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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. SULLIVAN

Plaintiff-Appellant

vs.
The United States of America, et al.

Defendant-Appellee

Case No. 91-5409

JOSEPH C. SULLIVAN, Plaintiff-Appellant,
vs.
THE UNITED STATES OF AMERICA, et al., Defendant-Appellee.

Plaintiff-Appellant
requests that the Court
grant him summary judgment
on his claim for damages
and that the Court
award him costs and
attorney's fees.

Respectfully,
JOSEPH C. SULLIVAN

CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES

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

A. *Parties and Amici*

All parties, intervenors and *amici*, other than those on this brief, appearing in this Court are listed in the Brief of Joseph Steffan. In accordance with Circuit Rule 26.1, the following paragraphs set forth the nature and purpose of the *amici* on this brief. None of these *amici* have issued debt securities or shares to the public. These *amici* are participating pursuant to the consent of the parties and by leave of this Court.

GENEVA COLLEGE CENTER FOR LAW AND PUBLIC POLICY

The Center for Law and Public Policy is a division of Geneva College, a liberal arts institution with a distinctive history since the anti-slavery movement of addressing issues of public policy and religious and moral principles. Its purpose is to provide a forum for the development of interdisciplinary debate and formulation over urgent issues of law and public policy which, directly or indirectly, reflect on fundamental questions of values, morality, or religious principles.

CENTER FOR MILITARY READINESS

The Center for Military Readiness is a tax-exempt, public policy educational organization formed to take a leadership role in promoting sound military policies that enhance the strength

and readiness of the United States Armed Forces, and protect the best interests of servicemen and women.

DEFENSE READINESS COUNCIL

The Defense Readiness Council (DRC) is a nonpartisan movement of people with military experience organized to inform the public, Congress, and the Executive of the harm to unit cohesion and military readiness that would occur if homosexuals were permitted to serve in the military.

THE MILITARY COALITION

The Military Coalition (TMC) is a voluntary association of 23 military-related organizations which was formed six years ago. Collectively its constituent organizations represent the interests of over 1,900,000 members, who are retired, reserve and active members of the Uniformed Services of the United States. TMC is dedicated to the purpose of providing a cohesive means for the study and advocacy of issues which impact upon the maintenance of a strong national defense and the preservation of rights and benefits its varied constituents have earned through years of dedicated service to the United States. The following organizations are members of The Military Coalition:

THE RETIRED OFFICERS ASSOCIATION (TROA)

The Retired Officers Association was founded in 1929 and has approximately 395,000 members. Membership in the Association is open to all past and present, active, reserve and retired

commissioned and warrant officers in any of the seven uniformed services. The organization's mission is to support strong national defense and to represent membership on retirement and benefit issues before Congress.

AIR FORCE ASSOCIATION (AFA)

The Air Force Association was founded in 1946 and has approximately 200,000 members. Membership is open to anyone who has served in the U.S. armed forces. Other American citizens may affiliate as patrons. The organization's mission is to promote public understanding of aerospace issues and national security requirements to ensure strong support of the nation's defense and the men and women who serve in the U.S. Air Force.

AIR FORCE SERGEANTS ASSOCIATION (AFSA)

The Air Force Sergeants Association was founded in 1961. It has approximately 165,000 members and is composed of active and retired enlisted personnel in the Air Force, Air National Guard, Air Force Reserve, Army Air Corps and Army Air Force. Its members belong to 198 chapters throughout the world and the purpose of the organization is to serve as the voice of Air Force enlisted service members.

ASSOCIATION OF MILITARY SURGEONS OF THE UNITED STATES (AMSUS)

The Association of Military Surgeons of the United States received its Congressional Charter in 1908. Its membership consists of 17,000 members and is open to all past and present

commissioned officers and civilians GS-9 and above in the medical services of the United States Air Force, the United States Air Force Reserve, the United States Army, the United States Army Reserve, the Air National Guard, the Army National Guard, the United States Public Health Service and the Veterans' Administration; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. The purpose of the Association is to improve the nation's federal health care system.

ASSOCIATION OF THE U.S. ARMY (AUSA)

The Association of U.S. Army was founded in 1950 and has approximately 135,000 individual and 250 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION, U.S. COAST GUARD (CW & WOA)

The Chief Warrant and Warrant Officer's Association was founded in 1929 and has approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

COMMISSIONED OFFICERS ASSOCIATION OF THE
U.S. PUBLIC HEALTH SERVICE, INC. (COA)

The Commissioned Officers Association of the U.S. Public Health Service was founded in 1937 and has approximately 7,500 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. The purpose of the organization is to ensure that the interests and welfare of commissioned officers of the USPHS are protected.

ENLISTED ASSOCIATION OF THE
NATIONAL GUARD OF THE U.S. (EANGUS)

The Enlisted Association of the National Guard of the U.S. was founded in 1962 and has approximately 67,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

FLEET RESERVE ASSOCIATION (FRA)

The Fleet Reserve Association was founded in 1922. It has approximately 170,000 members who are active duty, retired enlisted personnel and commissioned officers with prior service in the Navy, Marine Corps, and Coast Guard. The Association is chartered under the laws of Pennsylvania and its purpose is to

represent its members on military personnel legislative matters before Congress.

MARINE CORPS LEAGUE (MCL)

The Marine Corps League was founded in 1923 and has approximately 40,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the interests of the Marine Corps, and to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

MARINE CORPS RESERVE OFFICERS ASSOCIATION (MCROA)

The Marine Corps Reserve Officers Association was founded in 1928 and has approximately 5,700 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

NATIONAL ASSOCIATION FOR UNIFORMED SERVICES/SOCIETY OF MILITARY WIDOWS (NAUS/SMW)

The National Association for Uniformed Services/Society of Military Widows was founded in 1968 and has approximately 155,000 members. NAUS/SMW membership is open to all active, retired and former members of the uniformed services, their families and survivors. The association's mission is to represent members' interests by supporting legislation that upholds the security of

the United States, sustains the morale of the uniformed services and provides fair and equitable consideration for all.

NATIONAL GUARD ASSOCIATION OF THE UNITED STATES (NGAUS)

The National Guard Association of the U.S. was founded in 1878 and has approximately 54,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

NAVAL ENLISTED RESERVE ASSOCIATION (NERA)

The Naval Enlisted Reserve Association was founded in 1957. It has 15,000 members and its membership is open to active, inactive, and retired enlisted reservists in the Navy, Marine Corps and Coast Guard. The Association's mission is to focus on members' interests, morale and well-being, and readiness and training of sea service reserve forces.

NAVAL RESERVE ASSOCIATION (NRA)

The Naval Reserve Association was founded in 1954 and consists of 25,000 members. Membership in the Naval Reserve Association is open to active, inactive and retired Naval Reserve officers and its purpose is to maintain and strengthen the

nation's defense by ensuring a continued strong Navy and Naval Reserve.

NAVY LEAGUE OF THE UNITED STATES (NLUS)

The Navy League of the United States was founded in 1902 and has approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The league's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES (NCOA)

The Non Commissioned Officers Association of the United States is a patriotic, civic and fraternal organization. The Association was founded in 1960 and has more than 160,000 members. Its membership consists of active, reserve, retired or veterans of the United States armed forces in the grades E-4 through E-9. The purpose of the Association is to promote and protect the rights and benefits of active duty and veteran non commissioned officers and petty officers in all five branches of the armed forces and provide opportunities for them to join in patriotic, fraternal, social and benevolent activities.

RESERVE OFFICERS ASSOCIATIONS OF THE UNITED STATES (ROA)

The Reserve Officers Association of the United States was organized in 1922, and chartered by Congress in June 1950.

Originally, the Reserve Officers Association consisted solely of Army Officers, Reserve Officers, National Guard Officers, and Retired Officers. Following World War II, the Reserve Officers Association expanded its membership to all services and it now has approximately 100,00 members. The purpose of the Association is to ensure an adequate total force of all services including both active and reserve components, and a force that is mobilization ready to meet any contingency.

THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA (JWV)

The Jewish War Veterans of the United States was founded in 1896 and has approximately 100,000 members. Membership is open to veterans of war time service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

THE RETIRED ENLISTED ASSOCIATION (TREA)

The Retired Enlisted Association was founded in 1968 and consists of 68,000 members. Its membership is made up of enlisted retirees from all branches of the armed services and their surviving spouses. The mission of the association is to represent retired enlisted personnel and protect retiree military benefits.

U.S. ARMY WARRANT OFFICERS ASSOCIATION (USAWOA)

The U.S. Army Warrant Officers Association was founded in 1973 and has 9,000 members. Its members consist of National Guard active duty, reserve and retired Army warrant officers. The purpose of the association is to recommend improvement of the Army, and promote technical and professional information among warrant officers.

U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION (CPOA)

The U.S. Coast Guard Chief Petty Officers Association was founded in 1969. Its 11,600 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.

UNITED ARMED FORCES ASSOCIATION (UAFA)

The United Armed Forces Association was founded in 1986 and has approximately 15,760 members. Formed to serve all ranks and branches of the Armed Forces, Veterans, Civil Service, active and retired and their dependents, the association's purpose is to promote the social, political, and economical welfare of its members.

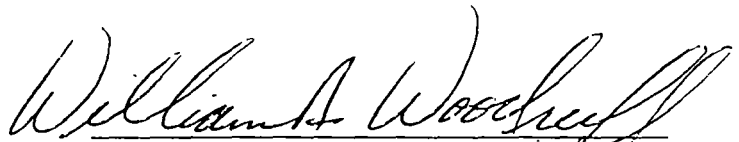
B. *Rulings Under Review*

References to the rulings at issue appear in the Brief for Joseph Steffan.

C. *Related Cases*

References to related cases appear in the Brief for Joseph Steffan.

Dated: Buies Creek, North Carolina
March 24, 1994

A handwritten signature in cursive script, reading "William A. Woodruff", written over a horizontal line.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This brief will address two issues: (1) Whether the Department of Defense homosexual policy is based upon conduct and reasonable inferences about conduct or whether exclusion is based upon a status unrelated to conduct; and, (2) Whether, the military may avoid the harm to good order, discipline, morale, and unit cohesion that all agree homosexual conduct causes by excluding the class most likely to engage in the prohibited conduct?

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Secretary of Defense.

STATEMENT OF THE FACTS

Amici adopt the Statement of the Facts contained in the Brief of the Secretary of Defense.

SUMMARY OF THE ARGUMENT

The courts, the Congress, and the military have long recognized that homosexual activity in the military undermines discipline, good order, morale, unit cohesion, and ultimately, combat effectiveness. Courts have consistently upheld the military's prohibition of homosexual activity. The Department of Defense (DoD) policy, which bans service by those most likely to engage in homosexual conduct, has been in place in one form or another for virtually our entire history. The Congress recently passed, and the President signed, legislation that codifies that

policy.¹ Steffan does not challenge the legitimate interest of the military in preventing homosexual conduct within the military setting.

Rather than punishing him for his "thoughts," as Steffan argues, the DoD directive that disqualified Steffan for service was a reasonable way to preclude from service those most likely to engage in conduct that all have agreed is deleterious to combat effectiveness. Thus, the excluded class, or "status," at issue is a status that is inextricably linked to and defined by conduct. Unlike skin color, a benign, non-behavioral characteristic, the class excluded by the DoD directive is defined in terms of behavior and the propensity to engage in certain behavior. Steffan's attempt to create a status-conduct dichotomy misrepresents the policy, ignores reality, and substitutes a legal fiction for common sense.

The Supreme Court has made clear that under rational basis review, the party challenging the classification has the burden to negate every conceivable basis that may support the policy. Steffan has not met his burden. Rather than attempting to

¹Reference to and consideration of the recent Congressional action is appropriate because the policy under review and the statute enacted by Congress are, in the context of this case, identical in all material respects. Compare Dep't of Defense Dir. 1332.14, H.1.c.(2), 32 C.F.R., Part 41, Appendix A. (1982) (hereinafter DoD Dir.), with, 10 U.S.C. § 654(b)(2). See also S. Rep. No. 103-112, 103d Cong., 1st Sess., at 293 (hereinafter S. Rep.) ("The restriction [in the statute] concerning statements demonstrating a propensity or intent to engage in homosexual acts reflects current Department of Defense policy . . ."). Both the Directive and the statute are reproduced in the addendum to this brief.

establish that homosexuality is compatible with military service, Steffan avoids addressing the burden the law places on him and he assumes that the policy is based upon private bias. Having made that assumption, he then concludes that the policy cannot stand under equal protection principles. Steffan misreads both the law and the policy at issue.

In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985), the Supreme Court held that "mere negative attitudes, or fears, unsubstantiated by factors properly cognizable in a zoning proceeding . . ." could not support a policy that required special permits for a group home for the mentally retarded but not for other group homes. Steffan reads *Cleburne* to mean that prevailing moral norms are "private bias" and cannot support a policy in the face of equal protection review. *Cleburne* does not stand for such a broad proposition. Correctly applied, *Cleburne* requires a court to sustain a policy if any factors "properly cognizable" in the classification scheme substantiate or support a legitimate government interest.

The DoD policy seeks to preserve unit cohesion, morale, good order and discipline in order to enhance the ability of the armed forces to win our nation's wars. Certainly success on the battlefield is a factor "properly cognizable" by the appropriate authorities in determining the criteria for service in the military.

ARGUMENT

I. The Department of Defense Policy is Based Upon Conduct and Reasonable Inferences About Conduct.

A. The military can forbid homosexual activity in the military environment.

In *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir.), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984), this Court specifically held that the Navy policy "requiring discharge of those who engage in homosexual conduct serves legitimate state interests which include the maintenance of 'discipline, good order and morale, . . . mutual trust and confidence among service members, . . . insur[ing] the integrity of the system of rank and command, . . . recruit[ing] and retain[ing] members of the naval service . . . and . . . prevent[ing] breaches of security.'" *Accord BenShalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). See also *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) ("It is not irrational . . . to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes many homosexuals, even 'open' homosexuals, to the risk of possible blackmail to protect their partners, if not themselves.").

After conducting extensive hearings on the impact of homosexuality on military effectiveness, the Congress found that the interests protected by the policy in *Dronenburg* were still valid: "The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service." 10 U.S.C. § 654(a)(13).

This aspect of the policy is not challenged. Neither Steffan, the panel that heard this case, nor any other court has questioned the military's right to exclude individuals who engage in homosexual acts. *Steffan v. Aspin*, 8 F.3d 57, 64 (D.C. Cir. 1993) ("homosexual acts' are forbidden to military servicemembers, and there is no dispute that laws forbidding such conduct are constitutional."). See also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (states may criminalize homosexual sodomy).

B. It is reasonable to conclude that homosexuals will engage in homosexual conduct.

Given that homosexual conduct adversely effects legitimate military interests and that such conduct can constitutionally be forbidden, may the military avoid the damage to its legitimate interests by excluding the class most likely to engage in the prohibited conduct? Every appellate court to finally decide the issue under the regulations Steffan attacks has clearly answered "Yes!"² Furthermore, after careful consideration of this very

²See, e.g., *BenShalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984). See

issue, Congress also answered that question "Yes!" and determined that "[t]he 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)(15). In reaching the conclusion that excluding those most likely to engage in homosexual conduct will protect and preserve legitimate military interests, the courts and Congress rejected the notion advanced by Steffan that the regulations somehow punish individuals on the basis of a "status" unrelated to conduct.³

If the policy was based upon benign, non-behavioral characteristics unrelated to homosexual conduct, the status argument might have some validity. The policy, however, is inextricably linked to homosexual conduct. Steffan was not discharged because he "said" he was a homosexual; he was discharged because his claim of homosexuality discloses his

also *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563 (9th Cir.), reh'g denied, 909 F.2d 375 (9th Cir. 1990);

³See, e.g., *BenShalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) ("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."). See also S. Rep. at 285 (an admission of homosexuality can "rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct.").

conduct.⁴ *BenShalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989),
cert. denied, 494 U.S. 1004 (1990).

The Directive defines homosexual as one who "engages in, desires to engage in, or intends to engage in homosexual acts." DoD Dir., para. H.1.b.(1). Steffan argues that the inclusion of "desires" proves that the policy is based on what a person thinks rather than on what he does or intends to do.⁵ "Desires," however, are more than idle thoughts or private fantasies. Webster's defines desire as "a wish, longing, or craving. . . ; passion."⁶ Thus, a "desire" to engage in homosexual conduct is more than an academic interest; it is a "craving" or "passion" to engage in such conduct. It is not unreasonable to assume that this craving or passion will ripen into actual conduct. This is especially true when the individual acknowledges that desire and

⁴Steffan's reliance upon *Jacobson v. United States*, 112 S. Ct. 1535 (1992), and *Robinson v. California*, 370 U.S. 660 (1962), is misplaced. Brief of Appellant at 29. Those cases dealt with criminal prosecutions and have no bearing on the ability of the military to preserve combat effectiveness through purely administrative means.

⁵The definition of homosexual in the statute substitutes "has a propensity" for "desires." 10 U.S.C. § 654(f)(1). The Senate Armed Services Committee noted that the change in wording was merely a "useful clarification that will not affect the practical effect of the policy; . . . statements that in the past provided a basis for discharge continue to provide a basis for discharge . . ." S. Rep. at 290.

⁶The full definition is: "[Transitive verb] 1. To wish or long for: crave. 2. To express a wish for: request; [Noun] 1. A wish, longing or craving. 2. A request or petition. 3. One that is longed for. 4. Sexual appetite: passion." Synonyms include, "Ache, Crave, Hanker, Long, Wish, Yearn." The core meaning of the verb is "to have a strong longing for. . . ." Webster's II New Riverside University Dictionary 367 (1984).

discloses it to others. See *BenShalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("Plaintiff's lesbian acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct.").

Steffan himself serves as an example of the policy's link between status and conduct. In describing his sexual experiences at the Naval Academy, Steffan wrote:

So I basically wasn't involved [with my sexual feelings] much during my Academy years, mainly by my own choosing. I did have a few experiences, but they were few and far between and very, very secretive, conservative.

In my case, the situations I did encounter tended to be with other Midshipmen in non-Academy surroundings.

It was usually . . . [on Academy-sponsored choir trips] that I had my secret contacts--something you'd never do on the Academy grounds. It was just too risky.

Mary Ann Humphrey, *My Country, My Right to Serve*, 237 (1990)

(Hereinafter Humphrey) (interview with Joseph Steffan. Emphasis added).

Proceedings in this very case also illustrate the logical connection between status and conduct. Because Steffan argued in the District Court that his status had nothing to do with conduct, the government sought to explore that premise during discovery. Steffan was asked at a deposition whether he had

engaged in homosexual conduct either before, during, or after his time at the Naval Academy. He denied any homosexual conduct prior to entering the Naval Academy, but invoked the Fifth Amendment and refused to answer questions concerning his actions while a Midshipman and later. He argued that answering the question could subject him to a prosecution for sodomy under either the Uniform Code of Military Justice, 10 U.S.C. § 925, or under Md. Ann. Code art. 27, §§ 553-554 (1982). *Steffan v. Cheney*, 733 F. Supp. 121, 126 (D.D.C. 1989), *rev'd*, 920 F.2d 74 (D.C. Cir. 1990). Steffan's claim of privilege certainly permits at least an inference that he has, in fact, engaged in homosexual acts. *See Baxter v. Palmigiano*, 425 U.S. 308, 317-18 (1976) (adverse inference may be drawn against a party who invokes the Fifth Amendment privilege and refuses to testify in a civil proceeding.). Thus, rather than being an exception to this fundamental fact, Steffan actually proves the rule.

The facts of life are that homosexuals are likely over time to engage in homosexual conduct. The Lambda Legal Defense and Education Fund, who represents Steffan in this action, has argued that state sodomy laws actually "impose an added burden on gay people blocking their sense of self as well as their sexual fulfillment [and that] . . . regulation of same sex behavior constitutes the total prohibition of an entire way of life." Amicus Curiae Brief on Behalf of Respondents at 23, n28, *Bowers v. Hardwick*, 478 U.S. 186 (1986). If state regulation of same sex behavior imposes an added burden on gay people, there is

obviously a connection between "gay people" and "same sex behavior." The plaintiff in *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987), who challenged the FBI's policy on using homosexuality in hiring decisions, was even more direct: "homosexual status is accorded to people who engage in homosexual conduct, and people who engage in homosexual conduct are accorded homosexual status." *Id.* at 101. Leaders of the gay-rights movement, especially those seeking to overturn the military policy, recognize the undeniable fact that homosexuals engage in homosexual conduct.⁷

Clearly, then, the policy excludes a class that is defined by conduct; claiming to be a member of that class necessarily says something about the conduct, or the propensity to engage in certain conduct, of the individual who claims class membership. Unlike racial classifications, which are based upon benign, non-behavioral characteristics such as skin color, the class to which Steffan claims to be a member is defined by behavioral characteristics. And it is the behavior--and the risk of the behavior--that the policy is attempting to eliminate from the military environment.

Steffan does not challenge the fact that homosexual conduct within the armed forces will adversely effect unit cohesion and

⁷"We do not support the idea of celibate homosexuals." Tanya Domi, *Gay and Lesbian Military Freedom Initiative, quoted in, David Evans, Gay activist agenda on the military goes far beyond tolerance, Chicago Tribune, Feb. 5, 1993, at 23.* "'I haven't worked for 30 years to give gays the right to be celibate,' said Frank Kameny, a guru of the gay-liberation movement." *Gays and the Military, Newsweek, Feb. 1, 1993, at 53.*

or desire to engage in homosexual acts does not establish that the policy targets status rather than conduct. Quite the opposite; it reflects the obvious connection between homosexual "status" and homosexual conduct.

Though he tries mightily to create a legal fiction regarding his and others' homosexuality, see Brief of Appellant at 27-29, Steffan himself proves the common sense proposition that sometime, somewhere, with someone homosexuals, as a class, will engage in conduct that professional military judgment holds,⁸ Congress expressly found,⁹ and courts have uniformly recognized¹⁰ presents a variety of risks to unit cohesion and to combat readiness.

When all is said and done, the policy is based upon a simple, logical, and reasonable thesis: the more homosexuals there are in the military, the more homosexual conduct will

⁸"In my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for units' survival in time of war." S. Rep. at 280 (Testimony of General H. Norman Schwarzkopf, U.S. Army (Ret.)).

⁹"The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service. . . . 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)(13)&(15).

¹⁰See, e.g., *BenShalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir.), reh'g denied, 746 F.2d 1579 (D.C. Cir. 1984); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

occur, and the more problems associated with homosexual conduct will occur. Because there is no practical way to prevent homosexuals from engaging in homosexual conduct--nor does the military wish to take on that task--the best, most efficient way--and the way that is fairest to both the individual and the military--to minimize homosexual conduct within the military is to exclude homosexuals, rather than subject them and the armed forces to unrealistic expectations and unnecessary administrative burdens. "The fact that . . . persons of 'homosexual orientation' engage in or seek to engage in homosexual conduct is as unremarkable as the fact that . . . persons of 'heterosexual orientation' engage in or seek to engage in heterosexual conduct. To pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd." *Watkins v. United States Army*, 847 F.2d 1329, 1361 n.19 (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).

This perfectly defensible logic and common sense approach to the facts of life should not be held captive to fantastic legal notions. After careful analysis, the Seventh Circuit properly concluded that the policy "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." *BenShalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). More recently, Congress concluded that the policy was based upon conduct and reasonable

inferences about conduct. S. Rep. at 266, 285, 294 ("[DoD] issued a conduct-based policy; . . . [u]nder current DoD policy, a servicemember's admission . . . [of homosexuality] provides a basis for discharge because the admission establishes a rebuttable presumption that the individual is a person who engages in, desires to engage in, or intends to engage in homosexual acts. . . . [t]he policy setting forth the grounds for discharge is conduct-based."). Sound judicial analysis as well as authoritative determinations by the branch responsible for establishing the rules and regulations governing the land and naval forces requires rejecting the politics of pretending that homosexuals, as a group, do not present a risk of homosexual conduct in the military.

II. The Military May Avoid the Harm to Good Order, Discipline, Morale, and Unit Cohesion that All Agree Homosexual Conduct Causes by Excluding the Class Most Likely to Engage in the Prohibited Conduct.

A. The challenged military personnel policy is presumed constitutional and the burden is on the party challenging it to negative every conceivable basis for the policy.

Last term, in *Heller v. Doe*, 113 S. Ct. 2637 (1993), the Supreme Court reviewed the principles applicable to rational basis review of legislative classifications challenged under equal protection principles. In summarizing the law, the Court reviewed a long line of cases and distilled the following time-honored rules:

[R]ational basis review in equal protection analysis 'is not a license to judge the wisdom, fairness, or logic of legislative choices.' Nor does it authorize 'the judiciary to sit as a superlegislature to judge the wisdom or desirability of . . . policy

determinations . . . that neither affect fundamental rights nor proceed along suspect lines.' For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . . Further, a legislature that creates these . . . [classifications] need not 'actually articulate at any time the purpose or rationale supporting its classification.' Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'

[M]oreover, [a state] has no obligation to produce evidence to sustain the rationality of a statutory classification. 'A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' . . . [C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.' 'The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be, and unscientific.'

Id. at 2642-3 (citations omitted).

The Court also made clear that 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.'" *Id.* at 2643.

Thus, the law imposes an extremely heavy burden on Steffan. A burden that he cannot meet.

B. The policy is grounded upon factors properly cognizable in determining qualifications for military service.

There can be no doubt that maintaining a combat-ready military force is a legitimate government interest. In fact, Steffan concedes that the regulatory rationale for the policy are "laudable goals." Brief of Appellant at 14. Instead of

analyzing the relationship between the purpose of the policy and the "laudable goals," and negating every conceivable basis for the policy, Steffan claims that because homosexual conduct is generally subject to disapproval, the policy is based solely upon irrational fears and must fall under *Cleburne*. A review of the factors that are properly cognizable in determining qualifications for military service refutes Steffan's approach.

In its review of the policy, the Congress carefully considered the purpose of the military, the unique nature of military service, the key elements that must be present to successfully accomplish a military mission, the function of personnel policies in building a force capable of successfully accomplishing the mission, and finally, the need for a policy excluding homosexuals in order to raise and maintain a force capable of success on the battlefield. These factors underscore the legitimacy of the governmental goals and the rational basis of the policy choice made to achieve those goals.

1. The Purpose of the Military.

"The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise." 10 U.S.C. § 654(a)(4). This straightforward statement of the need for a modern armed force is not open to debate. Furthermore, since this fundamental statement of purpose was made by the branch of government specifically entrusted with raising and supporting armies, there can be no doubt that the purpose is a legitimate one. See also *Toth v. Quarles*, 350 U.S. 11, 17 (1955) ("it is

the primary business of armies and navies to fight and be ready to fight should the occasion arise."). Certainly the purpose of the armed forces is a properly cognizable factor in establishing qualifications for service.

2. The Unique Nature of Military Service.

Military life is fundamentally different from civilian life in that -- (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society."

10 U.S.C. § 654(a)(8).

This principle is also beyond debate. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'"); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) ("the military must insist upon a respect for duty and a discipline without counterpart in civilian life."); *Parker v. Levy*, 417 U.S. 733, 743 (1974) ("the military is, by necessity a specialized society separate from civilian society."); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian.").

In explaining the unique nature of military service to Congress, General Gordon Sullivan, Chief of Staff of the Army, pointed out the essential difference between military and civilian life:

What separates us from civilian society is the ultimate sacrifice, the sacrifice of our lives for our country. We have to sublimate everything that we do to selfless service to our Nation. Duty, honor, country [I]t is, in fact, that mission, the protection of the Nation, which must govern everything that we do.

S. Rep. at 273.

Not only does the military differ from civilian life in the degree of sacrifice it requires soldiers to be prepared to make, it differs on the day-to-day living basis as well. General Colin Powell, Chairman of the Joint Chiefs of Staff, explained:

[T]he majority of our . . . [soldiers] are required to live in communal settings that force intimacy and provide little privacy. It may be hard to contemplate spending 60 continuous days in the close confines of a submarine; sleeping in a foxhole with half a dozen other people; 125 people all living and sleeping in the same 40 by 50 foot, open berthing area, but this is exactly what we ask our young people to do.

S. Rep. at 277.

To provide a modicum of privacy in these situations, the military has traditionally segregated bathing and sleeping facilities by gender. The presumption underlying gender segregation is that people are sexually attracted to the opposite sex. Thus, most people view being forced to sleep, shower, and use toilet facilities with members of the opposite sex as an infringement of their privacy. When the underlying presumption is not valid, e.g., when individuals find members of the same gender sexually attractive, the invasion of privacy occurs even in gender segregated facilities. This, in turn, disrupts the bonding and cohesion vital to military effectiveness. S. Rep. at 277-8.

Steffan dismisses such concerns as only a "fear" that homosexuals will invade privacy interests and claims that such a fear rests upon "irrational stereotypes." Brief of Appellant at 22. Steffan misses the point. Heterosexual soldiers who are stripped of the little privacy military living provides and are required to share cramped living space with those who are sexually attracted to the same gender do not fear a loss of privacy, they have already experienced it. A homosexual former soldier described a preinduction physical as "pretty spectacular, I mean, 'cause you've got three hundred naked men in one room." Humphrey at 61. A lesbian discharged from the Air Force wrote of her impression of barracks living at basic training:

"I entered the military knowing that I was a lesbian, but also knowing that I wanted to do what was right by military standards and stay there! But, by God, when I got into basic, I thought I had been transferred to hog heaven! No damn kidding! Lordy!"

Id. at 11.

The issue is not whether a homosexual will physically assault a heterosexual. The issue is the actual loss of privacy and discretion the soldier has come to expect and society has heretofore provided in deciding when and to whom to expose one's body. By recasting the privacy interests of heterosexuals into an "irrational worry over whether one would be assaulted in the shower, Steffan trivializes the legitimate interests of soldiers and elevates his own self-interests over the norms that our society has maintained and protected.

As with the purpose of the military, the unique nature of military life is clearly a factor that is properly cognizable by the senior military leadership, as well as by Congress, in determining qualifications for service.

3. Essential Elements of Military Capability.

"[H]igh standards of morale, good order and discipline, and unit cohesion . . . are the essence of military capability." 10 U.S.C. § 654(a)(15). See also *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps.").

During the recent Senate hearings several senior combat leaders testified to the critical role of cohesion and discipline in winning wars. General Schwarzkopf told the Congress, "In my 40 years of Army service in three different wars, I have become convinced that . . . [unit cohesion] is the single most important factor in a unit's ability to succeed on the battlefield." S. Rep. at 275. General Powell told Congress that soldiers "must bond together as a fighting force before it is sent to the battlefield; . . . [m]utual trust, common core values, self confidence, and realization of shared goals help to form the cohesive military team; [c]ohesion requires the sacrifice of personal needs for the needs of the unit, subjugating individual rights to the benefit of the team." *Id.*

Building cohesion is not something that is done overnight. "It does not suddenly happen the moment the bullets come; [i]f it

was not there to begin with, it is going to take a long time and some dead and mangled bodies before you get it." *Id.* at 276 (Testimony of Dr. David Marlowe, Chief of the Department of Military Psychiatry, Walter Reed Army Medical Center).

Homosexuality adversely effects the development of unit cohesion because it injects sexuality into a situation that should be sexually neutral. General Schwarzkopf observed that "the introduction of an open homosexual into a small unit immediately polarizes the unit and destroys the very bonding that is so important for the unit's survival in time of war." *Id.* at 280. Even among homosexuals, the sexual tension created by living in close quarters causes polarization and reduces cohesion:

People in each [homosexual] clique had their own rules and customs. Women often paired up into butch/girlfriend couples or remained unattached, although some lesbian cliques were made up only of butches. Adhering to their own sexual folkways and taboos, butches rarely dated each other and had to be careful about dating other butches' girlfriends in the same crowd. Rusty Brown, who was a Navy mechanic during the war, 'automatically went to the table with the butches' so that she could 'find out who was going with who - I didn't want to get my head knocked off.' Couple relationships stabilized a lesbian clique but breakups, rivalry, and jealousy caused fights and tensions that sometimes tore a group apart.¹¹

A military leader, whether an officer or a noncommissioned officer, is unable to effectively command or lead his troops if he loses the respect and trust of his subordinates. This adversely effects morale, discipline, and cohesion. For the

¹¹Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War Two*, 103-4 (1990).

homosexual leader, the loss of respect follows from engaging in conduct that may be the natural expression of his sexuality.¹²

If, as senior military leaders believe and Congress found, unit cohesion, good order and discipline, and morale are indispensable to success on the battlefield, there can be no question that it is a factor properly cognizable in establishing qualifications for service.

¹²The personal account of two former officers provides an example:

When I went out on a cruise with the USS Constellation, there was nobody in the squadron I knew who was gay, but I did, within a couple days, recognize a seaman I had seen at a bar, and made contact with him. . . . That's how I was introduced to the "Connie girls," a group of gay guys. . . [who] for the most part . . . were really flamboyant queen types, relatively young, mostly first tour. I was the only officer that associated with them at all.

. . . . One night, I was dancing with this sailor and limboed down toward my back, and he shimmied down on my face. All of these other guys who were not gay were sitting around going, "Oh, oh, oh," and "Gross." I just loved it, loved the heck out of it.

Humphrey at 163, (interview of Jim Woodward).

I . . . started seeking out the 'tearoom' [anonymous sexual encounters in public toilets] scene. The train stations were real good sources for that kind of stuff. I'd always known it was against the rules.

. . . . A lot of people attending the trial were my troops, people who wanted to see me get what they felt was my just deserts. You see, I was a hard-core squadron commander. I believed everyone was there to work and we all had the same mission to accomplish, and if you didn't play by the rules . . . I told them what the rules were. . . . I had very simple rules - tough but simple. I was known as a kick-ass commander, and so the troops that I had given reprimands to were there to watch me suffer.

Id. at 228, 230 (interview of Paul Starr).

4. The Function of Personnel Policies in Force Composition.

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

10 U.S.C. § 654(a)(14).

In light of the purpose of the military, the unique nature of military service, and the critical role of cohesion, none can seriously challenge the proposition that personnel policies must exclude those categories that military judgment and experience has found do not enhance cohesion and combat capability. Applying this self-evident principle, military policies are based upon professional military judgment as to what categories or classes do not contribute to overall combat effectiveness. This class-based approach reflects the fact that members of the military are not "hired" for a particular job at a particular location for a particular period of time. Rather, it recognizes that the individual must become subordinate to the unit and the mission. Wars are not won by individuals; they are fought and won by cohesive teams of warriors who are ready to sacrifice their own lives for that of their buddy. S. Rep. at 275.

Class-based personnel policies, or managing by categories, allows the military to expend its time, effort, and resources in those areas that professional military judgment has found are most conducive to creating the cohesive units required for victory in battle. See Melissa Wells-Petry, *Exclusion: Homosexuals and the Right to Serve* 66-73 (1993) [hereinafter

Wells-Petry]. Congress has imposed a number of restrictions on entry that disqualify personnel irrespective of their individual suitability. See, e.g., 10 U.S.C. § 504 (excluding the insane, intoxicated, deserters, and convicted felons); 10 U.S.C. § 505 (precluding enlistment by those under 17 years-old and over 35 years-old); 10 U.S.C. § 3253 (restricting enlistments to those who are citizens or permanent residents of the U.S.).

Congress has also delegated authority to the Secretary of Defense to establish "physical, mental, moral, professional, and age qualifications. . . ." 10 U.S.C. § 510(b). Pursuant to this authority, the services routinely exclude single parents, those with physical disabilities or limitations, those not meeting prescribed educational and mental aptitude standards, and those with a record of ingrained delinquency behavior patterns. See Wells-Petry at 5 (listing exclusion categories). Within each of these broad categories there may be individuals who could perform well in certain positions in the military. Enlistment qualifications, however, exclude them on a class-wide basis.

Given the purpose of the military, it is not only reasonable, but imperative that personnel policies exclude those whose presence will detract from the ability to accomplish the mission. Managing by categories is a logical and efficient way to select those potential soldiers that military judgment and experience has shown stand the best chance of enhancing combat effectiveness. And enhancing combat effectiveness is clearly a

factor properly cognizable in developing qualifications for service.

5. Homosexuals Create an Unacceptable Risk to Unit Cohesion.

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)(15).

With this legislative finding, Congress wrote into law the long-standing principle, contained in the Directive that Steffan challenges, that "homosexuality is incompatible with military service . . . [because 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.'" S. Rep. at 293, *quoting*, Dep't of Defense Dir. No. 1332.14. See also H. R. No. 103-200, 103d Cong., 1st Sess., at 287 ("the committee concludes that homosexuality is incompatible with military service.").

In reaching this conclusion Congress and the military did not rely upon private prejudice, bigotry, stereotypes, or mere negative attitudes and fears. Rather, they focused on military effectiveness, unit cohesion, the unique nature of military life, and the impact that homosexual conduct in the military would have, ultimately, on success on the battlefield. S. Rep. at 268-9; 278; 279; 281; 282; 283. See also Wells-Petry at 89-131. It

simply cannot be argued that these factors are not properly cognizable in determining qualifications for service.

D. The DoD Policy is Based on Prudence, Not Prejudice.

Relying upon *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), Steffan argues that the only basis of the policy is private bias and that private bias cannot, as a matter of law, support a classification challenged under equal protection principles. Brief of Appellant at 10-11. Steffan misreads *Cleburne* and fails to meet his burden of negating "every conceivable basis which might support . . . [the policy]." *Heller*, 113 S. Ct. at 2643.

Cleburne involved a challenge to a zoning regulation that required a special use permit for a group home for the mentally retarded but did not require a permit for other types of group homes. The Supreme Court recognized that there was a difference between a group home for the mentally retarded and other types of group homes that were freely permitted, but noted that "this difference is largely irrelevant unless . . . [the home for the mentally retarded] . . . would threaten legitimate interests of the city in a way that other permitted uses . . . would not." *Cleburne*, 473 U.S. at 448. The city argued that a special permit was required, (1) to control the size of the home and number of occupants in order to limit population density in the surrounding area; (2) because of doubts about legal responsibility for actions of the residents of the home; (3) because the home would be located in a flood plain; (4) fear that students in a nearby

school would harass the residents; and (5) because of negative attitudes of property owners within 200 feet of the proposed home as well as fears from elderly residents of the neighborhood. *Id.* at 448-9. The Court noted that factors 1, 2, and 3 would apply to all group homes and provided no justification for different treatment of the home for the mentally retarded.

Regarding factor 4, the Court observed that about 30 mentally retarded youths actually attended the school and that fears of harassment were vague and undifferentiated. The negative attitudes of the nearby property owners and the fears of elderly residents were similarly unexplained. The Court concluded that requiring a special use permit "appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450. In striking down the zoning ordinance, the Court held 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." *Id.* at 448.

Steffan reads *Cleburne* to say that "negative attitudes" or "fears" can never provide support for a classification scheme challenged under the Equal Protection Clause. Steffan is wrong. His argument misperceives the basis of the DoD policy, it improperly equates society's long-held opprobrium of homosexual practices with irrational prejudice, and assumes that the purpose

of the policy is to stigmatize or punish homosexuals rather than to contribute to combat effectiveness.

That the policy excludes those who are most likely to engage in homosexual conduct does not mean that it improperly caters to private bias or irrational prejudice. Assuming that homosexuals engage in homosexual acts is the result of simple logic, not bigotry.¹³ Claiming discrimination on the basis of "homosexual status" merely avoids confronting the real issue: The effect of homosexual conduct on unit cohesion and combat effectiveness. In upholding Georgia's power to criminalize homosexual sodomy, the Supreme Court recognized that the so called "private bias" against such conduct was sound public policy. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Indeed, our entire system of criminal law is based upon notions of what is "good" and "bad" for society at large. If the DoD homosexual policy improperly caters to "private bias," then our entire criminal code is equally suspect.

Cleburne does not require Congress and the military to risk a reduction in combat effectiveness. *Cleburne* merely holds that government may not impose a policy solely for the purpose of

¹³Even some critics of the current policy have acknowledged the reasonableness of this presumption. See, e.g., Jeffery Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 Mil. L. Rev. 55, 106 (1991) ("It is logical to assume the most [homosexuals] are going to act in accordance with their preference.").

disadvantaging a particular group or class.¹⁴ The recent Congressional action on this very issue clearly establishes that the purpose behind the policy is not to disadvantage homosexuals, but to promote an efficient and effective military capable of winning our nation's wars. As the branch specifically vested by the Constitution with the power to "raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, Congress found that the "primary purpose of the armed forces is to prepare for and to prevail in combat," 10 U.S.C. § 654(a)(4), and that personnel policies must "exclude persons whose presence in the armed forces 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)(14). Clearly, the purpose of the policy is to maintain an effective military, not to disadvantage gay men and women. "[T]he [Senate Armed Services] Committee's primary focus and concern has been the implications of any change in the current policy on the effectiveness of our armed forces to carry out their mission to

¹⁴See 2 Rotunda, Nowak & Young, *Treatise of Constitutional Law: Substance and Procedure*, § 15.4. ("[T]he [Clebourn] Court invalidated the legislation under the equal protection rationality standard because the state could assert no interest to support the legislation other than a desire to discriminate against the disfavored group. Such laws violate equal protection because the desire to discriminate cannot in itself supply a justification for the discriminatory classifications.").

defend our nation." S. Rep. at 268-9. The policy at issue is not "anti-gay;" it is "pro-combat effectiveness."

Steffan argues that despite the "laudable goals" the policy seeks to achieve, it is ultimately based upon private prejudice. What Steffan fails to appreciate is that the disruptive nature of homosexual conduct in the military is not the result of some bigoted attitude toward a benign, non-behavioral characteristic. Rather, the adverse impact on unit cohesion and combat effectiveness caused by homosexual conduct is a result of forcing soldiers to share close living conditions that afford minimal privacy with those who may find them sexually attractive. It injects an element of sexual tension and potential eroticism into a situation that must remain sexually neutral to insure maximum combat effectiveness. It places an imprimatur of the government on conduct that the vast majority of Americans consider "always wrong."¹⁵

To the extent that these concerns reflect traditional notions of morality and societal values, there is nothing in the law that disables policymakers from considering such factors in developing law and policy. The Supreme Court has held that "[t]he law . . . is constantly based on notions of morality." *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). The Court has recognized a "substantial government interest in protecting order

¹⁵The American Enterprise, *Views About Homosexuality*, March/April 1993 at 82, quoting National Opinion Research Center 1991 survey that revealed 71% of those polled said that sexual relations between two adults of the same sex was "always wrong."

and morality." *Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2462 (1991). Furthermore, the Court has acknowledged that "a legislature could legitimately . . . protect 'the social interest in order and morality.'" *Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973). If a legislature can rely directly upon notions of morality in writing laws, it can also consider notions of morality in developing policies to preserve combat effectiveness. This is especially true here where the need for cohesion, trust, confidence, loyalty, and shared values is so important to success in battle. Certainly, the impact of the invasion of privacy that occurs when heterosexuals are forced to share close living conditions with homosexuals, the introduction of a sexual component into what should be a sexually neutral situation, and the reduction in trust and cohesion produced by forced subjugation of widely held moral principles are all factors that are properly cognizable in developing personnel policies to promote combat effectiveness because they all effect the essential element of unit cohesion. Precluding consideration of such factors, as Steffan argues, results in elevating his personal sexual preferences over what professional military judgment and Congressional findings hold to be critical elements in winning on the battlefield. As stated by the court in *BenShalom v. Marsh*, 881 F.2d 454, 461 (7th Cir. 1989), the military "should not be required by this court to assume the risk, a risk it would be assuming for all our citizens, that accepting admitted homosexuals into the armed forces might

imperil morale, discipline, and the effectiveness of our fighting forces."

Cleburne does not, as Steffan argues, reject the principle that policies may be based upon traditional notions of morality. *Bowers* and *Glen Theatre*, which specifically approved basing laws on moral precepts, were both decided after *Cleburne*. In fact, the distinction between *Cleburne*, on one hand, and *Bowers* and *Glen Theatre* on the other, was the presence of traditional notions of morality and decency that supported the legislation in the latter two cases. The Court specifically recognized the power of the state to "provide for the public health, safety, and morals" *Glen Theatre*, 111 S. Ct. at 2462. The law upheld in *Bowers* was based upon a "millennia of moral teaching." *Bowers*, 478 U.S. at 197 (Burger, J. concurring). That legitimate moral basis was noticeably lacking in the city's justification of discrimination against the mentally retarded in *Cleburne*.¹⁶ Unlike *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2806 (1992), which Steffan claims "rejected out of hand" the notion that societal standards of morality can support public policy, (Brief of Appellant at 21), the case at bar does not involve the restriction of a fundamental right or individual liberty protected by the Constitution. Thus, Steffan sweeps with too broad a brush when he places societal standards

¹⁶Steffan's reliance on *Palmore v. Sidoti*, 466 U.S. 429 (1984), is similarly misplaced. *Palmore* involved discrimination based upon non-behavioral characteristics (race) and was reviewed under strict scrutiny. Furthermore, there is no legitimate moral basis to support determining the fitness of a parent along racial lines.

of morality in the same ash can as violations of the First Amendment, limitations on the constitutional right to abortion, irrational prejudices against the elderly, and zoning ordinances designed to disadvantage the mentally retarded. Brief of Appellant at 11 n5.

Steffan reads too much into Gen. Powell's testimony that the military leadership should not "use our official position to make moral or religious judgments on this issue." Brief of Appellant at 21, *quoting* S. Rep. at 279. While it may not be appropriate for the military leadership to assume the position of the final arbiter of moral choices, they are certainly not disabled from recognizing and considering the prevailing moral values of the American people in developing personnel policies applicable to the American people's armed forces. Indeed, Congress has directed the Secretary of Defense to establish "moral . . . qualifications for . . . enlistment" 10 U.S.C. § 510(b) (emphasis added). If "majority sentiments about the morality of homosexuality" can support criminal provisions, *Bowers*, 478 U.S. at 196, the consideration of those same sentiments and the impact homosexuals would have on unit cohesion is even more appropriate.

CONCLUSION

In the final analysis, Congress, professional military judgment, and common sense all recognize that homosexuality is inextricably linked to homosexual conduct. To pretend otherwise is absurd. It is also beyond dispute that the military may prohibit homosexual conduct because it destroys unit cohesion and

reduces combat effectiveness. It follows that excluding the class most likely to engage in homosexual conduct is a logical and reasonable way to minimize homosexual conduct in the military. Those constitutionally responsible for our national defense have made the policy choice to exclude homosexuals rather than risk the damage to cohesion that homosexual conduct causes.

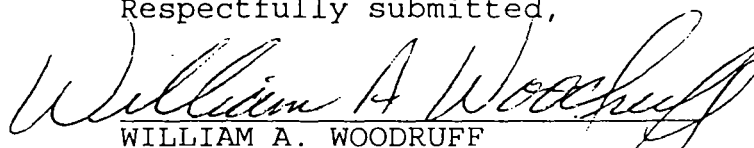
An unbroken line of Supreme Court decisions places this policy choice in the exclusive province of the political branches. See, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) ("judges are not given the task of running the Army. . . ; the judiciary [must] be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) ("we must be particularly careful not to substitute our judgment . . . for that of Congress, or our own evaluation of evidence for a reasonable evaluation by [Congress]"); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("it is difficult to conceive of an area of governmental activity in which the courts have less competence."); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("Our review of military regulations . . . is far more deferential than constitutional review of similar laws or regulations designed for civilian society."). This clear principle of deference to legitimate military authority, when coupled with rational basis review, requires the Court to affirm the District Court.

Instead of leading the parade of social change, the military has remained true to its purpose of preparing for and fighting our Nation's wars. It has analyzed the impact of homosexuality on the cohesion needed to prevail in battle and concluded that homosexuality is incompatible with military service. Steffan has not proved that homosexuality is compatible with military service. Nor has he proved that the policy was based upon anything other than legitimate concerns about the ability of the military to fulfill its ultimate purpose of winning in battle. Steffan asks this Court to value his sexual preferences over the right of the American people to a cohesive military prepared to win in battle. In essence, he claims the risk of "dead and mangled bodies" as the price for going to war without cohesive units is not too much to ask the American people to pay. Steffan's argument is the antithesis of military service and must be rejected.

For the foregoing reasons, this Court should affirm the opinion of the District Court.

Buies Creek, North Carolina
March 24, 1994

Respectfully submitted,

A handwritten signature in cursive script, reading "William A. Woodruff", written in dark ink.

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UNITED STATES CODE
TITLE 10. ARMED FORCES
SUBTITLE A-GENERAL MILITARY LAW
PART II-PERSONNEL
CHAPTER 37-GENERAL SERVICE REQUIREMENTS

§ 654. Policy concerning homosexuality in the armed forces

(a) Findings.-Congress makes the following findings:

- (1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.
- (2) There is no constitutional right to serve in the armed forces.
- (3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.
- (4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.
- (5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.
- (6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.
- (7) 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.
- (8) Military life is fundamentally different from civilian life in that--
 - (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

- (9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.
- (10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.
- (11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.
- (12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.
- (13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.
- (14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.
- (15) 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.

(b) Policy.-A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

- (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated 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;
 - (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
 - (E) the member does not have a propensity or intent to engage in homosexual acts.
- (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
- (3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.-

- (1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).
- (2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required briefings.-The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction.-Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that--

- (1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and
- (2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions.-In this section:

- (1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay " and "lesbian".
- (2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.
- (3) The term "homosexual act" means--
 - (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
 - (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

Department of Defense Directive 1332.14
(Excerpt from Enclosure 3, Part 1)

H. Homosexuality.

1. Basis.

a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engaged 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 to 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.

2. Characterization or description. Characterization of service or description of separation shall be in accordance with the guidance in section C. of Part 2. When the sole basis for separation is homosexuality, a characterization Under Other Than Honorable Conditions may be issued only if such a characterization is warranted under section C. of Part 2 and there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in the following circumstances:

- a. By using force, coercion, or intimidation;
- b. With a person under 16 years of age;
- c. With a subordinate in circumstances that violate customary military superior-subordinate relationships;
- d. Openly in public view;
- e. For compensation;
- f. Aboard a military vessel or aircraft; or

g. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

3. Procedures. The Administrative Board Procedure (section C. of Part 3) shall be used, subject to the following guidance:

a. Separation processing shall be initiated if there is probable cause to believe separation is warranted under paragraph H.1.c., above.

b. The Administrative Board shall follow the procedures set forth in subsection C. 5. of Part 3, except with respect to the following matters:

(1) If the Board finds that one or more of the circumstances authorizing separation under paragraph H.1.c., above, is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described in that paragraph.

(2) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph H.1.c. has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

c. In any case in which characterization of service Under Other Than Honorable Conditions is not authorized, the Separation Authority may be exercised by an officer designated under paragraph B.4.a. of Part 3.d. The Separation Authority shall dispose of the case according to the following provisions:

(1) If the Board recommends retention, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary concerned with a recommendation that the Secretary separate the member under the Secretary's Authority (section 0. of this Part 1).

(2) If the Board recommends separation, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis of the following considerations;

1. There is insufficient evidence to support the finding; or

2. Retention is warranted under the limited circumstances described in paragraph H.l.c., above.

(3) If there has been a waiver of Board proceedings, the Separation Authority shall dispose of the case in accordance with the following provisions:

(a) If the Separation Authority determines that there is not sufficient evidence to support separation under paragraph H.l.c., the Separation Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Separation Authority determines that one or more of the circumstances authorizing separation under paragraph H.l.c. has occurred, the member shall be separated unless retention is warranted under the limited circumstances described in that paragraph.

e. The burden of proving that retention is warranted under the limited circumstances described in paragraph H.l.c. rests with the member, except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

f. Findings regarding the existence of the limited circumstances warranting a member's retention under paragraph H.l.c. are required only if:

- (1) The member clearly and specifically raises such limited circumstances; or
- (2) The Board of Separation Authority relies upon such circumstances to justify the member's retention.

g. Nothing in these procedures:

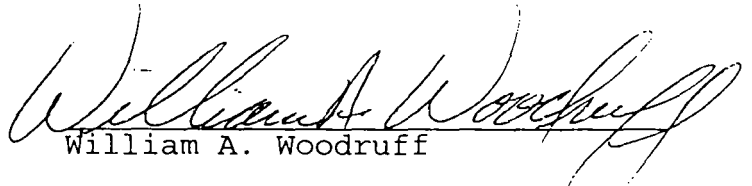
- (1) Limits the authority of the Secretary concerned to take appropriate action in a case to ensure that there has been compliance with the provisions of this part;
- (2) Precludes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned;
- (3) Authorizes a member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;
- (4) Precludes separation in appropriate circumstances for another reason set forth in this part; or
- (5) Precludes trial by court-martial in appropriate cases.

CERTIFICATE OF SERVICE

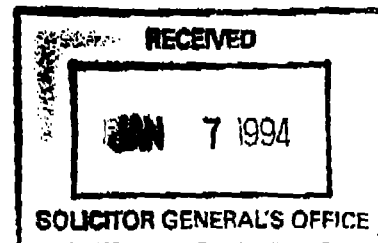
I hereby certify that on this 24th day of March 1994, I served the foregoing Brief of Geneva College Center for Law and Public Policy, The Center for Military Readiness, Defense Readiness Council, and The Military Coalition, *Amici Curiae*, upon counsel for Plaintiff-Appellant and counsel for Defendants-Appellees by causing copies to be delivered by first class mail, postage prepaid, to the addresses listed below. I hereby 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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*File - Gap-in-the-military
Steffan*



No. 91-5409

September Term, 1993

Joseph C. Steffan,

Appellant

v.

Les Aspin, Secretary,
Department of Defense, et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 07 1994

RON GARVIN
CLERK

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley,
Williams, Ginsburg, Sentelle, Henderson, and Randolph,
Circuit Judges

O R D E R

This matter is presently before the Court upon appellees' suggestion for rehearing in banc of the remedy ordered in the panel opinion. In addition, a judge of the court has sua sponte requested the taking of a vote on the question of also placing the merits of the case before the in banc court.

The court has been polled and a majority of the judges in regular active service have voted in favor of the entire case being reheard by the court sitting in banc. Accordingly, it is

ORDERED, by the Court, in banc, that the judgment filed herein on November 16, 1993, be, and the same hereby is, vacated.

A future order will govern further proceedings.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: *Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

Telco system was not CPE. The Government continually argued that while the MCI service bureau involved a computer, which alone might qualify as CPE, the "package of services" NYNEX provided qualified as an information system. The Government could not explain, however, what aspects of the "package" were prohibited.

Indeed, when asked about various elements of the service, the Government more often than not conceded their permissibility. For example, the Government agreed that the use of a computer (along with Telco's software) was lawful; that the location of the computer on Telco's premises was not itself unlawful; and also that Telco could lawfully provide maintenance for the system. In addition, countering the Government's argument that the components of the "package" were prohibited, NYNEX directs us to substantial evidence in the record which strongly suggests that most aspects of the MCI service bureau were expressly permitted by either the Consent Decree or specific waivers. See NYNEX Corporations' Proposed Findings of Fact and Conclusions of Law, *reprinted in* J.A. 233-39. The District Court made no findings on this showing and the Government did not dispute it.

In particular, NYNEX's list included the following aspects of the MCI service:

- (1) The modem's capability to modulate and demodulate telephone signals. According to NYNEX, modulation and demodulation were permitted as exchange services. J.A. 236.
- (2) Permitting MCI to reach the MicroVAX through Telco's Equinox data switch. Switching is expressly included as part of "telecommunications" under the Consent Decree. J.A. 236.
- (3) Installing, maintaining and troubleshooting the MicroVAX as needed. J.A. 238.
- (4) Licensing software for MCI's use in the MicroVAX and to provide program consulting and help-desk services in connection with the use of that software. J.A. 238.
- (5) Providing record conversion and associated services related to MCI's use of the software, including converting elec-

tronic data between tape, disk and paper, making electronic copies of MCI's data (backups), and transforming MCI's magnetic tapes to disk (reformatting where necessary to make the tapes readable by and usable with Telco software). J.A. 238.

(6) Using Telco's printer which was permitted as electronic-to-paper record conversion under the software waiver. J.A. 238.

(7) Sending e-mail to and from the MicroVAX to assist with the CPE and software provided to MCI. NYNEX insists nothing in the software waiver or the Consent Decree was intended to or did prohibit Telco or MCI from the normal use of telephone services to communicate with each other by voice, data, teleconference or facsimile. J.A. 239.

The District Court noted a number of these aspects, never doubting the legality of any individual component. Rather, the District Court apparently concluded that the whole was greater than the sum of the parts, finding that the "package of services" taken together constituted a prohibited information service. We cannot fathom the basis of this calculation, for it seems to ignore the applicable burden of proof in this case. As noted above, the Government was required to produce evidence sufficient to establish guilt *beyond a reasonable doubt*. The Government did not come close to satisfying this burden with respect to the question focused on the *clarity* of the Consent Decree. On this point, it is sufficient to note that, in contrast to the Government's unsupported conclusions, NYNEX points to uncontested evidence in the record tending to show that the MCI service bureau was more squarely in the "gray area" than on the prohibited pole.

The record also indicates that, in other like situations, the Government has taken positions on the scope of the CPE exemption inconsistent with the one that it takes in this case. The District Court incorrectly found that DOJ had never taken the position that a service which is arguably prohibited by the Decree may be provided if it consists of components each of which is permitted by the Decree. NYNEX, 814 F.Supp. at 138.

To the contrary, the record contains DOJ letters advising several companies subject to the Decree that they could provide central utility meter reading services. See J.A. 603-04, 636-39. Specifically, these services entailed the automatic transmission of meter readings from the utility customers' premises to the operating company, where the information was collected, stored, and then periodically retransmitted to the participating utility over the phone lines. *Id.* Although these "information services" blended customer premises equipment, J.A. 604, 638-39, exchange access, J.A. 639, and management of a telecommunications service—thus requiring a combination of exclusions for their legality—the Government gave its approval.

The Government argues that these letters are not inconsistent with the position taken in this case, because the letters merely indicated that companies could provide *information access* but not *information service*. Brief for Appellee United States at 29 n. 15. This distinction is lost on us. In any event, we surely do not see how it erases the problem before us in the instant case. We can comprehend no meaningful distinction between the service NYNEX provided and the meter reading service which was permitted under the CPE exception.

Adding to the confusion in this case were conflicting views about what it meant to provide CPE. The District Court held that "CPE is the lease or sale by a Regional Company of telephone equipment ... or, perhaps, a computer, to be used on the customer's premises." NYNEX, 814 F.Supp. at 136. At oral argument, Government counsel conceded that an arrangement could be characterized as CPE even if a computer remained on a provider's premises.³ In other words, a customer who was able to work from its home base to control and manipulate data on a remote computer that was dedicated to its use could be viewed as having been provided that equipment as contemplated by the CPE exception found in sections IV(E) and VIII(A) of the Consent Decree. When we consider the matter in light of the express

3. Government counsel also claimed that, "depending upon the circumstances," there might have been a violation of section II(D)(1) even if

terms of the Consent Decree, there is no clear answer as to whether the MCI service bureau was permissible CPE or an impermissible information service.

Because nothing in the record supports the Government's contention that the MCI service bureau was not in the "gray area" encompassing the overlap between information services and CPE, we are constrained to find that the Consent Decree lacked the necessary clarity and specificity to support a finding of criminal contempt. Accordingly, we reverse and vacate the judgment of the District Court.

So ordered.



Joseph C. STEFFAN, Appellant,

v.

Les ASPIN, Secretary of Defense, et al.

No. 91-5409.

United States Court of Appeals.
District of Columbia Circuit.

Argued Sept. 13, 1993.

Decided Nov. 16, 1993.

Order Granting Rehearing In Banc and
Vacating Judgment Jan. 7, 1994.

Midshipman brought action challenging Department of Defense (DOD) regulations prohibiting persons with homosexual orientation from serving in the Navy or attending the Naval Academy. The United States District Court for the District of Columbia, Oliver Gasch, Senior District Judge, ruled that regulations did not violate equal protection, 780 F.Supp. 1, and midshipman appealed. The Court of Appeals, Mikva, Chief Judge, held that regulations under which Navy compelled midshipman to resign from Naval Academy solely because he admitted his homosexual orientation violated the equal pro-

Telco had moved the computer to MCI's premises. We do not understand what "circumstances" might have prompted such a conclusion.

tection component of the Fifth Amendment's due process clause.

Reversed.

1. Armed Services ⇨16

Midshipman's resignation from United States Naval Academy, tendered after his superiors informed him of consequences of refusing to resign based on his admission that he was a homosexual, amounted to a "constructive discharge" under Department of Defense (DOD) Directives.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇨213.1(2)

Any governmental action challenged on equal protection grounds that burdens individuals unequally but does not burden "suspect class" need only survive "rationality," or "rational-basis" review; rationality review requires that action be rationally related to legitimate governmental purpose. U.S.C.A. Const.Amend. 5, 14.

3. Constitutional Law ⇨213.1(2)

Absent burden upon suspect class, court's role in reviewing equal protection challenge to government regulation is merely to ensure: that government has legitimate purpose for distinguishing among individuals affected; and that means chosen to effect that purpose bear some reasonable relation to it, and thus are not wholly arbitrary. U.S.C.A. Const.Amend. 5, 14.

4. Constitutional Law ⇨213.1(2)

Government is under no obligation to justify its behavior in proceeding challenging government regulation on equal protection grounds; instead, before striking down statute or regulation on rationality review, court must evaluate and find wanting any potentially legitimate grounds upon which to uphold government's action. U.S.C.A. Const.Amend. 5, 14.

5. Constitutional Law ⇨213.1(2)

When individuals are deprived of equal protection of the laws by governmental actor for entirely arbitrary reasons, or for reasons that rest solely upon irrational and invidious

prejudices against class of people, whether or not a "suspect class," court should declare government action unconstitutional even under rational-basis review. U.S.C.A. Const.Amend. 5, 14.

6. Armed Services ⇨16

Constitutional Law ⇨278.6(1)

Department of Defense directives under which Navy compelled midshipman to resign from Naval Academy solely because he admitted his homosexual orientation violated the equal protection component of the Fifth Amendment's due process clause; regulations were not rationally related to any legitimate goal, but instead excluded particular class of individuals, identifiable only by their thoughts and desires, for no other reason than military's fear and dislike of that group. U.S.C.A. Const.Amend. 5.

Appeal from the United States District Court for the District of Columbia (D.C. Civ. No. 88-3669).

Marc Wolinsky, argued the cause for appellant. With him on the briefs were Lambda Legal Defense and Education Fund, Inc., Norman Redlich, William C. Sterling, Jr., and Vineet Bhatia, Wachtell, Lipton, Rosen & Katz and Calvin Steinmetz, Steinmetz, Weinberg and Moats.

Anthony J. Steinmeyer, Atty., U.S. Dept. of Justice, argued the cause, for appellees. With him on the brief were J. Ramsey Johnson, Acting U.S. Atty., and E. Roy Hawkins, Atty., U.S. Dept. of Justice.

On the brief for amici curiae, the American Jewish Committee was David McBride. With him on the briefs, the Asian-American Legal Defense Fund, the American Jewish Congress and the Puerto Rican Legal Defense Fund.

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

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

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

I. Background

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

In addition to his outstanding military performance, Mr. Steffan also excelled at extracurricular activities. In his senior year, he served as President and Cantor of the Catholic Choir and as premier soloist of the Glee Club. In his junior and senior years he sang the National Anthem as a soloist on national television at the Army-Navy game, for which he earned a Citation from the Superintendent of the Academy. It appeared that the sky was the limit for Mr. Steffan's career in the United States Navy.

But Joseph Steffan's promising military career was not to be realized. In February 1987, the Naval Intelligence Service ("NIS") received a report from the Academy alleging that Mr. Steffan had stated to another student that he was gay. The NIS commenced an investigation. When Mr. Steffan learned of the investigation, he asked an Academy Chaplain to intercede on his behalf with the Commandant of Midshipmen, Captain H.W. Habermeyer, in hopes that he would be allowed to graduate. The Chaplain was unable to convince Captain Habermeyer, who advised only that Mr. Steffan seek legal counsel. Several days later, Mr. Steffan himself

Before: MIKVA, Chief Judge, WALD and EDWARDS, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA.

MIKVA, Chief Judge:

Joseph Steffan was, by all accounts, an exceptional midshipman as he prepared to graduate from the United States Naval Academy in 1987. Mr. Steffan's exemplary performance at the Academy had earned him numerous honors and the respect and praise of his superior officers. Most notably, he was selected in his senior year to serve as Battalion Commander, one of the Academy's ten highest ranking midshipmen. But only six weeks before his expected graduation, the Academy forced Mr. Steffan to resign—denying him a degree and a commission in the Navy—after he truthfully answered, "Yes, sir" to a superior officer's question, "[A]re you a homosexual?" In dismissing Mr. Steffan, the Academy applied Department of Defense Directives instructing that "[h]omosexuality is incompatible with military service," and mandating discharge of any servicemember who "has stated that he or she is a homosexual or bisexual, unless there is a further finding that the member is not a homosexual or bisexual." 32 C.F.R. Part 41, App.A §§ H.1.a, H.1.c(2). Mr. Steffan argues that his constructive discharge, based solely on his homosexual orientation, violates the equal protection component of the Fifth Amendment's Due Process Clause. He further argues that the truncated procedures the Navy used in effecting that discharge were arbitrary and capricious, violating both the equal protection component and the Administrative Procedure Act.

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

approached Captain Habermeyer to request a meeting with the Superintendent. Captain Habermeyer asked him, "Are you willing to state at this time that you are a homosexual?" Mr. Steffan responded, "Yes, sir." He then asked Captain Habermeyer if he would be allowed to graduate. The Captain told him it was unlikely and asked him what he would do in that event. Mr. Steffan responded, "I guess I would have to leave the Naval Academy." Captain Habermeyer then informed Mr. Steffan that he would convene a Brigade Military Performance Board the next day and that he would arrange for a psychological evaluation.

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

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

But on December 9, 1988, Mr. Steffan wrote to the Secretary of the Navy, asking that his resignation be withdrawn and that he be awarded his diploma. On February 9,

1989, based on the advice of the Superintendent of the Naval Academy, the Secretary denied that request. The sole stated basis of this denial was Mr. Steffan's status as a homosexual, as revealed by his un rebutted admission before the Performance Board.

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

The district court entered summary judgment for the Secretary on December 9, 1991. In a lengthy opinion, the court explained, first, that the Academy's expedited procedures were not arbitrary and capricious, but were an "accommodation to an accomplished young man," who desired speedy resolution of his status. *Steffan v. Cheney*, 780 F.Supp. 1, 6 n. 11 (D.D.C.1991). Going on to evaluate the constitutionality of the military's gay ban, the court noted that Mr. Steffan was discharged because of his homosexual status, and not because of any homosexual conduct. *Id.* at 4-5. But it held that (1) homosexuals are not a suspect class, so regulations discriminating on the basis of homosexuality are subject only to rational-basis review, *id.* at 5-10; and (2) the military's gay ban bears a rational relation to the legitimate goals of "maintenance of discipline, morale, good or-

der, a respected system of rank and command, . . . morality and respect for the privacy interests of both officers and the enlisted," *id.* at 16, and to the goal (not raised by the Secretary) of preventing the spread of AIDS in the armed forces. *Id.* at 13-16. Mr. Steffan appeals from the entry of summary judgment.

II. Discussion

[1] Mr. Steffan argues that the Navy constructively discharged him in violation of the equal protection component of the Fifth Amendment's Due Process Clause. The equal protection component imposes the same restrictions upon the federal Government that the Fourteenth Amendment's Equal Protection Clause places upon the States. *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 1228, 43 L.Ed.2d 514 (1975). Mr. Steffan challenges the regulations that were in effect when he resigned and when the Secretary of the Navy refused his request that he be allowed to graduate. The military's newly announced policy toward homosexuals in the armed forces was discussed at oral argument, but it is not at issue in this case. Both parties seem eager to have us resolve in advance the constitutionality of whatever guidelines the new regulations might ultimately prescribe. We decline their invitation. Mr. Steffan's appeal turns solely upon the legality of the regulations under which the military discharged him. Those regulations—and only those regulations—are properly before us in this case.

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

H. Homosexuality

1. Basis

a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members ad-

versely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and maintain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

b. As used in this section:

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

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

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

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

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

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

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

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

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

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

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

The Secretary's brief relies heavily upon the concept of "military deference" to sustain its Directives. And not without reason—for it is surely true that we accord great independence to decisions of the military branches in their areas of expertise. For example, the Supreme Court (as well as this Court) upheld a military prohibition on servicemembers wearing yarmulkes, because of the military's professed need for uniformity of dress. *Goldman v. Weinberger*, 475 U.S. 503, 508, 106 S.Ct. 1310, 1313-14, 89 L.Ed.2d 478 (1986) ("traditional outfitting . . . encourages the subordination of personal preferences and identities in favor of the overall group mission."), affirming *Goldman v. Secretary of Defense*, 734 F.2d 1531 (D.C.Cir.1984). This regulation would likely have been struck down as violative of the First Amendment in another context, but the Court deferred to the military's judgment that it had a compelling secular interest in uniformity. A strong and independent military is essential to the

national security, and courts should not lightly overturn military judgments as to the best means of ensuring that security.

But contrary to the Secretary's implication, a court need not close its eyes to the dictates of the Constitution whenever the military is involved—not even when it professes a national security interest in its conduct. There is no "military exception" to the Constitution. Indeed, even when the Supreme Court has deferred to a military judgment, it has been careful to do so only within the confines of ordinary constitutional analysis. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 67, 101 S.Ct. 2646, 2653, 69 L.Ed.2d 478 (1981). This is particularly true for equal protection cases. When the military fails to accord individuals the equal protection of the laws, it treads upon an area of expertise that has long been conceded to the courts. In deciding such cases, therefore, courts should not stray from the boundaries of ordinary equal protection review. For example, faced with a claim that the military discriminates against African-Americans or women, the court should not fail to apply strict or intermediate scrutiny to the military's action. See *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Although the concept of military deference should lead a court to grant the benefit of the doubt to the Government's opinion that a "compelling" or "important" military interest exists (at least where there is a colorable claim of such an interest), the court should not hesitate to review the case with its customary thoroughness.

In this case, however, we decline to rule on whether a "compelling" or "important" state interest is necessary. This would depend, of course, on whether homosexuals, defined by their sexual orientation, are a "suspect" or "quasi-suspect" class accorded "heightened scrutiny" under equal protection review. This Court has only had occasion to rule on the suspect status of homosexuals as defined by homosexual conduct. *Padula v. Webster*, 822 F.2d 97 (D.C.Cir.1987); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C.Cir.1984). In that context, we have noted the anomaly of acceding special protection to a class whose defining characteristic, homosexual conduct,

can be made illegal. *Padula*, 822 F.2d at 103 (citing *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986)). This is a different case: the class at issue is defined by homosexual orientation, not conduct. The Secretary does not allege that Mr. Steffan ever engaged in homosexual conduct. Accordingly, the district court acknowledged that Mr. Steffan was discharged solely because of his status as a homosexual. *Steffan v. Cheney*, 780 F.Supp. 1, 5 (D.D.C.1991) ("[T]his is primarily a case about the plaintiff's status as a homosexual."). As we have previously noted, "whether an agency of the federal government can discriminate against individuals merely because of sexual orientation" remains an open question in this Circuit. *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C.Cir.1986), *aff'd in part and rev'd in part sub nom. Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (emphasis in original). It is that open question that we must begin to answer today in deciding the constitutionality of the military regulations applied to Mr. Steffan.

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

A. Rationality Review

[2-4] Any governmental action that burdens individuals unequally but does not burden a "suspect class" need only survive "rationality," or "rational-basis" review. Rationality review requires that the action be "rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985). This is not an exacting standard. Nor should it be: Every governmental action burdens some individuals more than others. Thus, a strict standard of review invalidating a large percentage of regulations based only on their differential impact or purpose would handcuff government in the name of equality.

The Constitution neither requires nor permits courts to reach for a constitutional blunderbuss to resolve every equal protection challenge. Absent a burden upon a suspect class, the court's role is merely to ensure: (1) that the government has a legitimate purpose for distinguishing among the individuals affected; and (2) that the means chosen to effect that purpose bear some reasonable relation to it, and thus are not wholly arbitrary. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 61-64, 102 S.Ct. 2309, 2313-15, 72 L.Ed.2d 672 (1982). The government is under no obligation to justify its behavior; instead, before striking down a statute or regulation on rationality review the court must evaluate and find wanting any potentially legitimate grounds upon which to uphold the government's action. *Heller v. Doe*, — U.S. —, —, —, 113 S.Ct. 2637, 2642-43, 125 L.Ed.2d 257 (1993).

[5] Although the court has a limited role under rationality review, that role remains significant as a bulwark against unreasonable and illegitimate restrictions. When individuals are deprived of the equal protection of the laws by a governmental actor for entirely arbitrary reasons, or for reasons that rest solely upon irrational and invidious prejudices against a class of people (whether or not a "suspect class"), a court should declare the government action unconstitutional even under rational-basis review. *Cleburne*, 473 U.S. at 450, 105 S.Ct. at 3259-60. Otherwise, rationality review would be tantamount to no review at all—a result manifestly inconsistent with Supreme Court precedent. See, e.g., *Zobel*, 457 U.S. at 61-64, 102 S.Ct. at 2313-15; *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533-38, 93 S.Ct. 2821, 2825-28, 37 L.Ed.2d 782 (1973).

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

B. *Propensity to Engage in Illegal Conduct*

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

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

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

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

1. *The plain meaning of the Directives.*

From the face of the DOD Directives, it is plain that they primarily target homosexual *status*, and not homosexual *conduct*. Mr. Steffan was forced to resign under section H.1.c(2), which mandates dismissal of any servicemember who states that he or she is a homosexual unless there is a further finding that the servicemember is not, in fact, a

homosexual. Section H.1.b(1) defines "homosexual" as someone "who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directives § H.1.b(1).

Although this definition ultimately relies upon some connection to homosexual conduct, the primary focus of the Directives is not, in fact, the conduct itself, but the "desire" to engage in that conduct. This becomes clear when one compares section H.1.c(2), under which Mr. Steffan was discharged, with section H.1.c(1). Under c(1), a servicemember who actually *engages* in homosexual acts can escape discharge if he can show that "such conduct is a departure from the member's usual and customary behavior"; that it is unlikely to recur; that it was not coercive; that it will not harm the morale of the armed forces; and (most significantly) that "[t]he member does not desire to engage in or intend to engage in homosexual acts." DOD Directives § H.1.c(1). For all intents and purposes, the servicemember must prove that he is not a "homosexual," as defined in section H.1.b(1), except that he happened to engage in homosexual conduct. If his thoughts are in accord with his conduct (if he "desires" to engage in homosexual acts), then he cannot escape dismissal.

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

As this example illustrates, both c(1) and c(2) are aimed at the same thing: homosexual orientation. Whether the servicemember has engaged in homosexual conduct or has stated that he is a homosexual, he can escape dismissal by showing that he is a heterosexual. But he can never escape dismissal, once

he truthfully admits his orientation or his conduct, if he "desires" to engage in homosexual acts. The Directives thus attack status, not conduct; and the status they are after is defined only by one's thoughts.

2. *Status predicting conduct.*

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

But there is no such rational relation here. Homosexual conduct is more than a practice discouraged by the military: it is grounds for discipline and sometimes (in the case of sodomy) a criminal act. Therefore, the Secretary's justification for the gay ban presumes that a certain class of persons will break the law or the rules solely because of their thoughts and desires. This is inherently unreasonable. In a recent entrapment case the Supreme Court held that even a defendant's prior *conduct* did not demonstrate a propensity to engage in the exact same actions when they were later made illegal. "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it." *Jacobson v. United States*, — U.S. —, —, 112 S.Ct. 1535, 1542, 118 L.Ed.2d 174 (1992).

* A conclusion as to future conduct is even less justifiable when based, not on past conduct, but on mere thoughts and desires. "[A] person's inclinations and 'fantasies ... are his own and beyond the reach of government. ...'" *Id.* (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67, 93 S.Ct. 2628, 2640-41, 37 L.Ed.2d 446 (1973)). "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969) (government may not forbid private ownership of obscene materials in one's own home). By firing Mr. Steffan purely for his "inclinations and fantasies," the Secretary seeks to exercise this very power over the minds of those in the military.

The "constitutional heritage" to which Justice Marshall referred in *Stanley* is evident in the evolution of the law of treason. Under a statute of Edward III, it was a crime to "compass or imagine the Death of ... the King." Statute of Treasons, 25 Edw. III. This became the crime of "constructive treason," which was enforced against supposed "compassers" and "imagers" even in the absence of any overt act (other than mere words) or any conspiracy to carry out the regicide. See, e.g., *Case of Thomas Burdet*, 79 Eng.Rep. 706 (1477); *Trial of Sir John Perrot*, 1 How.St.Tr. 1315, 1318 (1592); *Trial of Thomas Hardy*, 24 How.St.Tr. 199, 894 (1794) (all cited in *Watts v. United States*, 394 U.S. 705, 709-10 & n. 1, 89 S.Ct. 1399, 1402-03 & n. 1, 22 L.Ed.2d 664 (1969) (Douglas, J., concurring)). See generally *Cramer v. United States*, 325 U.S. 1, 8-22, 65 S.Ct. 918, 921-29, 89 L.Ed. 1441 (1945) (discussing the law of treason in England and America prior to the Constitutional Convention). Our Constitution expressly repudiates constructive treason. Article III, section 3 declares: "treason against the United States shall consist *only* in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same *overt Act*, or on Confession in open Court." U.S. Const. art. III, § 3 (emphasis added). These restrictions, limiting the definition of treason to certain discrete types of conduct and requiring an

"overt act" for conviction, express the constitutional principle that a person's thoughts are his own—however distasteful they may be to the state.

These considerations were present even in the cases that upheld the Smith Act's broad proscriptions of subversive activities. Despite the nation's fear of a supposed communist threat to overthrow the state, the Supreme Court never went so far as to allow individuals to be prosecuted merely for private communist sympathies. For example, in *Scales v. United States*, 367 U.S. 203, 221-24, 81 S.Ct. 1469, 1482-84, 6 L.Ed.2d 782 (1961), the Court accepted as reasonable a construction of the Smith Act's "membership clause" that required for conviction proof of "active" membership in a communist-affiliated organization and a "specific intent" to overthrow the Government of the United States. Only with these limits did the Court uphold this provision, and it noted that a broader construction would render the statute's constitutionality doubtful. *Scales*, 367 U.S. at 222, 224, 81 S.Ct. at 1482-83, 1483-84; *Yates v. United States*, 354 U.S. 298, 318-20, 77 S.Ct. 1064, 1076-78, 1 L.Ed.2d 1356 (1957). Under the Court's approved construction, a connection existed between membership in the organization and an overt act of conspiracy that sufficed to bring the statute "within established, and therefore presumably constitutional, standards of criminal imputability." *Scales*, 367 U.S. at 228, 81 S.Ct. at 1485. Similarly, in *Dennis v. United States*, 341 U.S. 494, 499-502, 71 S.Ct. 857, 862-63, 95 L.Ed. 1137 (1951), the Court construed the subversive advocacy provisions of the Act as requiring both a specific conspiratorial intent to overthrow the Government of the United States at some future date, and active advocacy of (as opposed to a mere statement of support for) that position. Later, as the nation's fear of domestic communism waned, the Supreme Court reasserted its view that mere status—mere membership in a "subversive organization"—could not be sufficient grounds for a deprivation of rights, when the Court held unconstitutional a law that indiscriminately deprived Communist Party members of their passports. *Aptheker v. Secretary of State*,

378 U.S. 500, 509-11, 84 S.Ct. 1659, 1665-67, 12 L.Ed.2d 992 (1964). Thus, although the subversive activity cases are not beloved of civil libertarians, even these cases manifestly stop short of allowing the kind of presumption that the Secretary claims in this case: a presumption of misconduct from mere status, in the absence of evil intent.

In the present case, of course, Mr. Steffan has not been convicted of treason, nor subversive advocacy, nor any other crime. But he has been denied something that equally qualified and less qualified individuals have enjoyed: the privilege of serving and defending his country in the armed forces. In cases analogous to those under the Smith Act, the Supreme Court has consistently held that government may not deny a job to an individual solely because of his status as a member of a "subversive organization," absent any specific intent to further unlawful action. *Elfbbrandt v. Russell*, 384 U.S. 11, 17-19, 86 S.Ct. 1238, 1241-42, 16 L.Ed.2d 321 (1966); *Wieman v. Updegraff*, 344 U.S. 183, 190-91, 73 S.Ct. 215, 218-19, 97 L.Ed. 216 (1952). See also *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (government cannot fire non-policymaking employee solely because of political affiliation); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) (same); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (prohibition against discrimination based on political affiliation extends to employment decisions other than firing). Despite these warnings, the Secretary has accorded Mr. Steffan differential treatment solely because of the content of his thoughts, as revealed by his truthful statement that he is a homosexual. We think this is repugnant to the various common law and constitutional principles that guard the sanctity of a person's thoughts against government control, as expressed in the cases discussed above. A person's status alone, whether determined by his thoughts or by his membership in a certain group, is an inadequate basis upon which to impute misconduct. Accordingly, we find that the Secretary's "propensity" argument, which presumes that "desire" will lead to misconduct, is illegitimate as a matter of law.

It cannot provide a rational basis for the DOD Directives.

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

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

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

DOD Directives § H.1.a (emphasis added) (see *supra* page 61 for the full text of § H.1.a). The Secretary does not claim that homosexual servicemembers themselves will have poor morale or discipline, nor does he assert that they will intentionally sabotage the interests of the military. Instead, as the district court observed, the Secretary fears that these grievous consequences will arise because heterosexual soldiers will be appalled at the requirement that they serve alongside homosexuals. *Steffan v. Cheney*, 780 F.Supp. 1, 12-13 (D.D.C.1991).

Under rationality review, the court must presume that the Secretary's fears are well-founded, even though we may have a higher opinion of the maturity of members of the armed forces than do their policymakers. But these fears are patently insufficient to justify a discriminatory policy, even under rationality review, because each depends solely upon the prejudice of third parties. Because third parties do not like homosexuals, the argument runs, they will not wish to serve alongside them. Forcing them to serve with homosexuals will lower their morale, impair their discipline, and discourage them from enlisting. Similar objections were

voiced by opponents of President Truman's 1948 executive order requiring racial integration of the armed forces. See *Dahl v. Secretary of United States Navy*, 830 F.Supp. 1319 (E.D.Cal.1993) (quoting Defense Personnel Security Research and Education Center, *Nonconforming Sexual Orientations and Military Suitability* at 8-10 (1988)). But a cardinal principle of equal protection law holds that the government cannot discriminate against a certain class in order to give effect to the prejudice of others. Even if the government does not itself act out of prejudice, it cannot discriminate in an effort to avoid the effects of others' prejudice. Such discrimination plays directly into the hands of the bigots; it ratifies and encourages their prejudice.

In *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), the Court overturned a state court's child custody order, which took the child away from her mother and delivered custody to the child's father solely because the mother had remarried to an African-American. The state court had not acted out of prejudice, but stated that its order was in the best interest of the child because of society's prejudice. Although the mother and father were equally fit parents, the state court reasoned that the child would be subject to discrimination in her community if she lived with parents of mixed races. The Supreme Court reversed. In a unanimous opinion, it held that even if the child's welfare would indeed be impaired by living with parents of mixed races, the court could not determine custody on that basis because such a decision would merely give effect to the prejudice of others—a result that the Constitution does not allow. "The Constitution cannot control such prejudices but neither can it tolerate them," the Court held. *Palmore*, 466 U.S. at 433, 104 S.Ct. at 1882.

Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial

prejudice that they assume to be both widely and deeply held.'

Id.

Although *Palmore* involved a "suspect class" and was decided under strict scrutiny, the Court extended its reasoning to rational-basis review in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In *Cleburne*, the city had denied a zoning permit to construct a home for the mentally disabled in a residential neighborhood. One of the city's arguments for rejecting the permit was that neighborhood residents, angered by the presence of the home, would pose a danger to the mentally disabled residents. The Court (citing *Palmore*) rejected this argument as giving effect to irrational private biases, and held that it could not provide a rational basis for denying the permit. *Cleburne*, 473 U.S. at 448, 105 S.Ct. at 3258-59.

The *Palmore/Cleburne* principle has a parallel in First Amendment law: the "heckler's veto." The First Amendment forbids the government to silence speech based on the reaction of a hostile audience, unless there is a "clear and present danger" of grave and imminent harm. See, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949). Otherwise, a vocal minority (or even majority) could prevent the expression of disfavored viewpoints—a result contrary to the central purpose of the First Amendment's guarantee of free expression. See *Christian Knights of the KKK v. District of Columbia*, 919 F.2d 148, 150, 152-53 (D.C.Cir.1990) (Edwards, J., concurring; Wald, J., dissenting); *NAACP Legal Defense & Educ. Fund, Inc. v. Devine*, 727 F.2d 1247, 1261-62 (D.C.Cir.1984), *rev'd on other grounds sub nom. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir.1992); *Harry Kalven, Jr., The Negro and the First Amendment* 140-160 (1965).

These constitutional principles mandate that government may not disadvantage a person on the basis of his status or his views solely for fear that others may be offended or

angered by them. That is precisely the substance of the Secretary's argument in this case: that heterosexual service-members and potential recruits will be offended by the presence of homosexuals, and this will affect their morale, discipline, and enlistment. The Constitution does not allow government to subordinate a class of persons simply because others do not like them.

D. Privacy

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

This argument can mean one of two things: either (1) that homosexual servicemembers will ogle and stare at their heterosexual counterparts in the shower or other close quarters; or (2) that heterosexuals will fear such staring and feel an invasion of privacy. The argument that homosexuals will stare is very similar to the argument that they will engage in homosexual acts. Again, it equates thoughts and desires with propensity to engage in misconduct. The argument that heterosexuals will fear such staring is, in turn, a version of the argument that government should be allowed to give effect to the irrational fears and stereotypes of third parties. That argument is foreclosed by *Palmore* and *Cleburne*.

Moreover, even the Secretary's own interpretation of the Directives casts doubt upon the seriousness of his privacy rationale. Recall that counsel for the Secretary maintains that the Directives permit "celibate homosexuals" who are attracted to members of the same sex but do not "desire" homosexual conduct, to serve in the military. See *supra* page 64. So, if the Navy is not concerned about heterosexual servicemembers perceiving an invasion of privacy from the presence of a "celibate homosexual," then the marginal increase in invasiveness from a homosexual who "lusts in his heart" but does not intend conduct should be minimal. Thus, even if

the privacy rationale were legitimate in the abstract, these Directives plainly do not protect privacy.

E. Rationales Not Offered by the Secretary

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

Finally, another rationale on which the Secretary does not rely in his brief, but to which the Directives allude, is homosexuals' alleged susceptibility to blackmail. DOD Directives § H.1.a (presence of homosexuals impairs military's ability "to prevent breaches of security"). But as Judge Norris has aptly pointed out, the military's policy only increases the risk of blackmail by making gays and lesbians remain in the closet for fear of forfeiting their careers. *Watkins v. United States Army*, 875 F.2d 699, 730-31 (9th Cir.1989) (Norris, J., concurring), *cert. denied*, 498 U.S. 957, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990); see also *Dahl v. Secretary of United States Navy*, 830 F.Supp. 1319, 1332 (E.D.Cal.1993) ("the only possible threat homosexuals could pose to military security (i.e., that undeclared homosexuals might be 'discovered' and blackmailed) could be obviated by the very policy that the threat allegedly justifies..."). The gay ban raises the stakes of silence enormously, and gives potential blackmailers leverage they would not otherwise have. If there is a risk to military security from homosexuality, then, the Directives themselves are to blame for it.

III. Conclusion

[6] The DOD Directives, the military regulations in effect when the Navy compelled Joseph Steffan to resign solely because he admitted his homosexual orientation, are not rationally related to any legitimate goal. Instead, it is apparent that the Directives exclude a particular class of individuals, identifiable only by their thoughts and desires, for no other reason than the military's fear and dislike of that group. The constitutional requirement of equal protection forbids the government to disadvantage a class based solely upon irrational prejudice, whatever the standard of review. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-50, 105 S.Ct. 3249, 3257-60, 87 L.Ed.2d 313 (1985). We find that the Directives violate the equal protection component of the Fifth Amendment's Due Process Clause. We need not and do not reach the appellant's alternative contentions relating to the procedures used to effect his discharge.

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

emy, reinstate him to military service, and commission him as an officer.

It is so ordered.

Before: MIKVA, Chief Judge; WALD, HARRY T. EDWARDS, SILBERMAN, BUCKLEY, STEPHEN F. WILLIAMS, GINSBURG, SENTELLE, KAREN LeCRAFT HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

Jan. 7, 1994.

This matter is presently before the Court upon appellees' suggestion for rehearing *in banc* of the remedy ordered in the panel opinion. In addition, a judge of the court has *sua sponte* requested the taking of a vote on the question of also placing the merits of the case before the *in banc* court.

The court has been polled and a majority of the judges in regular active service have voted in favor of the entire case being reheard by the court sitting *in banc*. Accordingly, it is

ORDERED, by the Court, *in banc*, that the judgment filed herein on November 16, 1993, be, and the same hereby is, vacated.

A future order will govern further proceedings.



UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

DECISIONS WITHOUT OPINIONS

The following cases have been decided under Local Rule 14(c) without opinion. An asterisk identifies those cases where the judgment or order is accompanied by a Memorandum explanatory of the judgment. Such Memorandum is not included with the opinions of the Court that are printed, and it may not be cited in briefs or memoranda of counsel as precedents, under Local Rule 11(c). However, as Rule 11(c) makes clear, counsel may refer to unpublished dispositions when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
Bell v. Colonial Parking, Inc.	92-7214	10/13/93	AFFIRMED	D.C.D.C., 807 F.Supp. 796
Braswell v. Director, Office of Workers Compensation Programs	92-1256	10/5/93	REVIEW DENIED*	Dept. of Labor
Brown v. Reno	92-5460	10/15/93	AFFIRMED	D.C.D.C.
Doctor's Hosp. of Jefferson, Inc. v. Shalala	92-5184	11/2/93	AFFIRMED	D.C.D.C.
Kanuth v. Prescott, Ball & Turben, Inc.	92-7087	10/27/93	AFFIRMED	D.C.D.C.
Lakeside Community Hosp., Inc. v. N.L.R.B.	92-1186, 92-1375, 93-1200	10/8/93	REVIEW DENIED; ENFORCEMENT GRANTED	N.L.R.B.
McNeill v. Bentsen	92-5072	10/27/93	AFFIRMED	D.C.D.C.
Magnet Coal, Inc. v. N.L.R.B.	92-1210	10/15/93	REVIEW DENIED; ENFORCEMENT GRANTED	N.L.R.B.
Panahi v. Government of U.S.	93-5012	10/8/93	AFFIRMED	D.C.D.C.
Pyron v. Handelsbanken	93-5271	10/18/93	REMANDED	D.C.D.C.
Skidelsky v. F.C.C.	92-1460	10/28/93	AFFIRMED	F.C.C.
Stebbins v. Signet Banking Corp.	93-7016	10/15/93	AFFIRMED	D.C.D.C.
Thompson v. I.N.S.	92-1575	10/15/93	REVIEW DENIED	I.N.S.
U.S. v. Ballantine	93-3099	10/20/93	AFFIRMED	D.C.D.C.
U.S. v. Brown	92-3216	10/27/93	AFFIRMED	D.C.D.C.
U.S. v. Darring	92-3141	10/5/93	AFFIRMED*	D.C.D.C.
U.S. v. Dingle	92-3275	10/27/93	AFFIRMED	D.C.D.C.
U.S. v. Glenn	92-3039	10/27/93	AFFIRMED*	D.C.D.C.
U.S. v. Goodwin	92-3188	10/13/93	AFFIRMED	D.C.D.C.
U.S. v. Guillon	92-3070	10/8/93	AFFIRMED	D.C.D.C.



U.S. Department of Justice

Gays-in-the-military - Steffen

Washington, D.C. 20530

CIVIL DIVISION/APPELLATE STAFF

FAX TRANSMITTAL COVER SHEET

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DEPARTMENT OF THE NAVY

OFFICE OF THE JUDGE ADVOCATE GENERAL
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ALEXANDRIA, VA 22332-2400

IN REPLY REFER TO

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Ser 341/0630

April 28, 1994

Mr. Mark Levy, Esquire
Deputy Assistant Attorney General,
Civil Division, Appellate Staff
Room 3127
United States Department of Justice
10th Street and Pennsylvania Ave. NW
Washington, D.C. 20530

Re: Steffan v. Perry, No. 91-5409 (D.C. Circuit)

Dear Mr. Levy,

In his reply brief, Steffan challenges our assertion that the appointments clause prohibits the Court from awarding him an officer's commission in the United States Navy. Steffan asserts that because the President sent his name to the Senate for confirmation and the Senate approved the list without change, the court may order the commission delivered if it finds the DOD regulation Constitutionally infirm. The following factual and legal discussion gives you the information you need to effectively rebut Steffan's argument.

Procedure for forwarding the names of United States Naval Academy (USNA) midshipman to be nominated for commissions to the White House and Senate.

o Title 10 U.S.C. § 531 mandates that all "[O]riginal appointments. . . in the grades of ensign through captain in the Regular Navy shall be made by the President, by and with the advise and consent of the Senate."

o The USNA sends a list of proposed nominees for commissioning to the Navy Recruiting Command (CRUITCOM) in October/November of the year prior to graduation. In February, shortly after the midshipmen select which service they will enter, e.g. Navy/Marine Corps or Army or Air Force, the USNA sends the "final list" to CRUITCOM. If the academy knows someone is not eligible for commissioning at the time the list is submitted, that person's name would be omitted from the list.

o CRUITCOM forwards the list to the Chief of Naval Personnel (CNP)

o CNP forwards the list to the Secretary of the Navy (SECNAV) with appropriate endorsements and recommendations as necessary.

- o SECNAV reviews the list and forwards it to the Secretary of Defense (OSD) with recommendations for action.

- o OSD staffs the memo through the Assistant Secretary of Defense (Personnel and Readiness) and the Office of General Counsel (OGC). The Deputy Secretary of Defense forwards the list of nominees to the White House.

- o The President presents the list to the Senate via the Senate Armed Services Committee (SASC) and the Senate votes.

- o It is important to note that the Secretary of the Navy acts as the President's alter ego when making appointments. The alter ego theory is not based on a formal delegation of presidential authority but is based on a presumption that the President has knowledge of his appointed officer's actions. Courts have long recognized this theory of Presidential action. Wilcox v. Jackson, 38 U. S. 498, 513 (1829). Therefore, when the Secretary appoints "for the President", it is a Presidential appointment.

- o The Secretary issues regulations regarding the requirements for becoming a commissioned officer in the United States Navy. Any subordinate officer who has knowledge that a particular candidate for commissioning no longer meets the requirements for the office must return the commission to SECNAV even after the Senate confirms the appointment. SECNAV must make the decision, acting as the President's alter ego, whether or not to tender the commission to the individual.

- o In light of the above requirement, if a midshipman becomes ineligible for commissioning after the USNA sends the list of nominees to CRUITCOM, the USNA notifies CRUITCOM and a commissioning certificate and oath of office are not prepared for that person. This notification could be made via telephone or letter.

- o CNP acts on any USNA recommendation of dismissal and/or the non-commissioning of a midshipman. CNP reviews the case, makes recommendations and forwards it to SECNAV for final action. If SECNAV, acting for the President, determines not to appoint the individual to government office, the midshipman is not commissioned. If SECNAV, acting for the President, determines the individual is suitable for commissioning, he may tender the commission.

- o If an individual case is likely to elicit congressional interest, e.g. if it calls into question a controversial

policy or procedure, CNP and/or SECNAV may notify OSD who may then notify the White House and the SASC. The SASC can then remove that person from the list before it is presented to the Senate for confirmation.

o If CRUITCOM has already sent a commissioning certificate and oath of office to the USNA prior to being notified that the midshipman is ineligible for commissioning, the USNA returns the documents to CRUITCOM without tendering the commission to the individual.

o A thorough review of CRUITCOM's and CNP's files show that Steffan's Commission was never tendered even though his name appears on the confirmed list.

o At least one person other than Steffan was confirmed by the Senate and not tendered a commission.

Steffan's assertion that the President must tender a commission and oath of office to a nominee after the Senate approves the nomination is wrong.

o Steffan asserts that Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) allows court to order the government to deliver a commission withheld by the President for unconstitutional reasons. Plaintiff's Reply Brief at 20. In coming to this conclusion, Steffan seriously misreads this seminal, although basic, case. The Court recognized that:

-It had no power to order the President or an officer acting for the President--in Marbury's case it was the Secretary of State--to appoint a person to office. "...[T]he President is not amenable to any court of judicature, for the exercise of his high functions, but is responsible only in the mode pointed out in the Constitution." Id. at 149.

-The Court ruled that because the President had signed and ordered the commission delivered to Marbury, he had taken the last act necessary for the appointment to become final. The appointment in question was a magistrates position with lifetime tenure. The President had no removal power over the office. He sent the commission to the Secretary of State who had merely a ministerial duty to deliver the commission. He was not acting "for the President." Therefore, the Court ruled that it had authority to order the Secretary to perform this non-discretionary ministerial function.

o In refusing to tender the commission to Steffan, SECNAV was exercising one of the "high functions" of the

President's office, namely the power to appoint Officers of the United States enumerated in Article II § 2 of the United States Constitution. This is not a ministerial duty.

o Unlike judges and magistrates, military officers serve at the pleasure of the President. He may remove us at will.

o Unlike the facts of Marbury, no evidence exists in the record showing that either the President or the Secretary of the Navy, acting for the President, ordered a commission delivered to Mr. Steffan. In fact, by accepting Mr. Steffan's resignation, SECNAV ratified his decision, and the decision of his subordinates, not to tender the commission to Steffan.

o In Marbury, the Court recognized that it had no power to order the President or the Secretary of State, when acting for the President, to perform the high functions of their offices. The same limitations prevail on the D.C. Circuit.

If you have any questions regarding this matter, contact Major Edward J. Duffy at (703) 325-9870.



JOHN K. HENEBERY
CDR, JAGC, USN
Deputy Director, General
Litigation Division

THE WHITE HOUSE

WASHINGTON

November 17, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: New gays-in-the-military decision

Overview

As you know, the U.S. Court of Appeals for the D.C. Circuit yesterday issued a major gays-in-the-military decision. In a decision by Chief Judge Mikva, the court held that adverse actions taken against a standout midshipman, on the basis of his statements of homosexuality, are unconstitutional.

The Steffan Decision

Joseph Steffan was an exceptional midshipman at the United States Naval Academy -- a recipient of numerous honors, a Battalion Commander (one of the Academy's ten highest ranking midshipmen), and a soloist singing the National Anthem at the Army-Navy game in his junior and senior years. In February 1987, during Steffan's senior year, the Naval Intelligence Service (NIS) received a report that Steffan had stated to another student that he was gay. Steffan was subsequently asked if he was a homosexual and twice answered, "Yes, sir." On the basis of these statements, academy officials instituted discharge proceedings, changed Steffan's ratings, and advised him to resign. Six weeks before his scheduled graduation from the Academy, he resigned.

Steffan filed suit, claiming that his constitutional right to equal protection had been violated. The D.C. Circuit agreed. It found that the military regulations in effect at the time were "not rationally related to any legitimate goal" and rejected each of the military's stated reasons for the former policy. The court concluded:

- (1) the military's former policy addresses status, not conduct;
- (2) it is unreasonable to use status as a basis for predictions about conduct or a "propensity" to conduct;
- (3) the perceived effect on morale, discipline, and recruitment of heterosexuals cannot be accepted because "[t]he Constitution does not allow Government to subordinate a class of persons simply because others do not like them";

and

(4) the "privacy" concerns are invalid -- the concerns represent either an untenable assumption that homosexuals will "stare" or an impermissible deference to "the irrational fears and stereotypes of third parties."

It should be noted that the court's panel in this case -- Mikva, Patricia Wald, and Harry Edwards -- is quite liberal and may not reflect the views of the entire D.C. Circuit.

Effect of the Steffan decision on the new policy

The court's opinion explicitly states that the new policy is "not at issue" in Steffan and that the decision applies only to the old policy. The court's view of the impermissibility of using statements of homosexuality as a ground for discharge under the old policy, however, may well have implications for the new policy. One difference, of course, is that the new policy contains the explicit rebuttable presumption. (DOJ has argued that there was an opportunity to rebut under the old policy). But it is far from clear whether the rebuttable presumption would be sufficient to overcome the decision and reasoning in Steffan.

Next steps

In consultation with DOD and DOJ, Bruce, George, and the Counsel's office will be reviewing various options. Among the possible choices are: (1) an appeal to the Supreme Court in the Steffan case; (2) a request for en banc review by the entire D.C. Circuit in the Steffan case; (3) an announcement that we will not appeal the Steffan decision because we want to focus on the new policy; and (4) possible actions to expedite judicial review of the new policy (so that the issue can be put to rest).

Talking points

Comments on the Steffan decision should be as limited as possible. It would be appropriate simply to say that we are reviewing the Steffan decision and that we have no further comment on it at this time. You may also wish to say that, in our system of government, courts are always the ultimate judges of constitutional challenges to government policies.

Beatrice Dohrn

THE PRESIDENT HAS SEEN 11/30 ✓

No More Exclusions

It's not often that a president gets a clear second chance on an issue, but President Clinton now has one. The decision by the D.C. Circuit Court of Appeals in the case of *Steffan v. Aspin* should inspire the administration to return to principled consideration of whether gay men and lesbians ought to be excluded from military service solely because of their sexual orientation.

The court's Nov. 16 decision rejects the government's contention that it was permitted to bar lesbians and gay men from military service, because it anticipated that "because third parties do not like homosexuals . . . they will not wish to serve alongside them."

When the president spoke out against the military's exclusionary policy during last year's presidential campaign, he made clear his belief that discrimination against people because of who they are is wrong and unconstitutional. Ultimately he felt forced to backpedal from this position, although even as he announced his "compromise" he admitted he had hoped for better. The president's original view that discrimination is wrong has been vindicated by the *Steffan* decision as well as four other recent federal court decisions finding the ban unconstitutional.

Now the administration must decide how to respond. It can seek to have the court's ruling overturned by appealing to the Supreme Court or seeking rehearing by the full 12-member bench of the D.C. Circuit Court. Obviously this would represent a stinging about-face: an administration that promised to work toward recognizing the rights of lesbians and gay men choosing instead to seek reversal of a court ruling upholding those same rights.

Another political option would be to claim that the court's ruling in *Steffan*, and in the other recent decisions that have held the ban unconstitutional, speak only about the old version of the ban on service by lesbians and gay men, and thus have no bearing on the new one.

An effort to limit the significance of the court's ruling to the "old version" of the ban

would be a deeply disingenuous effort to buy time and bury this issue.

Three versions of the ban are at issue: the old ban, which is the version the court ruled on explicitly; the Aspin version, which is in effect; and the congressional version, which has been attached to the defense appropriations bill awaiting the president's signature.

The political spin on Aspin's version of the ban is to call it "don't ask, don't tell" and to claim that it's a liberal policy. The spin on the congressional version is that it's a codification slightly more restrictive than Aspin's.

But anyone who has read the three policies knows that they are in every important respect the same: Each prohibits military service by gay men and lesbians, whether or not they are publicly open about their identity. The ruling in *Steffan* cannot be said to concern only the extinct policy, because in making its decision, the court looked at the truth underlying every version of the ban: Each version defers to those who harbor irrational prejudice, and thereby each "ratifies and encourages their prejudice." And to that reality, the court applied the essence of our law: "America's hallmark has been to judge people by what they do, and not by who they are."

Finally, the president could take the simple and principled position that initially guided him on this issue: that discrimination—especially by the government against some of its own citizens—is wrong and intolerable. After all, it was the president who said that "we don't have a person to waste" and who articulated why according second-class status to lesbian and gay Americans was unacceptable in principle and wasteful in practice.

Spin is spin, principle is principle and leadership is just that. The president should seize this rare second chance, and let principle guide him to eliminate the military ban on service by lesbian and gay citizens.

The writer is legal director of Lambda Legal Defense and Education Fund, which represents Joseph Steffan.

MONDAY, NOVEMBER 29, 1993 THE WASHINGTON POST

Beatrice
letter in answer
for on this

to cliff
sloan
right?

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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

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

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No. 91-5409

Oral argument
scheduled for
May 11, 1994

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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 plaintiff-appellant is Joseph C. Steffan.

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

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

B. This is an appeal from the following decisions of the Honorable Oliver Gasch: (a) the final judgment entered in this action on December 9, 1991, reported at 780 F. Supp. 1 (D.D.C. 1991) (A. 4), denying plaintiff's cross-motion for summary judgment and granting defendants' motion for summary judgment; (b) the order entered in this action on April 12, 1991, reported at 1991 U.S. Dist. Lexis 4852 (D.D.C. 1991) (A. 41), denying plaintiff's motion for disqualification of the Honorable Oliver Gasch on the ground that he repeat-

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

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

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the military regulations in effect at the time that Steffan was compelled to resign from the Naval Academy cater to irrational prejudice against gay men and lesbians and, therefore, violate the constitutional guarantee of equal protection of the laws?

2. Whether Steffan is entitled to full equitable relief, including the award of a commission as an officer in the United States Navy, as a remedy for his unconstitutional discharge?

3. Assuming that the military regulations in issue allowed Steffan to rebut the presumption that he was a "homosexual" within the meaning of the regulations by demonstrating that

¹ The regulations that required Steffan's discharge as well as the new policy statement and regulations published after Steffan was discharged are reproduced in an addendum that is bound with this brief.

he had not engaged in and did not intend to engage in sexual misconduct, whether Steffan's right to due process was violated when the language of the regulations did not give him notice of this purported defense?

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

STATEMENT OF THE CASE

This case arises out of the compelled resignation of Midshipman First Class Joseph C. Steffan from the United States Naval Academy on April 1, 1987, some six weeks before his scheduled graduation. This harsh result came about because Steffan remained true to the United States Naval Academy honor code and truthfully answered "Yes, sir" when his superior asked him "I'd like your word, are you a homosexual?" There was no claim that Steffan had engaged in sexual misconduct at or away from the Academy, on or off duty. He was discharged solely on the basis of his statement that he is gay.

Following his compelled resignation from the Academy, Steffan filed this action challenging the constitutionality of the military regulations that required the discharge of servicemembers who merely state that they are gay. The district court denied the military's motion to dismiss the complaint, holding that the fact that Steffan was compelled to resign did not oust the district court of subject matter jurisdiction and did not deprive Steffan of standing to pursue his claims. *Steffan v. Cheney*, 733 F. Supp. 115, 121 (D.D.C. 1989). Thereafter, the district court dismissed the complaint pursuant to Fed. R. Civ. P. 37 after Steffan was directed not to answer questions at his deposition as to whether he had engaged in

homosexual conduct while at the Academy. This Court reversed and remanded the case to the district court, holding that the discovery sought was irrelevant. *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990).

Following the remand, the parties cross-moved for summary judgment. On December 9, 1991, the district court granted the military's motion, holding that while the military regulations did discriminate on the basis of a servicemember's "status as a homosexual," they nonetheless survive scrutiny under the equal protection component of the Fifth Amendment. *Steffan v. Cheney*, 780 F. Supp. 1, 5 (D.D.C. 1991). On appeal, a panel of this Court held that Steffan had suffered unconstitutional discrimination and that he was entitled to his diploma from the Academy, reinstatement to military service, and a commission as an officer. *Steffan v. Aspin*, 8 F.3d 57, 70 (D.C. Cir. 1993). This Court subsequently vacated the panel decision *sua sponte* and set the case down for rehearing *in banc*.

STATEMENT OF FACTS

The relevant facts here are set out in the panel opinion of November 16, 1993. 8 F.3d at 59-60. In brief, Joseph C. Steffan was "by all accounts, an exceptional midshipman as he prepared to graduate from the United States Naval Academy in 1987." His career came to an unceremonious end six weeks before his scheduled graduation and commissioning as an officer when he acknowledged to his superior that he is gay. That statement triggered a series of whirlwind proceedings which started on March 24, and concluded on April 1, 1987. During that single week: the "A" evaluation of Steffan's military performance was changed to an "F"; Steffan was stripped of his Battalion Commander rank; a Military Performance Board determined that Steffan had "insufficient aptitude for commissioned service" because of his status as

of private biases can *never* provide a constitutional basis for government discrimination. In the same vein, the Supreme Court has not hesitated to strike down regulations that are based on stereotypes that bear no relation to an individual's actual abilities. See *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

The government has made only two arguments against enforcement of these bedrock principles. Both were correctly rejected by the panel. First, the government contends that the principle of deference to the military requires the courts to ignore the teaching of *Cleburne* and *Palmore* here. But even assuming that the principle of deference is applicable in the equal protection context — an assumption that is unwarranted under the controlling precedents — no amount of deference can save the regulations that required Steffan's separation. As the panel observed: "There is no 'military exception' to the Constitution." 8 F.3d at 62. 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). One such ideal is that government action cannot be based on nothing more than private prejudice, and only an abandonment of that ideal by this Court can justify the destruction of Joseph C. Steffan's naval career.

Second, the government contends that the regulations that led to Steffan's separation were aimed at sexual misconduct, not orientation. The government even goes so far as to argue that there was a so-called "celibate homosexual exception" to be found somewhere in the regulations and that it was open to Steffan to prove that he is not a "homosexual" by proving that he had not engaged in and did not intend to engage in "homosexual acts." The simple answer to the contention is that the regulations in issue provided no such thing. Under the

regulations, a "homosexual" was defined to include an individual who merely harbors a "desire" to engage in "homosexual acts" — including hand holding — and once Steffan identified himself as a gay man, he was subject to mandatory discharge whether or not he had engaged in or intended to engage in sexual misconduct. Thus, as the panel opinion correctly found, the regulations impermissibly target gay men and lesbians on the basis of their thoughts and desires. 8 F.3d at 64-65.

Moreover, it is both irrational and illegal to presume that a servicemember who identifies him or herself as gay or lesbian is more likely to engage in sexual misconduct than a servicemember who is "openly" heterosexual. As a matter of fact, the government now acknowledges that gay men and lesbians are *not* predisposed to violate the rules. And as a matter of law, the Constitution prohibits the government from creating an irrebuttable presumption that a member of a group will engage in misconduct solely on the basis of his or her thoughts and "inclinations." *Jacobson v. United States*, 112 S. Ct. 1535, 1542 (1992). See Point I, *infra*.

On its limited petition for rehearing, the government has belatedly argued that even assuming that Steffan was subjected to unconstitutional discrimination and is entitled both to his Naval Academy diploma and reinstatement, the courts lack the authority to direct that he be awarded a commission. That contention too must fail. It is undisputed that Steffan would have received a commission but for his unconstitutional discharge from the Academy. Acceptance of the notion that this Court lacks the power to remedy a violation of Steffan's rights would stand *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), on its head. See Point II, *infra*.

Finally, even if the Court were to find that the regulations in issue were not *per se* illegal, they were applied in an unconstitutional manner on the facts of this case. *First*, if one accepts the government's claim that Steffan could have saved his career

by proving that although he has a "homosexual orientation," he is not a "homosexual" within the meaning of the regulations, there was no way that Steffan could have known about it. 8 F.3d at 64. Thus, "[t]raditional concepts of due process incorporated into administrative law preclude" the military from penalizing Steffan under a rule that did not "provid[e] adequate notice of the substance of the rule." *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

Second, Steffan was subjected to arbitrary and capricious treatment by the Academy. As a matter of practice, the Academy permits midshipmen who are deemed to be uncommissionable to graduate. Moreover, while Steffan was forced out in barely *one week*, the Navy's goal is to conclude the discharge of a Naval officer over a *four month* period. Thus, Steffan was treated more harshly than both other midshipmen who are deemed to be uncommissionable and other gay servicemembers facing discharge. Consequently, whether or not this Court finds that the military's discrimination against Steffan on the basis of his sexual orientation is unconstitutional, this Court should conclude that the decision to deprive Steffan of his diploma was illegal and award Steffan his degree. *See* Point III, *infra*.

Argument

POINT I

THE MILITARY REGULATIONS THAT REQUIRED STEFFAN'S DISCHARGE FROM THE NAVAL ACADEMY ARE UNCONSTITUTIONAL.

Midshipman Joseph C. Steffan was discharged from the Academy pursuant to servicewide regulations promulgated in 1981 as part of Department of Defense Directives 1332.14 and 1332.30, 32 C.F.R. Part 41, Appendix A, 46 Fed. Reg.

9571 (Jan. 29, 1981) (the "1981 Regulations").² Under the 1981 Regulations, a servicemember who truthfully stated that he or she is "homosexual" *had* to be discharged. The status of being a "homosexual" related principally to one's thoughts and inclinations; a "homosexual" was defined to include someone who "intends" to or "desires" to engage in "homosexual acts." Addendum at 1a. No proof of sexual misconduct was required. Indeed, if a "heterosexual" and a "homosexual" servicemember had sex together, the "heterosexual" could be retained. The "homosexual" had to be discharged. 8 F.3d at 64-65.

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

Neither the Supreme Court nor, prior to the panel ruling in this case, this Court has ruled on the question whether a federal personnel policy that discriminates on the basis of sexual orientation violates the equal protection component of the Fifth Amendment.³ In *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. Webster v. Doe*, 486 U.S. 592 (1988), this Court noted that this question presents a "difficult issue." In a related context, however, this Court has cast serious doubt on the validity of such policies, holding that justifications offered for regula-

² The 1981 Regulations were adopted in response to the decision in *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978). Prior to 1981, the applicable regulations *permitted* the retention of gay men and women. In *Matlovich*, this Court held that if the military did decide to discharge a gay servicemember, it had to articulate a reason as to why the discretion to retain the member was not being used. The 1981 Regulations eliminated the element of discretion and made the discharge of lesbian and gay servicemembers mandatory.

³ The equal protection component of the Fifth Amendment imposes the same prohibitions on the federal government as the equal protection clause of the Fourteenth Amendment imposes on state governments. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

tions that discriminate against lesbians and gay men must be examined to determine whether they are merely "a smoke-screen hiding personal antipathies or moral judgments." *Norton v. Macy*, 417 F.2d 1161, 1167 (D.C. Cir. 1969). Other Circuit Courts have gone further, holding flatly that "penalizing persons for their status rather than their conduct . . . is constitutionally impermissible." *Gay Lib v. University of Missouri*, 558 F.2d 848, 856 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); *Gay Student Services v. Texas A & M University*, 737 F.2d 1317, 1330 (5th Cir. 1984), *cert. denied*, 471 U.S. 1001 (1985).

In deciding the "difficult issue" before it, this Court must consider and apply the basic principles of equal protection law to this case *de novo*.⁴ And there is one overarching principle that dictates the outcome of this case: *the government cannot discriminate against one group in order to cater to the irrational biases and prejudices of another*. The leading Supreme Court decision is *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), where the Court rejected the argument that group homes for the mentally retarded could be uniquely burdened in a city's zoning regulations in order to cater to "negative attitudes" and fears of local property owners and elderly residents towards the retarded. Holding that indulgence of such attitudes and fears can *never* serve a *legitimate* state interest, the Court concluded: " 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.' " 473 U.S. at 448. It went on to hold that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." 473 U.S. at 450.

The Supreme Court was equally clear on this subject in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), where it reversed the

⁴ The district court's ruling on cross-motions for summary judgment is subject to *de novo* review. *Buongiorno v. Sullivan*, 912 F.2d 504, 508 (D.C. Cir. 1990).

lower court's award of custody of a Caucasian child to her father in order to spare the child from the damage that could result from growing up in her mother's racially mixed household. The Court acknowledged "the reality of private biases and the possible injury they might inflict." But it concluded that however real those potential injuries may be, the Constitution does not permit the government to base its policies or actions on private biases.⁵

The principles recently enforced in *Cleburne* and *Palmore* reflect a core constitutional value: that unpopular and disfavored groups and ideas are entitled to full equal protection, and that an individual's liberty may not be sacrificed to appease people biased against him or her. *E.g.*, *United States Department of Agriculture v. Moreno*, 413 U.S. 525, 534 (1973) ("a bare desire to harm a politically unpopular group cannot constitute a legitimate public interest"); *Wright v. State of Georgia*, 373 U.S. 284, 293 (1963) ("the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present"); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (First Amendment right to free speech cannot be infringed to avoid reaction from hostile audience); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (Fifth Amendment right to travel cannot be denied to member of an unpopular group); *Stanley v. State of Georgia*, 394 U.S. 557, 565 (1969) (individual may possess

⁵ Lower courts following the principles of *Cleburne* and *Palmore* have ruled that the hostility of neighbors to "heretical" religious groups is not a proper basis for discrimination, *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988); that public hostility to a performer's views on the Middle East cannot justify discrimination against her, *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 901-03 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989); and that fears of and prejudices against the elderly cannot be used to justify limits on adult group homes, *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 537 (S.D. Fla. 1987).

obscene materials because "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds").

Likewise, the Supreme Court has consistently rejected attempts to justify discrimination on the basis of "archaic and overbroad" assumptions that rest on "old notions" and stereotypes, both in the military context, *Frontiero v. Richardson*, 411 U.S. 677 (1973), and elsewhere. *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984); *Califano v. Goldfarb*, 430 U.S. 199, 211, 217 (1977). The Court has most recently affirmed this principle in *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993), where it held that under rational basis review, a governmental classification "must find some footing in the realities of the subject addressed" to withstand scrutiny. *Id.* (emphasis added).

The military, like every other branch of government, has been required to abide by these principles, most directly in the decisions that have either declared the 1981 Regulations unconstitutional or cast doubt on their constitutionality.⁶ The leading case is *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992), where the Ninth Circuit refused to hold that the 1981 Regulations were constitutional as a matter of law and held that the military had to show "on the record" that those regulations rest on more than "prejudice of others against homosexuals." 963 F.2d at 1165. Indeed, every Circuit Court that has addressed the issue presented by Steffan's discharge under the 1981 Regulations —

⁶ These principles have also been applied in *Crawford v. Cushman*, 531 F.2d 1114, 1121-24 (2d Cir. 1976) (Marine Corps regulation that required the discharge of female servicemembers who become pregnant was violative of equal protection), and in *Owens v. Brown*, 455 F. Supp. 291, 306 (D.D.C. 1978) (statute that precluded women from serving on Navy vessels was violative of equal protection because its purpose was "more related to the traditional way of thinking about women than to the demands of military preparedness").

whether identifying oneself as a gay man or woman can justify dismissal from the military — has raised doubts about their constitutionality. *Pruitt, supra*; *Matthews v. Marsh*, 755 F.2d 182, 184 (1st Cir. 1985); *Falk v. Secretary of the Army*, 870 F.2d 941, 947 (2d Cir. 1989). *See also Watkins v. United States Army*, 875 F.2d 699, 711 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 494 U.S. 1004 (1990).⁷ And every district court that has addressed the issue recently has either declared the 1981 Regulations unconstitutional or has held

⁷ *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990), is no exception. In its decision reversing the district court's earlier dismissal of this case under Fed. R. Civ. P. 37, this Court distinguished *Ben-Shalom* on the ground that the plaintiff there had been found to have engaged in homosexual conduct because she failed to rebut a presumption that she had engaged in homosexual conduct. *Steffan v. Cheney*, 920 F.2d 74, 76 n.* (D.C. Cir. 1990). Indeed, on the earlier appeal in this case, the military relied on *Ben-Shalom* in urging this Court to hold that Steffan in fact had been discharged on the basis of conduct. *E.g.*, A. 766-68. This Court refused to accept the military's argument. 920 F.2d at 76 n.*. Thus, *Ben-Shalom* — a case that was wrongly decided and that has been widely criticized — has already been held to be a case involving homosexual conduct, not status.

⁸ While it is not necessary to the decision on this appeal because the 1981 Regulations lack any legitimate rational basis, the consistent application of equal protection jurisprudence also requires that heightened scrutiny be applied since the defense of the 1981 Regulations rests on the claim that antipathy for gay men and lesbians justifies the military's discrimination against them and the regulations infringe upon fundamental rights by penalizing servicemembers on the basis of their thoughts and desires. *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Abod v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977). The evidentiary record likewise compels the conclusion that heightened scrutiny should be applied since gay men and lesbians as a group have all of the characteristics of a suspect class. A. 868-909 (history of purposeful discrimination); A. 491-578, 587-615, 1044-1133, 1497-695 (inaccurate and absurd stereotypes); A. 1134-98, 1826-30 (immutable characteristic); A. 1742-821 (relative political powerlessness). *See generally Watkins v. United States Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J.

that they are likely to be held unconstitutional. *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993) (declaring policy unconstitutional) (appeal pending); *Meinhold v. United States Department of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993) (same) (appeal pending); *Selland v. Aspin*, 832 F. Supp. 12 (D.D.C. 1993) (Oberderfer, J.) (granting preliminary injunction); *Elzie v. Aspin*, Civil Action No. 93-1853, 1993 WL 562962 (D.D.C. Nov. 10, 1993) (Sporkin, J.) (same).⁸

B. The 1981 Regulations had no rational basis and unlawfully catered to private biases.

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

The 1981 Regulations that required Steffan's discharge run squarely counter to the principles embodied in *Cleburne* and *Palmore*. They provided that the mere "presence" of individuals who state that they are gay is inconsistent with "discipline, good order and morale," and that people who make that statement must be excluded "to foster mutual trust and confidence among servicemembers," "to preserve the integrity of command," "to facilitate world deployment" and "recruitment," and to preserve the "public acceptability of military service." All of these are certainly laudable goals. But the Constitution *requires* the courts to go on to examine the military's explanation as to why discrimination on the basis of sexual orientation supposedly promotes these goals. And it is at this point that the defense of the policy falters.

(footnote continued)

concurring); *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993).

For the military itself has publicly admitted that the "problem" it was seeking to "avoid" by discriminating on the basis of sexual orientation is the possibility that some heterosexuals may compromise their commitment to protect and defend the nation because they "'despise/detest' homosexuality." *Watkins v. United States Army*, 875 F.2d 699, 728 (9th Cir. 1989) (Norris, J., concurring) (quoting Army brief), *cert. denied*, 498 U.S. 957 (1990). And in this Court, the government has argued that the discrimination required by the 1981 Regulations was necessary because—"rightly or wrongly"—"many members of the military services" would find the presence of gay men and lesbians to be "disturbing."

There can thus be no question that the policy was designed to cater to prejudice. In explaining the rationale for the 1981 Regulations, military documents contend that the "integrity of rank and command" will suffer because "[k]nown homosexuals . . . are unlikely to command necessary respect and obedience from subordinates" (A. 1221); that "worldwide deployment" would suffer because some people in other countries "hold unfavorable attitudes toward homosexuals" (A. 1217); that "recruitment" would suffer because "surveys . . . show that the vast majority of Americans in general and servicemembers in particular strongly disapprove of homosexuals" (A. 1220-21); and that "the military would suffer in esteem if known homosexuals were allowed to serve" "[b]ecause of the prevailing homophobia in society." A. 1222.

Indeed, the Commander-in-Chief admitted in his July 19, 1993 speech announcing the present policy that "those who oppose lifting the ban are clearly focused not on the conduct of individual gay service members, but on how non-gay service members feel about gays in general and, in particular, those in military service." Remarks of President William Clinton, July 19, 1993, *reprinted in Washington Post*, July 20, 1993 at A12. The recent Congressional testimony on the policy proves the same point. See *Dahl v. Secretary of the United*

States Navy, 830 F. Supp. 1319, 1332-33 (E.D. Cal. 1993) (reviewing, *inter alia*, recent testimony before Senate Armed Services Committee and concluding that "[t]he only inference that can be drawn . . . is that the threats to military effectiveness posed by homosexuals, assuming such threats actually exist, arise solely from heterosexuals' adverse reaction to the presence of known homosexuals in the Navy, and not from the behavior of homosexuals themselves. Given this, the court cannot conceive how the policy cannot be motivated by prejudice.") (emphasis added). The panel opinion was manifestly correct that a policy that rests on this footing cannot stand. 8 F.3d at 67-69.

That the 1981 Regulations rest on prejudice is further proved by the striking resemblance between the rationale underlying them and rationale underlying the military's repudiated "Jim Crow" policies aimed at "Negroes." *E.g.*, A. 812 ("[t]he close and intimate conditions of life aboard ship" precludes "Negroes" from serving in the Navy); A. 820 ("[t]he minute the negro is introduced into general service . . . the high type of man that we have been getting for the last twenty years will go elsewhere and we will get the type of man who will lie in bed with a negro."); A. 821 (if Southerners were "forced to serve with Negroes, they will cease to volunteer and . . . will not serve with that enthusiasm and high morale that has always characterized the soldiers and sailors of the southern states' "); A. 812 (a "Negro" "would find himself unable properly to perform his duty of exercising military authority"); A. 814 ("[t]here are a number of countries where the landing of Negro Marines would create an extremely difficult situation"). *See generally* A. 808-33, 1882-86; *Meinhold*, 808 F. Supp. at 1458.⁹

⁹ The only possible difference is the further claim that gays constitute a security risk, a claim that was fabricated during the McCarthy era (A. 1696-723); that was rejected in a 1957 Navy study (A. 1066, 1072); that was abandoned by the Navy seventeen years ago in *Berg v. Clayton*, 436 F. Supp. 76, 80 (D.D.C. 1977), *vacated*, 591 F.2d 849 (D.C. Cir.

Still more proof that the 1981 Regulations rested solely on "negative attitudes" against gay men and lesbians and that gays are well-qualified to serve comes from the fact that any number of our allies — including Canada, Australia, Belgium, France, Israel, Spain, Portugal, Sweden, The Netherlands, Denmark, Finland, Norway and Japan — permit gay men and lesbians to serve in their armed forces. A. 1807-21. Indeed, President Clinton in his July 19, 1993 speech acknowledged that "the ban has been lifted in other nations . . . with no discernible negative impact on unit cohesion or capacity to do the job." *See also* GAO, *Homosexuals in the Military: Policies and Practices of Foreign Countries* 10 (June 1993) (military officials from other countries noted that "the inclusion of homosexuals in their militaries has not adversely affected unit readiness, effectiveness, cohesion or morale").

The government's July 19, 1993 policy statement provides further proof that homosexuality is not incompatible with military service, and that it is only the indulgence of irrational biases that purportedly justifies their exclusion. The policy state-

(footnote continued)

1978); that was described by Secretary Cheney as a "bit of an old chestnut" (A. 1555); that was rejected again in 1989 and 1991 military studies (A. 587-615, 1834-76a); that was not relied upon by the district court; that has been abandoned in the new regulations; that has been repudiated by the Department of Justice in its new policy governing discrimination in granting security clearances; and that is belied by the record. A. 587-615, 1531-41, 1832-33. *See also* *Watkins*, 875 F.2d at 731 (Norris, J., concurring) (military ban on gay men and lesbians creates a security risk by subjecting servicemembers to the threat of blackmail); *Dahl*, 830 F. Supp. at 1333 ("the only possible threat homosexuals could pose to military security . . . could be obviated by repealing the very policy that the threat allegedly justifies"). The fact that the military clinged to this rationale in the 1981 Regulations notwithstanding its pedigree and notwithstanding the fact that under DOD guidelines *homosexuality is not grounds for denying a security clearance* (A. 1832), itself demonstrates that the 1981 Regulations are rooted in prejudice. Indeed, one military study has so concluded. A. 1869-70.

ment provides that "homosexual orientation is *not* a bar to service entry or continued service"; that "the Department of Defense recognizes that individuals with a homosexual orientation have served with distinction in the armed services of the United States"; that "Commanders and investigating agencies will not initiate inquiries or investigations solely to determine a member's sexual orientation"; and that "[s]ervice-members will not be asked or required to reveal their sexual orientation." Addendum at 4a. The regulations published on December 22, 1993 implementing the July 1993 statement are to the same effect, and even jettison the assertion that "[h]omosexuality is incompatible with military service." Addendum at 6a.

To be sure, the new policy continues to subject service-members who say that they are gay or lesbian to discharge. The reason can have nothing to do with any "propensity" to engage in misconduct, however. The government has never argued, nor could it, that a gay person who identifies him or herself as such is more likely to engage in misconduct than a gay person who does not disclose his or her sexual orientation. Nor can the government rationally contend that gay men and women who stay in the closet are more fit to serve than those who are open about their sexual orientation.

Rather, the July 19, 1993 policy statement explains that "[t]he constraints of military service require servicemembers to keep certain aspects of their personal lives private for the benefit of the group" — *i.e.*, that gay men and women only become unwanted when others learn of their sexual orientation. Addendum at 5a. Thus, by abandoning the practice of simply asking recruits and servicemembers if they are gay, and by requiring the discharge of only those gay men and lesbians who identify their sexual orientation, the new policy even more plainly demonstrates that it is the possibility that some heterosexual servicemembers may compromise their dedication to the service of our country that creates the alleged threat to good order, discipline and morale.

Indeed, the record shows that what the military actually does in actual times of war — presumably when the need for "unit cohesion" is greatest — is relax or simply drop the enforcement of its anti-gay policies "for the duration." Thus, in connection with the Persian Gulf buildup, the military *suspended* the authority of commanding officers to initiate discharge proceedings against gay reservists. The record shows that even after the military issued a message stating that gays were still subject to discharge, responsible authorities continued the practice of retaining openly gay servicemembers. A. 663-71, 834-42, 980-81.¹⁰

This same practice was followed during World War II, the Korean War and the Vietnam War, when the military altered or relaxed the enforcement of the ban on the service of gays in order to accommodate the need to recruit and retain qualified troops. See A. 1044-50, 2174-75; R. Shilts, *Conduct Unbecoming: Gays and Lesbians in the U.S. Military* 17, 70, 198, 214, 295, 356, 419 (1993) (discharge rates for "homosexuality" declined at the heights of World War II and the Korean and Vietnam Wars and increased during peacetime); A. Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* 179-86 (1990) (discussing effort to "salvage" homosexuals for service in World War II).¹¹

¹⁰ In the district court, the government successfully resisted Steffan's efforts to obtain additional evidence of the military's practices in this regard. 1991 U.S. Dist. Lexis 10621 (D.D.C. 1991) (A. 56).

¹¹ Even in peacetime, the anti-gay ban is enforced selectively, albeit often ruthlessly. A. 1046, 1056 (Vice Admiral Donnell administrative message; because "stereotypical female homosexual[s]" are "among the command's top professionals," allegations that they are lesbian are at times "dismissed out of hand or pursued half-heartedly."); Benecke and Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 Harv. Women's L.J. 215, 221-31 (1990) (documenting gay "witchhunts" disproportionately aimed at women); R. Shilts, *Conduct Unbecoming: Gays & Lesbians in the U.S. Military* 124-28, 139-45, 315-19 (1993) (same).

It is thus no surprise that the military's own studies have uniformly concluded that gay men and lesbians serve in the military in numbers proportional to their representation in society at large, and that the overwhelming majority of lesbians and gay men who serve in the military, like the overwhelming majority of heterosexuals, do so without incident and are honorably discharged at the normal conclusion of their service. A. 515-18, 1047-50, 1071. The most recent study specifically concluded that "a policy that ends discrimination based on sexual orientation can be implemented in a practical and realistic manner". National Defense Research Institute, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* xxviii (Rand 1993) (study commissioned by Secretary of Defense). See *Dahl*, 830 F. Supp. at 1329-31, 1336 (reviewing military studies).

The conclusion from all of this is inescapable: "military necessity" did not remotely require and does not remotely justify Joseph Steffan's separation from the Academy. If his discharge was a military necessity, our allies would not permit gay men and women to serve, our military would not have suspended or relaxed its enforcement of its anti-gay policies during wartime, and the government would not have adopted a policy that ostensibly permits gay men and lesbians to serve. The conclusion is likewise inescapable that the 1981 Regulations which led to Steffan's compelled resignation rested solely upon an impermissible indulgence of private prejudice and that our Constitution demands that they be declared unconstitutional.

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

The district court made several attempts to sidestep the plain fact that the 1981 Regulations were designed to cater to prejudice. The district court first claimed that because "many

would find the Navy's approval of a homosexual orientation . . . to be morally offensive, then it is not prejudice which is responsible for the regulations, but rather a standard of morality." 780 F. Supp. at 13. The district court apparently assumed that the morality of some can justify an infringement of the rights of others.

The government has not defended this argument on appeal. For good reason. The claim was rejected out of hand in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2806 (1992), where the Court held that the government may not justify its attempt to limit individual liberty by imposing its view of morality. It was also rejected by the Chairman of the Joint Chiefs of Staff, who testified that "it is not our place as the uniformed leaders of the armed forces to use our official position to make moral or religious judgments on this issue." Testimony of General Colin Powell before the Committee on Armed Services, United States Senate, July 20, 1993, *reprinted in* S. Rep. No. 103-112 at 279.

Even if one assumes that a "standard of morality" can justify discrimination against individuals whose *behavior* is unchallenged, no standard of morality legitimizes discrimination on the basis of *sexual orientation* or condones stigmatizing an individual on that basis. And while there is no consensus in society or among religious teachings, to the extent that any moral judgment is made at all, the focus is on acts, not orientation. A. 1724-38 (Prof. John Boswell, Yale University).¹²

The district court also claimed that the 1981 Regulations rationally furthered the interest of the services in protecting the privacy of its members. 780 F. Supp. at 13. But this "privacy" argument shares the same fatal defect as the other

¹² In contrast, gay or lesbian sexual orientation was criminalized in Nazi Germany and provided the justification for the internment of gays in concentration camps. See F. Rector, *The Nazi Extermination of Homosexuals* 119 (1981) (Paragraph 175A of German Penal Law in force during the Third Reich defined homosexual acts to include same gender sexual fantasies).

defenses raised by the government; there is no footing in reality for the belief that gay people *will* invade the privacy of their colleagues, but only a "*fear*" that they will. 780 F. Supp. at 13 (emphasis added). And given that the military now claims that there was a "celibate homosexual exception" in the 1981 Regulations and ostensibly now permits gay men and lesbians to serve, it would be absurd for the government to contend that there is any rational basis for this fear. 8 F.3d at 69.

The un rebutted record before this Court confirms that the "fear" adverted to by the district court rests on precisely the type of irrational stereotype that can never provide the basis for governmental discrimination. That evidence includes a 1988 military study which concluded, unremarkably, that homosexuals, like heterosexuals, are respectful of others' privacy. A. 525.¹³ As President Clinton acknowledged in his July 19, 1993 speech, *all* available evidence shows that gay men and lesbians are *not* prone to misconduct of any sort.

The district court also claimed in dictum that the 1981 Regulations (which pre-date the current AIDS crisis) were justifiable as a reasonable means for the military to prevent the transmission of HIV between servicemembers. 780 F. Supp. at 13-18. This claim — which the government has declined to support either below or on appeal — rests on the absurd premise that it is gay men and lesbians themselves, as opposed to a virus transmitted by unprotected sexual intercourse, that

¹³ The record also includes expert testimony that there is no basis for the stereotype that gay men or women are "sexually predatory or that they will try to convert or recruit heterosexuals"; that, if anything, gay men and lesbians in the military can and do exercise a higher degree of self-control than heterosexuals; and that the concern over privacy is at least in part a reflection of society's stereotype that gay men and lesbians are "hypersexual," pointing out that this same stereotype is often applied to other disfavored groups such as African-Americans and Jews. A. 1514-16. See also A. 1047 (Dr. Rankin). This evidence stands un rebutted in the record.

causes AIDS.¹⁴ It also rests on the fallacious contention that because *some* gay men are infected with HIV, *all* gay men and women should be excluded. See *Gay Student Services v. Texas A & M University*, 737 F.2d 1317, 1330 (5th Cir. 1984) (rejecting "speculative evidence" of public health concerns as grounds for discriminating against gays), *cert. denied*, 471 U.S. 1001 (1985).

C. The principle of deference to the military cannot save the 1981 Regulations.

The centerpiece of the government's defense of the 1981 Regulations is the claim that this Court must defer to the military. But there is no "military exception" in equal protection jurisprudence. In fact, *Frontiero v. Richardson*, 411 U.S. 677 (1973) — the first case to articulate the principle that laws that discriminate on the basis of gender must be subjected to heightened scrutiny — arose in the military context. Nowhere in that decision does the Supreme Court even hint that any special deference was due even though Congress was acting pursuant to its war powers.

More directly, in *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981), the Supreme Court applied traditional heightened scrutiny analysis in reviewing gender-based discrimination in draft registration requirements, and specifically noted that it has *not* applied "a different equal protection test" simply because a case arises in "the military context." *Id.* (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975)). *Rostker* thus recognizes that

¹⁴ The theory advanced by the district court is particularly bizarre given that it purported to rely on the *Final Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* (1988), 780 F. Supp. at 15, which clearly states that "it is *behavior*, *not* membership in any particular group or population, that places a person at greater risk for HIV infection." A. 1998 (emphasis added).

military judgments are not immune to passion, prejudice and stereotype¹⁵ and that because of their unique role and expertise in enforcing the principles of equal protection, "courts should not stray from the boundaries of ordinary equal protection review" in the military context. 8 F.3d at 62. *See also Emory v. Secretary of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated.") (citations omitted).

The deference doctrine is also inapplicable to this case because the premises underlying the doctrine are inapposite. The 1981 Regulations did not stem from the application of any military expertise, but from the indulgence of prejudice that infects some members of our society. Indeed, the experts commissioned by the Secretary of Defense concluded that with effective leadership the ban on service by gay men and women could be eliminated with *no* adverse impact on military readiness. National Defense Research Institute, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* (Rand 1993).¹⁶ And as noted above, one ally after

¹⁵ History confirms this. *See, e.g.*, A. 817 (senior Naval officer testifies that "[t]he colored race is very musical and they are versed in all forms of rhythm"; because of this, "possibly" they could serve with whites in the "musician branch"); *Hohri v. United States*, 782 F.2d 227, 230-37 (D.C. Cir. 1986), *vacated*, 482 U.S. 64 (1987) (armed services contend that military necessity required that 120,000 Japanese-Americans be forcibly removed from their homes and placed in internment camps); *Owens v. Brown*, 455 F. Supp. 291, 306 (D.D.C. 1978) (Navy contends that excluding women from naval vessels other than hospital ships is necessary because "duty at sea is part of an essentially masculine tradition").

¹⁶ One reason this is so is because, as the Commander-in-Chief observed, while some gay and lesbian servicemembers may choose to "come out of the closet," experience has shown that when official discrimination has been eliminated in both foreign military establishments and in similar organizations here at home, many have chosen not to do so. Remarks of President William Clinton, July 19, 1993, *reprinted in Washington Post*,

another has permitted gay men and women to serve without adverse consequences. The 1981 Regulations are thus entitled to no more deference than would be appropriate if the military were to attempt to resurrect the racist or sexist regulations and practices of decades past.

Nor would a decision in Steffan's favor involve the courts in a continuing oversight of "the composition, training, equipping, and control of" the armed services. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). The 1981 Regulations themselves have been superceded. And regardless of the outcome of this case, inappropriate or illegal sexual conduct that might have occurred while they were in force will remain grounds for discharge or other discipline.¹⁷ For the same reasons, vindication of the principles of equal protection in this case will not undermine the "'respect for duty and . . . discipline'" that is necessary for the military to "foster instinctive obedience, unity, commitment and esprit de corps," *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

The 1981 Regulations could not withstand scrutiny even if the Court were to find that some level of deference is appropriate. Deference does not equate to "abdication." *Rostker*, 453 U.S. at 67. Nor does the doctrine of deference mean that servicemembers are "'stripped of basic rights simply because they have doffed their civilian clothes.'" *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (quoting Warren, *The Bill of Rights*

(footnote continued)

July 20, 1993 at A12. *See also* GAO, *Homosexuals in the Military: Policies and Practices of Foreign Countries* 9 (June 1993) ("few homosexual military personnel" in foreign countries "openly identify their sexual orientation").

¹⁷ *See* Remarks of President William Clinton, July 19, 1993 (sexual "misconduct is already covered by the laws and rules which also cover activities that are improper by heterosexual members of the military"). *Cf. Owens v. Brown*, 455 F. Supp. 291, 301 (D.D.C. 1978) (invalidation of ban on service of women on navy vessels would not "involve the court in the supervision of military activities").

and the Military, 37 N.Y.U.L. Rev. 181, 188 (1962)). "[M]en and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *Weiss v. United States*, 114 S. Ct. 752 (1994) (Ginsburg, J., concurring). Thus, the "courts have shown no hesitation to review cases in which a violation of the Constitution . . . is alleged." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979). Accordingly, even where deference has been extended, the courts have recognized consistently that there are some lines that the Constitution prohibits the military and Congress from crossing.¹⁸

The 1981 Regulations crossed that line. They are at odds with the government's recognition in its July 19, 1993 policy statement that "homosexuality" is not incompatible with dedicated and effective military service. Addendum at 4a. They penalized the thoughts and "inclinations" of individuals whose conduct was blameless. *Jacobson v. United States*, 112 S. Ct. 1535, 1542 (1992) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)). They irrebuttably and unreasonably presumed that servicemembers who identified themselves as gay would break the law. *Jacobson*, 112 S. Ct. at 1542. They attempted to silence speech, in the form of an acknowledgment of one's sexual orientation, to avoid the

¹⁸ See *Frontiero*, 411 U.S. at 677 (military pay scheme violates equal protection); *Trop v. Dulles*, 356 U.S. 86 (1958) (penalty for desertion violates Eighth Amendment); *Reid v. Covert*, 354 U.S. 1 (1957) (extension of court martial jurisdiction violates Article III and Fifth and Sixth Amendments); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972) (mandatory chapel attendance at service academies violates First Amendment); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (mandatory discharge for pregnancy violates equal protection and due process); *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978) (exclusion of women from service on virtually all naval vessels violates equal protection). See also *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974) (remanding equal protection challenge to policy of excluding women from service academies for plenary trial).

reaction of a hostile audience. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). And they catered to private bias and irrational prejudice and gave them the imprimatur of law. *Cleburne*, 473 U.S. at 450. In short, the 1981 Regulations violated values that lie at the heart of the Constitution.

- D. The 1981 Regulations targeted status, not misconduct, and it is both irrational and unconstitutional to presume that gay men and lesbians will break the law.

The second prong of the government's defense is the claim that the 1981 Regulations contained an exception for so-called "celibate homosexuals," and targeted misconduct, not status. Thus, the government claims that Steffan could have avoided discharge by convincing the administrative discharge boards that he had not engaged in sexual misconduct and did not intend to do so. This argument was rejected on the first appeal in this case because it had "no support in the record," 920 F.2d at 76 n.*, and was rejected by the panel. 8 F.3d at 64-65.¹⁹ It is belied by the language of the 1981 Regulations, which requires discharge so long as a servicemember harbors a sexual "desire" for individuals of the same gender, i.e., so

¹⁹ Other decisions, likewise, have held that the 1981 Regulations discriminate on the basis of sexual orientation, not conduct. *Gay Veterans Association, Inc. v. Secretary of Defense*, 850 F.2d 764, 766, 767 (D.C. Cir. 1988) (regulations distinguish between "separation . . . based solely on homosexuality" and separations where "the discharged servicemember engaged in a homosexual act"); *Pruitt v. Cheney*, 963 F.2d 1160, 1163 (9th Cir. 1991) (the "Army . . . is not discharging members just for homosexual conduct, or even primarily for homosexual conduct. It is discharging members because of their status as homosexuals."), cert. denied, 113 S. Ct. 655 (1992); *Watkins v. United States Army*, 875 F.2d 699, 712-16 (9th Cir. 1989) (Norris, J., concurring) (rejecting claim that Army regulations based on Department of Defense Directive 1332.14 "target homosexual conduct rather than orientation" and finding that "the discrimination against homosexual orientation under these regulations is about as complete as one could imagine"), cert. denied, 498 U.S. 957 (1990).

long as the servicemember is a "homosexual." DOD Directive 1332.14(H)(1)(c)(2). It is belied by the government's concession that no servicemember has ever attempted to avail him or herself of the purported exception. 8 F.3d at 64. And it is belied by memoranda exchanged between DOD and the Department of Justice in July and August 1993 — *i.e.*, at the same time that this case was being briefed to this Court — which describe cases like Steffan's as being "based only on acknowledged homosexual 'status' as opposed to homosexual conduct" *Selland v. Aspin*, 832 F. Supp. 12, 13 (D.D.C. 1993). Thus it is simply indisputable that Steffan was discharged for the *status* of "being a homosexual" and that the government's Janus-faced argument on appeal should be rejected.²⁰

The government's related contention that it is reasonable and lawful to presume conclusively that an individual who acknowledges "homosexual desires" will engage in prohibited "homosexual conduct" is equally defective. As a factual matter, the government has now conceded that gay men and lesbians are not predisposed to "misconduct"; the regulations published on December 22, 1993 *permit* individuals with a "homosexual orientation," *i.e.*, individuals who have a "sexual attraction to individuals of [the same] sex," to serve. Addendum at 8a, 9a. Thus, just as heterosexuals are not presumed to be likely to violate the prohibition against oral sex in the Uniform Code of Military Justice, 10 U.S.C. § 925, or the other rules governing sexual misconduct, so gay men and

²⁰ By contrast, the regulations published on December 22, 1993 expressly provide that a statement by a servicemember that he or she is gay "creates a rebuttable presumption that the Service member engages in homosexual acts or has a propensity or intent to do so." The definition of "homosexual" has also been modified to exclude "desire." Addendum at 7a-9a. These changes constitute an admission that the construction that the government has sought to impose on the 1981 Regulations is not supported by their plain language.

women are not presumed to be likely to violate the same rules.

The legal defect in this contention is even more profound. At heart, the government argues that it is constitutionally permissible to erect an irrebuttable presumption that an individual categorized on the basis of his or her thoughts and desires will break the law or violate military regulation. This position "is repugnant to the various common law and constitutional principles that guard the sanctity of a person's thoughts against government control 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 at 67. As the Supreme Court held last term in *Jacobson v. United States*, 112 S. Ct. 1535, 1542 (1992), "personal inclinations" cannot rationally "support an inference that [an individual] would commit [a] crime" because "there is a common understanding that most people obey the law even when they disapprove of it."

Indeed, any such notion would unconstitutionally penalize individuals on the theory that they are predisposed to commit unlawful or prohibited acts because they identify themselves as being members of a disfavored group. *See Noto v. United States*, 367 U.S. 290, 298-99 (1961); *United States v. Robel*, 389 U.S. 258, 264-66 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500, 507-8, 514 (1964). *See also Robinson v. California*, 370 U.S. 660 (1962). In a similar vein, as the panel noted, the limited definition of treason in the Constitution and the repudiation of the crime of constructive treason expresses "the constitutional principle that a person's thoughts are his own — however distasteful they may be to the state." 8 F.3d at 66.

E. Regardless of whether the 1981 Regulations target status or misconduct, they still unconstitutionally cater to prejudice.

Resolution of the debate over whether the regulations target orientation as opposed to misconduct in the government's favor, however, still could not save the 1981 Regulations. Whether a "homosexual" is defined by "thoughts" or "acts," the military no longer contends that gay men or women by their nature are inclined to engage in the sort of "homosexual conduct within a naval or military unit [that is] almost certain to be harmful to morale and discipline." The factual underpinnings of *Dronenburg v. Zech*, 741 F.2d 1388, 1389 (D.C. Cir. 1984), which presumed that gay men and women were predisposed to engage in such misconduct, are gone. Whatever basis may have existed for this stereotype when *Dronenburg* was decided, and none was demonstrated at the time, today the government agrees that there is no "footing" in reality, *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993), for the proposition that gay men and lesbians are predisposed to engage in the types of misconduct that concerned the *Dronenburg* court.

The legal underpinnings of *Dronenburg* have eroded as well. Since the case was decided, the Supreme Court has made clear in *Palmore* and *Cleburne* that the prejudices and stereotypes that the court credited in *Dronenburg* cannot be given the imprimatur of law. See *Pruitt*, 963 F.2d at 1165 & n.4 (*Dronenburg* and prior Ninth Circuit precedents are of doubtful authority to the extent that they rely upon the prejudice of others to justify discrimination). Thus, on rehearing *in banc*, this Court should recognize that *Dronenburg* involved an officer who "engag[ed] in homosexual acts in a Navy barracks" with a subordinate, *Dronenburg v. Zech*, 746 F.2d 1579, 1581 (D.C. Cir. 1984) (Ginsburg, J., concurring in denial of petition for rehearing *in banc*), and limit the case to its facts.

POINT II

STEFFAN IS ENTITLED TO COMPLETE EQUITABLE RELIEF, INCLUDING THE AWARD OF A COMMISSION.

As shown above, the military's policy of discriminating on the basis of sexual orientation is unconstitutional and, as a result, Steffan's discharge was a nullity. Under the applicable precedents, Steffan is entitled to the entry of an order directing the Secretary of Defense to reinstate him to the Navy and award him his degree and a commission as an Ensign. See *White v. Secretary of Army*, 878 F.2d 501, 506 (D.C. Cir. 1989) (court exercises discretion in fashioning equitable remedy for illegal discharge); *Dilley v. Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980); *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979); *Crawford v. Cushman*, 531 F.2d 1114, 1127 (2d Cir. 1976).

In its limited petition for rehearing, the government has asserted that, even if the Court finds the 1981 Regulations unconstitutional and that Steffan must be awarded his degree and reinstated to military service, this Court lacks the power to direct that Steffan be commissioned as an officer. In support of its new-found position, the government has invoked the principle of separation of powers and has directed the Court to 10 U.S.C. § 531. The government had never previously questioned the Court's remedial power to direct that Steffan receive his commission, along with a Naval Academy diploma, and accordingly, no discovery on this issue has occurred. There is no reason why this Court cannot provide Steffan with the relief he requests, however.

As an initial matter, graduates of the Naval Academy are commissioned in the Navy or the Marines as a matter of course.²¹ The 1982-83 Naval Academy catalog for prospective

²¹ Congress has also provided by statute that a graduate of the Naval Academy is *entitled* to state a preference "for appointment, upon grad-

midshipmen (at page 51), of which the Court can take judicial notice, provided that "[e]very physically qualified graduate is commissioned in the unrestricted line of the Navy or the Marine Corps." The current catalog is to the same effect. Indeed, the week during which graduates of the Academy are bestowed their degrees is called "Commissioning Week" and both the diploma and the commission are presented simultaneously at a graduation ceremony that concludes with a group administration of the oath of office. Thus, the simple fact is that Steffan would have received a commission but for his unconstitutional dismissal from the Academy.

The government's separation of powers argument does not prevent this Court from providing Steffan with a commission if it finds that he was unconstitutionally discharged from the Academy. By the government's logic, if a court found that the President had refused to commission a Hindu or Jew who refused to swear a religious oath in direct contravention of Article VI, clause 3 of the Constitution, the court would be unable to provide a remedy because it would interfere with a power reserved to another branch of government. This position is contrary to basic tenets of judicial review and the ability of courts to remedy constitutional violations. As stated by Chief Justice John Marshall: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . '[E]very right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 Blackstone *Commentaries* 109). See also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Implicit in a court's ability to remedy a violation of law is the ability to grant relief that in effect usurps powers reserved

(footnote continued)

uation, as a commissioned officer in either the Army, Navy, Air Force or Marine Corps." 10 U.S.C. § 541(a).

to the executive and legislative branches of government. See, e.g., *Califano v. Westcott*, 443 U.S. 76, 90 (1978) (spending power; court orders payment of benefits to group not covered by existing legislation); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (same); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (same); *Powell v. McCormack*, 395 U.S. 486 (1969) (qualifications clause; court determines that House improperly refused to seat Congressman); *United States v. Nixon*, 418 U.S. 683 (1974) (upholding subpoena directed to the President for Watergate tapes); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (ordering return of steel mills). The government has offered no reason why the Court should apply a different rule when the appointment power is unconstitutionally exercised.

Indeed, neither the President nor the Senate has asserted that they will defy an order of this Court directing that Steffan not be denied his commission on grounds determined to be unconstitutional. Based on the precedents cited herein — cases that were far more central to the powers of the coordinate branches of government than the commissioning of "one of the most promising students" at the Naval Academy — this Court has every reason to believe that the President and the Senate will continue to accept that "[i]t is emphatically the province and duty of the judicial department to say what the law is" and to redress an injury. *Marbury*, 5 U.S. at 177. The government has attempted to create constitutional controversy where none exists.²²

²² *Orloff v. Willoughby*, 345 U.S. 83 (1953), which is cited by the government on its petition for rehearing, is not to the contrary. In *Orloff*, the prospective officer was not denied a commission for an unconstitutional reason, as was Steffan, but rather because he "haggle[d] about questions concerning his loyalty." 345 U.S. at 90-91. Thus, *Orloff* did not reach the issue of whether a court has the power to remedy a constitutional wrong by providing a commission to an individual who was denied office for unconstitutional reasons. *Marbury* stands for the proposition that a court does have this power.

POINT III

STEFFAN IS ENTITLED TO EQUITABLE RELIEF REGARDLESS OF WHETHER THE 1981 REGULATIONS ARE FOUND TO BE UNCONSTITUTIONAL BECAUSE HE WAS DENIED HIS CONSTITUTIONAL AND PROCEDURAL RIGHTS.

- A. Assuming that there is a "celibate homosexual" exception somewhere in the 1981 Regulations, Steffan could not have known about it and, as a result, his right to due process was violated.

Whether or not this Court decides that the 1981 Regulations are unconstitutional on their face, Steffan is entitled to equitable relief. As an initial matter, if this Court accepts the government's claim that Steffan's acknowledgment of his sexual orientation merely created a rebuttable presumption that he had engaged in or intended to engage in sexual misconduct, then it is plain that Steffan's statutory right to due process was violated. As this Court has held, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). See also *Gates & Fox Co. v. OSHA*, 790 F.2d 154, 156 (D.C. Cir. 1986).

Since this Court held on the first appeal in this case that Steffan could not possibly have had adequate notice of this defense, 920 F.2d at 76 n.*, his discharge was arbitrary and capricious as a matter of law and Steffan is entitled to be reinstated *nunc pro tunc* and granted plenary relief. *Satellite Broadcasting*, 824 F.2d at 4; *Dilley*, 627 F.2d at 413, 415.

- B. Steffan is also entitled to his degree because he was subjected to unconstitutionally harsh treatment.

Steffan is also entitled to the award of a degree because he was subjected to peculiarly harsh treatment in violation of the constitutional guarantee of equal protection and his statutory right to due process under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (the "APA").²³ The relevant facts were not contested below:

- The Academy has a practice of permitting midshipmen who are deemed to be uncommissionable for reasons unrelated to their performance to complete their studies. A. 657-58, 928-53. Steffan was not permitted to do so.
- The Academy also has a policy of grading the military performance of midshipmen on the basis of their "demonstrated performance." A. 417. Steffan, who up until he stated that he was gay had an "A" evaluation for military performance, had that evaluation peremptorily changed to "F" without any reference to or consideration of his performance at the Academy. A. 421.
- Gay or lesbian servicemembers charged with "homosexuality" generally are given 30 days' notice of the initial hearing on their discharge. Steffan was given 24 hours' notice. A. 410, 1295.
- Gay or lesbian servicemembers charged with "homosexuality" generally are discharged under a policy that states that it is a "goal" for the proceedings to be concluded within four months. Steffan was processed for discharge in one week. A. 106, 410, 1295.

²³ The decisions of the discharge boards are subject to review under the APA. See, e.g., *Miller v. Lehman*, 801 F.2d 492, 496 (D.C. Cir. 1986). See generally Folk, *The Administrative Procedure Act and the Military Departments*, 108 Mil. L. Rev. 135, 137-38 (1985).

On these facts, it is readily apparent that Steffan was treated more harshly than other midshipmen who are similarly situated, indeed, more harshly than other servicemembers facing discharge for "homosexuality," in violation of the APA and the principles of equal protection. *See Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985) (once agency allows exceptions to rule, it must provide rational explanation for failure "to allow exceptions in cases that appear similar"); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("all persons similarly circumstanced shall be treated alike").

The district court offered three bases for rejecting this claim. Each is frivolous. *First*, the district court contended that the midshipmen who were permitted to graduate all suffered from medical or psychological conditions and that "homosexuality" is distinguishable. 780 F. Supp. at 6 n.12. The threshold problem with the district court's contention is that, while the psychiatric profession disagrees, the Academy and the military *do* treat "homosexuality" as a psychological disorder.²⁴ In any event, a midshipman disqualified on the basis of sexual orientation, like a midshipman with a medical or psychological condition, is deemed to be uncommissionable as the result of an innate characteristic that does not reflect fault on the part of the midshipman. As a result, the distinction that the district court attempted to draw is meaningless.

Second, the district court claimed that Steffan was not treated differently from other uncommissionable midshipmen because Steffan recognized his sexual orientation in his third year, "which, if known to the Academy, under the Regulations would have caused a similarly situated midshipman with a medical condition to be discharged." 780 F. Supp. at 6 n.11. The regulation that the court cites, however, does not so provide. The determinative factor is not whether the condition

²⁴ See A. 415 (Steffan psychological evaluation); A. 1422 (Army regulation requiring mental status evaluation for alleged "homosexuals").

manifested itself in the senior year but, rather, whether it existed "prior to entry into the naval service." A. 379-81, 933, 937, 939, 953.²⁵

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

CONCLUSION

This case presents in stark terms the injustice of regulations that ruined the career of "one of the most promising students at the United States Naval Academy." 8 F.3d at 59. No legitimate basis, rational or otherwise, has been advanced in support of those regulations. None can be. To the contrary, the only claim is that it is expedient to pander to bigotry. Under our Constitution, that claim cannot be countenanced.

Judge Richard Posner has observed that "it is terrible to tell people they are unfit to serve their country, unless they really are unfit, which is not the case here . . ." R. Posner, *Sex and Reason* 321 (Harvard 1992). No case proves Judge Posner's

²⁵ Moreover, the district court's reasoning assumes that Steffan was under an obligation to turn himself in when he came to recognize his sexual orientation. He was not. 10 U.S.C. § 831 (compulsory self-incrimination prohibited).

point more clearly than this one. The time has come for this Court to right the injustice that Midshipman First Class Joseph C. Steffan suffered seven years ago and hold that the regulations that mandated his discharge are not merely misguided, but constitutionally infirm. Accordingly, the district court's order granting the government's motion for summary judgment should be reversed, and Steffan should be granted summary judgment directing the defendants to reinstate him to military service, award him his B.S. degree from the United States Naval Academy, and commission him as an Ensign.

Dated: New York, New York
February 24, 1994

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ADDENDUM OF PERTINENT REGULATIONS

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adopted on January 29, 1991

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.

Excerpts from United States Naval Academy
Regulation, COMDTMIDN Instruction 1610.6F
Ch-2.15 dated July 16, 1987

2.15 SEPARATION CRITERIA

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

* * *

3. The problems listed below are sufficient in and of themselves to warrant separation from the Naval Academy. If reasonable cause leads one to believe that such a problem exists, the Battalion Officer will refer the midshipman directly to a Brigade Performance Board. If the Brigade Performance Board determines that the problem does, in fact, exist, the midshipman will be referred to the Commandant with a recommendation for separation. This listing is not all-inclusive, but rather serves as examples of problems which severely limit a midshipman's aptitude and potential for commissioned service.

* * *

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

Department of Defense Policy on Homosexual Conduct in the Armed Forces dated July 19, 1993

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 evenhanded 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

acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.

b. 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 acts are a departure from the member's usual and customary behavior;

(b) Such acts under all the circumstances are unlikely to recur;

(c) Such acts were not accomplished by use of force, coercion, or intimidation;

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

(e) The member does not have a propensity or intent to engage in homosexual acts.

(2) The member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the Service member engages in homosexual acts or has a propensity or intent to do so. The Service member shall be advised of this presumption and given the opportunity to rebut the presumption

by presenting evidence that he or she does not engage in homosexual acts and does not have a propensity or intent to do so. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether a member has successfully rebutted the presumption that he or she engages in or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(a) whether the member has engaged in homosexual acts;

(b) the member's credibility;

(c) testimony from others about the member's past conduct, character, and credibility;

(d) the nature and circumstances of the member's statement;

(e) any other evidence relevant to whether the member is likely to engage in homosexual acts.

This list is not exhaustive; any other relevant evidence may also be considered.

(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).

2. *Burden of Proof.* See paragraphs H.4.e. and f. below for guidance as to the burden of proof and when a finding regarding retention is required.

* * *

4. *Procedures.* The Administrative Board Procedure (section C. of Part 3) shall be used, subject to the following guidance:

* * *

e. The member shall bear the burden of proving, by a preponderance of the evidence, that retention is warranted under

the limited circumstances described in paragraph H.1.b.
except in cases where the member's conduct was solely the
result of a desire to avoid or terminate military service.

* * *

g. Nothing in these procedures:

* * *

(3) Precludes retention of a member of a limited period of
time in the interests of national security as authorized by the
Secretary concerned; . . .

CERTIFICATE

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

Dated: February 24, 1994

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 1993 Decided November 16, 1993

No. 91-5409

JOSEPH C. STEFFAN,
APPELLANT

v.

LES ASPIN, SECRETARY OF DEFENSE, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civ. No. 88-3669)

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

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

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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

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

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

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

Before: *MIKVA*, Chief Judge, *WALD* and *EDWARDS*, Circuit Judges.

Opinion for the Court filed by Chief Judge *MIKVA*.

MIKVA, Chief Judge: Joseph Steffan was, by all accounts, an exceptional midshipman as he prepared to graduate from the United States Naval Academy in 1987. Mr. Steffan's exemplary performance at the Academy had earned him numerous honors and the respect and praise of his superior officers. Most notably, he was selected in his senior year to serve as Battalion Commander, one of the Academy's ten highest ranking midshipmen. But only six weeks before his expected graduation, the Academy forced Mr. Steffan to resign—denying him a degree and a commission in the Navy—after he truthfully answered, "Yes, sir" to a superior officer's question, "[A]re you a homosexual?" In dismissing Mr. Steffan, the Academy applied Department of Defense Directives instructing that "[h]omosexuality is incompatible with military service," and mandating discharge of any servicemember who "has stated that he or she is a homosexual or bisexual, unless there is a further finding that the member is not a homosexual or bisexual." 32 C.F.R. Part 41, App. A §§ H.1.a, H.1.c(2). Mr. Steffan argues that his constructive discharge, based solely on his homosexual orientation, violates the equal protection component of the Fifth Amendment's Due Process Clause. He further argues that the truncated

procedures the Navy used in effecting that discharge were arbitrary and capricious, violating both the equal protection component and the Administrative Procedure Act.

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

I. Background

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

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

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

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

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

Based on this recommendation, an Academic Board was convened on April 1, 1987; after a hearing, it too recommended Mr. Steffan's discharge. Subsequently, Mr. Steffan

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

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

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

The district court entered summary judgment for the Secretary on December 9, 1991. In a lengthy opinion, the court

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

II. Discussion

Mr. Steffan argues that the Navy constructively discharged him in violation of the equal protection component of the Fifth Amendment's Due Process Clause. The equal protection component imposes the same restrictions upon the federal Government that the Fourteenth Amendment's Equal Protection Clause places upon the States. *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975). Mr. Steffan challenges the regulations that were in effect when he resigned and when the Secretary of the Navy refused his request that he be allowed to graduate. The military's newly announced policy toward homosexuals in the armed forces was discussed at oral argument, but it is not at issue in this case. Both parties seem eager to have us resolve in advance the constitutionality of whatever guidelines the new regulations might ultimately prescribe. We decline their invitation. Mr. Steffan's appeal turns solely upon the legality of the regulations under which the military discharged him. Those regulations—and *only* those regulations—are properly before us in this case.

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

H. Homosexuality

1. Basis

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

b. As used in this section:

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

....

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

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

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

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

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

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

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

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

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

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

The Secretary's brief relies heavily upon the concept of "military deference" to sustain its Directives. And not without reason—for it is surely true that we accord great inde-

pendence to decisions of the military branches in their areas of expertise. For example, the Supreme Court (as well as this Court) upheld a military prohibition on servicemembers wearing yarmulkes, because of the military's professed need for uniformity of dress. *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) ("traditional outfitting ... encourages the subordination of personal preferences and identities in favor of the overall group mission."), affirming *Goldman v. Secretary of Defense*, 734 F.2d 1531 (D.C. Cir. 1984). This regulation would likely have been struck down as violative of the First Amendment in another context, but the Court deferred to the military's judgment that it had a compelling secular interest in uniformity. A strong and independent military is essential to the national security, and courts should not lightly overturn military judgments as to the best means of ensuring that security.

But contrary to the Secretary's implication, a court need not close its eyes to the dictates of the Constitution whenever the military is involved—not even when it professes a national security interest in its conduct. There is no "military exception" to the Constitution. Indeed, even when the Supreme Court has deferred to a military judgment, it has been careful to do so only within the confines of ordinary constitutional analysis. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). This is particularly true for equal protection cases. When the military fails to accord individuals the equal protection of the laws, it treads upon an area of expertise that has long been conceded to the courts. In deciding such cases, therefore, courts should not stray from the boundaries of ordinary equal protection review. For example, faced with a claim that the military discriminates against African-Americans or women, the court should not fail to apply strict or intermediate scrutiny to the military's action. See *Frontiero v. Richardson*, 411 U.S. 677 (1973). Although the concept of military deference should lead a court to grant the benefit of the doubt to the Government's opinion that a "compelling" or "important" military interest exists (at least where there is a colorable claim of such an interest), the court should not hesitate to review the case with its customary thoroughness.

In this case, however, we decline to rule on whether a "compelling" or "important" state interest is necessary. This

would depend, of course, on whether homosexuals, defined by their sexual orientation, are a "suspect" or "quasi-suspect" class accorded "heightened scrutiny" under equal protection review. This Court has only had occasion to rule on the suspect status of homosexuals as defined by homosexual conduct. *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984). In that context, we have noted the anomaly of according special protection to a class whose defining characteristic, homosexual conduct, can be made illegal. *Padula*, 822 F.2d at 103 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). This is a different case: the class at issue is defined by homosexual orientation, not conduct. The Secretary does not allege that Mr. Steffan ever engaged in homosexual conduct. Accordingly, the district court acknowledged that Mr. Steffan was discharged solely because of his status as a homosexual. *Steffan v. Cheney*, 780 F. Supp. 1, 5 (D.D.C. 1991) ("[T]his is primarily a case about the plaintiff's status as a homosexual."). As we have previously noted, "whether an agency of the federal government can discriminate against individuals merely because of sexual orientation" remains an open question in this Circuit. *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. Webster v. Doe*, 486 U.S. 592 (1988) (emphasis in original). It is that open question that we must begin to answer today in deciding the constitutionality of the military regulations applied to Mr. Steffan.

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

A. Rationality Review

Any governmental action that burdens individuals unequally but does not burden a "suspect class" need only survive

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

Although the court has a limited role under rationality review, that role remains significant as a bulwark against unreasonable and illegitimate restrictions. When individuals are deprived of the equal protection of the laws by a governmental actor for entirely arbitrary reasons, or for reasons that rest solely upon irrational and invidious prejudices against a class of people (whether or not a "suspect class"), a court should declare the government action unconstitutional even under rational-basis review. *Cleburne*, 473 U.S. at 450. Otherwise, rationality review would be tantamount to no review at all—a result manifestly inconsistent with Supreme Court precedent. See, e.g., *Zobel*, 457 U.S. at 61-64; *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533-38 (1973).

With these principles in mind, we must decide whether Mr. Steffan's unequal treatment was rationally related to a legiti-

mate military purpose. We will begin by addressing the purposes articulated in the Secretary's brief. We will then proceed to discuss other possible rationales for excluding homosexuals from military service.

B. *Propensity to Engage in Illegal Conduct*

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

In this case, Mr. Steffan stated that he was a homosexual and thereafter resigned under pressure because he was led to understand that his mere homosexual orientation was sufficient to compel dismissal. His superiors never asserted that Mr. Steffan had engaged in homosexual conduct, and he never admitted to any. On its face, therefore, his discharge seems unrelated to any conduct—his statement revealed nothing more than a sexual orientation. But the Secretary argues that even if Mr. Steffan had a "homosexual orientation" he could have rebutted the presumption that he was a "homosexual" by showing that he did not "engage[] in,

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

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

1. *The plain meaning of the Directives.*

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

Although this definition ultimately relies upon some connection to homosexual conduct, the primary focus of the Directives is not, in fact, the conduct itself, but the "desire" to engage in that conduct. This becomes clear when one compares section H.1.c(2), under which Mr. Steffan was discharged, with section H.1.c(1). Under c(1), a servicemember who actually *engages* in homosexual acts can escape discharge if he can show that "such conduct is a departure from the member's usual and customary behavior"; that it is unlikely to recur; that it was not coercive; that it will not harm the morale of the armed forces; and (most significantly) that "[t]he member does not desire to engage in or intend to engage in homosexual acts." DOD Directives § H.1.c(1). For all intents and purposes, the servicemember must prove that he is not a "homosexual," as defined in section H.1.b(1), except that he happened to engage in homosexual conduct. If his thoughts are in accord with his conduct (if he "desires" to engage in homosexual acts), then he cannot escape dismissal.

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

vicemember stands a good chance of remaining in the military.

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

2. *Status predicting conduct.*

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

But there is no such rational relation here. Homosexual conduct is more than a practice discouraged by the military: it is grounds for discipline and sometimes (in the case of sodomy) a criminal act. Therefore, the Secretary's justification for the gay ban presumes that a certain class of persons will break the law or the rules solely because of their thoughts and desires. This is inherently unreasonable. In a recent entrapment case the Supreme Court held that even a defendant's prior *conduct* did not demonstrate a propensity to engage in the exact same actions when they were later made

illegal. "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it." *Jacobson v. United States*, 112 S. Ct. 1535, 1542 (1992).

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

The "constitutional heritage" to which Justice Marshall referred in *Stanley* is evident in the evolution of the law of treason. Under a statute of Edward III, it was a crime to "compass or imagine the Death of . . . the King." Statute of Treasons, 25 Edw. III. This became the crime of "constructive treason," which was enforced against supposed "compassers" and "imagers" even in the absence of any overt act (other than mere words) or any conspiracy to carry out the regicide. See, e.g., *Case of Thomas Burdet*, 79 Eng. Rep. 706 (1477); *Trial of Sir John Perrot*, 1 How. St. Tr. 1315, 1318 (1592); *Trial of Thomas Hardy*, 24 How. St. Tr. 199, 894 (1794) (all cited in *Watts v. United States*, 394 U.S. 705, 709-10 & n.1 (1969) (Douglas, J., concurring)). See generally *Cramer v. United States*, 325 U.S. 1, 8-22 (1945) (discussing the law of treason in England and America prior to the Constitutional Convention). Our Constitution expressly repudiates constructive treason. Article III, section 3 declares: "treason against the United States shall consist *only* in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same *overt Act*, or on Confession in open Court." U.S. Const.

art. III, § 3 (emphasis added). These restrictions, limiting the definition of treason to certain discrete types of conduct and requiring an "overt act" for conviction, express the constitutional principle that a person's thoughts are his own—however distasteful they may be to the state.

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

presumption that the Secretary claims in this case: a presumption of misconduct from mere status, in the absence of evil intent.

In the present case, of course, Mr. Steffan has not been convicted of treason, nor subversive advocacy, nor any other crime. But he has been denied something that equally qualified and less qualified individuals have enjoyed: the privilege of serving and defending his country in the armed forces. In cases analogous to those under the Smith Act, the Supreme Court has consistently held that government may not deny a job to an individual solely because of his status as a member of a "subversive organization," absent any specific intent to further unlawful action. *Elfbrandt v. Russell*, 384 U.S. 11, 17-19 (1966); *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952). See also *Elrod v. Burns*, 427 U.S. 347 (1976) (government cannot fire non-policymaking employee solely because of political affiliation); *Branti v. Finkel*, 445 U.S. 507 (1980) (same); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (prohibition against discrimination based on political affiliation extends to employment decisions other than firing). Despite these warnings, the Secretary has accorded Mr. Steffan differential treatment solely because of the content of his thoughts, as revealed by his truthful statement that he is a homosexual. We think this is repugnant to the various common law and constitutional principles that guard the sanctity of a person's thoughts against government control, as expressed in the cases discussed above. A person's status alone, whether determined by his thoughts or by his membership in a certain group, is an inadequate basis upon which to impute misconduct. Accordingly, we find that the Secretary's "propensity" argument, which presumes that "desire" will lead to misconduct, is illegitimate as a matter of law. It cannot provide a rational basis for the DOD Directives.

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

The Secretary's argument that the Directives protect morale and discipline in the armed forces and aid recruitment of

new soldiers goes beyond preventing homosexual conduct. The Secretary apparently also fears the impact that the mere presence of persons of homosexual orientation will have on these vital military interests. The Directives state, in part:

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

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

Under rationality review, the court must presume that the Secretary's fears are well-founded, even though we may have a higher opinion of the maturity of members of the armed forces than do their policymakers. But these fears are patently insufficient to justify a discriminatory policy, even under rationality review, because each depends solely upon the prejudice of third parties. Because third parties do not like homosexuals, the argument runs, they will not wish to serve alongside them. Forcing them to serve with homosexuals will lower their morale, impair their discipline, and discourage them from enlisting. Similar objections were voiced by opponents of President Truman's 1948 executive order requiring racial integration of the armed forces. See *Dahl v. Secretary of United States Navy*, 1993 Westlaw 328364 at 8-9 (E.D. Cal. 1993) (quoting Defense Personnel Security Research and Education Center, *Nonconforming Sexual Orien-*

tations and Military Suitability at 8-10 (1988)). But a cardinal principle of equal protection law holds that the government cannot discriminate against a certain class in order to give effect to the prejudice of others. Even if the government does not itself act out of prejudice, it cannot discriminate in an effort to avoid the effects of others' prejudice. Such discrimination plays directly into the hands of the bigots; it ratifies and encourages their prejudice.

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

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

Id.

Although *Palmore* involved a "suspect class" and was decided under strict scrutiny, the Court extended its reasoning to rational-basis review in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). In *Cleburne*, the city had denied a zoning permit to construct a home for the mentally disabled in a residential neighborhood. One of the

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

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

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

D. Privacy

The Secretary also argues, and the Directives state, that the presence of homosexuals in the military will invade the

privacy of heterosexual servicemen. DOD Directives § H.1.a (presence of homosexuals impairs military's ability "to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy").

This argument can mean one of two things: either (1) that homosexual servicemembers will ogle and stare at their heterosexual counterparts in the shower or other close quarters; or (2) that heterosexuals will fear such staring and feel an invasion of privacy. The argument that homosexuals will stare is very similar to the argument that they will engage in homosexual acts. Again, it equates thoughts and desires with propensity to engage in misconduct. The argument that heterosexuals will fear such staring is, in turn, a version of the argument that government should be allowed to give effect to the irrational fears and stereotypes of third parties. That argument is foreclosed by *Palmore* and *Cleburne*.

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

E. Rationales Not Offered by the Secretary

Under the *Heller* formulation of rationality review, we must also evaluate arguments that the Secretary does not himself proffer, if they may present a rational basis for the Directives. *Heller*, 113 S. Ct. at 2642-43. The district court relied on one such rationale: preventing the spread of AIDS in the armed forces. We do not agree that this could be a

rational basis for the Directives. Homosexual *orientation* cannot spread the AIDS virus. Homosexual, or heterosexual, *conduct* can—and then only if one of the participants carries the virus. Even if AIDS happens to be more prevalent today among homosexuals than among heterosexuals, justifying the Directives on this basis requires the illegitimate assumption that persons of homosexual orientation will break the rules by engaging in homosexual conduct as members of the armed forces.

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

III. Conclusion

The DOD Directives, the military regulations in effect when the Navy compelled Joseph Steffan to resign solely because he admitted his homosexual orientation, are not rationally related to any legitimate goal. Instead, it is apparent that the Directives exclude a particular class of individuals, identifiable only by their thoughts and desires, for no other reason than the military's fear and dislike of that group.

The constitutional requirement of equal protection forbids the government to disadvantage a class based solely upon irrational prejudice, whatever the standard of review. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-50 (1985). We find that the Directives violate the equal protection component of the Fifth Amendment's Due Process Clause. We need not and do not reach the appellant's alternative contentions relating to the procedures used to effect his discharge.

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

It is so ordered.

Gay - in the military -
Steffan

ORAL ARGUMENT SCHEDULED 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

BRIEF FOR AMICUS CURIAE

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CERTIFICATE AS TO PARTIES,
RULINGS AND RELATED CASES

In accord with D.C. Circuit Rule 28, the certification is provided as to the following subjects:

(A) Parties and Amici:

1. Except for the following, all parties, and amici authorized to file briefs in this case are listed in the Briefs for plaintiff-appellant, Joseph C. Steffan, or the defendants-appellees, William J. Perry, et al.

2. The amici represented herein who support affirmance of the district court's order are (a) individual active duty service members, acting in their individual capacity and not as official representatives of the armed forces; (b) individual former homosexuals, i.e. they are no longer homosexual, who were also members of the armed forces; and (c) The Family Research Council (FRC), a non profit research and educational organization primarily concerned with family considerations.

B. Rulings Under Review. References to the rulings at issue appear in the Brief for plaintiff appellant.

C. Related Cases. Related cases as defined by Rule 28 are provided in the Brief for plaintiff-appellant.

Respectfully submitted,

March 28, 1993


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CERTIFICATE AS TO A SEPARATE BRIEF

The amici represented herein have as a primary purpose, the defense of the rationality and appropriateness of requiring the exclusion and separation from the armed forces of those who admit that they are homosexuals. Their focus is on explaining the factors necessary to organize, develop and maintain an efficient and effective fighting force and the disruption and degradation to these factors that allowing homosexuality brings to the military mission. Thus, the amici here are concerned with providing an explanation of the terms cohesion, discipline, morale and good order, and the impact that allowing homosexuals to serve would have on sailors, soldiers and airmen. We do not believe that the United States or other amici will address all these considerations. Yet, it is one that should be heard by the Court, since without sailors, soldiers or airmen, there can be no military.

These amici also believe that the recent review of the challenged policy and its supporting regulations by Congress validates the regulations at issue.

The broad outlines of our approach has been discussed with the Department of Justice after permission was granted to participate. Based DOJ's information as to its approach, there did not seem to be redundancy or needless duplication at that time other than that which was necessary to lay a foundation for argument.

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<u>Aptheker v. Secretary of State</u> , 378 U.S. 500 (1964)....	14
* <u>Ben-Shalom v. Marsh</u> , 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990)....7, 12, 13, 22, 27	
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<u>Steffan v. Cheney</u> , 780 F. Supp. 1, (D.D.C. 1991), <u>rev'd</u> , 8 F.3d 57 (D.C. Cir. 1993), <u>vacated and</u> <u>rehearing en banc granted</u> (D.C. Cir. Jan. 7, 1994).....	20, 28, 29
<u>United States v. Robel</u> , 389 U.S. 258 (1967).....	14
<u>Woodward v. United States</u> , 871 F.2d 1068 (Fed. Cir. 1989) cert. denied, 494 U.S. 1003 (1990).....	26

* An asterisk marks those authorities chiefly relied upon.

Statutes, Rules and Regulations

10 U.S.C. § 564 (Policy Concerning Homosexuality
in the Armed Forces).....passim

Regulations

DOD Directive 1332.....passim

Legislative Materials

H. Rep. No. 200 (National Defense Act), 103d Cong.,
1st Sess., reproduced at 1993 U.S. Code
Cong. and Admin. News..... 9, 18

S. Rep. No. 112 (National Defense Act), 103d Cong.,
1st Sess.....passim

Other Authorities

M. Humphrey, My Country, My Right to Serve, (1990)..... 26

K. Jay and A. Young, The Gay Report, (1979)..... 23

A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in The
Human Male (1948)..... 11

BG S. Marshall, The Officer As a Leader, (1966).....19, 25

M. Wells-Petry, Exclusion: Homosexuals and the
Right to Serve, (1993)..... 30

Webster's New Dictionary of the English Language (1984). 10

Army Surgeon General 4/29/93 Memorandum, RE: "Potential
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J.O. Billy, K. Tanfer, W.R. Grady, D. H. Klepinger, "The
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This brief addresses four questions concerning the challenged military regulations: (1) what is the importance of the recent Congressional review of the regulations challenged here; (2) whether "homosexuality" can be purely philosophical or whether it inherently incorporates behavior; (3) whether the regulations are based on a reasonably conceivable set of facts that provide a rational basis for exclusion of homosexuals from military service; and (4) what rights are at issue if any.

STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Statement of the Facts contained in the Brief of the Secretary of Defense.

SUMMARY OF ARGUMENT

The Constitution grants specific powers to the legislative and executive branches over the military, a unique community with no civilian analogue. In reviewing challenges to military personnel regulations, the Supreme Court has consistently recognized this uniqueness and charged the judiciary to proceed cautiously and accord the military special deference in military matters, including discipline, morale and unit effectiveness. Caution and deference are especially appropriate here where the President and the Congress unequivocally support the policy.

For these regulations to pass judicial review, the United States must show only a "reasonably conceivable set of facts" to support its regulations. Steffan's burden is to "negative" every

factor relied upon by the military or show that each such factor is not "reasonably cognizable" in making personnel decisions, a burden he has not met.

In answer to the President's unilateral (and subsequently abandoned) attempt to allow homosexuals to serve in the military, the Congress thoroughly examined the issue. Extensive hearings and findings validated the logic and rationale of the regulations that required Steffan's separation from the Naval Academy upon his admission of homosexuality. Congress codified its finding that homosexuality was incompatible with military service and revalidated the underlying policy reflected in the regulations at issue here, a fact Steffan fails to address.

Once in office, the President reversed his campaign stand on homosexuality. He agreed that homosexual exclusion was not based on negative attitudes toward any individuals (including Steffan), but, instead, upon the realistic risks to the degradation of unit readiness and performance.

The confluence of the military expertise in these regulations, and the Congress and the President's 1993 validation of their purpose and rationale, extinguish Steffan's ill-conceived argument. In their exclusive constitutional spheres, the executive and legislative branches have spoken unanimously. In the wake of the extensive 1993 Congressional hearings, Steffan's attack on the pre-existing regulations as lacking any rational basis is frivolous.

Homosexuality as "status" only is a false premise unsupported by any evidence. Sexuality is defined by behavior; conduct is

inherent in any sexuality. Congress found that one's self-identification as a homosexual established a rebuttable presumption that one engages in the behavior described by the term. Steffan's admission that he was a homosexual provides sufficient evidence to satisfy that presumption and he never presented evidence in rebuttal. Steffan attacks regulations that were the result of a careful consideration by military professionals, under the watchful eye of Congress.

Morale, an indispensable requirement for successful military units, is the interaction of discipline, training and individual and unit pride. Without morale, there cannot be unit cohesion, often the decisive element in close combat. Personal security and privacy also impact unit morale. The degradation of morale due to the presence or introduction of homosexuals into a unit is a vital, "cognizable" factor in formulating rational and legitimate military personnel qualifications. Additionally, the introduction of homosexuals into the military will have an adverse impact on military families further eroding morale and esprit.

Military personnel most often have no choice where they live and with whom. During deployments, and especially in time of war, the soldier's limited personal privacy is reduced even further. Consequently there is a high premium on a modicum of personal privacy. The presence of homosexuals invades the little personal privacy left to military personnel. The recognition by gay advocates that heterosexual men and women do not share quarters or private facilities exposes their inconsistency and hypocrisy.

Sexual dynamics in any work or living environment can produce disruptions, e.g., jealousy, allegations of favoritism or sexual harassment and fraternization. They are often difficult to resolve due to standards of proof, and other considerations. The military strives to sexually neutralize the work place. Yet experience has found the presence of homosexuals introduces a sexual dynamic, destabilizing working relationships, especially in the unparalleled stress of overseas deployments and combat.

The military is in the business of fighting wars. The ability of the military to function depends upon an effective and efficient chain of command. For the chain of command to function properly, military personnel must be confident that they are being treated fairly and recognized for their contribution. Commanders must know that orders will be obeyed and policies followed. Given that sodomy, a military crime, is the act that defines homosexuals, allowing them to remain in the military poses risks to the the chain of command's integrity by creating doubt as to a commitment to obey policy and regulations.

The district court properly considered risks to the health and welfare of the military when reviewing the rational of the regulations Steffan challenges. Analysis of the impacts of homosexuals on military medical areas projected increased incidents of disease and a decrease in deployability and military readiness, and other significant problems such as a decrease in the "walking blood supply", a vital concern in the treatment of battle casualties.

The district court considered many of these same factors and found that they formed a rational basis resting on a reasonably conceivable set of facts that were "properly cognizable" by military personnel policy planners. Steffan has simply not met his burden of negating these factors as required under the Cleburne and Beach Communications standards.

ARGUMENT

I. REVIEW OF MILITARY PERSONNEL MATTERS REQUIRES DEFERENCE

A. The Constitution and Judicial Precedent Require That the Judiciary Defer to the Military on Military Matters.

"[C]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (emphasis added). "It is difficult to conceive of an area of governmental activity in which the courts have less competence." Gilligan v. Morgan, 413 U.S. 1, 10 (1973). Even in the area of First Amendment challenges, judicial "review of military regulations ... is far more deferential than constitutional review of similar laws or regulations designed for civilian society." Goldman, 475 U.S. at 507.

The Constitution mandates civilian control of the military: Article I, § 8 grants exclusive authority to Congress to raise and regulate the armed forces; Article II, § 2 makes the President the Commander in Chief. These are the elective branches responsible to the people. Thus, there is a deliberate structural tension between the two branches accountable to the people. See Gilligan v.

Morgan, 413 U.S. 1, 10 (1970). This is not only a balance between competing branches, but a check on the military who cannot look elsewhere for authority. That constitutional tension is evident here and the judiciary, the non elected branch, should approach this case with respect and caution, lest it overstep its constitutionally limited role in review.

Deference is particularly appropriate here, where, the legislative and executive branches have reviewed and validated the military's expertise with one voice. "[E]qual protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices. *** Where there are 'plausible reasons' for Congress' action, '[judicial] inquiry is at an end.'" F.C.C. v. Beach Communications, Inc., 113 S.Ct. 2096, 2101 (1993) (quoting United States RR Retirement Board v. Fritz, 449 U.S. 166, 179 ((1980))).

B. The Military Must Show Only a Reasonably Conceivable Set Of Facts To Support its Regulations.

F.C.C. v. Beach Communications, Inc. articulates the standard for review of Steffan's challenge: "any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. Steffan has "the burden 'to negative every conceivable basis which might support [the policy barring homosexuals from the military].'" Id. at 2102 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). See also Heller v. Doe by Doe, 113 S.Ct 2637, 2642 (1993). This is a burden he has not and cannot meet.

II. CONGRESS' 1993 LEGISLATIVE FINDINGS THAT EXCLUSION OF HOMOSEXUALS FROM THE MILITARY IS NECESSARY AND DESIRABLE ARE NOT TIME LIMITED BUT A VALIDATION OF THE CONSISTENT PAST JUDGMENT OF THE MILITARY AND THE CITIZENRY.

The regulations at issue, DOD Directive 1332, have a triple wall of immunity against Steffan's attack. They represent not only professional military judgment, see Ben-Shalom v. Marsh, 881 F.2d 454, 461 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990), but their wisdom, rationality and necessity have recently been thoroughly revalidated by Congress.¹ "[J]udicial deference to ... congressional exercise of authority is at its apogee when legislative action [is] under the congressional authority to raise and support armies and make rules and regulations for their governance" Rostker v. Goldberg, 453 U.S. 67, 70 (1981). Additionally, "[t]hese restraints on judicial review have added force 'where the legislature must necessarily engage in a process of line-drawing.'" Beach Communications, 113 S.Ct at 2102 (quoting Fritz, 449 U.S. at 179). Congress, in determining qualifications for military service, is "drawing the line somewhere." Id.

A. Congress Reviewed the Military Exclusion Policy in Response to the President's Plan to Eliminate the Military Ban on Homosexuals That Is at Issue Here.

President Clinton, attempting to fulfill a campaign promise, initially sought to open the military to homosexuals. Congress, in response to its own legitimate concerns about the impact on

¹ "[T]he authority to administratively separate homosexuals has been in effect over a lengthy period of time [and] has been consistently supported over the years by Congress and by every administration, both Republican and Democratic." S.Rep. No. 112 (National Defense Act), 103d Cong., 1st Sess. (hereinafter S.Rep. 112) (Reproduced at Appendix 1).

readiness and to an outpouring of public opposition, held hearings on the validity and necessity of the military's policy on homosexuals -- the one challenged here. S.Rep. No. 103 at 267-68 (providing background to review) (Appendix 1).

Congress "received testimony reflecting these broad strongly held views" while keeping the "primary focus and concern [on] the implications of any change in the current policy on the effectiveness of our armed forces to carry out their mission to defend our nation." Id. at 268.

B. Congress Examined and Made Specific Findings Concerning the Role Mission and Uniqueness of the Military.

After a thorough review of the military's mission, unique circumstances and restraints that characterize military service, Congress codified fifteen specific findings relating to the exclusion of homosexuals from military service, twelve of which emphasized the uniqueness of the armed forces. These findings emphasized the importance of unit cohesion, morale, discipline, high standards, and the necessity "for members of the armed forces to involuntarily accept living ... and working conditions that are spartan, primitive and often characterized by forced intimacy with little or no privacy." 10 U.S.C. § 654(a) (at Appendix 2).

C. Congress Examined the Impact of Homosexuals Serving in the Military, Concluded that Their Presence Was Unacceptable in Light of the Overriding National Security Interest Involved and Validated the Regulations at Issue.

Congress found that the professional military judgment on the advisability and consequences of allowing homosexuals to serve in the military - what Steffan characterizes as "negative attitudes"

and irrational bias, Steffan Brief (hereafter "Brief") 12, 14, 15, 17, 22 - were reasoned and proper conclusions. This was no mere cursory review, but a thorough examination of the reasons upon which the exclusion policy rested, including visits to installations and ships, testimony from a "wide range of experiences" and a "broad variety of views" from all sides of the issue. S.Rep. 112 at 269-70; H.Rep. 103-200, 103 Cong. 1st. Sess., 287, reproduced at 1993 U.S. Code Cong. and Admin. News (USCCAN) 2074 (citing lengthy hearings and debate). Congress concluded that "homosexuality was incompatible with the military service," USCCAN at 2074, "the restrictions on the service of gays and lesbians are based upon reasonable military personnel policy considerations" that reflect "prudence not prejudice", S.Rep. 112 at 283, and "[r]estrictions on the service of gay men and lesbians do not violate the constitutional rights of military personnel." Id. at 284. See 10 U.S.C. § 654(a)(15) (presence of homosexuals in armed forces "creates an unacceptable risk")

Congress then codified in 10 U.S.C. § 654 the exclusion policy and considerations underlying the regulations here challenged. Congress also rejected Steffan's "status" argument by including in the definition of homosexuals those who admitted to being homosexual. 10 U.S.C. § 654(b)(2).

The President changed his mind about the impact of homosexuals on the military mission,² and signed this legislation forging a

² The President's subsequent signature on the codification of the exclusion policy belies Steffan's argument, Brief 15, that the President supports Steffan's contention that the military exclusion

unity on this issue between the two branches having exclusive authority over military matters. This Congressional and Presidential review also defeats any claim that this challenge should be evaluated under a standard higher than rational review. Brief 13, n.8. Given the background, openness and thoroughness of the Congress's review of these regulations, Steffan has no claim that homosexuals are a powerless group or that the regulations reflect anything other than prudence and sound policy.

III. ALL SEXUALITY, INCLUDING HOMOSEXUALITY, IS BEHAVIORAL.

A principal argument raised by Steffan is that the DOD Regulations impermissibly discriminate against homosexuals by virtue of their "status"³ as homosexuals. Steffan argues, inter alia, that he was discharged simply because he identified himself as a homosexual, not because he committed, or intended to commit, any homosexual act. Thus, Steffan contends, the DOD Regulations violate the equal protection component of the Fifth Amendment because they impermissible target gay men and lesbians on the basis of their thoughts and desires alone.

Steffan's attempt to distinguish between homosexual "status" or "orientation" and homosexual conduct, however, is specious and grounded in semantic gamesmanship. All sexuality is defined by

policy is based on the prejudice of the military.

³ We use the term homosexual "status" arguendo. As this brief demonstrates, the term homosexuality carries with it the conduct which would create that "status". Steffan's illogical and self-contradictory point would be analogous to the "baseball player" who neither plays baseball nor aspires to do so.

sexual conduct; whether cast euphemistically as "orientation" or "status", sexuality is meaningless without the concomitant and defining behavioral component.⁴

This scientific conclusion has been adopted by such military professionals as Generals Colin Powell and Norman Schwartzkopf. Moreover, it guided the Senate Armed Services Committee (SASC) in making its legislative findings contained in the law on the Policy Concerning Homosexuality in the Armed Forces, and Congress, making a legislative choice, codified it in 10 U.S.C. § 564(b)(2).

Under the weight of careful congressional investigation, findings and authority, Steffan's contentions ring hollow.

Testifying before Congress, General Colin Powell applied these well-settled behavioral principles to the military context:

Unlike race or gender, sexuality is not a benign trait. It is manifested by behavior. While it would be decidedly biased to assume certain behaviors based on gender or membership in a particular racial group, the same is not true for sexuality. We have successfully mixed rich and poor, black and white, male and female, but open homosexuality in units is not just the acceptance of benign characteristics, such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force. It asks us to deal with fundamental issues that society at large has not yet been able to deal

⁴ See generally A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in The Human Male (1948); B.C. Leigh, M.T. Temple, K.R. Trocki, "The Sexual Behavior of U.S. Adults: Results From a National Survey", Am. J. Public Health, October 1993; J.O. Billy, K. Tanfer, W.R. Grady, D. H. Klepinger, "The Sexual Behavior of Men in the United States", Fam. Plann. Perspect. Mar-Apr 1993.

with.⁵

S.Rep. 112 at 281 (emphasis added).

Furthermore, based in large measure on the same behavioral principles, the SASC found it reasonable to establish a rebuttable presumption that a service member's avowed homosexual "orientation" is not merely philosophical. As the Committee report sets forth:

It would be irrational...to develop military personnel policies on the basis that all gays and lesbians will remain celibate or that they will not be sexually attracted to others. When dealing with issues involving persons of different genders, for example, the armed forces do not presume that service members will remain celibate or that they will not be attracted to members of the opposite sex.... Similar considerations apply to the development of policies with respect to homosexuality. The Committee agrees with the view of the Department of Defense that it is appropriate to take into consideration that when a person indicates that he or she has a propensity or intent to engage in homosexual acts, the armed forces are not required to wait until the person engages in that act before taking personnel action.

S.Rep. 112 at 284 (emphasis added).

The federal judiciary has already dealt with this issue under preexisting policy. One federal appellate court held that a declaration of one's homosexuality "can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct". Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). The same

⁵ This observation by General Powell undercuts the analogy, exhaustively maintained by Steffan, that there is a "striking resemblance between the rationale underlying [the DOD Regulations] and rationale (sic) underlying the military's repudiated 'Jim Crow' policies aimed at 'Negroes'". Brief at 16.

court concluded that "the Army does not have to take the risk that an admitted homosexual will not commit homosexual acts that will be detrimental to its assigned mission." Id. at 460-461.⁶

Steffan would have this Court ignore the aforementioned authorities and jettison as irrational the specific legislative

⁶ Steffan contends, inter alia, that Ben-Shalom is "no exception" to his asserted claim that "every Circuit Court that has addressed the issue presented by Steffan's discharge under the 1981 Regulations -- whether identifying oneself as a gay man or woman can justify dismissal from the military -- has raised doubts about their constitutionality." Steffan, 13.

It is difficult to discern any such doubts in Ben-Shalom, a forthright constitutional endorsement of the DOD Regulations, and their application to the circumstances at bar. There, as here, the court was "concerned with plaintiff's forthright admission that [s]he is a homosexual". Ben-Shalom, 881 F.2d at 460. The court then made the pertinent observation that "[t]he Congress, as overseer of the Army and the other military branches, is...better equipped to make such determinations" as to whether "to assume the risk, a risk it would be assuming for all our citizens, that accepting admitted homosexuals into the Armed Forces might imperil morale, discipline, and the effectiveness of our fighting forces." Id. at 461. Congress has already decided not to assume that risk.

Steffan's suggestion that Ben-Shalom is distinguishable because "the plaintiff there had been found to have engaged in homosexual conduct because she failed to rebut a presumption that she had engaged in homosexual conduct", Steffan at 13 n. 7, is disingenuous. The circumstances in Ben-Shalom are remarkably similar to those presented here. There, as here, the court was confronted with an admitted homosexual who did not admit to any homosexual conduct; no evidence of homosexual conduct was offered by the Army or considered by the court. The court simply extrapolated from Ben-Shalom's avowed lesbianism "reasonable inferences about her probable conduct in the past and in the future." Ben-Shalom, 881 F.2d at 464. The court thereby affirmed, with a view toward "the practical realities of this situation," that homosexual "status"/"orientation" cannot be treated separately and distinctly from homosexual conduct. Id.

Finally, Steffan, like the Ben-Shalom plaintiff, forsook the opportunity to rebut any presumption that his avowal of his homosexuality was untrue or mischaracterized. Ben-Shalom virtually parallels this case.

findings which arose out of intensive hearings. He advocates a purported distinction between homosexual "status"/"orientation" and homosexual conduct on the basis of semantics, and by resort to empty moral platitudes. See, e.g., Brief at 21 ("...no standard of morality legitimizes discrimination on the basis of sexual orientation or condones stigmatizing an individual on that basis")(emphasis in original).⁷

The 1981 Regulations (DOD Directive 1332), moreover, were clearly not promulgated on the "irrebuttable presumption", advanced by Steffan, that gay men and lesbians would break the law or engage in other criminally proscribed conduct. Quoting the Circuit Court of Appeals, Steffan maintains that "[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". Steffan at 29. Steffan then cites Jacobson v. United States, 112 S.Ct. 1535, 1542 (1992) as well as other authorities,⁸

⁷ The inseparability of homosexual orientation and conduct was acknowledged by the panel in Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993). In the context of determining whether homosexuals were a "suspect class," the court acknowledged the "anomaly of according special protection to a class whose defining characteristic, homosexual conduct, can be made illegal." Id. at 62-63. The court then tried to distinguish this case because "the class at issue is defined by homosexual orientation, not conduct." Id. at 63 (emphasis in original). Logically, however, homosexual conduct should be no less a defining characteristic of homosexual orientation in this context than in the context of determining whether homosexuals are a "suspect class". The court then made the significant concession that homosexuality "ultimately relies upon some connection to homosexual conduct". Id. at 65.

⁸ I.e., Noto v. United States, 367 U.S. 290 (1961); United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964) and Robinson v. California, 370 U.S. 660

for the proposition that "'personal inclinations' cannot rationally 'support an inference that [an individual] would commit [a] crime' because 'there is a common understanding that most people obey the law even when they disapprove of it'." Brief at 29.

The rationale for applying these cases to the circumstances at bar, however, rests on two equally faulty premises: First, that homosexual "status" can somehow be equated to membership in a "subversive organization"; and second, that every act of an avowed homosexual must invariably be punishable as a criminal offense, or must invariably be classified as an act of sexual misconduct.

Preliminarily, the distinction between homosexual "status" and membership in a subversive organization is obvious yet critical: subversive organizations are generally grounded in ideology and political doctrine; homosexuality is not. Communism, for example, is defined in the first instance by socio-political and economic theory, not by any conduct in actualization of those theories. One can subscribe to, believe in, and be a communist, and yet do

(1962). Not one of these cases is legally or factually applicable to the circumstances at bar. Those cases dealt with the constitutional question of whether a person could be criminally sanctioned simply by virtue of his or her membership in a "subversive organization". These cases have no factual or legal application to this case because: (a) Steffan's discharge was administrative in nature, not criminal; and (b) homosexuality simply cannot be analogized to membership in a "subversive organization".

In a similar vein, the Court of Appeals in Steffan v. Aspin, supra, alluded to cases "analogous to those under the Smith Act" and observed that "the Supreme Court has consistently held that government may not deny a job to an individual solely because of his status as a member of a 'subversive organization', absent any specific intent to further unlawful action." Steffan, 8 F.3d at 67. That analogy is untenable for the above reasons.

nothing. Homosexuality, on the other hand, is defined by no such theories or ideology; it is defined solely by behavior. The statement, "I am a homosexual", if true, connotes behavior, past, present and/or future.

Furthermore, Steffan's specious contentions notwithstanding, the military has created no "irrebuttable presumption that an individual categorized on the basis of his or her thoughts and desires will break the law or violate military regulation." Brief at 29.⁹ Such an assertion is not merely inaccurate, but misleading, because it erroneously suggests that the Department of Defense promulgated its regulations regarding homosexuality solely as a prophylactic measure to prevent future criminal misconduct. Clearly, that is not the case, since not all behavioral manifestations of homosexuality rise to the level of a criminal offense punishable under the Uniform Code of Military Justice ("UCMJ"), or rise even to the level of misconduct. In fact, the types of sexual misconduct proscribed under the UCMJ are arguably applicable to heterosexuals as well as to homosexuals.

The regulations were not premised on the assumption that "a service member who identifies him or herself as gay or lesbian is more likely to engage in sexual misconduct than a service member who is 'openly' heterosexual." Steffan at 7. Rather, they serve to ensure and to maintain good order and discipline within the

⁹ Steffan waived the opportunity to rebut any presumption that his avowal of his homosexuality was untrue or mischaracterized. His statement conferred upon him only a rebuttable presumption, which he opted to let stand.

ranks of the armed services.

Finally, Steffan urges this Court to disregard the teachings of Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), claiming that the "factual underpinnings...which presumed that gay men and women were predisposed to engage" in "conduct within a naval or military unit [that is] almost certain to be harmful to morale and discipline" are gone. Brief at 30. In Dronenburg, a 27-year old petty officer in the United States Navy was administratively separated from the service for repeated acts of homosexuality with a 19-year old seaman recruit. In affirming the constitutionality of Dronenburg's separation (with an honorable discharge), the court noted:

Episodes of this sort are certain to be deleterious to morale and discipline, to call into question the even-handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and, it must be said, given the powers of military superiors over their inferiors, to enhance the possibility of homosexual seduction.

Dronenburg, 741 F.2d at 1398.

Every one of these enumerated concerns was relevant to good order and discipline in the armed forces when the regulations were adopted, when Steffan resigned, and remain so today; the Legislative Branch has already affirmed that they were and are relevant. In dismissing these concerns as a "stereotype", and in urging this Court to ignore Dronenburg, Steffan would apparently have this Court second guess a legislative finding by the Senate

Armed Services Committee that "when a person indicates that he or she has a propensity or intent to engage in homosexual acts, the armed forces are not required to wait until the person engages in that act before taking personnel action." S.Rep. 112 at 284. Insofar as the Legislature has rejected proposals similar to Steffan's argument, USCCAN at 2075-2076, and has not seen fit to make any distinction between homosexual "status"/"orientation" and homosexual conduct, 10 U.S.C. § 654(b)(2), this Court should not disturb that finding.

IV. THE REGULATIONS UNDER REVIEW BALANCE THE RIGHTS AND CONCERNS OF SOLDIERS WITH THE ORGANIZATIONAL NEEDS OF THE MILITARY

"The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise." 10 U.S.C. § 654(a)(4). Although military service has always required modifications or curtailments of basic rights common to all citizens, the American military leadership has always insured the protection of certain rights common to all citizens. The complete denial of basic rights without any reason would undermine the commitment of those defending those rights. The limited rights of military personnel are especially precious and important to those who serve.

Consequently, there is a continuity of interests and concerns among commanders, soldiers and the civilian leadership of the military in balancing soldiers rights and organizational needs. No one advocates a military organization that does not respect its members or lacks the esprit to perform its mission. These

congruent interests and concerns can be expressed as common needs, focused on producing effective fighting units.

A. Morale Is Essential For Effective Military Organizations

1. Morale is a critical complex issue related to discipline and esprit.

"Morale is when your hands and feet keep working when your head says it can't be done." BG S. Marshall, The Officer As A Leader, 139 (1966) (quoting a WW II sailor). While civilians may use "morale"¹⁰ to indicate how things are going at the office, morale has a deeper significance in the military which "consider[s] morale in conjunction with discipline, since in military service they are opposite sides of the same coin. When one is present, the other will be also." Id. Morale collectively expresses the individual's level of satisfaction with his job, the "[m]utual confidence between leaders and ranks, [and the] [c]onviction that all together were striving for something more important than themselves." Id. at 144. Morale is literally the measure of the spirit of a unit, the willingness of the unit to keep working at its mission in the midst of great difficulty and turmoil. "[E]ven when things are going wrong at every other level, men will remain loyal and dutiful if they see in the one junior officer who is nearest them the embodiment of the ideals they believe should apply throughout the Service." Id. at 144.

¹⁰ "The state of mind of an individual or group with respect to confidence, cheerfulness, discipline. etc." Webster's New Dictionary of the English Lang. 273 (1984)

2. Military experience over many years has shown homosexuals destroy unit (or ship) morale.

The military (and Congress) are right to conclude that homosexuals pose a risk to morale, good order and discipline. There are many examples of the serious degradation of morale caused by the presence of homosexuals in the unit or ship. A 12/2/92 Wall Street Journal article (pg. A10) by Mr. McCrane (at Appendix 3 for the courts convenience) recounting his experience with homosexuals on the USS Warwick, just after World War II provides a vivid illustration. Without analysis, his story is easy to dismiss as an example of activity that should be dealt with under the UCMJ given proper leadership. Rather, the story illustrates (1) the difficulty of using the UCMJ as a tool to control homosexual behavior, which even Steffan acknowledges is detrimental to military discipline and good order, e.g., all the incidents were one-on-one encounters and (2) the severe impact homosexuality can have in a unit.

Military leaders have seen the fruit that homosexuals bear in units. Gen. Schwarzkopf, U.S. Army (Ret), the Commander of Desert Storm testified:

[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the units survival in time of war

[I]n every case I am familiar with, and there are many, whenever it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered.

S.Rep. 112 at 280.

The district court's findings, Steffan v. Cheney, 780 F. Supp.

1, 12-13 (D.D.C. 1991), rev'd, 8 F.3d 57 (D.C. Cir. 1993), vacated and rehearing en banc granted (D.C. Cir. Jan. 7, 1994), that the military's concern about the preservation of morale and the prevention of other Warwicks were permissible "factors which are properly cognizable in the context of [military personnel decisions]", see Clayburne v. Clayburne Living Center, 473 U.S. 432, 473 (1985). Mr. Steffan's only response to this is to label such concerns negative attitudes or prejudice on the part of present day sailors who have followed in Mr. McCrane's footsteps or leaders such as Generals Schwartzkopf and Powell.

3. Allowing open homosexuals into the military will likely adversely impact military families, an important factor of service morale.

Attempts to integrate the homosexual lifestyle into military communities will have an immediate and dramatic negative impact on morale. When service members and their families no longer feel "at home" or settled in their own communities, the turmoil and anger caused by these issues will spill over directly into the workplace, and into attitudes toward the military as an institution. The increased stress in the work place will have an outlet in the family. Additionally, as discussed below, military medical experts have evaluated the impact of homosexuality on the military medical establishment. Medical resources now devoted to families may be reduced or eliminated due to the added resources necessary to deal with homosexual related medical problems. Morale will obviously suffer.

B. The Military Must Protect Some Personal Privacy.

1. The military must balance the subordination of personal autonomy with the soldiers right to personal privacy and freedom from unwanted sexual situations.

"The essence of military service is 'the subordination of the desires and interests of the individual to the needs of the service.'" Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)). This subordination includes restrictions on personal privacy unknown in civilian world and characterized by lack of choice in living arrangements and working conditions. Military service "routinely makes it necessary for members ... involuntarily to accept living conditions and working conditions that are often spartan, primitive and characterized by forced intimacy with little or no privacy." 10 U.S.C. § 654(a)(12) (emphasis added). Consequently, "the substantially more limited privacy expectations accompanying military life" create an environment where "privacy and liberty are necessarily a premium." Ben-Shalom, 881 F.2d at 465. Yet soldiers do not give up all their rights and it is the military's vital interest to insure that what is left after military necessity takes its toll is resolutely protected.

A basic privacy consideration is the right to at least a minimum degree of modesty. Universally, unmarried men and women do not regularly or casually shower, use bathrooms or undress together. No one suggests that they could be ordered to do so in the military. Only in special places do those of the same sex shower and undress together, such as swimming pools and gyms or

camping grounds, and then only for limited periods of time. Even in those circumstances, modesty is respected to the extent possible.

What is an exception in civilian life is a way of life in the military. Allowing homosexuals into the very places where privacy is at a minimum and intimacy is forced would destroy one of the remaining areas of personal choice remaining to military members. These concerns are not without foundation as illustrated by the Warwick and other examples¹¹.

In the field, it is both necessary and routine for military personnel of the same sex to share limited living facilities. For example, if two women are in a unit, they would be assigned to share a tent or room together with no other choice. Putting a homosexual and another person who was sexually attractive in the same living space would be a substantial violation of the latter's personal privacy. Morale and other problems would likely result. Assurance that homosexuality was "status" only (as Steffan argues) would not lessen legitimate concerns. No court would order women to share showers or bathrooms with men just because one man might claim that he had no interest in the opposite sex. See S.Rep. 112 at 281-82. Yet this is essentially what Steffan requests.

¹¹ "The use of public toilets for cruising and sex is so well known that a technical book by Cornell University entitled The Bath Room includes a whole section discussing the homosexual issues in the design of modern public rest rooms." K. Jay and A. Young, The Gay Report (1979).

2. Congress found that allowing personnel to serve in the military who sexually desire the same sex would compromise individual privacy without reason or necessity.

Congress examined in great detail the issues of privacy as they affect individual military members. Its thorough examination verified the conclusion of Gen. Colin Powell, Chairman JCS, that "allowing homosexuals in the military would affect the cohesion and well being of the [military] force." S.Rep. 112 at 281.

Sexual behavior is one of the most powerful forces in society. In civilian life people are not compelled to live with individuals who are sexually attracted to persons of the same sex, and the committee finds no military necessity to compel persons to do so in the military.

The committee agrees that the armed forces should not be required to take that risk [that a homosexual will engage in homosexual acts] in the unique conditions of forced intimacy and minimal privacy that characterize military life.

S.Rep. 112 at 281-82. The military "is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate." Dronenburg v. Zech, 741 F.2d 1389, 1398 (D.C. Cir. 1984)

C. Soldiers and Commanders Want disruptions Caused by Sexual Dynamics Eliminated or Minimized.

1. Sexual relationships in military organizations disrupt discipline and morale and undermine the chain of command.

"Sexual behavior is one of the most intimate and powerful forces in society." S.Rep. 112 at 281. While personal relations between the sexes is a common fact of life, those relationships can cause significant problems in small groups of people. The problems

are especially acute when there are relationships among the members of the group in terms of differing status, authority or power as is typical in military units. One of these problems is fraternization, where people of different ranks or status, e.g., officer-enlisted, act as there were no differences between them.

[T]here is no room for familiarity, since it will breed contempt. When it occurs, respect flies out the window, the officer loses part of his command authority, and discipline breaks down. Familiarity cannot obtain between the superior and the subordinate without the vice of favoritism entering into the conduct of organizational matters, ... The chief damage comes from the effect upon all the others.

BG S. Marshall, The Officer As A Leader, 137 (1966).

Other problems are the abuse of power, sexual harassment, or the perception or reality of favoritism. All of these problems create massive problems for commanders and supervisors, distract them from their main missions, consuming energy and resources and degrade morale and discipline. Many - though not all - of these problems are punishable under the UCMJ or regulations focused on controlling these relationships, be they merely romantic or otherwise. But not every infraction can be proved or punished. Accordingly, the military seeks sexual neutrality in the work place; prevention reduces costs in terms of resource utilization, impact on morale, discipline and other cognizable factors.

2. Homosexuality introduces sexual instability.

Homosexuality introduces a destabilizing sexual dynamic into personal relations in military units where living is characterized by forced intimacy and lack of privacy. One of the reasons is that

the normal rules are no longer normal. A "pat on the back" may take on a new meaning if given by a homosexual, e.g., "is that a proposition, or something else?" Men and women grow up learning how to deal with the sexual overtures of and relations with the opposite sex, not the same sex. Additionally, it impacts on the privacy considerations described in IV B. supra.

This dynamic is especially important in the areas of fraternization or abuse of authority. Dronenburg v. Zech, 741 F.2d 1389 (D.C. 1984) (petty officer who had homosexual relations with a seaman recruit), and Woodward v. United States, 871 F.2d 1068 (Fed.Cir. 1989), cert. denied, 494 U.S. 1003 (1990), are two illustrations of this problem that reached courts of appeal. Woodward is particularly illustrative in that the record shows he brought a gay enlisted man into a club because he didn't know any gay officers. His desire for homosexual activity overrode his obligation not to fraternize or violate the law against sodomy. See M. Humphrey, My Country, My Right to Serve, 161-163 (1990) (Woodward's description of his homosexual activities in the Navy).

D. The Integrity of the Chain of Command must Be Safeguarded.

The chain of command means the authority and command structure that transmits and executes the orders and missions of the military organization. It is a series of superior to subordinate relationships. The "integrity of the chain of command" refers to three basic requirements: first, the ability to efficiently and effectively pass orders and instructions down through the

subordinate organization and ranks and pass information up from the bottom to the appropriate decision makers; second, the confidence that the authority structure operates in an unbiased and rational manner in its decisions affecting the members of the organization; third, the loyalty of the members to those within the chain.

1. Soldiers must know that they will be treated fairly and rewarded based on how they perform their missions.

The present Chairman of the Joint Chiefs of Staff started his Army career as a private. In no other army does this happen without a coup. It can happen in our army because the military knows that the commitment, loyalty, and willingness of its members to sacrifice for the common good depends on their belief that the system will both reward and protect them. Morale, cohesion, discipline and other factors in successful armies depend on a chain of command to insure fairness and justice.

2. Commanders must know that laws, policies and orders will be followed.

"[T]he military must insist on a respect for duty and a discipline without counterpart in civilian life." Schlesinger v. Councilman, 420 U.S. 738, 757 (1975). Military members do not have the choice to decide which laws, regulations, orders or policies they will obey. The military member's duty to the organization must always take precedence over his personal desires. Trust depends on obeying a law or regulation even if it is personally unpopular or one disagrees with it.

Given the nature of homosexuality, a desire to do what the military forbids, it is rational to be concerned with the integrity

of the chain of command as explained below. As the Ben-Shalom Court explained, "Plaintiff's [homosexual] acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct." 881 F.2d at 464. How can Steffan presume that his would be commanders or subordinates would trust him to not violate the laws and customs of the service (as Lt. Woodward) did when Mr. Steffan admits that is precisely what he desires to do?

V. THE DISTRICT COURT PROPERLY RECOGNIZED THAT THE REDUCTION OF UNNECESSARY RISK IS A REASONABLE MILITARY CONCERN

The reasons given in §§ I through IV supra provide sufficient justification to sustain the lawfulness of the challenged regulations. However, the standard for review is "any conceivable state of facts that could provide a rational basis for the classification". F.C.C. v. Beach Communications, Inc., 113 S.Ct. 2096, 2101 (1993). The district court, perhaps in an abundance of caution to make sure all the obvious reasons were addressed, took judicial notice of other probable considerations that might affect the "Health and Welfare of the Military" as an additional rationale for upholding the challenged regulations. Steffan v. Cheney, 780 F. Supp. 1, 13-16 (D.D.C. 1991). Steffan claims the district court said "gay men and lesbians ... cause[d] AIDS", Brief at 22-23, and "because some gay men are infected with HIV, all gay men and women should be excluded." Id. at 23. This mischaracterizes and grossly distorts a rational decision.

The district court focused on risk: risk to the health, welfare and morale of the military, identifying homosexuals as "the highest risk category of AIDS", 780 F.Supp. at 13, and found it rational to "prevent[] those who are at the greatest risk of dying of AIDS from serving in the Navy" Id. at 16 (emphasis added). Risk, a neutral criteria, often serves as a basis to disqualify for military service the overweight, those with heart problems, mental disorders, etc.

Steffan attacks but does not negate this factor. Support for the district court's decision can be found in the analysis performed by the Army Surgeon General (ASG) in response to the general review following the President's initial (and later changed) proposal to eliminate the military's exclusion policy. The ASG "evaluat[ed] the implications of homosexuality in the army including the impact on readiness and on the Army health care system". Army Surgeon General's 4/29/93 Memo, at Appendix 4. He concluded that "Homosexuality, with its propensity for male-to-male sex, increases the incidence of HIV (and other) infections and increases medical costs." Id. The report examined the risks to the blood supply and risks of occupational exposure to infected blood; the impact on efforts to reduce sexually transmitted diseases; the impact on "readiness and deployability from a medical standpoint"; and medical costs. Id. at unnumbered enclosures.

The report's conclusion, based on homosexuals as a group and not as individuals, supports the district court's opinion. Furthermore, bias is not evident in this report since it merely

reflects a professional medical opinion based on medical evidence and available studies on medically related conditions associated with homosexuality and the probable risk to military medical considerations. Certainly, these are "cognizable factors" relevant to decision makers and appropriate for the district court to consider. See State v. Walsh, 713 S.W. 2d 508, 512 (Mo. 1986) (Court "need not refer to medical literature to suggest ... that there might rationally be health ramifications related to anal intercourse" to uphold sodomy statute). See also M. Wells-Petry, Exclusion: Homosexuals and the Right to Serve 103-118 (1993).

It should be noted that the availability of medical services to active duty and their families, which the report implies could be reduced if homosexuality were allowed in the military, is an important factor in morale.

CONCLUSION

Steffan asks this Court to invalidate a long standing policy related to maintaining an effective fighting force by disregarding the expertise of the professional military leadership. He asks the Court to forget that Congress reviewed in great detail the very policy and regulations he challenges with extensive hearings representing all sides of the issue, including those who share Steffan's views. He also asks the Court to ignore the fact that Congress then validated and codified in law the very policy he challenges here. Congress examined the very factors he claims are merely a catering to bias and found those factors valid and

necessary. Perhaps Steffan hopes the Court will try to second guess the judgment of Congress and the President forgetting the long precedent against courts sitting as super legislators.

Steffan has not met his burden to negate every fact supporting the regulations he challenges, a task made more difficult by Congress' validation of the same regulations. Accordingly, the Court should follow its own established precedent in Dronenburg v. Zech and echoed by the Seventh Circuit in Ben-Shalom v. Marsh, affirm the district court and dismiss Steffan's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March 1994, I served the forgoing BRIEF OF AMICUS CURIAE upon counsel for Plaintiff-Appellant and counsel for Defendant-Appellee by causing copies to be delivered by pre paid first class mail to the parties' counsel at the address listed below. I hereby further 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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103D CONGRESS
1st Session

SENATE

REPORT
103-113

**NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 1994**

REPORT

(TO ACCOMPANY H. R. 2646)

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 1994 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE, FOR MILITARY CONSTRUCTION AND FOR DEFENSE ACTIVITIES OF THE DEPARTMENT OF ENERGY, TO PRESCRIBE PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR FOR THE ARMED FORCES, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

**COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE**



JULY 27 (legislative day, JUNE 30), 1993.—Ordered to be printed

TITLE XXXV—PANAMA CANAL COMMISSION

This title authorizes expenditures from the Panama Canal Revolving Fund for the operation and maintenance of the Panama Canal. It also provides the consent of Congress to employees of the Panama Canal Commission who are not citizens of the United States accepting civil employment with and compensation from agencies and organizations affiliated with the Government of Panama for which the consent of Congress is required by section 9 of Article I of the Constitution. The consent is conditioned upon approval of such employment by their designated agency ethics official and by the Administrator of the Panama Canal Commission.

Finally, the title reinstates the right to challenge adverse personnel actions through a negotiated grievance procedure for non-preference-eligible bargaining unit employees of the Commission.

The Panama Canal operates on a self-sustaining basis, utilizing tolls and revenues paid by canal users. Appropriated funds are not utilized for the operation and maintenance of the canal.

POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES

Current Department of Defense policy provides that "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 armed forces discharge servicemembers when there is an approved finding that: (1) the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act; (2) the member has stated that he or she is a homosexual or a bisexual; or (3) the member has married or attempted to marry a person of the same biological sex.

On January 29, 1993, the President directed the Secretary of Defense to review the Department's policy and to provide him with recommendations by July 15, 1993. On February 4, 1993, the Senate adopted an amendment, which was enacted into law, calling for a comprehensive review of the policy, and directing the Committee on Armed Service to conduct hearings. On July 19, 1993, the Secretary of Defense submitted his recommendations, which were approved by the President, to the Congress.

The Committee on Armed Services, after detailed hearings and careful review of the recommendations of the Secretary of Defense, agreed that a specific legislative framework for the policy should be set forth in law. Part I of this Report summarizes the committee's findings and recommendations. Part II sets forth the background to the committee's action. Part III describes the basis for the committee's action. Part IV contains a sectional analysis of the committee's legislative proposal.

I. SUMMARY

Based upon the committee's review and deliberations, the committee recommends legislation that sets forth legislative findings and a framework to guide the Department of Defense in its implementation of the policy concerning homosexuality in the armed forces. The committee recommends the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed for

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

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

(7) 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.

(8) Military life is fundamentally different from civilian life in that—

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the army for high standards of morale, good order and discipline, and unit cohesion that are

(15) 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.

The committee recommends that the policy concerning homosexuality in the armed forces continue the current conduct-based standards for discharge, as reiterated by the Secretary of Defense on July 19, 1993, which require separation on the basis of homosexual acts, statements, and marriages. The committee also recommends that these standards be set forth in the enlistment contract and in similar documents used for the appointment of officers. In addition, the committee recommends that the decision as to whether questions about homosexuality should be asked during the accession policy should be left to the discretion of the Department of Defense.

The standards and procedures set forth in the committee's recommendations are consistent with the policy of the Department of Defense, as set forth in DoD Directive 1332.14 (Enlisted Administrative Separations) and the policy memorandum issued by the Secretary of Defense on July 19, 1993 ("Policy on Homosexual Conduct in the Armed Forces"), as clarified in hearings before the committee.

II. BACKGROUND

RESTRICTIONS BASED UPON HOMOSEXUALITY ARE A LONGSTANDING FEATURE OF MILITARY PERSONNEL POLICY

Until the post-World War II period, military regulations on administrative separation were drafted in a manner that gave commanders broad discretion to discharge members of the armed forces. The Army, for example, authorized separation for reasons such as "inaptness or undesirable habits" (section VIII of Army Regulation 615-200). This regulation did not list any specific traits.

With respect to courts-martial, homosexual conduct traditionally was prosecuted in the armed forces under the general article (currently Article 134 of the UCMJ, 10 U.S.C. 934), which authorizes trial by court-martial for conduct that is service-discrediting or that is prejudicial to good order and discipline. The Articles of War of 1916 established a specific article proscribing assault with intent to commit sodomy. In the aftermath of World War I, Congress established the offense of sodomy, including consensual sodomy, as Article 93 of the Articles of War. See Manual for Courts-Martial, 1921, para. 443, sec. XI.

During World War II, the Army developed a medical approach to homosexuality, involving efforts at identification and treatment. An undetermined number of gay men and lesbians served during the war as a result of a combination of factors: concealment of homosexuality because of social taboos; the relative flexibility of personnel regulations; wartime personnel needs; and the inability of psychiatrists to determine who was homosexual. When there was an identification of an individual as a homosexual, however, an effort at treatment was made. Failure to respond to treatment provided a basis for a "section VIII" discharge. The military policy in-

flux of civilians into the armed forces during World War II, combined with the medical approach to homosexuality, led to the discharge during the war of a significant number of persons for reasons related to homosexuality.

In 1944, the Army in Circular No. 3 endeavored to distinguish between homosexuals who were discharged because they were "not deemed reclaimable" and those who were retained because their conduct was not aggravated by independent offenses. In 1945, a greater emphasis was placed on "reclamation" of homosexual soldiers. If a homosexual soldier was deemed "rehabilitated", the soldier was returned to service.

In 1947, the policy was revised to discharge individuals who had "homosexual tendencies" even if they had not committed homosexual acts. Those who committed homosexual acts were subject to court-martial or administrative discharge, with the character of discharge depending on the nature of the act.

The Uniform Code of Military Justice, enacted in 1950, contained a prohibition on sodomy, including consensual sodomy, in Article 125 reflecting the previously enacted prohibitions in the Articles of War and the Articles for the Government of the Navy.

In 1950 the Army adopted a mandatory administrative separation policy, which stated: "True, confirmed, or habitual homosexual personnel, irrespective of sex, will not be permitted to serve in the Army in any capacity and prompt separation of known homosexuals from the Army is mandatory." This policy was somewhat relaxed in 1955, permitting soldiers to be deemed "reclaimable" when they "inadvertently" participated in homosexual acts. This policy was reversed in 1958, when the mandatory separation policy was reinstated.

In 1970, a Department of Defense-wide policy was issued, authorizing separation on the basis of homosexual acts and "homosexual tendencies." There was no definition of the term "homosexual tendencies." Under the Directive, the final decision on separation of an individual soldier was a matter of command discretion rather than mandatory.

In the 1970s, there was increasing litigation concerning the procedures and basis for the DoD policies on the separation of homosexuals. In several court cases, the Department was asked to provide detailed reasons for not exercising the discretion to retain an individual when there was a finding of homosexual acts or tendencies. There is no data on the specific number of cases in which the discretion to retain an individual was exercised, but it does not appear to have been frequently used. The litigation, however, was considered during a detailed review of the DoD administrative discharge policy in the late 1970s during President Carter's administration. This review involved all aspects of administrative discharge proceedings and all reasons for administrative discharge, not just discharges for homosexuality.

As a result of that review, the Department of Defense made two significant changes in policy which were set forth in a memorandum issued by then-Deputy Secretary of Defense Graham Claytor on January 16, 1981. First, the Department of Defense issued a conduct-based policy, which authorized separation of persons who, by their acts or statements, demonstrate a propensity or intent to

engage in homosexual conduct, and eliminated "homosexual tendencies" as a reason for separation. Second, the mandatory separation policy, which had been used in the 1950s, was reinstated. This policy was incorporated without substantive change in the 1982 revision of DoD Directive 1332.14, which provides the current authority for enlisted administrative separations. Similar standards are set forth in DoD Directive 1332.30, which governs officer administrative separations. The policy memorandum issued by the Secretary of Defense on July 19, 1993 continues the conduct-based focus of Department of Defense policy.

In summary, the authority to administratively separate homosexuals has been in effect over a lengthy period of time, although the manner in which this policy has been implemented has varied. This authority has been consistently supported over the years by Congress and by every Administration, both Republican and Democratic.

EVENTS LEADING UP TO THE COMMITTEE'S HEARINGS

In September 1992, during the Senate's debate on the National Defense Authorization Act for Fiscal Year 1993, Senator Howard Metzenbaum offered an amendment that would have established a "prohibition on discrimination in the military on the basis of sexual orientation." Senator Sam Nunn, Chairman of the Senate Armed Services Committee observed that "this subject deserves the greatest care and sensitivity" and stated: "We will have hearings on the subject next year. We will hear from all viewpoints, and we will take into consideration the viewpoints of our military commanders, the viewpoints of those in the homosexual community, the viewpoints of those who are in uniform who may be homosexual, gay, and we will also consider the men and women in uniform who are not in that category and the effect it would have on military morale." Based upon the assurance that hearings would be held in 1993, Senator Metzenbaum withdrew his amendment.

During the 1992 election campaign, Presidential candidate Bill Clinton said that, if elected, he would take action to change the current policy restricting the service of gay men and lesbians serving in the armed forces. He also spoke of the need to consult carefully with the military leadership on this issue. After the election, he reiterated his views on changing the policy and the need to consult with the military leadership.

Secretary of Defense Aspin, during his confirmation proceedings in January 1993, indicated that there would be extensive consultations with Congress on this subject.

Shortly after the Inauguration, a series of media reports suggested that a significant change in the Department's policy was imminent. A number of Senators indicated that they would offer an amendment early in the Congressional session that would prohibit any change in policy. Senator Nunn, among others, expressed the view that neither the Executive Branch nor Congress should institute a significant change in the current policy, by Presidential order or by Congressional action, prior to undertaking a comprehensive review, including hearings, on this subject.

On January 29, 1993, the President directed the issuance of an interim policy that would be in effect until July 15, 1993. This in-

terim policy retained all then-existing rules restricting the service of gay men and lesbians in the armed forces. The policy also set forth two modifications that would apply during the interim period. First, reflecting a recommendation made by the Joint Chiefs of Staff, new recruits would not be questioned about homosexuality during the enlistment process. Second, gay and lesbian cases that did not involve homosexual acts would be processed through separation from active duty, and the individual would be placed in a nonpay status in the Standby Reserve during this interim period.

In addition, the President directed the Secretary of Defense to conduct a review of the current policy and to provide him with a draft Executive Order by July 15, 1993.

On February 4, 1993, during Senate consideration of the Family and Medical Leave Act, the Senate debated two amendments related to the service of gay men and lesbians in the armed forces.

The first amendment would have frozen in law "all Executive Orders, Department of Defense Directives, and regulations of the military departments concerning the appointment, enlistment, and induction, and the retention, of homosexuals in the Armed Forces, as in effect on January 1, 1993." The amendment was tabled by a vote of 62-37.

The Senate then unanimously adopted an amendment expressing the Sense of Congress that the Secretary of Defense should conduct "a comprehensive review of the current Department of Defense policy with respect to the service of homosexuals in the Armed Forces." The amendment further expressed the Sense of Congress that the results of the review should be reported to the President and Congress not later than July 15, 1993. In addition, the amendment expressed the Sense of Congress that the Senate Committee on Armed Services should conduct "comprehensive hearings on the current military policy" and should conduct "oversight hearings on the Secretary's recommendations as such are reported."

The amendment, as adopted, was enacted as section 601 of the Family and Medical Leave Act of 1993, Public Law No. 103-3. The Senate also agreed to an order that effectively precluded consideration of any further amendments in the Senate relating to the service of gay men and lesbians in the armed forces until July 15, 1993. This procedure permitted the Department of Defense and the Committee on Armed Services to conduct their reviews prior to legislative action on specific amendments.

COMMITTEE PROCEEDINGS

The question of whether changes should be made in the restrictions on the service of gay men and lesbians in the armed forces has generated intense feelings in the Congress, in towns and communities across the country, and particularly throughout the ranks of the military services. Some individuals view the question as a moral issue, touching upon deeply held religious and philosophical beliefs. Others view it as a civil rights issue involving the fair and equitable treatment of individuals with a particular sexual orientation who want to serve their country in uniform.

While the committee has received testimony reflecting these broad, strongly held views, the Committee's primary focus and concern has been the implications of any change in the current policy

on the effectiveness of our armed forces to carry out their mission to defend our nation.

Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces. Pursuant to these powers, it lies within the discretion of Congress to establish the qualifications for military service, the terms and conditions of military service, and the standards necessary to ensure good order and discipline within the armed forces.

The committee began its hearings on March 29, 1993, with an overview of the historical and legal background of the current Defense Department policy. Dr. David Burrelli, a sociologist from the Foreign Affairs and National Defense Division of the Congressional Research Service, summarized the historical development of the Defense Department's current policy. Professor David A. Schlueter of St. Mary's Law School described how the military legal system addresses the issue of homosexuality, and outlined legal issues raised by the current policy and proposals for change. Professor Steven A. Saltzburg of George Washington University National Law Center described the state of litigation concerning the service of gay men and lesbians in the armed forces, and outlined legal issues raised by this litigation. Mr. Charles Dale, a legislative attorney from the American Law Division of the Congressional Research Service, summarized the general state of the law with respect to issues concerning gay men and lesbians in the United States.

On March 31, 1993, the committee conducted a hearing on the role of unit cohesion in developing combat effectiveness, receiving testimony from three experts on military personnel policy: Dr. William D. Henderson, former commander of the Army Research Institute; Dr. Lawrence Korb, former Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics; and Dr. David Marlowe, chief of the Department of Military Psychiatry at Walter Reed Army Institute of Research.

The committee held a hearing on April 29, 1993, on the experiences of foreign military services. Testimony was presented by Dr. Charles Moskos, Professor of Sociology at Northwestern University; Dr. David Segal, Professor of Sociology at the University of Maryland; Dr. Judith Stiehm, Professor of Political Science at Florida International University; and Lt. Gen. Calvin Waller, U.S. Army (retired).

On May 7, 1993, the committee received testimony from Members of the Senate, including Senator Howard Metzenbaum, Senator Frank H. Murkowski, Senator John F. Kerry, Senator Barbara Boxer, Senator Conrad Burns, Senator Dianne Feinstein, Senator John H. Chafee, and Senator James M. Jeffords.

The committee conducted a field visit to the Norfolk Naval Complex on May 10, 1993. During the morning, members of the committee visited four classes of ships: the aircraft carrier John F. Kennedy; the amphibious assault ships Austin and Gunston Hall; the attack submarines Montpelier, Flying Fish, and Baton Rouge; and the submarine tender, Emory S. Lamb. During these visits, members of the committee conducted informal discussions with sailors and marines of all ranks, visiting with them in their work-

and living spaces, including a visit to a submarine tender with mixed gender crew. During the afternoon, the committee conducted a formal hearing at which testimony was presented by seventeen members of the Navy and Marine Corps selected by the committee, including both enlisted personnel and officers.

On May 11, 1993, the committee received testimony in Washington, D.C., from current and former members of the armed forces, including: General H. Norman Schwarzkopf, U.S. Army (Ret.); Colonel Frederick C. Peck, U.S. Marine Corps; Major Kathleen Bergeron, U.S. Marine Corps; Command Master Chief David Horne, U.S. Navy; Dr. Margarethe Cammermeyer, former Colonel and Chief Nurse, Washington Army National Guard; Chief Petty Officer Stevens R. Amidon, U.S. Navy; Thomas Paniccia, former Staff Sergeant, U.S. Air Force; and Sergeant Justin Elzie, U.S. Marine Corps.

Secretary of Defense Les Aspin submitted the administration's commendations to Congress on July 19, 1993. On July 20, 1993, the committee received testimony on the recommendations from Secretary Aspin and the Joint Chiefs of Staff: General Colin L. Powell, U.S. Army, Chairman of the Joint Chiefs of Staff; Admiral David E. Jeremiah, U.S. Navy, Vice Chairman; General Gordon R. Sullivan, Chief of Staff, U.S. Army; General Carl E. Mundy, Jr., Commandant of the Marine Corps; Admiral Frank B. Kelso, II, Chief of Naval Operations; and General Merrill A. McPeak, Chief of Staff, U.S. Air Force.

On July 21 and July 22, 1993, the committee heard from the Honorable Jamie S. Gorelick, General Counsel of the Department of Defense, and Major General John P. Otjen, U.S. Army, Senior Member of the Military Working Group established by Secretary Aspin to review this issue.

In addition, the committee received testimony for the record from numerous private citizens and organizations.

The testimony presented to the committee represented a wide range of experiences, including those of current and former servicemembers who have publicly identified themselves as gay or lesbian. The committee received a broad variety of views, ranging from recommendations to reinstate the policy in effect prior to the January 29, 1993 interim modifications to recommendations for elimination of restrictions on homosexual acts. The committee carefully considered all points of view in developing its recommendations.

III. BASIS FOR COMMITTEE'S ACTION

Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces. Pursuant to these powers, it lies within the discretion of the Congress to determine qualifications for and conditions of service in the armed forces

The Framers of the Constitution, in Article I, section 8, expressly stated the powers to raise and regulate military forces in the Congress. Detailed statutory mandates on the qualifications for and conditions of military service are found primarily in title 10 of the

United States Code. The President may supplement, but not supersede, the rules established by Congress for the government and regulation of the armed forces.

The role of the courts in reviewing military personnel matters is even more circumscribed. Although the constitutional guarantees of the Bill of Rights are generally available to servicemembers, the application of those guarantees in the military setting differs considerably from the manner in which they apply in civilian society.

The limited role of the judiciary in reviewing military personnel policies, the differing application of constitutional rights in the military, and the special role of the armed forces have been consistent themes in the Supreme Court's review of military matters:

[J]udges are not given the task of running the Army.

... The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953).

[I]t is the primary business of armies and navies to fight and to be ready to fight should the occasion arise. *Ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *United States v. O'Brien*, 391 U.S. 377 (1968).

None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause . . . but the tests and limitations to be applied may differ because of the military context. . . . [W]e must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch. *Rostker v. Goldberg*, 453 U.S. 67-68 (1981).

[J]udicial deference to . . . congressional exercise of authority is at its apogee when legislative action [is] under the congressional authority to raise and support armies and make rules and regulations for their governance . . . *Id.* at 70.

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

[T]he military is, by necessity, a specialized society separate from civilian society. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

Congress is permitted to legislate both with greater breadth and with greater flexibility when regulating military personnel. *Id.* at 756.

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. *Id.* at 758.

[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life. *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975).

[C]ourts are 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.' *Chappell v. Wallace*, 462 U.S. 296, 305 (quoting Chief Justice Earl Warren, "The Bill of Rights and the Military," 37 N.Y.U.L. Rev. 181, 187 (1962)).

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. . . . *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

[T]o accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps. *Id.*

"The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" *Id.* (quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953)).

"[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Id.*

In summary, Article I, section 8 of the Constitution commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces. Pursuant to these powers, it lies within the discretion of the Congress to determine qualifications for and conditions of service in the armed forces.

Military service is a unique calling in which the rights of individuals are subordinated to the needs of national defense

The primary mission of the armed forces is to defend our national interests by preparing for and, when necessary, waging war, using coercive and lethal force. Responsibility for the awesome machinery of war requires a degree of training, discipline, and unit cohesion that has no parallel in civilian society.

The armed forces must develop traits of character, patterns of behavior, and standards of performance during peacetime in order to ensure the effective application and control of force in combat. Members of the armed forces are subject to disciplinary rules and military orders at all times, twenty-four hours a day, regardless of whether they are actually performing a military duty.

Military service is a unique calling. It is more than a job. Our nation asks the men and women of the armed forces to make extraordinary sacrifices to provide for the common defense. While civilians remain in their homes, with broad freedom to live

where and with whom they choose, members of the armed forces may be assigned, involuntarily, to any place in the world, often on short notice, often to places of grave danger, often in the most spartan and primitive conditions.

For the sailors in the Persian Gulf, their ship is home. For the soldiers on the DMZ in Korea, their barracks is home. For the Marines serving in Somalia in Operation Restore Hope, their tent is home. Military men and women do not have the right to choose with whom they will share this home. They do not have the right to choose with whom they will share these burdens. They do not have the right to choose whether they will be placed in harm's way or under what conditions. Most important, they do not have the right to choose when and where they may be asked to make the ultimate sacrifice for their country.

General Gordon Sullivan, Chief of Staff of the Army, eloquently summarized the differences between military and civilian life in testimony before the committee on July 20, 1993:

What separates us from civilian society is ultimate sacrifice, the sacrifice of our lives for our country. We have to sublimate everything that we do to selfless service to our Nation. Duty, honor, country . . . [I]t is, in fact, that mission, the protection of the Nation, which must govern everything that we do.

Although the individual decision to join the armed forces, in the absence of actual draft calls, is a matter of voluntary choice, there is no constitutional right to serve in the military. See, e.g., *Nieszner v. Mark*, 684 F.2d 562 (8th Cir.), cert. denied 460 U.S. 1022 (1982); *West v. Brown*, 558 F.2d 757 (5th Cir.), cert. denied 435 U.S. 926 (1977). The armed forces routinely restrict the opportunities for service on the basis of circumstances such as physical condition, age, sex, parental status, educational background, medical history, and mental aptitude. These restrictions primarily reflect professional military judgment as to what categories of personnel contribute to overall combat effectiveness rather than narrow performance criteria related to the performance of a specific task. They are based on the fact that members of the armed forces are not recruited for a single job at a single location. They must be capable of serving not as an individual, but as a member of a team, in a variety of assignments and locations, often under dangerous and life-threatening conditions.

Once military status is acquired, military service is not voluntary. Once an individual has changed his or her status from civilian to military, that person's duties, assignments, living conditions, privacy, and grooming standards, are all governed by military necessity, not personal choice. In a nation that places great value on freedom of expression, freedom of association, freedom of travel, and freedom of employment, the armed forces stand as a stark exception. Military commanders have the authority, as they have throughout our nation's history, to tell servicemembers where to live, where to work, and even when they must put their lives at risk—and to use the criminal law, the Uniform Code of Military Justice, to punish those who disobey any such orders.

The unique conditions of military service have existed from the days of the Revolutionary War, through the formation of the Constitution, to the present. Throughout our history, members of the armed forces have been subjected to controls and regulations that would not have been tolerated in civilian society.

This does not mean that Congress expects military commanders to exercise their authority in an arbitrary and capricious manner. There are numerous laws and regulations governing military service which provide servicemembers with protections against abuse and which establish means of redress. These have been carefully crafted to maintain the delicate balance between the individual concerns and the needs of the armed forces. While the nature of military service has changed over time, the fundamental precept—that the rights of the individual servicemember must be subordinated to the needs of national defense—remains unchanged.

The committee is mindful of the admonition of the Supreme Court that Congress is not free to disregard the Constitution when dealing with military affairs. As the Court noted in *Rostker v. Goldberg*, the "Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." 453 U.S. at 64.

Congress has played a leading role in enhancing the rights of members of the armed forces, including enactment of the Uniform Code of Military Justice; establishment of an independent civilian tribunal, the U.S. Court of Military Appeals, to review court-martial cases; authorization to appeal military justice cases directly to the Supreme Court; enhanced procedural rights in the promotion process; expanded opportunity for wearing religious apparel while in uniform; and protections for military whistleblowers. Whenever the committee considers a military practice or proposal in which military personnel would not be provided with the same rights as their civilian counterparts, the committee carefully assesses the military necessity for any difference in treatment.

The committee has carefully considered the needs of the armed forces and the rights of all persons, including those who are gay or lesbian, in addressing the issue of restrictions on the service of gay men and lesbians in the armed forces.

The foundation of combat capability is unit cohesion

General H. Norman Schwarzkopf, U.S. Army (Ret.), who commanded U.S. forces in Operations Desert Shield and Desert Storm, testified that unit cohesion "is the single most important factor in a unit's ability to succeed on the battlefield." General Schwarzkopf, whose distinguished career included combat in Vietnam and senior military personnel management responsibilities, told the committee:

What keeps soldiers in their foxholes rather than running away in the face of mass waves of attacking enemy, what keeps the marines attacking up the hill under withering machinegun fire, what keeps the pilots flying through heavy surface-to-air missile fire to deliver bombs on targets is the simple fact that they do not want to down their buddies on the left or on the right.

They do not want to betray their unit and their comrades with whom they have established a special bond through shared hardship and sacrifice not only in the war but also in the training and the preparation for the war.

It is called unit cohesion, and in my 40 years of Army service in three different wars, I have become convinced that it is the single most important factor in a unit's ability to succeed on the battlefield.

General Gordon Sullivan, Chief of Staff of the Army, in testimony before the committee on July 20, 1993, emphasized the importance of the bonds of trust between soldiers. Quoting from a letter in which one soldier wrote to another, "I always knew if I were in trouble and you were still alive that you would come to my assistance," General Sullivan added:

Every officer in the United States Army, . . . every soldier [and] noncommissioned officer, . . . everyone in the services must know that . . . I will give up my life for them; and they, in turn will give up their life for me. I have to have trust in them, and them in me.

General Colin Powell, Chairman of the Joint Chiefs of Staff, testified on July 20, 1993, that—

To win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to 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. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.

General Powell noted in response to a question from the committee that the armed forces give constant attention to the development and maintenance of unit cohesion:

Bonding begins on the first day of boot camp. Bonding takes place everytime a GI joins a new unit. A unit must bond as a fighting force before it is sent to the battlefield. Unit members work together, train together, and deploy together sharing experiences that contribute to the development of cohesion. Mutual trust, common core values, self confidence, and realization of shared goals help to form the cohesive military team. Cohesion requires the sacrifice of personal needs for the needs of the unit, subjugating individual rights to the benefit of the team.

While individual initiative is rewarded, the contribution of the team—the cohesive unit—is what guarantees military success.

In his testimony before the committee, Dr. William Darryl Henderson, a decorated combat veteran, former commander of the Army Research Institute, and author of the book, *Cohesion: The Human Element in Combat*, illustrated the role of unit cohesion in transforming a collection of disparate individuals into a motivated, combat capable group willing to endure and prevail amidst the horrors of war:

[T]he nature of the relationship among soldiers in combat is a critical factor in combat motivation. . . .

The real question is: why soldiers fight? What causes soldiers to repeatedly expose themselves to the most lethal environment known, instead of taking cover or leaving the area as quickly as possible.

Combat motivation is not a mythical force that emerges on the battlefield. It must be developed and maintained well in advance of any war. . . .

A central finding of cohesion research is that the nature of modern war dictates that small-unit cohesion is the only force capable of causing soldiers to expose themselves repeatedly to enemy fire in the pursuit of unit objectives.

The confusion, danger, hardship, dispersion, and isolation of modern war requires that soldiers, sailors, and airmen in combat be controlled and led through an internalization of soldier values and personal operating rules that are congruent with the objective, goals, and values of the organization. . . .

To summarize the findings on the importance of unit cohesion, Dr. Henderson cited the distinguished military author, S.L.A. Marshall, who wrote: "I find it to be one of the simplest truths of war that the thing which enables an infantry soldier to keep going with his weapon is the near presence or presumed presence of a comrade."

Dr. David Marlowe, Chief of the Department of Military Psychiatry at the Walter Reed Army Institute of Research, emphasized that unit cohesion must be developed long before a unit is on the battlefield:

Cohesion is not something magical. It does not suddenly happen the moment the bullets come. If it was not there to begin with, it is going to take a long time and some dead and mangled bodies before you get it.

Dr. Marlowe noted that while it is difficult to project current trend into the future, he anticipated that the unit cohesion would continue to be a paramount concern:

[T]echnological advances, smaller forces, battlefield dispersal, and the shift to a force projection modality have made the continuing maintenance of highly cohesive units more important to the future than they have ever been in the past and the immediate present.

In the past, in time of danger we have usually been . . . afforded the luxury of time in which to create highly cohesive units to counterpunch or strike the enemy. When we have not had that luxury, the results, as in the initial results of the Korean conflict, were disastrous for our soldiers.

The speed with which events and their consequences now overtake us make it imperative that our forces be able to make an immediate transition from peace to war. High continuing levels of cohesion are critical to making that transition with maximum unit effectiveness and minimal

short- or long-term negative effects on the mental health, physical health, and performance of the soldier.

The committee notes that the end of the Cold War has not diminished the need for military forces composed of readily available, highly cohesive units. Events in Somalia and the former Yugoslavia, as well as continuing tensions in areas ranging from the Korean border to the Persian Gulf, have demonstrated that units-in-being must be prepared to deploy to hostile, inhospitable conditions, with little advance warning or preparation.

Military personnel policy must facilitate the assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy

One of the defining characteristics of military life is deployment to the field or on board vessels, for training or operations. Although many servicemembers, in garrison, have the opportunity to live off-post or in on-post quarters providing substantial privacy, the armed forces do not train or deploy in a garrison environment. General Colin Powell, Chairman of the Joint Chiefs of Staff, advised the Committee that—

While some military specialties may gravitate to office type settings no Servicemember is guaranteed a particular assignment in a particular location. We are provided assignments anywhere in the world, often at very short notice, based on the needs of the Army, Navy, Air Force, or Marine Corps. Every military man and woman must be prepared to serve wherever and in whatever capacity the Armed Forces require their skills. Even forward deployed units need cooks and typists.

Military personnel policy must reflect the conditions under which servicemembers live while deployed for training or operations. General Powell noted that—

[T]he majority of our young men and women are required to live in communal settings that force intimacy and provide little privacy. It may be hard to contemplate spending 60 continuous days in the close confines of a submarine; sleeping in a foxhole with half a dozen other people; 125 people all living and sleeping in the same 40 by 50 foot, open berthing area, but this is exactly what we ask our young people to do.

During training and deployment, a servicemember's home frequently is a cramped tent, a crowded berth on a vessel, or an open-bay barracks. The little privacy that a servicemember can find in such circumstances is highly valued.

During field training exercises and deployments, every effort is made to ensure that men and women are provided with separate living arrangements. One of the factors in dictating the pace of increasing the opportunities for women in the armed forces has been the need to accommodate sexual privacy with respect to living, rest room, and bathing facilities for deployed troops.

The separation of men and women is based upon the military necessity to minimize conditions that would disrupt unit cohesion,

such as the potential for increased sexual tension that could result from mixed living quarters. General Powell stated that—

Cohesion is strengthened or weakened in the intimate living arrangements we force upon our people. Youngsters from different backgrounds must get along together despite their individual preferences. Behavior too far away from the norm undercuts the cohesion of the group. In our society gender differences are not considered conducive to bonding and cohesion within barracks living spaces.

It is reasonable for the armed forces to take these factors into consideration in establishing gender-based assignment policies and it is reasonable for the armed forces to take this into consideration when addressing issues concerning persons who engage in or have the propensity or intent to engage in sexual activity with persons of the same sex.

The presence in military units of persons who, by their acts or statements, demonstrate a propensity 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 essential to effective combat capability

Military life is fundamentally different from civilian life. The extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion require that the military community, while subject to civilian control, exist as a specialized society. The military society is characterized by laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable in civilian society.

The standards of conduct for members of the armed forces completely regulate a service member's life, twenty-four hours a day, from the day a person acquires military status until the day that person is discharged. Military personnel must be available, at all times, for worldwide deployment to a combat environment. Their conduct is subject to the Uniform Code of Military Justice at all times—on base and off base, on duty and off duty.

The world-wide deployment of U.S. military forces, the international responsibilities of the United States, and the potential for involvement in actual combat frequently require the involuntary assignment of military personnel in circumstances in which their living conditions are spartan and primitive, characterized by forced intimacy and little or no privacy.

In view of the unique conditions that characterize military life, there is broad agreement that lifting the restrictions on the service of gay men and lesbians would be detrimental to the best interests of the armed forces.

General Colin Powell, Chairman of the Joint Chiefs of Staff, testified before the committee on July 20, 1993 that—

[T]he presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces.

When asked about his position in light of the fact that military personnel can be asked to work with DoD civilians who may be gay or lesbian, General Powell responded by describing the unique nature of military service:

Active military service is not an everyday job in an ordinary workplace. It requires a unique blend of skills, ethics, culture, and bonding to ensure an effective warfighting force. There is often no escape from the military environment for days, weeks, and often months on end. We place unique demands and constraints upon our young men and women not the least of which are bathing and sleeping in close quarters. The fact that as military members we serve 24-hours a day under often severely constrained conditions is more than rhetoric, it is a way of life.

General Powell emphasized that the views of the Joint Chiefs were based upon careful, thorough, and open-minded review of the issue:

The Joint Chiefs and I have spent an enormous amount of time considering this issue. We had the President's guidance from January and we owed him and the Secretary of Defense our . . . very best advice on this issue. We challenged our own assumptions. We have challenged the history of this issue. We have argued with each other.

We have consulted with our commanders at every level, from lieutenant [and] ensign all the way up to the commander in chief[s] of the various theaters. We have talked to our enlisted troops. We have talked to the family members who are part of the armed services team. We examined the arguments carefully of those who are on the other side of the issue from us.

He also made it clear that the recommendations of the chiefs were based solely upon considerations of military effectiveness:

Our concern has not been about homosexuals seducing heterosexuals or heterosexuals attacking homosexuals. The first of these so-called problems is manageable and the second so-called problem is punishable. For us, the issue is also not what is acceptable in civilian life, and it is not our place as the uniformed leaders of the armed forces to use our official position to make moral or religious judgments on this issue.

Our perspective is a unique one, and it is the unique perspective of the military and what is best for military effectiveness. The military exists to fight the Nation's wars, to accomplish our war-fighting mission. Hopefully, we are always strong enough to deter wars, but always ready to fight and win . . . if necessary.

General H. Norman Schwarzkopf, U.S. Army (Ret.), who commanded U.S. and Coalition forces in Operations Desert Shield and Desert Storm, testified before the Committee on May 11, 1993:

I am opposed to . . . lifting the ban on homosexuals in the military service, and my opposition grows out of honest

concern for the impact that such a measure would have on the men and women of the armed forces and the resultant reduction in our Nation's ability to protect our vital interests.

[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war . . .

[I]n every case I am familiar with, and there are many, whenever it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered.

Lieutenant General Calvin Waller, U.S. Army (Ret.), who served as the Deputy Commander in Operations Desert Shield and Desert Storm, testified before the Committee on April 29, 1993:

Cohesion and discipline are the soul of a military organization, [and] it is my opinion that [allowing] homosexuals . . . total openness in our Armed forces would cause less ready units or units that would not nearly be as effective as the units we currently have. . . .

There is a big difference between the normal workplace of 8 hour days and a military unit, where units are routinely required to live in close and cramped quarters under the most adverse conditions. Having a casual encounter with an individual who is openly homosexual is one thing. . . . [O]n the other hand, having to be exposed to the same individual on a 24 hour basis, day in and day out, is "a horse of another color."

Command Master Chief David Borne, U.S. Navy, testified on May 11, 1993, that—

One the most compelling arguments against allowing openly gay men and women to serve in the military is privacy. However, there are others. Life aboard ship is not an eight-hour-a-day job. It is 24 hours a day, seven days a week, for as long as six months at a time. And that is if you are lucky. Some of us have done more. We sleep in extremely close quarters together. We use the same head or bathroom facilities, and you have nowhere you can go to just get away from your coworkers. In other words, you live together.

The committee carefully considered the testimony of other witnesses, including current and former members of the armed forces and former Assistant Secretary of Defense Lawrence Korb, who testified on March 31, 1993 that these problems could be overcome through training and education.

The committee is well-aware of the large and effective training establishment maintained by the armed forces. The Committee also notes that training troops to change social attitudes is a formidable task.

The issue, however, is not whether military personnel can be trained to accept gays and lesbians as co-workers. As the committee has noted elsewhere in this report, military personnel may be required to work with gays and lesbians who are DoD civilian employees or contractor employees. No servicemember has the right to refuse to work with a gay or lesbian or to abuse or harass such person. This is not the same, however, as requiring military personnel to share their personal living spaces with individuals who by their acts or statements, demonstrate a propensity or intent to engage in sexual conduct with persons of the same sex.

General Colin Powell, Chairman of the Joint Chiefs of Staff, emphasized the differences in the armed forces between the issue of homosexuality and the issues of race and gender:

Unlike race or gender, sexuality is not a benign trait. It is manifested by behavior. While it would be decidedly biased to assume certain behaviors based on gender or membership in a particular racial group, the same is not true for sexuality. We have successfully mixed rich and poor, black and white, male and female, but open homosexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force. It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.

Major Kathleen Bergeron, U.S. Marine Corps, offered the following observations at the May 11, 1993, hearing:

I do not believe that any amount of sensitivity training or reeducating will change the way Marines think or feel about homosexual behavior because there is nothing more basic to an individual than his or her sexuality. Homosexuals are tolerated in the civilian community because individuals can separate their jobs from the other aspects of their lives. Civilians go home at night and distance themselves from the workplace. If homosexuals were allowed to serve in the military, the rules would have to change. Marines would have to be afforded the same considerations their civilian counterparts now have.

It is one thing to use military training and education to ensure that military personnel treat all persons, including DoD civilian and contractors who happened to be gay or lesbian, with dignity and respect. It would be something very different, however, to direct that military training and education be used to require military personnel to accept shared living arrangements with person who, by their acts or statements, demonstrate a propensity or intent to engage in sexual conduct with persons of the same sex.

Sexual behavior is one of the most intimate and powerful forces in society. In civilian life people are not compelled to live with individuals who are sexually attracted to persons of the same sex, and the committee finds no military necessity to compel persons to do so in the military.

The reason it would be inappropriate to permit persons who engage in or have a propensity or intent to engage in homosexual acts to serve in the unique conditions that characterize military service was underscored by the General Counsel of the Department of Defense on July 21, 1993. In response to the question of why the armed forces would discharge an individual for stating: "I have a propensity to homosexuality, but I have resisted that propensity and have not engaged in any homosexual acts," she said:

The definition of homosexual conduct, which is the basis for discharge, includes a statement by a servicemember that demonstrates a propensity. Now, if you say that you have a propensity, I would say that demonstrates that you have a propensity, and that is all that is required. The military is not required to take the risk that you will not engage in the act.

The committee agrees that the armed forces should not be required to take that risk in the unique conditions of forced intimacy and minimal privacy that characterize military life.

There are important differences between the issue of racial integration and the issues related to the service of gays and lesbians in the armed forces

One of the arguments advanced in favor of lifting the restrictions against the service of gays and lesbians in the armed forces is that the current ban is simply the product of prejudice, similar to the prejudice involved in opposition to racial integration of the armed forces after World War II.

This issue was eloquently addressed by General Colin Powell, Chairman of the Joint Chiefs of Staff, in a letter dated May 8, 1992 to Representative Patricia Schroeder:

I am well aware of the attempts to draw parallels [to] the positions used years ago to deny opportunities to African-Americans. . . . I need no reminders concerning the history of African-Americans in the defense of their Nation and the tribulations they faced. I am a part of that history.

Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human characteristics. Comparison of the two is a convenient but invalid argument. I believe the privacy rights of all Americans in uniform have to be considered, especially since those rights are often infringed upon by the conditions of military service.

The committee notes that opposition to racial integration in the post-World War II period included stereotypes attributing behavior deficiencies to African-Americans. The committee also notes that there is prejudice based upon stereotypes against gays and lesbians in American society. The committee emphasizes, however, that its position on the service of gays and lesbians is not based upon stereotypes, but upon the the impact in the military setting of the conduct that is an integral element of homosexuality.

Homosexuality is not merely an abstract sense of identity. It is intimately connected with conduct. The Random House Dictionary

defines "homosexuality" to mean "sexual desire or behavior directed towards a person or persons of one's own sex." This is consistent with Department of Defense policy, as set forth in DoD Directive 1332.14, the July 19, 1993 policy memorandum of the Secretary of Defense, and the committee's proposed legislation, which are based on conduct. The proposed legislation, for example, defines "homosexual" to mean "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."

While some individuals may view themselves as homosexual, gay, or lesbian based upon thoughts that never ripen into a propensity or intent to engage in homosexual acts, advocates of gay rights have expressly linked sexual orientation to conduct. For example, in a brief challenging the the constitutionality of sodomy laws, which were ultimately sustained by the Supreme Court, *Bowers v. Hardwick*, 478 U.S. 186, the Lambda Legal Defense and Education fund took the position that—

For gay people, sexuality and their sexual orientation play an especially central role in the definition of self. . . . [Sodomy laws] impose an added burden on gay people, blocking their sense of self as well as their sexual fulfillment. . . .

[S]tate regulation of same sex behavior constitutes the total prohibition of an entire way of life. . . .

It is reasonable for the armed forces to take into account the potential behavior of persons who define themselves as homosexual, gay, or lesbian. As General Powell noted in testimony before the House Budget Committee in 1992:

[I]t is very difficult in a military setting, where you don't get a choice of association, where you don't get a choice of where you live, to introduce a group of individuals who are proud, brave, loyal, good Americans, but who favor a homosexual life style, and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive, put them in close proximity, [and] ask them to share the most private facilities together, the bedroom, the barracks, latrines, and showers.

I think that is a very difficult problem to give the military. I think it would be prejudicial to good order and discipline to try to integrate that in the current military structure.

General Powell's comments do not reflect an irrational prejudice against gays and lesbians. His comments, which the Committee endorses, represent a prudent evaluation of the impact of such behavior on the armed forces, and underscore the fact that the policy is based upon prudence, not prejudice.

The restrictions on the service of gays and lesbians are based upon reasonable military person policy considerations

As noted in the preceding sections of this report, the restrictions on the service of gays and lesbians in the ar for are ba

upon reasonable considerations related to military morale, discipline, and unit cohesion.

Some have suggested that the policy is based upon irrational stereotypes, such as the view that homosexuals are predators or that all homosexuals inevitably are attracted to all persons of the same sex.

The committee, in recommending codification of restrictions related to homosexuality, does not rely upon such stereotypical views. The committee notes that some individuals may view themselves as "homosexual", "gay," or "lesbian" based upon intentions that are never acted upon, just as there are persons who view themselves as heterosexual who remain celibate. Likewise, the committee notes that not every gay or lesbian person will find every person of the same sex to be sexually attractive, just as not every heterosexual person finds every person of the opposite sex to be sexually attractive.

It would be irrational, however, to develop military personnel policies on the basis that all gays and lesbians will remain celibate or that they will not be sexually attracted to others. When dealing with issues involving persons of different genders, for example, the armed forces do not presume that servicemembers will remain celibate or that they will not be attracted to members of the opposite sex. On the contrary, the military specifically provides men and women with separate quarters in order to ensure privacy because experience demonstrates that few remain celibate and many are attracted to members of the opposite sex.

Similar considerations apply to the development of policies with respect to homosexuality. The committee agrees with the view of the Department of Defense that it is appropriate to take into consideration that when a person indicates that he or she has a propensity or intent to engage in homosexual act, the armed forces are not required to wait until the person engages in that act before taking personnel action. As noted elsewhere in this report, the courts have sustained the Department's position and the committee agrees.

The committee notes that the under current DoD Directives and the July 19, 1993 Memorandum of the Secretary of Defense, separation is required when there is a finding that the individual has the propensity or intent. The government is not required to prove in each individual case that a service member will not remain celibate or to otherwise prove adverse impact on a specific unit. The committee agrees with this approach. No service member is guaranteed that he or she will remain in any particular unit, and the armed forces must be able to manage their personnel by establishing qualification standards that facilitate worldwide assignment and timely deployment.

Restrictions on the service of gay men and lesbians do not violate the constitutional rights of military personnel

As noted above, the responsibility for establishing the regulations for the government of the land and naval forces is vested in the Congress. The rights of military personnel are established by the Congress and by the Executive Branch, acting under authority granted by the Congress. The Supreme Court repeatedly

phasized that the application of constitutional rights to members of the armed forces may take into account the unique requirements of military service and may differ in substantial degree from the application of such rights in civilian life. The committee has carefully considered the constitutional rights of military personnel and prospective members of the armed forces, including those who are gay and lesbian, in drafting its recommendations.

Under current DoD policy, a servicemember's admission that he or she is homosexual provides a basis for discharge because the admission establishes a rebuttable presumption that the individual is a person who engages in, desires to engage in, or intends to engage in homosexual acts. The admission is not a statement protected by the free speech guarantees of the First Amendment because it "can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct." *ben Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied 110 S. Ct. 1296 (1990). See also *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984). As the court noted in *ben Shalom*, "the Army does not have to take the risk that an admitted homosexual will not commit homosexual acts that will be detrimental to its assigned mission." 881 F.2d at 460-61. The committee agrees with these views and has incorporated these concepts into its recommendations.

The discharge policy, as set forth in current DoD policy and as recommended by the committee, does not violate the due process or equal protection requirements of the Constitution. In response to a question about the differing treatment of homosexual and heterosexual behavior in the armed forces, the General Counsel of the Department of Defense testified on July 21, 1993 that—

The courts have specifically addressed the issue of the distinction that is made within the Uniform Code, within the Manual for Courts-Martial, and within our regulations between homosexual conduct and heterosexual conduct, and have repeatedly deferred to the military judgment that such distinctions are appropriate. [I]t is my view that if those precedents hold, that the courts in the future will reach the same result with respect to [Secretary Aspin's] July 19th policy.

Military personnel do not have a constitutionally protected property interest in continued military service, and there is no protected liberty interest arising from a discharge based on homosexuality. Homosexual conduct is not a fundamental right and a classification based upon the choice of one's sexual partners is not a suspect classification. Moreover, there is no constitutionally protected privacy right to engage in homosexual conduct. See *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984). *Beller v. Middendorf*, 7632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

The committee has taken note of a district court opinion, *Meinhold v. Department of Defense*, 808 F. Supp. 1455 (C.D. Cal.

1993) (holding that there is no rational basis for DoD's restrictions on the recruitment and retention of gays and lesbians). This opinion, which is not consistent with the decisions of other federal courts that have considered the DoD policy, was issued prior to the President's January 29, 1993 announcement of an interim policy, this committee's hearings, and the President's announcement of a revised policy on July 19, 1993. The review undertaken by the Executive Branch and this committee's hearings have established that the presence in the armed forces of persons who, by their acts or statements, have demonstrated a desire or propensity to engage in homosexual acts, would be contrary to the vital interest in ensuring morale, good order, discipline, and unit cohesion in the armed forces.

Legal issues in civilian society

The committee has taken note of legal issues involving gay men and lesbians in civilian society.

The Supreme Court, in *Bowers v. Hardwick*, has ruled that there is no constitutional right to engage in private homosexual acts, and that such acts may be proscribed by the criminal law. Sodomy is a crime in at least 24 states. Although proposals for decriminalization were adopted in two dozen states beginning in 1961, no state has decriminalized sodomy since 1983. Since 1973, a countertrend has resulted in the enactment of criminal laws prohibiting same-sex sodomy in eight states.

Federal law does not prohibit discrimination on the basis of homosexuality. The anti-discrimination provisions of Title VII of the 1964 Civil Rights Act and related statutes do not apply to discrimination based upon sexual orientation. There is no express statutory prohibition against discrimination in the federal civil service on the basis of sexual orientation. The Civil Service Reform Act of 1978, which does not expressly mention sexual orientation, prohibits "discrimination for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." 5 U.S.C. 2302(b)(10). As a result, federal agencies may not establish a blanket exclusion of gays and lesbians, but there are circumstances in which an agency may consider homosexuality to be a factor in an employment decision for a specific position. See, e.g., *Padula v. Webster*, 822 F.2d 98 (D.C. Cir. 1987).

Testimony before the committee indicated that a minority of the states provide protections on the basis of sexual orientation with respect to one or more of the following: public employment, private employment, public accommodations, education, housing, credit, banking, and insurance. Eight states have enacted statutes, fourteen have provided such protections through executive orders, and several state constitutions have been interpreted to provide protections to gay and lesbian employees. Various municipalities have adopted protections for municipal employees, and approximately 25 municipalities have adopted "domestic partnership" laws. Registration under these laws is largely symbolic, but in some jurisdictions the partnership law extends certain employment benefits to the

and private sectors, including police and fire departments, have eliminated restrictions based on sexual orientation.

The committee does not find these developments to be persuasive with respect to proposed elimination of the restrictions on homosexuality in the armed forces, due to the unique conditions of service in the United States military; the combat mission of the armed forces; world-wide deployments; the potential for extreme lack of privacy over extended periods of time while deployed on military operations or on field training exercises; the potential for involuntary assignments; the extraordinary physical, mental, and emotional demands of military combat; and the critical role of unit cohesion in achieving success during military combat.

The committee notes that while some jurisdictions and employers have reduced or eliminated certain restrictions based on sexual orientation, they have done so as a matter of local choice, not as a result of federal statutory or constitutional legal requirements. The courts have sustained a variety of state actions which were challenged as discriminating against gays and lesbians, including—

Police department dismissal of gays and lesbians. *E.g.*, *Childers v. Dallas Police Department*, 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd* 669 F.2d 732 (5th Cir. 1982) *Endsley v. Naes*, 673 F. Supp. 1032 (D. Kan 1987), *Todd v. Navarro*, 698 F. Supp. 81 (S.D. Fla. 1988), *Dawson v. State Law Enforcement Division*, (D.S.C. 1992). See also *Walls v. Petersburg*, 895 F.2d 188 (4th Cir. 1990) (sustaining a law enforcement agency's inquiry into an officer's off-duty same-sex relationship.)

Dismissal or sanctions against teachers based upon matters related to sexual orientation. *E.g.*, *Ross v. Springfield School Dist. No. 19*, 56 Or. App. 197, 641 P.2d 600 (1982); *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir.), *cert. denied*, 470 U.S. 1009 (1984); *Gaylord v. Tacoma School District*.

Presumptions against gays and lesbians prevailing in a child custody dispute. *E.g.*, *G.A. v. D.A.*, 745 S.W.2d 726 (Mo. Ct. App. 1987).

Limiting marital status to unions of persons of the opposite sex. *E.g.*, *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971).

While the committee takes note of the fact that there is no constitutional protection for homosexual acts, and there are no federal statutes which prohibit discrimination on the basis of homosexual orientation in civilian society, the committee emphasizes that these considerations are not essential to its recommendations. The committee makes no judgment as to whether the protection of the civil rights laws should be extended to sexual orientation. The committee's review and its recommendations have focused on the impact of homosexual conduct in the unique setting of military service. Therefore, if the Supreme Court should reverse its ruling in *Bowers* and hold that private consensual homosexual acts between adults may not be prosecuted in civilian society, this would not alter the committee's judgment as to the effect of homosexual conduct in the armed forces. The committee finds that there are no significant developments in civilian society that would require a change in military policy.

The experience of foreign nations

The committee considered testimony on the experience of foreign nations with respect to the service of gay men and lesbians in the armed forces. The committee found that although some nations permit gays and lesbians to serve in their armed forces, such service frequently is accompanied by discrimination which has the result of disadvantaging gays and lesbians with respect to assignments, tenure, or promotions. Even the Scandinavian nations and the Netherlands, which have the most liberal policies, apply a conscription policy that results in dissimilar treatment of homosexuals and heterosexuals. A declared homosexual in those countries has the option of avoiding military service, an option which is not available to heterosexuals.

There is little actual experience in foreign nations with open homosexuality in military service. As Dr. David Segal testified on April 29, 1963:

Even where policy and law allow them to serve, very few soldiers openly declare themselves to be homosexual, perhaps because there is a risk of gay bashing and of career costs to going public. Thus, the number of military personnel in Western nations who publicly identify themselves as homosexual appears to be very small. Even in those countries with non-exclusionary policies, open homosexuals may find themselves referred for psychiatric counseling, and excluded from certain units and certain assignments.

No other nation in the world requires the members of its armed forces to serve under the conditions that face the armed forces of the United States. There is no other nation which has the international responsibilities, overseas deployments, degree of field exercises, daily operating tempo, and frequency of circumstances in which servicemembers must live in conditions of little or no privacy. The committee concludes that while the foreign experience is worth monitoring, it does not provide a relevant basis for permitting gays and lesbians to serve openly in the armed forces of the United States.

The restrictions on the service of gays and lesbians do not provide a basis for harassment or mistreatment of persons who are gay or lesbian

Department of Defense civilian personnel policies do not, as a general rule, preclude the service of gays and lesbians as civilian employees of the Department of Defense. Similarly, civilian contractors who provide equipment and services to the armed forces may employ gays and lesbians. As a result, military personnel who are assigned to work with DoD civilian or contractor employees may be required to work with persons who are gay or lesbian. They are obligated to conduct themselves in such circumstances as military professionals without regard to the sexual orientation of their civilian co-workers.

Similarly, military personnel must conduct themselves off-duty and off-post in a manner that reflects it on the ar. for Harassment of civilians be upon their sexuality inappropriate

The same considerations apply when a member of the armed forces is subject to administrative or disciplinary processing based on allegations related to homosexuality. The proper means of addressing such allegations is through administrative discharge boards or courts-martial, not through harassment or mistreatment of individual servicemembers. Every member of the armed forces, regardless of alleged misconduct, is entitled to be treated with dignity and respect during the course of any military proceedings.

As General Colin Powell said in testimony before the committee on July 20, 1993: "No soldier, sailor, airman or Marine should be subjected to harassment or violence. . . ." The committee agrees that members of the armed forces who harass or mistreat their colleagues bring discredit upon themselves and their military service.

The committee notes that there have been instances of abuse of gay and lesbian servicemembers, including a recent court-martial which resulted in a conviction for murder of a servicemember who was facing discharge for homosexuality. The committee condemns any harassment or mistreatment of gay men and lesbians by members of the armed forces. The Uniform Code of Military Justice provides ample authority to discipline individuals who harass or mistreat civilian employees, members of the civilian community, or fellow servicemembers based upon sexual orientation. The committee expects the Secretary of Defense to monitor this issue and, if necessary, to issue appropriate regulatory guidance.

The July 19, 1993 Secretary of Defense Policy Memorandum

On July 19, 1993, Secretary Aspin submitted to Congress a memorandum which he had issued to the Secretaries of the Military Departments and the Chairman of the Joint Chiefs of Staff entitled "Policy on Homosexual Conduct in the Armed Forces" (hereafter referred to as the "July 19 Memorandum"). Under the July 19 Memorandum, current policies remain in effect until October 1, 1993. The committee reviewed the memorandum during three hearings on July 20, 21, and 22, receiving testimony from the Secretary of Defense, the Joint Chiefs of Staff, the General Counsel of the Department of Defense, and the Military Working Group. The committee carefully considered the July 19 Memorandum and the related hearings in the development of its legislative recommendations.

Based upon the testimony received at the hearing, the committee finds that the Department of Defense has retained the central features of its policy concerning homosexuality in the armed forces. The July 19 Memorandum carries forward longstanding Department of Defense policy, as reflected in the current version of DoD Directive 1332.14, which focuses on conduct that is incompatible with military service—homosexual acts, marriages, and statements that demonstrate a propensity to engage in homosexual acts. The July 19 Memorandum makes it clear that the mandatory discharge policy is necessary because such matters interfere "with the factors critical to combat effectiveness, including unit morale, unit cohesion, and individual privacy."

In the July 19 Memorandum, the description of the basic reasons for aration on the basis of homosexual ts, statements, and marriages remains unchanged, except for minor drafting clarifica-

tions. The July 19 Memorandum, for example, refers to statements which indicate a "propensity or intent" rather than "desire or intent" as under the current version of DoD Directive 1332.14. The committee views this as a useful clarification that will not affect the practical effect of the policy. The General Counsel confirmed that acts and statements that in the past provided a basis for discharge continue to provide a basis for discharge under the July 19 Memorandum.

The basic procedures for processing such cases also remain the same. The government must prove by a preponderance of the evidence that an individual engaged in the proscribed conduct or made the requisite statement. If the case involves a homosexual act, the burden then shifts to the individual to show that he or she meets the traditional criteria for retention in a homosexual acts case (including a showing that the conduct is a departure from the member's usual and customary behavior and the member does not have a propensity or intent to engage in homosexual acts). If the case involves a statement, the individual carries the burden throughout the proceeding of demonstrating that he or she is not a person who engages in or has a propensity or intent to engage in homosexual acts.

The July 19 Memorandum would make two changes in the way that the underlying policy is administered. First, it would continue the interim policy, established on January 29, 1993, that questions concerning homosexuality would not be asked as part of accession processing. Second, it would provide guidance on the conduct of investigations, including criminal investigations, administrative investigations, and commander's inquiries.

The July 19 Memorandum expressly states: "Any changes to existing policies shall be prospective only." The General Counsel confirmed in testimony on July 22 that there is nothing in the July 19 Memorandum which would cast doubt on the legal sufficiency of either the pre-January 29, 1993 policy or the January 29, 1993 interim policy; nor was there anything in the July 19 Memorandum that would provide a basis for a person to challenge successfully the validity of an administrative or court-martial action taken under either the pre-January 29, 1993 policy or under the January 29, 1993 interim policy.

The committee reviewed the investigative guidance during its hearings on July 20-22. The committee notes that military commanders and investigative agencies have broad powers to initiate inquiries, inspections, and investigations. These powers—which are essential to the commander's authority to maintain morale, good order and discipline, and unit cohesion—are subject to the limitations provided in the Uniform Code of Military Justice and the Manual for Courts-Martial. In addition, the Department of Defense and its components issue a variety of directives and guidelines that pertain to investigations.

The committee agrees that guidelines can provide a useful means of ensuring the proper allocation of scarce Department of Defense investigative resources and the establishment of reasonable investigative priorities. The committee is concerned, however, about the number of issues concerning the application of the guidelines that were raised in the committee's hearings. It is important that the

guidelines not be misinterpreted to establish new grounds for challenging administrative or disciplinary proceedings. The committee considered whether it should recommend legislation to clarify the guidance on investigations, but decided not to do so for the following reasons.

First, the July 19 Memorandum expressly states that it "creates no substantive or procedural rights". The significance of this provision was explained by the General Counsel on July 22:

Chairman NUNN. Does the July 19th policy give an individual the right to invalidate an administrative or judicial proceeding or to exclude the use of any evidence in such a proceeding by alleging that an investigation was conducted in a manner contrary to the policy?

Ms. GORELICK. No.

Chairman NUNN. Tell us why.

Ms. GORELICK. These are guidelines for commanders and investigators to try to improve internally our administration of this process. And it is not intended to create any substantive or procedural rights to encumber the necessary flexibility that the military must have in approaching the management of such a large group of personnel.

The General Counsel concurred with Senator Nunn's observation that the guidance does not "set up a whole set of legal obstacles that have to be adjudicated by a judge every time a commander makes a decision. This is * * * commonsense guidance and not a legal standard * * *." This means that the guidance can be reviewed, revised, and clarified on the basis of experience without disrupting past or pending cases.

Second, she confirmed that the references to "credible information" and "reasonable belief" as grounds for initiating investigations and inquiries constituted guidance for commanders to use in making commonsense judgments about the allocation of resources, and did not involve a legal standard, such as probable cause.

Third, the General Counsel assured the committee that the guidance will not be implemented in a manner that establishes unusual restrictions on the authority of commanders to initiate investigations. She noted that while the guidelines provided "additional guidance" for investigating homosexual cases, the guidance was "consistent with the way in which we approach other underlying offenses or problems." The discretion of commanders to initiate investigations was stressed by Secretary Aspin in his testimony before the committee on July 20, 1993:

[I]n the last analysis, this policy leaves it up to the unit commanders. Now, there is going to be from each of [the military] departments and the Department of Defense generally some kind of guidelines for them, but we are essentially going to leave it up to the unit commanders to institute this policy and to make it work.

Secretary Aspin also noted: "It is up to the individual commander to determine when he has credible information."

Fourth, the General Counsel made it clear that a single statement, if the commander determines it to be credible, would provide

basis for an investigation: "If service member A says to servicemember B 'I am homosexual' and * * * service member B goes to the commander and says 'service member A said he is homosexual,' if the commander believes service member B, that is absolutely grounds for initiating a discharge." Fifth, the General Counsel clarified the guidance which provided that an activity such as "association with known homosexuals at a bar, possessing or reading homosexual publications, or marching in a gay rights rally" did not, by itself, provide a basis for initiating an investigation:

In assessing what is credible information to initiate an inquiry, a commander may consider whether such actions as frequenting gay bars, reading gay literature, or marching in a gay rights parade are non-verbal statements which show a propensity to engage in homosexual acts. What the policy recognizes is that heterosexuals, as well as homosexuals, might march in gay rights parades, frequent a gay bar, [and] read gay literature. * * * [C]ommanders should be sensitive to the legitimate interests of service members in what they read and who their friends are and what they believe in.

The General Counsel also made it clear that the guidance regarding presence at gay bars did not restrict the authority of commanders to consider any conduct or statements occurring at such establishments, nor did it restrict the discretion of commanders to debar establishments off-limits or to consider information about conduct or statements occurring at such an establishment. In summary, the committee finds that the July 19 Memorandum, explained in the Department's authoritative testimony before the committee, is consistent with past DoD separation policy. The committee also received assurances from the Department of Defense that the investigative guidance would be implemented in a manner that would provide commanders with the discretion they needed to maintain good order and discipline. In developing the committee's legislative recommendations, the committee specifically took into account the Department's position that the Memorandum does not affect past cases and does not establish substantive or procedural rights with respect to future cases. The committee will carefully monitor the implementation process to ensure that the policy is implemented in a manner consistent with the Department's testimony and the statutory framework recommended by the committee.

IV. SECTIONAL ANALYSIS

Section 546 would establish an express statutory policy concerning homosexuality in the armed forces.

Modification (sec. 546(a))

The statutory policy would be set forth in section 654 of title 10, United States Code.

Findings (10 U.S.C. 654(a))

This provision would set forth the findings that describe the basis for the policy recommended by the committee. The findings reflect long standing Department of Defense policy, as set forth in DoD Directive 1332.14, that "[h]omosexuality is incompatible with military service * * * [because 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."

Policy (10 U.S.C. 654(b))

This provision would codify the standards and procedures for separation on the basis of homosexuality. Separation is authorized for persons who engage in homosexual acts, statements and marriages.

A servicemember would be discharged if there is an approved finding that the individual has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts. A homosexual act, as defined in 10 U.S.C. 654(f), means "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." It also includes any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in such an act. This reflects the definitions in DoD Directive 1332.14 and the July 19, 1993 Memorandum issued by the Secretary of Defense.

The servicemember who may be retained in such circumstances only if there is a further finding that the member has demonstrated that: the conduct is a departure from the servicemember's usual and customary behavior; it is unlikely to recur; it was not accomplished by use of force, coercion or intimidation; the member's continued presence is consistent with the interests of the service in proper discipline, good order, and morale; and the member does not have a propensity or intent to engage in homosexual acts. These standards reflect current Department of Defense policy in DoD Directive 1332.14 and the July 19, 1993 Memorandum issued by the Secretary of Defense.

A servicemember would be discharged if there is an approved finding that the member has made a statement that he or she is a homosexual. The committee intends that this provision be interpreted in accordance with the testimony of the General Counsel of the Department of Defense on July 21 and 22, 1993 that the term "statement" includes a nonverbal statement, and that an act may constitute a non-verbal statement. The servicemember has the opportunity to submit evidence in rebuttal, but the servicemember may be retained only if there is a further finding that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

The restriction concerning statements demonstrating a propensity or intent to engage in homosexual acts reflects current Department of Defense policy, as contained in the Secretary of Defense's July 19, 1993 Memorandum. It is based on the presumption that when a member of the armed forces makes a verbal or nonverbal

ement that "I am homosexual," or any other words to the same effect, the member is stating that he or she is a person who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in" homosexual conduct.

The committee agrees that it is reasonable for the armed forces to presume that when a person uses the term "I am homosexual," the individual engages in, attempts to engage in, has a propensity to engage in, or intends to engage in impermissible conduct. It is appropriate for the armed forces to separate the individual from military service without waiting until the individual's propensity or intent to violate the UCMJ ripens into specific conduct prejudicial to good order and discipline. See *ben Shalom v. Marsh*, 881 F.2d 464 (7th Cir. 1989), cert. denied 110 S. Ct. 1296 (1990).

The committee intends that this provision be interpreted in accordance with the following points, which are consistent with the interpretations made by the General Counsel of the Department of Defense during her testimony before the committee on July 21 and

first, once the government introduces evidence that the member stated that he or she is a homosexual, the burden shifts to the member and remains with the member throughout the proceeding to demonstrate that he or she is not a homosexual as defined in the statute (i.e., a person who engages in, attempts to engage in, has the propensity or intent to engage in homosexual acts).

Second, a member cannot rebut the presumption simply through promise to adhere to military standards of conduct in the future; the member can rebut the presumption by a statement to the effect that he or she has a propensity towards homosexuality but has not acted on it.

Third, if the member in rebuttal offers evidence to the effect that he or she does not engage in homosexual acts or has a propensity not to do so, that does not shift the burden to the government. Because the burden remains on the member throughout the proceeding, the member bears the burden of persuading the factfinder by a preponderance of the evidence that the rebuttal is more credible than the original statement (e.g., by proving that the original statement was made in jest). If the fact-finder determines that the evidence in rebuttal does not overcome the presumption, the evidence is legally sufficient to sustain a discharge.

Fourth, the presumption applies when the individual makes a verbal or nonverbal statement that he or she is homosexual, or uses words a reasonable person would take as such a statement, such as "I am gay," "I am lesbian," "I have a homosexual orientation," "I am sexually attracted to person of the same sex", or nonverbal statements to the same effect. As noted by the General Counsel, implementing regulations would make it clear that the final assessment as to what the words were intended to convey would be made by commanders.

The policy setting forth the grounds for discharge is conduct-based. There are no on-post/off-post, on-duty/off-duty, or public/private distinctions. The armed forces have a legitimate interest in the behavior of military personnel at all times and places, off-post as well as on-post. The Supreme Court has expressly rejected the requirement that military offenses be "service-connected." *Solorio*

v. United States, 483 U.S. 435 (1987). Accordingly, the prohibitions apply at all times and in all places. This is consistent with the July 19, 1993 Policy Memorandum and the testimony of the Department of Defense General Counsel.

The committee agrees with Department of Defense policy that acts and statements which form a basis for administrative discharge may include such conduct even when the act or statement occurs at a time when the conduct would not necessarily be subject to criminal prosecution under the Uniform Code of Military Justice (e.g., while the individual is acting in a civilian capacity, such as before joining the armed forces or when a reservist is in his or her civilian capacity). This is consistent with general military personnel policy, under which a person's qualifications for service may be affected by the circumstances of his or her civilian life, even if the act in question occurs at a time when the individual is not subject to military criminal jurisdiction under the Uniform Code of Military Justice. The committee's proposal continues current policy. The committee recognizes the authority of the Secretary of Defense, in developing implementing rules consistent with the statutory standards for discharge, to provide guidance on the treatment of information that involves isolated matters that are remote in time.

The committee notes that nothing in this provision precludes commanders from taking action to separate a member under another provision of law or to refer cases to trial by court-martial.

Entry standards and documents (10 U.S.C. 654(c))

This provision would require the Secretary of Defense to ensure that the standards for enlistment and appointment of members of the armed forces reflect the restrictions based on homosexual acts, statements, and marriages. This reflects current DoD policy and the July 19, 1993 Memorandum issued by the Secretary of Defense.

The committee also recommended a provision that the codified restrictions in 10 U.S.C. 654(b) be set forth in the enlistment contract and in similar documents used in connection with the appointment of officers. The purpose of this provision is to provide potential members of the armed forces with an opportunity to consider the implications of the policy prior to making a commitment to join the armed forces. This document is not a prerequisite to separation action under this provision, and the government need not prove that the individual read or signed an accession document that contained a copy of subsection (b) in order to take administrative or disciplinary action.

Required briefings (10 U.S.C. 654(d))

The committee recommends codifying the requirement, established in the January 29, 1993 interim policy and continued in the July 19, 1993 Memorandum by the Secretary of Defense, that the military justice briefings which military personnel receive upon entry into military service and periodically thereafter include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including sexual harassment as well as the restrictions based upon homosexual acts, statements, and marriages. This briefing is not a prerequisite to separation action under this provision, and the government

not prove that the individual received such a briefing in order to take administrative or disciplinary action.

Rule of construction concerning avoidance of military service (10 U.S.C. 654(e))

This provision would make it clear that nothing in this section could be construed to require separation processing when an individual has engaged in conduct or made a statement simply for the purpose of obtaining a discharge (e.g., to avoid combat duty or a deployment).

Definitions (10 U.S.C. 654(f))

The provision recommended by the committee would define the terms "homosexual," "bisexual," and "homosexual act." These definitions reflect DoD Directive 1332.14 and the July 19, 1993 memorandum issued by the Secretary of Defense.

Regulations (sec. 546(b))

Under the provision recommended by the committee, the Secretary of Defense would be required to revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement the policy that would be set forth in 10 U.S.C. 654.

Savings provision (sec. 546(c))

It is the committee's view that the policy in effect prior to January 29, 1993, the January 29, 1993 interim policy, the July 19, 1993 policy, and this provision are all consistent with applicable constitutional requirements. Section 546(c) would make it clear that nothing in this provision may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense.

Sense of Congress concerning accession questions (sec. 546(d)(1))

This provision expresses the sense of Congress that the suspension of questioning concerning homosexuality as part of accession processing under the January 29, 1993 interim policy should be continued, but the Secretary of Defense may reinstate such questions, or such revised questions as he deems appropriate, if necessary to effectuate the congressional policies concerning homosexuality in the armed forces.

Although the law has prohibited homosexual conduct expressly since the enactment of the Articles of War of 1920, the systemic questioning of recruits about sexual orientation was not initiated until World War II. Department of Defense records indicate that specific questions on enlistment documents were not introduced until 1956. Accession questioning was suspended as part of the January 29, 1993, based upon a recommendation of the Joint Chiefs of Staff. The Chiefs have recommended, and the President has agreed, that the policy of not asking questions about homosexuality during accession processing should be continued.

The committee notes that the current enlistment form does not ask about every possible indication of indiscipline as part of the ac-

cession processing. The committee, however, does not believe that the suspension of the question should be made permanent as a matter of statutory law. It may well be that experience under the suspension could lead the Department of Defense to conclude that the question should be reinstated. Therefore, the committee's recommendation makes it clear that the Secretary of Defense retains discretion to reinstate accession question if the Secretary determines that it is necessary to effectuate the restrictions on homosexuality.

Sense of Congress concerning self-incrimination (sec. 546(d)(2))

Article 31 of the Uniform Code of Military Justice provides members of the armed forces with a privilege against self-incrimination, including a rights-warning requirement, when they are accused or suspected of committing a criminal offense. This privilege does not apply, however, with respect to acts or statements which provide a basis for administrative action, including separation, when such acts or statements do not constitute technical criminal offenses.

The practical impact of the investigative guidance which the Secretary of Defense has drafted will not be clear until there has been some experience over a period of time. Should that experience demonstrate that there are a significant number of occasions involving questions related to homosexuality in which the rights warning requirement of Article 31 is not applicable, then it may be desirable to consider whether such questions should trigger protections similar to the privilege against self-incrimination. Accordingly, this provision expresses the Sense of Congress that the Secretary of Defense should consider issuing guidance governing the circumstances under which servicemembers questioned about homosexuality should be afforded warnings similar to the Article 31 warnings concerning the privilege against self-incrimination.

Subtitle-Other Matters

SEC. 671. POLICY CONCERNING HOMOSEXUALITY OF THE ARMED FORCES.

(a) CODIFICATION.-(1) Chapter 37 of title 10, United States Code, is amended by adding at the end the following new section:

"§ 654. Policy concerning homosexuality in the armed forces

"(a) FINDINGS - Congress makes the following findings:

"(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

"(2) There is no constitutional right to serve in the armed forces.

"(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

"(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

"(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

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

"(7) 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.

"(8) Military life is fundamentally different from civilian life in that-

"(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

"(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

"(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

"(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

"(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

"(12) The worldwide deployment of United States military forces, the international

responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

"(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

"(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

"(15) 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.

"(b) POLICY.-A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

"(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated 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;

"(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

"(E) the member does not have a propensity or intent to engage in homosexual acts.

"(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

"(3) That the member has married or attempted to marry a person known to be of the same biological sex.

"(c) ENTRY STANDARDS AND DOCUMENTS.-(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

"(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

"(d) REQUIRED BRIEFINGS.-The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

"(e) RULE OF CONSTRUCTION.-Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that-

"(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

"(2) separation of the member would not be in the best interest of the armed forces.

"(f) DEFINITIONS.-In this section:

"(1) The term 'homosexual' means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian'.

"(2) The term 'bisexual' means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

"(3) The term 'homosexual act' means-

"(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

"(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)."

(2) The table of sections at the beginning of such chapter is amended by adding the following:

⁶⁵⁴.Policy concerning homosexuality in the armed forces.

(b) REGULATIONS.-Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall revise the Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a).

(c) SAVINGS PROVISION.-Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a) may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654.

(d) SENSE OF CONGRESS.-It is the sense of Congress that-

(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice).

Gays in the Military? A Cautionary Tale

By KEVIN M. McCRAVE

Bill Clinton's desire to lift the ban on homosexuals in the military brings to mind a troubling incident from my own military experience more than a generation ago.

When I turned 18 late in 1945 I discovered that I had missed the war but not the draft. After five weeks of boot camp, I was shipped to San Francisco's Treasure Island, the Navy base where new recruits waited to receive their orders.

It was dark and raw as only San Francisco can be in January when five of us mustered on a pier to await a ship's boat from the USS Warrick. The new recruits were told the Warrick was an Attack Cargo Auxiliary, which sounded promising. We soon discovered this was a fancy name for a cargo carrier. Even so, we were excited at the prospect of shipping out. Lugging our bags, we arrived on board late at night. We unhooked our berths from their vertical positions and settled down to sleep.

The awakening was sudden, panic-filled. A hand was caressing my leg, running up the inside of my thigh. A dim figure ducked away as I lashed out, kicking, swinging a fist and striking air. There was no more sleep that night.

Our voyage began the next day, our destination Honolulu. But the excitement was gone, at least for me. At the end of a long day riding the sea's rolling swells, I took a 12-inch box-end wrench from the engine room and retreated to my berth. Hanging on to the wrench under my pillow, I slept.

My sense of unease did not go away even when the seasickness passed. On the fourth day at sea I visited the ship's post

office. The second-class petty officer manning the tiny cubicle greeted me warmly. Grinning broadly, he stepped back from the counter, dropped his dungarees, fondled himself and made an obscene invitation. I walked away.

Whom do you tell? I chose a third-class petty officer on my watch. He laughed at what I told him. "You're on a French cruiser, kid." He told me to watch out.

It was in the open now, a subject for discussion among the new recruits. Each of us had been accosted, patted, propositioned. Though we were in different divisions, we flocked together for meals, averting our eyes when one of "them" leered in our direction.

There were five such aggressive homosexuals that we knew of on board this ship with almost 250 men. They were all petty officers. Their actions were enough to poison the atmosphere on the Warrick. Meals, showers, attendance at the movies, decisions about where you went on the ship alone — all became part of a worried calculation of risk.

After two weeks at sea, I received the whispered news that the smallest and most vulnerable of our "team" had been sodomized in the paint locker. When I looked at the bearer of this news, I saw that there were tears in his eyes. "Why are they doing this to us?" he asked.

It was a good question. The comments of some petty officers suggested that the rapid discharge of so many veterans at the end of the war had brought with it a slackening of discipline. On board the Warrick this disciplinary neglect had loosened the restraints on homosexual

behavior — the threat of discharge was the surest of these — and created an atmosphere where exhibitionism and lewd action were commonplace.

All homosexuals aren't rapists. But in this closed male society, with its enforced communal living, unchecked homosexual appetites wrought havoc. The atmosphere on the USS Warrick in January of 1946 does have a present-day parallel — the atmosphere of fear that rules in today's prisons.

Is there a lesson here for Mr. Clinton? I think so. The U.S. Navy certainly won't turn into a collection of horror ships like the Warrick if he succeeds in ending the ban on homosexuals in the military. But my experience does suggest that military officials are right to worry that "good order and discipline of the services will be impaired" if the ban is lifted.

A postscript: When the Warrick reached Pearl Harbor in that long-ago winter, a new executive officer reported aboard. On the sixth day in port the PA system blared a summons "for all those personnel being transferred to assemble at the quarterdeck."

I joined the rush topside to see who was going ashore. The ship's rail was lined with crewmen cheering as five petty officers debarked into a P-boat.

I went below decks and ran back up. When the P-boat cleared the side, I dropped my box-end wrench into the blue waters of Pearl Harbor.

Mr. McCrave is a retired businessman living in New Jersey.



REPLY TO
ATTENTION OF

DASG

29 APR 1993

MEMORANDUM FOR Office of the Deputy Chief of Staff for Personnel
ATTN: BG T.C. Jones, Director of Human
Resources)

SUBJECT: Potential Medical Implications of Homosexuality
in the Military

1. This correspondence is in response to your memorandum of 12 April 1993 concerning the above subject.
2. The Army Medical Department (AMEDD) concurs that DoD policies related to homosexual or heterosexual behavior should be based upon military personnel, unit, and mission concerns and considerations. The AMEDD has participated actively with the Office of the Deputy Chief of Staff for Personnel in evaluating the implications of homosexuality in the Army, including the impact on readiness and on the Army health care system.
3. The Army Medical Department has assessed the impact of rescission of the ban on military service by open homosexuals on the medical care system. It should be noted that the focus of the positions in the AMEDD response is upon the behavior associated with homosexuality, not sexual preferences, per se, which was the focus of the OASD(HA) statement. Homosexuality, with its propensity for male-to-male sex, increases the incidence of HIV (and other) infections and increases medical costs.
4. Enclosed are answers to questions raised in your memorandum dated 9 April 1993 to the Director, OSD Working Group.
5. My points of contact are COL Tomlinson and MAJ Patton, (703) 756-0135.

Encl
as

Alcide M. Lanoue
ALCIDE M. LANOUE
Lieutenant General
The Surgeon General

MEDICAL RISK
BLOOD SUPPLY AND OCCUPATIONAL EXPOSURE TO BLOOD

Question: What are the risks to the blood supply and what would be the risks of occupational exposure to blood?

Answer: Homosexual male-to-male sex has a negative impact on the safety and adequacy of the blood supply and increases the risk of occupational exposure to HIV-infected blood.

Supporting evidence:

The Food and Drug Administration (FDA), Public Health Service, Department of Health and Human Services, recognizes the risk of homosexual behavior as a threat to the safety of the country's blood supply.³ The FDA mandates that any male donor who has had sex with another man since 1977, even once, is ineligible to donate, and is to be placed on a permanent deferral list. This exclusion applies in both civilian and military blood banks.

Thousands of surgical patients and hemophiliacs have been infected with HIV and have AIDS from transfusions of blood and blood products donated by HIV-infected individuals prior to availability of the laboratory test for HIV infection. Even with the ability to test for HIV infection, males who have had sex with another male continue to be excluded because they are a high risk population and because of the "window" of time between infection and development of a positive test.⁴

The Army Medical Department is dependent on active duty soldiers for much of its blood supply. In fact, 84% of donated blood in the Army blood program in the 4th quarter 1992 came from military donors. Homosexual males who have had sex with another male since 1977 are ineligible to donate blood in peacetime as well as in war.

Adequate amounts and safe blood for transfusion are critical in both peace and war. To maximize safety of the blood, it is routinely tested for the HIV virus and hepatitis B and C viruses, as well as the presence of syphilis. Each donor is also asked a series of questions designed to assess the risk of the donor's blood being tainted by these and other pathogens. One of the exclusions mandated by the Food and Drug Administration and enforced by military and civilian blood banks is that any male donor who has had sex with another man since 1977, and any female donor who has had sex with a man who in turn has had sex with another man since 1977, may not donate blood.³ Again, these people are placed on permanent deferral lists. This is based upon the scientifically valid reason to minimize risk of HIV transmission.

In the militarily unique requirement for blood for transfusion on the battlefield, blood may be needed urgently and collected locally without the benefit of the usual testing and exclusion of high risk donors. Every deployable hospital as part of its basic load has 180 blood bags intended for emergency blood collection and transfusion in the field.

Finally, the risks of infection of blood-borne pathogens, notably HIV and Hepatitis B virus, through occupational exposure, are well known. OSHA has recently issued an extensive regulation designed to minimize the occupational risk of exposure to blood and body fluids.¹⁸ Significantly, the OSHA blood-borne pathogen standard is extremely difficult to maintain and apply to the military while in a mission deployed status. The potential for exposure to blood from non-battle injuries as well as on the battlefield is obvious and threatens both military first aid providers in line units as well as medical personnel.

Open integration of homosexuals into the military will increase the likelihood of bringing in members of the group with the very highest risk of acquiring HIV: male homosexuals. Because of the documented and recognized risk of HIV infection in this group, their blood is unacceptable for donation, and these soldiers would not be available as blood or plasma donors. Furthermore, they pose a risk to others in the field during training or actual operations, through exposure to their blood resulting from accidents or injury.

Conclusion: The military setting provides unique requirements for safety in executing the Army blood transfusion program and for preventing the transmission of bloodborne pathogens (especially HIV and hepatitis B) in the field setting. Homosexual males would comprise a pool of ineligible blood donors and as a group are at high risk of infection by HIV and Hepatitis B, both significant blood-borne pathogens which can infect other soldiers through exposure to blood in peace and war.

MEDICAL RISK
SEXUALLY TRANSMITTED DISEASES

Question: What effect would lifting the exclusion policy have on Sexually Transmitted Disease (STD) rates?

Answer: Rescission of the ban on military service by open homosexuals would have a negative impact on the Army's efforts to reduce the incidence of HIV infection and other STDs.

Supporting evidence:

Several factors help to explain higher rates of STD in homosexual men: 1) Homosexual men have significantly more sexual partners than heterosexual men. Kinsey et al. have estimated that the average homosexual man has approximately 1000 partners in his lifetime. 2) Many partners are anonymous sexual contacts, making it difficult to interrupt disease transmission through contact tracing. 3) Homosexual men have additional potential sites of primarily asymptomatic infection, serving as silent reservoirs of disease. 4) Homosexual men may be more reluctant to seek medical care due to fear over revealing their sexual preference.¹⁶

If a greater proportion of homosexual males comprises the force, this addition of a known high risk population for HIV prevalence and transmission will increase the incidence of HIV infection (occurrence of new cases) in the Army.¹⁷

Male homosexuals and bisexuals are at increased risk of acquiring sexually transmitted diseases.^{1,2,7,8,9,11,12,13,14,15,16} Compared with heterosexual men, homosexual men experience significantly greater rates of gonorrhea, syphilis, and type B viral hepatitis. Other significant STDs resulting from receptive anorectal intercourse practices in homosexual/bisexual men include anorectal venereal warts, herpes simplex, and chlamydial proctitis.

Conclusion: HIV and other STD rates will increase to the extent that the proportion of homosexual males in the Army increases because homosexual/bisexual men are allowed to enter and remain in the Army.

MEDICAL RISK
READINESS AND DEPLOYABILITY

Question: What effect would lifting the homosexual exclusion policy have on readiness and deployability from a medical standpoint?

Answer: Rescission of the ban on military service by open homosexuals would have a negative impact on readiness and deployability.

Supporting evidence:

Readiness and deployability are unique to the military and are vital to the defense of the country.

There are a number of medical conditions which would prevent any soldier from deploying. Most are temporary, a few are permanent. Readiness suffers when soldiers are nondeployable. Homosexuals are more likely to be nondeployable for health reasons, either because of HIV or high rates of sexually transmitted diseases.

Male homosexuals are at higher risk for acquiring HIV infection, as well as other sexually transmitted diseases (STD), as a consequence of their male-to-male sexual practices within the high risk civilian and military homosexual male populations. By DoD policy, HIV-infected soldiers are non-deployable and are assigned to CONUS units.¹⁹ However, by current Army policy, these soldiers may be assigned to TOE units.²⁰ When these units deploy, the HIV-infected soldiers must remain behind, and replacements must be found to take their places in the deployed unit. Of the approximately 461 HIV-infected soldiers currently serving on active duty, approximately half are in TOE positions. Non-deployable HIV-infected soldiers are problematic in making assignments and cause an imbalance in distribution if only assigned to nondeployable units.

In addition to HIV and AIDS, male homosexuals are at disproportionately higher risk for a variety of other sexually transmitted diseases, with a wide spectrum of morbidity and mortality. Several of these diseases are severe enough to require hospitalization and convalescence, especially if simultaneously infected with more than one, which would preclude deployment.

As the force structure is reduced, the impact on deployability by each new HIV-infected soldier is magnified, even at current rates of infection. Moreover, the rate of infection can be expected to increase if the exclusion policy is lifted and the proportion of male homosexuals soldiers comprising the force increases. HIV-infected soldiers are not deployable in

compliance with DoD policy. There are currently approximately 461 soldiers on active duty who cannot deploy overseas even in an emergency.

Costly preventive measures such as increased frequency of HIV screening may be necessary to reduce the risk to the Force of HIV transmission. Resources to accomplish this must be found or diverted from other medical programs, decrementing readiness.

Preventive measures will not reduce the HIV and STD rates to zero. Soldiers in general and homosexuals in particular will continue to require medical care. Once again, resources to provide this care must be provided, at the expense of other medical programs. The costs involved can be staggering. A GAO report in 1990 on the "Effects of AIDS in the Military" projected a range of costs to DOD over a ten year period of \$1 to \$10 billion, assuming various incidence rates of HIV infection.²

Readiness suffers when the blood supply is threatened and the pool of eligible donors is reduced. All male homosexuals who have had sex with another male since 1977 will be ineligible to donate blood.³

Conclusion: A male homosexual soldier is significantly likelier than a heterosexual soldier to be nondeployable for medical reasons related to HIV infection. If HIV-infected, the soldier will be permanently nondeployable. Male homosexuals are more likely to acquire sexually transmitted diseases which can render them nondeployable, such as gonorrhea, syphilis, and hepatitis B.

Readiness from a medical standpoint will suffer if the restriction is lifted. The impact would be felt at the unit level, when the homosexual soldier cannot train and deploy for health reasons. Likewise, the impact would be felt Army-wide in terms of the military blood program and of the burden placed on the Army health care system.

MEDICAL COSTS

Question: What effect would rescission of the ban on military service by open homosexuals have on the cost to the Army health care system?

Answer: Homosexual male-to-male sex has had a profound effect on increasing medical costs within the United States and within the U.S. Army.

Homosexual male-to-male sex is the practice most responsible for the AIDS epidemic within the United States.^{4,5,6,10} Homosexual male-to-male sex and intravenous drug abuse are the two practices most responsible for transmission of HIV within the United States.⁴ The homosexual male and the intravenous drug abuse populations form the reservoir of HIV infection from which HIV infection is spread to the pediatric and heterosexual populations of the United States.

HIV/AIDS Surveillance Report, issued February 1993 by the Centers for Disease Control and Prevention (CDC), Public Health Service, U.S. Department of Health and Human Services, reports on the total 249,199 adult/adolescent cases of AIDS in the United States from the onset of the AIDS epidemic through December 1992. Of the total, 142,626 (57%) were in the exposure category "men who have sex with men"; 57,412 (23%) were in the exposure category "injecting drug use"; and 15,899 (6%) were in the exposure category "men who have sex with men and inject drugs". In the exposure category "heterosexual contact" were 16,254 (7%), the majority being in two sub-categories, "sex with injecting drug user" and "sex with bisexual male".⁴

In the U.S. Army, epidemiologic studies have found the greatest risk factor for HIV infection to be male-to-male sex.¹⁷

Medical costs are in terms of money, personnel, supplies and equipment, education, surveillance, investigations, and other infection control measures.²¹

The U.S. Army and the Army Medical Department have been in the forefront of the fight against AIDS, with a scientific, compassionate, and comprehensive program to interrupt the chain of HIV transmission and to protect the uninfected soldier. Any Army or DoD policy which fosters in any way homosexual male-to-male sex resulting in an increased incidence of HIV infection in soldiers with its resulting increase in costs will have a negative impact on military readiness and on the U.S. Army health care system.

Selected Bibliography

1. Holmes KK, Mardh PA, Sparling PF, Wiesner PJ. *Sexually Transmitted Diseases*, 2d Ed. New York, NY: McGraw-Hill; 1990.
2. Benenson AS. *Control of Communicable Diseases in Man*, 15th Ed. Army Field Manual FM 8-33. Washington, DC: American Public Health Association; 1990.
3. Food and Drug Administration. *Revised Recommendations for the Prevention of Human Immunodeficiency Virus (HIV) Transmission by Blood and Blood Products*. Bethesda, MD: Dept of Health and Human Services; April 23, 1992.
4. Centers for Disease Control and Prevention. *HIV/AIDS Surveillance*. Atlanta, GA: Dept of Health and Human Services; February 1993.
5. Centers for Disease Control and Prevention. Projections of the Number of Persons Diagnosed with AIDS and the Number of Immunosuppressed HIV-Infected persons--United States, 1992-1994. *MMWR*, December 25, 1992;41:RR-18.
6. Kelly JA, Murphy DA, et al. Acquired Immunodeficiency Syndrome/Human Immunodeficiency Virus Risk Behavior Among Gay Men in Small Cities. *Archives of Internal Medicine*. 1992;152:2293-2297.
7. Owen, WF. Sexually Transmitted Diseases and Traumatic Problems in Homosexual Men. *Annals of Internal Medicine*. 1980;92:805-808.
8. Darrow WW, Barrett D, Jay K, Young A. The Gay Report on Sexually Transmitted Diseases. *American Journal of Public Health*. 1981;71:1004-1011.
9. Daling JR, Weis NS, Hislop TG, et al. Sexual Practices, Sexually Transmitted Diseases, and the Incidence of Anal Cancer. *The New England Journal of Medicine*. 1987;317:973-977.
10. Smith TW. Adult Sexual behavior in 1989: Number of Partners, Frequency of Intercourse and Risk of AIDS. *Family Planning Perspectives*. 1991;23:102-107.
11. Collier AC, Meyers JD, Corey L, et al. Cytomegalovirus Infection in Homosexual Men. *The American Journal of Medicine*. 1987;82:593-601.
12. Quinn TC, Stamm WE, Goodell SE, et al. The Polymicrobial Origin of Intestinal Infections in Homosexual Men. *The New England Journal of Medicine*. 1983;309:576-582.

13. Corey L, Holmes KK. Sexual Transmission of Hepatitis A in Homosexual Men. *The New England Journal of Medicine*. 1980;302:435-438.
14. Hutchinson CM, Rompalo AM, Reichart CA, Hook EW. Characteristics of Patients With Syphilis Attending Baltimore STD Clinics. *Archives of Internal Medicine*. 1991;151:511-516.
15. Centers for Disease Control. Hepatitis A Among Homosexual Men - United States, Canada, and Australia. *Journal of the American Medical Association*. 1992;267:1587-1588.
16. Judson FN, Penley KA, Robinson ME, Smith JK. Comparative Prevalence Rates of Sexually Transmitted Diseases in Heterosexual and Homosexual Men. *American Journal of Epidemiology*. 1980;112:836-843.
17. Levin LI, Peterman TA, Lasley-Bibbs VA, et al. Risk Behaviors Associated with Recent HIV Seroconversion Among Young Men in the United States Army. Poster presented at the VIII International Conference on AIDS, Amsterdam, The Netherlands, 19-24 July 1992.
18. Federal Register, Occupational Exposure to Bloodborne Pathogens; Final Rule. 29 CFR 1910.1030, December 6, 1991.
19. Department of Defense. Human Immunodeficiency Virus (HIV-1). DoD Directive 6485.1, March 19, 1991.
20. Department of Army. Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV). AR 600-110, 11 March 1988.
21. U.S. General Accounting Office. Defense Health Care - Effects of AIDS in the Military. GAO/HRD-90-39; February 1990.