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Steffan

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 REHEARING EN BANC

MOTION FOR LEAVE TO FILE AND
TO PARTICIPATE OUT OF TIME AND
TO PARTICIPATE AS AMICUS CURIAE AND
TO FILE THE ATTACHED BRIEF

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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.

Pursuant to Rule 29, FRAP, and Circuit Rule 29, the Judge Advocates Association seeks leave to file and to participate out of time and leave to participate as *Amicus Curiae* and to file the attached brief in support of Defendant-Appellees. The Association will be represented by the undersigned counsel.

The Judge Advocates Association is comprised of active duty and retired military lawyers and civilian practitioners of military law. Indeed, among them, for example, the four counsel on this brief have over 120 years of military experience.

As military lawyers, judge advocates perform a legal mission within the armed forces as well as the duties common to all Army, Navy, Air Force, and Marine Corps officers. Military lawyers stand at the precise intersection of law and policy and the military mission. From this unique vantage point, military

lawyers see firsthand the impact of laws and policies on troops, commanders, and the military mission. Throughout their careers, in peace and war, in garrison or posted with forward-deployed troops, judge advocates play an integral role in advising commanders on all issues regarding the maintenance of good order, discipline, and morale. Judge advocates also advocate on behalf of soldiers, sailors, airmen, and Marines. Judge advocates know firsthand from their professional experience--as military prosecutors, defense counsel, appellate counsel, recorders for administrative boards, and judges--in short, from their presence and participation at every critical point in the personnel system--the repercussions military personnel policies can have for individual servicemembers, their units, their missions, and the armed forces as a whole.

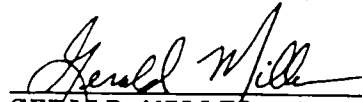
This unique perspective of military lawyers, and their wealth of professional experience with how policies, especially military personnel policies, affect the troops, commanders, and units on the ground, is relevant to the issues in the instant case. Indeed, the Judge Advocates Association believes this information--in essence, the soldier's story--is critical to resolving Steffan's challenges to the military's homosexual exclusion policy appropriately. As military lawyers, our clients--soldiers, sailors, airmen, and Marines--are concerned that, in the crescendo of discussion over individual and group rights for homosexuals, the voice of the soldier's everyday experience, the realities of life in the service, the press of

the military mission, may be drowned out.

The Judge Advocates Association files this brief to ensure servicemembers have the opportunity to be heard on a policy issue that affects them most of all. *Amicus* has coordinated with other *amici* participating on behalf of Defendant-Appellees and is assured that the unique perspective brought to this court by The Judge Advocates Association will not be addressed elsewhere. Thus, the Judge Advocates Association respectfully seeks leave to file and leave to participate out of time, leave to participate as *Amicus Curiae*, and leave to file the attached brief on behalf of The Judge Advocates Association.

Washington, D.C.
March 25, 1994

Respectfully submitted,



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To be argued May 11, 1994

No. 91-5409

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Joseph C. Steffan,

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Defendants-Appellees.

ON REHEARING EN BANC

BRIEF FOR THE JUDGE ADVOCATES ASSOCIATION,
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CERTIFICATE AS TO PARTIES,
RULINGS AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), I certify as follows:

A. *Parties and Amici*

The parties and amici are those listed in Brief of Plaintiff-Appellant and Brief of Defendants-Appellees. This *Amicus*, the Judge Advocates Association is a private organization comprised of active duty and retired military lawyers and civilian practitioners of military law. Indeed, among them, for example, the four counsel on this brief have over 120 years of military experience.

As military lawyers, judge advocates perform a legal mission within the armed forces as well as other duties common to all Army, Navy, Air Force, and Marine Corps officers. Military lawyers stand at the precise intersection of law and policy and the military mission. From this unique vantage point, military lawyers see firsthand the impact of laws and policies on troops, commanders, and the military mission. Throughout their careers, in peace and war, in garrison or posted with forward-deployed troops, judge advocates play an integral role in advising commanders on all issues regarding the maintenance of good order, discipline, and morale. Judge advocates also advocate on behalf of soldiers, sailors, airmen, and Marines. Judge advocates know firsthand from their professional experience--as military prosecutors, defense counsel, appellate counsel, recorders for administrative boards, and judges--in short, from their presence

and participation at every critical point in the personnel system--the repercussions military personnel policies can have for individual servicemembers, their units, their missions, and the armed forces as a whole.

This unique perspective of military lawyers, and their wealth of professional experience with how policies, especially military personnel policies, affect the troops, commanders, and units on the ground, is relevant to the issues in the instant case. Indeed, the Judge Advocates Association believes this information--in essence, the soldier's story--is critical to resolving Steffan's challenges to the military's homosexual exclusion policy appropriately. As military lawyers, our clients--soldiers, sailors, airmen, and Marines--are concerned that, in the crescendo of discussion over individual and group rights for homosexuals, the voice of the soldier's everyday experience, the realities of life in the service, the press of the military mission, may be drowned out.

The Judge Advocates Association files this brief to ensure servicemembers have the opportunity to be heard on a policy issue that affects them most of all. *Amicus* has coordinated with other *amici* participating on behalf of Defendants-Appellees, and with Defendants-Appellees, and is assured that the unique perspective brought to this court by the Judge Advocates Association will not be addressed elsewhere.

The Judge Advocates Association has issued no debt securities or shares to the public.

B. *Rulings Under Review*

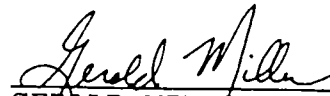
The rulings under review are set out in Brief for Plaintiff-Appellant.

C. *Related Cases*

Related cases are set out in Brief for Plaintiff-Appellant.

Dated: Washington, D.C.
March 25, 1994

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Addendum of Pertinent Regulations

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Amicus addresses: (1) whether the facts of military life constitute reasonably conceivable bases for excluding homosexuals from service; and, (2) whether homosexuality presents risks to combat readiness that are properly cognizable and which substantiate the policy choice to exclude homosexuals from service.

STATEMENT OF THE CASE

Amicus adopts the Secretary of Defense's Statement of the Case.

STATEMENT OF THE FACTS

Amicus adopts the Secretary of Defense's Statement of the Facts.

SUMMARY OF THE ARGUMENT

The burden of proof is upon Steffan. "A statute is presumed constitutional . . . and the 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 v. Doe*, 113 S. Ct. 2637, 2643 (1993). Indeed, the legislative arrangement must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for [it]." *Id.* at 2642.

Steffan fails to meet his burden of proof because, quite simply, he studiously avoids it. First, he creates a legal fiction that "status" and conduct are a dichotomy, rather than a continuum in homosexuality. Then, after claiming to dispose of

any issue of homosexual conduct--which conduct he concedes is detrimental to the military, *Steffan v. Aspin*, 8 F.3d 57, 63 (D.C. Cir. 1993)--Steffan declares the military's policy is wholly an expression of private bias. Finally, because he assumes the question of private bias, Steffan fails to apply the test for private bias. The test is whether the policy is based on "mere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable [in determining enlistment criteria for military service]*." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).

In determining what factors are cognizable in setting military enlistment criteria, there can be no more authoritative source than our nation's senior military leaders and the Congress exercising its constitutional authority under Article I, Section 8. Indeed, "ultimate responsibility for [the military] is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1970). The potential result of departing from this standard is severe. As the Supreme Court strongly has counseled, it is this very "power of oversight and control of the military force by elected representatives and officials which underlies our entire constitutional system." *Id.*

To avoid this deferential standard, Steffan simply raises the flag of "private bias." He pronounces the military's policy entails no degree of military expertise. Brief of Appellant at 24. He argues that the views of veterans are not based on their

extensive military experience in war and peace or on their mature, and personal, understanding of discipline, good order, and morale that means life or death on the battlefield. Rather, these are dismissed blithely as lies and hate--as "private bias."

The law holds otherwise. Applying *Cleburne* to the military's homosexual exclusion policy, it stands. The policy is based on sound military and congressional conclusions regarding the impact of homosexuality within the armed forces, substantiated by relevant facts.

Clearly, the military is not required even to articulate the basis for its common sense policy. *Heller*, 113 S. Ct. at 2642. Nevertheless, the military has advanced several rationales for excluding homosexuals. The importance, or relative weight, of these separate rationales may vary over time and circumstances. They may not each play a role in every situation. As the basis for a broad policy choice, however, the convergence of these several critical military concerns certainly supports the determination that homosexuality is incompatible with military service. *Dep't of Defense Dir. 1332.14, H.1.c.(2), 32 C.F.R., Part 41, Appendix A (1982) [hereafter DoD Dir.]*; *S. Rep. No. 103-112, 103d Cong., 1st Sess., at 293 [hereafter S. Rep.]*; *H. Rep. No. 103-200, 103d Cong., 1st Sess., at 287 [hereafter H. Rep.]*.

The military need not try to fine tune policies to minimize risk to combat readiness. Rather, it can elect a solution that avoids risk altogether. *Ben-Shalom v. Marsh*, 881 F.2d 454, 460-61, (7th Cir. 1989), *cert. den'd*, 494 U.S. 1004 (1990). This is

all the homosexual exclusion policy represents: the policy judgment that it is better--more efficient, effective, and fairer--to exclude homosexuals than to risk the potential detrimental effects of homosexual conduct within the military. Steffan has not negated this policy choice, nor can he. The military's policy choice stands.

ARGUMENT

I. The defining feature of homosexuality is the propensity for homosexual conduct.

Steffan wrongly equates military judgments about the likelihood and results of defining sexual conduct of a class with prejudgment of the *individual*. Policymakers, particularly when what is at stake is maintaining an "efficient and easily administered system of raising armies," *Ben-Shalom*, 881 F.2d at 462, whose "primary business . . . [is] to fight or be ready to fight wars," *Toth v. Quarles*, 350 U.S. 11, 17 (1955), do not make decisions based on any individual. Policymakers must rely on classwide presumptions, and they are entitled to make presumptions knowing fully well not every individual subject to the rule will fit the presumption. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 599-601 (1987).

Clearly, in regard to homosexuality, "individuals in the group . . . have distinguishing characteristics relevant to interests the [military and the Congress have] the authority to implement." *Cleburne*, 473 U.S. at 441. The characteristic that distinguishes homosexuals from heterosexuals is the propensity of homosexuals to engage in homosexual conduct. This is not, as

Steffan argues, an "irrebuttable presumption erected by the military." Brief of Appellant at 29. It is fact, and Steffan has not attempted to show otherwise. He simply attempts to evade this fact by claiming there are, or may be, exceptions. But the reality of policymaking is that "[n]early any statute which classifies people may be irrational as applied in particular cases." *Beller v. Middendorf*, 632 F.2d 788, 808, n.20 (9th Cir. 1980). Further, "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. . . . Perfection in making the necessary classifications is neither possible nor necessary." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981).

While Steffan, with numerous other plaintiffs, concedes the deleterious effect of homosexual conduct within the armed forces, *Steffan v. Cheney*, 733 F. Supp. 121, 126 (D.D.C. 1989), *rev'd* 920 F.2d 74 (D.C. Cir. 1990), Steffan presents no evidence that homosexual conduct is only a remote possibility in the homosexual community, nor does such evidence exist.

The facts of life are that homosexuals, even Steffan, are likely over time to engage in homosexual conduct. While Steffan attempts to create a legal fiction regarding his and others' homosexuality, Steffan himself proves the common sense proposition that, as a class, homosexuals will engage in conduct that presents a variety of risks to military unit cohesion. Indeed, Steffan himself argued below that invoking his Fifth Amendment privilege was warranted because his testimony would

subject him to prosecution for sodomy. *Id.*

Such legal particulars may be *de rigueur* inside the courtroom, but, in the crucible of the real world of warfighting, these analytical gymnastics are patently absurd. The status-conduct dichotomy urged by Steffan is nothing more than the politics of pretending and it has no place in decisions ultimately affecting whether servicemembers live or die in the next battle. A nice, philosophical distinction between status and conduct is difficult in theory and unrecognizable in reality. To constitute a workable *policy premise*--as opposed to a passable *legal construct*--the status-conduct dichotomy urged by Steffan requires either *factual celibacy* on the part of homosexuals or *deliberate ignorance* of the facts on the part of the military.

The first is unrealistic and the second, as Steffan concedes, is unacceptable. No amount of semantic gyrations, campaign rhetoric, or political wrangling can change the real probability that homosexuals, as a characteristic of a group, will engage in homosexual conduct and that such conduct poses a variety of substantial risks to unit cohesion and combat readiness. The focus of the policy is the effect of *homosexuality*--not the effect of any given homosexual individual--on unit cohesion and hence on combat readiness.¹/ Even if

¹ Cf. Steve Zeeland, *Barracks Buddies and Soldier Lovers* (1993):

Z: When you joined [the Army] you knew that homosexuality is prohibited in the military. Did you know that you were gay at the time?

(continued...)

Steffan could reliably predict his own sexual proclivities, it is doubtful he can speak for others.

II. Homosexuality presents risks to combat readiness that are properly cognizable and which substantiate the policy choice to exclude homosexuals from service.

A. The Congress has set out factors that are properly cognizable in military personnel policy decisions.

The Congress, exercising its constitutional authority under Article I, Section 8, identified several factors relevant to military enlistment criteria. 10 U.S.C. sec. 654. These factors are, broadly:

The primary purpose of the Armed Forces is to prepare for and to prevail in combat should the need arise.

Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

Military personnel policies must facilitate assignments and world-wide deployment, and must reflect the conditions under which servicemembers must live.

The Armed Forces must maintain personnel policies that exclude persons whose presence in the Armed Forces would create an unacceptable risk to the military's high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

There can be no debate whether these factors properly are cognizable in determining military personnel policy. These findings, and the intense national debate that preceded them, evidence the constitutional scheme whereby the military is

¹(...continued)

R: Yeah. . . . I just thought, well, you know, yeah, the Army doesn't like it. So what if they have one?

Id. at 51.

accountable to those who are accountable to the American people. This court has no charter to interject itself into that constitutional scheme.

B. Military policy has set out factors that are properly cognizable in personnel decisions.

The nation's military leaders likewise have identified several factors relevant to deciding enlistment criteria in regard to homosexuals. DoD Dir. These factors are ratified by the overarching congressional findings. Moreover, these factors substantiate the conclusions that underlie the military's policy choice to exclude homosexuals. These factors are:

1. Maintain Discipline, Good Order, and Morale.

The abiding fact of military life is that, in a moment, the soldier, sailor, airman, or Marine can be ordered into long-term, high-stress, life-threatening situations where privacy is at a minimum and discipline is decisive. For the servicemember, more than for anyone else, "[t]he facts of war are often in total opposition to the facts of peace." M. Watson, *Chief of Staff: Pre-War Plans and Preparations*, 12 (1950). Moreover, servicemembers live--and die--by the creed that "the inescapable demands of military discipline and obedience cannot be taught on battlefields." *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

Many veterans have spent the better part of their lives under the hard strictures of military discipline. They accepted these hardships because they knew it made the American armed forces the best, and they knew that, in turn, maximized their chances to live and see their buddies live. Veterans are frankly

dismayed at the sometimes cavalier dismissal of military concerns for discipline, good order, and morale. These concerns are "[a]t the heart of every successful military force . . . [a military] which lacks [them] cannot hope to succeed . . . and the nation must necessarily fail in battle." *United States v. Voorhees*, 16 C.M.R. 83, 106-107 (C.M.A. 1954) (Latimer, J., concurring in part and dissenting in part).

If the military fails to vouchsafe the discipline, good order, and morale of the armed forces, it breaches its "sacred responsibilities to the sons and daughters of this nation who are entrusted to [its] care." Vuono, *Training and the Army of the 1990s*, 1 Mil. Rev. 2 (1991) at 4-5. These concerns, in the judgment of those who serve, literally are worth dying for.

Steffan ignores the impact of homosexuality on discipline, good order, and morale by using his construct of "status" to claim he need not address the proposition that, over time, most homosexuals would engage in a variety of homosexual conduct and that homosexual conduct has potential adverse consequences for unit cohesion.^{2/} To argue that most homosexuals are celibate is

² Homosexual sexual practices include oral and anal sodomy. oral-anal contact (called "rimming"), anal-fist contact (called "fisting"), and shared "sex toys." Secondary homosexual sexual practices include rectal insertion of objects and urination on or into body cavities of the partner. E.g., Guinan, *Heterosexual and Homosexual Patients with [AIDS]*, 100 *Annals of Internal Med.* 213-18 (1984); Ildefonso, *Oral Sex as a Risk Factor for Chlamydia-Negative Ureaplasma-Negative Nongonococcal Urethritis*, 15 *Sex. Trans. Diseases* 100-02 (1988); Walters, *Sexual Transmission of Hepatitis A in Lesbians*, 256 *J.A.M.A.* 594 (1986); St. Lawrence, *Differences in Gay Men's AIDS Risk Knowledge and Behavior Patterns in High and Low AIDS Prevalence Cities*, 104 (continued...)

unreal. Reams of literature show that homosexuals do indeed engage in homosexual conduct and that the potential for this conduct is not remote. But neither veterans nor this court need studies to prove what common sense makes perfectly obvious.

As one activist pointedly remarked, homosexuals are not fighting for the "right to be celibate." *Gays and the Military*, Newsweek (Feb. 1, 1993) at 53 [hereafter Newsweek]. Indeed, the concept of monogamy--much less celibacy--has been rejected by some homosexuals as an expression of "pervasive heterosexism" and, thus, as a "marginalization" of one's homosexual identity. *The Hands That Would Shape Our Souls*, Atlantic Monthly (Dec. 1990) at 79. Researchers have observed that "[g]uidelines for safe sex among homosexuals may require marked alteration of sexual behavior. . . . Pressure to accept a monogamous relationship or celibacy may be difficult." Holland, *The Psychosocial and Neuropsychiatric Sequelae to [AIDS] and Related*

²(...continued)

Pub. Health Rep. 391-95 (1989); Stamm, *The Association Between Genital Ulcer Disease and Acquisition of HIV Infection in Homosexual Men*, 206 J.A.M.A. 1429-33 (1988); Corey, *Sexual Transmission of Hepatitis A in Homosexual Men: Incidence and Mechanism*, 302 New Eng. J. of Med. 435-38 (1980); Kingsley, *Sexual Transmission Efficiency of Hepatitis B Virus and [HIV] Among Homosexual Men*, 264 J.A.M.A. 203-34 (1990); Roffman, *Continuing Unsafe Sex: Assessing the Need for AIDS Prevention Counseling*, 105 Pub. Health Rep. 202-08 (1990); Gottesman, *The Use of Water-soluble Contrast Enemas in the Diagnosis of Acute Lower Left Quadrant Peritonitis*, 27 Diseases Colon and Rectum 84088 (1984); Kingsley, *Colorectal Foreign Bodies*, 28 Diseases Colon and Rectum 941-44 (1985); Barone, *Management of Foreign Bodies and Trauma of the Rectum*, 156 Surg. Gyn. Ob. 453-57 (1983); Linn, *Recent Sexual Behaviors Among Homosexual Men Seeking Primary Medical Care*, 149 Archives Internal Med. 1685-90 (1989).

Disorders, 103 *Annals Internal Med.* 760-64 (1985). Attitudes toward monogamy and celibacy are evidenced in the homosexual community's reaction to "suggest[ions] that homosexual men look for love, instead of random sex . . . critics felt [this] was denigrating the gay liberation movement . . . a multitude of homosexual leaders angrily resisted, saying such recommendations were premature and punitive." *Kramer v. Kramer*, *Los Angeles Times* (June 20, 1990) at E1.

Even courts have recognized that "[c]riminal sanctions do not deter homosexual sodomy--because 'sex, next to hunger and thirst, is the most powerful drive that human beings experience,' and it is unrealistic to think that laws will force total abstinence." *Baker v. Wade*, 553 F. Supp. 1121, 1130, (N.D. Tex. 1982), *rev'd on other grounds*, 769 F.2d 289 (1985); accord *High Tech Gays*, 909 F.2d 375, 382 (9th Cir. 1990) (Canby, J., dissenting). The director of a Gay Men's Health Crisis stated, "no one can live with 'don't' for a lifetime, especially when it comes to sex." *Relapses Into Risky Sex Found in AIDS Studies*, *New York Times* (June 22, 1990) at A18. In one Justice's view, to leave a person with "no real choice but a life without any personal intimacy" may violate the Eighth Amendment. *Bowers v. Hardwick*, 478 U.S. 186, 203, n.2 (1986) (Blackmun, J., dissenting).

Indeed, in his autobiography, Steffan describes an instance of tentative touching while on an Academy choir trip. He stated: "the incident . . . convinced me that my feelings toward other

men were real and significant. *I wasn't going to be able to ignore them forever.*" Joseph Steffan, *Honor Bound*, 77 (1992) [hereafter J. Steffan]. The military, of course, knows this general truth at least as well as Steffan, and, hence, the homosexual exclusion policy.³/

It is reasonably conceivable--indeed, axiomatic--that allowing homosexuals to serve increases the risk of homosexual conduct occurring in the ranks. Homosexuals are quick to say this conclusion is based on a predator stereotype, but clearly the most significant risk for the military is the potential increase in voluntary sex among homosexuals. See, e.g., Steven Zeeland, *Barracks Buddies and Soldier Lovers*, (1993) [hereafter Zeeland]; Mary Ann Humphrey, *My Country, My Right to Serve*, (1990) [hereafter Humphrey]; Lawrence Murphy, *Perverts By Official Order*, (1988) [hereafter Murphy]; Randy Shilts, *And The Band Played On* (1987), *Conduct Unbecoming* (1993); *Investigation at Fort Hood Discharges 14*, Fort Worth Star-Telegram (Sept. 25, 1992) at 21A.

Military experience and common sense demonstrate that discipline, good order, and morale would be severely disrupted by increasing the potential for conduct that violates the Uniform Code of Military Justice (UCMJ), introduces a sexual dynamic into

³ Steffan further described his feelings, saying, "Since the first inkling of doubt about my sexuality, the first spark of attraction to men, I had resisted. I had fought, prayed, and hoped that it was just a phase, that I would wake up one morning and the attraction would be gone. But every day it was there, lingering in the background waiting to pounce." J. Steffan at 103.

situations that otherwise would be sexually neutral, e.g., *J. Steffan* at 108 ("[a]lthough there were a few classmates and friends [at the Academy] that I felt attracted to, Rob wasn't one of them, and that made our friendship all the easier for me"), and which risks the health and welfare of the individuals who participate in it as well as the health and welfare of the unit. See Melissa Wells-Petry, *Exclusion: Homosexuals and the Right to Serve*, 92-119 (1993) [hereafter Wells-Petry].

Since the military cannot efficiently and effectively address its concerns about homosexual conduct and the risk of homosexual conduct through criminal sanctions, much less through less coercive social processes, the appropriate policy--and certainly a constitutionally available policy choice--for both the military and the individual is to exclude homosexuals before either they or the military are put to the test. *Ben-Shalom*, 881 F.2d 454.

2. Foster Mutual Trust and Confidence.

It must be said: in the real world of combat boots and sweat, Steffan's own homosexuality has had a profound impact on the ability of the military community to place trust and confidence in him. Steffan must have full advantage of every legal rule in the courtroom, but "[i]n military life there is a higher code termed honor, which holds its society to strict accountability; and it is not desirable that the standard of the [military] shall come down to the requirements of a criminal code." *Parker v. Levy*, 417 U.S. 733, 765 (1974) (Blackmun, J.,

concurring).

Those who would be his military classmates, shipmates, bunkmates, subordinates and leaders know by common sense that Steffan is not owning up to them completely. The record, as well as common sense, supports the inference that Steffan has engaged in and desires now and in the future to engage in homosexual sex. Trust and confidence are not fostered by those, like Steffan, who are determined to decide for themselves which rules, whether it be an exclusion policy or a provision of the UCMJ, are worthy of obedience. But this was precisely the decision Steffan made--and the decision all homosexuals in the military must face. While at the Academy, Steffan talked with a chaplain and said:

In a way, I was expecting [the chaplain] to try and convince me that homosexuality was wrong, to pressure me to change. Perhaps that's what I was hoping for, an outside means of helping suppress what I knew I could not suppress any longer on my own. But he did nothing of the sort He acknowledged that my decision to stay at the academy and live a double life would be a difficult one, but he said only I could make that decision.

J. Steffan at 79. Thus, until Steffan resigned in the wake of an investigation, he had determined that "living a double life" was an option and that he need not obey the rules, either by excluding himself from the military or, in the long run, abiding by the UCMJ. See J. Steffan at 114 ("I wanted to start meeting other gay people, to start dating and having sex").

Indeed, Steffan submits that "a principled choice to violate a law that is perceived as unjust may even indicate an unusually high level of moral development." A. at 1537. This notion may fancy some ethical theorists, but it is the lethal antithesis of

the discipline required in the crucible of warfighting. It is fundamental that "[t]hose who today would be [military] leaders must first learn to follow"--orders, rules, regulations, principles--and that a leader must take "responsibility for his actions, regardless of their outcome." Karel Montor and Anthony J. Ciotti, ed., *Fundamentals of Naval Leadership*, (1984) at 147 & 8 [hereafter *Fundamentals*].

Plainly, no servicemember can be a rule unto himself. Indeed, "military life is such that the degree of community control over even its law-abiding members is greater than that to which civilian probationers are subject." *United States v. Matthews*, 2 M.J. 881, 885 (A.C.M.R. 1976) (Costello, J., concurring). And so it must be. Otherwise, not only will discipline suffer, but unit cohesion--absolute, sacrificial loyalty to others and to the service, rather than championing of self--will crumble and, with it, combat readiness.

Steffan himself provides a case study of this result. Steffan recounts in his autobiography two midshipmen who had answered official questions about Steffan's homosexuality. *J. Steffan* at 135-37. He praised one midshipman for lying, saying, "Alan had lied, committed an honor offense to protect me." *Id.* at 137. The other midshipman, however, told the truth. Steffan saw this allegiance to the honor code as a personal betrayal, and bitterly told the classmate: "*I can't believe you value your loyalty to [the Navy] more than to me . . . You've ruined my entire f-----g life!*" *Id.* at 136.

This incident is a clear snapshot of the dynamics homosexuality creates in the military environment. It shows a stunning lack of comprehension of what military service is all about to berate a fellow midshipman for *telling the truth* and then for *being loyal to the Navy*. Loyalty to the service is the defining attribute of military service. It is what makes soldiers, sailors, airmen, and Marines fight, fight again, and die trying. Loyalty to the mission is unit cohesion.

This is no abstruse concept. First Sergeant Eduardo Layug, for example, was at Fort Stewart, Georgia, when he saw televised reports of a mob dragging a dead American soldier through the streets of Mogadishu--"[Sergeant Layug's] voice still cracked when talking about it nearly two months later." *We Did Right That Night*, Soldiers (Feb. 1994) at 17 [hereafter *That Night*]. Another soldier, Staff Sergeant Richard Roberts, who was in Mogadishu, said of that October battle,

[W]e found out that the Ranger task force was pinned down. . . you wouldn't have even needed to ask or order anybody from the company to go. Everyone wanted to go out; we all knew that American soldiers were stuck out there and needed help.

Id. at 18.

Two soldiers died in a brave attempt to rescue Warrant Officer Durant, who later was taken prisoner. *Captive in Somalia*, Soldiers (Jan. 1994) at 22. Other soldiers, exposing themselves to great danger, struggled hours to free a dead American crewman whose body was pinned under a helicopter. "We weren't going to leave anybody out there," one said. Why did

these soldiers risk--and give--their lives for each other? A soldier explained, "the Rangers would have done the same for us." *That Night* at 20.

Loyalty to the service always requires sacrifice, and that sacrifice is surely greater than that of losing one's career.⁴/ Clearly, "[i]t must be understood by all members of the military that the mission comes first" *Fundamentals* at 7. By championing himself over loyalty to the Navy, Steffan belittled the true sacrifice required by military service, the fact that while "[n]o man willingly lays down his life for a national cause . . . implicit in military life is the concept that he who so serves must be prepared to do so." *Voorhees*, 16 C.M.R. at 107. Without absolute loyalty to the service, without deep respect for sacrifice, there can be no mutual trust and confidence among servicemembers.

By urging this court to rescind the homosexual exclusion policy on the basis of a legal fiction that homosexuals as a group do not engage in homosexual conduct, Steffan invites this court to bring into the military a class of people whom common sense shows--and Steffan's case illustrates--will always be vulnerable to tension between their sexuality and the rules and needs of the service, and thus to tension between their sexuality

⁴ Sacrifice in military life is not confined to the ultimate sacrifice in war or hardships in peace. For example, "[m]uch of the Army's training is extraordinarily dangerous. That's pretty much a given if you're going to prepare soldiers for combat." *Safety By The Numbers*, *Soldiers* (Jan. 1994) at 26. During the first three quarters of fiscal 1993, 20 soldiers died and 765 were injured in training accidents in the Army alone. *Id.*

and their unit and the military cause.

In some instances, as happened with Steffan, the homosexual will resolve that tension in favor of his homosexuality rather than in favor of the service. This factor--the reasonable prospect that homosexuality could hinder the development of the mutual trust and confidence among servicemembers that is required to win wars--is properly cognizable by the military and the Congress. Steffan has not and cannot negate these reasonably conceivable facts.

3. Insure the Integrity of the System of Rank and Command.

As a former Chief of Staff noted, the present American military "is the finest fighting force this nation has ever fielded and the best in the world today . . . [But this fighting force] did not come about by accident." Vuono at 1. This fine fighting force came about through leadership. To those who serve, and especially those who have gone into battle, it is plain that the integrity of the system of rank and command is a crucial component of combat readiness. Indeed, without this system of command authority the military simply would cease to be a *fighting* force.

Leadership is more than commanding obedience, for that the military can exact. Fundamentally, leadership is "the art, science, or gift by which a person is enabled and privileged to direct the thoughts, plans, and actions of others in such a manner as to obtain . . . their confidence, . . . respect, and . . . loyal cooperation.. . . [L]eadership is the art of

accomplishing the navy's mission through people." *Fundamentals* at 1.

The potential that a homosexual may be unable to command respect as a military leader is a fact of life. In *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), for example, the plaintiff informed the Chief of Naval Personnel: "I am well aware of the problems of social acceptance and special problems of leadership with which I will be confronted as my associates become aware of my homosexuality." *Id.* at 1069-70. One could vice "homosexuality" with other sexual orientations--pedophilia, exhibitionism, fetishism, bestiality, transsexualism, and sado-masochism, for example--and reach the same conclusion. This is finally because the problem, the source of social disapproval, is not the individual, but the individual's sexual conduct and the potential for that conduct. See *Wells-Petry* at 82-83 (discussing societal reaction to AIDS).

Steffan misperceives the requirements of leadership. Again, his focus is singularly on the homosexual. If servicemembers have a problem with a homosexual leader, according to Steffan, it is the servicemembers who must be trained, changed, adapted. Steffan submits a variety of "educational programs" should be used to change attitudes toward homosexuality, including "exercises in which participants role-played a gay person coming out to others." A. at 1523. This training may even involve "[p]resenting alternative, noncondemnatory religious perspectives on homosexuality" A. at 1521.

Obviously, it is not the military's task or charter to teach servicemembers moral perspectives on homosexuality or disabuse them of the perspectives they already have. Military policy has one aim: combat effectiveness. It is telling--and to his detriment--that Steffan believes such training is precisely what is required to "solve" the problems homosexuality poses for those who propose to lead men and women in the profession of arms. Thus, Steffan distorts the goal of military policy from combat victory for the nation to social triumph for homosexuals.

Homosexuality affects military leadership in a second way. Servicemembers look to their leaders to enforce the rules and regulations on a fair and equitable basis. While legal niceties may have commerce in the courtroom, hypertechnical notions of "status" are not persuasive down at the company, squadron, or wardroom level. This result is not because young servicemembers are bigots or full of hate. Rather, it is because they have common sense--what naval leaders have called "a learned capacity for seeing things as they are, without illusion or emotional bias." *Fundamentals* at 115. Moreover, the realities of military life include "doing something as a unit around the clock. By the time [servicemembers] get home, [they] know more about each other than they do about their [spouses]." *Training for Real, Soldiers* (Nov. 93) at 27.5/

⁵ See Murphy at 43 (one homosexual sailor said, "Thank goodness . . . the USS *Baltimore* was no longer in port, for its crew 'could convict almost anybody.' The best approach [for homosexuals under investigation]. . . was to say as little as
(continued...)

Seeing things as they are, and knowing each other as servicemembers do, inescapably leads to the conclusion that sometime, somewhere, there is the distinct possibility that homosexuals are putting themselves above the law. Indeed, it is no revelation to anyone with common sense that homosexuals are not fighting for the "right to be celibate." *Newsweek* at 53.

Plainly, it is no defense--either to the criminal offense of sodomy or to the deleterious impact of homosexual conduct on good order, discipline, and morale--to say as one former Air Force squadron commander said after he was court-martialed for homosexual conduct and for lying about his conduct: "I'd always known [homosexual conduct] was against the rules . . . [but] it was my private time" *Humphrey* at 228. Steffan himself provides a case study of the reality that homosexuals in the military must "live a double life." Clearly, *this reality would not be changed by this court imposing Steffan's legal fiction on the military's homosexual policy.* See, e.g., Addendum at 7.

Homosexuals simply are not similarly situated with others who may commit other kinds of misconduct. Every homosexual servicemember must choose between not living his lifestyle, that is, *between not being himself*, and breaking the law every time he has sex. It is impossible for servicemembers not to reason that, at least at various times in his career, a homosexual is engaged in a pattern of law-breaking and hiding. See *Zeeland* and

⁵(...continued)
possible.").

Humphrey. Further, anything that divides a servicemember's loyalty between the needs of the service and self "can quickly pervade and sap the morale of any unit because of the necessary intermixture of professional mission and duties with the equally necessary social and interpersonal relationships which are part and parcel with military life and tradition." *United States v. Van Slate*, 14 M.J. 872, 876 (N.M.C.M.R. 1982) (May, J., concurring in part and dissenting in part). This is true because "naval service is more than just a business, profession, or trade; it is a way of life." *Fundamentals* at 78.

The fact is, "[m]oral responsibility for the unit has traditionally been placed on the commanding officer. Article I of the *Rules for the Regulation of the Navy of the United Colonies of North America*, written in 1775, stated:

The Commanders of all ships and vessels belonging to the thirteen United Colonies are strictly required to show in themselves a good example of honor and virtue to their officers and men, and to be very vigilant in inspecting the behavior of all such under them, and to discountenance and suppress all dissolute, unmoral, and disorderly practices; and also such as are contrary to the rules of discipline and obedience, and to correct those who are guilty of the same according to the usage of the sea.

Id. at 72. Commanders--leaders--simply cannot fulfill these duties if they determine to decide for themselves which rules apply to them.

Steffan attempts to avoid this discussion of the potential impact of homosexuality on the integrity of the system of rank and command by the unreal proposition that neither he nor any other homosexual has the slightest potential for homosexual

conduct. This assertion, frankly, is only another sad expression of contempt for the military system of command authority. If homosexuals want to serve they ought to admit forthrightly they intend to engage in homosexual conduct and they expect the military, first, to change its laws to permit this and, secondly, to change, or attempt to change, servicemembers' attitudes toward homosexual conduct. Both proposals are hugely complex for the military as well as society at large. But at least this forthrightness would place the policy change urged by Steffan in the context of human realities, rather than the realm of legal fiction.

4. Facilitate Assignment and Worldwide Deployment.

The Commander of the U.S. Army Training and Doctrine Command stated the "primary mission of projecting land combat power will place a premium on the *deployability* of our Army." *Advent of the Nonlinear Battlefield*, Army (Feb. 1991) at 21. Deployability--the ability to go--is a premium for all the services. In February 1994, 42% of the Navy was underway, with more than one out of five sailors and Marines deployed overseas. *1994 Department of the Navy Posture Statement*, 7. The Army has "125,000 soldiers assigned to forward areas [and] on a normal day . . . 20,000 to 25,000 troops [are] deployed in 65-75 countries." *America's Army--Into the 21st Century*, Army Green Book, 14 (1993-94).

Homosexuals have hooted down even the mention of the military's concern with privacy issues involved in sleeping arrangements and hygiene facilities. But, regardless whether

Steffan will admit it, sex is a part of life and sex can be a command problem, in garrison and especially on the battlefield. In the Gulf War, for example, "[t]wo-thirds of American troops who served in coed units . . . say men and women were having sex, and more than half said it hurt morale." *Wells-Petry* at 156. Another Gulf War report noted: "[h]omosexual acts are punishable in Saudi Arabia by execution. When servicemembers . . . were caught in homosexual acts, they were returned immediately to the United States . . . [in order to avoid] having the incidents come to the attention of Saudi religious police." *Id.* at 76.

Steffan apparently argues that because existing circumstances within the military could create problems with sexual activity, *increasing the potential for such problems by permitting homosexuals to serve is justified*. This is not syllogism, but sophistry. It is true that homosexual and heterosexual men sometimes shower together at the YMCA and that men and women sometimes lounge together in nude spas in Europe. It is true that some homosexuals and some heterosexuals could be subjected to the most relentless sexual temptation and not act out. It is true that the exigencies of war sometimes make gender segregation impossible. Finally, it is true that the military already suffers some detriment because of sexual activity. But it is still true that the military need not court--or create new--problems associated with sexual activity in order to accommodate homosexuals within its ranks.

Indeed, creating opportunities for sexual liaisons has two

effects on the command climate: some servicemembers will not like this situation, but some will. *Both results jeopardize the climate of discipline.* The military cannot avoid all problems associated with sex, but it can take steps to minimize those problems. Excluding homosexuals is an efficient and fair way to minimize problems with homosexual sex, including its impact on servicemembers' privacy interests and the command climate. Indeed, since homosexuals are only self-identifiable, it is self-evident that exclusion is the only way to address this concern.

Medical issues, and medical deployability standards, also are reasonably conceivable. Steffan claims the court below practically imagined a link between HIV and other diseases and the homosexual community, but Steffan's own papers acknowledge this reality. A. at 1761. Like other medical realities, this reasonably conceivable fact is and must be a factor in determining enlistment criteria. Indeed, *Field Manual 21-10, Field Hygiene and Sanitation*, for example, begins, "INTRODUCTION TO THE MEDICAL THREAT . . . MESSAGE TO THE UNIT COMMANDER." The discussion opens:

What action do you think should be taken against a commander who allows his unit to sustain 40% combat injuries through neglect? How about a commander with a unit 40% ineffective due to malaria, cold injuries, or diarrhea?

Historically, in every conflict the US has been involved in, only 20% of all hospital admissions have been from combat injuries. The other 80% have been from diseases and nonbattle injuries (DNBI). Excluded from these figures are vast numbers of soldiers with decreased combat effectiveness due to DNBI not serious enough for hospital admission.

. . . .

The medical threat [includes] food/waterborne diseases [and] the unfit soldier.

Field Manual 21-10, Headquarters, Dep't. of the Army, 1 & 4 (Nov. 1988) [hereafter Manual]. Each military service faces a medical threat.

Ample evidence exists that, as a group, homosexuals are at a significant risk for a variety of diseases and infections. In addition to bloodborne infections, some infections that are statistically significant among homosexuals may be food- or waterborne. *E.g., Ernst, Characteristics of Gay Persons with Sexually Transmitted Disease, 12 Sex. Trans. Diseases 59-63 (1985) (homosexuals at high risk, inter alia, for Hepatitis A).* These infections are particular threats on board ship, in encampments, and for weapons crews, such as a tank platoon where food and water is shared and hygiene may be compromised. Hepatitis A, for example, is transmitted "[p]erson-to-person by the fecal-oral route. . . . Direct transmission occurs among male homosexuals. Common-source outbreaks have been related to contaminated water; food contaminated by infected foodhandlers, . . . [and rarely] by transfusion of blood" Abram S. Benenson, ed., *Control of Communicable Diseases in Man*, 198 (1990). Common-source outbreaks of disease can devastate units, for example:

Merrill's Marauders: Disease was an important detractor to this famous unit. . . . Everyone was sick, but some had to stay and fight. Evacuation was limited to those with high fever and severe illness. One entire platoon cut the seats from their pants because severe diarrhea had to be relieved during gunfights. After a bold and successful attack on a major airfield, Merrill's Marauders were so

decimated by disease that they were disbanded.

Manual at 3.

Besides posing risks to the unit, disease or infection, even if asymptomatic, may make a homosexual servicemember especially vulnerable to medical threats. In a recent military exercise in Egypt, for example, the medical officer reported, "There is a lot of airborne bacteria [in] this part of the world and several soldiers came in for allergy shots." *Bright Star Rising, Soldiers* (Feb. 1994) at 40. Deployed servicemembers routinely are given batteries of inoculations. See *Wells-Petry* at 105 (discussing dangers of inoculations in persons with compromised immune systems).

Ultimately, the higher risk of disease and infection in the homosexual community increases the risk that homosexual servicemembers would be nondeployable. Any condition that affects a servicemember's deployability affects the combat readiness of the force. The Army Surgeon General recently studied this issue and found that "[r]ecission of the ban on military service by open homosexuals would have a negative impact on readiness and deployability." *Memorandum from The Surgeon General to the Deputy Chief of Staff, Personnel* (Subject: Potential Medical Implications of Homosexuals in the Military) (April 29, 1993).

Like the common sense matters of privacy and command climate, factors relating to the impact of homosexuality on deployment issues are properly cognizable--and *must* be considered

by--the military and the Congress. As one soldier explained in a letter he sent to elected officials:

Dear President Clinton:

I am a Special Operations Medical Sergeant who was assigned to Task Force Ranger in Mogadishu, Somalia, during the battle of October 3-4 [1993]. My job during the mission was to fly in an orbit over the target area and to respond as part of a Search and Rescue package to any downed aircraft.

We responded to the first Blackhawk that was shot down. All the surviving passengers and crew had made it clear of the aircraft except one. An Air Force paramedic sergeant and myself went into the wreck to extract the remaining crew member.

While we were inside the wreck, bullets were coming through the helicopter from both sides. One of these hit my wedding ring finger and split the skin from the tip to the middle of the finger. Later, while assisting me with moving a patient on a litter, the soldier next to me was shot through the lower leg. It was a through and through wound with an open fracture and significant arterial bleeding. Instinctively, I reached over with my left hand and applied direct pressure to the wound while I opened a field bandage with my right hand.

During the course of the evening I cared for eleven casualties. I ran out of intravenous fluids, morphine and needles. I was forced to reuse the same needle several times with three different patients.

Many thoughts went through my mind that day. Would I ever see my wife and son again? Would I be maimed, losing an arm or a leg? There was another very distressing thought that flashed through my mind as I put my open and bleeding hand into the wound of another soldier that was, did I just get AIDS? Did I give other soldiers AIDS when I had to reuse a needle? The idea of surviving such a battle and later dying of AIDS is unspeakable. It is a disease which is very familiar to me. I have seen it in the health care setting while training in wards and emergency rooms and I have also seen it at home. My brother died of AIDS this summer after a long, hard and painful fight.

The largest source of AIDS transmission is among active male homosexuals. Battlefield exposure to blood is a reality whether it is from reusing supplies, a battlefield transfusion or stopping bleeding while you yourself have an

open wound. I question the motivation of anyone who is aware of the potential problems that homosexuals in the military will bring and still pursues a change in DOD policy. It is my personal opinion that homosexuals are using this issue in an attempt to further legitimize their lifestyle and that the well-being of our military and our nation is not their concern.

I would like to ask you, Mr. President, to reconsider your position on homosexuals in the military. Homosexuals would create not only a strain on discipline among the young soldiers in the barracks, but, they would also create a potential for doubt on the battlefield. Would I have changed my treatment of the soldier who was shot in the leg if I had a doubt about his sexual orientation? Probably not. Would I have had an increased risk of contracting the AIDS virus if he were an active male homosexual? Absolutely.

In my almost ten years of service to this country that I love dearly, I have spent many irreplaceable months away from my family. I have been tired, wet, cold and hungry countless times. I have risked my life and safety. I am proud to have been able to do it and I hope to continue. I do not wish to deny anyone the opportunity to serve our great nation, however, I feel there are numerous avenues to do so outside the military. There is already enough risk involved with military service. The young men and women of our services accept it proudly. Please do not increase it by allowing homosexuals in the military.

Sincerely,

Sergeant First Class Bob Mabry

cc:
Senator David Boren
Senator Don Nickles
Representative Dave McMurdy
Senator Sam Nunn
Representative Ronald Dellums

This soldier's story tells it all and Steffan cannot answer him.

5. Recruit and Retain Members of the Service.

The public's genuine concern with many aspects of the homosexual rights movement needs no great elaboration. Several

states have invoked legislative initiatives to address issues regarding homosexuality. There was a tremendous public outpouring of opinion on the issue of using the Executive branch to change the military's homosexual exclusion policy.

Clearly, the effect of permitting homosexuals in the military would not be neutral as to recruiting and retention. In this regard, the principles of war are as relevant to military personnel policies as they are to battle plans. As Clausewitz, perhaps the most studied military strategist of all time, explained:

The task of the military theorist . . . is to develop a theory that maintains a balance among . . . the *trinity of war--the people, the government, and the [military]*. . . . A theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless.

Wells-Petry at 180.

Steffan asks this court, not to take account of and defer to this trinity of war, but to "fix an arbitrary relationship" between the people, the government, and the military--a relationship driven by the desires of homosexuals rather than the needs of the service. As the scope of public concerns about the homosexual agenda demonstrates, however, any attempt by the judicial branch to force that agenda upon the military "would conflict with reality to such an extent that for that reason alone it would be totally useless," if not calamitous.

Simply put, *the military is concerned about the impact of homosexuals on recruiting and retention because the nation is*

concerned about homosexuality. Of particular concern to the nation is the impact of homosexuality on young people. See, e.g., *Table for One*, National Review (Dec. 13, 1993) at 54-59; *Morality and Homosexuality*, Wall Street Journal (Feb. 24, 1994) [hereafter *Morality*]. This is the very group most likely to have the least privacy and the most contact with homosexuals if homosexuals were allowed to serve. See *Zeeland*.

Steffan cannot dismiss honest social debate on an issue that engages "a millennia of moral teaching," *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring), as mere prejudice, lies, hate, or bigotry. Indeed, distinguished scholars have concluded, "it is not too much to say that civilization itself depends on the making of . . . distinctions (*between, finally, right and wrong*)."
Morality. This momentous social process, upon which civilization itself depends, cannot be discounted as mere "private bias." Rather, this process, and its possible expression in the area of military recruiting and retention, is a factor properly cognizable by those charged with safeguarding the nation's combat readiness.

6. Maintain Public Acceptability of Military Service.

The relationship between the military and the public is founded on the fact that, "under the Constitution, the American people through their elected representatives not only raise, support, and regulate the [military] but also determine the very battlefields upon which the [military] must fight." H. Summers, *On Strategy: A Critical Analysis of the Viet Nam War*, 19 (1984).

Thus, when the military evaluates the possible impact of a particular policy on the public, its analysis must focus on the "importance of maintaining the bond between the American people and their soldiers . . . [because that bond is] the source of [the military's] moral strength." *Id.* at 47.

The nation will send the armed forces her sons and daughters only if its leaders purpose to "train with [their] eyes firmly fixed on [their] sacred responsibilities to [those] entrusted to [their] care." *Vuono* at 4-5. Those sacred responsibilities cannot be discharged, and the public cannot be convinced military leaders are training our military to be the best in the world, if this court ignores the expertise of military leaders, the Congress, and the voice of the people and attempts instead to fix the military's sights on accomplishing social goals.

Steffan's brief barely contemplates combat readiness. As Sergeant Mabry poignantly observed, "[i]t is my personal opinion that homosexuals are using this issue in an attempt to further legitimize their lifestyle and that the well-being of our military and our nation is not their concern." If the public perceives that the military is occupied with anything other than the business of fighting and winning wars, then the acceptability of military service will falter. The American military--in real terms, the blood of our sons and daughters--plainly is too precious to gamble on social initiatives on homosexuality when the nation itself is still engaged in strong and legitimate debate on that issue. This factor must, and properly does,

concern the military and the Congress. Indeed, Steffan's quest pales before it.

7. Prevent Breaches of Security.

While some would put this rationale down as an old chestnut, those who have served see much plain common sense in the proposition that because homosexuals, as a group, are likely to engage in conduct proscribed by the UCMJ, they may be vulnerable to various types of coercion. In fact, the July 19th memorandum (which was never implemented) devoted an entire section to extortion of homosexuals, thus conceding the potential for homosexuals to engage in homosexual conduct and the reality that such conduct cannot be hidden forever. Addendum at 7.

Indeed, in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), for example, plaintiff, an employee of a defense contractor and an open homosexual, admitted he had been the subject of blackmail attempts because of his homosexuality. *Id.* at 577. An expert in hostile intelligence doctrines testified that agencies, such as the former KGB, viewed homosexuality as a marker for other exploitable traits. *Id.* at 575-577. It is immaterial whether homosexuals are more likely than heterosexuals to compromise military security concerns. Anything which draws or increases hostile intelligence activity--regardless of its success--is detrimental to the military.

Moreover, so long as homosexual conduct is a crime, those who engage in it, as the July 19th memorandum recognized, are

vulnerable to extortion. A former officer stated, "it wasn't an issue of my homosexuality so much that made me leave the Army, but an issue of compromise. I was being blackmailed into doing things because of it." *Humphrey* at 217. What may seem merely petty when discussed inside a courtroom--for example, a young sailor saying to another, "I'll tell the Lieutenant about your homosexual conduct unless you pull watch for me"--is a pernicious seed of indiscipline in a military unit. As the July 19th memorandum shows, however, such bartering is an inevitable risk the military would take if it allowed homosexuals to serve. Addendum at 7. These reasonably conceivable facts are properly cognizable by the military and the Congress and, again, Steffan cannot negate them.

III. The reasonably conceivable facts underlying the conclusions that support the policy are uniquely informed by military judgment; thus, they require the strictest judicial deference.

Our senior military leaders, as well as the Congress, have determined that homosexuality--homosexual conduct, the risk of homosexual conduct, and the social, political, and health and welfare ramifications of homosexuality--is incompatible with military service. *DoD Dir.*, *S. Rep.* at 293, *H. Rep.* at 287. All military policies, including the homosexual policy, are designed to deliver servicemembers with the best potential for successful service with the least administrative burden on the military's weighty mission to fight and win this nation's wars. *Cf. Mathews v. Eldridge*, 424 U.S. 319 (1976) (fiscal and administrative burdens are properly cognizable factors in policy choices).

The military simply, and prudently, has declined to "assume the risk that the presence of homosexuals within the service will not compromise . . . admittedly significant government interests" *Ben-Shalom*, 881 F.2d at 460. This risk includes the risk of homosexual conduct. Controlling conduct, quite logically, is not limited to taking action after the conduct occurs. Rather, it may include preventive measures. To prevail on rational basis review, "[i]t is enough to show that a potential danger exists without the restrictions of the challenged . . . regulation." *Espinoza v. Wilson*, 814 F.2d 1093, 1097-98 (6th Cir. 1987).⁶ Clearly, the military can avoid unwarranted risks to combat readiness. In fact, it is beyond cavil that those who serve deserve no less.

CONCLUSION

A critic should . . . not check a great commander's solution to a problem as if it were a sum in arithmetic. To judge . . . it is necessary for a critic to take a more comprehensive view.

Clausewitz, *On War*

⁶ In *Espinoza*, prison officials testified that:

there was a strong correlation between prison violence and inmate homosexuality. . . . homosexuality played a major role in inmate assaults, rapes, intimidation, extortion and personal abuse. Consequently, the prison officials believe that they could not sanction activity that *might* further expose innocent inmates to increased dangers, increase the opportunities for identification of homosexual inmates, and increase the ability of dangerous inmates to target homosexual inmates.

Id. at 1097. Thus, the court permitted the withholding of homosexual literature based on the potential danger to discipline within the prison.

Steffan's *ex post* arguments are nonresponsive to the military's broad policy concerns. *Wells-Petry* at 59-61 (discussing Easterbrook, *The Court and the Economic System*, 98 Harv. L. Rev. 4 (1984)). Rather, this court must take a comprehensive view: "What does the Navy do?" The answer expert sailors give is: "[The Navy] takes ships, planes, and men and women, and organizes them into an effective manifestation of American strength upon the sea." J. Calvert, *The Naval Profession*, 41 (1965). Warfighting--and the personnel policies that undergird the effective projection of military power--is not a sum to be checked for arithmetic. It is, in the final analysis, an art, and Steffan's blithe dismissal of military judgment, expertise, and vision rings hollow.

There is ample evidence from which the military reasonably could conclude that allowing homosexuality within the armed forces would present substantial risks to unit cohesion and combat readiness. The military's homosexual exclusion policy is rational, not because Steffan's own situation proves the military's concerns, "but because the general policy of discharging all homosexuals is rational." *Beller*, 632 F.2d at 808-809, n.20.

"The military commander has traditionally been responsible for the health, welfare, support, morale, and discipline of the members of his command, expecting in return loyalty and dedication to mission." *United States v. Williams*, 8 M.J. 506, 509 (A.F.C.M.R. 1979). The nation's military leaders have

fulfilled their responsibility and those who serve have trusted these leaders with their lives. This court, likewise, can have confidence in their professional judgment. Accordingly, the opinion of the District Court should be affirmed.

Washington, D.C.
March 25, 1994

Respectfully submitted,



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ADDENDUM OF PERTINENT REGULATIONS

News Release No. 328-93, Office of Assistant
Secretary of Defense (Public Affairs), *Secretary
of Defense Directs Implementation of New
Homosexual Policy* (July 19, 1993) (complete version
of memorandum at Plaintiff-Appellant's Addendum at 3a
with policy attachments) 1a



NEWS RELEASE

OFFICE OF ASSISTANT SECRETARY OF DEFENSE
(PUBLIC AFFAIRS)

WASHINGTON, D.C. - 20301

PLEASE NOTE DATE

IMMEDIATE RELEASE

July 19, 1993

No. 328-93

(703) 695-0192 (media)

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SECRETARY OF DEFENSE DIRECTS IMPLEMENTATION OF NEW HOMOSEXUAL POLICY

Secretary of Defense Les Aspin today directed the implementation of the President's new policy on homosexual conduct. A memorandum establishing the new policy along with an attachment containing policy guidelines has been sent to the Service Secretaries and the Chairman of the Joint Chiefs of Staff. A copy of that correspondence is attached.

-END-



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.

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.

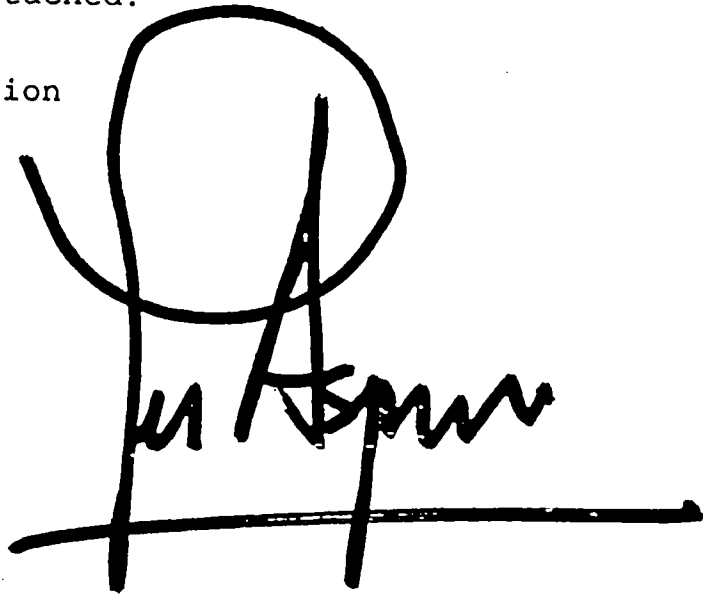
A homosexual act includes any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires or any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts. Sexual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

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. Spurr" written in a cursive, somewhat blocky style. It features a large, circular loop at the top, followed by a vertical line, and then a series of horizontal and vertical strokes that form the rest of the name. A thick horizontal line is drawn across the bottom of the signature.

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

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.

Credible Information

- Credible information of homosexual conduct exists when the information, considered in light of its source and all attendant circumstances, supports a reasonable belief that a servicemember has engaged in such conduct. It requires a determination based on articulable facts, not just a belief or suspicion.

Security Clearances

- Questions pertaining to an individual's sexual orientation are not asked on personnel security questionnaires. An individual's sexual conduct, whether homosexual or heterosexual, is a legitimate security concern only if it could make an individual susceptible to exploitation or coercion, or indicate a lack of trustworthiness, reliability, or good judgment that is required of anyone with access to classified information.

The Threat of Extortion

- As long as servicemembers continue to be separated from military service for engaging in homosexual conduct, credible information of such behavior can be a basis for extortion. Although the military cannot eliminate the potential for the victimization of homosexuals through blackmail, the policy reduces the risk to homosexuals by making certain categories of information largely immaterial to the military's initiation of investigations.
- Only credible information that a servicemember engaged in homosexual conduct will form the basis for initiating an inquiry or investigation of a servicemember; suspicion of an individual's sexual orientation is not a basis, by itself, for official inquiry or action.
- Extortion is a criminal offense, under both the UCMJ and United States Code, and offenders will be prosecuted. A servicemember convicted of extortion risks dishonorable discharge and up to three years confinement. Civilians found guilty of blackmail under the U.S. Code may be subject to a \$2000 fine and one-year imprisonment. The risk of blackmail will be addressed by educating all servicemembers on the policy and by emphasizing the significant criminal sanctions facing convicted extortionists.

Outing

- A mere allegation or statement by another that a servicemember is a homosexual is not grounds for official action. Commanders will not take official action against members based on rumor, suspicion or capricious allegations.
- However, if a third party provides credible information that a member has committed a crime or act that warrants discharge, e.g., engages in homosexual conduct, the commander may, based on the totality of the circumstances, conduct an investigation or inquiry, and take non-judicial or administrative action or recommend judicial action, as appropriate.
- Commanders are responsible for initiating an investigation when credible information exists that a crime or basis for discharge has been committed. The commander examines the information and decides whether an investigation by the Service investigative agency or a commander inquiry is warranted, or if no action should be taken.

Harassment

- Commanders are responsible for maintaining good order and discipline.
- All servicemembers will be treated with dignity and respect. Hostile treatment or violence against a servicemember based on a perception of his or her sexual orientation will not be tolerated.

CERTIFICATE

I hereby certify that I have this day caused to be served in duplicate the foregoing Brief of the Judge Advocates Association on Rehearing *En Banc* by hand, by United States Mail, postage prepaid, or by Federal Express to the Attorney for Plaintiff-Appellant and the Attorney for Defendants-Appellees. I hereby further certify that the foregoing Brief contains no more than the number of words allowed by D.C. Circuit Rules 28(d)(1).

Dated: March 25, 1994

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Gap-in-the-midway

To be argued by:
MARC WOLINSKY

No. 91-5409

Oral argument
scheduled for
May 11, 1994

United States Court of Appeals
for the
District of Columbia Circuit

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

—v.—

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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

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JOSEPH C. STEFFAN ON REHEARING *IN BANC***

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Joseph C. Steffan

THE WHITE HOUSE

WASHINGTON

April 7, 1994

Tim McFeeley
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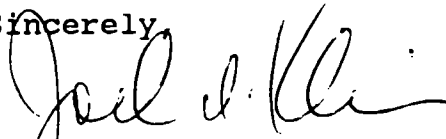
Dear Mr. McFeeley:

The President has asked me to respond to your letter of November 17, 1993.

As you probably know, on December 30, 1993, the Department of Justice announced that it would not seek further review with respect to most aspects of the Steffan decision. The only issue in Steffan on which the Department did seek further review was the judicial order of a commission. Because the commission requires Presidential nomination and Senate confirmation, Justice determined that this part of the decision clearly exceeded judicial authority. On January 7, 1994, the court issued an order stating that one judge had "sua sponte requested the taking of a vote on the question of also placing the merits of the case" before the full 10-judge court and that a majority of judges had voted in favor of doing so. As a result, the court vacated the Steffan decision, and the case is now pending on the merits before the full court.

We appreciate having your views on this issue, and we apologize for the delay in responding.

Sincerely,



Joel I. Klein
Deputy Counsel to the President

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Tim McFeley

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Subject: Request that the POTUS not appear (through the DOS) Joseph C. Stettin's case beyond the D.C. Circuit

ROUTE TO:

ACTION

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Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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<u>✓ CU</u>	<u>A763</u>	<u>RI</u>	<u>93/1/21/03</u>			<u>1/1</u>

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November 17, 1993

The Honorable Bill Clinton
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing respectfully to urge you not to appeal the decision of the United States Court of Appeals for the District of Columbia Circuit reinstating midshipman Joseph C. Steffan.

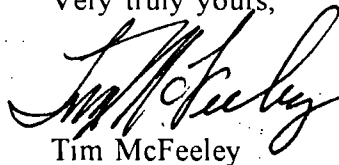
So much of the language of the Court's unanimous decision is reminiscent of yours on the issue of discrimination. The Court says: "A cardinal principle of equal protection law holds that the Government cannot discriminate against a certain class in order to give effect to the prejudice of others.... Such discrimination plays into the hands of bigots; it ratifies and encourages their prejudice."

In echoing statements you have made, the Court went on to say that "Constitutional principles mandate that the Government may not disadvantage a person on the basis of his status solely for fear that others may be offended or angered by him." If the Government were to reject these principles, it would undermine the entire system of equal rights protections this country has struggled to achieve over many decades.

Earlier this year, we were unable to find sufficient votes in Congress to end discrimination against lesbians and gays in the military. In our constitutional democracy, however, the rights of minorities must be protected. It is your responsibility as President to ensure that all Americans are treated equally, especially by the Government. I urge you to see that the decision of the Court of Appeals is upheld.

Thank you for your consideration.

Very truly yours,



Tim McFeeley
Executive Director

IN BANC ORAL ARGUMENT SCHEDULED FOR MAY 11, 1994

No. 91-5409

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

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

v.

WILLIAM J. PERRY,
SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees.

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

BRIEF FOR THE APPELLEES ON REHEARING IN BANC

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4

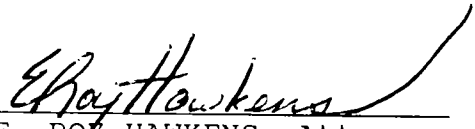
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties And Amici. All parties, intervenors, and amici appearing in this Court are listed in appellant's brief, except for the following amici, which were granted leave to file amici briefs after the filing of appellant's brief: (1) the National Lesbian and Gay Law Association and Service Members Legal Defense Network; (2) the Geneva College Center for Law and Public Policy, Center for Military Readiness, Defense Readiness Council, and the Military Coalition, whose members are the Retired Officers Association, Air Force Association, Air Force Sergeants Association, Association of Military Surgeons of the United States, Association of the U.S. Army, Chief Warrant and Warrant Officers Association, Commissioned Officers Association of the U.S. Public Health Service, Inc., Enlisted Association of the National Guard of the U.S., Fleet Reserve Association, Marine Corps League, Marine Corps Reserve Officers Association, National Association for Uniformed Services/Society of Military Widows, National Guard Association of the United States, Naval Enlisted Reserve Association, Naval Reserve Association, Navy League of the United States, Non Commissioned Officers Association of the United States, Reserve Officers Associations of the United States, Jewish War Veterans of the United States of America, Retired Enlisted Association, U.S. Army Warrant Officers Association, U.S. Coast Guard Chief Petty Officers Association, and United Armed Forces Association; and (3) Concerned Service Members (who consist of Benjamin W. Jordan, Helen Spalding, Randy K. Turner, Stuart Glover McLennan, and Carter Thomas), former service

members Mark Canavan, Richard Culbertson, Shrai Tritapoe, and James Richard Hughes, and the Family Research Council.

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. After the filing of that brief, Selland v. Aspin, 832 F. Supp. 12 (D.D.C. 1993), was dismissed pursuant to the parties' stipulation.


E. ROY HAWKENS, Attorney

GLOSSARY

APA	Administrative Procedure Act
App.	Appendix
DOD	Department of Defense
NIS	Naval Investigative Service
UCMJ	Uniform Code of Military Justice

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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.

WILLIAM J. PERRY,
SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees.

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

BRIEF FOR THE APPELLEES ON REHEARING IN BANC

STATEMENT OF THE ISSUES PRESENTED

1. Whether the military's "old policy" on service by homosexuals, which contained a rebuttable presumption that a person who states that he is a homosexual engages in or is likely to engage in proscribed homosexual acts, violates equal protection.
2. Whether the administrative proceedings in this case were arbitrary or capricious or violated procedural due process.
3. Assuming arguendo that Steffan's separation was substantively or procedurally invalid, whether the plenary relief Steffan seeks is inappropriate because: (a) it cannot be determined as a matter of law that Steffan was constructively discharged; (b) the only possible relief would be a remand for further proceedings under the correct standards; and (c) the Court lacks authority to order a commission because that

authority is vested in the President, with the advice and consent of the Senate.

STATEMENT OF THE CASE

A. Nature of the Case. This case involves Joseph Steffan's resignation from the Naval Academy in May 1987 after discharge proceedings were commenced against him pursuant to the Department of Defense ("DOD") regulations then in effect -- the so-called "old policy" -- concerning service by acknowledged homosexuals. As the panel of this Court recognized (8 F.3d 57, 61), this case does not involve the legality of the "new policy" announced by the President on July 19, 1993, 29 Weekly Comp. Pres. Doc. 1369 (1993), and embodied in the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670 (to be codified at 10 U.S.C. § 654).

Steffan unsuccessfully sought to withdraw his resignation in December 1988, and brought suit alleging that his separation from the Naval Academy was unlawful. The district court granted summary judgment for the Government, upholding the old policy and rejecting Steffan's challenge to the procedures under which he was separated. App. 4-40; 780 F. Supp. 1 (D.D.C. 1991).

A panel of this Court reversed, holding that the old policy violated equal protection. 8 F.3d 57 (D.C. Cir. 1993). It ordered that Steffan be awarded a Naval Academy diploma, reinstated to military service, and commissioned as an officer. The full Court vacated the panel's judgment and ordered that the case be reheard in banc.

B. Statement of the Facts.

1. The Regulations. The DOD Directive embodying the "old policy" regarding service by homosexuals provides:

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.

Directive 1332.14.H.1.a. The Directive explains the rationale for the policy (id.):

The presence of . . . members [who have a propensity to engage in homosexual conduct] adversely affects the ability of the Military Services 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; 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 Service; to maintain the public acceptability of military service and to prevent breaches of security.

The Directive provides for the separation of any member who has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts"; (2) "married or attempted to marry a person known to be of the same biological sex"; or, as relevant here, (3) "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." Directive 1332.14.H.1.c. A "[h]omosexual" is defined as a person who "engages in, desires to engage in, or intends to engage in homosexual acts" Id. H.1.b(1). Under the Directive, therefore, separation is prescribed for any person who, inter

alia, "state[s] that . . . [he] is a homosexual" and thus "demonstrate[s] a propensity to engage in homosexual conduct," "unless there is a further finding" that he does not "engage[] in, desire[] to engage in, or intend[] to engage in homosexual acts." Id. H.1.a, c(2).

2. Steffan's Separation From The Naval Academy. In 1983, Steffan entered the Naval Academy as a midshipman. App. 73. In the Fall of his senior year, he voluntarily told two subordinate midshipmen that he was a homosexual. Id. at 308-11. One of these subordinates advised Academy officials of Steffan's statement. Id. at 360. The Naval Investigative Service ("NIS") initiated an investigation pursuant to regulatory provisions regarding service by homosexuals and provisions under the Uniform Code of Military Justice ("UCMJ") regarding criminal sexual conduct. Id. at 347, 360. Subsequently, Steffan himself told Academy officials that he was a homosexual. Id. at 75-76.

On March 24, 1987, a Performance Board convened to recommend appropriate action to the Commandant in light of Steffan's statements. App. 403-04; 410-22. Steffan declined to present witnesses or evidence to the Performance Board. Id. at 418. At the hearing, a member of the Board asked Steffan, "[A]re you a homosexual?". He replied, "Yes, sir." Id. at 421. When asked by the Board whether he "desire[d] to be commissioned as an officer of the Naval service by continuing as a midshipman of the Naval Academy," Steffan answered, "No, sir." Id. at 419. The

Performance Board recommended that Steffan be separated from the Academy. Id. at 421, 423.

On March 26, 1987, the Commandant, after receiving the recommendation of the Performance Board, recommended that Steffan be separated from the Academy, App. 350, and forwarded his recommendation to the Academic Board, which was chaired by the Superintendent of the Academy. Id. at 371. Steffan, who received advice from a military attorney, also obtained assistance from two civilian attorneys, one of whom accompanied him to the Academic Board hearing on April 1, 1987. Id. at 277-79. At that point, Steffan informed the Board that he wished "to be permitted to complete the academic requirements to earn [his] diploma." Id. at 89. Because Steffan's continued service as a midshipman would have violated the regulations concerning service by persons who state that they are homosexuals, the Academic Board voted to recommend to the Secretary of the Navy that Steffan be discharged from the Academy. Id. at 89, 98.

Later that same day, Steffan was advised he could either challenge the Academic Board's determination or submit a qualified resignation. App. 98-100. After consulting with a fourth attorney, Steffan submitted a "qualified resignation" stating that he "desire[d] to resign in lieu of being recommended for discharge." Id. at 106. On April 7, 1987, the Superintendent forwarded Steffan's resignation to the Secretary and recommended that it be approved. Id. at 97. The Secretary accepted Steffan's resignation, and Steffan was given an

Honorable Discharge on May 28, 1987. Id. at 96. On June 16, 1987, the NIS closed the investigation that it had begun but never completed into possible regulatory and criminal violations by Steffan. Id. at 347-49, 360-61.

3. Steffan's Administrative Challenge To His Separation From The Naval Academy. Eighteen months later, on December 9, 1988, Steffan wrote to the Secretary of the Navy requesting permission "to withdraw [his] resignation and to be allowed to receive [his] diploma." App. 83. On February 8, 1989, the Secretary denied Steffan's request. Id. at 107. The Secretary acted in accord with the recommendation of the Superintendent of the Academy, who concluded that Steffan's "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.

4. Prior Court Proceedings. On December 29, 1989, Steffan brought this action challenging his separation. App. 71-80. Steffan alleged that his separation from the Naval Academy violated equal protection and the Administrative Procedure Act ("APA"). See id. at 16 n.11, 78-79.¹

In its initial decision, the district court (Gasch, J.) denied the Government's motion to dismiss, rejecting the argument that Steffan lacked standing to sue because he had voluntarily

¹ The complaint also alleged violations of the First Amendment, App. 78, but Steffan has since abandoned this theory. See Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment at 9 n.* (Aug. 29, 1991).

resigned. App. 2225. The court did not decide the factual dispute whether Steffan's resignation was voluntary, but held that Steffan had alleged sufficient facts that, "if true, establish his standing to sue." Id.

The case proceeded to discovery. After Steffan refused at deposition to answer whether he had engaged in homosexual acts, App. 215-27, the district court dismissed the action. 733 F. Supp. 121 (D.D.C. 1989).

Steffan appealed, and a panel of this Court (Wald, C.J., D.H. Ginsburg and Randolph, JJ.) reversed and remanded in a per curiam decision. 920 F.2d 74 (D.C. Cir. 1990). The panel held that because the sole basis for Steffan's separation from the Academy had been his statement that he was a homosexual, "the question whether he engaged in potentially disqualifying conduct" was not in issue in his challenge to his separation. Id. at 76.

On remand, the district court granted summary judgment for the Government and upheld the old policy under the rational basis standard. App. 4, 40. The court recognized that Steffan, in stating that he was a homosexual, "demonstrated a propensity to engage in conduct which both parties agree is clearly regulable under Dronenburg [v. Zech, 741 F.2d 1388 (D.C. Cir. 1984)]." App. 31. Absent a showing by Steffan to the contrary, "the presumption must be, and it is rational for the Navy to believe," that he would likely engage in proscribed homosexual acts. Id. In addition, the court concluded that the Navy did not violate

the APA in processing Steffan's case or denying his request to graduate. Id. at 16 n.11.

5. **The Panel's Decision.** Steffan appealed, and a panel of this Court (Mikva, C.J., Wald and Edwards, JJ.) reversed. 8 F.3d 57 (D.C. Cir. 1993). The panel first held that Steffan's resignation from the Academy amounted to a "constructive discharge." Id. at 62.

On the merits, the panel, applying the rational basis test, held that the old policy violated equal protection. 8 F.3d at 63. The panel acknowledged that "'homosexual acts' are forbidden to military servicemembers, and there is no dispute that laws forbidding such conduct are constitutional." Id. at 64. But the panel rejected the military's interpretation of the old policy as conduct-directed; it held that the regulations are "far more concerned with status -- with thoughts and desires -- than with conduct," id., and that the presumption under the old policy that a person who states that he is a homosexual would act on his sexuality is irrational because it assumes that a person will act "on mere thoughts and desires." Id. at 66. The panel also concluded that the old policy "depends solely upon the prejudice of third parties [i.e., heterosexual service members and potential recruits]," id. at 67, 68, and thereby violates "constitutional principles mandat[ing] 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." Id. at 68-69. As relief, the panel ordered that Steffan be awarded a Naval

Academy diploma, reinstated to military service, and commissioned as an officer. Id. at 70.

SUMMARY OF THE ARGUMENT

1. This Court and other courts of appeals repeatedly have upheld the military's regulations proscribing homosexual acts by service members. Indeed, the panel itself accepted that the military's regulations barring service members from engaging in homosexual acts are constitutional. 8 F.3d at 64. In Dronenburg v. Zech, 741 F.2d 1388, 1398 (1984), this Court upheld the very policy challenged here as applied to a member who engaged in homosexual acts, finding that the policy was a "rational means of advancing a legitimate, indeed a crucial, interest common to all our armed forces." In so ruling, this Court accepted the military's conclusion that "[t]he effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline." Id.

The central issue here is whether, under the applicable regulations, the military may constitutionally presume that when a person states that he is a homosexual, he rationally can be expected to act upon his sexuality. Contrary to the panel's conclusion, the old policy does not bar service based on homosexual thoughts or status. It bars service by persons whose statements raise a legitimate presumption that they engage in or have a propensity to engage in homosexual acts. But that is only a presumption, not an invariable rule, and a person may remain in the military by showing that, notwithstanding his statement, he

does not and is not likely to violate military standards of conduct proscribing homosexual acts.

The military's conduct-directed policy is subject to review under the rational basis test, with great deference given to the military's considered professional judgment. Dronenburg, 741 F.2d at 1398; Ben-Shalom v. Marsh, 881 F.2d 454, 463-66 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). It is not for "[a] civilian court to second-guess [the] military decision[]," United States v. Shearer, 473 U.S. 52, 57 (1985), that service by persons who engage in or are likely to engage in homosexual acts is detrimental to "the primary business of armies and navies [which is] to fight or be ready to fight wars should the occasion arise." Toth v. Quarles, 350 U.S. 11, 17 (1955).

Based on its special expertise, the military rationally determined in the old policy that service by such persons would "seriously impair[] the accomplishment of the military mission." Directive 1332.14.H.1.a. The imperative need for unit cohesion in the military represents a governmental interest of paramount importance. That cohesion must be achieved in difficult circumstances that may include living and working conditions that are spartan and primitive, involving forced intimacy with little or no privacy. In determining the appropriate composition of the armed services, military authorities are not required to limit their consideration to whether a particular service member can perform his individual duties. Rather, they must consider the overall needs for an effective fighting unit, and they do "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, 881 F.2d at 460-61.

Moreover, DOD did not cater to impermissible prejudice in formulating this policy. At least outside the context of heightened scrutiny review, the military is not foreclosed from taking into account factors that are rationally related to preventing proscribed acts, achieving unit cohesion, and accommodating members' privacy concerns. The military's considered judgment that the policy serves to protect these legitimate interests satisfies the rational basis test.

2. Steffan's procedural challenges to the Navy's application of the regulations lack merit. He errs in asserting that he was denied adequate notice of the rebuttable nature of the presumption raised by his statement that he is a homosexual. The presumption is inherent in the language, structure, and purpose of the regulation. Nor, contrary to his argument, did the panel's per curiam reversal of the initial dismissal of the complaint hold that Steffan was deprived of fair notice.

Furthermore, it was not arbitrary for the Navy to deny Steffan his diploma while granting diplomas to midshipmen who had medical disabilities rendering them uncommissionable. Midshipmen with such medical disabilities had not been found unfit for service at the Naval Academy; by contrast, the applicable regulations rendered Steffan ineligible to serve in any military capacity, including as a midshipman at the Academy. In addition,

Steffan's complaint about the expeditious handling of the proceedings against him are unfounded. The record reflects that those proceedings were handled in accord with the applicable regulations and that Steffan himself sought expedition in various respects.

3. Even if this Court were to accept Steffan's claims, he would not be entitled to the relief ordered by the panel. First, contrary to the panel's holding, Steffan's resignation in the face of a likely discharge does not, by itself, constitute a constructive discharge. Moreover, the present record does not otherwise support a finding of a constructive discharge. Material facts regarding Steffan's claim that he was "forced" to leave the Academy were assumed in his favor when the district court granted summary judgment to the Government, but such factual issues would have to be resolved on remand before relief could be awarded to him.

Second, settled doctrines of equitable relief and administrative law require that, even if some procedural or substantive legal error were found in the proceedings against Steffan, the appropriate remedy would not be to grant the plenary relief that Steffan seeks. Rather, the proper course would be to remand the case for further proceedings, thereby placing Steffan in the position he would have been in but for the error and allowing the Navy to reprocess Steffan under the correct legal standards.

Finally, courts lack the authority to order that Steffan be granted an officer's commission in the Navy. Since Marbury v.

Madison, 5 U.S. (1 Cranch.) 137 (1803), it has been established that courts may not direct the President and the Senate in the exercise of their powers under the Appointments Clause, which applies to military officers. Weiss v. United States, 114 S. Ct. 752 (1994). A judicial remedy that compels the award of an officer's commission would violate these principles and squarely conflict with Orloff v. Willoughby, 345 U.S. 83, 90 (1953), which rejected a claim for a commission because the courts "have never assumed by any process to control the appointing power in either civilian or military positions."

ARGUMENT

I.

THE MILITARY'S POLICY OF EXCLUDING PERSONS WHO ENGAGE IN OR DEMONSTRATE A PROPENSITY TO ENGAGE IN HOMOSEXUAL ACTS DOES NOT VIOLATE EQUAL PROTECTION.

As the panel recognized, the starting point of the analysis in this case is that the "'homosexual acts' [defined in DOD Directive 1332.14.H.1.b] are forbidden to military service-members, and there is no dispute that laws forbidding such conduct are constitutional" in the special military context. See 8 F.3d at 64 (emphasis added). See also App. 31 (district court recognized that "both parties agree [that homosexual acts are] clearly regulable"). This Court and all of the other courts of appeals to consider the issue have rejected constitutional challenges to the military policy barring homosexual acts. Dronenburg, 741 F.2d at 1397-98; Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); Beller v. Middendorf, 632

F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); see Ben-Shalom, 881 F.2d at 460-61 (upholding discharge based on member's statement that she was a lesbian because military's policy targets those who are likely to engage in homosexual acts); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990) (same). Thus, DOD's well-established and unchallenged authority to forbid the commission of homosexual acts by service members is the backdrop for resolution of this case. Cf. Rostker v. Goldberg, 453 U.S. 57, 77 (1981) (equal protection challenge to male-only draft registration policy did not contest the separate restriction on the ineligibility of women for combat).

As we show below, the panel and Steffan are incorrect in viewing DOD's old policy as excluding persons based on their thoughts or status, rather than on their demonstrated propensity to engage in homosexual acts. DOD reasonably construes its regulations as raising a rebuttable presumption that a person who states that he is a homosexual is likely to act on his sexuality and engage in proscribed homosexual acts. Under the rational basis test, and in light of the great deference owed to the professional judgment of the military, the regulations pass constitutional muster because they prevent the commission of proscribed acts, promote unit cohesion, and protect privacy concerns.

A. The Challenged Regulations Are Not Directed To A Person's Thoughts Or Status, But Rather Exclude Persons Who Engage In Or Demonstrate A Propensity To Engage In Homosexual Acts.

1. The old policy establishes a rebuttable presumption that a person who states that he is a homosexual is likely, absent a showing to the contrary, to engage in homosexual acts. The policy begins with the declaration that service in the Armed Forces by those "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." Directive 1332.14.H.1.a (emphasis added). It then enumerates three specific grounds for separation: homosexual acts, homosexual marriage, and a person's statement that he is a homosexual. Id. H.1.c(1-3) (emphasis added). On their face, these provisions are addressed to homosexual conduct, not to homosexual status or thoughts.

The provision regarding statements provides that a service member will be discharged if he "has stated that he . . . is a homosexual . . . unless there is a further finding that . . . [he] is not a homosexual" Directive 1332.14.H.1.c(2). The first part of this provision contains the basic presumption that homosexuals, like heterosexuals, are likely to act in accordance with their stated sexuality. DOD's presumption comports with settled law allowing administrative presumptions that rest on "a sound factual connection between the proved and inferred facts." NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 787 (1979). A "sound factual connection" exists between a person's

statement that he is a homosexual and the inference of past and future homosexual acts:

[A person's statement that he is a homosexual] 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 status], but upon reasonable inferences about . . . probable [homosexual] conduct in the past and in the future.

Ben-Shalom, 881 F.2d at 464; see also Woodward, 871 F.2d at 1076; Nat'l Defense Research Inst., Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment 51, 64 (Rand 1993) (a "strong correlation" exists between persons who identify themselves as homosexuals and homosexual acts); Watkins v. United States Army, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting) (it is an "unremarkable" fact that homosexuals and heterosexuals "engage in or seek to engage in" homosexual and heterosexual conduct respectively; "[t]o pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd"), vacated, 875 F.2d 699 (1989) (in banc), cert. denied, 498 U.S. 957 (1990). Thus, as found by the Senate Armed Services Committee after extensive hearings leading to the enactment of legislation embodying the new policy on military service by homosexuals, "[i]t is reasonable for the armed forces to take into account the potential behavior of persons who define themselves as homosexual." Senate Comm. on Armed Services, Nat'l Def. Auth. Act for Fiscal Year 1994, S. Rep. No. 103-112, 103d Cong., 1st Sess. 283 (1993).

DOD's presumption, however, is a general supposition, not an invariable rule, and in some instances it will be inapplicable. Accordingly, the "unless" clause in the provision embodies the rebuttable nature of the presumption by affording the service member an opportunity to show that, despite the presumption of homosexual acts arising from his statement, he should be allowed to remain in the service because he does not in fact present the risks that the regulations are directed against.² To rebut the presumption, he must demonstrate that he does not "engage[] in, desire[] to engage in, or intend[] to engage in homosexual acts," Directive 1332.14.H.1.b(1) (emphasis added), thereby showing that he neither engages in nor has a "propensity" to engage in homosexual acts, and hence is not within the category of people whose presence the military has determined would "impair[] the accomplishment of the military mission." *Id.* H.1. In this way, the member establishes that he will conform his actions to the rules barring homosexual acts that are designed to promote the good of the service. By rebutting the presumption, he acknowledges that "[t]he essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service'" in order to "foster [the] instinctive obedience, unity, and esprit de corps [necessary] to accomplish . . . [the mili-

² DOD's use of a rebuttable presumption is "sensible and timesaving," *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-89 (1990), because an individual who has stated that he is a homosexual has the "peculiar means of knowledge" to prove whether or not the general presumption applies in his particular case. IX *Wigmore on Evidence* § 2486, at 290 (Chadbourn rev. 1981).

tary] mission." Goldman v. Weinberger, 475 U.S. 503, 507 (1986).³

The fact that, under the rebuttable presumption, a person who states that he is a homosexual but who demonstrates that he does not and will not engage in homosexual acts will be allowed to continue in the service is flatly inconsistent with the argument advanced by Steffan and accepted by the panel that the old policy is based on homosexual thoughts or status. Both the Seventh Circuit and the Federal Circuit have held that the policy is conduct-directed. Ben-Shalom, 881 F.2d at 464 ("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"); Woodward, 871 F.2d at 1074 n.6, 1076 (absent an assertion by plaintiff that he did not engage in homosexual acts, the court was not presented with a claim based only on homosexual "status"). The district court therefore correctly understood that when Steffan stated he was a homosexual, he "thereby demonstrated a propensity to engage in conduct which both parties agree is clearly regulable under Dronenburg." App. 31. Accordingly, unless Steffan showed

³ The decision in Ben-Shalom confirms that the military construed and applied the old policy as containing a rebuttable presumption. There, the Army advised a service member who had stated that she was a lesbian that her statement "gave rise to a presumption" that she engaged in, desired to engage in, or intended to engage in homosexual acts, and that she could "submit a response rebutting that presumption." 881 F.2d at 457. See also Steffan v. Cheney, 920 F.2d 74, 76 n.* (D.C. Cir. 1990) (recognizing the military's application of the rebuttable presumption in Ben-Shalom).

otherwise, "the presumption must be, and it is rational for the Navy to believe" that Steffan would likely engage in proscribed homosexual acts. Id.⁴

2. In rejecting the military's construction of its policy as conduct-directed and holding instead that the policy classified on the basis of status and thoughts, the panel focused on the word "desires" in the definition of a "homosexual." 8 F.3d at 64, 65, 67, 70. Whatever ambiguity this word may have in isolation, DOD interprets it as conduct-directed in light of both the overarching standard of "propensity," Directive 1331.14.H.1, and the surrounding terms "engages in" and "intends to engage in" homosexual acts. Id. H.1.b(1). Moreover, this interpretation is consistent with accepted definitions of the term "desires." See, e.g., Black's Law Dictionary 448 (6th ed. 1990) ("desire" defined as "[t]o ask, to request" and cross-referencing "intent"); The Random House Dictionary of the English Language 539 (1987) ("desire" defined as "to express a wish to obtain; ask for;

⁴ The policy also provides that a service member who has committed a homosexual act may be retained under exceptional circumstances if, inter alia, such conduct "is a departure from the member's . . . customary behavior," "is unlikely to recur," and "[t]he member does not desire to engage in or intend to engage in homosexual acts." Directive 1332.14.H.1.c(1). Contrary to the panel's understanding, see 8 F.3d at 64-65, this exception does not demonstrate that the policy targets members based on homosexual thoughts and status. This exception fully supports the interpretation advanced by DOD: the military will not retain any person -- regardless of sexual status -- who it concludes, based on the person's acts or statements, engages in or is likely to engage in homosexual acts. Cf. Beller, supra (upholding discharge of member based on homosexual acts even though the member claimed he was a heterosexual); Falk v. Secretary of the Army, 870 F.2d 941 (2d Cir. 1989) (same).

request"). "Desires" thus is not construed to mean an abstract thought or state of mind, but rather refers to the prospect of future homosexual acts.⁵

For these reasons, DOD's construction of its own policy -- which gives "desires" a narrow and conduct-directed meaning -- is reasonable and entitled to "controlling weight." Stinson v. United States, 113 S. Ct. 1913, 1919 (1993). DOD's interpretation is further reinforced by the principle that courts should construe statutes and regulations to avoid rather than compound constitutional issues. See, e.g., DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988).⁶

The panel also erred in concluding that the old policy is directed to "mere thoughts and desires" and thus "seeks to exercise . . . power over the minds of those in the military. 8 F.3d at 66. As explained above, the policy applies to members who engage in or have a propensity to engage in homosexual acts; it does not target homosexual status or thoughts. Nor, contrary to

⁵ Indeed, in 1981, DOD eliminated "homosexual tendencies" as a basis for separation in an effort to clarify that its policy was conduct-directed. See S. Rep. No. 103-112, supra, at 267. This regulatory evolution further supports DOD's construction of its own regulations.

⁶ Service members have understood that the old policy is directed to homosexual acts, not mere thoughts or status. For instance, in Meinhold v. DOD, Nos. 93-55242, 93-56354 (9th Cir.) (appeal pending), Meinhold's counsel argued in the administrative process that "the policy is directed towards persons who engage in homosexual conduct, or who, by their statements demonstrate[] a propensity to engage in homosexual conduct. [The p]olicy is not directed towards those who have a[n] orientation or a status." Transcript of Admin. Discharge, Record Entry No. 69 at 15 (June 29, 1992).

the panel's citation (id.) of cases such as Dennis v. United States, 341 U.S. 494 (1951), is it unconstitutional to make evidentiary use of a person's statements to demonstrate that he has engaged or will likely engage in acts that the Government may prohibit. As the Supreme Court recently held in Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993), even in the criminal context "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent," and thus it was not unconstitutional to use "evidence of the defendant's prior speech or associations." See also Dawson v. Delaware, 112 S. Ct. 1093, 1097 (1992) ("the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations . . . simply because those beliefs and associations are protected by the First Amendment").⁷

3. Steffan incorrectly argues (Br. 28) that the old policy improperly assumes that homosexuals, but not heterosexuals, are predisposed to engage in "misconduct." The policy simply presumes that a person, whether a homosexual or a heterosexual, is likely to act in a manner that is consistent with his stated sexuality. See S. Rep. 103-112, supra, at 284. The difference between the treatment of declared homosexuals and heterosexuals is, as the panel observed, 8 F.3d at 64, that "'homosexual acts'

⁷ Steffan's reliance (Br. 7, 26, 29) on Jacobson v. United States, 112 S. Ct. 1535 (1992), is misplaced. Unlike Jacobson, this case involves neither an attempt to use an "inclination" as a conclusive presumption, nor the imposition of criminal punishment.

are forbidden to servicemembers, and there is no dispute that laws forbidding such conduct are constitutional."⁸

B. DOD's Policy Should Be Reviewed Under The Rational Basis Test, With Great Deference Accorded To The Military's Professional Judgment.

1. Classifications relating to homosexual acts in the special context of the military are subject to rational basis review. Dronenburg, 741 F.2d at 1398; see High Tech Gays v. DISCO, 895 F.2d 563, 570-74 (9th Cir. 1990); Ben-Shalom, 881 F.2d at 463-66; Woodward, 871 F.2d at 1076; Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984). See also Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987) (relying on Dronenburg and Bowers v. Hardwick, 478 U.S. 186 (1986); to hold that heightened scrutiny does not apply to classifications based on homosexual acts).⁹

⁸ Steffan erroneously cites (Br. 9, 13, 27 n.19) Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986), rev'd in part, 486 U.S. 592 (1988); Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985); and Falk v. Secretary of the Army, 870 F.2d 941 (2d Cir. 1989). In those cases, the courts simply observed that a classification based solely on homosexual status would present a "difficult issue." Doe, 796 F.2d at 1522. As we have shown, the instant classification is directed at homosexual acts, not homosexual status. Steffan also errs in asserting that this Court in Gay Veterans Ass'n v. Secretary of Defense, 850 F.2d 764 (D.C. Cir. 1988), "held that the 1981 regulations discriminate on the basis of sexual orientation, not conduct" (Br. 27 n.19). That case -- which did not even involve the regulations challenged here -- upheld the military's regulations governing the characterization of discharges (e.g., honorable, general, and undesirable), concluding that homosexual "conduct may be presumed a 'negative aspect' in a servicemember's record." 850 F.2d at 768.

⁹ In Pruitt v. Cheney, 963 F.2d 1160, 1165 (1991), cert. denied, 113 S. Ct. 655 (1992), the Ninth Circuit held that DOD's policy must be analyzed pursuant to an "active" rational basis test. As the Steffan panel recognized (8 F.3d at 63), the Pruitt (continued...)

In determining the proper standard of review, it does not matter that DOD's policy targets future as well as past homosexual acts. In one category, the acts already have occurred; in the other, the military has a reasonable basis to believe that they will occur. Thus, the principle that classifications based on homosexual acts in the military context do not warrant heightened scrutiny applies with equal force to classifications based on reasonable inferences regarding future homosexual acts. See Ben-Shalom, 881 F.2d at 463-66; Woodward, 871 F.2d at 1076.

In a footnote, Steffan suggests (Br. 13 n.8) that heightened scrutiny is warranted on the alternative grounds that DOD's old policy: (1) penalizes "thoughts" and thus infringes on a fundamental right; and (2) targets homosexual "status," a classification he asserts has "all of the characteristics of a suspect class." The short answer to this argument is that the policy does not classify on the basis of homosexual thoughts or status; rather, as we showed supra Part I.A, it is based upon "reasonable inferences about . . . probable [homosexual] conduct in the past and in the future." Ben-Shalom, 881 F.2d at 464; accord Woodward, 871 F.2d at 1076. Because the challenged classification is directed to acts that the military may legitimately proscribe, there is no basis for the application of heightened scrutiny

⁹(...continued)
test does not survive the Supreme Court's subsequent decision in Heller v. Doe, 113 S. Ct. 2637 (1993), which we discuss infra Part I.B.2. Indeed, the Ninth Circuit's creation of an "active" rational basis test was especially inappropriate in the military context.

here. See High Tech Gays, 895 F.2d at 571; Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1076. See also Padula, 822 F.2d at 102-03.

2. Classifications subject to rational basis review are accorded "a strong presumption of validity" and must be sustained if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller v. Doe, 113 S. Ct. 2637, 2642 (1993). Pursuant to this "relaxed" standard, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976), the Government "has no obligation to produce evidence to sustain the rationality" of a classification; rather, the Government may rely on "'rational speculation unsupported by evidence or empirical data.'" Heller, 113 S. Ct. at 2643 (quoting FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993)). And, of course, rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Heller, 113 S. Ct. at 2642. So long as the asserted rationale is "plausible," "debatable," or "find[s] some footing in the realities of the subject addressed," the classification must be sustained. Heller, 113 S. Ct. at 2643, 2645, 2646.

In applying the rational basis test here, great deference is due the "considered professional judgment" of "appropriate military officials." Goldman, 475 U.S. at 509. This deference derives from the Constitution, which vests "plenary control" in the President, see U.S. Const., Art. II, § 2, cl. 1, and Congress, see id. Art. I, § 8, cls. 12-14, for promulgating rules

relating to the composition and governance of the military.

Chappell v. Wallace, 462 U.S. 296, 301 (1983); Rostker, 453 U.S. at 67.

The military's "special constitutional function . . . to fight or be ready to fight wars should the occasion arise," Greer v. Spock, 424 U.S. 828, 837-38 (1976), renders the military a "specialized society separate from civilian society [that has,] by necessity, developed laws and traditions of its own during its long history." Parker v. Levy, 417 U.S. 733, 743 (1974). "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life" in order to "foster instinctive obedience, unity, commitment, and esprit de corps." Goldman, 475 U.S. at 507

As the Supreme Court has explained, the judiciary lacks institutional "competence" to second-guess military judgments relating to military effectiveness. Gilligan v. Morgan, 413 U.S. 1, 10 (1973). Courts accordingly are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." Goldman, 475 U.S. at 507. In military matters, therefore, a court must be "particularly careful not to substitute [its] judgment of what is desirable for that of [the Political Branches], or [its] own evaluation of evidence for a reasonable evaluation by the [Political Branches]." Rostker, 453 U.S. at 68. This is not to say that a court has no role in deciding constitutional questions in the military context; but in deciding such questions, "the Constitution itself

requires [great] deference" to the military's considered judgment. Rostker, 453 U.S. at 67.¹⁰

C. The Military's Policy Is Rationally Related To A Legitimate Government Goal.

Underlying the old policy is the judgment by the "appropriate military officials," Goldman, 475 U.S. at 509, that service by "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." Directive 1332.14.H.1. This considered policy decision represents a "rational means of advancing a legitimate . . . interest common to all our armed forces," Dronenburg, 741 F.2d at 1398, and serves a number of constitutionally permissible goals, including preventing the commission of prohibited homosexual acts, promoting unit cohesion, and accommodating privacy concerns.

1. DOD's policy is designed to prevent the commission of proscribed homosexual acts that the military has determined are "almost certain to be harmful to morale and discipline" within a military unit. Dronenburg, 741 F.2d at 1398. The Steffan panel correctly observed that "[h]omosexual conduct is more than a practice discouraged by the military: it is grounds for disci-

¹⁰ Steffan's assertion (Br. 29) that "[t]he deference doctrine is . . . inapplicable" is insupportable. Even in Rostker, where the Supreme Court considered a challenge to a military classification based on gender -- a classification entitled to heightened scrutiny in the civilian context -- the Court stated that judicial deference in military matters was "at its apogee." 453 U.S. at 70.

pline and sometimes (in the case of sodomy) a criminal act." 8 F.3d at 65. And, in the military context, "there is no dispute that laws forbidding [homosexual] conduct are constitutional." Id. at 64. Thus, DOD has a substantial "interest in deterring homosexual conduct by members of the Armed Forces." Hatheway v. Secretary of the Army, 641 F.2d 1376, 1384 (9th Cir.), cert. denied, 454 U.S. 864 (1981).

The part of the old policy that Steffan challenges serves to prevent the commission of those acts harmful to the military mission by excluding persons who, by their statements, demonstrate a propensity to engage in homosexual acts. Cf. UCMJ, 10 U.S.C. §§ 880, 881 (authorizing criminal sanctions for attempts and conspiracies prior to the commission of the substantive offense). "[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). Thus, as the Seventh Circuit explained in rejecting a challenge identical to Steffan's, principles of equal protection do not require the military "to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission." Ben-Shalom, 881 F.2d at 460-61.¹¹

¹¹ Steffan argues (Br. 29) that Robinson v. California, 370 U.S. 660 (1962), bars the Navy from discharging persons who "are predisposed to commit unlawful . . . acts." But Robinson stands for the principle that the Government may not impose criminal sanctions based solely on a person's status as a drug addict; it does not prevent the Navy from formulating non-criminal rules (continued...)

New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), directly supports the rationality of the military's judgment. Beazer involved a challenge by methadone patients to the Transit Authority's rule barring employment to all persons who use narcotic drugs. Plaintiffs argued that the policy violated equal protection because it denied employment to methadone users who were enrolled in a rehabilitation program and therefore able to perform the jobs. Id. at 589-90. The Supreme Court disagreed, holding that the policy was rationally "supported by the legitimate inference that . . . a degree of uncertainty [regarding future drug use while still in the program] persists," id. at 591, and that it "represent[ed] a policy choice . . . [regarding employment] made by that branch of Government vested with the power to make such choices." Id. at 592. Accord Vance v. Bradley, 440 U.S. 93, 106 (1979) (in establishing mandatory retirement age, Congress permissibly drew a line that sought to "avoid the risks" that otherwise might result).

Similarly, DOD's policy represents a rational choice about how to avoid the commission of proscribed homosexual acts that pose a significant threat to the effective accomplishment of the military mission. See, e.g., Dronenburg, 741 F.2d at 1398; Ben-

¹¹(...continued)
regarding the composition of its forces to preclude service by people who it reasonably concludes will use illegal drugs or commit any other dischargeable offense. See Orloff, 345 U.S. at 92 (military may refuse to grant an officer's commission based on reasonable concerns arising from a person's past political affiliations); 10 U.S.C. § 504 (statutory bar to military enlistment by felons absent a special waiver).

Shalom, 881 F.2d at 464. DOD's policy is not rendered irrational merely because it may be "broader than necessary" to accomplish its purpose. Beazer, 440 U.S. at 592. In fact, in contrast to the "general rule" upheld in Beazer, DOD's policy gives "individualized consideration" to every member by affording an opportunity to rebut the presumption. See id. In sum, the military's conclusion that the policy prevents homosexual acts that would interfere with the military mission provides a rational basis for the policy.

2. DOD's policy is also rationally related to the vital military goal of maintaining unit cohesion. It has long been the military's judgment that unit cohesion and military readiness would be impaired by service of persons who have demonstrated a propensity to engage in homosexual acts. The military has determined that service by such members would harm unit cohesion by adversely affecting the military's ability to "maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; [and] to ensure the integrity of the system of rank and command." Directive 1332.14.H.1.a. This Court and other courts of appeals have found that DOD's policy is reasonably related to these legitimate concerns. Dronenburg, 741 F.2d at 1398; Ben-Shalom, 881 F.2d at 465; Woodward, 871 F.2d at 1076-77; Rich, 735 F.2d at 1229; Beller, 632 F.2d at 811 & n.22. Even the Steffan panel acknowledged that, under rationality review, "the court must presume that [DOD's concerns regarding unit cohesion] are well-founded" 8 F.3d at 67.

In recently enacting legislation embodying DOD's new policy, Congress carefully examined and reaffirmed the rationales underlying the old policy. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670 (to be codified at 10 U.S.C. § 654). Although the new policy "is not at issue in this case," 8 F.3d at 61, and although these legislative developments are not essential to the validity of the old policy under the rational basis test, the legislative findings are properly considered and confirm the rationality of the old policy. See Rostker, 453 U.S. at 74-75; Schlesinger v. Ballard, 419 U.S. 498, 510 n.13 (1975). Given Congress' constitutional responsibility and expertise regarding military affairs, and its institutional competence to "amass and evaluate the vast amounts of data bearing on such an issue," its legislative "findings are of course entitled to a great deal of deference." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985).¹²

¹² Although the new policy is not before this Court, we note that it differs from the old policy in that it: (1) expressly states that a person's sexual orientation is a personal and private matter, and that only homosexual acts, marriages, and statements that reveal a propensity to engage in acts are grounds for separation; (2) eliminates questions regarding sexual orientation during the accession process; (3) clarifies the definition of "homosexual" and the nature of the rebuttable presumption by eliminating "desires"; (4) specifies the circumstances in which investigations will be commenced; and (5) spells out the procedures by which a member who states that he is a homosexual may rebut the presumption that he engages in or is likely to engage in homosexual acts.

The new statute makes two key findings regarding unit cohesion:

One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

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The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

10 U.S.C. § 654(a)(7), (15). Congress thus has considered and ratified the continued validity of this rationale underlying DOD's old policy. It would be remarkable to conclude that the policy challenged in this case, whose underpinnings were so recently reaffirmed by the Executive and Legislative Branches, is constitutionally irrational.

Abundant congressional testimony supports the above legislative findings. For example, General H. Norman Schwarzkopf testified to Congress that unit cohesion "is the single most important factor in a unit's ability to succeed on the battlefield." S. Rep. 103-112, supra, at 274. Likewise, then-Chairman of the Joint Chiefs of Staff, General Colin L. Powell, explained that the military strives to "create cohesive teams of warriors who will bond so tightly that they [will] go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies." Id. at 275.

Concerned that "[w]e []not allow anything to happen which would disrupt . . . cohesion within the force," military officials testified that, in their considered professional judgment, service by persons who by their statements demonstrate a propensity to engage in homosexual acts "would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." S. Rep. 103-112, supra, at 275, 278. See also id. at 281 (service by persons with a stated propensity to engage in homosexual acts "would [adversely] affect the cohesion and well-being of the force"). This military judgment is entitled to the utmost deference. "It is not for [the courts] to dismiss [concerns regarding unit cohesion] as insignificant in the context of military preparedness and the exigencies of a future mobilization." Rostker, 453 U.S. at 81.¹³

3. Military authorities also have rationally determined that the challenged policy accommodates legitimate privacy concerns of service members "who frequently must live and work

¹³ Steffan argues (Br. 17) that the experience of foreign countries in removing restrictions on military service by homosexuals shows that those restrictions are not necessary for military effectiveness. The Senate Armed Services Committee recently considered this matter and concluded that, for the reasons stated in its report, "the foreign experience . . . does not provide a relevant basis for" determining the policy for the United States military. S. Rep. 103-112, supra, at 288.

Steffan also asserts (Br. 19) that the rationality of DOD's policy is belied by the fact that DOD has suspended it during national emergencies. But "the authority to administratively separate homosexuals has been in effect [continuously] over a lengthy period of time." S. Rep. 103-112, supra, at 267 (discussing history of policy). Moreover, record evidence explicitly refutes Steffan's contention that DOD suspended the policy during the Persian Gulf conflict. See App. 59-60.

under close conditions affording minimal privacy." Directive 1332.14.H.1.a. This privacy concern provides a constitutionally permissible basis for DOD's policy, especially given the "potential . . . of possible close confinement aboard ships or bases for long periods of time" Beller, 632 F.2d at 812.

Congress stated in its recent legislative findings that service members "routinely" and "involuntarily" must "accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy." S. Rep. 103-112, supra, at 264. Their military duties frequently require them to "spend[] 60 continuous days in the close confines of a submarine; sleep[] in a foxhole with half a dozen other people; [and live and sleep with] 125 people . . . in the same 40 by 50 foot . . . area." Id. at 277. General Powell stated that "it would be prejudicial to good order and discipline" if the military required heterosexuals and persons who demonstrated a propensity to engage in homosexual acts "to share the most private facilities together, the bedroom, the barracks, latrines, and showers." Id. at 283; see id. at 280-82. Thus, as the district court correctly held (App. 33), DOD has rationally concluded that its policy serves to avoid undesirable intrusions into the privacy of service members.¹⁴

¹⁴ For similar reasons, DOD has rationally concluded that allowing service by those who demonstrate a likelihood to engage in homosexual acts would "adversely affect[] the ability of the Military Services to . . . recruit and retain members" in our all-volunteer force. Directive 1332.14.H.1.a. See Dronenburg, 741 F.2d at 1398; Woodward, 871 F.2d at 1076-77; Rich, 735 F.2d at 1227-28 n.7; Beller, 632 F.2d at 811.

Contrary to Steffan's suggestion (Br. 22 & n.13), DOD's policy is not based on assumptions that homosexual service members are "hypersexual" or "sexually predatory" and thus will molest unwary heterosexuals. Rather, as the district court explained (App. 33), DOD's policy springs from legitimate concerns relating to privacy, modesty, and decorum regarding a service member's interest in avoiding unwanted viewings "in certain states of undress" in the extremely confined living conditions often present in military life. DOD's concerns are undeniably "plausible" and have, at a minimum, "some footing in . . . realit[y]." Heller, 113 S. Ct. at 2643, 2645.

Steffan asserts (Br. 22) that the privacy rationale is rendered "absurd" by the fact that DOD permits continued service by a person who states that he is homosexual but successfully rebuts the presumption of homosexual acts. This assertion ignores that retaining a member who rebuts the presumption is perfectly consistent with the policy's purpose of excluding only persons who engage in or likely will engage in homosexual acts; by definition, a member who succeeds in rebutting the presumption has demonstrated that he does not engage in and will not engage in homosexual acts. More fundamentally, the retention of such persons reveals a balance struck by DOD between two competing interests: the privacy interest of heterosexuals, on the one hand, and, on the other hand, the interest of persons who state that they are homosexuals in serving in the military if they demonstrate that they have no propensity to engage in homosexual

acts and thus will conform their conduct to military standards. The fact that the military affords members the opportunity to rebut the presumption surely does not render the policy impermissible. A policy need not be carried to its logical limits, without regard to other competing interests, to be rational. Rather, in the context of rational basis review, "the latitude of discretion is notably wide in . . . the granting of . . . exemptions upon grounds of policy." Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992).

4. Steffan's argument (Br. 10) that DOD's policy caters to impermissible "prejudice" fails to recognize that the "statements" portion of the old policy is, as we showed supra Part I.A, conduct-directed and rests on concerns identical to those underlying DOD's policy banning homosexual acts. Thus, the unbroken line of appellate decisions holding that DOD's proscription of homosexual acts rests on a constitutionally permissible basis applies with equal force here. See Dronenburg, 741 F.2d at 1398; Ben-Shalom, 881 F.2d at 460-61; Woodward, 871 F.2d at 1076; Rich, 735 F.2d at 1229; Beller, 632 F.2d at 811.

Moreover, Steffan overlooks the fact that service members' views about homosexual conduct in the unique living and working conditions found in the Armed Forces reflect a number of different considerations -- including religious doctrines, moral precepts, ethical values, and privacy concerns -- about an extraordinarily complex issue. Rationality review does not require that military officials attempt to determine the basis

for attitudes involving the complex issue of homosexuality. If rational basis review and deference to the military mean anything, it is that the Armed Forces must be allowed sufficient latitude to deal with practical problems that may arise due to the attitudes of service members that affect military preparedness, unit cohesion, discipline, and morale. See S. Rep. 103-112, supra, at 279.

Steffan's argument that the Armed Forces cannot consider factors rationally related to military readiness cannot be reconciled with the military's "vital role," Goldman, 475 U.S. at 507, to be prepared to defend our country. Given the realities the Armed Forces confront, it is within the province of the military to conclude that service by those who engage in or likely will engage in prohibited homosexual acts "seriously impairs the accomplishment of the military mission." Directive 1332.14.H.1.a. The consequence of Steffan's argument, if accepted by this Court, is that the military would be precluded from addressing what even the panel accepted, under rationality review, are "the Secretary's . . . well-founded . . . fears" (8 F.3d at 67) of a serious impairment of the military mission. Steffan's claim of "prejudice" does not undermine the rationality of the military's policy for dealing with this issue or overcome the deference due the military's judgment on matters concerning the effectiveness and readiness of our Armed Forces. Accordingly, as the Seventh Circuit held in Ben-Shalom, 881 F.2d at 465,

"the concerns set forth in the military policy and regulation can[not] be so easily dismissed as mere prejudice"

Contrary to Steffan's assertion (Br. 10), Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), does not establish that DOD's policy is based on impermissible prejudice. First, Cleburne did not arise in the special context of the military. But beyond that, the Court's holding in Cleburne was that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." 473 U.S. at 448 (emphasis added). Thus, the negative societal attitudes toward retarded persons in Cleburne were not "properly cognizable" or relevant to legitimate governmental interests in the zoning proceeding, because it was not the responsibility of the Cleburne zoning board to make sure that neighbors could get along and live together in harmony. Quite the opposite is true in the Armed Forces, where one of the most important military objectives is to ensure close cooperation and unit cohesion.

Steffan's reliance (Br. 10) on Palmore v. Sidoti, 466 U.S. 429 (1984), is even more misplaced. The challenged policy in Palmore occurred in the civilian context and involved a racial classification. Unlike race, which occupies a unique position in our legal system and in our history, the likelihood of a service member engaging in homosexual acts is not per se an illegitimate consideration for DOD to take into account when establishing

military regulations. Indeed, it is undisputed here that the military is constitutionally empowered to regulate homosexual acts. Thus, contrary to Steffan's assertion, the old policy is in no way comparable to "racist" regulations of the past (Br. 16, 25) and does not discriminate on the basis of homosexual "status" (id. at 21).¹⁵

In sum, DOD's policy does not represent "unthinking[]" or "reflexive[]" government action and is not an "accidental by-product of a traditional way of thinking about [homosexuals]." Rostker, 453 U.S. at 72, 74. Nor does it embody "a bare . . . desire to harm" homosexuals -- a plainly "[il]legitimate" objective. See Cleburne, 473 U.S. at 447. Rather, it reflects the considered professional judgment of military authorities, which was recently subjected to "careful, thorough, and open-minded review" as to "what is best for military effectiveness." See S. Rep. 103-112, supra, at 279. As the Senate Committee observed, the policy "is not based upon stereotypes, but upon the impact in the military setting of . . . [persons who engage or

¹⁵ The "heckler's veto" cases upon which Steffan and the panel rely (Br. 26; 8 F.3d at 68) are inapposite because they involve the exercise of the fundamental right of free speech outside the military context and thus -- unlike a military policy directed at homosexual acts and the propensity to engage in homosexual acts -- are subject to a higher standard of scrutiny than the rational basis test. Similarly, cases such as Frontiero v. Richardson, 411 U.S. 677 (1973), and Califano v. Goldfarb, 430 U.S. 199 (1977), which Steffan cites (Br. 6, 12), are beside the point because they too involve heightened scrutiny review (and indeed in Frontiero, the Government's argument "was based solely upon considerations of administrative convenience" and not deference to military judgment, see Schlesinger, 419 U.S. at 506).

likely will engage in homosexual acts] [T]he policy is based upon prudence, not prejudice." Id. at 282, 283.

II.

THE ADMINISTRATIVE PROCEEDINGS DID NOT VIOLATE DUE PROCESS AND WERE NOT ARBITRARY OR CAPRICIOUS.

Steffan argues that the Navy's processing of his case violated due process and the Administrative Procedure Act in several respects. The district court correctly rejected these arguments, concluding that the Navy's actions were in accord with the law and supported by the record.

A. Steffan Was Not Denied Fair Notice Of What The Regulations Prohibited.

Without ever having claimed that he does not engage and will not engage in homosexual acts, Steffan argues (Br. 34) that the per curiam decision in the prior appeal from the order of dismissal in this case held that he "could not possibly have had adequate notice" of the rebuttable presumption under the old policy. The panel's opinion, of course, is not binding on the in banc Court. But more importantly, Steffan misperceives the previous decision.

In the prior appeal, the panel held only that the district court improperly dismissed Steffan's suit because he refused to answer deposition questions about whether he had engaged in homosexual acts. The panel concluded that there was no basis for the inquiry because the ground asserted by the Government for the proceedings against Steffan -- i.e., his statement that he was a homosexual -- did "not put into issue the question whether he

engaged in potentially disqualifying conduct." 920 F.2d at 76. We agree that evidence of specific homosexual acts (although in our view not irrelevant, see Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985)) was not necessary to the resolution of this case, precisely because the Navy was entitled to proceed on its reasonable and un rebutted regulatory presumption that Steffan, based on his statements, engaged or likely would engage in homosexual acts and was therefore subject to discharge.

Beyond that, Steffan's assertion that he was denied his right to fair notice is legally unavailing. As the district court held, App. 31, the rebuttable nature of the conduct-directed presumption in the old policy is inherent in the language, structure, and purpose of the regulations. Two courts of appeals similarly have recognized that the old policy targets homosexual acts, not "thoughts" or "status." See Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1076. And in the prior appeal in this case, the panel, citing Ben-Shalom, recognized that the military has applied the old policy as giving rise to a rebuttable presumption. See 920 F.2d at 76 n.*. Therefore, a reasonable attorney defending a discharge proceeding based upon his client's statement that he was a homosexual had adequate notice from the regulations to explore the defense set forth in the "unless" clause of DOD Directive 1332.14.H.1.c(2) and argue (if warranted by the facts) that his client had not engaged, and did not have a propensity to engage, in homosexual acts. See supra Part I.A.1. Steffan, who was assisted by four attorneys, thus

was not deprived of a fair opportunity to assert the facts, if true, necessary to establish this defense.¹⁶

B. Steffan Was Not Subjected To Disparate Treatment.

Steffan contends (Br. 35-36) that the Navy unlawfully denied him a diploma while permitting other similarly situated midshipmen to graduate. Steffan does not contend that any midshipman found to have demonstrated a propensity to commit homosexual acts was permitted to graduate. Rather, his claim of disparate treatment was based upon evidence (App. 928-53) that midshipmen were permitted to graduate even though they were ineligible for a commission because of medical disabilities that did not impair their military performance at the Academy.

Steffan was not comparable to these midshipmen. Although a medical disability may prevent a midshipman from performing tasks necessary for a commissioned officer, it does not necessarily render him unfit to serve at the Academy. In contrast, persons who state that they are homosexuals are not, absent rebuttal of the regulatory presumption, permitted to serve in the Navy in any capacity because their service has been determined to "seriously impair[] the accomplishment of the military mission." Directive 1332.14.H.1.a. The record does not show that anyone who, like Steffan, was ineligible to serve at the Academy was allowed to

¹⁶ In any event, as explained infra Part III, Steffan's due process claim here, even if valid, would not entitle him to the "plenary" relief he requests (Br. 34), but rather would lead only to a remand for further administrative proceedings where he could seek to rebut the applicable presumption. See also infra note 20.

graduate.¹⁷ Thus, Steffan was not treated differently from other similarly situated midshipmen.

Steffan also argues (Br. 35-36) that the Navy violated its policy by separating him for a condition that did not exist prior to his entry into the Navy. As a factual matter, this assertion is erroneous because the psychologist who examined Steffan found that his homosexuality "pre-dates his tenure at the Naval Academy." App. 105. In any event, DOD's policy does not permit continued service for members who, like Steffan, have demonstrated a propensity to engage in homosexual acts, regardless of when such a propensity began.¹⁸

C. The Administrative Proceedings Were Not Unlawfully Expedited.

Steffan complains (Br. 35, 37) that the Navy 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." Steffan, however, fails to

¹⁷ A variety of other reasons disqualify midshipmen from further service at the Naval Academy, e.g., "discreditable management of personal affairs," "[f]ailure to conform to the prescribed weight standards," and "[c]ertain illnesses . . . which adversely affect performance." See App. 380-81.

¹⁸ Steffan further asserts (Br. 36) that the Academy viewed his homosexuality "as a psychological disorder." Because the Academy permitted other midshipmen who suffered from psychological conditions to graduate, he contends, it was required to permit him to graduate. Steffan's argument misstates the record, which shows -- as he elsewhere concedes (App. 83) -- that the Academy concluded that he did not suffer from a psychological disorder. *Id.* at 105. In any event, whether or not homosexuality is a psychological disorder is irrelevant to the validity of the old policy's exclusion of those who engage, or demonstrate a propensity to engage, in homosexual acts.

mention his own role in expediting the administrative process. The Navy notified him in writing that he was entitled to "72 or more hours" advance notice before the Performance Board hearing, and he expressly "elect[ed] to waive this requirement" App. 103. See id. at 401. In addition, at the Performance Board, Steffan stated that he did not desire to remain at the Academy, id. at 419, and he did not dispute the Commandant's written statement that he desired to leave the Academy "as soon as possible" if he were not permitted to graduate. Id. at 352, 358. Finally, Steffan pretermitted the pending discharge proceeding by resigning, knowing that, in so doing, he "forfeit[ed] his right to" contest the Academic Board's recommendation that he be discharged. Id. at 98. This evidence amply supports the district court's determination that the Navy's expeditious processing of Steffan's case 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.

Moreover, contrary to Steffan's assertion, the separation process took over 60 days, not one week. The process commenced on March 23, 1987, when, after learning of the NIS investigation, Steffan approached the Commandant and admitted that he was a homosexual. In full compliance with the governing regulations (App. 370-72), the process continued for more than two months, until May 28, 1987, when the Secretary of the Navy accepted

Steffan's resignation. Id. at 96. Steffan's claim of unlawful haste is therefore without merit.

III.

EVEN IF THIS COURT WERE TO HOLD THAT STEFFAN HAS A MERITORIOUS CLAIM, HE WOULD NOT BE ENTITLED TO THE RELIEF THAT HE SEEKS.

A. The Panel Erred In Holding That Steffan Was Constructively Discharged As A Matter Of Law.

Steffan's separation from the Naval Academy was based on his letter of resignation, which stated that he "desire[d] to resign in lieu of being recommended for discharge." App. 106. Nevertheless, the panel held that Steffan was constructively discharged because he resigned "after his superiors informed him of the consequences of refusing to resign." 8 F.3d at 62.

The panel's reliance on the fact that Steffan resigned in the face of administrative proceedings likely to lead to his discharge is not a sufficient ground for a finding of a constructive discharge. A constructive discharge occurs when an employee can show that an employer created or maintained conditions so intolerable that a reasonable employee would have felt compelled to resign. Simpson v. Federal Mine Safety & Health Rev. Comm'n, 842 F.2d 453, 461-62 (D.C. Cir. 1988). As a matter of law, a resignation is not converted into a constructive discharge whenever a person elects to resign rather than complete the discharge process because a resignation is more advantageous to him. Arnold v. McClain, 926 F.2d 963, 966-67 (10th Cir. 1991). Here, Steffan made a conscious and rational choice to resign rather than contest the Academic Board's recommendation that he be dis-

charged. He thereby obtained an official record describing the cause for his separation as "resigned" rather than "discharged," and his resignation resulted in the termination of the NIS investigation prior to its completion. See App. 90, 347, 360. He cannot now avoid the consequences of his decision. Cf. Brady v. United States, 397 U.S. 742 (1970) (voluntary guilty plea not invalid even though it was made to avoid possibility of death penalty that the Supreme Court later held could not constitutionally have been imposed).

Moreover, the present record does not support the panel's conclusion that the Navy "forced" Steffan to resign. 8 F.3d at 62. Although Steffan claimed that Major Funk pressured him to resign (App. 90, 288), Major Funk specifically denied that allegation. Id. at 162. Accordingly, this disputed issue of material fact precludes summary judgment for Steffan on the constructive discharge question.¹⁹

¹⁹ The panel incorrectly stated that "the district court held . . . that Mr. Steffan's resignation . . . amounted to a 'constructive discharge'" 8 F.3d at 62. The district court held only that Steffan had "pled sufficient facts to defeat a motion to dismiss for want of standing" on that issue and that his allegations "if true, establish his standing to sue." App. 2234, 2225 (emphasis added). Later, in granting summary judgment for the Government, the district court properly did not resolve any disputed factual issues.

B. Even If Steffan's Separation Were Invalid, The Panel Erred In Granting Him Substantive Relief Rather Than Remanding the Case To The Navy For Further Proceedings Under The Correct Legal Standard.

Even if this Court were to invalidate Steffan's separation from the Academy, settled doctrines of equitable relief and administrative law would limit the remedy to a remand to the Navy for further proceedings under the correct legal standard.

1. If this Court were to hold that there was a procedural defect in Steffan's separation proceedings, a fundamental principle of equitable relief would require that he be "return[ed] . . . to the position that [he] would have occupied 'but for' [his] illegal release from duty." Dilley v. Alexander, 627 F.2d 407, 413 (D.C. Cir. 1980). For example, were the Court to conclude that Steffan was not given adequate notice that he could rebut the presumption arising from his statement that he is a homosexual, then, at most, he should be granted a remand and the opportunity to rebut that presumption.²⁰ A violation of procedural due process does not by itself entitle an individual to substantive relief. Cf. Carey v. Piphus, 435 U.S. 247 (1978) (award of nominal damages for denial of procedural due process).

At the time of his separation, Steffan was a midshipman under investigation for possible regulatory and criminal violations, and the Academic Board had recommended his discharge. If

²⁰ Indeed, even that relief is inappropriate here because Steffan has never asserted that, in fact, he did not and would not engage in homosexual acts. Absent such a claim, there is no material issue in dispute that would require a hearing. See Codd v. Velger, 429 U.S. 624, 627 (1977).

any procedural error occurred in connection with his separation, the case should be remanded to permit the Navy to complete its investigation and then conduct appropriate administrative proceedings in light of this Court's decision.

2. Similarly, in the event the Court holds that part of the old policy is substantively defective, a remand, not the plenary relief requested by Steffan, would be appropriate. Thus, if this Court were to conclude, as the panel did, that the use of the term "desires" in the old policy renders the policy invalid because it focuses more on "thoughts" or "status" than on conduct, see 8 F.3d at 64, the "desires" portion of the policy should be severed, and the Navy should be permitted to reprocess Steffan under the remaining valid portions of the policy that mandate the discharge of a person who "engages in . . . or intends to engage in homosexual acts." Directive 1332.14.H.1.b(1). By awarding Steffan substantive relief rather than remanding the case to the Navy for further proceedings, the panel violated the fundamental principle of administrative law that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952); see NLRB v. Food Stores Union, Local 347, 417 U.S. 1, 9 (1974).

C. The Panel Lacked Authority To Award Steffan A Commission As A Military Officer.

Finally, the panel lacked authority to order that the Secretary commission Steffan as a Naval officer. To begin with, the commission issue is not properly presented in this case. When

Steffan sought approval from the Secretary of the Navy to withdraw his resignation, he asked only that he be permitted "to withdraw my resignation and to . . . receive my diploma" App. 83. See also App. 419 (Steffan advised the Performance Board that he did not "desire to be commissioned as an officer of the Naval Service"). Because he did not present the question of a commission at the administrative level, any claim to such relief has been waived. See Kendall v. Army Bd. for Corr. of Military Records, 996 F.2d 362, 366 (D.C. Cir. 1993).

In any event, since Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166-70 (1803), it has been established that the courts may not direct the President and the Senate in the exercise of their powers under the Appointments Clause to appoint "Officers of the United States."²¹ Weiss v. United States, 114 S. Ct. 752, 757 (1994), makes clear that "the Appointments Clause applies to military officers" Under 10 U.S.C. § 531:

Original appointments . . . in the grades of ensign through captain in the Regular Navy shall be made by the President, by and with the advice and consent of the Senate.

The Supreme Court's decision in Orloff v. Willoughby, 345 U.S. 83 (1953), establishes that it is beyond the authority of

²¹ Article II, section 2, clause 2 of the Constitution provides:

The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law

the courts to grant military commissions. There, the Court specifically rejected a request for a judicial order directing that a military commission be given, stating:

Congress has authorized the President alone to appoint [military] officers . . . [to specified ranks], above which the advice and consent of the Senate is required

It is obvious that the commissioning of officers in the [Armed Forces] is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions.

.

Whether Orloff deserves appointment is not for judges to say

345 U.S. at 90, 92. In short, the awarding of a commission is a sensitive matter that is entrusted not to the judiciary but to the discretion of the President with the advice and consent of the Senate. See Orloff, 345 U.S. at 90, 91 ("[t]he President[] commission[s] . . . [military officers] to the specified rank during the pleasure of the President," and such appointments require "the advice and consent of the Senate").

In an effort to circumvent this settled doctrine, Steffan makes the remarkable argument (Br. 32-33) that "[i]mplicit in a court's ability to remedy a violation of law is the ability to grant relief that in effect usurps powers reserved to the executive and legislative branches of government." But "'[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" INS v. Pangilinan, 486 U.S. 875, 883 (1988). Indeed, in Orloff the Supreme

Court held that it did not have the remedial power to order the commissioning of an individual notwithstanding his argument that he had been denied a commission on grounds that violated freedom of speech and association. See 345 U.S. at 89. More generally, Steffan's argument would vitiate a host of settled principles that preclude a court from awarding relief -- such as sovereign immunity, the political question doctrine, and immunity for government officials. That is not, and cannot be, the law.

As in Pangilinan, 486 U.S. at 883-84, which involved the authority of the Congress to establish rules conferring citizenship, the power to grant a commission "has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." Rather, the power to commission military officers has been conferred on the President, with the advice and consent of the Senate. Steffan's assertion of unlimited judicial authority provides no basis for the Court to disregard the Appointments Clause and order the commission that he seeks.²²

²² Steffan's assertion (Br. 31) that Naval Academy graduates are commissioned "as a matter of course" is irrelevant to the issue of where the authority to commission a military officer lies. In Orloff, the Court assumed that "it has been a uniform practice to commission Army doctors," 345 U.S. at 88, but rejected Orloff's argument that the Court could order him commissioned. Id. at 91-92.

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF SERVICE AND WORD COUNT

I hereby certify that on this 28th day of March 1994, I served the foregoing Brief For The Appellees On Rehearing In Banc upon counsel by causing copies to be delivered by overnight delivery service to Marc Wolinsky, Esquire, and by causing copies to be mailed, first-class, postage prepaid, to the counsel listed below. I also certify that the foregoing brief contains no more than the number of words allowed by D.C. Circuit Rule 28(d)(1).

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A D D E N D U M

DOD DIRECTIVE 1332.14

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 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 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.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

To be argued by:
MARC WOLINSKY

No. 91-5409

Oral argument
scheduled for
May 11, 1994

United States Court of Appeals
for the
District of Columbia Circuit

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

—v.—

WILLIAM J. PERRY, Secretary of Defense, JOHN H. DALTON, 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

**REPLY BRIEF OF PLAINTIFF-APPELLANT
JOSEPH C. STEFFAN ON REHEARING *IN BANC***

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SUMMARY OF REPLY ARGUMENT

Midshipman First Class Joseph C. Steffan was asked one substantive question at his discharge hearing: "I'd like your word, are you a homosexual?" He answered: "Yes, sir." Based on that answer, the Naval Academy discharge boards found that the midshipman selected to lead his peers as a Battalion Commander because of his exemplary ability no longer had "sufficient aptitude" for commissioned service because he "was a homosexual."

That finding in turn was the *sole* basis for the determination that Steffan's "A" grade for military performance should be changed to "F." It was the *sole* basis for the decision to suspend Steffan from class and bar him from receiving his degree six weeks shy of graduation. It was the *sole* basis for the administrative finding that "Midshipman Joseph C. Steffan has acknowledged that he *is* a homosexual, and as such, he should be separated from the Academy." And the *sole* basis for the rejection of Steffan's request that his compelled resignation be withdrawn was that Steffan "had admitted to *being* a homosexual." All these events occurred *solely* because of Steffan's status as a gay man, and for no other reason.

The government labors mightily to create the impression that more was involved; that the 1981 regulations provided Steffan with an opportunity to "rebut" a "rebuttable presumption," and that they did not require that Steffan be discharged for "being a homosexual" as the Superintendent of the Naval Academy found (A. 95), but because he either had violated or intended to violate the rules of conduct that govern all servicemembers.

The centerpiece of the government's defense is a sham concocted for purposes of litigation. Under both the servicewide and the Naval Academy regulations in effect at the time of Steffan's discharge, servicemembers who truthfully stated that

they were gay were subject to mandatory discharge on the basis of their "acknowledged homosexual status." A. 2211-12. There was no opportunity to rebut any presumption and no opportunity to prove that the servicemember had conformed and intended to conform his or her conduct to the requirements imposed equally on all who chose military life.

This is the second time that the government has attempted to tell this Court that the 1981 regulations did not mean what they said. In the 1990 appeal in this case, the government argued that Steffan had in fact been discharged because his statement regarding his sexual orientation "raised a 'rebuttable regulatory presumption that he had a predilection [sic] to commit, and had committed, homosexual acts,' " and that having failed to "rebut" that "presumption," it was conclusively established that Steffan both had engaged in and had a "predilection [sic]" to commit "homosexual acts." That claim was derided. 920 F.2d 74, 76 n.*.

Given this history, this Court should reject the government's attempt to relitigate the question of whether the 1981 regulations discriminated on the basis of status. That is particularly so given that, once again, what the government says in its brief and what it says elsewhere are at odds. As detailed below, the government has repeatedly and consistently taken the position in public, in practice and in a submission to this Court that cases like this one involve discrimination on the basis of "status" and "status" alone. Indeed in proposing new regulations, the Commander-in-Chief stated that the 1981 regulations mandated discharge "based on status alone." A. 2212. It is simply mind boggling that the government would have the temerity to contend otherwise in light of this history.

The balance of the government's defense is no more credible. The repeated claim that because the military has the authority to regulate the sexual activities of servicemembers, it can discriminate against servicemembers who merely iden-

tify themselves as gay is untenable. The military has the authority to prohibit "heterosexual acts" and does so. *See United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992) (upholding criminalization of consensual oral sex between men and women under UCMJ, Art. 125); *United States v. Boyett*, 37 M.J. 872 (A.F.C.M.R. 1993) (upholding criminalization of consensual sexual relationship between male officer and enlisted woman even absent a command relationship under UCMJ, Art. 133). It also has the authority to proscribe unauthorized headgear. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

Yet nothing in these authorities permits the government to presume that a serviceman who says that he is a "heterosexual" is likely to dishonor his oath and engage in prohibited "heterosexual conduct," or that a female officer who harbors sexual "desires" for male enlisted men can be discharged for conduct unbecoming an officer. Nor would they countenance a claim that all Orthodox Jews can be excluded from the services because they have a "propensity" or "desire" to wear yarmulkes. As the panel opinion held, under our common law and constitutional heritage, "[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." 8 F.3d 57, 67. The 1981 regulations run afoul of this bedrock legal principle.

They run afoul of the government's factual determinations as well. As the Commander-in-Chief and the Secretary of Defense have acknowledged, gay and lesbian servicemembers are *not* predisposed to engage in the sort of sexual misconduct that can adversely affect the military mission. They have also acknowledged that misconduct of this type "is already covered by the laws and rules which also cover activities that are improper by heterosexual members of the military." Remarks of President William Clinton, July 19, 1993; Testimony of

Hon. Les Aspin, *Hearing of the Senate Armed Services Comm.: Gays in the Military*, 103d Cong., 1st Sess. (July 20, 1993). Thus, as the government concedes, the 1981 regulations do not rest on the assumption that gay servicemembers have a "propensity" to engage in "homosexual conduct within a naval or military unit." *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

Given this fact, the government is left to argue that the 1981 regulations rested on a perceived need to avoid the reactions of those servicemembers who do not like gay men and women and who would prefer not to serve with them. The government contends, however, that the military does not have to "attempt to determine the basis for" these negative "attitudes." Def. Br. 36. There is no need for the military or this Court to strain to determine the basis for these "attitudes," however. The basis is well-known and is recited in DOD's own documents: gay men and women purportedly had to be excluded "[b]ecause of the prevailing homophobia in society." A. 1222. And contrary to the suggestion in the government's brief, this "homophobia" has no rooting in "religious doctrines, moral precepts [or] ethical values." Def. Br. 35. No religious, moral or ethical tradition validates discrimination on the basis of an individual's sexual orientation or status as a gay person.

Likewise, this Court must reject the government's claim that even if these "attitudes" do reflect prejudice, "the Armed Forces must be allowed sufficient latitude to deal with practical problems that may arise due" to these "attitudes" — *i.e.*, that the Armed Forces alone may give bigotry the imprimatur of law. Def. Br. 36. Acceptance of this argument would elevate the principle of deference to military judgment to heights that no court should countenance. The Supreme Court long ago cautioned that the "concept of 'national defense' cannot be deemed an end in itself," justifying "the subversion" of the "democratic ideals enshrined" in the Constitution that "makes

the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967). The notion that the military could be permitted to cater to the blatant prejudice of some in the name of expedience is repugnant and cannot be accepted by this Court. *See* Point I, *infra*.

The government's response to Steffan's procedural claims is equally meritless. As noted above and as shown below, Steffan could not possibly have had notice of the government's newly-minted construction of the 1981 regulations. Indeed, the fact is that neither the Superintendent of the Naval Academy nor the officers charged with enforcing the 1981 regulations could have had notice of the tortured construction that the government now advances — they would have been duty-bound to reject a hypothetical defense based on a "rebuttable presumption." Moreover, the government has utterly failed to rebut Steffan's showing that he was singled out for harsher treatment than that afforded others similarly situated. *See* Point II, *infra*.

Finally, the government's belated claim that Steffan cannot be awarded a commission and a degree should be rejected. There simply is no "separation of powers" issue here: the public record shows that Steffan was nominated for a commission as an Ensign by President Reagan on May 11, 1987, and that the Senate confirmed the nomination by unanimous consent on May 15, 1987. All that remains is for the President to deliver Steffan's commission. Plainly, this Court has the authority to order that it be done. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This Court also has the authority and the obligation to recognize that in light of the passage of time and the fact that Steffan has completed the requirements for a Bachelor's degree, equity demands that he be awarded a diploma from the Academy. *See* Point III, *infra*.

Argument

POINT I

THE MILITARY REGULATIONS THAT REQUIRED STEFFAN'S DISCHARGE FROM THE NAVAL ACADEMY VIOLATED EQUAL PROTECTION.

A. The 1981 regulations required the discharge of gay and lesbian servicemembers solely on the basis of who they are.

1. The government has repeatedly, consistently and clearly acknowledged that the 1981 regulations discriminated on the basis of status.

The government's defense of the 1981 regulations rests on the premise that the regulations in issue did "not bar service based on homosexual thoughts or status" and that, rather, a servicemember who stated that he or she is gay might "remain in the military by showing that, notwithstanding his statement, he does not and is not likely to violate military standards of conduct proscribing homosexual acts." Def. Br. 9-10. As shown in Steffan's opening brief (at 27-28), this is a falsehood that was rejected in the 1990 appeal in this case. 920 F.2d at 76 n.*. The law of the case doctrine precludes relitigation of this issue. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987).

The contention should be rejected again on the merits as well. The Commander-in-Chief, the Department of Defense and the Department of Justice have repeatedly, consistently and clearly acknowledged that the 1981 regulations discriminated on the basis of status. Thus:

- In a January 29, 1993 briefing, the President stated that he had asked the Secretary of Defense to draft an "executive order . . . which would end the *present*

policy . . . of the exclusion from military service *solely on the basis of sexual orientation . . .*" Speaking of DOD Directive 1332.14(H)(1)(c)(2) — *i.e.*, the very provision in issue in this case — the Commander-in-Chief went on to state that "administrative separation under *current* Department of Defense policies *based on status alone*, will be stayed pending completion of this review. The final discharge in cases based *only on status* will be suspended . . ." A. 2211-12 (emphasis added).

- Five days later, on February 3, 1993, the Secretary of Defense issued a Memorandum implementing the January 29 directive. Once again, the Secretary drew a distinction between cases involving actual "conduct," and cases involving only "acknowledged homosexual status" and defined "homosexual status" cases as those processed under DOD Directive 1332.14(H)(1)(c)(2), the very provision that required Steffan's discharge. (Available on Nexis.)
- On February 5, 1993, the government filed a motion to stay proceedings in this Court, submitting a January 29, 1993 policy statement from The White House. The government argued that in light of the President's plan to eliminate the provision of DOD Directive 1332.14(H)(1)(c)(2) discriminating on the basis of status alone, "the President's directive may moot certain issues on appeal." A. 2200-01. The White House policy statement *submitted to this Court* made a distinction between "[c]ases involving homosexual conduct" and "case[s] involv[ing] *only homosexual status*." The policy statement went on to make it clear that "status" cases were those cases — such as this one — where the servicemember had "acknowledged" being gay. A. 2203 (emphasis added).

- On January 6, 1994, the Assistant Secretary of Defense for Manpower issued a memorandum to each of the Service Secretaries and to the Chairman of the Joint Chiefs of Staff.¹ That memorandum distinguished between cases under the 1981 regulations “involving only ‘acknowledged homosexual status’ (*i.e.*, servicemembers who stated that they were homosexual or bisexual)” and cases involving “homosexual conduct.” It went on to note that the new policy “revises” the basis for separation “based on a servicemember’s statement that he or she is a homosexual” and provided that pending cases involving “acknowledged homosexual status” should be “reconsidered under the new policy.”

This recent history mirrors the understanding of the 1981 regulations when they were adopted. Thus, in the January 16, 1981 memorandum to the Service Secretaries and the Chairman of the Joint Chiefs of Staff that accompanied the publication of DOD Directive 1332.14(H), Deputy Secretary of Defense Claytor stated that the new provision “makes discharge mandatory for admitted homosexuals” and asserted that the “most important aspect of our policy is the ability to keep homosexuals out of the service.” Claytor went on to state that “the fact that a servicemember is a homosexual” requires discharge. The memorandum does not even remotely suggest that there remained a special class of “homosexuals” who could be retained by “rebutting” a “presumption.”

Consistent with the plain meaning of the regulations and Deputy Secretary Claytor’s memorandum, the officers who have administered the 1981 regulations have uniformly understood that they targeted status. For example, in the 1993 discharge proceedings of Sgt. Justin Elzie under the 1981 reg-

¹ The January 6, 1984 memorandum and the January 16, 1981 memorandum referred to below are being lodged with the Court with this brief.

ulations, the prosecuting Marine Corps officer stated that in light of Sgt. Elzie’s statement that he was gay, the prosecutor was not “going to argue anything other than his status in this proceeding[.]” Tr. at 10.² In voting Sgt. Elzie’s separation, the discharge board affirmatively *rejected* his argument that the lack of any evidence regarding his propensity to engage in forbidden conduct precluded his discharge. Tr. at 100.

The discharge proceedings for Lieutenant Richard D. Selland prove the same point. Lt. Selland filed an objection to his discharge “rais[ing] the issue of whether the Navy must allege misconduct, in addition to status, in order to separate an officer based on his homosexuality.”³ The objection was rejected on the ground that “[n]either DOD guidelines nor policy concerning the retention of homosexual [*sic*] contains any such provision.” Thereafter, in a May 21, 1993 memorandum, the Assistant Secretary of the Navy recommended Lt. Selland’s discharge, reciting that Selland “was processed for acknowledged homosexual status.”

The discharge proceedings for AWO First Class Volker K. Meinhold are to the same effect. There, the legal advisor to the discharge board stated that “when someone admits that they are gay . . . they are admitting that their sexual preference is for people of the same sex” and that the board “should completely disregard the acts. . . . We’re talking specifically about the classification, and not the act.” Tr. at 47. And when Meinhold subsequently challenged his discharge in court, the Navy’s lawyer agreed that under the 1981 regulations, “one would have to change his or her sexual orientation in order to be able to overcome the prohibition.” *Meinhold v. U.S. Department of Defense*, No. CV 92-6044-TJH, Transcript of Nov. 16, 1992 Hearing at 18.

² The transcript is part of the record in *Elzie v. Aspin*, Civil Action No. 93-1853 (SS) (D.D.C.).

³ The record of Lt. Selland’s discharge proceedings was filed in *Selland v. Aspin*, 832 F. Supp. 12 (D.D.C. 1993).

2. The government's reading of the 1981 regulations is nonsensical.

In the face of all this, the government attempts to revive the textual argument that this Court rejected in 1990. The attempt fails. As a threshold matter, the Naval Academy regulation regarding "homosexuality" — the regulation that is directly applicable here — is categorical: "homosexuality" is grounds for mandatory discharge, and "homosexuality" is defined to "include[] statements by the member that he or she is homosexual or bisexual." Opening Brief Addendum at 3a.

The 1981 regulations, likewise, are categorical. They provided that a servicemember who stated that he or she was gay had to be discharged "unless there [was] a further finding that the member is not a homosexual or bisexual." DOD Directive 1332.14(H)(1)(c)(2). A "homosexual" was defined as someone "who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directive 1332.14(H)(1)(b)(1). Thus, once Steffan truthfully responded "Yes, sir" to the question posed to him, there was nothing to rebut; he acknowledged being a "homosexual" within the meaning of the regulations. And, contrary to the government's claim, servicemembers who truthfully acknowledged their status as "homosexuals" and who "intended" to conform their conduct to the requirements of military life nonetheless had to be discharged because they harbored "homosexual desires."

As the prior panel held, further proof that the 1981 regulations targeted status, not conduct, can be found in the separate provision that required the discharge of servicemembers who had engaged in "homosexual conduct" "unless" they could establish that they did "not desire to engage in or intend to engage in homosexual acts" — *i.e.*, "unless" the servicemember could establish that he or she was not a "homosexual." DOD Directive 1332.14(H)(1)(c)(1)(e). And again, "homosexuals" who intended to conform their conduct to the requirements of military life would still be subject to manda-

tory discharge on the basis of their "desires," *i.e.*, their "thoughts" or "status." If the 1981 regulations were concerned with discouraging "homosexual conduct," they would have punished "homosexual conduct." The fact is, however, that they punished "homosexuals" regardless of their actions and defined "homosexuals" with reference to nothing more than "desires" — *i.e.*, "thoughts."

The government seeks to sweep this fatal linguistic flaw aside by arguing that "DOD interprets" the word "desire" "to refer[] to the prospect of future homosexual acts," not "thoughts or status." Def. Br. 19-20. In support of this claim, the government quotes excerpts from two dictionaries. Def. Br. 19. The *Random House* quote provides no support: it defines "desire" as a "wish," *i.e.*, as a "thought." The government's citation to *Black's Law Dictionary* is outright deceptive: omitted from the portion quoted is the observation that "desire" "ordinarily means to wish for more or less earnestly." *Black's Law Dictionary* 448 (6th ed. 1990).

The government also claims to find support from the fact that the phrase "desires to engage in" is placed in the context of "engages in" and "intends to engage in" and from the preamble to the regulation which refers to "statements" that "demonstrate a propensity to engage in homosexual conduct." Def. Br. 19. The context proves the contrary.

Ordinary rules of statutory construction indicate that the word "desire" must have a meaning different from "intent." See *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2d 581, 583 (D.C. Cir. 1990) (quoting Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 224 (1967) ("when Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things")). The government's construction impermissibly ascribes the same meaning to different words. And the government's attempt to blur the distinction between "propensity" and

"likely conduct" is nonsensical; Sikhs have a "propensity" to wear turbans, yet Sikh servicemembers are not "likely" to violate dress regulations.

B. The 1981 regulations unconstitutionally presumed that gay and lesbian servicemembers would violate their oaths, military regulations and the UCMJ.

Since the 1981 regulations clearly targeted status, the government is left to argue that it was constitutionally permissible to erect an absolute presumption that all members of a group defined on the basis of status alone are likely to violate their oaths, military regulations and the UCMJ. Any such argument is constitutionally defective and must fail. As the panel opinion held, according "differential treatment solely because of the content of [one's] thoughts . . . is repugnant to the various common law and constitutional principles that guard the sanctity of a person's thoughts against government control" 8 F.3d at 67.

The government cannot overcome this principle with its claim that because it can lawfully regulate the sexual activities of servicemembers, it could lawfully discriminate against servicemembers who "desire" or have a "propensity" to engage in "homosexual conduct." As the panel opinion observed, our law presumes that individuals can and will conform their conduct to the requirements of law. 8 F.3d at 64-65. Thus, it was no more reasonable or permissible to presume that a servicemember who did nothing more than identify him or herself as a gay man or woman would engage in prohibited "homosexual acts" than it would be to presume that a servicemember who identified him or herself as a heterosexual would engage in prohibited "heterosexual acts."⁴

⁴ Indeed, the very page of the report of the National Defense Research Institute cited in the government's brief (at 16) concludes that a "person who *does* identify himself or herself as a homosexual may refrain from engaging in homosexual acts." *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessments* 51 (Rand 1993).

Avoiding the principal authorities cited by the panel, the government places its major reliance on *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).⁵ In fact, *Beazer* undercuts the government's claim. The *Beazer* Court was careful to conclude that the challenged regulation was "neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass" and that the exclusionary policy in issue "is not one which is directed 'against' any individual or category of persons' . . . [nor does it] circumscribe a class of persons characterized by some unpopular trait or affiliation . . . [or] create or reflect any special likelihood of bias on the part of the ruling majority." 440 U.S. at 592-93. That is decidedly *not* the case here.

Moreover, *Beazer* did not involve a group defined by its status. Rather, it involved individuals who admittedly engaged in a pattern of felonious activity by using illegal narcotics (heroin) and who continued to regularly use a narcotic (methadone) that, when taken in large doses, would impair the employee's ability to function. 440 U.S. at 573, 591 n.37.

C. The 1981 regulations unlawfully catered to private prejudice and lacked any legitimate rational basis.

The government also fails to articulate any legitimate rational basis for its 1981 regulations. To be sure, the government does repeatedly assert that the mere "presence" of a "homosexual" purportedly will have a deleterious effect on unit cohesion and morale. The rhetoric rings hollow, however, when one considers the fact that, in the next breath, the mil-

⁵ The government also relies on *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), without noting that its continuing authority was questioned by the Ninth Circuit in *Pruitt v. Cheney*, 963 F.2d 1160, 1165 & n.4 (9th Cir. 1991) (petition for rehearing *in banc* denied), *cert. denied*, 113 S. Ct. 655 (1992). And the government's claim that the authority of *Pruitt* is in doubt fails to mention that *Pruitt* has been reaffirmed by the Ninth Circuit in *Jackson v. Brigle*, 1994 U.S. App. Lexis 3282 (9th Cir. 1994).

itary claims that the 1981 regulations *permitted* gay men and lesbians to serve, and that the new policy that recently went into effect provides that "homosexual orientation is not a bar to military service" and on its face prohibits the military from conducting inquiries regarding a servicemember's or recruit's sexual orientation.⁶

Yet even if one accepts the government's claim, the fact remains that the government utterly fails to provide a constitutional rationale for why the "presence" of an individual who identifies herself or himself as a gay woman or man could jeopardize unit cohesion. Notably, the government does *not* claim that gay and lesbian servicemembers posed a security threat. Nor is there a claim that they have a propensity to engage in "homosexual conduct within a naval or military unit" or "homosexual seduction," *i.e.*, the activities that concerned this Court in *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984), and the Seventh Circuit in *Ben-Shalom v. Marsh*, 881 F.2d 454, 460-61 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

To the contrary, the claim that gay and lesbian servicemembers are likely to engage in such misconduct has been disavowed both by President Clinton and the Secretary of Defense, *supra*, and by Gen. Colin Powell. Testimony of General Colin Powell, *reprinted in* S. Rep. No. 103-112 at 279 ("Our concern has not been about homosexuals seducing heterosexuals or heterosexuals attacking homosexuals."). Thus, the contention in *Ben-Shalom*, 881 F.2d at 460-61, that the military "does not have to take the risk that an admitted homosexual

⁶ It also rings hollow when one considers the successes of foreign military establishments in eliminating discrimination on the basis of sexual orientation. See National Defense Research Institute, *Sexual Orientation and U.S. Military Personnel Policy*, *supra*, at 31-32. Thus, the government's attempt to disavow the Commander-in-Chief's July 19, 1993 statement that the experiences of these foreign countries is instructive for the United States (Def. Br. 32 n.13) cannot be credited.

will not commit homosexual acts which may be detrimental to its assigned mission" cannot stand given that the responsible officials have now determined that this risk is ephemeral and the government's argument that gay and lesbian servicemembers were and are now permitted to serve.

Rather than press the rejected rationales of the past, the government makes only vague references to the "attitudes" of some other servicemembers. Def. Br. 36. Nowhere, however, does the government confront the fact that these "attitudes" are, in fact, irrational prejudices. Instead, the government claims that because it does not wish to examine the real nature of these "attitudes," this Court should not do so either. Repeating a refrain from the past,⁷ the military contends that even if these "attitudes" are rooted in nothing more than base hatred, the Armed Forces must be given "latitude" to deal with the "practical problems" that this prejudice can cause. Def. Br. 36.

The Constitution does not permit either the military or this Court to avoid examining the substance of these "attitudes," however. And that examination shows that "attitudes" is nothing more than the government's latest euphemism for prejudice. The government's own documents (A. 1210-23), the President's and Secretary's statements, *supra*, and the testimony of both military leaders and military experts before the Senate Armed Services Committee, *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1332-34 (E.D. Cal. 1993), all demonstrate that this is so.

The government's invocation of "religious doctrines, moral precepts, [and] ethical values" and vacuous reference to "the

⁷ During World War II, the Navy fought the enlistment of African-Americans by arguing that "[t]he Navy must, of necessity, deal with realities and actualities . . . [and] cannot permit its efficiency and morals . . . to be affected by theories or abstract aspirations, however meritorious." A. 812.

complex issue of homosexuality" do not change this conclusion. Def. Br. 35, 36. As shown in the unrebutted evidentiary record, there is no ground in any ethical, religious or moral teaching for discrimination on the basis of the mere status of being a gay man or woman. A. 1724-38. Similarly, there is no basis in the "realities of the subject addressed," *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993), for the proposition that gay men and lesbians are predisposed to impose their "visual attention" on their colleagues through "unwanted viewings." Def. Br. 34. Indeed, the government does not and cannot rationally claim to the contrary, particularly given that it also claims that gay men and lesbians were permitted to serve under the 1981 regulations.

The fundamental problem with all of these contentions is that the Constitution does not permit the military to solve the perceived "practical problems" that prejudice can cause by giving legal effect to bigotry. *Palmore v. Sidoti*, 466 U.S. 429 (1984), and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), are crystal clear on the subject, and the government's attempts to distinguish them are for naught. Both opinions state categorically that prejudice can *never* be given the force of law. No court has held that the military is excepted from this principle. And under our Constitution, it is inconceivable that any court could.

POINT II

STEFFAN DID NOT HAVE FAIR NOTICE OF THE GOVERNMENT'S CONSTRUCTION OF THE 1981 REGULATIONS AND WAS UNLAWFULLY SUBJECTED TO PARTICULARLY HARSH TREATMENT.

The government's attempt to overcome Steffan's showing that he was subjected to unconstitutional and arbitrary and capricious treatment in his discharge proceedings is riddled

with the same sort of defects that permeate its defense of the 1981 regulations on the merits.

First, assuming that the 1981 regulations meant what the government now says, Steffan could not possibly have known it. Indeed, as the record detailed above demonstrates, not even the military officials charged with implementing and enforcing the regulations understood that they provided a "rebuttable presumption" exception.⁸ The government cannot credibly contend otherwise: even if its arguments are accepted at face value, its brief admits that the term "desire" has some "ambiguity" and that the new policy "clarifies the definition of 'homosexual' and the nature of the rebuttable presumption." Def. Br. 18, 30. *See, e.g., Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (a regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law").

Second, Steffan was treated more harshly than other midshipmen deemed to be uncommissionable. The government admits that this is so. Def. Br. 41. It claims, however, that Steffan's case is distinguishable because Steffan's identity as a gay man rendered him "unfit to serve at the Academy" while the others were only deemed to be "unfit" to serve as commissioned officers. Def. Br. 41. The administrative record belies the contention. Like the others, Steffan was recommended for discharge because he had "insufficient aptitude to be a commissioned officer." A. 95. And like the others, Steffan's

⁸ The notices provided to Steffan for both his Brigade Performance Board and Academic Board hearings contained not a word suggesting that he could "rebut" a "presumption." A. 103, 485. The government's citation to *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990), is thus inapposite. As this Court observed in distinguishing *Ben-Shalom* on the 1990 appeal, Ben-Shalom was given "written notice" of her opportunity to rebut some presumption. 920 F.2d at 76 n.*.

performance at the Academy was never faulted. The others were permitted to graduate, however. Steffan was not.⁹

Finally, the government's argument that Steffan was not given a "bum's rush" because the Secretary did not accept Steffan's compelled resignation of April 1 until May 28 is Kafkaesque. If Steffan had been provided the same procedural rights as other servicemembers facing discharge for "homosexuality," the first hearing would not even have taken place until well into May. A. 1365, 1414-15, 1467. The fact that it took the Secretary of the Navy two months to accept the compelled resignation that the Academy was able to procure in only one week is a credit to Navy inefficiency, not due process.

POINT III

STEFFAN IS ENTITLED TO THE FULL RELIEF THAT HE SEEKS.

A. The government's call for a "remand" is frivolous.

The government argues that this case should be remanded to either the district court or the Navy for further proceedings. There is no basis for either contention. There are no contested issues of material fact that preclude a finding by this Court that Steffan was subjected to a constructive discharge. It is undisputed that Steffan was compelled to resign from the Academy because the 1981 regulations required the discharge of servicemembers who truthfully stated that they are gay. If those regulations are found to be unconstitutional, then Steffan's

⁹ The government's further contention that Steffan's case is distinguishable because his status pre-dated his tenure at the Academy is also unavailing. The applicable regulations do not distinguish between conditions discovered or developed before or after entry to the Academy. A. 379, 381. Moreover, the record shows that Steffan did not recognize that he was gay until long after he entered the Academy. A. 489.

compelled resignation is "involuntary" as a matter of law. See *Roskos v. United States*, 549 F.2d 1386, 1389-90 (Ct. Cl. 1977) ("action is not voluntary if it is produced by government conduct which is wrongful"). *Accord Arneson v. Heckler*, 879 F.2d 393, 396 (8th Cir. 1989).¹⁰

The claim that principles of administrative law only permit this Court to remand Steffan's case to the Navy is also without merit. The call for a remand ignores the well-settled tenet of military law recognized by this Court in *Steffan v. Cheney*, 920 F.2d 74, 76 (D.C. Cir. 1990), that an illegal discharge is a "nullity," and as a result, Steffan "ha[s] never been discharged[;]. . . in the eyes of the law, [he] remain[s] in service.'" This rule applies irrespective of whether the improper discharge was the result of a "procedural" defect or a "substantive" defect.¹¹ The cases that the government cites (at 47) all involve direct appeals from agency actions. They do not limit the relief that a court can award an individual who sues in district court to redress a constitutional wrong. See *American Postal Workers Union v. United States Postal Service*, 830 F.2d 294, 311-12 (D.C. Cir. 1987) (ordering reinstatement where discharge was in violation of First Amendment).

Accordingly, under the precedents cited in Steffan's Opening Brief (at 31), Steffan is entitled to appropriate equitable relief. Such relief must make Steffan "whole" and place him in the position he would have occupied "but for" his illegal separation from the Academy. *Dilley v. Alexander*, 627 F.2d

¹⁰ In any event, Steffan's entitlement to relief does not depend upon a finding of constructive discharge. Steffan sought to withdraw his resignation by petitioning the Secretary of the Navy, who had the authority to reinstate him. A. 81-83. The Secretary refused on the ground that Steffan "admitted to being a homosexual." A. 95, 107. The Court can provide relief if it finds that the Secretary's refusal was unlawful.

¹¹ See *VanderMolen v. Stetson*, 571 F.2d 617, 624-27 (D.C. Cir. 1977) (discharge procedurally infirm); *Dilley v. Alexander*, 603 F.2d 914, 925 (D.C. Cir. 1979) (discharge statutorily infirm).

407, 413 (D.C. Cir. 1980). Since it is undisputed that "but for" his compelled resignation, Steffan would have graduated and been commissioned, equity demands that he be awarded his diploma and a commission as an Ensign.¹²

B. There is no constitutional impediment to a court order directing that Steffan be delivered his commission.

The government's further claim that separation of powers concerns prevent this Court from directing that Steffan be awarded a commission because that power is reserved to the President and Congress is likewise frivolous. The political branches have already acted: the public record shows that on May 11, 1987, President Reagan nominated Steffan to be commissioned as an Ensign in the United States Navy. The nomination was referred to the Senate Armed Services Committee on May 12, 1987, which reported favorably on May 14, 1987. The Senate thereafter confirmed Steffan's nomination by unanimous consent on May 15, 1987. 133 Cong. Rec. 11997, 12033, 12046, 12486, 12636 (1987).

The only question that is presented on these facts, then, is whether this Court can order the government to deliver a commission that has been voted by the Senate and withheld by the President for unconstitutional reasons. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), answered that question in the affirmative one hundred ninety-one years ago.

¹² The government's belated claim that Steffan waived his right to a commission at the administrative level ignores the fact that the district court held that Steffan did not have to pursue any administrative remedies because it would have been futile to do so. *Steffan v. Cheney*, 733 F. Supp. 115, 119-20 (D.D.C. 1989). That ruling was never appealed from and is now the law of the case. See *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987).

CONCLUSION

Midshipman Joseph C. Steffan has been done an injustice. A credit to the United States Naval Academy, he was denied his chosen career solely on the basis of his status as a gay man. His successes belie any claim that his "presence impaired the accomplishment of the military mission." He should be awarded the full relief that he seeks.

Dated: New York, New York
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CERTIFICATE

I hereby certify that I have this day caused to be served in duplicate the foregoing Reply Brief of Plaintiff-Appellant Joseph C. Steffan on Rehearing *In Banc* by hand delivery upon the Attorneys for Defendants-Appellees and by hand, or by United States Mail, postage prepaid, to *amici* and their counsel. I hereby further certify that the foregoing Reply Brief contains no more than the number of words allowed by D.C. Circuit Rule 28(d)(1).

Dated: April 8, 1994

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