguments for rejecting the permit was that neighborhood residents, angered by the presence

of the home, would pose a danger to the mentally disabled residents. The Court (citing *Palmore*) rejected this argument as giving effect to irrational private biases, and held that it could not provide a rational basis for denying the permit. *Cleburne*, 473 U.S. at 448.

The *Palmore/Cleburne* principle has a parallel in First Amendment law: the "heckler's veto." The First Amendment forbids the government to silence speech based on the reaction of a hostile audience, unless there is a "clear and present danger" of grave and imminent harm. See, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949). [*37] Otherwise, a vocal minority (or even majority) could prevent the expression of disfavored viewpoints--a result contrary to the central purpose of the First Amendment's guarantee of free expression. See *Christian Knights of the KKK v. District of Columbia*, 287 U.S. App. D.C. 39, 919 F.2d 148, 150, 152-53 (D.C. Cir. 1990) (Edwards, J., concurring; Wald, J., dissenting); *NAACP Legal Defense & Educ. Fund, Inc. v. Devine*, 234 U.S. App. D.C. 148, 727 F.2d 1247, 1261-62 (D.C. Cir. 1984), rev'd on other grounds sub nom. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992); *Harry Kalven, Jr., The Negro and the First Amendment* 140-160 (1965).

These constitutional principles mandate that government may not disadvantage a person on the basis of his status or his views solely for fear that others may be offended or angered by them. That is precisely the substance of the Secretary's argument in this case: that heterosexual servicemembers and potential recruits will be offended by the presence [*38] of homosexuals, and this will affect their morale, discipline, and enlistment. The Constitution does not allow government to subordinate a class of persons simply because others do not like them.

D. Privacy

The Secretary also argues, and the Directives state, that the presence of homosexuals in the military will invade the privacy of heterosexual servicemen. DOD Directives @ H.1.a (presence of homosexuals impairs military's ability "to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy").

This argument can mean one of two things: either (1) that homosexual servicemembers will ogle and stare at their heterosexual counterparts in the shower or other close quarters; or (2) that heterosexuals will fear such staring and feel an invasion of privacy. The argument that homosexuals will stare is very similar to the argument that they will engage in homosexual acts. Again, it equates thoughts and desires with propensity to

engage in misconduct. The argument that heterosexuals will fear such staring is, in turn, a version of the argument that government should be allowed to give effect to [*39] the irrational fears and stereotypes of third parties. That argument is foreclosed by *Palmore* and *Cleburne*.

Moreover, even the Secretary's own interpretation of the Directives casts doubt upon the seriousness of his privacy rationale. Recall that counsel for the Secretary maintains that the Directives permit "celibate homosexuals," who are attracted to members of the same sex but do not "desire" homosexual conduct, to serve in the military. See *supra* pages 12-13. So, if the Navy is not concerned about heterosexual servicemembers perceiving an invasion of privacy from the presence of a "celibate homosexual," then the marginal increase in invasiveness from a homosexual who "lusts in his heart" but does not intend conduct should be minimal. Thus, even if the privacy rationale were legitimate in the abstract, these Directives plainly do not protect privacy.

E. Rationales Not Offered by the Secretary

Under the *Heller* formulation of rationality review, we must also evaluate arguments that the Secretary does not himself proffer, if they may present a rational basis for the Directives. *Heller*, 113 S. Ct. at 2642-43. The district [*40] court relied on one such rationale: preventing the spread of AIDS in the armed forces. We do not agree that this could be a rational basis for the Directives. Homosexual orientation cannot spread the AIDS virus. Homosexual, or heterosexual, conduct can--and then only if one of the participants carries the virus. Even if AIDS happens to be more prevalent today among homosexuals than among heterosexuals, justifying the Directives on this basis requires the illegitimate assumption that persons of homosexual orientation will break the rules by engaging in homosexual conduct as members of the armed forces.

Finally, another rationale on which the Secretary does not rely in his brief, but to which the Directives allude, is homosexuals' alleged susceptibility to blackmail. DOD Directives @ H.1.a (presence of homosexuals impairs military's ability "to prevent breaches of security"). But as Judge Norris has aptly pointed out, the military's policy only increases the risk of blackmail by making gays and lesbians remain in the closet for fear of forfeiting their careers. *Watkins v. United States Army*, 875 F.2d 699, 730-31 (9th Cir. 1989) (Norris, J., [*41] concurring), cert. denied, 498 U.S. 957, 112 L. Ed. 2d 395, 111 S. Ct. 384 (1990); see also *Dahl v. Secretary of United States Navy*, 1993 Westlaw 328364 at 13 (E.D. Cal. 1993) ("the only possible threat homosexuals could pose to military security (i.e., that undeclared homosexuals might be 'discovered' and blackmailed) could be obviated by the very policy that the threat allegedly justifies...."). The gay ban raises the stakes of silence enormously, and gives potential blackmailers leverage

they would not otherwise have. If there is a risk to military security from homosexuality, then, the Directives themselves are to blame for it.

III. Conclusion

The DOD Directives, the military regulations in effect when the Navy compelled Joseph Steffan to resign solely because he admitted his homosexual orientation, are not rationally related to any legitimate goal. Instead, it is apparent that the Directives exclude a particular class of individuals, identifiable only by their thoughts and desires, for no other reason than the military's fear and dislike of that group. The constitutional requirement of equal protection forbids the government to disadvantage a class based solely upon irrational [*42] prejudice, whatever the standard of review. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-50, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). We find that the Directives violate the equal protection component of the Fifth Amendment's Due Process Clause. We need not and do not reach the appellant's alternative contentions relating to the procedures used to effect his discharge.

America's hallmark has been to judge people by what they do, and not by who they are. Just as Mr. Steffan won his Battalion Commander ranking by his conduct, so must he be judged by his conduct. It is fundamentally unjust to abort a most promising military career solely because of a truthful confession of a sexual preference different from that of the majority, a preference untarnished by even a scintilla of misconduct. We reverse the decision of the district court. The appellees shall grant Mr. Steffan his diploma from the United States Naval Academy, reinstate him to military service, and commission him as an officer.

It is so ordered.

File Copy in the M. L. H.

3 December 1993

MEMORANDUM FOR THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

Subject: Appeal of the D.C. Court of Appeals Panel Decision in Steffan v. Aspin

1. As you are aware, a panel of judges of the Court of Appeals for the District of Columbia Circuit recently reinstated a former Naval Academy Midshipman discharged under the Department of Defense's previous homosexual exclusion policy. The basis of its decision was that the policy's presumption that homosexual status is evidence of intent to engage in homosexual activity violates the Constitution's Fifth Amendment equal protection clause. Although the decision technically applies only to our previous policy, a similar presumption is the heart of the President's new policy recently endorsed by Congress. To preserve it and a number of other DoD equities described below, the Army, Navy, and Air Force Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps join me in urging their principals to appeal this decision. A meeting has been called at the White House to discuss this case this morning. I request you discuss this matter personally with Mr. Lake prior to that meeting.

2. In addition to the critical need to defend the rebuttable presumption linking homosexual status and activity, we must appeal Steffan to avoid a number of its collateral effects.

a. Up to now, the military has enjoyed judicial deference with regard to its military personnel decisions. Established by the Supreme Court, this deference has given us considerable discretion in conceiving and implementing policies that advance military objectives but, if applied in civilian settings, might be considered unconstitutional. The Steffan decision severely restricts this deference by second-guessing a personnel policy based on important military objectives. This assault on the military's traditional latitude in personnel matters has the real potential to weaken judicial deference toward the military in other areas.

b. Steffan undercuts another recent circuit court decision addressing the relationship between homosexual status and conduct in the military context. In Ben-Shalom v. Marsh, the Seventh Circuit upheld our previous policy because it articulated a "rational basis" for the nexus between status and conduct. When weighed against the legitimate government interests protected, the Ben-Shalom court held the interests must prevail. The interests the court acknowledged included:

- (1) maintaining good order and discipline;
- (2) fostering mutual trust and confidence among servicemembers;

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- (3) Insuring the integrity of the system of rank and command;
 - (4) facilitating assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy;
 - (5) recruiting and retaining members of the military service; and
 - (6) maintaining the acceptability of military service.

These interests continue as the bases of the President's current policy. Steffan, however, rejects any connection between homosexual status and conduct. It characterized as "illegitimate" the "assumption that persons of homosexual orientation will break the rules by engaging in homosexual conduct as members of the Armed Forces." In an appeal, we would seek application of the Ben-Shalom rational basis standard.

c. We are also concerned that if Steffan is allowed to stand, it could impact thousands of prior status-based homosexuality discharges that can still be appealed. Although the decision is binding only within the District of Columbia, it could persuade the Boards for Correction of Military Records (BCMRs) to reverse previous discharges. Even if the BCMRs uphold the discharges, the appellants have recourse to federal courts, which may follow Steffan's precedent. Reinstatement and back pay could result from such reversals.

3. Our options are to allow Steffan to stand, appeal it to the full D.C. Circuit sitting *en banc*, or appeal it to the Supreme Court. I recommend an appeal to the D.C. Circuit *en banc*; an appeal to the Supreme Court could result from whatever decision the court ultimately reaches.

4. In summary, Steffan seriously weakens the legal underpinnings of the new homosexual policy. If allowed to stand, it will provide considerable support to past, present, and future status-based homosexual discharges in their efforts to strike down the policy and reverse their discharges. All the government interests underlying the new policy still exist. Unless Steffan is appealed, we may not be able to defend those interests in the future.


JAMES P. TERRY
Colonel, USMC
Legal Counsel

APPEAL IN STEFFAN V. ASPIN

- IN STEFFAN THE COURT DECLARED THE FORMER DOD HOMOSEXUAL EXCLUSION POLICY UNCONSTITUTIONAL

- THE COURT SAID IT IS UNREASONABLE FOR DOD TO ASSUME THAT AN ADMITTED HOMOSEXUAL IS LIKELY TO ENGAGE IN HOMOSEXUAL CONDUCT

- THIS CONCLUSION IS IN DIRECT CONFLICT WITH THE PRIOR DECISION OF A COURT OF EQUAL STATURE, THE CONCLUSION OF THE SASC AFTER HEARINGS ON THE ISSUE, AND THE RECENTLY ENACTED LEGISLATION WHICH ALLOWS THE DISCHARGE OF ADMITTED HOMOSEXUALS

- STEFFAN MUST BE APPEALED FOR THREE REASONS:

- THE NEW DOD POLICY ALSO PRESUMES AN ADMITTED HOMOSEXUAL IS LIKELY TO ENGAGE IN HOMOSEXUAL CONDUCT AND IS, THEREFORE, PUT IN JEOPARDY BY THIS RULING

3,200 | - THE LARGE NUMBER OF SERVICEMEMBERS DISCHARGED UNDER THE OLD POLICY (3000+ IN THE LAST 6 YRS) CREATES POTENTIAL FOR SIGNICANTLY INCREASED LITIGATION IF THIS DECISION STANDS

- THE COURTS' FLAT REFUSAL TO DEFER TO MILITARY EXPERTISE, ENDORSED BY CIVILIAN LEADERSHIP, IN THE DEVELOPMENT AND IMPLEMENTATION OF THIS POLICY OPENS THE DOOR FOR LEGAL CHALLENGE UNDER A WEAKENED STANDARD TO NUMEROUS OTHER PERSONNEL POLICIES

- WE STRONGLY RECOMMEND APPEAL TO THE FULL COURT (10 JUDGES - THIS DECISION WAS BY ONE 3-JUDGE PANEL) AND, IF NECESSARY, REVIEW BY THE SUPREME COURT

- The court in Steffan flatly refused to defer to the expertise of the military as endorsed by the civilian leadership in DOD in the development and implementation of this personnel policy -- which is one of many at risk under this rationale. Virtually all such policies are arrived at the same way: they are developed based on the specialized needs of the military, as determined by the uniformed leadership in the exercise of their best judgment and expertise; if the civilian leadership agrees, the policies are implemented. If Steffan is not appealed based on the extraordinary lack of deference by the court, this decision will stand as an invitation for plaintiffs to challenge our numerous personnel policies (i.e. limitations or exclusions based on sole-parent status, disability, height/weight, physical or mental ability, age, or gender) under a weakened standard of review.

- As in all litigation, there are risks in going forward with further appeals -- we could ultimately lose. Nevertheless, we strongly recommend appeal to the full court en banc (that is, appeal to all ten judges sitting together; the decision we now have was from one three-judge panel of the court). Should that fail, we recommend seeking review by the U.S. Supreme Court. We are confident that our position on the law is correct, and we believe there is a significant downside in not appealing this case.

THE WHITE HOUSE
WASHINGTON

October 28, 1993

MEMORANDUM FOR BRUCE LINDSEY ✓
BERNARD NUSSBAUM
GEORGE STEPHANOPOULOS

CC: KEITH BOYKIN
FROM: CLIFF SLOAN
SUBJECT: Gays-in-the-federal-government

One item that Barney Frank raised in his White House meeting is a pending case against the FBI by a gay agent. Two imminent developments are important and may generate publicity. First, the case is scheduled to go to trial on November 8. Second, DOJ is preparing a change in its policy with regard to homosexuality.

1. The Buttino case

FBI Agent Frank Buttino, a 21-year veteran of the Bureau, was discharged from the Bureau in 1990 after it was revealed that he is gay and his security clearance was revoked. Buttino sued, claiming unconstitutional discrimination on the basis of sexual orientation. The FBI maintains that he was discharged, not because of his sexual orientation, but because of his deceptiveness in the investigation concerning his sexual orientation. (It is undisputed that Buttino initially lied when he disclaimed authorship of a handwritten note to another man; the note, which explicitly described homosexual conduct, was anonymously sent to the FBI with a reference to Buttino as the author. The FBI claims other deceptive actions, but Buttino denies them.)

The district court in San Francisco appears sympathetic to Buttino. It denied the government's request for summary judgment and, over the government's objection, it converted the case into a class action on behalf of all gay FBI agents, past and present, and all gay applicants to the FBI. Efforts to settle the case have not succeeded.

2. DOJ's new sexual orientation policy

DOJ plans to announce a new sexual orientation policy before the Buttino trial begins. The proposed new policy would (1) bar discrimination on the basis of sexual orientation, (2) state that

sexual orientation is relevant only insofar as it relates to possible coercion, and (3) emphasize that sexual orientation, by itself, is not sufficient reason either to conclude that an individual is susceptible to coercion or to initiate an investigation. The policy would apply to all parts of the Department, including the FBI.

DOJ hopes that, by announcing this policy before the Buttino case goes to trial, it will take the sting away from the class action and allow the government to focus on what it views as Buttino's deceptiveness.

3. Issues

A few issues are presented by these developments:

- (1) Should we do anything to let Barney Frank know what will happen in the Buttino case and why?
- (2) Should we do anything with regard to DOJ's new policy? To what extent does the White House want to be involved in this issue? Is it an occasion for giving credit to Barney Frank and others in the gay community who have been supportive?
- (3) Do we need to consider the effect DOJ's new policy will have on other parts of the government, particularly those who, like the FBI, are deeply involved in security clearances? Will DOJ be perceived as being out in front of the rest of the government? Should any steps be taken with respect to other Departments and agencies regarding their policies?

My own initial view is that:

- (1) after appropriate consultation with DOJ, we should brief Barney Frank about Buttino and about DOJ's new policy (or prepare a meeting in which DOJ does so).
- (2) although we should be supportive, there is no need for this to be seen as a White House announcement, rather than a DOJ announcement. While we would get some credit from gay groups, we might get directly embroiled in controversy, and we might be pressured to do the same thing immediately with other Departments and agencies.
- (3) With respect to other Departments and agencies, I think that, for the most part, we can let the issues percolate as they arise. If we are asked about other Departments and agencies, we can say that they are always reviewing their policies in an effort to ensure that the government is discharging its duties properly.

Incidentally, one other point that Barney Frank raised was whether OPM could publicize the existing federal government grievance procedure for a claim of discrimination based on sexual orientation unrelated to job performance. If we want to take this step -- and it would be a way of doing something with respect to other parts of the government -- it would be fairly easy to accomplish.

THE WHITE HOUSE
WASHINGTON

617M
✓BRL

October 28, 1993

MEMORANDUM FOR BRUCE LINDSEY

FROM: CLIFF SLOAN *CS*

At 4:30 today, at Jamie Gorelick's request, a team from DOJ, Jamie, and I will be meeting at the Pentagon to discuss the future course of gays-in-the-military cases. I plan to make two points: (1) let's proceed with the plan to send letters to people discharged under the old policy (I believe that DOJ wants to wait until after the Supreme Court acts on our motion, which should be within a week or so); and (2) let's try to be careful about the briefs (and exhibits) and reflect the tone and substance of the President's comments in introducing the new policy.

If you have any thoughts about points that you'd like to be made at this meeting, let me know.

THE WHITE HOUSE
WASHINGTON

November 12, 1993

MEMORANDUM FOR BRUCE LINDSEY

FROM: CLIFF SLOAN

SUBJECT: NEW GAYS IN THE MILITARY DECISION

Attached is a decision issued by Judge Sporkin granting a preliminary injunction on behalf of a gay marine.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUSTIN C. ELZIE,

Plaintiff,

v.

LES ASPIN, et al.,

Defendant.

Civil Action No. 93-1853
(Stanley Sporkin)

FILED

NOV 10 1993

MEMORANDUM OPINION

CLERK OF DISTRICT COURT

DEPARTMENT OF JUSTICE

11/10/93 This matter is before the Court on plaintiff's Application for Preliminary Injunction. Plaintiff, Justin Elzie, a sergeant in the United States Marine Corps ("Marine Corps"), brings this action against defendants Les Aspin, Secretary of Defense, John Dalton, Secretary of the Navy, and Carl Mundy, Jr., Commandant of the Marine Corps, seeking declaratory and injunctive relief charging that the Marine Corps improperly and unlawfully recommended him for discharge from active duty and barred him from a retirement benefits program. Plaintiff alleges that the Marine Corps took such action against him based solely on his public announcement that he is a homosexual. Defendants do not dispute that their action was based solely on plaintiff's public declaration of his sexual orientation. They assert, however, that the Marine Corps was authorized to take such action by long-standing military policy that permits service members to be separated from the armed forces on the sole ground of "homosexual admissions."

In his Application for Preliminary Injunction, plaintiff asks

this Court to 1) restore him to active duty in the Marine Corps; 2) enjoin defendants from discharging him from the Marine Corps during the pendency of this action on the basis of his status as a homosexual; 3) restore him to full participation in the Voluntary Separation Incentive and Special Separation Benefit ("VSI/SSB") program. It is plaintiff's position that if he succeeds on the merits, absent an injunction he will suffer irreparable injury because he will have been discharged from the Marine Corps.

STATEMENT OF FACTS

Plaintiff is an eleven year veteran of the Marine Corps. During his rise through the ranks from private to sergeant, he distinguished himself at every step. His service record is replete with commendations and awards and decorations. In 1982 he received a meritorious promotion to Private First Class. In 1984 he received another meritorious promotion to Corporal. In 1985 he received a citation for "outstanding service" from his commanding officer. In 1989 plaintiff was nominated for and selected "Marine of the Year" for his battalion and for his group. He successfully completed the training program at the selective Marine Corps embassy school in Quantico, Virginia and was subsequently charged with the security of some of the nation's senior government officials. He consistently received outstanding fitness reports.

In 1991, Congress established the Voluntary Separation Incentive and Special Separation Benefit ("VSI/SSB") program designed to reduce the size of the armed forces in keeping with a

perceived diminished threat to United States' interests posed by the "new world order." The VSI/SSB program provides, to those members of the armed forces who qualify, incentive payments and medical and veterans benefits as inducements to elect early retirement. 10 U.S.C. §§ 1174(a), 1175. Among the criteria disqualifying Marines' participation in the program for fiscal year 1993 is "pending administrative action which could culminate in discharge proceedings." All Marines Bulletin 349/92, Para. 5.H(2).

In 1992, plaintiff applied for acceptance into the VSI/SSB program planning to retire from the Marine Corps to pursue other career goals. At the time he applied, his service record made him eligible for the program and he was accepted into the program. On January 28, 1993, a United States district court in California enjoined the Department of Defense from "discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces." Meinhold v. United States Dept. of Defense, 808 F.Supp. 1455, 1458 (1993).¹

The day after that injunction issued, the President of the United States announced in a press conference that he opposed the military's policy on homosexual service and announced his determination to lift the ban and thereby end the policy of excluding or discharging service members "solely on the basis of

¹ The Supreme Court has since stayed the Meinhold injunction as it applies to persons other than the named plaintiff pending disposition of the appeal in the Ninth Circuit. Department of Defense v. Meinhold, 1993 U.S. Lexis 6922 (Oct. 29, 1993).

sexual orientation." The President's News Conference, 29 Weekly Comp. Pres. Doc. 108, 109 (Jan. 29, 1993). The President stated that the Department of Defense would conduct a review of the then-existing policy and draft an Executive Order reflecting the product of that review by July 15, 1993. The President also announced that while the Department of Defense reviewed the policy on homosexuals, an interim policy would obtain.

Under the interim policy, the military was barred from questioning prospective service members about their sexual orientation on induction applications. In addition, the interim policy allowed the military to process service members for separation pursuant to the existing policy, however, where the service member was subject to discharge solely because of his/her status as a homosexual the Attorney General was authorized to suspend final discharge and transfer the member to standby reserve pending completion of the policy review.

On the evening of January 29, 1993, the ABC television program World News Tonight aired an interview in which plaintiff declared that he is a homosexual. Plaintiff asserts he publicly revealed his sexual orientation in reliance on the President's announcement and the Mainhold decision. He subsequently made several public statements affirming his sexual orientation.

On February 5, 1993, plaintiff was informed that he had been accepted into the VSI/SSB program. On February 10, 1993, plaintiff was told that because of his statements regarding his sexual orientation the Marine Corps planned to remove him from the VSI/SSB

program. The Marine Corps gave plaintiff the option to agreeing to a voluntary separation, in which case he would be temporarily reaccepted into the VSI/SSB program with his benefits held in abeyance pending the final Executive Order with respect to the military ban. If the new policy allowed plaintiff to continue service in the Marine Corps, he would be given full VSI/SSB benefits. If he was not eligible for continued service under the new policy he would be denied VSI/SSB benefits. The Marine Corps advised plaintiff that if he refused a voluntary separation he would be involuntarily separated pursuant to Marine Corps regulations that authorize discharge on the grounds of homosexual "admissions." Plaintiff declined a voluntary separation with less than full VSI/SSB benefits and the Marine Corps began administrative discharge proceedings.²

On March 31, 1993, an Administrative Discharge Board recommended that plaintiff be discharged pursuant to MarCorSepMan § 6207.3b(2) which provides for discharge when a Marine "admits to being a homosexual or bisexual, unless there is a further finding that the member is not homosexual or bisexual." The discharge

2 The Marine Corps' position on sexual orientation is found in Department of Defense ("DOD") Directive 1332.14 (Jan. 28, 1982), published at 32 C.F.R. part 41, app. A (1992). The policy provides for the separation of enlisted persons who have been found to have "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," or who have "stated that he or she is a homosexual." Marine Corps regulations require the initiation of discharge proceedings where there is "probable cause" that a Marine has "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," or has "admitted to being a homosexual or bisexual, unless there is a further finding that the member is not homosexual or bisexual." Marine Corps Separation and Retirement Manual ("MarCorSepMan"), § 6207.3(b).

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proceeding was based solely on plaintiff's statements regarding his sexual orientation. The Marine Corps argued that the exclusionary regulations were not limited to conduct, thus admissions of homosexual status would be sufficient grounds for discharge. Plaintiff's assertion that the regulations required a finding that he had a propensity to engage in homosexual conduct was rejected. The Administrative Discharge Board recommended discharge on the sole basis of plaintiff's "public admissions and numerous media statements."

On July 19, 1993, the President announced that the military's policy concerning homosexual service was being revised. The new policy, which took effect on October 1, 1993, removes homosexual orientation, standing alone, as a sufficient basis for discharge. In addition to an admission of homosexual orientation, there must be a finding that the service member has a propensity to engage in homosexual conduct. A service member's homosexual admission creates a rebuttable presumption of such propensity, which casts the burden on the service member to rebut the presumption. Separation is warranted under the new policy only when the service member fails to present evidence rebutting the presumption of propensity.

Plaintiff was officially removed from active duty on September 1, 1993. Defendants adopted the Administrative Discharge Board's recommendation of discharge and placed plaintiff on unpaid standby reserve. Accordingly, plaintiff's pay was terminated and he was given one half of the ordinary separation pay.

As a result of the Meinhold decision the parties agreed that plaintiff be returned to active duty and remain there pending resolution of this litigation. This agreement expired on October 29, 1993, when the Supreme Court limited the injunction in Meinhold solely to the named plaintiff. On November 2, 1993, this Court issued a temporary restraining order maintaining the status quo while it considered the issues presented in this case. The order restrained defendants for 10 days from taking any adverse action against plaintiff based solely on his status as a homosexual.

ANALYSIS

A party moving for a preliminary injunction must demonstrate:

1) a substantial likelihood of success on the merits, 2) irreparable injury absent an injunction, 3) relatively less injury to the non-moving party, and 4) that the injunction will promote the public interest. See Washington Metro. Area Transit Auth. v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). For the reasons set forth below, this Court finds that plaintiff is entitled to the preliminary injunction he seeks.

A. Likelihood of Success on the Merits.

Plaintiff has demonstrated probable success on the merits with respect to his removal from active duty. The policy applied to plaintiff must be reviewed under the rational basis test. Under the rational basis test, a government policy fails if it does not serve a legitimate governmental purpose or deprives an individual

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of his constitutional or legal rights.

The cornerstone of the armed forces' homosexual ban is that homosexual's serving in the armed forces impair the ability of the military to perform its mission. According to the Marine Corps policy statement, homosexual Marines adversely affect the service's ability to "maintain discipline, good order, and morale; to foster mutual trust and confidence among Marines; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Marine Corps; to maintain public acceptance of military service; and to prevent breaches of security." MarCorSepMan ¶ 6207.1

Defendants state that the courts should defer to the "considered professional judgment" of military officials as to who is fit to serve their country in the armed forces. Goldman v. Weinberger, 475 U.S. 503, 509 (1986). Defendants take the position that under the policy at issue here, "'appropriate military officials' concluded, as a matter of 'considered professional judgment,' . . . that 'the presence of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.'" Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction at 25, quoting Goldman supra at 509 and DOD Directive 1332. They also cite this circuit's holding in Dronenburg v. Zech, 741 F.2d 1388

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(D.C. Cir. 1984) to support their assertion that the Marine Corps' discharge of plaintiff passes constitutional muster.

This court is unpersuaded by defendants' arguments. First the Dronenburg case involved sexual misconduct by a homosexual soldier. The instant case is devoid of any such allegation. This case involves adverse action against plaintiff based solely on his homosexual status. Recently, Judge Oberdorfer had the opportunity to pass on the same issue presented here, namely, whether a serviceman's homosexual status by itself can justify his discharge from Active Duty. See Selland v. Aspin, No. 93-1924 slip op.

(D.D.C. Sept. 28, 1993). In that case Judge Oberdorfer granted a preliminary injunction to a homosexual sailor barring the United States Navy from discharging him solely on the basis of his sexual orientation. In so doing, Judge Oberdorfer distinguished between homosexual orientation and homosexual conduct in reaching the conclusion that the plaintiff, Richard Selland, would likely prevail on the merits. Neither the Court of Appeals nor the Supreme Court has yet ruled on this issue.

Defendants present no evidence that homosexual status alone adversely affects the accomplishment of the military mission. Examination of the record in this case reveals no basis, other than the Marine Corps' policy statement that supports the discharge of a service member solely because of that member's status as a homosexual. It is well established that courts cannot give "private biases" legal effect. Palmore v. Sidoti, 466 U.S. 429, 433 (1984). At this stage of the proceedings, plaintiff presents

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a strong case that he will probably succeed in establishing that the policy banning homosexuals from the military solely on the basis of status serves no legitimate governmental purpose.

B. Irreparable Injury.

The Court finds that plaintiff will suffer irreparable injury if the Marine Corps is allowed to involuntarily discharge him and deprive him of his rights as a Marine. First, plaintiff will suffer the loss of constitutional rights for which money damages ~~11/10/93~~ ^{are} inadequate, namely, the right to equal protection under the Fifth Amendment. Defendants' actions also implicate free speech concerns under the First Amendment. Second, plaintiff stands to lose his medical benefits, his opportunity to participate in the VSI/SSB program, and a portion of his retirement pay. Third, plaintiff faces the stigma of being removed from active duty as a sergeant in the Marine Corps--a position which he has performed in a sterling fashion for eleven years--and labeled as unfit for service solely on the basis of his sexual orientation, a criterion which has no bearing on his ability to perform his job. That plaintiff has performed in exemplary fashion for eleven years clearly negates defendants' assertion that homosexuality is incompatible with being a good Marine. Plaintiff did not become any less of a Marine on the day he announced his sexual orientation.

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C. Relatively Less Injury to Defendants.

Granting a preliminary injunction keeping plaintiff on active duty and maintaining his eligibility for the VSI/SSB program pending the final outcome of this case will result in no discernible injury to defendants. Plaintiff served in the Marine Corps for eleven years with distinction. This Court sees no injury to defendants by having the services of a "model Marine" for the duration of this litigation. What is more, plaintiff is ready and willing to leave the Marine Corps voluntarily if he is permitted to participate in the VSI/SSB program. This Court is at a complete loss why the Marine Corps would not accede to this reasonable request particularly since in every respect plaintiff is entitled to be placed in the program. Indeed, prior to acknowledgement of his homosexuality he had been accepted into the VSI/SSB program. It seems to this Court that the defendants want to go beyond merely enforcing their policy on homosexuality and actually want to punish plaintiff because of his statements that he is a homosexual. This the law does not allow.

D. Injunction Would Promote the Public Interest.

The public's interest in the efficient operation of the armed forces is clear. The Court does not believe that banning homosexuals from the armed forces on the basis of status alone will adversely affect the military's mission. The issue in this case is status alone. Conduct is not involved and there is nothing in this

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Court's decision which would prevent the armed forces from enforcing conduct codes.

The same arguments made today concerning homosexuals were made in the past when efforts were first made to knock down sexual and racial barriers in the armed forces. This nation was told that we could not have effective armed services unless we maintained racially and sexually segregated armed forces. We now know such statements were grossly in error. Many say this same misconception applies to the homosexual issue. The ability of homosexuals to perform in all phases of the workplace, including the armed services, has been proven beyond any question. There is simply no correlation between an individual's sexual orientation and his or her intellectual or physical capacity to perform in the workplace.

Indeed, in considering the public interest, it might well be argued that to deprive our armed forces of the intellectual and physical prowess of some extraordinarily talented individuals strictly because of their sexual orientation would be doing a great disservice to this nation. If the Court accepts defendants' position, it would create an incongruity in that the policy would preclude homosexuals from serving in the armed forces but would not extend to the Commander-in-Chief.

For the above reasons the Court enters a preliminary injunction barring defendants from taking any adverse action against plaintiff solely on the basis of his status as a homosexual. So long as plaintiff discharges his duties and responsibilities as a United States Marine Corps sergeant he shall

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be allowed to remain on active duty pending this Court's determination on the merits.

CONCLUSION

Because the Court finds that plaintiff has shown a likelihood of success on the merits and the balancing of the equities favors plaintiff, plaintiff's Application for Preliminary Injunction will be granted.

11/10/93

DATE

UNITED STATES DISTRICT JUDGE

be allowed to remain on active duty pending this Court's determination on the merits.

CONCLUSION

Because the Court finds that plaintiff has shown a likelihood of success on the merits and the balancing of the equities favors plaintiff, plaintiff's Application for Preliminary Injunction will be granted.

11/10/93

DATE

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUSTIN C. ELZIE,

Plaintiff,

v.

LES ASPIN, et al.,

Defendant.

Civil Action No. 93-1853
(Stanley Sporkin)

FILED

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ORDER

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

On the basis of the findings and reasons stated in the accompanying Memorandum Opinion, it is this 10 day of November, 1993 hereby

ORDERED: that for the duration of this litigation defendants, Les Aspin, Secretary of Defense, John Dalton, Secretary of the Navy, and General Carl Mundy, Jr., Commandant of the Marine Corps, their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, are enjoined from taking any adverse action against plaintiff, separating plaintiff from active duty, placing him on standby reserve, discharging him from the Marine Corps or denying him participation in the VSI/SSB program on the sole basis of his sexual orientation.

November

Stanley Sporkin
UNITED STATES DISTRICT JUDGE



File Meinhold
U.S. Department of Justice
Office of the Solicitor General
fyi:

Washington, D.C. 20530

September 28, 1993

TO: Jamie Gorelick
General Counsel
Department of Defense

FROM: Edwin S. Kneedler
Deputy Solicitor General

Mark I. Levy
Deputy Assistant Attorney General

John A. Rogovin
Deputy Assistant Attorney General

RE: Promulgation of Regulations Implementing
New Policy on Homosexuals in the Military

We understand that the Department of Defense is considering public issuance on October 1, 1993, of regulations implementing the new policy on homosexuals in the military announced by the President and the Secretary on July 19, 1993. The regulations would be slated to take effect on November 1, subject however to the effect of any judicial injunction then in place.

A. As we discussed yesterday evening, we believe that the proposed action would present substantial litigation risks that should be taken into account in reaching a final decision:

1. Publication before we have succeeded in narrowing the existing Meinhold injunction would almost certainly lead Judge Hatter to examine the new regulations and issue a further order finding some or all of them unconstitutional and specifically enjoining their implementation. This would cut against our goal of having the Ninth Circuit or, if necessary, the Supreme Court narrow the existing injunction to Meinhold individually. That goal is important precisely so that the new policy may be implemented, and so that Judge Hatter will not have the chance to offer the first, highly visible, and almost certainly highly unfavorable judicial reaction to it.

2. Publication of regulations would also complicate and worsen our procedural posture.

- a. At a minimum, further proceedings in our effort to have the existing injunction limited to Meinhold himself will be clouded by arguments that will be raised about the new policy, including specific objections to particular implementing regulations.
- b. If Judge Hatter asserts jurisdiction and enjoins the new regulations, we will have to take a new appeal to the Ninth Circuit, probably before it has acted on our petition to rehear en banc the panel's denial of our motion to narrow the existing injunction. That would be a very confusing procedural situation for the court of appeals to resolve.
- c. While our emergency efforts to narrow the injunction thus far have been limited to the procedural ground of overbreadth, DOD's proposed implementation would probably force us to brief and argue, for the first time, the facial validity of the new policy. That argument would have to be made before the new policy can be implemented, in highly visible emergency proceedings, and in a case that should involve (and in which the record addresses) only one individual and only the old, less favorable and somewhat less defensible policy.
- d. It would be preferable to wait until we can rely on an Act of Congress, together with implementation of the President's policy, in seeking a stay from the Supreme Court, should that be necessary. We could then argue that the political branches have spoken in unison, that their actions are presumptively constitutional, and that the way should be clear for implementation. It would be best to have no detailed implementing regulations to bog the Court down in secondary issues (let alone consideration of the new policy on the merits).

3. Publication of new regulations at this point may invite on-the-record Congressional examination before the pending legislation is passed. This could lead to Congressional objections to particular implementing regulations, or attempts to modify the legislation that would at best delay its passage. It would also weaken considerably the otherwise useful argument that, under Chevron, the courts owe deference to the regulations as legitimate administrative interpretations of whatever statutory provisions are ultimately enacted. Finally, it could lead to the inclusion in committee reports or floor statements of unfavorable language that would undercut the argument for deference.

B. We would instead propose (although the Solicitor General has not yet formally authorized this course) that our next step be a petition for en banc rehearing of the Ninth Circuit panel's September 22 order denying our motion to narrow the existing injunction to Meinhold. Such a petition would present a single, essentially procedural issue (the nationwide scope of the injunction entered in a suit brought by one plaintiff) on which Judge Hatter is certainly wrong, irrespective of the merits of Meinhold's substantive constitutional arguments. If the Ninth Circuit has not acted by the time the pending legislation is enacted, we could seek a stay from the Supreme Court -- again solely on the scope of the injunction -- in order to allow the Secretary to implement the President's policy and the legislation. Accordingly, solely from the standpoint of litigation strategy, we strongly advise awaiting passage of the legislation, and then taking the position that the regulations are ready for promulgation but will not be published until the cloud of the injunction is lifted. That strategy is designed to minimize Judge Hatter's involvement, contain any possible damage from adverse appellate resolution of the Meinhold case, and reserve all arguments concerning the validity of the new policy and regulations for later cases, before other judges, arising from the actual application of that policy.

To be argued by:
MARC WOLINSKY

No. 91-5409

Oral argument
scheduled for
September 13, 1993

United States Court of Appeals
for the
District of Columbia Circuit

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

—v.—

LES ASPIN, Secretary of Defense, ADMIRAL FRANK B. KELSO II,
Acting Secretary of the Navy, REAR ADMIRAL THOMAS C. LYNCH,
Superintendent, United States Naval Academy, and CAPTAIN JOHN B.
PADGETT III, Commandant of Midshipmen,
United States Naval Academy,

Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF OF PLAINTIFF-APPELLANT
JOSEPH C. STEFFAN**

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**CERTIFICATE AS TO PARTIES, RULINGS AND
RELATED CASES**

In accordance with General Rule 11(a)(1), I certify as follows:

A. *Parties and Amici*

The plaintiff-appellant is Joseph C. Steffan.

The defendants-appellees are: Les Aspin, Secretary of Defense (replacing Richard Cheney); Admiral Frank B. Kelso II, Acting Secretary of the Navy (replacing Lawrence Garrett III); Rear Admiral Thomas C. Lynch, Superintendent, United States Naval Academy; and Captain John B. Padgett III, Commandant of Midshipmen, United States Naval Academy (replacing Captain Michael D. Haskins).

The Court has granted leave to four sets of amici to file briefs in this case. They are: (a) the American Civil Liberties Union, the Minnesota Civil Liberties Union, and the American Civil Liberties Union of the National Capital Area; (b) the American Jewish Committee, the American Jewish Congress, the Asian-American Legal Defense and Education Fund and the Puerto Rican Legal Defense Fund; (c) NOW Legal Defense and the Northwest Women's Law Center; and (d) the American Association of University Professors.

B. This is an appeal from the following decisions of the Honorable Oliver Gasch: (a) the final judgment entered in this action on December 9, 1991, denying plaintiff's cross-motion for summary judgment and granting defendants' motion for summary judgment reported at 780 F. Supp. 1 (D.D.C. 1991) (A. 4); (b) the order entered in this action on April 12, 1991, denying plaintiff's motion for disqualification of the Honorable Oliver Gasch which is unreported but can be found at 1991 U.S. Dist. Lexis 4852 (D.D.C. 1991) (A. 41); and (c) the order entered in this action on August 1, 1991, denying plaintiff's motion to compel document and interrogatory discovery which is unreported but can be found at 1991 U.S. Dist. Lexis 10621 (D.D.C. 1991) (A. 56).

C. This case has been before this Court on two prior occasions. The first occasion was an appeal from a decision and order dismissing this action pursuant to Fed. R. Civ. P. 37 after plaintiff declined to answer certain deposition questions on grounds of relevance and Fifth Amendment privilege. *Steffan v. Cheney*, 733 F. Supp. 121 (D.D.C. 1989). This Court reversed the district court in a *per curiam* opinion, holding that the discovery sought was irrelevant, and remanded the case for further proceedings. *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990). The second occasion was on a petition for the issuance of a writ of mandamus to the Honorable Oliver Gasch directing Judge Gasch to disqualify himself from this case on the ground that he repeatedly referred to plaintiff and other gay men and lesbians as "homos." This Court denied the petition in an unpublished opinion dated May 16, 1991. Counsel is not aware of any other related cases pending in any other court.

Dated: New York, New York
May 3, 1993

/s/ MARC WOLINSKY
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiff-appellant Joseph C. Steffan brought this action to challenge the constitutionality of his compelled resignation from the United States Naval Academy under military regulations that require the discharge of servicemembers who state that they are homosexual.¹ Accordingly, the district court had subject matter jurisdiction over the action under 28 U.S.C. § 1331. The district court entered a final judgment in this action on December 9, 1991, granting defendants' motion for summary judgment, dismissing plaintiff's complaint in its entirety and denying plaintiff's cross-motion for summary judgment. Plaintiff filed a notice of appeal on December 16, 1991. A. 67. Accordingly, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the military regulations that exclude persons from the armed services solely on the basis of their status as homosexuals cater to irrational prejudice against gay men and lesbians and, therefore, violate the constitutional guarantee of equal protection of the laws?

2. Whether the military regulations that discriminate solely on the basis of a person's status as a homosexual must be subjected to heightened scrutiny under the equal protection component of the Fifth Amendment?

3. Whether the district court properly concluded that the military regulations which discriminate on the basis of homosexual orientation are justifiable as a reasonable step toward the protection of servicemembers from HIV infection?

¹ The pertinent regulations are reproduced in an addendum that is bound with this brief.

4. Whether the United States Naval Academy deprived plaintiff of his constitutional right to equal protection of the laws, and acted arbitrarily and capriciously, by departing from its normal practice of allowing uncommissionable midshipmen to graduate and refusing to permit plaintiff to finish the last six weeks of his academic career?

STATEMENT OF THE CASE

In the spring of 1987, plaintiff-appellant Joseph C. Steffan was a model midshipman at the United States Naval Academy. Selected to be a Battalion Commander in his senior year — one of the ten highest ranking midshipmen at the Academy — he was six weeks away from graduation when a promising career in service to his country was abruptly terminated. This harsh result came about because Steffan remained true to the United States Naval Academy honor code and truthfully answered "Yes, sir" when he was asked "I'd like your word, are you a homosexual?" No one ever claimed that Steffan's sexual orientation interfered with his performance at the Academy or his three tours of duty. And no one ever claimed that Steffan engaged in homosexual conduct, in or out of uniform, on or off duty. For purposes of the Navy's regulations, Steffan's character and record of service are all irrelevant. All that is relevant is Steffan's status as a gay man, a status that is an intrinsic part of his makeup, as intrinsic as his race or hair color. In the eyes of the military, nothing Steffan could do or refrain from doing would allow him to graduate, save his career or qualify him for continued service once he truthfully answered his commander's question.

Following his compelled resignation from the Academy, Steffan filed this action challenging the constitutionality of the military regulations that require the discharge of servicemembers who merely state that they are gay. The district court initially denied the military's motion to dismiss the complaint, holding that the fact that Steffan was compelled to resign did not deprive the district court of subject matter jurisdiction and

did not deprive Steffan of standing to pursue his claims. *Steffan v. Cheney*, 733 F. Supp. 115 (D.D.C. 1989). Thereafter, the district court dismissed the complaint pursuant to Fed. R. Civ. P. 37 after Steffan was directed not to answer questions at his deposition as to whether he had ever engaged in homosexual conduct. *Steffan v. Cheney*, 733 F. Supp. 121 (D.D.C. 1989). This Court reversed and remanded the case to the district court, holding that the discovery sought was irrelevant. *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990).

Following the remand, the military moved for summary judgment and plaintiff filed a cross-motion for summary judgment. On December 9, 1991, the district court granted the military's motion, holding that the military regulations discriminating on the basis of sexual orientation survive scrutiny under the equal protection component of the Fifth Amendment and that Steffan was lawfully deprived of his degree. *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991). This appeal followed.

STATEMENT OF FACTS

A. Joseph C. Steffan

Plaintiff-appellant Joseph C. Steffan entered the United States Naval Academy in July 1983, shortly after he graduated from high school in Warren, Minnesota as the salutatorian of his class with eight varsity letters. A. 81. Once he arrived at the Academy, his promise was quickly recognized. His first year evaluation called him "gifted" and predicted that he would "excel as a whole-man over the next three years." A. 136. During a tour of duty in the summer between his freshman and sophomore years, Steffan was identified as having "excellent potential to perform well as a nuclear submarine division officer." A. 150. During his sophomore year, Steffan was praised as an "outstanding performer" who had "exhibited excellent leadership" and who was "an asset to the Academy" who "should continue to do well in the future." A. 130, 134.

In his junior year, Steffan was selected to serve as the Regimental Commander of one-half of his class of 1,000 midshipmen and was described as a "model for his classmates and subordinates." A. 120. That year, and again the following year, Steffan sang the National Anthem as a soloist on national television at the Army-Navy game, earning a Citation from the Superintendent of the Academy in the process. A. 10, 122. An evaluation of his performance during a tour of duty in the summer between his junior and senior years stated that Steffan's "training is best characterized by his constant dedication to superior performance" and that he "will undoubtedly make an outstanding naval officer." A. 117.

In his senior year, on the basis of the "A" evaluation of his military performance, among other things, Steffan was selected as a Battalion Commander. A. 82, 109. As a Battalion Commander he was one of the ten highest ranking midshipmen at the Academy with direct command over one-sixth of the Academy's 4,500 midshipmen. He served at that time as the President and Cantor of the Catholic Choir and premier soloist of the Glee Club. A. 81-82, 122. In the spring of 1987, all expected that Steffan would be awarded a Bachelor's degree in May, enter the Navy's prestigious nuclear submarine program and pursue a career for which, according to one evaluation, the sky was the limit. A. 15, 156. It was not to be.

B. The initiation of discharge proceedings

On or about February 13, 1987, the Naval Investigative Service ("NIS") commenced an investigation of Joseph Steffan after it received a report from the Academy that Steffan had stated to another midshipman that he was gay. Steffan learned of the investigation in mid-March 1987 from a friend who had been interviewed by an NIS special agent. A. 376-77, 468-70. A few days later, Steffan approached a Chaplain at the Academy, Byron Holderby, and told Chaplain Holderby that he was gay. The Chaplain offered to speak with Captain H.W. Habermeyer,

Jr., the Commandant of Midshipmen, on Steffan's behalf to see if Steffan could be allowed to graduate. A. 378-79, 534.

Holderby failed and a few days later, on March 23, Steffan approached Habermeyer and told Habermeyer that he wanted permission to meet with the Superintendent of the Academy to discuss a "personal matter." A. 380, 535. Habermeyer pressed Steffan on the nature of the matter, finally asking him "Are you willing to state at this time that you are a homosexual?" Steffan responded "Yes, sir." Steffan asked Habermeyer if he would be allowed to graduate and stated that "he desired to receive his diploma if the Superintendent would so rule." A. 381-82, 535. Habermeyer responded that it was unlikely that he would be permitted to graduate and asked Steffan what he would want to do in that event. Steffan replied "I guess I would have to leave the Naval Academy." A. 382, 392-93, 535. Habermeyer then told Steffan that he would arrange for a Brigade Military Performance Board to convene the next day, March 24, to review Steffan's "performance" in light of his statement, and arranged for Steffan to be evaluated by a Navy psychologist. A. 85-86, 378-82, 531-36.²

C. The Brigade Military Performance Board hearing

A Brigade Military Performance Board was convened, the Deputy Commandant, Captain Konetzni, presiding.³ Konetzni

² The Brigade Military Performance Board is an administrative body charged under the Academy's regulations with considering allegations of deficiencies in a midshipman's military performance. A. 514, 524. By statute and regulation, the Performance Board cannot discharge a midshipman. Rather, it can only make a recommendation of discharge to the Academic Board, a separate body that is chaired by the Superintendent of the Academy. 10 U.S.C. § 6962 (1988); A. 539, 553-54.

³ Before they entered the Board room, Konetzni threatened Steffan, stating that he should not answer any questions in an adversarial manner and that if he "did not go along with the proceedings of the performance board without taking an adversarial stance, that the Academy had within its means the ability to make life much more difficult for [him] than it already was." A. 402.

opened the proceeding by explaining that the concept of the military performance evaluation system was to assess whether a midshipman has the "desirable qualities which are considered prerequisites to service as a commissioned officer." Konetzni went on to explain that through "demonstrated performance it is possible to recognize those midshipman [sic] who possess outstanding officer-like qualities." A. 537-38.

Konetzni dispensed with the requirement of Academy regulations that a resume of Steffan's record be presented, observing that Steffan's "performance here as a midshipman . . . has been outstanding." Konetzni then asked Steffan: "I'd like your word, are you a homosexual?" Steffan responded: "Yes, sir." A. 540, 542. The Board then went into secret deliberations. When it reconvened, Konetzni reported that the Board had voted to change the "A" evaluation of Steffan's military performance to an "F," to suspend Steffan from his classes and to recommend that Steffan — the midshipman selected to a top leadership position because of his proven performance — be discharged due to "insufficient aptitude for commissioned service." A. 109, 542, 544.

D. The Academic Board hearing

On the basis of the recommendation of the Brigade Military Performance Board, an Academic Board was scheduled to convene on April 1 to hear Steffan's case.⁴ Prior to the Academic Board hearing, on March 26, Steffan told the Conduct Officer, Major Funk, that he "did desire to graduate from the Academy and wanted that statement" transmitted to the Academic Board prior to the hearing. Funk refused the request. A. 87. When the Academic Board convened, the Superintendent of the Academy either read or summarized the recommendation that Steffan be discharged on the basis of his statements that he is gay.

⁴ During the week prior to that hearing, a second threat was conveyed to Steffan: he was informed by a Professor at the Academy that the Navy was considering court-martialing Steffan if he did not resign. A. 86, 162-63.

A. 617.⁵ Steffan next read a prepared statement in which he asked to be permitted to complete the academic requirements needed to obtain his diploma. The Superintendent responded that there was nothing that the Academic Board could do to allow Steffan to graduate. After Steffan protested that the Board did have the discretion to permit him to graduate, the Board went into closed session. Barely five minutes later, Steffan was informed that the Academic Board had unanimously voted to recommend his discharge. A. 88-90.

Steffan then met with Major Funk, who pressured Steffan to resign. Funk told Steffan that an appeal would be useless and that if he were discharged involuntarily, his discharge certificate would include a code indicating that Steffan was gay and that his academic and career prospects would suffer as a result. A. 90, 408-10. Under the pressure of numerous threats, suspended from class, with no hope that he would be permitted to graduate and faced with an Academic Board recommendation from which an appeal would be futile, Steffan submitted an involuntary resignation from the Academy on April 1, 1987. He later returned to the midwest to complete his undergraduate studies at North Dakota State University on a part-time basis, supporting himself with a full-time job. He was awarded a Bachelor of Science degree in Economics from North Dakota State in June 1989. A. 313-14, 320-24, 326-29, 557. While he was finishing his degree, on December 9, 1988, Steffan wrote to the Secretary of the Navy requesting that his compelled resignation be deemed withdrawn and that he be awarded his diploma. A. 81-83. On February 8, 1989, the Secretary denied Steffan's request based on the recommendation of the Superintendent of the Naval Academy. A. 95, 107.

⁵ The proceedings were tape recorded. Neither a copy nor a transcription of the tape can be located by the defendants, however. A. 259-60, 617.

SUMMARY OF ARGUMENT

This Court acknowledged in *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986) (Edwards, J.), *aff'd in part and rev'd in part sub nom. Webster v. Doe*, 486 U.S. 592 (1988), that it has not decided "whether an agency of the federal government can discriminate against individuals merely because of sexual orientation." (Emphasis in original.) The *Doe* Court also acknowledged that this is a "difficult issue." *Id.* What makes it difficult is that discrimination on the basis of sexual orientation results in a system in which individuals who perform well in their positions — even superlatively as Steffan did — are discharged not because of something they have done, but because of who they are.

Applying a rational basis test, the district court held that the military's draconian policy of discharging servicemembers who merely state that they are gay passed constitutional muster because it promotes "morale, discipline and the system of rank and command" as well as the privacy of heterosexual servicemembers. 780 F. Supp. at 12. In dictum, the district court also found in a flight of fantasy that excluding gays was a reasonable step to prevent the spread of AIDS in the armed forces — an argument that the military *declined* to make even after the district court *sua sponte* invited it to do so. These justifications cannot withstand scrutiny.

Gay men and women have served in the military with distinction and without incident throughout our country's history; indeed, throughout recorded history. American servicemembers currently serve with openly gay soldiers and sailors from any number of our allies, including Canada, Israel, Australia, Germany, Spain, France, The Netherlands, Sweden, Denmark, Finland, Brazil, Norway and Japan — *none* of which preclude the service of gays and *all* of which have found that homosexuality is not "incompatible with military service" as our military claims. The military in fact acknowledges that many thousands of gay men and women from the lowest to the highest ranks are

now serving honorably. And as of January 29, 1993, the military has stopped asking recruits about their sexual orientation.

Faced with these facts, the military argues that the gays and lesbians who so ably serve do so only because they remain "in the closet" and conceal their sexual orientation. This concession, however, underscores the fundamental flaw in the military's defense of its invidious discrimination. By conceding that lesbians and gay men who want to serve in the armed forces can do so as long as they hide one aspect of their personality, the military concedes that gays are not disqualified because of their personal qualities, but merely because other servicemembers may be offended by the mere presence of individuals who acknowledge a homosexual orientation. Thus, in the military's view, gays must be excluded not because they cannot do their jobs, but because some of their fellow servicemembers harbor irrational prejudices against them.

These arguments have an ignoble origin. During World War II, African-Americans were largely excluded from the Navy, serving only as mess attendants. In those branches of the military where they were permitted to serve, African-Americans were relegated to segregated units. The stated justification for that policy was *precisely* the same one that the military offers here: integration would damage morale, discipline and good order and would invade the privacy of whites. The underlying rationale for the policy is also familiar: "members of the Negro race" could not be permitted to serve with white soldiers because some whites were prejudiced against "coloreds" and would prefer not to sleep in close quarters with them. Today, with an African-American serving as the Chairman of the Joint Chiefs of Staff, we know that the asserted justification for such blatant racial discrimination made no sense. We know also that no court today would ever sanction the exclusion of African-Americans from the Navy on the ground that the prejudices of white sailors made it necessary to exclude African-Americans in order to preserve "good order" and "morale" and the "privacy" of whites who would prefer not to berth with people of color.

Judge Richard Posner has written that "it is terrible to tell people they are unfit to serve their country, unless they really are unfit, which is not the case here — and [dropping the ban] would be a step forward in social justice." R. Posner, *Sex and Reason* 321 (1992). And so the battle over excluding gays from the military, like the earlier battle over the exclusion of African-Americans from the Navy and from combat units, takes on an overwhelming symbolic importance to the greater question of whether the constitutional guarantee of equal protection of the laws protects individuals who, through no choice or action of their own, have a homosexual orientation.

Appellant submits that this Court cannot come to any conclusion other than that the discrimination in issue here is invidious and unlawful. As discussed in Point I.A *infra*, the fundamental tenets of our constitution prohibit discrimination against one group of individuals in order to cater to the prejudices of others. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Similarly, the Supreme Court has not hesitated to strike down regulations that are based on stereotypes that bear no relation to an individual's actual abilities. See *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Frontiero v. Richardson*, 411 U.S. 677 (1973). This Court cautioned long ago in *Norton v. Macy*, 417 F.2d 1161, 1167 (D.C. Cir. 1969), that justifications offered for discrimination against homosexuals must be examined to determine whether they are merely "a smokescreen hiding personal antipathies or moral judgments."

On the basis of these authorities, the Ninth Circuit in *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992), held that the military could not constitutionally rely on the "prejudice of others against homosexuals" to defend its regulations. Stripped bare, the only rationale that the military has for its policy is the one that the constitution forbids. As shown in Point I.B *infra*, the unsupported

assertions made in justification for the policy — taken individually and, most tellingly, taken as a whole — boil down to the proposition that the services must cater to the "prevailing homophobia" of society and the stereotype that homosexuals are unstable sexual predators intent on imposing their sexual desires on others. Indeed, the only other district court to consider the constitutionality of the ban since *Pruitt* held on the evidence submitted by the military that "[t]he Department of Defense's justifications for its policy . . . are based on cultural myths and false stereotypes. These justifications are baseless and very similar to the reasons offered to keep the military racially segregated in the 1940's." *Meinhold v. United States Dep't of Defense*, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993).

In its attempt to articulate a rational basis that could withstand analysis, the court below compared the ban on gays to the "policy of separating men and women" and argued without record support that the ban is rational because "with no one present who has a homosexual orientation, men and women alike can undress, sleep, bathe, and use the bathroom without fear of embarrassment that they are being viewed as sexual objects." 780 F. Supp. at 13. The district court's attempt to articulate a rational basis fails, however. It overlooks the fact that thousands of gay men and lesbians in American and foreign military establishments (as well as in fire departments, on sports teams and in college dormitories and health clubs) already work and live with heterosexuals in conditions of minimal privacy with no consequence. It overlooks the fact that gay men and lesbians grow up sharing dorms, showers and locker rooms with members of the same sex and as a result, do not view group showers as sexual experiences. And it overlooks the fact that the military's own experts recently concluded that homosexuals, like heterosexuals, are selective in their choice of intimate partners and in their expression of sexual behavior and — *precisely because there is a lack of privacy in the military* — do not engage in the sort of unrestrained expressions of sexuality about which the district court speculates.

Recognizing that private bias cannot be sanctioned with the force of law, the district court also argued that "it is not prejudice which is responsible for the regulations, but rather a standard of morality." 780 F. Supp. at 13. The argument that it is rational to discriminate on the basis of sexual orientation because gay people are morally inferior is the most disturbing and least defensible aspect of the district court's opinion. Assuming that it is the military's place to pander selectively to the moral views of some of its members, the fact remains that no Western legal or moral tradition — civil or ecclesiastical, European, English or Anglo-American — has ever attempted to penalize or stigmatize a "homosexual person" as opposed to someone who engages in homosexual acts, and no twentieth century religious tradition makes moral judgments on the basis of homosexual orientation as opposed to conduct. It would be remarkable indeed for an American appellate court in the 1990's to declare that the government may lawfully discriminate against gay men and lesbians solely on the basis of their status because they are supposedly worthy of the contempt that many feel for them.

Quite apart from the patent unconstitutionality of the regulations as a whole is the unconstitutionality of the treatment that Steffan himself received at the Academy. Six weeks away from graduation, he was made the subject of whirlwind discharge proceedings that were initiated and concluded in the space of one week. Steffan was singled out for this harsh treatment even though the Academy as a matter of practice permits midshipmen who are deemed to be uncommissionable to graduate, even though there is wide discretion in the timing of the initiation and prosecution of administrative discharge proceedings, and even though once initiated, the Navy's goal is to conclude the discharge of a commissioned Naval officer over a four month period.

In rejecting Steffan's claim that the administrative decision to deny him his diploma was unlawful, the district court found that the speed of Steffan's discharge was not arbitrary and

capricious but rather was an "accommodation to an accomplished young man." 780 F. Supp. at 6 n.11. As shown in Point II *infra*, in reality the decision was nothing more or less than invidious discrimination by an institution acutely embarrassed by the fact that one of its best and brightest happened to be gay. Consequently, whether or not this Court finds that the military's discrimination on the basis of sexual orientation is unconstitutional, this Court should conclude that the decision to deprive Steffan of his diploma was illegal and award Steffan his degree.

Argument

POINT I

THE MILITARY REGULATIONS THAT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION SHOULD BE DECLARED UNCONSTITUTIONAL.

Plaintiff-appellant Joseph C. Steffan was discharged from the Academy pursuant to servicewide regulations promulgated in 1981 as part of Department of Defense Directives 1332.14 and 1332.30, 32 C.F.R. Part 41, Appendix A, 46 Fed. Reg. 9571 (Jan. 29, 1981). The regulations were adopted in response to the decision in *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978). Prior to 1981, the applicable regulations *permitted* the retention of homosexuals. In *Matlovich*, this Court held that if the military did decide to discharge a gay servicemember, it had to articulate a reason as to why the discretion to retain the member was not being used. The 1981 regulations challenged here eliminated the element of discretion and made the discharge of homosexual servicemembers mandatory.

The military's exclusionary policy treats similarly situated heterosexuals and homosexuals differently in at least two respects. *First*, heterosexuals and homosexuals who engage in identical sexual conduct with another person of the same gender are accorded completely different treatment. A "hetero-

sexual" who engages in homosexual conduct may not suffer any adverse action if the conduct is found to be a "departure from the member's usual and customary behavior," e.g., if the servicemember was intoxicated. For a "homosexual," however, there is no defense, no matter what the cause of the conduct or how isolated the episode. Thus, if a heterosexual and homosexual engage in a single episode of homosexual conduct with each other, the heterosexual may be retained while the homosexual *must* be discharged.

Second, the regulation discriminates against lesbians and gay men who have engaged in no conduct. The mere status of being a "homosexual"—defined to include an individual who "desires" to hold hands with or hug someone of the same gender—is a disqualifying characteristic. The regulation is thus directed against the presence of lesbians and gay men in the military without regard to their conduct or their sexual activity. The regulation applies alike to sexually active homosexuals, sexually inactive homosexuals, and married homosexuals who lead exclusively heterosexual lifestyles. *See generally* *Watkins v. United States Army*, 875 F.2d 699, 712-16 (9th Cir. 1989) (Norris, J., concurring) (rejecting claim that Army regulations based on Department of Defense Directive 1332.14 "target homosexual conduct rather than orientation" and finding that "the discrimination against homosexual orientation under these regulations is about as complete as one could imagine"), *cert. denied*, 498 U.S. 957 (1990).

A. The constitution prohibits discrimination against a disfavored group in order to cater to the prejudices of others.

The Supreme Court has never ruled on the question whether a federal personnel policy that discriminates on the basis of sexual orientation violates the equal protection component of the Fifth Amendment.⁶ In *Doe v. Casey*, 796 F.2d 1508, 1522

⁶ The equal protection component of the Fifth Amendment imposes the same prohibitions on the federal government that the equal protection (footnote continued)

(D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. Webster v. Doe*, 486 U.S. 592 (1988), this Court noted that this "difficult issue" is open in this Circuit. It is difficult because such a policy penalizes a group "for their status [as homosexuals] rather than their conduct," something which the Eighth Circuit in *Gay Lib v. University of Missouri*, 558 F.2d 848, 856 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978), found to be "constitutionally impermissible." *See also* *Gay Student Services v. Texas A&M University*, 737 F.2d 1317, 1330 (5th Cir. 1984), *cert. denied*, 471 U.S. 1001 (1985). *Cf. Robinson v. California*, 370 U.S. 660 (1962).⁷

In a related context, however, this Court has cast serious doubt on the validity of such regulations, holding that justifications offered for regulations that discriminate against homosexuals must be examined to determine whether they are merely "a smokescreen hiding personal antipathies or moral judgments." *Norton v. Macy*, 417 F.2d 1161, 1167 (D.C. Cir. 1969). It was precisely for these reasons that Justices Brennan and Marshall in their dissent from the denial of certiorari in *Rowland v. Mad River Local School District*, 470 U.S. 1009 (1985), questioned whether discrimination based on homosexual status "can be upheld under *any* standard of equal protection review."⁸ *Rowland*, 470 U.S. at 1017 (emphasis added).

(footnote continued)

clause of the Fourteenth Amendment imposes on state governments. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁷ Two Circuit Courts have expressed reservations about the constitutionality of the military's policy of discriminating on the basis of sexual orientation. *See Matthews v. Marsh*, 755 F.2d 182, 184 (1st Cir. 1985); *Falk v. Secretary of the Army*, 870 F.2d 941, 947 (2d Cir. 1989).

⁸ The only court upholding the military policy of discriminating on the basis of sexual orientation is *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). In its decision reversing the district court's earlier dismissal of this case, this Court distinguished *Ben-Shalom* on the ground that the plaintiff in that case was dismissed because she failed to rebut a presumption under the applicable regulations that she had engaged in homosexual conduct. *Steffan v. Cheney*, 920

(footnote continued)

In deciding the "difficult question" before it then, on an appeal from cross-motions for summary judgment, this Court must consider and apply the basic principles of equal protection law to the evidentiary record in this case *de novo*. *Buongiorno v. Sullivan*, 912 F.2d 504, 508 (D.C. Cir. 1990); *Shields v. Eli Lilly and Co.*, 895 F.2d 1463, 1465-66 (D.C. Cir. 1990).

The Supreme Court has set forth differing levels of scrutiny in its equal protection jurisprudence. At a minimum, a statutory classification must be "rationally related to a legitimate governmental purpose" in order to withstand challenge. *E.g.*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985). Where the classification involves a "suspect class,"

(footnote continued)

F.2d 74, 76 n.* (D.C. Cir. 1990). Indeed, on the earlier appeal in this case, the military urged this Court to hold that Steffan in fact had been discharged on the basis of conduct, citing *Ben-Shalom*. A. 1000-1, 1012. This Court refused to accept the military's argument. 920 F.2d at 76 n.*. Thus, *Ben-Shalom* has already been held to be distinguishable from this case.

In any event, *Ben-Shalom* was not followed in *Pruitt*, has been widely criticized and should not be followed by this Court. See Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. Ill. L. Rev. 95, 122 (1990); Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 Cal. W.L. Rev. 395, 406 (1990); Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick*, 31 B.C. L. Rev. 375, 469-73 (1990); Note, *Unacceptable Risk or Unacceptable Rhetoric? An Argument for a Quasi-Suspect Classification for Gays Based on Current Government Security Clearance Procedures*, 7 J.L. & Pol. 133, 159-60 (1990); Note, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men From the Military*, 17 N.Y.U. Rev. L. & Soc. Change 171, 203-7 (1989-90); Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499, 563-65 (1991); Note, *The Seventh Circuit in Ben-Shalom v. Marsh: Equating Speech with Conduct*, 24 Loy. L.A. L. Rev. 421 (1991); Falik, *Exclusion of Military Recruiters from Public School Campuses: The Case Against Federal Preemption*, 39 UCLA L. Rev. 941, 948 n.23 (1992).

however, the regulations can be upheld only if they are " 'necessary to promote a compelling governmental interest.' " *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (emphasis in original) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)). An intermediate level of scrutiny is applied where a "quasi-suspect class" is involved. Under that standard, the government must show that the challenged classification is "substantially related to an important governmental objective." *E.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982); *Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992).

The district court here applied a rational basis test. That decision was erroneous. The uncontradicted evidence before the district court established that lesbians and gay men have suffered a history of purposeful discrimination; that homosexual orientation bears no relationship to an individual's ability to perform or contribute to society; that homosexual orientation is an "immutable characteristic" for purposes of constitutional analysis; that gays have been saddled with unique disabilities because of prejudice and inaccurate and absurd stereotypes; and that gays as a group are materially disadvantaged in the political process and are virtually unrepresented in the federal government.⁹ See A. 1115-70, 1393-99, 1485-535.

⁹ The district court reached its conclusion that heightened scrutiny does not apply by ignoring the record and improperly substituting its unfounded opinions for the evidence. Of particular note is the district court's finding on the basis of two book reviews (one of which is reproduced at A. 2508) that "some people exercise some choice in their own sexual orientation." 780 F. Supp. at 6 n.12 (emphasis in original). The sworn testimony of Dr. Richard Green, a noted expert in the etiology of human sexual orientation, showed "that homosexual orientation is not consciously chosen but rather, that sexual and affectational feelings are a basic part of an individual's psyche and are established by early childhood" and that this view is "widely shared in the scientific community." A. 1486. See also *Watkins*, 875 F.2d at 726 (Norris, J., concurring) ("Scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change"). That evidence stands uncontradicted in the record and there was no basis for the district court to make contrary findings.

(footnote continued)

1850-94, 2097-161, 2181-85. Accordingly, applying the criteria that the Supreme Court has laid out in decisions such as *City of Cleburne, Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), *Plyler v. Doe*, 457 U.S. 202, 216-23 (1982), and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), it is manifestly clear that a regulation discriminating on the basis of sexual orientation should be subjected to heightened judicial scrutiny. See generally *Watkins v. United States Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992).¹⁰

Regardless of the level of scrutiny that applies, however, there is one overarching principle that governs all equal protection analysis: *the government cannot discriminate against one group in order to cater to the irrational biases and prejudices of another.* This principle has most recently been applied in this very context in *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992), where the Ninth Circuit refused to hold that the regulations in issue here were constitutional as a matter of law and held that the military had to show "on the record" that its policy rests on more than

(footnote continued)

See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Sherwood v. Washington Post*, 871 F.2d 1144, 1147 (D.C. Cir. 1989).

¹⁰ See also Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwillingly or Otherwise*, 64 Temple L. Rev. 937, 948-75 (1991); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1299-1305 (1985); Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. Cal. L. Rev. 797, 799-807, 824-25 (1984); *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1554, 1575 (1989). See generally J. Ely, *Democracy and Distrust* 145-53 (1980); Calabresi, *Antidiscrimination and Constitutional Accountability*, 105 Harv. L. Rev. 80 (1991); Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161 (1988).

"prejudice of others against homosexuals themselves, rather than on disapproval of specific acts of criminal conduct." 963 F.2d at 1165. The decision in *Pruitt* follows ineluctably from the Supreme Court decision in *City of Cleburne*, where the Court applied what the Ninth Circuit in *Pruitt* called an "'active' rational basis review," 963 F.2d at 1165, carefully scrutinizing the record and rejecting the city's claim that it needed to regulate the size, location and population density of homes for the mentally retarded, reasoning that the same state concerns would apply equally to many other kinds of facilities, such as nursing homes, which were not subject to the ordinance. 473 U.S. at 448-50.

Most importantly for purposes presented here, the *Cleburne* Court also rejected the city's argument that requiring a special use permit was justified by the "negative attitudes" and fears of local property owners and elderly residents because this did not serve a *legitimate* state interest. The Court concluded: "'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" 473 U.S. at 448. It went on to hold that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." 473 U.S. at 450. The Supreme Court was equally clear on this subject in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). In an opinion by Chief Justice Burger, the Court acknowledged "the reality of private biases and the possible injury they might inflict." It concluded that however real those potential injuries may be, the constitution does not permit the state to dignify them.¹¹

¹¹ Lower courts following the principles of *City of Cleburne* and *Palmore* have ruled that the hostility of neighbors to "heretical" religious groups is not a proper basis for discrimination, *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988); that public hostility to a performer's views on the Middle East cannot justify discrimination against her, *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 901-3 (1st Cir. 1988); and that fears of and prejudices against the elderly cannot be used to justify limits on adult group homes, *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 537 (S.D. Fla. 1987).

In a related vein, the Supreme Court has also rejected attempts to justify discrimination on the basis of "archaic and overbroad" assumptions that rest on "old notions" and stereotypes. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984); *Califano v. Goldfarb*, 430 U.S. 199, 211, 217 (1977). So, for example, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Supreme Court invalidated a military compensation scheme that relied on the outdated stereotype of males being "breadwinners" and females being "homemaker dependents."¹²

B. The military's discrimination on the basis of homosexual orientation unlawfully caters to private biases and irrationally concludes that gays are security risks.

DOD Directives 1332.14 and 1332.30 assert that "[h]omosexuality is incompatible with military service." That assertion is literally untrue. Even before the most recent controversy over gays in the military erupted, Secretary of Defense Cheney admitted that "we've got a large number of gays in military service." A. 1272. Since January 29, 1993, the military has stopped asking recruits whether they are homosexual — which at least is an acknowledgement that gay men and lesbians can serve effectively so long as they remain discreet. A. 2607. And a 1990 administrative message from Vice Admiral Joseph S. Donnell, the Commander of the Navy's surface Atlantic Fleet, stated that "[e]xperience has . . . shown that the stereotypical female homosexual in the Navy is hardworking, career-oriented, willing to put in long hours on the job and among the

command's top professionals." A. 1405. Indeed, the unrebutted record before the district court — which includes military studies conducted in 1957 and 1988 — establishes that gays serve in the military in numbers proportional to their representation in society at large, and that the overwhelming majority of homosexuals who serve in the military do so without incident and are honorably discharged at the normal conclusion of their service. A. 648-51, 1396-99, 1420. See also Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 Mil. L. Rev. 55, 65-69 (1991).

The notion that "homosexuality is incompatible with military service" is also belied by the experience of any number of our allies—including Canada, Australia, France, Israel, Spain, Sweden, The Netherlands, Denmark, Finland, Norway and Japan — which permit gays to serve in their armed forces. A. 2162-76; *Meinhold v. United States Dep't of Defense*, 808 F. Supp. at 1458; Davis, *supra*, 131 Mil. L. Rev. at 80.¹³ The fact that these allies permit gays to serve in their armed forces means that American servicemembers have served and are serving with gay servicemembers in the Persian Gulf, Somalia and elsewhere with no reported deleterious effects.

Perhaps the ultimate proof of the fallacy of the claim that homosexuality is incompatible with military service is that during World War II, the Korean War and the Vietnam War, our military altered or relaxed the enforcement of the ban on the service of gays in order to accommodate the need for sufficient troop levels. A. 648, 701 (increased rate of discharges for homosexuality over past 20 years); R. Shilts, *Conduct Unbecoming: Gays and Lesbians in the U.S. Military* 17, 70, 198, 214, 295, 356, 419 (1993) (discharge rates for homosexuality declined at the heights of World War II and the Korean

¹³ When Australia dropped its ban, Australia's Prime Minister stated that the decision "will not have the adverse effect on morale and cohesion predicted by some." *Meinhold*, 808 F. Supp. at 1458. When Canada dropped its ban, the Chief of the Defense Staff stated that "the military leadership was 'satisfied that the policy no longer serves the best interests of the [Canadian Forces] and its members.'" *Id.*

¹² Following *Frontiero*, the Second Circuit held in *Crawford v. Cushman*, 531 F.2d 1114, 1121-24 (2d Cir. 1976), that a Marine Corps regulation that required the discharge of female servicemembers who become pregnant was violative of equal protection. Similarly, in *Owens v. Brown*, 455 F. Supp. 291, 306 (D.D.C. 1978), Judge Sirica declared that the statute that precluded women from serving on all Navy vessels was violative of equal protection because its purpose was "more related to the traditional way of thinking about women than to the demands of military preparedness." *Owens* was cited with approval by this Court in *Doe v. Sullivan*, 938 F.2d 1370, 1381 n.16 (D.C. Cir. 1991).

and Vietnam Wars and increased during peacetime); A. Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* 179-86 (1990) (discussing effort to "salvage" homosexuals for service in World War II). Most recently, in connection with the Persian Gulf buildup, the military suspended the authority of commanding officers to initiate discharge proceedings against gay reservists. A. 1285-86. The record shows that even after the military issued a message stating that gays were still subject to discharge, responsible authorities were refusing to discharge gay men and lesbians. A. 839-847, 1081-88, 1311-13.

The record also shows that even in peacetime, the anti-gay ban is enforced selectively. Thus, the likelihood that a servicemember will be discharged is a direct function of the attitudes of the servicemember's commanding officer, and many officers do not concern themselves at all with the sexual orientation of their subordinates unless it creates a problem within their chain of command. A. 1395. Indeed, Vice Admiral Donnell in his administrative message acknowledged that allegations of homosexuality against high achievers are often "dismissed out of hand or pursued half-heartedly." A. 1405.¹⁴ Thus, the truth is that homosexuality is deemed "incompatible with military service" when it is "convenient" for the military, and that alleged incompatibility tends to be overlooked when hostilities are at their fiercest and when tolerant officers are in positions of authority.

¹⁴ While the policy often is not enforced, when it is enforced, it is typically with a vengeance. The tactics employed include protracted and intimidating interrogations in which individual servicemembers are threatened with prison and public humiliation unless they agree to identify other homosexuals. These "witch hunts" are disproportionately aimed at women, who, as a group, are particularly vulnerable to charges of lesbianism when they excel in non-traditional roles or resist sexual advances from male servicemembers. See, e.g., Benecke and Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 Harv. Women's L.J. 215, 221-31 (1990); R. Shiltz, *Conduct Unbecoming: Gays & Lesbians in the U.S. Military* 124-28, 139-45, 315-19 (1993).

1. The military itself recognizes that its discrimination on the basis of sexual orientation is intended to cater to the "prevailing homophobia" in society.

While it is clear that homosexuality is not "incompatible with military service," the military nonetheless argues that the exclusion of individuals who state that they are gay is necessary to preserve "discipline, good order and morale," "to foster mutual trust and confidence among servicemembers," "to preserve the integrity of command," "to facilitate world deployment" and "recruitment," and to preserve the "public acceptability of military service." All of these are certainly laudable goals. But the constitution *requires* the courts to go on to examine the military's explanation as to why discrimination on the basis of sexual orientation supposedly promotes these goals. And it is at this point that the defense of the policy falters. For the military itself has argued unabashedly to the Ninth Circuit that the "problem" that the military is seeking to "avoid" by discriminating on the basis of sexual orientation is conflict between acknowledged homosexuals and heterosexuals who "despise/detest" homosexuality. *Watkins*, 875 F.2d at 728 (Norris, J., concurring) (quoting Army brief). Thus, the military explains the fact that "closeted" homosexuals serve effectively by arguing that since they are not known to be gay, bigoted servicemembers do not permit their hatred to interfere with the performance of their duties.

There can be no doubt that the policy is designed to cater to prejudice. In explaining the rationale for the policy, military documents contend that the "integrity of rank and command" will suffer because "[k]nown homosexuals . . . are unlikely to command necessary respect and obedience from subordinates" (A. 1574); that "worldwide deployment" would suffer because people of other countries "hold unfavorable attitudes toward homosexuals" (A. 1569); that "recruitment" would suffer because "surveys . . . show that the vast majority of Americans in general and servicemembers in particular strongly

disapprove of homosexuals" (A. 1573-74); and that "the military would suffer in esteem if known homosexuals were allowed to serve" "[b]ecause of the prevailing homophobia in society" (A.1575).

Perhaps the clearest proof that the military's policy of discriminating on the basis of sexual orientation rests on prejudice is that virtually every justification used for the military's ban on gays was used to justify the military's discrimination against African-Americans in World War II.¹⁵ E.g., A. 1059 (a "Negro" "would find himself unable properly to perform his duty of exercising military authority"); A. 1061 ("[t]here are a number of countries where the landing of Negro Marines would create an extremely difficult situation"); A. 1059 ("[t]he close and intimate conditions of life aboard ship" precludes "members of the Negro race" from serving in the Navy); A. 1067 ("The minute the negro is introduced into general service . . . the high type of man that we have been getting for the last twenty years will go elsewhere and we will get the type of man who will lie in bed with a negro."). See generally A. 1055-80, 2286-90; *Meinhold*, 808 F. Supp. at 1458 (the justifications for the policy "are baseless and very similar to the reasons offered to keep the military racially segregated in the 1940's").

¹⁵ The only exception is the claim that gays constitute a security risk, a claim that was fabricated during the McCarthy era (A. 2051-78); that was rejected in a 1957 Navy study (A. 1415, 1421); that was abandoned by the Navy sixteen years ago in *Berg v. Claytor*, 436 F. Supp. 76, 80 (D.D.C. 1977), *vacated*, 591 F.2d 849 (D.C. Cir. 1978); that was described by Secretary Cheney as a "bit of an old chestnut" (A. 1908); that was rejected again in 1989 and 1991 military studies (A. 624-711, 2193-236); that was not relied upon by the district court; and that is belied by the record. A. 720-48, 1884-92, 2191-92. See also *Watkins*, 875 F.2d at 731 (Norris, J. concurring) (military ban on gays creates a security risk by subjecting servicemembers to the threat of blackmail). The fact that the military still clings to this rationale notwithstanding its pedigree and the fact that the Navy conceded in 1977 that the regulation cannot be justified on this ground itself demonstrates that the policy is rooted in prejudice. Indeed, one military study has so concluded. A. 2228-29.

2. The district court's attempt to justify the policy on grounds of morality, privacy and health cannot withstand scrutiny.

In its attempt to sidestep the plain fact that the military's policy is designed to cater to prejudice, the district court offered three arguments. Not one of them can withstand scrutiny.

First, the district court claimed that because "many would find the Navy's approval of a homosexual orientation . . . to be morally offensive, then it is not prejudice which is responsible for the regulations, but rather a standard of morality." 780 F. Supp. at 13. In reaching this decision, the district court assumed that the morality of some can justify an infringement of the rights of others. This assumption was rejected in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2806 (1992), where the Court held that the government could not justify its attempt to limit individual liberty by imposing its view of morality.

Even if one assumes that a "standard of morality" can justify discrimination against individuals whose conduct is faultless, however, the fact remains that no standard of morality legitimizes discrimination on the basis of homosexual orientation or stigmatizes an individual on that basis. To the contrary, to the extent that any judgment is made at all, Western moral traditions uniformly focus on conduct, not status. A. 2079-93 (unrebutted expert testimony of Professor John E. Boswell, Chairman of the History Department of Yale University). The same is true of Western legal traditions. As Judge Norris observed in his *Watkins* concurrence, "homosexual orientation itself has never been criminalized in this country." 875 F.2d at 725.¹⁶ Nor could it be. E.g., *Robinson v. California*, 370 U.S.

¹⁶ In contrast, homosexual orientation was criminalized in Nazi Germany and provided the justification for the genocide of gays. See F. Rector, *The Nazi Extermination of Homosexuals* 119 (1981) (Paragraph 175A of German Penal Law defines homosexual acts to include homosexual fantasies). See also H. Heger, *The Men With the Pink Triangle* (1980).

660 (1962); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1076 n.4 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977).¹⁷

Second, the district court claimed without any record support that the policy was a rational means for the military to maintain "a semblance of privacy for its members," analogizing the ban on gays to "the policy of separating men and women while sleeping, bathing and 'using the bathroom.'" 780 F. Supp. at 13. The district court's argument, however, founders on the fact that gay men and lesbians currently serve in the military by the thousands without incident. It also founders on the fact that the separation of the sexes in the military is not absolute: servicemen and servicewomen share tents in army field exercises,

¹⁷ The district court also ignored the fact that its view of morality which condones anti-gay discrimination stands at odds with the judicial trend in the United States and around the world to respect the dignity of gay men and lesbians and their relationships in areas ranging from family law to the criminal law. See *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991) (recognizing lesbian couple as a "family of affinity"); *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989) (gay couple constitutes a family for purposes of rent stabilization statute); *Rezin v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980) (awarding child custody to lesbian mother); *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (awarding child custody to lesbian mother); *In the Matter of Jacinta M.*, 764 P.2d 1327 (N.M. Ct. App. 1988) (awarding child custody to gay older brother); *Commonwealth v. Wuxson*, 842 S.W.2d 487 (Ky. 1992) (invalidating sodomy statute); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980) (same); *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992) (same). See also *Norris Case*, No. 6/1987/129/180 (Eur. Ct. of Human Rights Oct. 26, 1988) (Irish law criminalizing homosexual sodomy violates Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms) (reproduced at A. 1577-99).

This trend in the courts is mirrored in the increasing recognition of the contributions that lesbians and gay men have made to society. *E.g.*, T. Kushner, *Angels in America* (1992) (Pulitzer Prize); P. Monette, *Becoming a Man* (1992) (National Book Award); H. Fierstein, *La Cage Aux Folles* (1984) (Tony Award); H. Fierstein, *Torchsong Trilogy* (1983) (Tony Award); J. Boswell, *Christianity, Social Tolerance and Homosexuality* (1980) (American Book Award).

serve together in missile silos on 24-hour tours of duty and were stationed in Saudi Arabia during the Persian Gulf war in coed living quarters. A. 830-32, 1373-74. These facts — especially when combined with the fact that foreign military establishments, sports teams, college dormitories and health clubs all manage the privacy "issue" without adopting outright bans — demonstrate concretely that the district court's speculation that gay men and lesbians by their nature will invade the privacy of others is just that, speculation, without any basis.

In seeking to justify the policy on the basis of privacy concerns, the district court also overlooked the testimony not only of the plaintiff's expert, Professor Gregory Herek,¹⁸ but also the conclusion of a 1988 study conducted by experts selected by the military itself. A. 624-712. That study concluded, unremarkably, that concerns over homosexuals invading the privacy of others are unfounded because homosexuals like heterosexuals are "selective in their choice of intimate partners and in their expression of sexual behavior" and are selective "in observing rules of privacy, in considering appropriateness of time and place, in connecting sexuality with the tender sentiments, and so on." A. 658. This conclusion rests in part on the fact that gay men and lesbians grow up sharing rooms, showers and toilet facilities with people of the same gender and, as

¹⁸ Professor Herek testified that the concern over privacy is at least in part a reflection of society's stereotype that gay men and lesbians are "hypersexual," pointing out that this same stereotype is often applied to other disfavored groups such as African-Americans and Jews, and that the privacy argument rests in part on the false stereotype that "young, often vulnerable, female sailors" will be subjected to "subtle coercion or outright sexual advances by more senior and aggressive female sailors" in a "predator-type environment." A. 1867-68 (quoting Donnell administrative message). He went on to testify that there is no basis for the belief that gays are "sexually predatory or that they will try to convert or recruit heterosexuals" and that gay men and lesbians in the military can and do exercise a higher degree of self-control than heterosexuals. A. 1868-69. See also A. 1396 (Dr. Rankin) (same). This evidence stands un rebutted on the record.

a result, are accustomed to respect the privacy of people of the same sex. Thus, contrary to the district court's conclusion, the lack of privacy in the military — coupled with the unfortunate fact that our society stigmatizes gay men and lesbians — means that gay men and lesbians, more so than heterosexuals, will be circumspect in their behavior, and that "fear" on the part of some heterosexuals that "they are being viewed as sexual objects" rests on stereotype and prejudice, not fact.

Finally, the district court claimed in dictum that the policy was a reasonable means for the military to prevent the transmission of HIV between servicemembers. 780 F. Supp. at 13-18. The threshold problem with the district court's conclusion is that the military expressly *disclaimed* that this was a basis for the regulation, in part because the AIDS epidemic had not been recognized at the time that the regulations were adopted. A. 2298-99. Thus, the district court's extended discussion of deference to the military and legislative determinations in this section of its opinion is completely inapposite; no deference is due because no such judgment has been made. Accordingly, in these circumstances, it was manifestly improper for the district court to justify the military's discriminatory policy on a rationale that the district court created out of whole cloth. See *Delaware River Basin Comm'n v. Bucks County Water & Sewer Authority*, 641 F.2d 1087, 1097 (3d Cir. 1981).

In any event, the district court's conclusion that discrimination on the basis of sexual orientation is rational to protect the health of servicemembers rests on the absurd premise that it is homosexuality itself, as opposed to a virus, that causes AIDS.¹⁹ It also rests on the crude assumption that because *some*

gay men are infected with HIV, *all* gay men and lesbians should be excluded, an assumption that is faulty both as a matter of logic and as a matter of fact, since there is an inexpensive and accurate test available to detect the disease (A. 2390-91); since all persons who engage in unprotected sexual activity are at risk of HIV infection (A. 2399-402); and since the rate of growth in the AIDS population in adolescents and adults under age 25 is higher in the heterosexual population than the homosexual population. A. 2306.²⁰ See *Gay Student Services*, 737 F.2d at 1330 (rejecting "speculative evidence" of public health concerns as grounds for discriminating against gays).

C. The district court's reliance on *Dronenburg* was misplaced.

In *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), this Court upheld the constitutionality of the discharge of a servicemember who, in the words of Judge Ginsburg, "engag[ed] in homosexual acts in a Navy barracks." *Dronenburg v. Zech*, 746 F.2d 1579, 1581 (D.C. Cir. 1984) (statement supporting denial of suggestion for rehearing *en banc*). The district court here, "[r]ecognizing that the Dronenburg court had homosexual conduct in mind rather than homosexual orientation when it spoke of 'homosexuality,' " nonetheless held that by stating his sexual preference, "the presumption must be, and it is rational for the Navy to believe, that plaintiff could one day have acted on his preferences in violation of regulations prohibiting such conduct." 780 F. Supp. at 12-13. From this, the district court reasoned that *Dronenburg* supports the conclusion that the military may constitutionally discriminate on the basis of

¹⁹ The theory advanced by the district court is particularly bizarre given that it purported to rely on the *Final Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* (1988), 780 F. Supp. at 15, and made the report part of the record. A. 2302, 2307-2507. The report states, however, that "it is behavior, not membership in any particular group or population, that places a person at greater risk for HIV infection." A. 2402 (emphasis added).

²⁰ The district court's conclusion that discrimination on the basis of sexual orientation can be justified on these grounds also reflects ignorance of the policies that the military has in place to address the AIDS epidemic. Thus, among other things, the military tests all inductees for the presence of HIV antibodies, excludes any potential recruit who tests positive, regularly tests active duty servicemembers and limits their assignments as appropriate, and educates servicemembers about the means through which HIV can be transmitted. 32 C.F.R. pt. 58 (1992).

sexual orientation because orientation indicates a "propensity" to engage in conduct that is disruptive of the military mission. The district court's reasoning is faulty in at least five respects.

First, the district court simply ignored the long legal, moral and religious tradition distinguishing between "inclinations" and conduct. See pp. 15, 25-26, *supra*. Most recently, in *Jacobson v. United States*, 112 S. Ct. 1535 (1992), the Supreme Court expressly rejected the notion that "personal inclinations" to commit prohibited sex acts can support an "inference" that an individual will in fact commit those prohibited acts. In reaching this decision, the Supreme Court relied on the well-established principle that "a person's inclinations and 'fantasies . . . are his own and beyond the reach of the government . . .'" *Id.* at 1542 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973)). See *Stanley v. Georgia*, 394 U.S. 557, 56-566 (1969). The regulations in issue here thus represent an illegitimate attempt to "control the moral contents of a person's thoughts." *Stanley*, 394 U.S. at 565. Accordingly, however "rational" it may be in the abstract, the law has rarely condoned discrimination against individual members of a group on the "presumption" that the individual "could one day" act in an illegal manner.

Second, the district court put more weight on *Dronenburg* than the case can reasonably bear. As noted, the plaintiff in *Dronenburg* had sex in the barracks with a subordinate. Thus, it was manifestly reasonable to conclude that an individual who had already engaged in disruptive conduct of this type has a "propensity" to engage in disruptive conduct in the future. The same cannot be said of an individual who merely states that he or she is gay. In fact, *all* of the evidence is to the contrary. See pp. 26-28 & n.18, *supra*.

Third, the district court failed to recognize that the authority of *Dronenburg* has been severely undercut by the Supreme Court's later decisions in *Palmore* and *City of Cleburne*. As the Ninth Circuit noted in *Pruitt*, 963 F.2d at 1165 & n.4, to the

extent that *Dronenburg* relies on the anti-gay prejudice of others to support the military's discriminatory policy, *Dronenburg* is not good authority.

Fourth, the district court is simply wrong in assuming that "propensity" can be equated with "conduct." For example, one would "presume" that many heterosexuals, such as unmarried men and women who adhere to the traditional mores of our society, have not engaged in heterosexual conduct despite their "propensity" to do so. As Dr. Richard Green, Professor of Psychiatry at the University of California School of Medicine, Los Angeles, California, explained in his unrebutted testimony, "homosexual orientation is separate and distinct from homosexual conduct" and "a person's sexual behavior does not necessarily define his or her orientation." Thus, "[h]eterosexual conduct is common among individuals who identify themselves as lesbian or gay" and vice-versa, and "[w]hile sexual activity among heterosexuals and homosexuals is common and diverse, significant portions of both populations engage in little or no interactive sexual conduct, both temporarily and for long periods of time, for various reasons." Accordingly, as a matter of fact, it cannot be presumed that a servicemember who identifies himself or herself as a "homosexual" is regularly (or even irregularly) engaging in homosexual conduct at all, let alone conduct that is disruptive of the military mission. A. 1486-89.

Finally, the "presumption" that someone who states that he or she is a homosexual "could one day" act on his or her "preferences in violation of regulations prohibiting such conduct" proves too much. To use the district court's words, "it is rational for the Navy to believe" that *heterosexuals* have a "propensity" and "proclivity" to engage in sexual conduct prohibited by Article 125 of the Uniform Code of Military Justice, 10 U.S.C. § 925 (1988) (criminalizing oral sex between members of the same or opposite sex). See *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992) (upholding constitutionality of

Article 125 as applied to non-commercial, heterosexual sodomy in private between consenting adults).²¹ Yet no court would uphold a regulation that provided that every servicemember who states that he or she is a heterosexual is presumed to be a sodomist and can be discharged from the service on that basis unless the servicemember testifies that he or she has never engaged in oral sex and commits never to do so in the future. This same faulty logic underlies the district court decision here and underscores the constitutional infirmity in the military's decision to discriminate against homosexuals on the basis of sexual orientation alone.²²

* * *

In short, the military's policy of discriminating on the basis of sexual orientation is unconstitutional and, as a result, Steffan's discharge was a nullity. Under the applicable precedents, Steffan is entitled to the entry of an order reinstating him to the Navy, awarding him his degree, and granting him a commission as an officer. *See Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979); *Dilley v. Alexander*, 627 F.2d 407, 413, 415 (D.C. Cir. 1980) (illegally discharged officers should be restored "to the position they would have occupied 'but for' their illegal release

²¹ See A. 648 ("it is reasonable to assume that large numbers of military men and women, married and unmarried, are in violation of" Article 125). See also W. Masters & V. Johnson, *Sex and Human Loving* 328 (1986) (noting "remarkable changes in the last forty years" in "[m]ariatal sexual techniques" and reporting results of study showing that 87% of married women report engaging in oral sex).

²² Other cases upholding aspects of the military's policy on homosexuality were decided on the basis of conduct, not status, and are distinguishable on this ground. See *Pruitt*, 963 F.2d at 1165 n.4 (distinguishing *Dronenburg*, *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984), *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981), and *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981)).

from duty"). See also *White v. Secretary of Army*, 878 F.2d 501, 506 (D.C. Cir. 1989) (court exercises discretion in fashioning equitable remedy for illegal discharge); *Crawford v. Cushman*, 531 F.2d 1114, 1127 (2d Cir. 1976) (same).

POINT II

STEFFAN WAS UNLAWFULLY DEPRIVED OF HIS DEGREE.

As shown above, since Steffan was compelled to resign on the basis of an unconstitutional regulation, he is entitled to plenary relief, including the award of a degree from the Academy. Quite separately, however, Steffan is entitled to the award of a degree because he was subjected to peculiarly harsh treatment in violation of the constitutional guarantee of equal protection of the law and in violation of the constraints placed on federal administrative action by the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), which gives the courts the power to overturn "arbitrary and capricious" agency actions and actions that constitute an "abuse of discretion."²³

The relevant facts were not contested below. The Academy has a practice of permitting midshipmen who are deemed to be uncommissionable for reasons unrelated to their performance to complete their studies. A. 833-34, 1209-34. Steffan was not permitted to do so. The Academy also has a policy of grading the military performance of midshipmen on the basis of their "demonstrated performance." A. 538. Steffan, who up until he stated that he was gay had an "A" evaluation for military performance, had that evaluation peremptorily changed to "F"

²³ There can be no question that Steffan's treatment is subject to review under the Administrative Procedures Act. See, e.g., *Miller v. Lehman*, 801 F.2d 492, 496 (D.C. Cir. 1986); *Lewis v. Marsh*, 672 F. Supp. 14 (D.D.C. 1987) (commanding officer's order removing plaintiff from Army Officer Candidate School held arbitrary and capricious under APA). See generally Folk, *The Administrative Procedure Act and the Military Departments*, 108 Mil. L. Rev. 135, 137-38 (1985).

without any reference to or consideration of his performance at the Academy. A. 542. Homosexual servicemembers generally are given 30 days' notice of the initial hearing on their discharge. Steffan was given 24 hours' notice. A. 531, 1648. And homosexual servicemembers generally are discharged under a policy that states that it is a "goal" for the proceedings to be concluded within four months. Steffan was processed for discharge in one week. A. 106, 531, 1648. On these facts, it is readily apparent that Steffan was treated more harshly than other midshipmen who are similarly situated, indeed, more harshly than other servicemembers facing discharge for homosexuality, in violation of the principles of equal protection law established in *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (" 'all persons similarly circumstanced shall be treated alike' ").

The district court offered three bases for upholding the harsh treatment that Steffan was subjected to. Each is frivolous. *First*, the district court contended that the midshipmen who were permitted to graduate all suffered from medical or psychological conditions and that since Steffan argued that homosexuality is not a disease or illness, his condition is distinguishable. 780 F. Supp. at 6 n.11. The threshold problem with the district court's contention is that regardless of what Steffan argued below, the Academy and the military *do* refer alleged homosexuals to psychologists.²⁴ In any event, the distinction that the district court tried to draw is meaningless. A midshipman disqualified on the basis of sexual orientation, like a midshipman with a medical or psychological condition, is deemed to be uncommissionable as the result of an innate characteristic that does not reflect fault on his or her part. Once an exception is made for the one group, fairness, equity, and the constitution require that gay and lesbian midshipmen be permitted to complete their studies as well.

Second, the district court claimed that Steffan was not treated differently from other uncommissionable midshipmen because Steffan recognized his sexual orientation in his third year,

²⁴ See A. 536 (Steffan psychological evaluation); A. 1775 (Army regulation requiring mental status evaluation for alleged homosexuals).

"which, if known to the Academy, under the Regulations would have caused a similarly situated midshipman with a medical condition to be discharged." 780 F. Supp. at 6 n.11. The problem with the district court's analysis is that the regulation cited (reproduced at A. 500-2) does not so provide. To the contrary, the record shows that the critical factor is not whether the condition manifested itself in the senior year but, rather, whether it existed "prior to entry into the naval service." A. 1214, 1218, 1220, 1234.²⁵

Finally, the district court claimed that the haste with which Steffan was discharged from the Academy was not arbitrary and capricious, but rather "an accommodation to an accomplished young man" designed "to save him the embarrassment and expense of duplicative, longer and more protracted discharge proceedings." 780 F. Supp. at 6 n.11. The district court's reasoning is facetious at best. The record is uncontradicted that Steffan's entire effort was directed at securing his diploma *and* that if the Academy had proceeded within the normal time parameters for discharge proceedings, Steffan would have received his degree. The notion that the "bum's rush" that Steffan was subjected to somehow constituted an "accommodation" to him is as offensive as it is illogical and cannot withstand scrutiny.

CONCLUSION

This case presents in stark terms the injustice of a policy that has ruined the careers of gay men and lesbians whose only desire has been to serve their country with pride and dignity, free from the constant fear that an overheard conversation or a vindictive rumor could bring their military service to a tragic and premature end. No evidence has been presented to show

²⁵ Moreover, the district court's reasoning assumes that Steffan was under an obligation to turn himself in when he came to recognize his homosexual orientation. In fact, Steffan was not asked about his sexual orientation until the events in issue here transpired and he had an absolute right to keep his innermost thoughts to himself. 10 U.S.C. § 831 (compulsory self-incrimination prohibited under the UCMJ).

that there is any legitimate basis, rational or otherwise, for the policy. None can be. To the contrary, *all* of the evidence shows that the policy panders to bigotry. At this juncture in our national debate on the role of gays in the military, the time has come for this Court to right the wrong that Joseph Steffan suffered over six years ago and hold that the policy that mandated his discharge is not merely misguided, but constitutionally infirm. Accordingly, for the reasons set forth herein, the district court's order granting the government's motion for summary judgment should be reversed, and plaintiff-appellant should be granted summary judgment directing the defendants to reinstate him to military service, award him his B.S. degree from the United States Naval Academy, and commission him as an officer.

Dated: New York, New York
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H. *Homosexuality*

1. *Basis*

a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service-members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

b. As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts;

(2) Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts; and

(3) A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

Excerpts from United States Naval Academy Regulation,
COMDTMIDN Instruction 1610.6F Ch-2.15

2.15 SEPARATION CRITERIA

1. A small minority of midshipmen will either not perform to standards or will possess certain traits which are undesirable in commissioned officers. Those individuals may be disciplined when appropriate or may be processed for separation in accordance with this instruction.

* * *

3. The problems listed below are sufficient in and of themselves to warrant separation from the Naval Academy. If reasonable cause leads one to believe that such a problem

exists, the Battalion Officer will refer the midshipman directly to a Brigade Performance Board. If the Brigade Performance Board determines that the problem does, in fact, exist, the midshipman will be referred to the Commandant with a recommendation for separation. This listing is not all-inclusive, but rather serves as examples of problems which severely limit a midshipman's aptitude and potential for commissioned service.

* * *

c. Homosexuality. The basis for separation may include previous, prior service or current service conduct or statements. Homosexuality includes the member engaging in, attempting to engage in or soliciting another to engage in a homosexual act or acts. It also includes statements by the member that he or she is homosexual or bisexual, or the member marrying or attempting to marry a person known to be of the same biological sex.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served in duplicate the foregoing Brief of Plaintiff-Appellant Joseph C. Steffan by hand delivery upon the Attorney for Defendants-Appellees and by hand, by United States Mail, postage prepaid, or by Federal Express to *amici* and their counsel.

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ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 13, 1993

NO. 91-5409

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

v.

SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5409

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

v.

SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court correctly rejected Steffan's equal protection challenge to regulations that mandate the discharge of service members who the military concludes have committed or are likely to commit homosexual acts.

2. Whether the district court correctly rejected Steffan's contention that the Navy violated the Administrative Procedure Act ("APA") in processing him for discharge and denying him a diploma from the Naval Academy.

REGULATIONS INVOLVED

Pertinent regulations are contained in the addendum to Appellant's Brief and in the Appendices.

SUBJECT MATTER JURISDICTION

As discussed in Appellant's Brief, the district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. Although Steffan's Complaint listed the Little Tucker Act, 28 U.S.C. § 1346, as a jurisdictional basis, see Appendix at 72, he subsequently abandoned it for jurisdictional purposes and waived his right to money damages. See Appendix at 177. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Nature of the Case. This case involves Joseph Steffan's resignation from the Naval Academy in 1987 after the commencement of discharge proceedings against him under the Navy regulations concerning service by acknowledged homosexuals then in effect.¹

Steffan entered the United States Naval Academy in July 1983. During his senior year, Steffan revealed to several military subordinates and, subsequently, to Naval Academy officials that he was homosexual. Because military regulations then in effect mandated the discharge of service members who, "by their statements, demonstrate a propensity to engage in

¹ On July 19, 1993, the President announced a new policy regarding homosexuals in the military. The new policy is to become effective on October 1, 1993.

homosexual conduct," Department of Defense ("DOD") Directive 1332, the Naval Academy convened administrative hearings to determine Steffan's eligibility for continued military service. Following these hearings, and after having sought and received advice from attorneys, Steffan resigned from the Naval Academy in April 1987.

In December 1988, Steffan brought this suit alleging that his "forced separation" from the Naval Academy was unlawful. He sought, inter alia, a declaration that the regulations barring homosexuals from military service are unconstitutional, and an order enjoining the Navy from denying him a diploma from the Naval Academy and requiring that he be granted a commission as a Navy officer.

The district court (Judge Oliver Gasch) upheld the regulations and their application to Steffan. Steffan appeals that decision.

B. Statement of the Facts.

1. Events Leading Up To Steffan's Resignation From The Naval Academy On April 1, 1987. In July 1983, Steffan entered the United States Naval Academy as a midshipman. In the Fall of his senior year, Steffan revealed to several military subordinates that he was homosexual. See Appendix ("App.") 429-31. One of these subordinates advised Naval Academy officials about Steffan's admission, see App. 469, and in February 1987, the Naval Investigative Service ("NIS") initiated an investigation to determine, inter alia, whether Steffan was

homosexual within the meaning of military regulations -- that is, whether he had "engage[d] in . . . homosexual acts," or whether he had a "desire" and "propensity" to engage in homosexual acts. See DOD Directive 1332. The NIS attempted to interview Steffan, but he invoked his right to remain silent. See App. 469, 481.

Steffan "knew before entering the Naval Academy that the Navy . . . did not allow homosexuals to serve." App. 426. He also knew that acknowledged homosexuality "warrant[ed] separation from the Naval Academy." Commandant of Midshipmen Instruction 1610.6F CH-1, App. 500, 501. As a fourth-year student who occupied a leadership position at the Naval Academy, Steffan had a "[t]horough knowledge of [Naval Academy] regulations and directives," id. at 375, and was responsible for enforcing the policy regarding homosexuals. See id. at 364, 367-68.

In March 1987, concerned about the NIS investigation, Steffan admitted his homosexuality to the Chief of Chaplains, Captain Byron Holderby. Steffan asked the Chaplain to intervene on his behalf with the Commandant of Midshipmen (who in the Naval Academy chain of command is subordinate only to the Superintendent of Midshipmen) to see whether he could graduate despite his homosexuality. See App. 75. The Commandant did not give the Chaplain any assurances regarding Steffan's prospects for graduation. The Commandant advised that Steffan seek legal counsel, see id. at 76, 394, and Steffan consulted a military attorney. See id. at 397-98.

On March 23, 1987, Steffan approached the Commandant, Captain H.W. Habermeyer, Jr., admitted his homosexuality, and asked to meet with the Superintendent to request permission to graduate. See App. 76, 85. The Commandant denied Steffan's request because "it would be inappropriate for the Superintendent[,] who would sit in judgment of the case[,] to be offering opinions before the case had been presented to him formally." Id. at 479. The Commandant stated, however, that he "seriously doubted whether [the Superintendent] would permit [Steffan's] completion of his course of study to receive his diploma." Id. Steffan replied that, under those circumstances, "[he] would have to leave the Naval Academy."² Id. at 382.

The Commandant informed Steffan that, in view of his admission of homosexuality, a Performance Board would be convened. See App. 86, 479. The purpose of the Performance Board was to determine whether Steffan was homosexual. As more fully discussed below, Steffan was entitled to testify and present witnesses and evidence to refute or rebut the allegation that he was homosexual within the meaning of the regulations. See id. at 500. If the Performance Board finds that a midshipman is homosexual within the meaning of the regulations, it refers the matter to the Commandant with a recommendation of discharge.

² Steffan's later recollection of his interview with the Commandant differed somewhat from the latter's contemporaneous record of the conversation. Captain Habermeyer's notes indicate that after being informed that it was unlikely that he would be allowed to graduate, Steffan "stated that he desired to leave the Naval Academy as soon as possible." App. 478-79. See also App. 382-86.

The Commandant then forwards the case with his recommendation to the Academic Board, which is chaired by the Superintendent. If the Academic Board, after conducting a hearing where the midshipman is entitled to be accompanied by an attorney, votes unanimously for discharge, that recommendation is forwarded to the Secretary of the Navy, whose decision is final. See App. 500, 514-15, 524-25, 553. At each level of review, the board or official involved is responsible for reviewing both relevant factual determinations and the proper application of Navy regulations to the facts as found.

Although Steffan was entitled to 72 hours notice before the convening of a Performance Board, he expressly waived that right. See App. 475. Prior to the Performance Board hearing, Steffan received formal notice that he had the right to consult an attorney, and that he was entitled to call witnesses and submit documentary evidence. He also received a copy of Naval Academy regulations governing Performance Board procedures. See id. Finally, he received copies of the following documents that would be considered by the Performance Board: (1) a letter from his battalion officer stating that, in light of his "acknowledge[ment] that he is a homosexual, . . . he should be separated from the Naval Academy," id. at 477; (2) written statements by the Commandant documenting that he had admitted his homosexuality and expressed a "desire[]" to leave the Naval Academy as soon as possible" if he were not permitted to graduate, id. at 478-79; and (3) an evaluation by a psychologist

who, having examined him on March 23, 1987, stated that administrative separation by reason of homosexuality was appropriate because he "admitted to homosexuality. This orientation pre-dates his tenure at the Naval Academy. . . . [H]is homosexuality does not appear to be unwanted . . . [and it] appears to be a preferred orientation to which he has adjusted." Id. at 480.

On March 24, 1987, the Performance Board, consisting of the Deputy Commandant and five officers, convened and accepted into evidence the documents that Steffan had received the previous day. See App. 540-41. The Performance Board reviewed the contents of the documents with Steffan, who stated that he had no questions and nothing to add. See id. at 541-42. Steffan declined to present witnesses or submit evidence on his own behalf. See id. at 539-42. He stated that he "ha[d] received fair and impartial treatment," and that his actions were unaffected "by personal, family or other problems." Id. at 539, 540. In response to the question, "Are you homosexual?", Steffan replied "Yes, sir." Id. at 542. When the Performance Board asked Steffan whether he "desire[d] to be commissioned as an officer of the Naval service by continuing as a midshipman of the Naval Academy," he answered "No, sir." Id. at 540.

Based on the evidence, including Steffan's "admi[ssion] that he was a homosexual and did not desire to graduate from the Naval Academy," App. 544, the Performance Board forwarded Steffan's case to the Commandant, recommending that Steffan be separated

due to homosexuality. See id. at 542, 544. Steffan reviewed the Performance Board's recommendation, which was then forwarded to the Commandant accompanied by a memorandum from Steffan advising that he "[did] not desire to make a statement." Id. at 545.

On March 26, 1987, the Commandant forwarded the case to the Academic Board recommending that Steffan be separated from the Naval Academy because:

Midshipman Steffan admitted to the . . . Performance Board that he was a homosexual and that he did not desire to graduate from the Naval Academy. Based on his own admission and the evaluation of the clinical psychologist, I recommend that Midshipman Steffan be separated from the Naval Academy due to insufficient aptitude for commissioned service.

App. 555.

On March 30, 1987, Steffan received notice that the Academic Board would convene on April 1, 1987. See App. 614. Steffan was advised that he could present any facts on his own behalf, including documentary evidence, written statements of third parties, and oral statements of witnesses, and that an attorney could accompany him at the proceedings. See id.

Steffan obtained assistance from two civilian attorneys, one of whom accompanied Steffan to the Academic Board when it convened on April 1, 1987. See App. 87, 398-99. Steffan informed the Board, which consisted of the Superintendent and seven officers, that he wished to complete the academic requirements to earn his diploma. See id. at 88-89. The Superintendent responded that, given the undisputed fact of Steffan's homosexuality, "the regulations were very clear [that

separation was mandated] and that . . . there was nothing the board could do to allow [Steffan] to graduate." Id. at 89. Following the hearing, the Academic Board voted unanimously that Steffan be recommended for discharge from the Naval Academy. See id. at 89, 98.

Later that day, an Academy official counseled Steffan, orally and in writing, regarding his options in light of the Academic Board's action. See App. 98-100. First, he could challenge the Academic Board's recommendation in a Show Cause Statement to the Secretary of the Navy setting forth the reasons why he should not be discharged. See id. at 98-99. The Academy official candidly advised that such a challenge would likely be futile, because "to his knowledge, [no service member] had ever been retained in the military after openly admitting [his] homosexuality." Id. at 90. Alternatively, Steffan could submit a "qualified resignation," in which case: (1) his official transcript would read "RESIGNED" rather than "DISCHARGED"; and (2) his separation papers would not contain a code reflecting that he was homosexual. See App. 90, 98. The Academy official stated that a resignation, as opposed to a discharge, might be preferable in terms of Steffan's future academic and employment pursuits. See id. at 90. He told Steffan, however, that "the explanation of these options . . . [did] not constitute pressure upon [him] to resign." Id. at 98. Further, he explained that although a qualified resignation is submitted voluntarily, "it contains a statement by the midshipman that he knows he will be

recommended for discharge by the Superintendent, if he does not resign." Id. Finally, he told Steffan that a "midshipman who submits a qualified resignation, by so doing, forfeits his right to show cause to higher authority why he should not be disenrolled from the Naval Academy." Id.

That same day, after consulting with an attorney from the American Civil Liberties Union, see App. 397-99, Steffan submitted a qualified resignation. The resignation reiterated that Steffan, by virtue of resigning, forfeited his right to any administrative challenge to his disenrollment from the Naval Academy. See id. at 106. Several days later, the Naval Academy placed Steffan in a Leave Pending Separation status, whereupon he left the Academy. See id. at 96, 312.

On April 7, 1987, the Superintendent forwarded Steffan's resignation to the Secretary of the Navy. See App. 97. The Secretary accepted Steffan's resignation, and Steffan received an Honorable Discharge on May 28, 1987. See id. at 96.

On June 16, 1987, the NIS closed its investigation of Steffan after being notified that he had resigned from the Naval Academy and that no further action against him was being contemplated.³ See App. 469-470.

³ The final NIS report stated that the inquiry "had resulted in a determination that [Steffan was] in violation of Article 125" of the Uniform Code of Military Justice, 10 U.S.C. § 925, which makes sodomy a criminal offense. The report set forth no evidentiary basis for that conclusion.

2. Steffan's Administrative Challenge In December 1988 To His Disenrollment From The Naval Academy. Over one and one-half years after resigning, on December 9, 1988, Steffan requested permission from the Secretary of the Navy to withdraw his resignation and complete the requirements necessary to obtain a diploma. See App. 81. Steffan characterized his resignation as "involuntary" because it was submitted under the impression that "any appeal would prove futile and probably damaging to [his] future as a civilian" and "[o]ut of concern for [his] family [who had been unaware of his sexual orientation] and shock over what was happening. . . ." Id. at 81, 83.

On February 8, 1989, the Secretary of the Navy denied Steffan's request to withdraw his resignation from the Naval Academy, see App. 107, because:

Mr. Steffan admitted to being a homosexual, which constituted a basis for separation due to insufficient aptitude under [military regulations]. He was accorded all of the rights to which he was entitled . . . , including a hearing before the . . . Performance Board and the Academic Board. Mr. Steffan advised both the Commandant of Midshipmen on 23 March 1987 and the . . . Performance Board on 24 March 1987 that he did not desire to remain at the Naval Academy. His decision to submit a qualified resignation was made after he acknowledged a thorough understanding of the options available to him as well as the ramifications of the various courses of action.

Id. at 95.

C. District Court Proceedings. Steffan brought suit challenging his separation. See App. 71. As relevant here, Steffan complained that his separation from the Naval Academy based solely on his admission of homosexuality, and without any

specific allegation of homosexual acts, violated the equal protection component of the Due Process Clause of the Fifth Amendment. Alternatively, Steffan argued that the Navy violated the APA by not allowing him to graduate or receive a commission. See id. at 78-79. Steffan therefore asked the court to: (1) declare his resignation null and void; (2) declare that regulations mandating the discharge of service members based solely on admissions of homosexuality are unconstitutional; and (3) enjoin the Navy from denying him a diploma from the Naval Academy and a commission in the United States Navy. See id. at 79.

Following extensive discovery, full briefing, and argument, the district court rejected Steffan's arguments. Applying rational basis review, see App. 25, the court held that the military's regulations rationally further legitimate purposes, "includ[ing] the maintenance of discipline, morale, good order, a respected system of rank and command, a healthy military force, morality and respect for the privacy interests of both officers and the enlisted." Id. at 40. Further, the court held that the Navy did not violate the APA in processing Steffan's case or denying his request to graduate. See id. at 16-17 n.11. The court therefore granted the Government's motion for summary judgment. See id. at 4, 40. Steffan appeals.⁴

⁴ This case has been before this Court on two prior occasions. The first occasion was Steffan's appeal from an order dismissing his suit after he repeatedly declined to answer deposition questions concerning whether he had engaged in
(continued...)

STANDARD OF REVIEW

Steffan challenges the district court's entry of summary judgment. The district court's judgment is reviewed de novo.

SUMMARY OF THE ARGUMENT

This case involves Steffan's resignation from the Naval Academy in order to avoid the application to him of the military policy concerning acknowledged homosexuals in effect at the time of his resignation.⁵ It concerns the constitutional parameters within which a decision governing military service by homosexuals

⁴ (...continued)
homosexual acts. See 733 F. Supp. 121 (D.D.C. 1989). This Court reversed in a per curiam decision and remanded for further proceedings. See 920 F.2d 74 (D.C. Cir. 1990). The second occasion was on a petition by Steffan for the issuance of a writ of mandamus directing Judge Gasch to recuse himself from the case on the ground that he had referred to homosexuals as "homos." This Court denied the petition in an unpublished opinion dated May 16, 1991.

⁵ On July 19, 1993, the President announced a new policy regarding homosexuals in the military, following a policy review of this highly controversial issue by the political branches of the Government. A copy of the Secretary of Defense's directive concerning the new policy is attached for the convenience of the Court. Under the new policy, homosexual conduct is grounds for separation. However, sexual orientation by itself is considered a personal and private matter, and will not be a bar to service entry or continued service unless manifested by homosexual conduct. Further, homosexual conduct is defined under the new policy as a homosexual act, a statement by the service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a service member that he or she is homosexual or bisexual creates a rebuttable presumption that the service member is engaging in homosexual acts, or has a propensity or intent to do so. The service member has the opportunity to present evidence that he or she does not engage in homosexual acts and does not have a propensity or intent to do so, and the evidence on that question will be assessed by the relevant separation authority. The new policy is to become effective on October 1, 1993.

may be made by the political branches, not what that policy should be.

In Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), this Court rejected an equal protection challenge to DOD's policy barring service by persons who commit homosexual acts. This Court, quoting Parker v. Levy, 417 U.S. 733, 743 (1974), stated that "[t]he unique needs of the military, 'a specialized society separate from civilian society,' justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission." 741 F.2d at 1398 (citation omitted). Accordingly, this Court held that the policy was a "rational means of advancing a legitimate, indeed a crucial, interest common to all our armed forces" because, as the Court saw it, "[t]he effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline." Id.

We do not understand Steffan to contest the Navy's ability to discharge individuals on the basis of homosexual acts. See, e.g., Apt. Br. 1-2, 8, 12. Instead, he attempts to avoid the settled law on that issue by arguing that the proceedings leading to his separation were based solely on his statement that he is a homosexual, rather than on evidence of his having engaged in homosexual acts. See, e.g., id. at 8-9. This argument is based on a fundamental misunderstanding of the policy at issue. That policy bars service by persons who the military reasonably concludes have committed or are likely to commit homosexual acts. The basis for the policy, as reflected in DOD Directive 1332, is

that "[t]he presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission" (emphasis added). Thus, the district court correctly concluded that absent a showing by Steffan that he had a commitment to celibate living, "the presumption must be, and it is rational for the Navy to believe, that [he] could one day have acted on his [homosexual propensity] in violation of regulations prohibiting such conduct." See App. 26.

The district court's application of the rational basis test to review the constitutionality of DOD's former policy is in accord with Dronenburg, in which this Court squarely held that an equal protection challenge to the policy must be evaluated pursuant to the rational basis test. 741 F.2d at 1391, 1397-98. Steffan attempts to distinguish the present case from settled law and asks the Court to apply heightened scrutiny in this case on the ground that this case does not involve evidence of specific homosexual acts. But in the context of qualifications for military service, there is no justification for this Court to depart from established law simply because an individual has demonstrated, through his or her statements, a propensity to engage in prohibited acts, rather than having committed individually demonstrable acts in the past. The military's interest in determining who is likely to engage in future homosexual acts while in the military is similar to its interest

in determining who has engaged in particular past homosexual acts. In both situations, the classification of "homosexuals" consists of persons who have a propensity to commit homosexual acts, and whose presence, under Dronenburg, 741 F.2d at 1398, may therefore permissibly be determined to be detrimental to the accomplishment of the military mission.

The district court correctly concluded that DOD's traditional policy passed constitutional muster under the rational basis test because the policy furthered "discipline, morale, good order, a respected system of rank and command, . . . and respect for the privacy interests of both officers and the enlisted." App. 40. Rationality permits the military to adopt and enforce a policy of discharging an individual whose statements or conduct reveals an intent or propensity to engage in homosexual acts. As the Seventh Circuit has held, the military "does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission." Ben-Shalom v. Marsh, 881 F.2d 454, 460-61 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

Finally, the Navy did not violate the APA in denying Steffan a diploma from the Naval Academy. The record shows that the Navy applied its regulations in a proper manner that accorded Steffan ample due process. In processing Steffan for discharge, and in ultimately accepting his resignation, the Navy did not treat him differently from similarly situated midshipmen. Moreover, the

Navy's expeditious processing of Steffan's case was not arbitrary and capricious. Indeed, the district court found that it was "an accommodation to an accomplished young man" designed "to save him the embarrassment and expense of duplicative, longer and more protracted discharge proceedings." App. 16-17 n.11.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE MILITARY'S POLICY REGARDING HOMOSEXUALS COMPORTS WITH EQUAL PROTECTION.

A. Extraordinary Deference Is Due To The Political Branches In Determining The Composition Of The Military Services.

The Constitution confers on the President, in conjunction with Congress, the responsibility for constituting and ordering the Armed Forces in a manner that protects our national security. U.S. Const. Art. II, § 2; Art. I, § 8. In recognition of this direct and critical constitutional mandate, the courts have accorded extraordinary deference to the considered professional judgment of appropriate military officials regarding the proper composition of the Armed Forces. Goldman v. Weinberger, 475 U.S. 503, 509 (1986). The Supreme Court has observed that "[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence" than the "complex, subtle, and professional decisions as to the composition . . . and control of a military force," which are "essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." Rostker v. Goldberg, 453

U.S. 57, 65-66 (1981), quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (emphasis omitted). Thus, whatever standards might apply in civilian contexts, on questions of the appropriate composition and regulation of the Armed Forces, the courts must defer to any rational exercise of political and military judgment.

Under the policy that Steffan challenges, "appropriate military officials" concluded, as a matter of "considered professional judgment," Goldman, 475 U.S. at 509, that "the presence of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." See DOD Directive 1332. This Court's decision in Dronenburg, supra, forecloses debate over whether it is constitutionally permissible for DOD to have concluded that the presence of persons who engage in homosexual acts adversely affects the military mission and, therefore, that service by those persons may be barred. See also Gay Veterans Ass'n v. Secretary of Defense, 850 F.2d 764, 768 (D.C. Cir. 1988). Moreover, every other circuit that has reached the equal protection issue has similarly upheld DOD's policy. See Ben-Shalom v. Marsh, supra; Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984). See also Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992) (substantive due process).

In Dronenburg, this Court, quoting Parker v. Levy, 417 U.S. at 743, stated that "[t]he unique needs of the military, 'a specialized society separate from civilian society,' justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission." 741 F.2d at 1398 (citation omitted). The Court further stated:

[DOD's] policy requiring discharge of those who engage in homosexual conduct serves legitimate state interests which include the maintenance of "discipline, good order and morale[,] . . . mutual trust and confidence among service members, . . . insur[ing] the integrity of the system of rank and command, . . . recruit[ing] and retain[ing] members of the naval service . . . and . . . prevent[ing] breaches of security."

Id. Accordingly, the Court held that the policy was a "rational means of advancing a legitimate, indeed a crucial, interest common to all our armed forces" because, as the Court saw it, "[t]he effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline."

Id. The military's policy also may permissibly be applied to homosexual acts that occur outside the confines of the military base or with non-service members. See Solorio v. United States, 483 U.S. 435 (1987) (military justice system reaches off-base sexual misconduct of service members); Beller v. Middendorf, 632 F.2d 788, 794 (9th Cir. 1980), cert. denied, 454 U.S. 855 (1981) (upholding discharge of member for homosexual acts with non-service member).

We do not understand Steffan to contest the Navy's ability to discharge individuals on the basis of homosexual acts. See, e.g., Apt. Br. 1-2, 8, 12. Instead, he attempts to avoid the

settled law on that issue by arguing that the proceedings leading to his separation were based solely on his statement that he was a homosexual, rather than on evidence of his having engaged in homosexual acts.⁶ See e.g., id. at 8-9. But that argument is based on a fundamental misunderstanding of the policy at issue.

B. The Challenged Classification Affects Persons Who DOD Reasonably Concludes Have Committed Or Are Likely To Commit Homosexual Acts.

1. The district court correctly held, App. 31, that the pertinent classification challenged in this case is persons who the military has reasonably concluded have committed or are likely to commit homosexual acts. DOD construes the policy at issue to apply to persons who, based on their statements, have created a justifiable inference that they either have committed or will commit homosexual acts consistent with those statements. As the district court held, DOD's interpretation and application of its own regulation are reasonable, and must be accepted as the basis for the constitutional analysis. "Any other approach would not be testing the [policy] in light of the purposes [DOD] sought to achieve." Rostker v. Goldberg, 453 U.S. at 75.

DOD's construction of the policy is plainly consistent with the language used in framing it. The policy states: "The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the

⁶ Steffan conceded in the district court -- as he must -- that under Dronenburg the military may proscribe service members from committing homosexual acts. See App. 31.

accomplishment of the military mission." See DOD Directive 1332 (emphasis added). Similarly, the regulatory definition of "homosexual" is linked to homosexual acts and the propensity to commit homosexual acts. See id. ("homosexual" defined as person who "engages in, desires to engage in, or intends to engage in homosexual acts").⁷

Steffan's contention, see Apt. Br. 31, that the relevant classification is unrelated to homosexual conduct is untenable in view of the regulatory language and the Navy's reasonable interpretation. The Seventh Circuit and the Federal Circuit have both held, contrary to Steffan's argument, that the regulations target past and prospective homosexual conduct. See Ben-Shalom v. Marsh, 881 F.2d at 464; Woodward v. United States, 871 F.2d at 1074. As the Seventh Circuit explained:

[A person's admission of homosexuality] is compelling evidence that [he] has in the past and is likely to again engage in [homosexual] conduct. To this extent, therefore, the regulation does not classify . . . based merely upon [homosexual orientation], but upon

⁷ The meaning that DOD attributes to the regulatory term "desire" is informed by its context and by the term "propensity." Pursuant to DOD's interpretation, a service member's expressed "desire" to commit homosexual acts evidences more than an abstract, ephemeral, or suppressible whim. Like acts themselves and like intentions, "desire" in the relevant sense evidences a "propensity," or an "often intense natural inclination," Webster's New Collegiate Dictionary 943 (9th ed. 1990), to commit serious regulatory violations. Absent a credible contrary showing by the member, the military reasonably concludes that a member who expresses a homosexual "desire" will act on the basis of his sexual "propensity." If a member shows that he has no such propensity, the regulations do not mandate his separation. As discussed above, DOD's reasonable interpretation of its own regulations must be accepted as the basis for evaluating Steffan's equal protection challenge. See Rostker, 453 U.S. at 75.

reasonable inferences about . . . probable [homosexual] conduct in the past and in the future.

Ben-Shalom, 881 F.2d at 464 (emphasis added). See also Watkins v. United States Army, 847 F.2d 1329, 1362 (9th Cir. 1988) ("the regulations are targeted at conduct -- past, present, and future, but conduct nonetheless") (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990). But cf. Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992) (plaintiff could state a claim on theory that policy had been applied to status independent of related acts).

Thus, in admitting his homosexuality, Steffan at least indicated that he had a "desire" and "propensity" to commit homosexual acts. See DOD Directive 1332. Absent a contrary showing (or even assertion) by Steffan, it was then reasonable for the Navy to infer, under the applicable policy, that Steffan would likely commit homosexual acts. The district court correctly observed:

[Steffan] has stated his sexual preference for people of the same gender as himself and has thereby demonstrated a propensity to engage in conduct which both parties agree is clearly regulable under Dronenburg. Unless it can be shown that [Steffan] has some commitment to celibate living, the presumption must be, and it is rational for the Navy to believe, that plaintiff could one day have acted on his preferences in violation of regulations prohibiting such conduct.

App. 31.

Steffan errs in asserting, see Apt. Br. 30, that DOD's regulatory inference is impermissible. Instead, "[t]he fact

that. . . persons of 'homosexual orientation' engage in or seek to engage in homosexual conduct is as unremarkable as the fact that . . . persons of 'heterosexual orientation' engage in or seek to engage in heterosexual conduct. To pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd." Watkins, 847 F.2d at 1361 n.19 (Reinhardt, J., dissenting). Of course, not everyone of a particular sexual orientation will necessarily act on that orientation. But it is rational for military authorities to presume that, absent contrary evidence, a person who states without qualification that he is a homosexual is likely to commit homosexual acts.

Steffan's repeated assertion that "no one ever claimed that [he] engaged in homosexual conduct, in or out of uniform, on or off duty," Apt. Br. 2, is somewhat disingenuous. Steffan acknowledges, id. at 4, that discharge proceedings were commenced based on conversations that he initiated with Naval Academy officials after he became aware of an NIS investigation concerning his homosexuality. See also App. 478. That investigation was terminated shortly after, and in light of, Steffan's admissions to Academy officials and his resignation from the Academy. See id. at 469-70. At the time of the inquiry and later, during this litigation, Steffan has consistently refused to answer questions about his sexual conduct on grounds of relevancy and the privilege against self-incrimination; he has never attempted to demonstrate the falsity of the Navy's

regulatory presumption. Id.; Steffan v. Cheney, 920 F.2d 74 (D.C. Cir. 1990). What evidence would have been developed had Steffan's approach to Academy officials and his resignation not pretermitted both the NIS inquiry and the subsequent involuntary discharge proceedings is a matter of speculation. But it would be ironic, to say the least, to hold that precepts of individual liberty required the Navy to continue an unavoidably intrusive investigation into the intimate details of Steffan's personal life rather than accept his statements at face value and act on the basis of reasonable, and unrebutted, administrative inferences therefrom.

Indeed, Steffan's entire case represents an attempt to avoid the consequences of difficult but voluntary and intelligent choices that he made at the time of his resignation. After consulting with civilian counsel, Steffan agreed to resign from the Academy rather than pursue further administrative proceedings. Because he resigned, (i) he avoided further investigation, which might have developed evidence of criminal conduct; (ii) his official transcript indicated that he had "resigned" rather than having been "discharged"; and (iii) his separation documents did not contain a code reflecting that he was a homosexual. App. 90, 98. In return, Steffan agreed to forfeit his right to contest his separation through the full administrative process. Id. at 106. Having made a conscious and rational choice (albeit between unpleasant options) and enjoyed the benefits thereof, Steffan should not now be allowed to avoid

the burdens of his settlement by seeking his diploma and commission through the courts. See Brady v. United States, 397 U.S. 742 (1970) (voluntary guilty plea not invalid merely because made to avoid possibility of death penalty that Court later held could not constitutionally have been imposed). Indeed, it was for this reason that the Secretary denied Steffan's request to withdraw his resignation. App. 95-100, 107. That decision by the Secretary was not arbitrary, capricious, or an abuse of discretion, and it forms an independent basis for denying Steffan relief and affirming the judgment below.⁸

In short, precedent and DOD's reasonable construction of its former policy mandate the conclusion that the relevant classification is persons who the Navy determines have committed or are likely to commit homosexual acts. Steffan had the opportunity to rebut the reasonable inference of homosexual acts. He declined to do so, and the military "need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for

⁸ The district court addressed the question of the "voluntariness" of Steffan's resignation in its order denying the government's motion to dismiss the complaint on standing grounds, which was premised on the theory that, in light of Steffan's resignation, the government did not cause his injury. App. 169-74. In that order, however, the district court simply held that Steffan had alleged sufficient facts to withstand a motion to dismiss. *Id.* at 174. That conclusion does not undermine our submission that the Secretary's decision denying Steffan's request to withdraw his resignation was not arbitrary or capricious. The fact that his resignation might have been induced by the anticipated application of regulations to him does not mean that his resignation was "involuntary" in any legally relevant sense, or that he should be excused from living up to his part of the agreement under which he resigned.

evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here." Ben-Shalom, 881 F.2d at 464. See Department of Navy v. Egan, 484 U.S. 518, 527-530 (1988) (courts must show the "utmost deference" to "[p]redictive judgment[s]" by the Executive Branch in matters relating to the military); cf. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 778-789 (1990) (rebuttable presumptions are valid when "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it'").⁹

2. In Steffan's prior appeal, see supra note 4, this Court held that the district court improperly dismissed his suit based on his refusal to answer deposition questions regarding homosexual conduct. That decision does not affect the equal protection analysis here. The Court observed in that decision that "Steffan is challenging the Navy's administrative determination that he is unfit for continued service because he

⁹ The policy at issue provides that a service member who has committed a homosexual act may, under exceptional circumstances, be retained if he shows that: (1) the act was a departure from his customary behavior; (2) the act under all the circumstances is unlikely to recur; (3) the act was not accomplished by use of force; (4) the member does not have a propensity to commit future acts, as evidenced by homosexual "desire" or "intent"; and (5) the member's continued presence in the military is consistent with the interest of the military. See DOD Directive 1332. Contrary to Steffan's argument, see Apt. Br. 13, this exception does not result in "similarly situated heterosexuals and homosexuals [being treated] differently"; rather, it is wholly consistent with the principle that the military will not retain persons -- homosexuals or heterosexuals -- who it concludes will likely commit future homosexual acts.

stated that he is a homosexual," 920 F.2d at 76 (emphasis added), and held that there was no basis for inquiry into whether Steffan had committed homosexual acts because Steffan's claim did "not put into issue the question whether he engaged in potentially disqualifying conduct." Id. We agree that evidence of specific homosexual acts is not necessary to the resolution of this case, precisely because the Navy was entitled to proceed solely on the basis of its reasonable and unrebutted regulatory presumption that Steffan, based on his statements, had engaged or would engage in homosexual acts and was therefore subject to discharge.¹⁰

¹⁰ The Court commented in a footnote that the Government's rebuttable presumption argument was "not raised in district court [and] finds no support in the record." 920 F.2d at 76 n.*. With respect, we submit that the argument was raised repeatedly in the district court. For example:

[P]laintiff argues that it is irrational for the Secretary of the Navy to presume that admitted homosexuals have a propensity to engage in prohibited homosexual conduct and, as such, should be discharged from the military. Plaintiff has placed the validity of this presumption squarely in issue. What then could be more relevant to know than whether or not the Secretary's presumption holds true in plaintiff's own case? Cf. Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1201 (Fed. Cir. 1987) ("in a civil suit, a party placing facts in issue may not rely upon the fifth amendment to avoid disclosure of such facts and still maintain the suit").

Defendants' Reply Brief In Support Of Its Renewed Motion For Rule 37 Sanctions at 13-14 (Oct. 25, 1989). See also Defendants' Response To Plaintiff's Proposed Orders Of Dismissal at 2-3 (Nov. 14, 1989). In any event, this Court neither analyzed the regulatory language at issue nor purported to decide the question on the previous appeal. The issue has now been addressed by the district court, and is squarely presented here.

3. Contrary to Steffan's suggestion, see Apt. Br. 35 n.25, a regulatory inference of unsuitability based on a service member's admission of homosexuality does not implicate the member's Fifth Amendment right against compulsory self-incrimination. In the first place, Steffan initially voluntarily admitted his homosexuality to several military subordinates. See supra p. 3. Accordingly, the right against compulsory self-incrimination is not implicated. Moreover, as in Orloff v. Willoughby, 345 U.S. 83, 91 (1953), the critical "question is whether [Steffan] can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must [retain] him [in] a post of honor and trust." Like the Supreme Court, this Court should "have no hesitation in answering that question 'No.'" Id. See 10 U.S.C. § 6953 ("Midshipmen at the Naval Academy shall be appointed by the President alone").

4. Steffan also argues that DOD's former policy is an impermissible attempt at "thought control." See Apt. Br. 30. He is wrong. The challenged policy is not concerned with a person's thoughts. Rather, as we have shown, it is concerned with homosexual conduct, and its enforcement is triggered by a member's action (e.g., committing a homosexual act, entering a homosexual marriage, admitting homosexuality) that gives rise to a reasonable inference that the member has committed or will commit homosexual acts. We do not dispute that Steffan, like all service members, was entitled "to keep his innermost thoughts to

himself." See Apt. Br. 35 n.25. Steffan, however, voluntarily divulged not only his "innermost thoughts," but also the likelihood that he would commit prohibited acts when he voluntarily revealed his homosexuality to military subordinates and Naval Academy officials. See supra pp. 3-4.

C. The District Court Correctly Reviewed The Challenged Classification Pursuant To The Rational Basis Test.

The Supreme Court has cautioned against undue reliance on abstract "levels of scrutiny" in evaluating equal protection limitations on decisions made in the special context of qualifications and requirements for military service. Rostker v. Goldberg, 453 U.S. at 69-70. To the extent that such labels are relevant, however, this Court made clear in Dronenburg that DOD's policy regarding service by homosexuals need only be "rationally related to a permissible end" in order to withstand challenge on privacy and equal protection grounds. 741 F.2d at 1398. In Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987), this Court, relying both on Dronenburg and on Bowers v. Hardwick, 478 U.S. 186 (1986), again held that classifications based on homosexuality -- defined as "persons who engage in homosexual conduct" -- do not merit heightened scrutiny. See 822 F.2d at 102-03.

Other courts have similarly rejected arguments that, in the special military context, homosexuals are a suspect or quasi-suspect class entitled to heightened scrutiny from the courts. See, e.g., Ben-Shalom v. Marsh, 881 F.2d at 463-466 (admitted homosexual but no evidence of specific acts); Woodward v. United

States, 871 F.2d at 1076 ("[t]he Navy's challenged practice regarding homosexuals need only be rationally related to a permissible governmental end to pass constitutional muster"); High Tech Gays v. DISCO, 895 F.2d 563, 570-74 (9th Cir. 1990) (DOD security clearances for civilian personnel); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) ("[a] classification based on one's choice of sexual partners is not suspect"). In Pruitt v. Cheney, supra, the Ninth Circuit reiterated that the military's policy regarding homosexuals should be reviewed under a rational basis standard, but instructed the district court on remand to subject the policy to an "active" rationality review that would require DOD to produce objective record evidence, to be weighed by the district court, to support its policy. The Supreme Court's recent decision in Heller v. Doe, 61 USLW 4728, 4730 (U.S. June 24, 1993), however, restates in unmistakable terms the limits of the rational basis inquiry, and makes clear that the Ninth Circuit's decision to make that inquiry more onerous to the Government in this context was simply erroneous. See infra pp. 34-35.

Steffan's reliance on the absence of evidence of specific past homosexual acts is unavailing. The military's interest in determining who might engage in future homosexual acts while in the military is similar to its interest in determining who has engaged in past homosexual acts. In both situations, the classification of "homosexuals" consists of persons who have a propensity to commit homosexual acts, and whose presence, under

Dronenburg, 741 F.2d at 1398, may permissibly be determined to be detrimental to the accomplishment of the military mission. In one category, the propensity has already been acted upon; in the other, the military has a reasonable basis to believe that it will be acted upon. As the Seventh Circuit pointed out in rejecting the argument that an acknowledged homosexual's challenge to DOD's policy should be evaluated under heightened scrutiny because there was no evidence that she had engaged in homosexual acts, "the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future." Ben-Shalom, 881 F.2d at 464.

Furthermore, the Supreme Court has strictly limited the range of classifications to which it has applied heightened scrutiny. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-442 (1985). Suspect classification has been accorded to race, Loving v. Virginia, 388 U.S. 1, 11 (1967); national ancestry and ethnic origin, Korematsu v. United States, 323 U.S. 214, 216 (1944); and alienage, Graham v. Richardson, 403 U.S. 365, 372 (1971). Quasi-suspect status has been accorded to gender, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-724 (1982), and illegitimacy, Lalli v. Lalli, 439 U.S. 259, 265 (1978). But the Supreme Court has refused to accord suspect or quasi-suspect classification to many other groups, such as the elderly, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976), and the mentally retarded, Cleburne, 473 U.S. at.

442. See also Lynq v. Castillo, 477 U.S. 635, 638 (1986) (holding that "[c]lose relatives are not a 'suspect' or 'quasi-suspect' class"); Bowen v. Gilliard, 483 U.S. 587, 601-03 (1987) (declining to apply heightened scrutiny to statutory definition of family unit).

Contrary to Steffan's contentions, Apt. Br. 17, in the military context a classification based on an admission of homosexuality cannot be equated with those classifications that are subject to heightened scrutiny. The military has broader discretion to develop its own rules than would be the case in a civilian context. See, e.g., Rostker, 453 U.S. at 66; Parker v. Levy, 417 U.S. at 756. The classification at issue here targets persons who have engaged in, or are reasonably considered likely to engage in, acts that the military may forbid. The military's use of this classification does not implicate the concerns that have led the courts to apply heightened scrutiny to legislation that burdens groups defined by race, gender, or nationality.

For these reasons, the traditional criteria used in civilian contexts for determining the appropriateness of creating a suspect classification -- a history of invidious discrimination, immutability of the class, and political powerlessness¹¹ -- are unsatisfied or irrelevant here. First, while homosexuals have undoubtedly been subject to discrimination in many contexts, the policy at issue, based as it is on the unique mission and operational needs of the military, is rationally related to

¹¹ See, e.g., Lynq v. Castillo, 477 U.S. at 638.

legitimate military interests. Therefore, the policy is not "invidious" as that term has been used with respect to discrimination based on classifications that have been held to be suspect or quasi-suspect. See Padula, 822 F.2d at 103; Ben-Shalom, 881 F.2d at 465-466.

Second, the question whether homosexual orientation is "immutable" for purposes of equal protection analysis is not presented by this case.¹² The policy at issue affects individuals who engage in or are reasonably considered likely to engage in acts that are explicitly and validly prohibited in the separate military society that they have voluntarily chosen to join. Behavior cannot be said to be wholly immutable in the same sense that applies to characteristics such as race and gender, see High Tech Gays, 895 F.2d at 573; Woodward, 871 F.2d 1076, and the military is entitled to impose on behavior restraints that might not be tolerated in other contexts. See Goldman v. Weinberger, 475 U.S. at 507-10.

Third, this case does not turn on whether homosexuals as a class should be considered to be "politically powerless" as a general matter. Although homosexuals, unlike blacks, women, and

¹² The district court observed that the question whether homosexual orientation is immutable in the legally relevant sense is "difficult to analyze" because "the scientific community is still quite at sea on the causes of homosexuality, its permanence, its prevalence, and its definition." App. 17. Moreover, all characteristics that are wholly or partly "immutable" clearly do not give rise to heightened equal protection scrutiny; "[o]ne need mention in this respect only the aging, the disabled, the mentally ill, and the infirm." Cleburne, 473 U.S. at 445-46; see App. 24-25.

aliens, have not historically been legally disenfranchised, there is no occasion here to consider whether they nevertheless might be considered politically disadvantaged in the same sense or degree in civilian society.¹³ For, as stated above, this case involves the military's use of a classification concerning its own members -- a classification defined by persons who have engaged in, or are reasonably considered likely to engage in, acts that the military may forbid.

In sum, it is well established that, to the extent precise delineation of standards of review is helpful in the military context, see Rostker, 453 U.S. at 69-70, the policy of barring from military service individuals who have engaged in, or are reasonably considered likely to engage in, homosexual acts should be reviewed only for a rational relationship to legitimate government objectives. A case involving professional military judgments about the composition of the Armed Forces is not one in which it would be appropriate for a court to expand the carefully limited classifications that are subject to heightened scrutiny.

¹³ Of course, any group may be unsuccessful in achieving its preferred political outcome on a given issue. But suspect classification is not accorded solely on that ground. As the Supreme Court has stated, "[a]ny minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect." Cleburne, 473 U.S. at 445.

D. The District Court Correctly Upheld DOD's Policy As Rationally Related To A Legitimate Governmental End.

1. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Heller v. Doe, 61 USLW at 4730 (quoting FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993)). Classifications subjected to rational basis review are accorded "a strong presumption of validity," and they must be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller, 61 USLW at 4730. The Government "has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" Heller, *id.* (quoting Beach Communications, 113 S. Ct. at 2102). "'[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." Heller, 61 USLW at 4730 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). Finally, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends [and despite the fact that] 'in practice [the classification] results in some inequality.'" Heller, 47 USLW at 4730 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970), and Lindsley v. Natural

Carbonic Gas Co., 220 U.S. 61, 78 (1911)). See also Heller, 47 USLW at 4730 (accommodation between governmental means and end may be "rough," "illogical," and "unscientific," but it will be sustained under rational basis review so long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification").

This case involves more than the customary deference that is due to policy decisions by the political branches pursuant to the rational basis test. As set forth in section I. A., extraordinary deference is due to a decision involving the composition of the military services. This case involves judicial review over the authority of the political branches in matters involving "national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded [the political branches] greater deference." Rostker, 453 U.S. at 64-65. When promulgating rules for the governance of the military, the political branches are permitted to regulate "both with greater breadth and with greater flexibility" than in the civilian context. Id. at 66 (quoting Parker v. Levy, 417 U.S. at 756). Thus, in deciding questions regarding the appropriate composition of the military services, courts must be "particularly careful not to substitute [their] judgment of what is desirable for that of [the political branches], [nor should courts substitute their] own evaluation of evidence for a reasonable evaluation by the [political branches]." Rostker, 453 U.S. at 68.

2. DOD's policy of discharging all members who, through their acts or statements, demonstrate a propensity to commit homosexual acts is rational because it is designed to protect against what this Court has found to be a reasonable prospect of interference with military effectiveness, while conserving scarce resources and protecting individual privacy. See Dronenburg, supra. As the district court found, military professionals and policy makers could rationally conclude that the policy furthers "discipline, morale, good order, a respected system of rank and command, . . . and respect for the privacy interests of both officers and the enlisted." App. 40.

The primary purpose of the Armed Forces is to prepare for and prevail in combat. That unique purpose makes the military a unique and specialized society characterized by extraordinary responsibility and governed by its own laws, rules, customs and traditions, including numerous restrictions on personal behavior that would not be acceptable outside the military context. Military life is thus fundamentally different from civilian life. See, e.g., Parker v. Levy, 417 U.S. at 743-744. Success in combat requires military units that are characterized by high morale, good order and discipline, and a degree of unit cohesion that is unparalleled elsewhere. Unit cohesion, in turn, involves building bonds of trust and mutual respect among individual service members that make the unit as a whole more effective than the sum of the effectiveness of individual unit members. Those bonds must be built and maintained in a context where service

members must be prepared at all times for world-wide deployments where they may be required to accept living and working conditions that are spartan and primitive, involving forced intimacy and leaving room for little or no privacy. Because of this constant need for readiness, military rules and standards of conduct apply to members of the Armed Forces at all times -- whether on base or off base, on duty or off. See, e.g., Solorio v. United States, 483 U.S. 435 (1987).

Military professionals have concluded that in light of the unique duties of the military and its specialized society, the longstanding prohibition against homosexual conduct in the military context is necessary, and that the presence in the Armed Forces of individuals who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order, discipline, and unit cohesion that are the essence of military capability. In view of that conclusion by those most directly responsible for the ordering of the Nation's military forces, rationality permits the military to adopt and enforce a policy of discharging an individual whose statements reveal such an intent or propensity. As the Seventh Circuit has held, the military "does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission." Ben-Shalom v. Marsh, 881 F.2d at 460-461.

Indeed, rationality plainly permits those with responsibility for the military to prevent or remedy

circumstances that they conclude would adversely affect military preparedness. "[N]othing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops . . . under his command." Greer v. Spock, 424 U.S. 828, 840 (1976). "The [military] need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here." Ben-Shalom, 881 F.2d at 464.

The policy of barring service by persons who evidence their likelihood to engage in homosexual acts by admitting their homosexuality may rationally be thought to serve many legitimate military purposes. If, as military authorities have concluded, morale is damaged and divisiveness among the troops is promoted by the presence of individuals who are likely to commit proscribed acts, the military need not wait until those acts in fact take place before taking steps to maintain an effective fighting force. As this Court said in Dronenburg, "[t]he [military] is not required to produce social science data or the results of controlled experiments" to validate its considered judgment. 741 F.2d at 1398.

The DOD Policy Statement reveals several reasons that may cause such divisiveness. See DOD Directive 1332. First, in assessing possible impairments to military effectiveness, the military leadership is not required to ignore the tensions and

effect on morale that it finds would be caused by the service of persons who have engaged in, or who by their statements exhibit a propensity to engage in, homosexual conduct that many members of the military services, whether rightly or wrongly, find to be disturbing. See, e.g., Dronenburg, 741 F.2d at 1398. The need for good order, discipline, and unit cohesion in the military is unlike anything in civilian society, and military authorities are entitled to consider how these crucial needs will be affected when determining the appropriate composition of the military services. See Rostker, 453 U.S. at 65-66.

Second, there are privacy concerns to be considered. As the district court stated:

In the Military Establishment and for those who attend the Naval Academy, the policy of separating men and women while sleeping, bathing and "using the bathroom" seeks to maintain the privacy of officers and the enlisted when in certain states of undress. The embarrassment of being naked as between the sexes is prevalent because sometimes the other is considered to be a sexual object.

App. 32-33 (footnote omitted). The district court held that it was quite rational for the Navy to conclude that the presence in such circumstances of persons who have committed or are likely to commit homosexual acts would be an intrusion into the privacy of personnel of the same sex because of "fear or embarrassment that they are being viewed as sexual objects." Id. at 33. See Cameron, Cameron & Proctor, Homosexuals in the Armed Forces, 62 Psychological Reports 211, 215-16 (1988). This concern over privacy issues, which implicates military cohesion and morale,

provides a constitutionally permissible basis for the policy before this Court.

In addition, DOD could also rationally conclude that a ban that did not prohibit service by those who are likely to engage in homosexual acts might adversely affect retention and recruitment, which could have a serious impact on our all-volunteer military force. Cf. Cameron, Cameron & Proctor, 62 Psychological Reports at 214-15 (survey suggests that over 33% of heterosexuals would advise relatives against serving in the military if homosexuals were permitted to serve).

Moreover, the use of reliable evidence such as the admission of a person that he or she is a homosexual prevents the military from having "to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct" in order to enforce its ban on such conduct. Ben-Shalom, 881 F.2d at 464. Thus, the privacy of service members is not unnecessarily invaded by unavoidably intrusive investigations. See id.

This Court may also take notice of the testimony given during extensive hearings before Congress in the recent reconsideration of the military's policy regarding homosexuals. In particular, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff ("JCS"), the Vice Chairman of the JCS, and each service chief supported with forceful and unambiguous testimony the policy of discharging persons who commit, or have a propensity to commit, homosexual acts. See Hearing Before The Senate Committee On Armed Services To Receive Testimony On DOD

Policy On The Service Of Gay Men And Lesbians In The Armed Forces, 103rd Cong., 1st Sess. at 38-39, 78, 88, 113, 134 (July 20, 1993).¹⁴ Indeed, the reasons that this Court and other courts have accepted as sufficient to support the military's former homosexual discharge policy were discussed at length in this hearing and explicitly ratified by political and military officials who are entrusted under the Constitution with establishing suitability criteria for service in the Armed Forces.¹⁵ It would be remarkable to conclude that such policy considerations, so recently reaffirmed at the highest levels of the military after thorough review, are constitutionally irrational.

Of course, all of the concerns underlying the DOD policy will not apply to all individuals in all instances. But that fact does not mean that the policy fails to satisfy the rational basis test. As then-Judge Kennedy explained in Beller v. Middendorf, 632 F.2d at 808-09 n.20: "Nearly any statute which classifies people may be irrational as applied in particular

¹⁴ The above-cited transcript of the Senate Armed Services Committee hearing has not yet been issued in final form. We will submit a copy of the published transcript when it is issued.

¹⁵ See, e.g., Hearing before Senate Committee On Armed Services (July 20, 1993) at 16 (policy promotes morale in all-volunteer military); id. at 17, 25, 28 (policy respects privacy of service members who, because of unique nature of military service, must live in close quarters); id. at 25, 30, 31, 33, 37 (policy promotes unit cohesion); id. at 31, 35 (policy promotes military discipline, dedication, and selfless service); id. at 53 (policy promotes recruiting ability); id. at 54-55 (policy promotes combat readiness); id. at 88 (policy promotes compliance with regulatory and statutory standards of conduct); id. at 129 (policy promotes acceptability of service in Armed Forces).

cases. See Weinberger v. Salfi, 422 U.S. 749 (1975). Discharge of [a given individual] would be rational, under minimal scrutiny, not because [his] particular case[] present[s] the dangers which justify Navy policy, but instead because the general policy . . . is rational."

In sum, DOD's means of implementing the policy in question satisfies the rational relation test because legitimate policy reasons support both a military decision to exclude from service individuals who engage in homosexual acts, and an implementing regulatory scheme that reasonably infers prohibited acts from a member's admission of homosexuality.¹⁶ Steffan has certainly failed to satisfy his burden of negating every conceivable rational basis that could support DOD's policy. See Beach Communications, 113 S. Ct. at 2102.

II.

THE DISTRICT COURT CORRECTLY HELD THAT THE NAVY'S APPLICATION OF ITS REGULATIONS DID NOT VIOLATE THE APA.

Finally, Steffan argues that the Navy's decision to deny him a Naval Academy diploma violated the APA in several respects. See Apt. Br. 33-35. On the contrary, the district court's conclusion that the Navy acted pursuant to its regulations and in

¹⁶ The district court also upheld DOD's policy on the ground that it promoted a healthy military force. See App. 33-40. Although it was consistent with the proper analytic framework for the district court to find that this factor was conceivably a rational basis for the policy, it is not a basis relied upon by DOD to support the policy. See id. at 2299.

accordance with law is correct and supported by ample record evidence.¹⁷

1. Steffan contends that the Navy acted arbitrarily and capriciously in its allegedly hasty processing of his discharge. See Apt. Br. 34. He complains that the Navy improperly subjected him to a "bum's rush" to the extent it: (1) gave him "24 hours' notice" prior to the Performance Board hearing; and (2) "processed [him] for discharge in one week." See id. Steffan's assertions are misleading in the extreme, and his argument lacks merit.

First, although Steffan correctly states that he received about 24 hours' notice prior to the Performance Board hearing, he fails to mention that: (1) the Navy notified him in writing that he was entitled to "72 or more hours" advance notice; and (2) he expressly "elect[ed] to waive this requirement and appear before the Performance Board as scheduled" App. 475. Under these circumstances, it is disingenuous for Steffan to complain that his notice was abbreviated.

Second, contrary to Steffan's assertion, the discharge process took over 60 days, not one week. As discussed supra pp.

¹⁷ To receive a diploma from the Naval Academy, a midshipman must, inter alia, complete the academic requirements for graduation. See 10 U.S.C. §§ 6959(a), 6967; United States Naval Academy Instruction ("USNAINST") 1531.16S, Encl. 1 (Nov. 27, 1984). Steffan resigned from the Naval Academy prior to completing the academic year and prior to taking his final examinations. He is not, therefore, academically eligible to receive a diploma, nor is he suitable, under the regulations barring homosexuals, for reinstatement as a midshipman to complete the requirements for graduation. See 10 U.S.C. § 6967; USNAINST 1531.16S, Encl. 1 (Nov. 27, 1984).

3-4, the discharge process commenced on March 23, 1987 when, after learning that the NIS was investigating his homosexuality, Steffan approached the Commandant and admitted that he was homosexual. The discharge process continued until May 28, 1987, when the Secretary of the Navy accepted Steffan's resignation. See App. 96. The process thus took over two months, despite Steffan's apparent effort to expedite it in an attempt to forestall the NIS investigation that was already in progress. See id. at 470.

The record supports the conclusion that Steffan desired to expedite the discharge process. He not only waived his right to 72 hours' notice prior to the Performance Board, he also did not dispute the Commandant's written statement that Steffan desired to "leave the Naval Academy as soon as possible" if he were not permitted to graduate. See App. 478-79. Although Steffan advised the Academic Board on April 1, 1987 that he wished to complete the course of study and receive a diploma, later that day, after again consulting with civilian counsel, he submitted his qualified resignation. He did this despite being advised, both orally and in writing, that a qualified resignation would preclude him from appealing his separation. In light of this record evidence, the district court concluded that the Navy's decision to process Steffan's case in a timely fashion was an "accommodation to an accomplished young man" designed "to save him the embarrassment and expense of duplicative, longer and more protracted discharge proceedings." Id. at 16-17 n.11.

2. Steffan also contends that the Navy unlawfully denied him a diploma while allegedly permitting other similarly situated midshipman to graduate. See Apt. Br. 34. The record does not support this contention. Steffan presented no evidence that other homosexual midshipmen in his class were permitted to graduate. Instead, he submitted evidence that midshipmen who were not commissionable due to physical or psychological disabilities were permitted to graduate. Steffan's attempt to equate the propensity to commit homosexual acts with medical disabilities must be rejected, because it ignores the fact that, in DOD's professional judgment, the presence in the military environment of persons "who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." DOD Directive 1332. Although a midshipman's medical disability may prevent him from receiving a commission, his continued presence at the Naval Academy -- unlike Steffan's -- would not necessarily "adversely affect[] the ability of the [Navy] to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; . . . [and] to maintain the public acceptability of military service" Id.

Steffan argues that "[o]nce an exception is made for the one group [*i.e.*, midshipmen with medical disabilities], fairness, equity, and the Constitution require that gay and lesbian midshipmen be permitted to complete their studies as well." Apt.

Br. 34. Steffan's argument, at bottom, invites this Court to dismiss as insignificant the serious problems that DOD has determined will occur if the military retains persons who, through their acts or statements, reveal a propensity to engage in homosexual conduct. The Supreme Court has admonished that when military staffing decisions have been made on the basis of professional judgments as to practical problems that might otherwise arise, "[i]t is not for [the courts] to dismiss such problems as insignificant in the context of military preparedness." See Rostker, 453 U.S. at 81. We note, moreover, that DOD is entitled, in the exercise of its broad constitutional authority over the military, "to focus on the question of military need rather than 'equity.'" Id. at 80.

Steffan also argues that the Navy violated its own policy by separating him for a condition that did not exist prior to his entry in to the naval service. See Apt. Br. 35. This argument may be summarily rejected. First, as a factual matter, the psychologist who examined Steffan found that his homosexuality "pre-dates his tenure at the Naval Academy." App. 480. Second, and in any event, DOD's homosexual policy does not permit continued service for members who, like Steffan, have an avowed propensity to commit homosexual acts. See DOD Directive 1332.

In short, and as discussed above, DOD's policy regarding service by homosexuals comports with equal protection principles. The Navy applies the policy to midshipmen -- and applied it to Steffan -- in a consistent and even-handed manner. Steffan's

attempt to renew his equal protection challenge in the guise of an APA claim must therefore be rejected.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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JULY 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July 1993, I served the foregoing Brief For The Appellees upon counsel by causing copies to be delivered by overnight delivery service to Marc Wolinsky, Esq. and copies to be mailed, first-class, postage prepaid, to the remaining counsel listed below:

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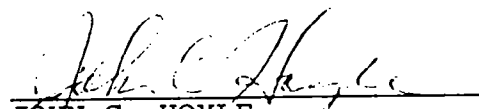
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A D D E N D U M

DOD MEMORANDUM OF JULY 19, 1993 ESTABLISHING
POLICY AND POLICY GUIDELINES ON HOMOSEXUAL
CONDUCT IN THE ARMED FORCES

JUL 19 '93 12:16

TEL: FROM OASD-PA-DDI

Jul 19.93 15:10 No.001 P.03
PAGE.003



THE SECRETARY OF DEFENSE
WASHINGTON, THE DISTRICT OF COLUMBIA

July 19, 1993

MEMORANDUM FOR THE SECRETARY OF THE ARMY
SECRETARY OF THE NAVY
SECRETARY OF THE AIR FORCE
CHAIRMAN, JOINT CHIEFS OF STAFF -

SUBJECT: Policy on Homosexual Conduct in the Armed Forces

On January 29, 1993, the President directed me to review DoD policy on homosexuals in the military. The President further directed that the DoD policy be "practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our armed forces must maintain."

An extensive review was conducted. I have paid careful attention to the hearings that have been held by both the House and Senate Armed Services Committees, conferred with the Joint Chiefs and acting Secretaries of the Military Departments and considered recommendations of a working group of senior officers in the Department of Defense and those of the Rand Corporation.

The Department of Defense has long held that, as a general rule, homosexuality is incompatible with military service because it interferes with the factors critical to combat effectiveness, including unit morale, unit cohesion and individual privacy. Nevertheless, the Department of Defense also recognizes that individuals with a homosexual orientation have served with distinction in the armed services of the United States.

Therefore, it is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct. Homosexual conduct will be grounds for separation from the military services. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.

I direct the following:

Applicants for military service will not be asked or required to reveal their sexual orientation. Applicants will be informed of accession and separation policy.

Servicemembers will be separated for homosexual conduct.

JUL 19 '93 12:19

TEL:
FROM OASD-PA-UUI

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Commanders and investigating agencies will not initiate inquiries or investigations solely to determine a member's sexual orientation. Servicemembers will not be asked or required to reveal their sexual orientation. However, commanders will continue to initiate inquiries or investigations, as appropriate, when there is credible information that a basis for discharge or disciplinary action exists. Authority to initiate inquiries and investigations involving homosexual conduct shall be limited to commanders. Commanders will consider, in allocating scarce investigative resources, that sexual orientation is a personal and private matter. They will investigate allegations of violations of the Uniform Code of Military Justice in an even-handed manner without regard to whether the conduct alleged is heterosexual or homosexual or whether it occurs on-base or off-base. Commanders remain responsible for ensuring that investigations are conducted properly and that any abuse of authority is addressed.

The constraints of military service require servicemembers to keep certain aspects of their personal lives private for the benefit of the group. Our personnel policies will be clearly stated and implemented in accordance with due process of law.

Commanders remain responsible for maintaining good order and discipline. Harassment or violence against other servicemembers will not be tolerated.

Homosexual conduct is a homosexual act, a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

A statement by a servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts or has a propensity or intent to do so. The servicemember has the opportunity to present evidence that he does not engage in homosexual acts and does not have a propensity or intent to do so. The evidence will be assessed by the relevant separation authority.

A homosexual act includes any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires or any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts. Sexual orientation is a sexual attraction to individuals of a particular sex.

The interim policy and administrative separation procedures that I established on February 3, 1993, will remain in effect until October 1, 1993. Secretaries of the Military Departments and responsible officials within the Office of the Secretary of

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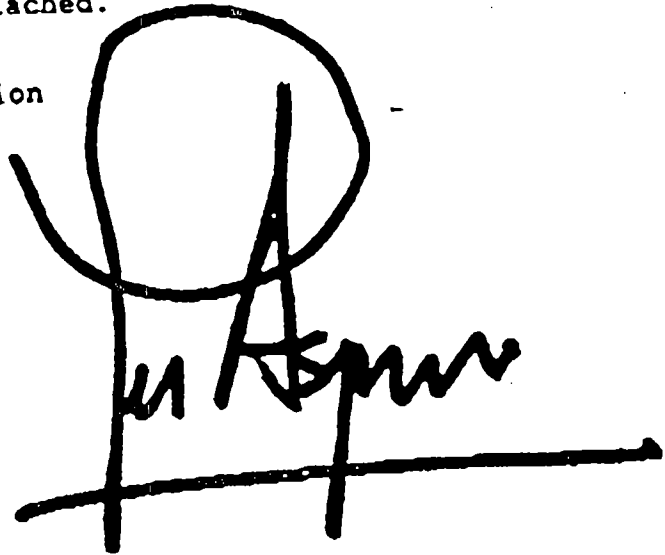
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Defense shall, by October 1, 1993, take such actions as may be necessary to carry out the purposes of this directive. Secretaries of the Military Departments will ensure that all members of the armed forces are aware of their specific responsibilities in carrying out this new policy. This memorandum creates no substantive or procedural rights. Any changes to existing policies shall be prospective only.

Policy Guidelines are attached.

.. cc: Secretary of Transportation

A large, stylized handwritten signature in black ink. The signature appears to be "J. A. Spruill". It features a large, circular loop at the top, followed by a vertical line, and then a series of horizontal and diagonal strokes that form the rest of the name. A thick horizontal line is drawn across the bottom of the signature.

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FROM OHSD-PH-DDI

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POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES

Summary of Policy

• Accession Policy

- Applicants for military service will no longer be asked or required to reveal if they are homosexual or bisexual, but applicants will be informed of the conduct that is proscribed for members of the armed forces, including homosexual conduct.

• Discharge Policy

- Sexual orientation will not be a bar to service unless manifested by homosexual conduct. The military will discharge members who engage in homosexual conduct, which is defined as a homosexual act, a statement that the member is homosexual or bisexual, or a marriage or attempted marriage to someone of the same gender.

• Investigations Policy

- No investigations or inquiries will be conducted solely to determine a servicemember's sexual orientation. Commanders will initiate inquiries or investigations when there is credible information that a basis for discharge or disciplinary action exists. Sexual orientation, absent credible information that a crime has been committed, will not be the subject of a criminal investigation. An allegation or statement by another that a servicemember is a homosexual, alone, is not grounds for either a criminal investigation or a commander's inquiry.

Activities

- Bodily contact between servicemembers of the same sex that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts (e.g., handholding or kissing in most circumstances) will be sufficient to initiate separation.
- Activities such as association with known homosexuals, presence at a gay bar, possessing or reading homosexual publications, or marching in a gay rights rally in civilian clothes will not, in and of themselves, constitute credible information that would provide a

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basis for initiating an investigation or serve as the basis for an administrative discharge under this policy.

The listing by a servicemember of someone of the same gender as the person to be contacted in case of emergency, as an insurance beneficiary or in a similar context, does not provide a basis for separation or further investigation.

- Speech within the context of priest-penitent, husband-wife or attorney-client communications remains privileged.

Off-Base Conduct

- No distinction will be made between off-base and on-base conduct.
- From the time a member joins the service until discharge, the servicemember's duty and commitment to the unit is a 24 hour-a-day, seven-day-a-week obligation. Military members are required to comply with both the UCMJ, which is federal law, and military regulations at all times and in all places. Unacceptable conduct, homosexual or heterosexual, is not excused because the servicemember is not "at work."

Investigations and Inquiries

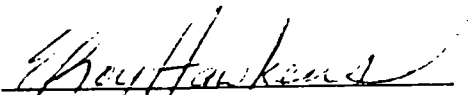
- Neither investigations nor inquiries will be conducted solely to determine an individual's sexual orientation.
- Commanders can initiate investigations into alleged homosexual conduct when there is credible information of homosexual acts, prohibited statements or homosexual marriage.
- Commanders will exercise sound discretion regarding when credible information exists, and will evaluate the information's source and all attendant circumstances to assess whether the information supports a reasonable belief that a servicemember has engaged in proscribed homosexual conduct. Commanders, not investigators, determine when sufficient credible information exists to justify a detail of investigative resources to look into allegations.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties And Amici. All parties, intervenors, and amici appearing below and in this Court are listed in Appellant's Brief.

B. Rulings Under Review. References to the rulings below appear in Appellant's Brief.

C. Related Cases. Related cases appear in the Appellant's Brief.


E. ROY HAWKENS, Attorney