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ORAL ARGUMENT SCHEDULED FOR APRIL 11, 1994

NO. 91-5409

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

JOSEPH C. STEFFAN

Plaintiff Appellant

**LES ASPIN
SECRETARY OF DEFENSE, ET AL.**

Defendants Appellees

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

BRIEF FOR AMICI CURIAE

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The Institute for Media Education*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties And Amici. Except for the following, all parties, intervenors and *amici* appearing before the district court and this Court are listed in the Briefs for Appellant and Appellee: Naval Aviation Foundation, Inc., and The Institute for Media Education, which have conditionally filed this brief pending the grant of their Request to File out of Time and Motion to Participate as *Amici Curiae*.

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

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


RONALD D. RAY

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and Circuit Rule 26.1, the Naval Aviation Foundation, Inc. and The Institute for Media Education, *amici curiae* herein, state that neither have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

The Naval Aviation Foundation, Inc., a not-for-profit corporation organized under the laws of Virginia, is dedicated to the promotion, preservation, education, support, advancement of, and participation in, the naval aviation sciences. It is uniquely equipped to provide relevant information to the public concerning the role and history of American naval character from the days of John Paul Jones and the effects of permitting openly homosexual naval officers to be commissioned or to serve in the American armed forces. The members of the Board include a former Chairman of the Joint Chiefs of Staff and other distinguished flag officers who are also graduates of the Naval Academy.

The Institute, a non-profit educational and research agency chartered in the Commonwealth of Virginia in 1985, is a scientific research and educational center studying "sex science" and mass media, disseminating relevant data and providing education to the public regarding the effects of both of these revolutionary change agents on personal and national attitudes and behavior, law and public policy. The Institute seeks to provide other scientists, researchers, educators, media organizations, government agencies, decision makers and the general public with viable information and reliable scientific research on the a/effects of media in the areas of criminology, sexuality and image perception, substance and child abuse, as well as serving as an alternative to the largely tainted area of "sex science" scholarship.

These *amici* are uniquely able to provide scientific data not before the Court concerning the a/effects of homosexual behavior which are relevant to the Court's determination in this case.

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

NO. 91-5409

JOSEPH C. STEFFAN,

Plaintiff-Appellant

v.

LES ASPIN,
SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees

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

BRIEF FOR *AMICI CURIAE*

NAVAL AVIATION FOUNDATION, INC.
&
THE INSTITUTE FOR MEDIA EDUCATION

STATEMENT OF THE ISSUES PRESENTED

1. Whether homosexuality, or those defining themselves as homosexual, are compatible with American Naval Character or service?
- 2.. Whether homosexual orientation can be separated from homosexual behavior?
3. Whether a federal court can substitute its judgment about the first principles of American miliary service involving Naval moral standards where overwhelming numbers

of senior military leaders (90-98%) have affirmed the critical significance and military necessity of retaining that standard?

4. Whether Mr. Steffan's dismissal from the Naval Academy can even be challenged in view of Steffan's admission of serious misconduct, violations of the U.C.M.J., and deceptions revealed by him in *My Country, My Right to Serve*?

SUMMARY OF THE ARGUMENT

The American Naval Character is rooted in virtue. Its unyielding moral standard and characteristics are the mark and animating spirit of Naval leadership, which standard must be maintained for the Naval Academy to accomplish its vital mission: producing future naval combat commanders imbued with the same character and spirit.

This case is only indirectly about Joseph Steffan. It is primarily about whether the Naval Academy, and by extension the American military, will be permitted to maintain its high founding standards, including morality, which have stamped the unique character of the American Naval Services upon generations of Naval leaders. In the formative years at the Academy, the midshipman's orientation is directed toward receiving instruction and developing leadership and character marked with virtue, honor, courage, patriotism, self-sacrifice, discipline, honesty, authority, subordination, faithfulness, temperance, chastity, fidelity, and duty, the traits of the American Naval Character first epitomized in the flesh by John Paul Jones. The U.S. Supreme Court has repeatedly observed that "the military is, by necessity, a specialized society apart from civilian society." Parker v. Levy, 471 U.S. 733, 743 (1974). Therefore, the midshipman's military life, as well as his social and family life, is always expected to fully reflect those character traits.

Immoral and dissolute practices, any vice or breach of virtue or fidelity necessarily must be stopped immediately and corrected or it will undermine the high standards of the Academy and subvert and alter American Naval Character. Active duty and retired flag and general officers overwhelmingly reject any lifting or altering of homosexual exclusion laws or policy and federal courts should continue to defer to their considered military judgments.

In an analysis of Joseph Steffan's own personal statements, particularly those given to Mary Ann Humphrey and published in Humphrey's book, *My Country, My Right to Serve*, Dr. Judith Reisman demonstrates Steffan's consistent failure to adhere to Navy regulations and to exhibit the traits of the American Naval Character. (See Appendix). Steffan admits to homosexual acts while at the Naval Academy to Humphrey, but deceives, misleads and lies to his superior officers when his homosexuality is originally investigated, and expects others at the Academy to be more loyal to him than to the institution. Dr. Judith Reisman's groundbreaking study on homosexual orientation and character is also contained herein as a Report in the Appendix. Dr. Reisman's content analysis of 21 years of *The Advocate* reflects the irreconcilable nature of the homosexual character with American Naval character.

Joseph Steffan has chosen to declare and define himself as a homosexual, and hence to forcibly seek to challenge and thereby alter the Academy's long standing first principles. History and science testify that homosexual orientation and character significantly conflicts and differs dramatically from the virtue, moral standard and disciplined life expected of a midshipman dedicated to upholding the first principles of the

American Naval Service. Only through the deceptive abuse and manipulation of words and images mired in an alchemy of semiotics and science can the American Naval Character and homosexual character be given the illusion of reconciliation. The data finds that homosexual orientation is inseparable from homosexual practices and character, and is incompatible with military service and American Naval Character.

Strict and faithful adherence to such an absolute moral standard and virtuous character is difficult, but that has been the charge to those who are selected to defend the first principles of America and its way of life. Through the spectacle of human weakness and failure it is convenient to belittle and degrade these long-standing but fragile and intangible principles. Progressive moderns *in every generation* have declared war upon absolute and ruling life principles, claiming them to be antiquated, even discriminatory, and urged their removal; first with a little compromise here and then there, then with outright abandonment.

Comes the Naval Aviation Foundation onto the field against this domestic enemy, carrying the eternal standard first borne in the American Navy by John Paul Jones for all to see. A standard proven sure, where blood is spilled in every clime; on land, on sea, and in the air where the mettle of a man's real character is sorely tested true, and victory won or lost. America and the cause of liberty can ill afford to see this standard fall.

INTRODUCTION

This brief applies the disciplines of history and science to contrast American military character, as developed over 200 years since the War for Independence, with homosexual character and orientation. The perspective of this brief is not legally narrow but places *Steffan* into its broader intellectual, scientific, social and historical context.

While the military and American Naval character are well conceived and amply recorded, and while anecdotal, literary, historic and artistic, data on homosexuality abound there has been little, if any way to capture and measure homosexual character and orientation. This brief presents, for the first time, scientifically reliable data which authoritatively speaks to stable and distinctive qualities of homosexual character and orientation.

ARGUMENT

I. Homosexuality Has Been Incompatible, Unacceptable and a Disqualification from American Military Service Since Before the Founding of the American Navy in 1775.

Overview, Origin and History of Disqualification of Homosexuals from the Naval Services

*"It ought to give any young man entering the Naval Service a certain thrill of elation that he became the heir of a long and glorious tradition, and that, studying the Articles controlling that Service, he is familiarizing himself with regulations, some of which, couched in almost exactly the same words, were obeyed by John Paul Jones and were read to the ship's company of the 'Bon Homme Richard.'"*¹

Charles Richard Williams

In 1775, John Adams chaired the Marine Committee, which created the American Navy, fitting out five American vessels, the first being the *Alfred* in honor of the founder of the British fleet. Congress named as First Lieutenant one John Paul Jones, who helped fit out the *Alfred*. Adams, who became the second President of the United States, personally compiled the original regulations for the government of the new American Naval forces. The regulations, entitled "The Rules for the Regulation of the Navy of the United Colonies," contained as its first article what has been termed as expressing "the keynote of the animating spirit of the naval service." On November 28, 1775, the Continental Congress adopted John Adams' compilation.²

Virtue, the "keynote" within the first article, entitled "Commander's Duties of Supervision and Correction," consisted of John Adams' simple mandate that:

¹ Lieutenant Commander Leland F. Lovette, USN, *Naval Customs: Traditions and Usage* (Annapolis: United States Naval Institute, 1939).

² See, U.S. Navy, *Naval Justice* 18 - 19 (1945). See also, Lovette, *supra*, p. 60-61; Catherine Drinker Bowen, *John Adams and the American Revolution* (Boston, Massachusetts: Little, Brown & Company, 1951), p. 547-549.

The commanders of all ships and vessels belonging to the thirteen United Colonies are strictly required to shew in themselves a good example of **honor and virtue** to their officers and men, and to be very vigilant in inspecting the behaviour of all such men, and to **discountenance and suppress all dissolute,³ immoral,⁴ and disorderly practices**, and also such as are contrary to the rules of discipline and obedience, and to correct those who are guilty of the same, according to the usage of the sea.

John Adams' original mandate remains fully intact, reenacted by Congress in 1956 as 10 U.S.C. § 5947, "Requirement of Exemplary Conduct," which still charges American naval officers that:

All commanding officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted under their command or charge.

Importantly, 10 U.S.C. § 5947, enacted only 38 years ago, is much broader in scope than its 219-year-old predecessor. Most notably, the statute now includes "others in authority in the naval service" and confirms the duty to:

"guard against . . . all dissolute and immoral practices . . . and to take all necessary and proper measures . . . to promote and safeguard the morale, the physical well-being, and the general welfare . . . [of those] under their command or charge."

³ Dissolute: Loose in behavior and morals; given to vice and dissipation; wanton; lewd; luxurious; debauched; not under the restraints of law; as a dissolute man; dissolute company. (2) Vicious; wanton; devoted to pleasure and dissipation; as a dissolute life. See, *Noah Webster's First Edition of an American Dictionary of the English Language* (San Francisco: The Foundation for American Christian Education, 1967).

⁴ Immoral: Inconsistent with moral rectitude; contrary to the moral or divine law; wicked; unjust; dishonest; vicious. Every action is immoral which contravenes any divine precept, or which is contrary to the duties which men owe each other. Wicked or unjust in practice; vicious; dishonest; as an immoral man. Every man who violates a divine law or a social duty, is immoral, but we particularly apply the term to a person who habitually violates the law. *Noah Webster's First Edition of an American Dictionary of the English Language, supra*.

This statute stands as the foundation of American Naval Service mandating VIRTUE and imposing a duty upon those in authority in the Naval service to legally oppose any action to condone or permit dissolute and immoral practices, including any manifestation of immorality including homosexuality. Secondly, forbidding entry of homosexuals, including those persons self-identified as homosexual, will accomplish the lawful purpose by necessary means, and prompt dismissal is a “necessary and proper measure” to safeguard the morale, physical well-being, and general welfare of the officers and enlisted Naval personnel.

10 U.S.C. § 5947 is not optional; it burdens those in authority with a positive duty to take action. To not regard the homosexual lifestyle as a “dissolute and immoral” practice would essentially eviscerate 10 U.S.C. § 5947 from its plain meaning. Even more conspicuous is the fact that Congress has determined homosexuality to be “dissolute and immoral,” enacting the so-called “Sodomy Statute,” 10 U.S.C. § 925 (Article 125 UCMJ). Among other things, this statute subjects those of the same sex who engage or attempt to engage in oral and anal copulation to punitive action by court martial. This reason is obvious: Congress labeled such acts as “unnatural” and proscribed them in particular, because the essence of such acts are dissolute and immoral. Additionally, discharging a person oriented toward or desiring and/or performing oral and anal copulation with same sex partners is a most effective way to curb homosexual activity because these acts are the most common manifestations and preferred sexual techniques among homosexuals.⁵

⁵ See, Alan P. Bell & Martin S. Weinberg, *Homosexualities* 106, 330 (Table 9) (1978); Dr. Charles Silverstein and Felice Picano, *The New Joy of Gay Sex* (New York: HarperCollins Publishers, 1992).

Pursuant to its powers under Article I, Section 8, clause 14 of the U.S. Constitution, Congress enacted both 10 U.S.C. § 925 and § 5947. The Supreme Court has consistently held that this power is plenary. See, Chappel v. Wallace, 462 U.S. 296, 300-301 (1983). Although the President, by virtue of his authority as Commander in Chief, has the inherent power to also regulate the Naval service, such exercises of power cannot be contrary to the express will of Congress. Additionally, when the President, or other members of the executive branch (i.e., Secretary of Defense, the service secretaries, etc.) are acting pursuant to powers delegated to them by Congress, such actions must not be contrary to expressed congressional intent. See, U.S. v. Symonds, 120 U.S. 46, 49-50 (1886). This is because, by virtue of the Constitution, Congress' plenary power to regulate the Naval service trumps all contrary executive action. Finally, even if the President had or were to issue an Executive Order to admit homosexuals into the naval service, this would be unlawful because the action would be contrary to the express intent of Congress as set forth in 10 U.S.C. § 925 and § 5947. For additional insightful instruction of this point, see Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 634-638 (1952) (Jackson, J., concurring).

By virtue of their commission, officers of the Naval forces are legally bound to execute the law as directed within Title 10. Naval officers must not execute orders which are "contrary to the Constitution, [or] the laws of the United States." See, UCMJ, Articles 92(1)(c) & 90c(2)(a)(ii); 10 U.S.C. § 892.

II. The First Principle of American Naval Service is Virtue, Imposing Absolute Moral Obligations, Including Abstaining from Vice and Conformity of Military Life and Conversation to the Moral Law Based upon the Old and New Testaments.

American Naval and Military Character

It was President John Adams, who has been called the “father of the American Navy,” who linked together the value system of the Declaration of Independence with that of the Constitution. In an address to the military on October 11, 1798, President Adams was able to state with firm conviction that:

We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”⁶

President John Adams
October 11, 1798

The definitions from the original Naval Regulations of “dissolute” and “immoral” are from Noah Webster’s 1828 First American Dictionary, which also clarified the intended meaning of VIRTUE as follows:

VIRTUE The radical sense is strength, from straining, stretching, extending. . . 1. Strength; that substance or quality of physical bodies, by which they act and produce effects on other bodies. . . 2. Bravery; valor. This was the predominant signification of *virtus* among the Romans. . . 3. **Moral goodness; the practice of moral duties and the abstaining from vice, or a conformity of life and conversation to the moral law.** In this sense, *virtue* may be, and in many instances must be, distinguished from *religion*. The practice of moral duties merely from motives of convenience, or from compulsion, or from regard to reputation, is *virtue*, as distinct from *religion*. The practice of moral duties from sincere love to

⁶ John Adams, *The Works of John Adams, Second President of the United States*, Charles Francis Adams, Ed., (Boston: Little, Brown, 1854), Vol. IX, p. 229, October 11, 1798; David Barton, *The Myth of Separation* (Aledo, TX: WallBuilder Press, 1990), p. 123.

God and his laws, is virtue and religion. . . 4. A particular moral excellence; as the *virtue* of temperance, of chastity, or charity. . . 5. Acting power; something efficacious. . . 6. Secret agency, efficacy without visible or material action. . . 7. Excellence; or that which constitutes value and merit. . . 10. Legal efficacy or power; authority. A man administers the laws by *virtue* of a commission.⁷

There was great reason for George Washington and John Adams to declare, and for the Continental Congress to enact, "virtue" as the animating spirit of the American Army and Navy because they knew it was critical to successful and victorious military command. The Hebrews termed virtue the "mana aspect" of the spirit because it gave a person the ability to transform difficult circumstances and events without apparent means. When fighting and winning outnumbered, as during the American War of Independence, virtue and moral leadership by example were essential.⁸

To order the Academy to admit Mr. Steffan or any homosexual will break the foundation standard of American Naval Service, undermine moral principle and forever alter the standard for American Naval Character. It is simply not possible to ignore the crucial and historic role of virtue and morality in shaping American military character. Moral principle cannot be compromised. Moral principle is fixed, unyielding and not relative as to time or circumstance. Many who defend moral principles without yielding are today called "extremist," "hard-liners," "bigots," and "homophobic," but principle exists externally. When principles fall into relativism and subjectivism, making each man a law unto himself, the ultimate result is immorality and sexual anarchy.⁹ As

⁷ Noah Webster's *First Edition of an American Dictionary of the English Language*, *supra*

⁸ Colonel Ronald D. Ray, *Military Necessity & Homosexuality* (Louisville, KY: First Principles Press, 1993).

⁹ Suzanne Fields, "Moral Deregulation," *The Washington Times*, 27 May 1993. Sen. Daniel Moynihan of New York, a Democrat, describes a contemporary phenomenon called "defining

much as the media and some leaders may want to believe otherwise, Christian moral principles formed the foundation of our nation. The U.S. Supreme Court so held as a matter of fact, law, and history in 1892.¹⁰ John Adams made the point abundantly clear that America and her new Naval Service were established on a Christian moral standard.

The *general principles*, on which the fathers achieved Independence, were the only Principles in which that beautiful Assembly of young Gentlemen [representing the numerous religious denominations of the country at the time of the Revolution] could Unite. . . And what were these *general Principles*? I answer, the general Principles of Christianity, in which all these Sects were United: And the *general Principles* of English and American Liberty, in which all those young Men United, and which had United all Parties in America, in Majorities sufficient to assert and maintain her Independence.

Now I will avow, that I then believed, and now believe, that those general Principles of Christianity, are as eternal and immutable, as the Existence and Attributes of God; and that those Principles of Liberty, are as unalterable as human Nature and our terrestrial, mundane System.¹¹

President John Adams

Over two hundred years ago, virtue was established by the Continental Congress as the "animating spirit" of the American armed forces. "Virtue" and its moral characteristics became the very heart of American military character, and made the

deviancy down." - He refers to our capacity for "moral deregulation" - redefining deviant behavior so that it appears to be normal. He specifically refers to the high level of violent crime, the exploding numbers of unwed mothers and single parent families that we all know weaken social standards: "We are getting used to a lot of behavior that is not good for us."

¹⁰ *See, Church of the Holy Trinity v. United States*, 143 U.S. 457, 466 (1892), in which Justice Brewer, delivering an opinion for a unanimous Supreme Court, stated unequivocally:

"It is also said, and truly, that the Christian religion is a part of the common law . . . These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that **this is a Christian nation.**"

¹¹ Letter of John Adams to Thomas Jefferson, June 28, 1813; *see The Adams-Jefferson Letters*, 2nd Vol., Lester Cappon, ed., (Chapel Hill, NC: University of North Carolina, 1959), pp. 339-370.

American military unique. Those general characteristics included absolute moral principles from primitive Christianity.

Most Americans still abide by the normative Old and New Testament principles upon which the United States was founded.¹² Examples of these principles are clearly represented in the spiritual law of the Ten Commandments and related judgments, statutes and precepts, and the natural law teachings of the political and philosophical founders of Western democratic thought such as William Blackstone, John Locke and the authors of the Federalist Papers. These sources, which are inextricably woven into the fabric of our American Republic, point to an objective law order outside of man which obligates him to respect authority, behave morally, and to accept responsibility and obligation without complaint. This natural law declares that such acts as murder, adultery, theft, lying, rebellion against authority, sodomy, etc. are objectively wrong and are not subject to compromise because of semantics, "political clout," individual preference, intimidation or judicial decision.

George Washington, when serving as the nation's first Commander-in-Chief, approved the court-martial sentence and prompt separation of a young officer for lying and attempted sodomy.¹³ In sharp contrast, President Clinton has ignored the moral issue

¹² Barton, *supra*.

¹³ The following historical account gives a clear indication of General Washington's strong disapproval of lying and homosexuality in the American military:

"At a General Court Martial whereof Colo. Tupper was President (10th March 1778) Lieutt. Enslin of Colo. Malcom's Regiment [was] tried for attempting to commit sodomy, with John Monhort a soldier; Secondly, For Perjury in swearing to false Accounts, [he was] found guilty of the charges exhibited against him, being breaches of 5th Article 18th. Section of the Articles of War and [we] do sentence him to be dismiss'd [from] the service in Infamy. **His Excellency the Commander in Chief approves the sentence and with Abhorrence and Detestation of such Infamous Crimes orders Lieutt. Enslin to**

and failed to enforce the very same laws. In so doing, President Clinton thus began to surrender the animating spirit, principle and character of American military service contrary to American history, existing laws and the Constitution. The compromise policy 'Don't ask, don't tell, maybe pursue' is built upon deception and is also illegal.¹⁴ Such radical rejection of American law and tradition will require coercion or worse to force or intimidate military members to accept open homosexuality.

"Let us not forget that violence does not and cannot exist by itself; it is invariably intertwined with the lie. They are linked in the most intimate, most organic and profound fashion: violence cannot conceal itself behind anything except lies, and lies have nothing to maintain them save violence. Anyone who has once proclaimed violence as his method must inexorably choose the lie as his principle."¹⁵

Alexander Solzhenitsyn

Those lies and deceptions are no more apparent then in this case of Joe Steffan's claim for readmission to the Naval Academy. Witness the panel ruling which rested upon a falsehood that Mr. Steffan's performance as a midshipman was "untarnished by even a scintilla of misconduct."

be drummed out of Camp tomorrow morning by all the Drummers and Fifers in the Army never to return; The Drummers and Fifers [are] to attend on the Grand Parade at Guard mounting for that Purpose." [Emphasis added].

See, George Washington, *The Writings of George Washington*, John C. Fitzpatrick, ed. (Washington: U.S. Government Printing Office, 1934), Vol. II, pp. 83-84, from General Orders at Valley Forge on March 14, 1778.

¹⁴ Legal opinion rendered by Dr. Charles Rice, Constitutional Law Professor at Notre Dame Law School, June 14, 1993.

¹⁵ Alexander Solzhenitsyn, *Critical Essays and Documentary Materials*, edited by John B. Dunlop, Richard Haugh, and Alexis Klimoff, Norland, (Blemon, Massachusetts, 1973), p. 497.

III. Homosexual Character, Orientation and Behavior are Totally Irreconcilable and Incompatible with American Naval Service.

Steffan's case, according to the court panel, turned on the crucial fact that he never engaged in homosexual sex while in the Academy. Steffan apparently refused to answer questions about his sodomy and homosexual behaviors in discovery. However, according to news accounts and a book which published an interview given by Mr. Steffan, Steffan publicly acknowledged his own deception and violation of felony statutes contrary to the spirit and first principles of American Naval Service, not to mention the Academy honor code. **Steffan admitted deception, lying and committing homosexual acts while he was a midshipman:**

I did have a few experiences, but they were few and far between and very, secretive, conservative . . . in my case, the situations I did encounter tended to be with other midshipmen in non-Academy surroundings.

*My Country, My Right to Serve*¹⁶

¹⁶ Mary Ann Humphrey, *My Country, My Right to Serve: Experiences of Gay Men and Women in the Military, World War II to the Present* (New York: HarperCollins Publishers, 1990). Humphrey's gay favorable book, with a Foreword by Rep. Gerry Studds, often cited during the public debates of 1993, contains numerous references to homosexual misbehavior in the military including sodomy, vice, crime, lies, violence and immoral behaviors by those interviewed, which are contained in an Appendix hereto. See also, Francis, Samuel, "Gays in Uniform? Don't Ask," *Washington Times*, 3 December 1993, p. A-23.

IV. Active Duty and Retired Military Leaders Overwhelmingly Reject Lifting of the Homosexual Exclusion Laws and Policy and Federal Courts Should Defer to their Considered Military Judgments.

Active Duty and Retired Flag and General Officers overwhelmingly reject lifting the homosexual ban. The military leadership with extraordinary experience has given its considered military judgment. Military Necessity¹⁷ requires deference to sound military judgment.

Two surveys were taken of the entire community of active duty and retired flag and general officers on the subject of removing the disqualification from homosexual service in the armed forces. A confidential survey of all 1,040 serving Generals and Admirals was taken between June 7, and 21, 1993 by the Military Personnel Task Force of the House Republican Research Committee with the statistical analysis prepared by the American Security Council. Of the 621 respondents, 96.9% supported retaining the ban on homosexuals in the military.¹⁸ The Survey of all retired Flag and General officers with 50% 2,800 responding 90% opposed lifting the ban.¹⁹ These surveys represent more than 100,000 years of American commissioned officer service. Their sound military judgment and answer was a resounding no.

In accordance with military necessity, the U.S. courts have consistently deferred to the judgment of the military leadership in cases regarding the military policies and rights of

¹⁷ Colonel Ronald D. Ray, USMCR, *Gays: In or Out?* (McLean, VA: Brasseys (US), 1993). The *Oxford English Dictionary* defines necessity as "the constraining power of something...with defining terms as absolute, conditional, logical, moral, natural, philosophical and physical." In relation, "military necessity" is defined as the doctrine whereby the military may utilize any measure required to provide for successful operation. These may be measures that are not always contemporaneous with its civilian counterpart. *The Compact Edition of the Oxford English Dictionary*, Volume I:A-O (New York: Oxford University Press, 1971).

¹⁸ National Security Report, Vol. XXXVI No. 5, (American Security Council, July 1993), p. 7.

¹⁹ Debbie Howlett, "Retired Top Brass," *U.S.A. Today*, 3 June 1993, p.10.

military personnel. The courts have recognized the special nature and expertise of military leaders, the seriousness of the institution's mission of national defense and the necessity for maintaining good order, discipline and military effectiveness. The entire military, including its own separate judicial system, is constructed with these considerations in mind. The weight of Supreme Court precedent has confirmed the lower Federal courts' respect for both the military's special nature and the considered judgment of military leaders.

No better synopsis of the doctrine of military necessity can be found than Justice Rehnquist's very brief majority opinion in *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which the following appears:

...we have repeatedly held that "the military is, by necessity, a specialized society from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). See also *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life," *Schlesinger v. Councilman*, *supra*, at 757, in order to prepare for and perform its vital role. See also *Brown v. Glines*, 444 U.S. 348, 354 (1980).

To accomplish its mission the military must foster instinctive uniformity and subordination requiring obedience, unity, commitment and esprit de corps. See, e.g., *Chappell v. Wallace*, *supra*, at 300; *Greer v. Spock*, 424 U.S. 828, 843-844 (1976) (POWELL, J., concurring); *Parker v. Levy*, *supra*, at 744. The essence of the military service "is the subordination of the desires and interests of the individual to the needs of the service." *Orloff v. Willoughby*, *supra*, at 92.

"Within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." *Parker v. Levy*, *supra*, at 751. In the

context of the present case, when evaluating whether military needs justify a particular restriction, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. See *Chappell v. Wallace, supra*, at 305; *Orloff v. Willoughby, supra*, 93-94. The Court notes that military regulations inherently demand uniformity, restrict individuality and require personal sacrifices which is at the heart of the profession of arms and military life.

Uniformity in all aspects of military life among military personnel builds cohesion and military team work and properly subordinates individual desire, expression and preference to military necessity, no proof is required -- no scientific studies, no historical examples, no exhaustive arguments to make this fact a fact. Even expert testimony to the contrary is not enough to contradict the military's "considered professional judgment." Clearly the Court has allowed the military very broad authority to restrict even fundamental constitutional rights of its members in the interest of military necessity and combat effectiveness.

CERTIFICATE OF SERVICE

I hereby certify on this 28th day of March, 1994, that the foregoing Brief for *Amici Curiae* Naval Aviation Foundation, Inc. and The Institute for Media Education contains no more than the number of words permitted by Circuit Rule 28(d), and further certify that the above-referenced brief was served this day upon the following counsel for appellant, appellees, and *amici curiae* by causing two copies to be mailed via the U.S. Postal Service, first-class, postage-prepaid, to them at the following addresses:

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RONALD D. RAY

APPENDIX

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Report on Homosexual Character and Orientation

The following comments are in response to a request by *Amici*,
Naval Aviation Foundation, Inc.
and for
The Institute for Media Education, Inc.
by
Judith A. Reisman, Ph.D.

March 28, 1994

Report on Homosexual Character and Orientation

A Content Analysis of Two Decades of *The Advocate* Reveals a "Gay" Sociosexual System and Confirms Homosexual Orientation as Inseparable from Homosexual Behavior and Character by Judith A. Reisman, Ph.D.

A Verifiable Measure of Homosexual Character and Orientation *The Scientific Method in "Content Analysis"*

Behavioral science researchers have long sought ways to identify the relationship between thought, or orientation, and behavior. Of the variety of techniques and theoretical perspectives for the analysis of mass media information, one of the most practical and oft-used techniques is that of content analysis. As a research methodology, content analysis has a long and distinguished history. Its history and techniques are described in Krippendorff's book *Content Analysis: An Introduction into its Methodology* (1980). Krippendorff provides reliable technical and theoretical assistance for the analyst of complex content schema. Since the Lasswell team's successful use of this technique to predict enemy movements in World War II, and especially since Krippendorff's operationalization of its methodology, CA has emerged as a verifiable¹ and increasingly diverse investigatory tool for predictive behavior of the population under study.²

Like all research techniques, the mission of CA is to gather an accurate representation of data with which to provide new knowledge, and insights in order to *predict future conduct*. Content Analysis is a reliable guide to *outcomes* based on practical methods of careful inquiry into the actual and symbolic meaning of messages and other information systems.³ The technique has been used to examine a myriad of information delivery systems in electronic, audio and print media; for example, prime time

¹ E. Michael Jones, *Degenerate Moderns*, (San Francisco: Ignatius Press, 1993) p. 106.

² Judith Reisman, *Images of Children, Crime and Violence in Playboy, Penthouse, and Hustler*, (Washington, D.C.: U.S. Department of Justice Prepared under Grant No. 84-JN-AX-K007), 1990.

³ Krippendorff, *Content Analysis: An Introduction into its Methodology* (1980) pp. 21-22.

television drama, soap operas and cinema, magazine fiction, textbooks, advertising in general, alcohol advertisements in college newspapers, popular music and so on.

Professional educators utilize CA to study gender, racial, political and religious bias in educational media, while the technique has been used to predict suicide rates based on violent events covered by the mass media. Most important, *positive media messages have been as consistently predictive of resulting pro-social conduct* as have negative media messages been predictive of anti-social conduct.⁴ This author's Content Analysis of child pornography and violence described the content of the *Playboy* genre's use of children so accurately, that *Playboy temporarily* eliminated child pornography from its magazine, predictably to offset public outrage.⁵ Content Analysis would be the single most reliable source of data on "sexuality" extant, for this analysis can be validated or publicly repudiated by anyone who examines the media under study.

**The Homosexual's Defining Behavior, Same Sex Practices,
is not Comparable to the Union of Woman and Man in the Act of
Generation and is Subversive of Existing American Institutions and Laws**

One of the most often cited and poorly documented methods of behavioral study is that of "self-report" or "recall" survey data and especially "sexual" survey data. Since there is no way to replicate or validate the data, such surveys may be considered art but certainly not science. The Steffan case relates directly to orientation in the critically intimate area of human sexual conduct. The tools of content analysis permit homosexual orientation and character traits to be measured. The content analysis technique measures not only what a group *says* about their conduct, but what they actually *do*.

Why *The Advocate* ?

⁴ Reisman, *Images, supra*. See bibliography for pro-social message effects in American populations.

⁵ Judith Reisman, "Self-Censorship" in Dolf Zillmann, Jennings Bryant, et al, *Media, Children & the Family* (NJ: Erlbaum, 1994).

The Advocate (founded in 1967 as a paper of and for the movement) [is] the main source for gay news coverage in the United States....*The Advocate* seems more clearly aimed at middle-class gay men and has a far greater emphasis on a high-consumption life style than does *Gay Community News*. With a circulation of 90,000 and a paid staff of thirty, the *Advocate* is the most important of the gay publications, and in recent years it has shown itself to be open to some of the more controversial (and non-commercial) trends in the gay world.⁶

The Advocate, is a glossy, 4-color publication which seeks to represent "gay culture" to its readership and the larger society. Each *The Advocate* issue, from 1972 through September 1992, has contained homosexual pornography alongside hundreds of sexually-related articles and personal classified advertisements soliciting sex and sexual partners. Nothing similar exists in heterosexual pornography,⁷ and certainly not in any non-pornographic, heterosexual publication.

In September, 1992, partly in order to gain wider circulation at public newsstands, schools and libraries and to attract more "mainstream" advertisers, *The Advocate* isolated its pornography and prostitution solicitations into a companion magazine *The Advocate Classifieds*, which now showcases four-color photos of full-frontal (and rear) male nudity. *The Advocate Classifieds*,⁸ with its phallic displays and plethora of explicit sex advertisements, is a division of *The Advocate* in every way; produced by the same editorial staff, marketed together and mutually advertised.

Extensive market research data⁹ confirm the acceptance of *The Advocate* within the established national press.¹⁰ Randy Shilts (*And the Band Played On*) called *The Advocate*, "the only national gay newsmagazine." Frank Browning (*The Culture of Desire*) developed this further in the following:

⁶ Dennis Altman, *The Homosexualization of America, The Americanization of the Homosexual* (NYC: St. Martins Press, 1982), p. 164-165.

⁷ Reisman, *Images*, *supra*.

⁸ The logo: "Dirty Minds Want to Know".

⁹ Reisman, *Ibid*.

¹⁰ In 1993-94, among others, *The Advocate* interviewed NEA Director Jane Alexander, *Playboy* publisher Hugh Hefner, television actress Cybill Shepherd, "conservative icon" Barry Goldwater.

Only one gay publication, *The Advocate*, has built any substantial national circulation. Since it was taken over by professional journalists in 1990, *The Advocate* has established itself as a serious magazine. Once devoted primarily to beefcake and community boosterism, it has recently broken important stories, secured interviews with major entertainment celebrities (gay and straight), and reported on scandals in which gay people have acted as nastily as straight people. Yet if in its editorial pages it fancies itself the Newsweek of gay journalism, *The Advocate's* financial base,-its personals and phone-sex ads-betrays a profile of gay America just as narrow as the bronzed white-man images in Calvin Klein underwear ads....

Just as balloon breasted blondes made millions for the owners of *Playboy* and *Penthouse*, hairless white boys have been used by gay advertisers to sell their products and by gay publishers to sell their books.....They are, or claim to be, "whole life" papers that tell gay, mostly urban, male readers what it means to be gay in America. They set the paradigm on fashion from coupling rituals to facial hair to body piercing. And for general-interest newspapers, newsmagazines, and television news shows, even for sitcoms and films, they are the resource book that guide the straight coverage of gay life.¹¹ (Emphasis added).

What better way to understand the character of a group than to read what that group says to each other in its own words, week after week, month after month, year after year, decade after decade within the pages of its most established and acclaimed national magazine, *The Advocate*? What we gain is a clear model of the lifestyle, the character of the readership as demonstrated in the behaviors that are written about in articles and portrayed in illustrations. Much as the *Saturday Evening Post* captured normative American culture in the first half of the 20th century,¹² *The Advocate* is, for homosexuals, the primary voice capturing the essence of "gay culture."¹³

The Sample Represents a Universe of 446,000 "In Search Of" Paid Advertisements

The Advocate data presented here represent a 21-year random sample of a 56 issue population out of a universe estimated at 446,000 "In Search Of" (ISO) personal classified

¹¹ Browning, Frank, *The Culture of Desire* (New York: Crown Publishers, 1993), pp. 192-193.

¹² Lasch, Christopher, *Culture of Narcissism*, (New York: W.W. Norton, 1979), p.114.

¹³ This information is supported by homosexual research on personal *The Advocate* research. See especially Lee; Lamby; Laner and Kamel, in *Gay Relationships*, edited by John De Cecco (New York: Harrington Park Press, 1988), pp. 11-32, 61-72, 73-90.

advertisements (approximately 2000 classified advertisements per issue). Most significantly, the data do not represent homosexuals self-reporting their behavioral preferences to researchers in a clinical setting, but rather, homosexuals communicating their sexual preferences to each other, through paid classified ads seeking partners of a desired sexual practice or "orientation." As the homosexual community views *The Advocate* as a mainline conservative magazine, the sexual characteristics and partner-seeking demonstrated in these ads imply mainline conservative homosexual conduct. *The Advocate* has been analyzed also by homosexual researchers to measure homosexual conduct and gay relationships.¹⁴

A casual informative contrast to *The Advocate* is provided from a sample taken from the *Washingtonian*. A pilot study was conducted to insure a contrasting demographic fit to *The Advocate*. The *Washingtonian*, published in Washington, D.C. since 1965 attracts a similar upscale, urban, liberal and politically active married and single readership, offering national and local news, art, politics, gossip, investigative reports, full-page color product advertisements and a "CLASSIFIEDS" section for "relationships." The seven recurring *The Advocate* solicitation themes were applied against the *Washingtonian* ads. While the small sample size of the April 1993 *Washingtonian* ads negates statistical comparison, a statistically significant study of these advertisements is currently underway. However, a descriptive look at this time, of these early *Washingtonian* findings is helpful as a reference point of departure.

"IN SEARCH OF" (ISO) ads in magazines reflect their population profile. As *The Advocate* reaches between 33 and 50 percent of homosexuals,¹⁵ the Content

¹⁴ Id.

¹⁵ *The Simmons Report*, New York, Rate Card, Highlights of "Profile of Readers," Simmons Market Research Bureau, 1993, citing September 1990 data collection. A review of the homosexual literature establishes THE ADVOCATE as the leading "acceptable" homosexual publication; See especially, John Frances Hunter, *The Gay Insider USA*, (Stonehill Publishing, 1972): "Every Gay in America should subscribe to *The Advocate* and *Gay*, [no longer published] and to a regional newspaper and magazine . . . patronized by business run by Gays, or those which openly solicit gay patronage . . . *The Advocate's* . . . editorial stance brings down the wrath of radical [gay] papers who love to single it out as establishment," 166, 169.

Analysis, supported by both homosexual advocacy scholarship and ex-and current homosexual male testimonies reveal a accepted "gay" sociosexual culture.

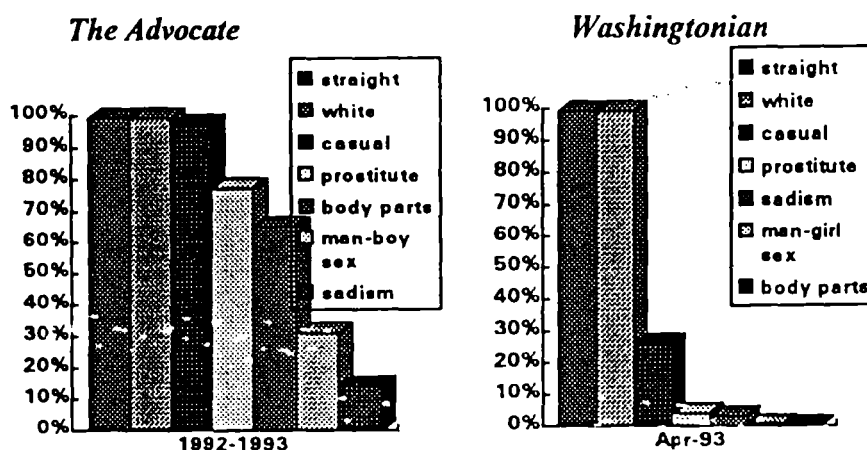
THE ADVOCATE TABLE

7 "IN SEARCH OF" HOMOSEXUAL SOLICITATION CHARACTERISTICS

(Nearest Percent of ~47,200/~446,000~Rank-Ordered by Rate of Occurrence, 1972-1993)

1.	ISO Straight looking ("masculine") men/boys	97% ('72-93)
2.	ISO Casual, AIDS-efficient sex	97% ('92-'93) 97% ('72-91)
3.	ISO White partners	97% ('72-'93)
4.	ISO Prostitution services	77% ('92-'93) 58% ('72-91)
5.	ISO Body parts sex/phallus	65% ('92-'93) 32% ('72-91)
6.	ISO Man-Boy sex	31% ('92-'93) 20% ('72-91)
7.	ISO Sadism/humiliation	14% ('92-'93) 20% ('72-91)

(Code identifiers/groupings explained in Main Body Chapter)



THE WASHINGTONIAN TABLE

7 "IN SEARCH OF" HETEROSEXUAL SOLICITATION CHARACTERISTICS

(Rank-Ordered by Rate of Occurrence, April 1993)

1.	ISO Straight (normal)	99% (Nearly all ads)
2.	ISO White partners	99% (Nearly all ads)
3.	ISO Marriage permanence	67% males
4.	ISO Prostitution services	4% males
5.	ISO Sadism/humiliation	2.6% males
6.	ISO Man-Girl sex	0.5%
7.	ISO Body parts/phallic size wanted	no ISO citations

Of the ~47,200 coded advertisements within this *The Advocate* study sample, seven recurring characteristics emerge in terms of homosexuals soliciting partners. Homosexual conduct can be defined as centered on multiple partner, mechanistic aggressive, and condomless sex, including a full 31 percent exclusively seeking sex with

boys. Looking at the rank-ordered findings, several interesting differences and similarities emerge between upscale *Washingtonian* male partner seekers, and men in *The Advocate*.

Summary of the Key Data

While 97% of homosexual males seek "straight-looking" or masculine males, no *Washingtonian*'s males solicited especially feminine women, instead emphasizing general physical, social and spiritual characteristics. Roughly 97% or more of both groups were partial to "white" partners, reasonable for the 67% heterosexuals seeking permanent, long term and/or marital relations with children and such. It is a puzzle to find bigotry among the 98% of homosexual males who sought were recreational sex but who also stand on black civil rights gains. Only 1% of homosexuals were couples -- and these were in search of a third. One percent sought a permanent partner and a large number of these men were AIDS positive, seeking someone to care for them until death.

The latest data found 4% of heterosexuals versus 77% of homosexual males offering or seeking paid sex (prostitution). The military should be concerned if less than 3% of heterosexual men are interested in violence versus 14% of the homosexual males. Again, of military concern regarding youthful recruitment, less than 1% of heterosexual males advertised an interest in 18 plus or younger girls, while fully 31% of the homosexual males admitted their desire for such boys. Of less military interest, no heterosexual males sought women by bust or waist size while 65% of the homosexual males advertised for body parts, even by circumference of the erect penis. While the comparison data are merely of interest, a statistically significant comparison study of the *WASHINGTONIAN* versus *The Advocate* is currently underway.

Science, depending upon rational observation of varied phenomena, also tells us that when a myriad of diverse data in a culture all point to the same conduct, that conduct is occurring. *The Advocate* content analysis provides a window into the "gay" sociosexual culture. The character of this social subset can also better understood by "outsiders" through an analysis of its specialized lexicon. Following, is a short extract

Clinton Presidential Records

Graphic/Offensive Material Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff to identify graphic images and documents inappropriate for individuals under the age of 18 that have been removed from this folder. Please ask the staff member on duty to retrieve this material for your review.

66 pages

Judith A. Reisman, Ph.D.
Curriculum Vitae

JUDITH A REISMAN, Ph.D.

Dr. Judith Reisman, author of Kinsey, Sex and Fraud (1990) and Soft Porn Plays Hardball (1991) has been a consultant to the U.S. Departments of Justice, Education and Health and Human Services. She is listed in numerous *Who's Who* biographies such as; *Who's Who in Science & Engineering*, *International Who's Who in Education*, *International Who's Who in Sexology*, *Who's Who of American Women*, *The World's Who's Who of Women*, etc. In 1981, Dr. Reisman presented a paper on Kinsey's fraudulent child sexuality data at the Fifth World Congress of Sexology in Jerusalem where she called for an investigation of the "child sexuality" investigations conducted by Indiana University's Kinsey team. Such a fact-finding investigation was never undertaken by the academic community. Kinsey, Sex and Fraud thus became necessary. Reisman's scholarly discoveries have had international import, e.g., The German Medical Tribune and the British medical journal, The Lancet demanded Kinsey be investigated.

"In Kinsey, Sex and Fraud Dr. Judith A. Reisman and her colleagues demolish the foundations of the two reports . . . Kinsey . . . has left his former co-workers some explaining to do." The Lancet, (Vol. 337: March 2, 1991; 547).

James Shannon, former Massachusetts Attorney General said, "I contacted Dr. Reisman in connection with an important child pornography case, Massachusetts v. Oakes...in the United States Supreme Court in January, 1989....To make the point, I quoted Dr. Reisman's study, "Images of Children, Crime and Violence In Playboy, Penthouse and Hustler Magazines...."

In 1993, Jim E. Crouch, Texas Assistant Criminal District Attorney wrote, "As a prosecuting attorney, I have tried approximately 35 obscenity jury trials in which the defense has called a sociologist as an expert on community standards. Your book, Kinsey, Sex and Fraud, has proven invaluable on cross-examination....To be able to point out the jury the fraud that Alfred Kinsey and his institute have perpetrated is a very effective tool."

Reisman's report helped win an important child molestation conviction of Hustler child pornography cartoonist Dwaine Tinsley in 1990 and her Department of Juvenile Justice study was cited by Southland Corporation as a key factor in their decision to remove Playboy and Penthouse from their 7-Eleven stores. Exposing Playboy's buying of legislative influence in Washington, D.C. to discredit Reisman and the Attorney General's Commission on Pornography, reporter Susan Trento (The Power House, 1992) noted "Many in law enforcement say she is often the only person willing to come forward and testify on the subject [pornography]" (166).

John Rabun, Deputy Director, National Center for Missing & Exploited Children said Reisman's "study must be read by all those concerned with the ways pornography and violence in the media affect the incidence of child sexual exploitation and abuse." Pat Buchanan noted, "On the cultural Richter scale, the impact of Kinsey, Sex and Fraud could be close to a 10" and Tom Landry, former Dallas Cowboys Coach, said: "I am supporting Reisman...who is working hard to equip national leadership with the necessary information to address this critical issue."

Worried that Reisman's data exposing Playboy's drug and child pornography histories might lose large numbers of its consumers, Playboy warned; "Reisman...is lying with statistics....Playboy never has, never will" sexualize children (12/85). Reisman, a "social charlatan" (1/89) "trying to start a panic....puts men's magazines on the endangered species list," (10/88) "propagating a new witch-hunt mentality...possibly crazy" (2/89). Inflaming its consumers against Reisman since 1985, by 1991, Playboy became more sinister. The LATimes said, Reisman "delivers a potentially damaging blow....when she compared two [Mapplethorpe] photographs...to child pornography and said none are fit to hang in an art museum" (10/5/90). Re: her testimony, Playboy reported; "I would have taken a .357 Magnum, walked up to her and said, 'Judith, you're history'" (2/91).

JUDITH A. REISMAN, Ph.D.

AUTHOR: PUBLICATIONS

- Images of Children, Crime and Violence in Playboy, Penthouse and Hustler (1990). Prepared under U.S. Department of Justice Grant No. 84-JN-AX-K007.
- Kinsey, Sex and Fraud with Edward Eichel (Ed) Gordon Muir & John Court, (1990) Lafayette: Huntington House
- Soft Porn Plays Hardball (1991). Lafayette: Huntington House
- Child Sexuality or Child Sexual Abuse: A Critical Analysis of the Kinsey Reports with Deborah Fink (unpublished)

SELECTED INCLUSION IN SCIENTIFIC AND SCHOLARLY BOOKS

Zillmann, D. (1994) *Media, Children and The Family*. NJ: Erlbaum
Hattermer, B. (1993) *Don't Touch That Dial*. Lafayette, LA: Huntington House
Trento, S. (1992) *The Power House*. NYC: St. Martin's Press
Kinkaid, C. (1992) *The Playboy Foundation*. Washington DC: Capital Research Center
Bolton, R. (1992) *Culture Wars*. NYC: The New Press
Osanka, F. (1989) *Source book of Pornography*. MA: Lexington
Zimbardo, P. (1988) *Psychology and Life*. MA: Scott, Foresman
Mawyer, M. (1987) *Silent Shame*. Westchester, IL: Crossways
Burgess, A. (1986) *Sexual Exploitation of Patients*. NYC: Praeger
Burgess, A. (1985) *Rape and Sexual Violence*. NYC: Garland
McCuen, E. (1985) *Pornography and Sexual Violence*. WI: Gem
Lederer, Laura (1981) *Take Back the Night*. NYC: Bantam
Skirball Museum (1974) *A Walk Through the Past*. CA: Hebrew Union College

SELECTED PUBLIC POLICY CITATIONS

- Australian Senate Select Committee on Community Standards, 1992
- State of Georgia Senate Education Subcommittee: Sex Education Curriculum, 1992
- New Zealand Indecency Tribunal, 1991
- U.S. Supreme Court: Osborne v. OH, 1990
- U.S. Supreme Court: Oakes v. MA, 1989
- Superior Court, Ventura County: Tinsley v. CA, 1989
- New Zealand: Pornography Commission, 1989

GUEST LECTURER

Princeton University	American Society of Criminology
Georgetown University	North Carolina Psychiatric Association
American University	National Urban Coalition
University of Jerusalem	Int'l Assoc. of Police Women
University of Haifa	Criminal Division/Executive Office U.S.
Tel Aviv University	Attorneys
Rutherford Institute	NOVA, NCASA, CCAVE, NCTV, NET...
Texas Woman's University	Federal Bureau of Investigation
Clarkson College	Vice and Police Associations
Notre Dame University	Church and Civic Organizations
University of Kentucky	Child Protection Organizations

ACADEMIC POSITIONS

Adjunct faculty, George Mason University, 1990
Research Professor, The American University, 1983-85

EXPERT WITNESS: COURT AND CIVIC HEARINGS

- The Ontario Human Rights Commission (Pornography Neurochemical Effects) 1993
- Younger, et. al. v. The Stroh Brewery Co. (Federal court) Sex harassment, 1992
- Australian Parliament, Senate Select Committee (X & R rated effects) April 1992
- State of Georgia Senate Ed Committee (Kinsey-sex Ed curriculum) Feb. 1992
- Hamilton County Prosecutor's Office; OH (Mapplethorpe) Aug. & Oct. 1990
- Michigan State Senate Juvenile Justice, Corrections; MI (effects) Oct. 1980
- City Council; Newport News, VA (Public order) June 1986
- U.S. Attorney General Commission on Pornography; NYC (effects) Jan. 1986
- U.S. Attorney General Commission on Pornography; Miami (effects) Nov. 1985
- U.S. Attorney General Task Force, Domestic Violence; DC (effects) Aug. 1985

EDUCATION

Ph.D. 1980 in Communications, Case Western Reserve University

M.A. 1976 in Communication, Case Western Reserve University

SELECTED GRANTS/POSITIONS

Australian Parliament Standing Committee on Social Issues 1993
Bureau of Justice Assistance, US Dept. of Justice: Grant Reviewer 1991
HHS: Administration for Children, Youth, and Families: Grant Reviewer 1991
Eastern Division Vice Investigators Association Inservice Trainer 1987-89
HHS: Dept. Substance Abuse Prevention: Research 1998
Skaggs Foundation: Visual Literacy Training Grant 1987-88
Dept. of Education: "Drug Free Schools" Grant Reviewer 1987
Dept. of Education: Drug Free Videos Grant Reviewer 1985
Georgetown Pediatrics Dept.: Training Seminar(s) 1984
FBI Academy: Erotica/Pornography Effects, Inservice Training Seminar/Video 1983
OJJDP: Missing Children - Serial Murder Task Force 1983-85
DoJ Office of Juvenile Justice: Media Research 1983-84
Scholastics Magazine, NYC: Art & Education 1981
Israel Science Ministry; Israeli Media Analysis 1976
Cleveland Museum of Art: Art/Head Start, Education Videos 1974
Los Angeles Skirball Museum: History/Archeology Educational Videos 1966-81
CBS, NBC, ABC, PBS: TV Special Events Educational Videos 1966-68
Milwaukee Public Museum: Educational Videos (Historic/Anthropologic)

PAST/PRESENT SELECTED MEMBERSHIPS

National Association for Research & Therapy of Homosexuality, (Fellow)
National Association of Scholars
The American Statistical Association
National Council on Family Relations
The New York Academy of Sciences
American Association for the Advancement of Science
The World Assoc. of Infant Psychiatry & Allied Disciplines
The National Black Child Development Institute
The International Communication Association
Research Council on Ethnopsychology
American Public Health Association
The Society for the Scientific Study of Sex
American Society of Composers, Authors and Publishers
Women in Neuroscience

PAST/PRESENT ADVISORY BOARD MEMBER

Founder, Institute for Study of Media and Family, Israel
Bereaved Parents Assoc. (Juvenile autoerotic deaths), AZ
Paul & Lisa, Inc. (Child prostitute rescue organization), CT
ELI (Assoc. for Protection of Children), Israel
Accuracy in Academia, Washington, D.C.

MEDIA APPEARANCES

Donahue	The Lancet (British Medical Journal)
The Today Show	International German Medical Tribune
Larry King Live	Science magazine
People are Talking	The Scientist
Crossfire	Archives of Sexual Behavior
700 Club	The (British Physicians) Quarterly
NBC, ABC, CBS	TIME Magazine
PBS, CBN, CNN TV	Newsweek magazine
Jenny Jones	The Harvard Peninsula
Sally Jessy Raphael	The New York Times
Jerry Springer	The Washington Post
Crier & Crier	The Washington Times
Entertainment Tonight	The Los Angeles Times
Faith Daniels (NBC)	New Dimensions

SELECTED MEDIA CO-AWARDS

Learning Magazine, Best Filmstrip of Year, w. Scholastics 1981-82
US Industrial Film Festival Gold Camera w/Scholastics 1982
Dukane Award Outstanding Creative Sound Films w/ Scholastics 1982
US Industrial Film Festival Silver Camera w/ Scholastics 1982
ACT Award Children Music w/CBSTV Captain Kangaroo 1976-79
1st Place Local PSA/TV series w/ Jewish Family Service Assoc. 1974

SELECTED PAST/PRESENT BIOGRAPHICAL HONORS

Who's Who in Science and Engineering
International Who's Who in Education
The World Who's Who of Women
Who's Who in Sexology
Who's Who of American Women
Two Thousand Notable Americans
International Book of Honor
Scientist of the Year: Save Our children National Alliance

SELECTED JOURNAL ARTICLES

Ethology and Sociobiology (USA)
New Universities Quarterly: Culture, Education, and Society (UK)
Journal of Educational Thought and Practice in Collective Settlements (Israel)
New York University Review of Law and Social Change (USA)
Women Speaking (UK)

AWARD: THE 1992 SCIENTIST OF THE YEAR AWARD
SAVE OUR CHILDREN NATIONAL ALLIANCE

VI. The American Security Council Survey of Active Duty Flag Officers

New Survey of Military Officers Shows Near-Universal Opposition to Lifting the Ban on Homosexuals in the Military

A new confidential survey of all 1,040 generals and admirals currently serving in the U.S. Armed Forces shows almost unanimous opposition to President Clinton's decision to lift the ban on homosexuals in the military.

The survey, the first of its kind to poll our nation's active, senior military leaders, was taken by mail between June 7 and 21, 1993. It was conducted by the **Military Personnel Task Force** of the House Republican Research Committee, chaired by Rep. **Cliff Stearns** (R-L). The statistical analysis was prepared by the American Security Council Foundation.

Rep. Stearn's office has received a response from 621 flag and general officers, "an overwhelming response for a voluntary survey and at least double what we expected in our most optimistic projections," according to Congressman Stearns. The Congressman, along with the ASC, held a press conference to release the survey results and shared the results with Congress, the Pentagon's senior civilian leadership, and President Clinton.

The survey found that an overwhelming **96.9** percent of the respondents support the ban on homosexuals in the military. **97.5** percent agreed with the statement by the Chairman of the Joint Chiefs of Staff, General **Colin Powell**, that allowing homosexuals in the military would be "prejudicial to good order and discipline." And only 5.9 percent agreed with the contention of homosexual advocacy groups that this is an issue of "civil rights," while **88.7** percent of the senior officers saw it as a question of "national security."

"This is the senior uniformed leadership of the Army, Navy, Air Force and Marines, and President Clinton has ignored their overwhelming and strongly-felt advice," said Rep. **Duncan Hunter**, who serves as Co-Chairman of the Military Personnel Task Force. "These men and women are not only saying it's a bad idea, they are demonstrating that implementation of Clinton's plan will be destructive and seriously harmful to the morale and welfare of our men and women in uniform."

"The Congressional leadership and the White House delayed this issue for six months to allow for hearings and to do some fact-finding. This confidential survey provides one of the most significant facts of all. The combined senior leadership of our armed forces are totally, unalterably opposed to change in the present policy, and any efforts to change the policy, even slightly, will be destructive to our national security," said Rep. Hunter.

The complete results of the survey appear at right.

1. General Colin Powell has said that allowing homosexuals in the military would be "prejudicial to good order and discipline." Do you agree with this statement?

Yes:	606	97.58%
No:	13	2.09%
No Opinion:	0	0.00%
Other:	2	0.32%

2. Do you view the issue of gays in the military as one of civil rights or of national security?

Civil Rights:	37	5.96%
National Security:	551	88.73%
No Opinion:	12	1.93%
Other:	12	1.93%
Both:	9	1.45%

3. Do you think homosexuals in the military should share the same sleeping and bath facilities?

Yes:	36	5.80%
No:	567	91.30%
No Opinion:	16	2.58%
Other:	2	0.32%

4. Do you think young people will be more or less likely to join the military if they have to share the same facilities with homosexuals?

More Likely:	3	0.48%
Less Likely:	606	97.58%
No Opinion:	11	1.77%
Other:	1	0.16%

5. Do you think homosexuals pose a health threat to the military?

Yes:	511	82.29%
No:	68	10.95%
No Opinion:	39	6.28%
Other:	3	0.48%

6. Based on your military experience, do you feel the presence of open homosexuals in the military would:

A. Undermine soldier's morale?		
Yes:	609	98.07%
No:	8	1.29%
No Opinion:	4	0.64%

B. Undermine the cohesiveness and readiness of a combat unit?

Yes:	615	99.03%
No:	6	0.97%
No Opinion:	0	0.00%

C. Deter some heterosexual males from joining the military?

Yes:	611	98.39%
No:	6	0.97%
No Opinion:	4	0.64%

D. Lead to large numbers of heterosexual soldiers seeking discharges?

Yes:	326	52.50%
No:	208	33.49%
No Opinion:	76	12.24%
Other:	11	1.77%

7. If one of the soldiers under your command were an openly practicing homosexual, do you think you could give a fair performance evaluation of that soldier?

Yes:	366	58.94%
No:	196	31.56%
No Opinion:	51	8.21%
Other:	8	1.29%

8. If the situation were reversed and one of your commanding officers were an openly practicing homosexual, do you think you would receive a fair performance evaluation?

Yes:	175	28.18%
No:	262	42.19%
No Opinion:	174	28.02%
Other:	10	1.63%

9. Do you support the ban on homosexuals in the military?

Yes:	602	96.94%
No:	16	2.58%
No Opinion:	2	0.32%
Other:	1	0.16%

**The Defense Readiness Council
Survey of Retired Flag and General Officers**

June 15, 1993

THE ROBERTSON GROUP

Presents a

SURVEY of RETIRED FLAG OFFICERS

For

The Defense Readiness Council

June 15, 1993

EXECUTIVE SUMMARY

This survey was sponsored and funded by the Defense Readiness Council. The Chairman of the Advisory Board is Admiral Thomas Moorer, USN, (Retired), former Chairman of the Joint Chiefs of Staff.

The Defense Readiness Council believes that it is important that the experience of the military is an important consideration during the debate concerning the status of the military policy on homosexuals.

This survey is the only data base which has polled the retired flag officers of all of the services on this issue. Although the Office of the Secretary of Defense has been requested, on at least two separate occasions, to conduct a service wide poll, it has thus far chosen not to do so. The requests were initiated by Senator Coats as well as by Admiral Moorer, in his capacity as the Advisory Chairman of the Defense Readiness Council.

METHODOLOGY

This poll surveyed the retired flag community of all four services, Army, Navy, Marine and Air Force. Approximately 5800 questionnaires were mailed. Of those, almost 250 were returned for incorrect address.

This poll was divided into two portions, a response card which allowed the respondents to choose from a selection of answers as well as discussion points, if the respondent chose to respond more expansively.

Over 2800 cards were received and almost 1500 letters. Some of the respondents chose to send both the response card as well as a narrative on the various discussion point.

There were five basic questions included on the post card. These are listed in the section titled Post Card Questionnaire. In order to identify the segments within the sample, three defining questions were asked: Branch of Service; Year Retired, as well as Total Number of Years in the service. These three questions have been used for identification and analysis of any trends within the respective services as well as identification of trends within generations or year groups of retirement.

The design of the post card covered a range of responses, allowing the respondents flexibility. Nonetheless, on all of the questions, with only slight variations among the services, there is always one significant response.

By totaling the number of years on active duty, as stated on each of the post cards, there is a total of over 93,000 years of military experience represented by this portion of the survey alone.

The Discussion Points of the additional questionnaire were developed to encourage more definitive statements of experience and concern from the retired community which should be taken under advisement before any significant policy change is implemented. Many of the responses received were well organized and thought provoking. Respondents included former POW's from Korea as well as Viet Nam, and Veterans from World War II, Korea, and Viet Nam.

Although this survey targeted a specific community of retired military flag officers, it remains statistically valid since the responses represent a random sample of that group. Additionally, by conservatively assessing the total number of responses, post cards and letters, the response rate is greater than 60%.

The analysis is provided in two major sections, the post card questionnaire and the discussion points. These are further subdivided by each question. Charts from the post card data base are included as well as quotable quotes from the narratives.

CONCLUSION

Cohesion ranks as the single most important issue regarding the integration of homosexuals in the military. Ironically, it is difficult to define to those whose experiences have not included the military. It is the core of the unit that allows it to function and to accomplish all that is required and more. Although alternative choices such as Moral and Religious, Costs or Medical were provided, they did not compare to the almost 90% total response given in support of cohesion.

A significant majority also believe that the military policy of discrimination of homosexuals should remain unchanged and be retained.

Most importantly are the experiences and concerns which are expressed in the letters which were received. Even throughout these responses, whether briefly or more expansively articulated, there remains an overwhelming concern for cohesion, unit effectiveness and leadership. All of these are critical elements for an effective fighting force.

In today's budget analysis and strategic discussions, there is an emerging concern of whether or not the US is beginning to "hollow" its military. The Defense Readiness Council respectively submits, that this proposed policy change should also be considered as a potential contributor to a hollow force which the US can ill afford.

James L. DRONENBURG, Appellant,
v.

Vice Admiral Lando ZECH, Chief of
Naval Personnel, et al.

No. 82-2304.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 29, 1983.

Decided Aug. 17, 1984.

Rehearing En Banc Denied
Nov. 15, 1984.

Discharged Navy petty officer brought action seeking to enjoin discharge and an order for his reinstatement. The United States District Court for the District of Columbia, Oliver Gasch, J., rendered summary judgment for the Navy, and appeal was taken. The Court of Appeals, Bork, Circuit Judge, held that: (1) District Court had subject-matter jurisdiction, and (2) Navy's policy of mandatory discharge for homosexual conduct does not violate constitutional rights to privacy or equal protection.

Affirmed.

Opinion on rehearing, D.C.Cir., 746 F.2d 1579.

1. Federal Courts §181

District court had jurisdiction of action by discharged Navy petty officer challenging constitutionality of mandatory discharge for homosexual conduct. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331; U.S.C.A. Const.Amends. 1, 5, 14.

2. Courts §96(3)

Supreme Court's summary disposition of a case constitutes a vote on the merits and as such is binding on lower federal courts.

3. Armed Services §11.22

The military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society.

*Sitting by designation pursuant to 28 U.S.C.

4. Constitutional Law §82(10), 242.1(3)

There is no constitutional right to engage in homosexual conduct and, hence, Navy's policy of mandatory discharge for homosexual conduct is not violative of any constitutional right to privacy or equal protection as unique needs of the military justify determination that homosexual conduct impairs its capacity to carry out its mission. U.S.C.A. Const.Amends. 1, 4, 5, 9, 14.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 81-00933).

Stephen V. Bomse, San Francisco, Cal., with whom Steven M. Block, Leonard Graff, San Francisco, Cal., and Calvin Steinmetz, Washington, D.C., were on the brief, for appellant.

William G. Cole, Atty., Dept. of Justice, Washington, D.C., of the Bar of the District of Columbia Court of Appeals, pro hac vice by special leave of the Court, with whom J. Paul McGrath, Asst. Atty. Gen., Anthony J. Steinmeyer, Richard A. Olderman, Attys., Dept. of Justice and Stanley S. Harris, U.S. Atty., Washington, D.C. (at the time the brief was filed), were on the brief, for appellees. Marc Johnston, Atty., Dept. of Justice, Washington, D.C., also entered an appearance for appellees.

Charles Lister and Arthur B. Spitzer, Washington, D.C., were on the brief, for amicus curiae urging remand.

Before BORK and SCALIA, Circuit Judges, and WILLIAMS,* Senior District Judge, United States District Court for the Central District of California.

Opinion for the Court filed by Circuit Judge BORK.

BORK, Circuit Judge:

James L. Dronenburg appeals from a district court decision upholding the United States Navy's action administratively discharging him for homosexual conduct. Appellant contends that the Navy's policy of

§ 294(d).

mandatory discharge for homosexual conduct violates his constitutional rights to privacy and equal protection of the laws. The district court granted summary judgment for the Navy, holding that private, consensual, homosexual conduct is not constitutionally protected. We affirm.

I.

On April 21, 1981, the United States Navy discharged James L. Dronenburg for homosexual conduct. For the previous nine years he had served in the Navy as a Korean linguist and cryptographer with a top-security clearance. During that time he maintained an unblemished service record and earned many citations praising his job performance. At the time of his discharge Dronenburg, then a 27-year-old petty officer, was enrolled as a student in the Defense Language Institute in Monterey, California.

The Navy's investigation of Dronenburg began eight months prior to the discharge, in August, 1980, when a 19-year-old seaman recruit and student of the Language Institute made sworn statements implicating Dronenburg in repeated homosexual acts. The appellant, after initially denying these allegations, subsequently admitted that he was a homosexual and that he had repeatedly engaged in homosexual conduct in a barracks on the Navy base. On September 18, 1980, the Navy gave Dronenburg formal notice that it was considering administratively discharging him for misconduct due to homosexual acts, a violation of SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix ("J.A.") at 216, which provided in pertinent part, that

1. Discharge for homosexual conduct was not invariably mandatory. Instruction 1900.9C ¶ 6b (Jan. 20, 1978) provides that:

A member who has solicited, attempted, or engaged in a homosexual act on a single occasion and who does not profess or demonstrate proclivity to repeat such an act may be considered for retention in the light of all relevant circumstances. Retention is to be permitted only if the aforesaid conduct is not likely to present any adverse impact either upon the member's continued performance of military duties or upon the readiness, efficiency, or morale of the unit to which the member

[a]ny member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale.¹

On January 20 and 22, 1981, at a hearing before a Navy Administrative Discharge Board ("Board") Dronenburg testified at length in his own behalf, with counsel representing him. He again acknowledged engaging in homosexual acts in a Navy barracks.

The Board voted unanimously to recommend Dronenburg's discharge for misconduct due to homosexual acts. Two members of the Board voted that the discharge be characterized as a general one, while the third member voted that the discharge be an honorable one. The Secretary of the Navy, reviewing this case at appellant's request, affirmed the discharge but ordered that it be characterized as honorable. On April 20, 1981, the appellant filed suit in district court challenging the Navy's policy mandating discharge of all homosexuals. The district court granted summary judgment for the Navy.

II.

[1] As a threshold matter, we must dispose of appellees' contention that the district court lacked subject matter jurisdiction over this action. According to appellees, the doctrine of sovereign immunity precludes the bringing of this action except insofar as the Tucker Act permits damage suits in the Claims Court. Brief for Feder-

is assigned either at the time of the conduct or at the time of processing according to the alternatives set forth herein.

J.A. at 218. Moreover, the Secretary of the Navy retained the power to keep a person in service despite homosexual conduct on an ad hoc basis for reasons of military necessity.

These regulations have since been replaced by SEC/NAV Instruction 1900.9D (Mar. 12, 1981) which implements a Department of Defense Directive. J.A. at 219. The policy of 1900.9C, under which appellant was discharged, is continued in effect by 1900.9D.

al Appellees at 11-16. Appellees reason that the appellant's action is essentially one for damages; specifically, back pay against the government. The Claims Court, appellees allege, has exclusive jurisdiction over such actions where, as here, the amount is in excess of \$10,000. In the alternative, appellees claim, appellant may waive the damages to the extent they exceed \$10,000 and bring the suit in the district where Dronenburg resides, the Northern District of California. Brief for Federal Appellees at 15.

This circuit has held in a case remarkably similar to this one that the federal courts have jurisdiction to determine the legality and constitutionality of a military discharge. *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 859 (D.C.Cir.1978). Matlovich, like the appellant here, challenged the Air Force's decision to discharge him based upon his homosexual activities. In vacating and remanding the determination to the district court, this court relied upon the "power and the duty [of the federal courts] to inquire whether a military discharge was properly issued under the Constitution, statutes, and regulations." 591 F.2d at 859, citing *Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958); *Van Bourg v. Nitze*, 388 F.2d 557, 563 (D.C.Cir.1967); *Hodges v. Callaway*, 499 F.2d 417, 423 (5th Cir.1974). We are bound by that prior determination and therefore are not free to refuse to hear this case on jurisdictional grounds.

We are further bound by another decision of this court holding that "the United States and its officers . . . are [not] insulated from suit for injunctive relief by the doctrine of sovereign immunity." *Schnapper v. Foley*, 667 F.2d 102, 107 (D.C.Cir.1981), cert. denied, 455 U.S. 948, 102 S.Ct. 1448, 71 L.Ed.2d 661 (1982). See also *Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C.Cir.1981). In *Schnapper*, the complainants alleged that certain officials of the Administrative Office of the

United States Courts and the Register of Copyrights violated, among other things, various provisions of the Constitution, the old Copyright Acts, 17 U.S.C. § 105 (1976) and 17 U.S.C. § 8 (1970), and portions of the Communications and Public Broadcasting Acts. 667 F.2d at 106. The complaint sought injunctive and declaratory relief, as does the complaint here.² In finding that the District Court for the District of Columbia did in fact have jurisdiction, the court held that 5 U.S.C. § 702 was intended to waive the sovereign immunity of the United States in suits for injunctive relief. That section provides, in part, that

[a]n action in a court of the United States seeking relief other than [sic] money damages and stating a claim that an agency or an employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief thereon denied on the ground that it is against the United States

5 U.S.C. § 702 (1982). In discussing the legislative history of this section, the court said:

The legislative history of this provision could not be more lucid. It states that this language was intended "to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful official action by a federal official" S.Rep. No. 996, 94th Cong., 2d Sess. at 2 (1976).

Schnapper, 667 F.2d at 108. The court also noted that the Senate Report had expressly stated that "the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *Id.*, quoting S.Rep. No. 996, 94th Cong., 2d Sess. 7-8 (1976). The *Schnapper* court concluded by stating its belief that "section 702 retains the defense of sovereign immunity only

have this court enjoin the Navy from discharging him and order his reinstatement. Complaint at 12; J.A. at 12.

2. In his amended complaint, appellant eliminated any damages claim. Reply Brief of Appellant at 6 n. 6. Specifically, appellant seeks to

Cite as 741 F.2d 1388 (1984)

when another statute expressly or implicitly forecloses injunctive relief." *Id.* Because no such statute has been pointed to by the appellees here, we are bound to take jurisdiction over this case.³

III.

Appellant advances two constitutional arguments, a right of privacy and a right to equal protection of the laws. Resolution of the second argument is to some extent dependent upon that of the first. Whether the appellant's asserted constitutional right to privacy is based upon fundamental human rights, substantive due process, the ninth amendment or emanations from the Bill of Rights, if no such right exists, then appellant's right to equal protection is not infringed unless the Navy's policy is not rationally related to a permissible end. *Kelley v. Johnson*, 425 U.S. 238, 247-49, 96 S.Ct. 1440, 1445-47, 47 L.Ed.2d 708 (1976). We think neither right has been violated by the Navy.

A.

According to appellant, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and the cases that came after it, such as *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), have "developed a right of privacy of constitu-

tional dimension." Appellant's Opening Brief on Appeal at 14-15. Appellant finds in these cases "a thread of principle: that the government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her own body" except by the least restrictive means available and in the presence of a compelling state interest. *Id.* at 15. Given this principle, he urges, private consensual homosexual activity must be held to fall within the zone of constitutionally protected privacy. *Id.*

[2, 3] Whatever thread of principle may be discerned in the right-of-privacy cases, we do not think it is the one discerned by appellant. Certainly the Supreme Court has never defined the right so broadly as to encompass homosexual conduct. Various opinions have expressly disclaimed any such sweep, see, e.g., *Poe v. Ullman*, 367 U.S. 497, 553, 81 S.Ct. 1752, 1782, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting from a decision that the controversy was not yet justiciable and expressing views on the merits later substantially adopted in *Griswold*). More to the point, the Court in *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), summarily affirmed a district court judgment, 403 F.Supp. 1199 (E.D.Va.1975), upholding a Virginia statute making it a criminal offense to engage in private consensual homosexual conduct. The district court in *Doe* had found that the right to privacy did not extend to private

961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Sheehan v. Army & Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir.1980), rev'd on other grounds, 456 U.S. 728, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982); *Warin v. Director, Dep't of Treasury*, 672 F.2d 590, 591-92 (6th Cir.1982) (per curiam); *Beller v. Middendorf*, 632 F.2d 788, 796-97 (9th Cir.), cert. denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1980). See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 346 (2d ed. Supp.1981) ("Since the Administrative Procedure Act does not itself confer jurisdiction, [the determination in *Watson*] would mean, would it not, that the amendments had no effect on immunity at all?").

3. We note that there has been some disagreement on the question whether 5 U.S.C. § 702 (1982) does in fact waive sovereign immunity in suits under 28 U.S.C. § 1331 (1982). The Second Circuit first held, as an alternative ground for a correct decision, that the 1976 amendments to § 702 "did not remove the defense of sovereign immunity in actions under [28 U.S.C.] § 1331." *Estate of Watson v. Blumenthal*, 586 F.2d 925, 932 (2d Cir.1978). Later, however, another of that circuit's panels, one which included within it the author of the opinion in *Watson*, disagreed with that determination. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 724 (2d Cir.1983), as have the Third, Fifth, Sixth and Ninth Circuits. *Jaffee v. United States*, 592 F.2d 712, 718-19 (3d Cir.), cert. denied, 441 U.S.

homosexual conduct because the latter bears no relation to marriage, procreation, or family life. 403 F.Supp. at 1200. The Supreme Court's summary disposition of a case constitutes a vote on the merits; as such, it is binding on lower federal courts. See *Hicks v. Miranda*, 422 U.S. 332, 343-45, 95 S.Ct. 2281, 2288-90, 45 L.Ed.2d 223 (1975); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247, 79 S.Ct. 978, 978, 3 L.Ed.2d 1200 (1959). Cf. *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 n. 3 (2d Cir.1967). If a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context. That the military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society has repeatedly been made clear by the Supreme Court. See, e.g., *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

It is urged upon us, however, that *Doe v. Commonwealth's Attorney* cannot be taken as an authoritative decision by the Supreme Court. The case should be viewed, it is said, as an affirmance based not on the constitutionality of the statute but rather upon plaintiffs' lack of standing. Plaintiffs were homosexuals who had not been threatened with prosecution under the statute. Indeed, those plaintiffs may have lacked standing, but the majority of the three-judge district court placed its decision squarely on the constitutionality of the statute, and the Supreme Court's summary affirmance gives no indication that the Court proceeded upon any other rationale. It would have been easy enough to affirm summarily giving a lack of standing as the reason. Under these circumstances, we doubt that a court of appeals ought to distinguish a Supreme Court precedent on the speculation that the Court might possibly have had something else in mind.

But even should we agree that *Doe v. Commonwealth's Attorney* is somewhat ambiguous precedent, we would not extend the right of privacy created by the Su-

preme Court to cover appellant's conduct here. An examination of the cases cited by appellant shows that they contain little guidance for lower courts. The right of privacy first achieved constitutional stature in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The *Griswold* Court began by noting that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484, 85 S.Ct. at 1681. The cases cited in support of that unexceptional proposition demonstrated, for example, that a state could not force disclosure of the NAACP's membership lists because of the chilling effect upon the members' first amendment rights of assembly and political advocacy. The "penumbra" was no more than a perception that it is sometimes necessary to protect actions or associations not guaranteed by the Constitution in order to protect an activity that is. The penumbral right has no life of its own as a right independent of its relationship to a first amendment freedom. Where that relationship does not exist, the penumbral right evaporates. The Court referred to the first amendment's penumbra as a protection of "privacy," noted that other amendments created "zones of privacy," and concluded that there was a general right of privacy that lay outside the "zones" or "penumbras" of particular amendments. *Id.* It was not explained how areas not lying within any "penumbra" or "zone of privacy" became part of a more general "right of privacy," but clearly that is what the Court intended. The right of a husband and wife to use contraceptives, which the challenged Connecticut statute prohibited, was held to be guaranteed by this general right, though not by any individual amendment, penumbra, or zone. The *Griswold* opinion stressed the sanctity of marriage. It did not indicate what other activities might be protected by the new right of privacy and did not provide any guidance for reasoning about future claims laid under that right.

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), struck down a state antimiscegenation statute because it constituted an invidious racial classification violative of the equal protection clause of the fourteenth amendment and because it deprived appellants of liberty without due process of law in violation of the same amendment. The equal protection ruling followed from prior cases and the historical purpose of the clause. It is not entirely clear whether the due process analysis broke new ground. The Court spoke of a right of marriage but emphasized heavily the racial discrimination worked by this statute, a point central to the equal protection holding. In its brief analysis of the due process holding, the Court said only:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 [62 S.Ct. 1110, 1113, 86 L.Ed. 1655] (1942). See also *Maynard v. Hill*, 125 U.S. 190 [8 S.Ct. 723, 31 L.Ed. 654] (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive to the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

388 U.S. at 11-12, 87 S.Ct. at 1824. There is in this passage no mode of analysis that suggests an answer to the present case, certainly none that favors appellant.

Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), invalidated under the equal protection clause of the fourteenth amendment a Massachusetts

law prohibiting the distribution of contraceptives. The law in question provided that married persons could obtain contraceptives to prevent pregnancy on prescription only, single persons could not obtain contraceptives at all in order to prevent pregnancy, and married and single persons could obtain contraceptives from anyone to prevent the spread of disease. *Id.* at 442, 92 S.Ct. at 1032. The Court reasoned that there was no "ground of difference that rationally explains the different treatment accorded married and unmarried persons" under the statute. *Id.* at 447, 92 S.Ct. at 1035. The Court demonstrated that the purpose of the statute could not rationally be to deter fornication or to safeguard health. The opinion then came to the aspect presumably of most interest here: could the statute be sustained simply as a prohibition on contraception? The Court explicitly declined to decide whether such a law would conflict with "fundamental human rights" and offered instead this line of reasoning:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453, 92 S.Ct. at 1038 (emphasis in original). In order to apply *Eisenstadt* to a future case not involving the same personal decision, a court would have to know whether the challenged governmental regulation was "unwarranted" and whether the regulation was of a matter "so fundamentally affecting a person as the decision

whether to bear or beget a child." *Eisenstadt* itself does not provide any criteria by which either of those decisions can be made.

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), severely limited the states' power to regulate abortions in the name of the right of privacy. The pivotal legal discussion was as follows:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 [11 S.Ct. 1000, 1001, 35 L.Ed. 734] (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 [89 S.Ct. 1243, 1247, 22 L.Ed.2d 542] (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 [88 S.Ct. 1868, 1872-1873, 20 L.Ed.2d 889] (1968), *Katz v. United States*, 389 U.S. 347, 350 [88 S.Ct. 507, 510, 19 L.Ed.2d 576] (1967), *Boyd v. United States*, 116 U.S. 616 [6 S.Ct. 524, 29 L.Ed. 746] (1886), see *Olmstead v. United States*, 277 U.S. 438, 478 [48 S.Ct. 564, 572, 72 L.Ed. 944] (1928) (Brandeis, J., dissenting); in the penumbra of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484-485 [85 S.Ct. at 1681-1682]; in the Ninth Amendment, *id.*, at 486 [85 S.Ct. at 1682] (Goldberg J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 [43 S.Ct. 625, 626, 67 L.Ed. 1042] (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed. 288] (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving*

v. Virginia, 388 U.S. 1, 12 [87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010] (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 [62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655] (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454 [92 S.Ct. at 1038-1039]; *id.*, at 460, 463-465 [92 S.Ct. at 1041, 1043-1044] (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 [64 S.Ct. 438, 442, 88 L.Ed. 645] (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 [45 S.Ct. 571, 573, 69 L.Ed. 1070] (1925), *Meyer v. Nebraska*, *supra*.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

410 U.S. at 152-53, 93 S.Ct. at 726-27. The Court nevertheless refused to accept the argument that the right to abort is absolute.

The Court's decisions recognizing a right of privacy also acknowledged that some

state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. *The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions.* The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 [25 S.Ct. 358, 49 L.Ed. 643] (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 [47 S.Ct. 584, 71 L.Ed. 1000] (1927) (sterilization).

Id. at 153-54, 93 S.Ct. at 727 (emphasis added). Thus, though the Court gave an illustrative list of privacy rights, it also denied that the right was as broad as the right to do as one pleases with one's body. Aside from listing prior holdings, the Court provided no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right of privacy.

Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), held unconstitutional yet another regulation of access to contraceptives on grounds of privacy. The New York statute required that distribution of contraceptives to persons over sixteen be only by a licensed pharmacist. That provision was held unconstitutional because no compelling state interest was perceived that could overcome "the teaching of *Griswold* ... that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Id.* at 687, 97 S.Ct. at 2017. A

compelling state interest was required "not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*." *Id.* at 688-89, 97 S.Ct. at 2018. Limiting distribution to licensed pharmacists significantly burdened that right. *Id.* at 689, 97 S.Ct. at 2018.⁴

These cases, and the suggestion that we apply them to protect homosexual conduct in the Navy, pose a peculiar jurisprudential problem. When the Supreme Court decides cases under a specific provision or amendment to the Constitution it explicates the meaning and suggests the contours of a value already stated in the document or implied by the Constitution's structure and history. The lower court judge finds in the Supreme Court's reasoning about those legal materials, as well as in the materials themselves, guidance for applying the provision or amendment to a new situation. But when the Court creates new rights, as some Justices who have engaged in the process state that they have done, see, e.g., *Doe v. Bolton*, 410 U.S. 179, 221-22, 93 S.Ct. 739, 762-63, 35 L.Ed.2d 201 (1973) (White, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 167-68, 93 S.Ct. 705, 733-34, 35 L.Ed.2d 147 (1973) (Stewart, J., concurring), lower courts have none of these materials available and can look only to what the Supreme Court has stated to be the principle involved.

In this group of cases, and in those cited in the quoted language from the Court's opinions, we do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. The Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be

4. The Court also struck down a provision of the law forbidding distribution of contraceptives to those less than 16 years old, but there was no

majority rationale for this result and it would not advance our inquiry to discuss the various opinions offered.

said that none of these covers a right to homosexual conduct.

The question then becomes whether there is a more general principle that explains these cases and is capable of extrapolation to new claims not previously decided by the Supreme Court. It is true that the principle appellant advances would explain all of these cases, but then so would many other, less sweeping principles. The most the Court has said on that topic is that only rights that are "fundamental" or "implicit in the concept of ordered liberty" are included in the right of privacy. These formulations are not particularly helpful to us, however, because they are less prescriptions of a mode of reasoning than they are conclusions about particular rights enunciated. We would find it impossible to conclude that a right to homosexual conduct is "fundamental" or "implicit in the concept of ordered liberty" unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw.

In dealing with a topic like this, in which we are asked to protect from regulation a form of behavior never before protected, and indeed traditionally condemned, we do well to bear in mind the concerns expressed by Justice White, dissenting in *Moore v. City of East Cleveland*, 431 U.S. 494, 544, 97 S.Ct. 1932, 1958-59, 52 L.Ed.2d 531 (1977):

That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-

made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive "application" of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

Whatever its application to the Supreme Court, we think this admonition should be taken very seriously by inferior federal courts. No doubt there is "ample precedent for the creation of new constitutional rights," but, as Justice White said, the creation of such rights "comes nearest to illegitimacy" when judges make "law having little or no cognizable roots in the language or even the design of the Constitution." If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights,⁵ we think it certain that lower courts should not do so. We have no guidance from the Constitution or, as we have shown with respect to the case at hand, from articulated Supreme Court principle. If courts of appeals should, in such

5. It may be only candid to say at this point that the author of this opinion, when in academic life, expressed the view that no court should create new constitutional rights; that is, rights must be fairly derived by standard modes of legal interpretation from the text, structure, and history of the Constitution. Or, as it has been aptly put, "the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common

ground." J. Ely, *Democracy and Distrust* 2 (1980). These views are, however, completely irrelevant to the function of a circuit judge. The Supreme Court has decided that it may create new constitutional rights and, as judges of constitutionally inferior courts, we are bound absolutely by that determination. The only questions open for us are whether the Supreme Court has created a right which, fairly defined, covers the case before us or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide.

circumstances, begin to create new rights freely, the volume of decisions would mean that many would evade Supreme Court review, a great body of judge-made law would grow up, and we would have "pre-empt[ed] for [ourselves] another part of the governance of the country without express constitutional authority." If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court.

Turning from the decided cases, which we do not think provide even an ambiguous warrant for the constitutional right he seeks, appellant offers arguments based upon a constitutional theory. Though that theory is obviously untenable, it is so often heard that it is worth stating briefly why we reject it.

Appellant denies that morality can ever be the basis for legislation or, more specifically, for a naval regulation, and asserts two reasons why that is so. The first argument is: "if the military can defend its blanket exclusion of homosexuals on the ground that they are offensive to the majority or to the military's view of what is socially acceptable, then no rights are safe from encroachment and no minority is protected against discrimination." Appellant's Opening Brief on Appeal at 11-12. Passing the inaccurate characterization of the Navy's position here, it deserves to be said that this argument is completely frivolous. The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities. If a court refuses to create a new constitutional right to protect homosexual conduct, the court does not thereby destroy established constitutional rights that are solidly based in constitutional text and history.

Appellant goes further, however, and contends that the existence of moral disap-

6. At oral argument, appellant's counsel was pressed by the court concerning his proposition that the naval regulations may not permissibly be founded in moral judgments. Asked whether moral abhorrence could never be a basis for a regulation, counsel replied that it could not.

proval for certain types of behavior is the very fact that disables government from regulating it. He says that as a matter of general constitutional principle, "it is difficult to understand how an adult's selection of a partner to share sexual intimacy is not immune from burden by the state as an element of constitutionally protected privacy. That the particular choice of partner may be repugnant to the majority argues for its vigilant protection—not its vulnerability to sanction." Appellant's Opening Brief on Appeal at 13. This theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government. When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason. We stress, because the possibility of being misunderstood is so great, that this deference to democratic choice does not apply where the Constitution removes the choice from majorities. Appellant's theory would, in fact, destroy the basis for much of the most valued legislation our society has. It would, for example, render legislation about civil rights, worker safety, the preservation of the environment, and much more, unconstitutional. In each of these areas, legislative majorities have made moral choices contrary to the desires of minorities. It is to be doubted that very many laws exist whose ultimate justification does not rest upon the society's morality.⁶ For these reasons, appellant's argument will not withstand examination.

[4] We conclude, therefore, that we can find no constitutional right to engage in homosexual conduct and that, as judges, we have no warrant to create one. We

Asked then about the propriety of prohibiting bestiality, counsel replied that that could be prohibited but on the ground of cruelty to animals. The objection to cruelty to animals is, of course, an objection on grounds of morality.

need ask, therefore, only whether the Navy's policy is rationally related to a permissible end. See *Kelley v. Johnson*, 425 U.S. 238, 247-49, 96 S.Ct. 1440, 1445-47, 47 L.Ed.2d 708 (1976). We have said that legislation may implement morality. So viewed, this regulation bears a rational relationship to a permissible end. It may be argued, however, that a naval regulation, unlike the act of a legislature, must be rationally related not to morality for its own sake but to some further end which the Navy is entitled to pursue because of the Navy's assigned function. We need not decide that question because, if such a connection is required, this regulation is plainly a rational means of advancing a legitimate, indeed a crucial, interest common to all our armed forces. To ask the question is to answer it. The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate. This very case illustrates dangers of the sort the Navy is entitled to consider: a 27-year-old petty officer had repeated sexual relations with a 19-year-old seaman recruit. The latter then chose to break off the relationship. 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.

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

tain[ing] members of the naval service ... and ... prevent[ing] breaches of security." SEC/NAV 1900.9D (Mar. 12, 1981); J.A. at 219. We believe that the policy requiring discharge for homosexual conduct is a rational means of achieving these legitimate interests. See *Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir.), cert. denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1980). The unique needs of the military, "a specialized society separate from civilian society," *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974), justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission.

Affirmed.



John F. HARMON, Appellant.

v.

BALTIMORE & OHIO RAILROAD.

No. 83-1532.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 13, 1984.

Decided Aug. 17, 1984.

Railroad employee, who received benefits under the Longshoremen's and Harbor Workers' Compensation Act for injuries he sustained while repairing a hopper, or funnel, through which coal passed as it moved from railroad cars to the holds of barges and ships at railroad's coal pier, brought suit against the railroad under the Federal Employers' Liability Act. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., 560 F.Supp. 914, entered summary judgment in favor of railroad, and employee appealed.

The Court of Appeals, Mikva, Circuit Judge, held that Longshoremen's and Harbor Workers' Compensation Act provided exclusive coverage for employee, precluding coverage for employee under the Federal Employers' Liability Act.

Affirmed.

1. Workers' Compensation ⇐262

An employee is covered by the Longshoremen's and Harbor Workers' Compensation Act only if he or she meets both the situs and status tests. Longshoremen's and Harbor Workers' Compensation Act §§ 2(3), 3(a), as amended, 33 U.S.C.A. §§ 902(3), 903(a).

2. Workers' Compensation ⇐262

Simple distinction between "traditional railroad tasks" and "traditional maritime tasks" is not the sole inquiry to be made in determining a railroad employee's status under the Longshoremen's and Harbor Workers' Compensation Act; declining to follow *Conti v. Norfolk & Western Ry. Co.*, 566 F.2d 890. Longshoremen's and Harbor Workers' Compensation Act, § 2(3), as amended, 33 U.S.C.A. § 902(3).

3. Workers' Compensation ⇐262

Longshoremen's and Harbor Worker's Compensation Act provided exclusive coverage for railroad employee injured while repairing a hopper, or funnel, through which coal passed as it moved from railroad cars to the holds of barges and ships at railroad's coal pier, precluding coverage for employee's injuries under the Federal Employers' Liability Act. Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 2(3), 3(a), as amended, 33 U.S.C.A. §§ 901 et seq., 902(3), 903(a); Federal Employers Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 82-03093).

J. Michael Farrell, Washington, D.C., of the Bar of the District of Columbia Court

of Appeals *pro hac vice* by special leave of the Court, with whom Kurt C. Rommel, Washington, D.C., was on the brief, for appellant.

George F. Pappas, Baltimore, Md., of the Bar of the Court of Appeals for Maryland *pro hac vice* by special leave of the Court, with whom Walter J. Smith, Jr., Washington, D.C., was on the brief, for appellee.

Before WRIGHT, MIKVA and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

A recurring problem in workers' compensation laws has been the coverage of maritime workers. Commencing in 1917, when the Supreme Court held that under certain circumstances states could not constitutionally provide compensation to injured maritime workers, *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), Congress, the courts, and the states have struggled to carve out rational areas for state and federal laws. The original "Jensen line", named after that 1917 case, held that the states could not cover longshoremen injured seaward of the water's edge. In 1927, after several unsuccessful attempts to extend state compensation remedies to injured maritime workers, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* (1982), to provide coverage for such precluded longshoremen and others similarly situated. That statute, significantly amended in 1972, has been intersected by other federal compensation laws. We here address the application of the LHWCA, as amended in 1972, to the facts in this case and the interface, if any, between that Act and the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.* (1982).

John Harmon, appellant, was employed by the Baltimore and Ohio Railroad Company (B & O) at its coal pier in Baltimore. He was injured while repairing a hopper, or funnel, through which coal passes as it

among various right-wing groups as "drifting" (a statement we have disposed of in the context of another allegation earlier, see page 1572, *supra*), asserted that Carto "organized and promoted the Joint Council for Repatriation. What he meant by 'repatriation' was the forced deportation of all blacks to Africa." The published sources relied upon by defendants support the assertion that Carto created this organization, and that its purpose was to "send[] American blacks back to Africa." They do not establish, however, that the proposal envisioned "forced deportation"—in fact, to the contrary, one of them asserted that Carto (overtly at least) only sought "voluntary" repatriation. While the latter detail reduces not at all the repugnant racism of the scheme, it is possible to be a racist without being guilty of the quite separate fault of advocating the forced deportation of United States citizens. It is the distinction between the actions of White Citizen Councils, during the worst days of the civil rights struggle, in subsidizing bus fares for blacks willing to emigrate from the South, and the action of groups such as the Ku Klux Klan in driving blacks out by physical force. As far as racism is concerned, there is no distinction between the two, but the latter contains an additional and quite distinct repugnancy. Since the published sources referred to by the defendants not only do not establish this point but to the contrary assert that Carto's scheme was formally for "voluntary" repatriation, we think it is a jury question whether this allegation, if false, was made with actual malice.

[15] We find that a jury could reasonably conclude that defamatory statements based wholly on the *True* article were made with actual malice. That article was the subject of a prior defamation action which was settled to Carto's satisfaction, a fact likely known to Bermant's editors, if not Bermant. Whether the particular statements relied on were false and whether the appellees were actually aware of

that falsity are matters for a jury to determine. Allegation 19, the illustration suggesting that Carto emulated Hitler, and allegation 29, that Carto joined the singing of "Hitler's 'Horst Wessel Lied'" and delivered a speech in an attempt to emulate Hitler's style and charisma, were based solely on the *True* article. There is no other evidence that Carto emulates Hitler in appearance or in action, allegations the jury could find to be defamatory.

[16] We turn next to the five allegations based solely upon the conversation with Robert Eringer:

13. Statement that Carto "conducts his business by way of conference calls from a public telephone," which arguably suggests criminality;
14. Claim that in 1968 a Carto front organization "used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York" (since Liddy was later convicted of felony in connection with political activities, the allegation could be considered defamatory);
17. Illustration showing Carto secretly observing prospective employees through a one-way mirror;
23. One-way mirror allegation, in text;
27. Claim that a lead story in an issue of *The Spotlight* was a total hoax.

We find that a jury could reasonably conclude that Bermant made these allegations with a disregard for their truth or falsity that constituted actual malice. For one thing, there is only Bermant's word for the fact that Eringer ever said anything that supports the statements. The same was true for the statements, discussed earlier, attributed to Bartell and Suall—but as we noted, see pages 1576–1577, *supra*, those individuals were present at known locations in this country and could have been deposed by the plaintiffs, whereas the mysterious Mr. Eringer was thought to be somewhere in England. Moreover, Bermant's dealings with Eringer display a much lesser degree

of care, despite the scurrilous allegations for which he is the sole source. Bermant not only did not inquire how Eringer came to know these details of Carto's operations; he never even looked the unknown Eringer in the eye until after the story was published, but spoke to him only once over the telephone. Anderson admits that he did not care whether Eringer was reliable. These actions came close to the hypothetical case of actual malice the Supreme Court described in *St. Amant*: a story "based wholly on an unverified anonymous telephone call." 390 U.S. at 732, 88 S.Ct. at 1326. Eringer was identified by name, but he was in all other respects unknown to the appellees. These allegations, which defendants claim were based solely on Eringer's assertions, should have gone to the jury.

We affirm the District Court's grant of summary judgment as to all claims of defamation except those addressed in Part V of this opinion. As to the latter, we reverse and remand for further proceedings consistent with this opinion.

So ordered.



James L. DRONENBURG, Appellant,

v.

Vice Admiral Lando ZECH, Chief of Naval Personnel, et al.

No. 82-2304.

United States Court of Appeals,
District of Columbia Circuit.

Nov. 15, 1984.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 81-00933), Oliver Gasch, Judge.

Stephen V. Bomse, Leonard Graff and Calvin Steinmetz, Washington, D.C., were on the suggestion for rehearing en banc filed by appellant.

Charles Lister and Margaret R. Alexander, Washington, D.C., were on the supporting petition for amicus curiae the American Civil Liberties Union of the National Capital Area.

Abby R. Rubenfeld, Evan Wolfson, Sarah Wunsch and Anne E. Simon, New York City, were on the joint brief of amicus curiae LAMBDA Legal Defense and Education Fund, Inc., et al., in support of the suggestion for rehearing en banc.

Before ROBINSON, Chief Judge, WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges.

ORDER

On Appellant's Suggestion for Rehearing *En Banc*

PER CURIAM.

The Suggestion for Rehearing *en banc* of Appellant, and the briefs *amici curiae* in support thereof, have been circulated to the full Court and a majority of the judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED, by the Court, *en banc*, that the aforesaid Suggestion for rehearing *en banc* is denied.

Opinion dissenting from denial of suggestion to hear case *en banc* filed by Chief Judge SPOTTSWOOD W. ROBINSON, III, and Circuit Judges WALD, MIKVA and HARRY T. EDWARDS.

Statements of Circuit Judges GINSBURG and STARR are attached. Also attached is a statement of Circuit Judge BORK, joined by Circuit Judge SCALIA.

SPOTTSMWOOD W. ROBINSON, III, Chief Judge; WALD, MIKVA and HARRY T. EDWARDS, Circuit Judges, dissenting from denial of suggestion to hear case en banc:

We would vote to vacate the decision of the panel and to rehear the matter before the court *en banc*. This is a case of extreme importance in both a practical and a jurisprudential sense. For reasons discussed below, we do not think that *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *aff'g mem.* 403 F.Supp. 1199 (E.D.Va.1975), is controlling precedent here. Moreover, we are deeply troubled by the use of the panel's decision to air a revisionist view of constitutional jurisprudence.

The panel's extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court. The *ratio decidendi* of the panel decision is fairly well stated in the last paragraph of the opinion. Jurists are free to state their personal views in a variety of forums, but the opinions of this court are not proper occasions to throw down gauntlets to the Supreme Court.

We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint. Regardless whether it is the proper role of lower federal courts to "create new constitutional rights," *Dronenburg v. Zech*, 741 F.2d 1388, at 1396 (D.C. Cir.1984), surely it is not their function to conduct a general spring cleaning of constitutional law. Judicial restraint begins at home.

We object most strongly, however, not to what the panel opinion does, but to what it fails to do. No matter what else the opinions of an intermediate court may properly include, certainly they must still apply federal law as articulated by the Supreme Court, and they must apply it in good faith. The decisions of that Court make clear that the constitutional right of privacy, whatever its genesis, is by now firmly established.

An intermediate judge may regret its presence, but he or she must apply it diligently. The panel opinion simply does not do so. Instead of conscientiously attempting to discern the principles underlying the Supreme Court's privacy decisions, the panel has in effect thrown up their hands and decided to confine those decisions to their facts. Such an approach to "interpretation" is as clear an abdication of judicial responsibility as would be a decision upholding all privacy claims the Supreme Court had not expressly rejected.

We find completely unconvincing the suggestion that *Doe v. Commonwealth's Attorney* controls this case. In *Doe*, the Supreme Court affirmed without opinion a three-judge district court's dismissal of a pre-enforcement constitutional challenge to a state criminal statute. *Dronenburg*, by contrast, challenges the constitutionality of his discharge pursuant to a military regulation not expressly authorized by statute. To hold *Dronenburg's* claims hostage to a one-word summary affirmance disregards the well-established principle that such a disposition by the Supreme Court decides the issue between the parties on the narrowest possible grounds. See *Mandel v. Bradley*, 432 U.S. 173, 176-77, 97 S.Ct. 2238, 2240-41, 53 L.Ed.2d 199 (1977) (per curiam); *Fusari v. Steinberg*, 419 U.S. 379, 391-92, 95 S.Ct. 533, 540-41, 42 L.Ed.2d 521 (1975) (Burger, C.J., concurring). Moreover, the Court has clearly indicated that the *Doe* issue remains open. See *Carrey v. Population Services International*, 431 U.S. 678, 688 n. 5, 694 n. 17, 97 S.Ct. 2010, 2018 n. 5, 2021 n. 17, 52 L.Ed.2d 675 (1977) ("[T]he Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits its state statutes regulating [private consensual sexual] behavior among adults."); *New York v. Uplinger*, — U.S. —, 104 S.Ct. 2332, 81 L.Ed.2d 201 (1984) (dismissing certiorari as improvidently granted).

Even were we convinced by Judge Ginsburg's well-intentioned attempt to justify

the panel decision as a simple application of *Doe*, we would still vote to vacate the opinion. The opinion purports to speak for the court throughout the text, and we cannot indulge its twelve-page attack on the right of privacy as a harmless exposition of a personal viewpoint. Cf. *Dronenburg*, at 1396 n. 5.

In its eagerness to address larger issues, the panel fails even to apply seriously the basic requirement that the challenged regulation be "rationally related to a permissible end." There may be a rational basis for the Navy's policy of discharging all homosexuals, but the panel opinion plainly does not describe it. The dangers hypothesized by the panel provide patently inadequate justification for a ban on homosexuality in a Navy that includes personnel of both sexes and places no parallel ban on all types of heterosexual conduct. In effect, the Navy presumes that any homosexual conduct constitutes cause for discharge, but it treats problems arising from heterosexual relations on a case-by-case basis giving fair regard to the surrounding circumstances. This disparity in treatment calls for serious equal protection analysis.

We intimate no view as to whether the constitutional right of privacy encompasses a right to engage in homosexual conduct, whether military regulations warrant a relaxed standard of review, or whether the Navy policy challenged in this case is ultimately sustainable. What we do maintain is that the panel failed to resolve any of these compelling issues in a satisfactory

1. The dissenting opinion bends "judicial restraint" out of shape in suggesting that it is improper for lower federal courts ever to propose "spring cleaning" in the Supreme Court. In my view, lower court judges are not obliged to cede to the law reviews exclusive responsibility for indicating a need for, and proposing the direction of, "further enlightenment from Higher Authority." See *United States v. Martino*, 664 F.2d 860, 881 (2d Cir.1981) (Oakes, J., concurring). It is a view on which I have several times acted. See, e.g., *Mosrie v. Barry*, 718 F.2d 1151, 1162-63 (D.C.Cir.1983) (concurrency questioning consistency of *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), with prior precedent on the concept of liberty sheltered by

manner. Because we believe that the panel substituted its own doctrinal preferences for the constitutional principles established by the Supreme Court, we would vacate the decision of the panel and hear the case anew.

GINSBURG, Circuit Judge:

In challenging his discharge for engaging in homosexual acts in a Navy barracks, appellant argued that the conduct in question falls within the zone of constitutionally protected privacy. The panel held that, either because of the binding effect of the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *summarily aff'g* 403 F.Supp. 1199 (E.D.Va.1975), or on the basis of principles set forth in other Supreme Court decisions, the Navy's determination could not be overturned. I agree with the first basis of that holding. See *Hicks v. Miranda*, 422 U.S. 332, 344-45, 95 S.Ct. 2281, 2289-90, 45 L.Ed.2d 223 (1975).

It is true that, in its discussion of the alternative basis, the panel opinion airs a good deal more than disposition of the appeal required.¹ Appellant and amici, in suggesting rehearing en banc, state grave concern that the panel opinion's "broad scope" creates correspondingly broad law for the circuit and, in so doing, sweeps away prior landmark holdings and divergent analyses.

The concern is unwarranted. No single panel is licensed to upset prior panel rul-

due process); *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951, 953-55 (D.C.Cir.1982) (concurrency questioning cogency of Supreme Court precedent on "zone of interests" test for determining standing to sue); see also *American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 49 (D.C.Cir.1983) (Wald, J.) (citing, *inter alia*, *Copper & Brass*); *United States v. Ross*, 655 F.2d 1159, 1193-94 (D.C.Cir. 1981) (Wilkey, J., dissenting) (questioning seamlessness of web woven by *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), and its precursors), *rev'd*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

ings, landmark or commonplace, or to impose its own philosophy on "the court." The panel in this case, I am confident, had no design to speak broadly and definitively for the circuit. I read the opinion's extended remarks on constitutional interpretation as a commentarial exposition of the opinion writer's viewpoint, a personal statement that does not carry or purport to carry the approbation of "the court."

Because I am of the view that the Supreme Court's disposition in *Doe* controls our judgment in this case, and that the panel has not tied the court to more than that, I vote against rehearing the case en banc.

Statement of Circuit Judge BORK, joined by Circuit Judge SCALIA.

BORK, Circuit Judge:

The dissent from the court's denial of the suggestion of rehearing en banc undertakes to chide the panel for criticizing the Supreme Court's right to privacy cases and for failing to extract discernible principle from those cases for application here. In rather extravagant terms the dissent accuses the panel of such sins as attempting to "wipe away" Supreme Court decisions, of "throw[ing] down gauntlets" to that Court, and "conduct[ing] a general spring cleaning of constitutional law." While rhetorical excess may be allowed to pass, we think that underlying it in this instance are serious misunderstandings that require a response.¹

In the first place, the dissent overlooks both what we actually did and the necessity

1. The dissent also objects to our reliance on the Supreme Court's summary affirmance, in *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), of a district court judgment that upheld a state statute making it a criminal offense to engage in private consensual homosexual conduct. Since the Navy's regulation in this case is if anything a less drastic restriction on the liberty of homosexuals than the statute in *Doe*, it must follow—on any conceivable rationale that could be given for *Doe*—that the regulation is constitutional. The dissent tries to evade this straightforward analysis by relying on the Court's suggestion in *Carey v. Population Services International*, 431

for it. The appellant cited a series of cases—*Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); and *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977)—which he claimed established a privacy right to engage in homosexual conduct. It was, therefore, essential that the panel examine those decisions to determine whether they did enunciate a principle so broad. We quoted the pivotal language in each case and concluded that no principle had been articulated that enabled us to determine whether appellant's case fell within or without that principle. In these circumstances, we thought it improper for a court of appeals to create a new constitutional right of the sort appellant sought. That much is certainly straightforward exegesis. The dissenters appear to be exercised, however, because the conclusion that we could not discover a unifying principle underlying these cases seems to them an implicit criticism of the Supreme Court's performance in this area. So it may be, but, if so, the implied assessment was inevitable. It is difficult to know how to reach the conclusion that no principle is discernible in decisions without seeming to criticize those decisions. Had our real purpose been to propose, as the dissent says, that those cases be eliminated from constitutional law, we would have engaged in a much more extensive analysis than we undertook. As it

U.S. 678, 694 n. 17, 97 S.Ct. 2010, 2021 n. 17, 52 L.Ed.2d 675 (1977), that the *Doe* issue remains open. It is true in one sense that the issue remains open—a summary affirmance does not foreclose full consideration of the issue by the Supreme Court. That is all the language from *Carey* suggests. But it was settled in *Hicks v. Miranda*, 422 U.S. 332, 344–45, 95 S.Ct. 2281, 2289–90, 45 L.Ed.2d 223 (1975), that summary affirmances by the Supreme Court are fully binding on the lower federal courts, and *Carey* does not even hint otherwise. Hence *Carey* cannot justify the dissent's refusal to follow *Doe*.

was, we said no more than we thought required by the appellant's argument.

Unless the dissent believes that we are obliged to dissemble, enunciating a unifying principle where we think none exists, then its only criticism must be with the adequacy of our analysis rather than our bona fides. That criticism, we may note, would be a good deal more persuasive if the dissent set forth (as it conspicuously did not) the unifying principle that we so obviously overlooked.

Contrary to the dissent's assertion, moreover, the panel opinion explained the rational basis for the Navy's policy with respect to overt homosexual conduct. Slip op. at 20–21. We cannot take seriously the dissent's suggestion that the Navy may be constitutionally required to treat heterosexual conduct and homosexual conduct as either morally equivalent or as posing equal dangers to the Navy's mission. Relativism in these matters may or may not be an arguable moral stance, a point that we as a court of appeals are not required to address, but moral relativism is hardly a constitutional command, nor is it, we are certain, the moral stance of a large majority of naval personnel.

Though we think that our analysis of the privacy cases was both required and accurate, we think it worth addressing the rather curious version of the duties of courts of appeals that the dissent urges. It is certainly refreshing to see "judicial restraint" advocated with such ardor, but we think the dissent misapprehends the concept. "Judicial restraint" is shorthand for the philosophy that courts ought not to invade the domain the Constitution marks out for democratic rather than judicial governance. That philosophy does not even remotely suggest that a court may not offer criticism of concepts employed by a superior court. Some very eminent jurists have done just that and have thereby contributed to the growth and rationality of legal doctrine. See, e.g., *Salerno v. American League of Professional Baseball Clubs*,

429 F.2d 1003, 1005 (2d Cir.1970) (Friendly, J.) (criticizing Supreme Court cases holding professional baseball exempt from federal antitrust laws); *United States v. Dennis*, 183 F.2d 201, 207–212 (2d Cir.1950) (L. Hand, J.), *aff'd*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) (criticizing Supreme Court's explication and application of the "clear and present danger" test, and proposing a reformulation of that test which the Court proceeded to approve, 341 U.S. at 510, 71 S.Ct. at 867); *United States v. Roth*, 237 F.2d 796, 801 (2d Cir.1956) (Frank, J., concurring) (criticizing the Supreme Court's decisions affirming the constitutionality of an obscenity statute as overlooking a variety of historical, sociological, and psychological grounds for calling the constitutionality of the statute into question). See also Arnold, *Judge Jerome Frank*, 24 U.Chi.L.Rev. 633, 633 (1957) ("When forced by *stare decisis* to reach what he considered an undesirable result [Judge Frank] would write a concurring opinion analyzing the problem and plainly suggesting that either the Supreme Court or Congress do something about it. It was a unique and useful technique whereby a lower court judge could pay allegiance to precedent and at the same time encourage the processes of change."). None of the judges mentioned could be characterized as lacking judicial restraint.

The judicial hierarchy is not, as the dissent seems to suppose, properly modelled on the military hierarchy in which orders are not only carried out but accepted without any expression of doubt. Law is an intellectual system and courts are not required to approve uncritically any idea advanced by a constitutionally superior court. Lower court judges owe the Supreme Court obedience, not unquestioning approval. Without obedience by lower courts, the law would become chaos. Without reasoned criticism, the law would become less rational and responsive to difficulties. The fact that criticism may come from within the judicial system will often make it more valuable rather than less. We say this,

however, only to clarify the question of the proper relationship between inferior and superior courts and more for its application to future cases than to this one. In the present case, as we have said, any criticism the dissent may believe it detects in the panel opinion was at most implicit and inseparable from the analysis required of us.

STARR, Circuit Judge:

It is not the province of the lower federal courts to chide the Supreme Court for decisions that, in the considered view of federal judges, may be ill-reasoned or misguided. It is our bounden duty, whatever our own views of the matter may be, to follow in good faith applicable precedent, no matter how disagreeable that precedent might be.

But in my judgment, the panel in its opinion for the court has simply not strayed from this elementary judicial obligation. To the contrary, the panel's moving beyond *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), to examine more broadly the Supreme Court's teachings on the right of privacy, beginning with *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1673, 14 L.Ed.2d 510 (1965), seems not only appropriate but necessary to treat dispassionately and fairly the constitutional claims advanced by Mr. Dronenburg.

And I am satisfied that the panel has rightly analyzed the applicable materials. It simply cannot seriously be maintained under existing case law that the right of privacy extends beyond such traditionally protected areas as the home or beyond

traditional relationships—the relationship of husband and wife, or parents to children, or other close relationships, including decisions in matters of childbearing—or that the analytical doctrines enunciated by the Court lead to the conclusion that government may not regulate sexually intimate consensual relationships. In our federal system, governments indisputably have done so for two centuries in a variety of ways that seem to have gone, until more recent times, utterly unquestioned. While bright lines in the law of privacy are difficult for the most earnestly conscientious judges to discern, the teachings and doctrines which we thus far have to guide our way in this troubling area suggest that the result here is entirely correct—a result that can be reached without resort to a single dissenting opinion from one or more members of the Supreme Court concerned by the legitimacy of creating judge-made rights, as opposed to rights clearly and broadly enumerated at the Founding. *Goldman v. Secretary of Defense*, 739 F.2d 657 (D.C.Cir.1984) (Starr, J., dissenting from denial of suggestion to hear case *en banc*).



KEY NUMBER DIGEST



ADMINISTRATIVE LAW AND PROCEDURE

IV. POWERS AND PROCEEDINGS OF ADMINISTRATIVE AGENCIES, OFFICERS AND AGENTS.

(C) RULES AND REGULATIONS.

§382. Nature and scope.

C.A.Cal. 1984. In determining whether rule is substantive or interpretive for purposes of the Administrative Procedure Act, substantive rules are rules which create law and are usually implementary to an existing law, incrementally imposing general, extrastatutory obligations pursuant to authority properly delegated by the legislature, while interpretive rules merely clarify or explain existing law or regulations and go more to what the administrative officer thinks the statute or regulation means. 5 U.S.C.A. § 553(b), (b)(A), (d), (d)(2).—*Alcaraz v. Block*, 746 F.2d 593.

§394. — Notice; necessity.

C.A.Cal. 1984. Exceptions to Administrative Procedure Act's notice and comment provisions are narrowly construed and only reluctantly countenanced but, while agency must carefully follow notice and comment law even though self-adopted in situations otherwise exempted from the Act, congressional policy for interpreting good cause extremely narrowly does not operate in those situations, although agency may not use "good cause" to manipulate procedures to its own uses. 5 U.S.C.A. §§ 552(a)(2), 553.—*Alcaraz v. Block*, 746 F.2d 593.

§413. — Administrative construction.

C.A.D.C. 1984. Interpretation by the FCC of its own policies and regulations is entitled to great deference.—*National Ass'n of Regulatory Utility Com'rs v. F.C.C.*, 746 F.2d 1492.

Deference to administrative interpretation is even more clearly in order when construction of an administrative regulation rather than a statute is in issue.—*Id.*

A court must necessarily look to the administrative construction of a regulation if the meaning of the words used is in doubt.—*Id.*

Administrative interpretation of administrative regulation is of controlling weight unless it is plainly erroneous or inconsistent with the regulation.—*Id.*

§416. Effect.

C.A.9 1984. Agencies must comply with their own regulations.—*Confederated Tribes and Bands of Yakima Indian Nation v. F.E.R.C.*, 746 F.2d 466.

§419. — Retroactivity.

C.A.2 1984. In determining whether to give retroactive effect to new rules adopted in course of agency adjudication, court must balance desirable effects of application of new rule against the

possible unfairness sustained by litigant.—*N.L.R.B. v. Niagara Mach. & Tool Works*, 746 F.2d 143.

(D) HEARINGS AND ADJUDICATIONS.

§461. — Admissibility.

C.A.9 1984. In the absence of ambiguity, Federal Energy Regulatory Commission must ascertain the meaning of a contract without resort to parol or extrinsic evidence; contract is not ambiguous merely because parties disagree on its interpretation.—*Pacific Gas and Elec. Co. v. F.E.R.C.*, 746 F.2d 1383.

§466. Depositions.

C.A.9 1984. Extent of discovery to which party to an administrative proceeding is entitled is primarily determined by particular agency; rules of civil procedure are inapplicable and Administrative Procedure Act does not provide expressly for discovery. 5 U.S.C.A. § 551 et seq.—*Pacific Gas and Elec. Co. v. F.E.R.C.*, 746 F.2d 1383.

V. JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS.

(A) IN GENERAL.

§668. — Persons aggrieved or affected.

C.A.7 1984. A person is aggrieved within meaning of the Administrative Procedure Act for standing purposes if he alleges that he has or will sustain some actual or threatened injury in fact resulting from challenged agency acts and the alleged injury was to an interest arguably within zone of interests protected or regulated by the statute in question. 5 U.S.C.A. § 551 et seq.—*Hartigan v. Federal Home Loan Bank Bd.*, 746 F.2d 1300.

(B) DECISIONS AND ACTS REVIEWABLE.

§701. In general.

C.A.7 1984. Under the Administrative Procedure Act, an administrative decision is immune from judicial review only if review is expressly precluded by statute or if the agency's action is committed to agency discretion by law; this exception is a narrow one and there is a presumption in favor of judicial review. 5 U.S.C.A. § 701(a).—*Hartigan v. Federal Home Loan Bank Bd.*, 746 F.2d 1300.

The "committed to agency discretion" exception to judicial review of administrative decisions arises only when the statute is drawn in such broad terms that in a given case there is no law to apply. 5 U.S.C.A. § 701(a).—*Id.*

(D) SCOPE OF REVIEW IN GENERAL.

§749. Presumptions.

C.A.7 1984. Under the Administrative Procedure Act, an administrative decision is immune

Other gays find hope in midshipman's court victory

By Debbie Howlett
USA TODAY



Joseph Steffan was among the best and the brightest of the U.S. Naval Academy's class of 1987 — a soloist in the choir, one of the top 10 students, a "model" for classmates.

Then he said he was gay.

Six weeks before graduation, a Navy review panel recommended that he be discharged for "insufficient aptitude for commissioned service." Steffan left Annapolis, sure that he had no recourse.

On Tuesday, a judge said the military's ban on gays was unconstitutional and ordered Steffan reinstated and commissioned as an officer.

"I didn't dare think about it," says Steffan. "It was like going through first year (at the academy): You're so concerned about getting through the moment you don't dare think about what might be next."

Now 27 and a law student, Steffan is eager to return to the Navy.

Since 1989, at least 3,500 service members have been discharged for being gay. This year, in four cases, federal courts have ruled that such discharges are, or likely are, unconstitutional.

Gay rights activists insist Tuesday's court decision sealed the fate of the military's long-standing ban on gays.

"It's only a question of time before we have a (Supreme Court) that sees the rightness of the argument," Gregory King of the Human Rights Campaign Fund says.

But the appeals court decision involved the old policy, which is to be supplanted by a "don't ask, don't tell" compromise. Clinton is expected to approve Congress' compromise — sandwiched

in the Defense Department budget — possibly by month's end.

Several other cases are on the federal dockets. Circuit court panels are expected to hear two challenges — one by Petty Officer Keith Meinhold in California; the other by Navy Lt. Dirk Selland in Virginia — next month.

In addition, the ACLU has filed suit against the "don't ask, don't tell" policy for seven service members.

And while gay activists relish the court fight, so do those who support the military's ban.

"What you've got here is a political hot potato" says Rev. Lou Sheldon of the Traditional Values Coalition. "But the (Supreme) Court will say, 'Yes Congress has a right to determine who is in military: If they're tall or thin, fat or short, gay or what.'"

While the debate bounces from court to court, least a dozen gay men and lesbians are serving openly in the military.

"Maybe this will even discourage discharges ... change a few minds," says sailor Mark Phillips, a machinist's mate who filed suit in Seattle this year to remain in the Navy. "It gives me hope."

► Appeals court ruling, 1A

STATESLINE

FROM USA TODAY'S NATIONAL NEWS NETWORK

Senate prepared to endorse ban on 19 assault weapons

By Leslie Phillips
USA TODAY

The Senate today is expected to endorse a ban on the sale, possession and manufacture of 19 types of semiautomatic assault weapons as part of a \$22 billion crime bill.

A test vote last week indicated a 1- or 2-vote margin for the amendment by Sen. Dianne Feinstein, D-Calif., underscoring the Senate's tug of war between voting against the powerful National Rifle Association and for crime-fighting measures demanded by the public.

The amendment expires after 10 years, does not apply to guns lawfully purchased before the effective date, and excludes 650 other automatic weapons.

"It's certainly irrelevant in terms of stopping violent crime," says Wayne LaPierre of the NRA. "The sad thing about this issue is it has nothing to do with ballistics. It has to do with what a gun looks like."

Even Democrats predicted the ban would be eliminated when the House and Senate meet to reconcile their respective crime bills.

Majority Leader George Mitchell, D-Maine, hoped to complete work on the Senate bill early today, but another gun control amendment threatened those prospects.

Senate Minority Leader Robert Dole, R-Kan., was ready with a plan to enforce a five-day waiting period before a handgun purchase — allowing law enforcement agencies to conduct criminal back-



By John Duricka, AP
FEINSTEIN: Sponsor of amendment

ground checks on the gun purchaser. Once a computerized instant check system is in place nationwide, state laws requiring waiting periods and background checks would be pre-empted. Dole's proposal is opposed by Democrats, who argue that it denies states the choice of enforcing more comprehensive background checks.

Dole's amendment could also open the crime bill to scores of anti- and pro-gun amendments, delaying passage.

The House last week approved an independent five-day waiting period with background checks, and voted to add 55,000 new officers to police forces nationwide, and to provide drug treatment for prison addicts.

The overloaded Senate bill, by contrast, has become a catchall for get-tough proposals popular with voters frightened by neighborhood crime, but which many concede may not contribute to crime control.

The Senate also is expected to table a proposal to streamline the death row appeals process by limiting state inmates to one federal appeal — known as habeas corpus — and allowing a second appeal under extenuating circumstances.

A plea to the president

By Robert Davis
USA TODAY

WASHINGTON — Yoshi Hattori was living his dream — to call the USA his home away from Japan — right up to the instant he was shot to death.

On Tuesday his parents met with President Clinton, urging him to lead the effort to make the USA safer.

Clinton promised to fight gun violence, and Yoshi's mother placed an anti-handgun sticker on the president's jacket.

She also gave Clinton pictures her son took of him the day before the teen died. Yoshi, 18, an exchange student living in Baton Rouge, La., met candidate Clinton last year.

The next day, Yoshi went to the wrong house looking for a party and was gunned down by a frightened homeowner.

In a country riddled with violence and rocked by fear, the gunman was justified, a jury said.

Yoshi's parents gathered 1.7 million Japanese signatures on petitions against the easy availability of guns in the USA and urged Clinton to lead the nation to safety.

"We started this petition because we love America like Yoshi did," says Mieko Hattori. She and her husband, Masaichi, lobby again today with the National Coalition to Stop Gun Violence, which wants to ban all handguns.

Coalition president Mike Beard says "interest and public outcry" are now at "levels needed to make a difference."

Gun violence has exploded in the USA since President John F. Kennedy was killed 30 years ago Monday. Clinton was inspired by Kennedy, and Yoshi Hattori, who was inspired by seeing Clinton, would have turned 18 on Monday.

Mieko Hattori doesn't believe in miracles but says when America is safer, "Yoshi's life will not have been wasted."

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

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-

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

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 $\S$ 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 $\S$ 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 $\S$ 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 $\S$ 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 $\S$ 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. Amends. 5, 14.

6. Armed Services $\S$ 16

Constitutional Law $\S$ 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.

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 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 pre-service, 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 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, 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. *Elbrandt 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-policy-making 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.
Parahi v. Government of U.S.	93-5012	10/8/93	AFFIRMED	D.C.D.C.
Paron 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.

THE WHITE HOUSE
WASHINGTON
November 22, 1993

FILED
Garry in [unclear]
Steffan

MEMORANDUM FOR KEITH BOYKIN

FROM: CLIFF SLOAN
SUBJECT: DOJ STEFFAN STATEMENT

Attached is a possible redraft of the Steffan statement. I've also added some suggestions to the Q & A's.

I hope that these comments are helpful.

DRAFT DOJ STATEMENT

On November 16, 1993, the United States Court of Appeals for the District of Columbia Circuit decided that certain actions taken against midshipman Joseph Steffan, under the Department of Defense's former policy concerning homosexuals in the military, were unconstitutional. The Court emphasized that "[t]he military's newly announced policy toward homosexuals in the armed forces . . . is not at issue in this case. . . . 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." Slip op., p. 6.

Because the Court's decision is explicitly limited to the former policy, the Court considered neither the new policy announced by the President on July 19 nor the legislation passed by Congress last week.

The policy announced by the President changes the former policy in several significant respects. Among other changes, the new policy eliminates the questioning of all recruits on issues of sexual orientation; states that sexual orientation itself is not a bar to military service; limits the grounds for undertaking investigations of homosexuality; directs commanders to enforce the Uniform Code of Military Justice equally with regard to homosexuals and heterosexuals; and explicitly provides service members with an opportunity to rebut a presumption created by homosexual statements.

As the Attorney General explained on July 19, 1993, the changes in the new policy strengthen the constitutionality of the military's policy. (A copy of the Attorney General's July 19 memorandum is attached).

A further appeal in Steffan would require a request for exceptional relief from the full D.C. Circuit or the Supreme Court. But the Steffan decision is limited to a former policy which will soon be formally superseded, and it explicitly does not reach the soon-to-be-implemented new policy and new legislation.

Accordingly, in consultation with the White House and the Department of Defense, the Department of Justice has determined that the government will not file a further appeal in the Steffan case.

The government plans to proceed expeditiously with implementation of the new policy. In addition, the government will, of course, fully comply with the Court's orders regarding Mr. Steffan.

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The policy announced by the President *even totally* changes the former policy in several significant respects. Among other changes, the new policy eliminates the questioning of all recruits on issues of sexual orientation; states that sexual orientation itself is not a bar to military service; limits the grounds for undertaking investigations of homosexuality; directs commanders to enforce the Uniform Code of Military Justice equally with regard to homosexuals and heterosexuals; and explicitly provides service members with an opportunity to rebut a presumption created by homosexual statements.

As the Attorney General explained on July 19, 1993, the changes in the new policy strengthen the constitutionality of the military's policy. (A copy of the Attorney General's July 19 memorandum is attached).

A further appeal in Steffan would require a request for exceptional relief from the full D.C. Circuit or the Supreme Court. But the Steffan decision is limited to a former policy which will soon be formally superseded, and it explicitly does not reach the soon-to-be-implemented new policy and new legislation.

Accordingly, in consultation with the White House and the Department of Defense, the Department of Justice has determined that the government will not file a further appeal in the Steffan case.

The government plans to proceed expeditiously with implementation of the new policy. In addition, the government will, of course, fully comply with the Court's orders regarding Mr. Steffan.

Press Guidance on Steffan case:

Question 1: Why won't the Administration appeal the case?

- o The Justice Department will not appeal the Steffan decision because the decision affects only the old policy.
- o Because Congress approved the new policy just last week, the Administration may now conclude its efforts to promulgate regulations to implement the new policy.

Question 2: Doesn't the rationale of the Steffan decision affect the new policy as well?

- o The Appeals Court in Steffan specifically limited its decision to the old policy and other decisions (such as Meinhold) have not made that distinction. We believe the new policy and the old policy are significantly different.

Question 3: Last week you said the Steffan decision would have some policy impact on the new decision. What's changed?

- o After thoroughly reviewing the Steffan decision, it became clear that the Court chose to limit its ruling to the old policy. The Court said:

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...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.

Question 4: What will you do about other pending cases?

- o The decision not to appeal applies only to this particular case, and the Pentagon and the Justice Department will continue to review other pending cases brought under the old policy.

Question 5: Does it hurt your policy to have two federal circuits now saying that the current policy, even if its going to be changed, is unconstitutional?

- o We would like to resolve the cases under the old policy as expeditiously as possible so we can move onto the new policy, which we believe will stand up in court.

DRAFT DOJ STATEMENT

On November 16, 1993, the United States Court of Appeals for the District of Columbia Circuit decided that certain actions taken against midshipman Joseph Steffan, under the Department of Defense's former policy concerning homosexuals in the military, were unconstitutional. The Court emphasized that "[t]he military's newly announced policy toward homosexuals in the armed forces . . . is not at issue in this case. . . . 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." Slip op., p. 6.

Because the Court's decision is explicitly limited to the former policy, the Court considered neither the new policy announced by the President on July 19 nor the legislation passed by Congress last week.

The policy announced by the President changes the former policy in several significant respects. Among other changes, the new policy eliminates the questioning of all recruits on issues of sexual orientation; states that sexual orientation ~~itself is not~~ a bar to military service; limits the grounds for undertaking investigations of homosexuality; requires the Secretary of Defense to enforce the Uniform Code of Military Justice equally with regard to homosexuals and heterosexuals; and explicitly provides service members with an opportunity to rebut a presumption created by homosexual statements.

As the Attorney General explained on July 19, 1993, the changes in the new policy strengthen the constitutionality of the military's policy. (A copy of the Attorney General's July 19 memorandum is attached).

A further appeal in Steffan would require a request for exceptional relief from the full D.C. Circuit or the Supreme Court. But the Steffan decision is limited to a former policy which will soon be formally superseded, and it explicitly does not reach the soon-to-be-implemented new policy and new legislation.

Accordingly, in consultation with the White House and the Department of Defense, the Department of Justice has determined that the government will not file a further appeal in the Steffan case.

The government plans to proceed expeditiously with implementation of the new policy. In addition, the government will, of course, fully comply with the Court's orders regarding Mr. Steffan.



U. S. Department of Justice
Civil Division

Gap - in - the - military / Steffan

January 28, 1994
2:43 pm
2 Page(s)

To : Cliff Sloan
White House Counsel

Fax No : 9456-1647

From : STEINMEYER

Subject : Steffan Schedule

Comments :

Recipients:

Mike Vatis (to)

Ed Duffy (to)

Date: Friday, January 28, 1994 2:36 pm
From: SS01(STEINMEY)
Subject: Steffan Briefing Schedule

The D.C. Clerk's Office just called me and said that the Court had issued an order scheduling en banc briefing and oral argument.

Steffan's brief due -	Feb. 24
Amici briefs due -	Mar. 3
Our brief due -	Mar. 28
Reply brief due -	Apr. 8
Oral argument -	May 11.

The order will state that, in addition to any other issues that the parties want to brief, they should address the issue of the power of the court to issue a commission. The printed order will not be available from the Court until Monday.



3 December 1993

MEMORANDUM FOR THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

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

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

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

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

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

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

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

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

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

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

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



JAMES P. TERRY
Colonel, USMC
Legal Counsel

APPEAL IN STEFFAN V. ASPIN

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

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

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

- STEFFAN MUST BE APPEALED FOR THREE REASONS:

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

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

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

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

APPEAL IN STEFFAN V. ASPIN

- In the Steffan case, the U.S. Court of Appeals for the District of Columbia Circuit found the former DOD homosexual exclusion policy unconstitutional and ordered the reinstatement and commissioning of a discharged Naval Academy Midshipman.

- In a critical holding, the court concluded that it is "inherently unreasonable" to presume under the policy that persons who identify themselves as homosexuals are likely to engage in homosexual conduct.

- This holding is in direct conflict with the conclusion of a court of equal stature, the U.S. Court of Appeals for the Seventh Circuit, which held in Ben-Shalom v. Marsh that an admission of homosexuality "can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct." In its report on the recently signed legislation concerning homosexuality in the Armed Forces, the Senate Armed Services Committee agreed completely with this conclusion, and the recently enacted legislation allows us to continue to discharge admitted homosexuals.

- We believe there are three extremely important reasons why the Steffan case must be appealed in an effort to overturn this ruling and its reasoning:

- The very same presumption (that an admitted homosexual engages in or has a propensity to engage in homosexual conduct) is a crucial underpinning of the new policy reflected in the legislation and soon to be released DOD policy. If Steffan is not challenged, therefore, the new policy is in jeopardy.

- No matter what happens with the new policy, the Services will still have to deal with the cases of service members who were separated under the old policy. There are approximately 3200 potential cases service-wide (about 1500 Army cases) which would come within the Federal courts' six-year statute of limitations for filing a lawsuit based on an unlawful discharge. If Steffan is not challenged, we would have great difficulty defending cases brought in that circuit. Furthermore, any effort by the Services to avoid additional litigation by some type of administrative action instead (i.e. review by the Army Board for Correction of Military Records or new separation boards) would be so onerous as to be impractical.

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

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

Draft #1

Steffan

The U.S. Court of Appeals for the District of Columbia Circuit ruled on November 16, 1993 that the Department of Defense must implement orders relating to Joseph Steffan. The Court declined to apply its decision to the pending policy announced by the President July 19, 1993. Because the D.C. Circuit Court's decision is limited to the old policy, it has no bearing on the new legislation approved by Congress last week nor on the implementing legislation to be promulgated by the Department of Defense.

The new policy changes the old policy in several significant ways. It shifts the focus of DoD inquiries from sexual orientation status to conduct, eliminates questioning of all recruits on issues of sexual orientation, and permits the Secretary of Defense to enforce the Uniform Code of Military Justice equally with regard to homosexuals and heterosexuals.

Insofar as the Court's decision specifically affects only the old policy, the Justice Department will not file an appeal in Steffan v. Aspin. The Defense Department will implement the orders of the Court with regard to Joseph Steffan.

from K. Boykin, x 7151

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

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

v.

LES ASPIN,
SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees.

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

APPELLEES' PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC

File
Exps - in - the -
military -
Steffan

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* Authorities chiefly relied upon are marked with an asterisk.

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

No. 91-5409

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

v.

LES ASPIN,
SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees.

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

APPELLEES' PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC

CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE

This case arises under a provision of the military's old policy concerning service by homosexuals in the Armed Forces. The panel rejected the military's interpretation of its own policy as conduct-based, construing it instead as status-based. The panel held that, so construed, the old policy violated the equal protection component of the Due Process Clause.¹

In our view, the panel's decision is fundamentally in error. The panel's construction of the old policy is inconsistent with the cardinal principles that an agency's interpretation of its own regulations is entitled to great deference and should be accepted especially where, as here, it avoids more difficult

¹ A copy of the panel's opinion is attached.

constitutional issues.² Furthermore, although the panel purported to recognize the principles of rational-basis review and deference to the judgment of the Armed Forces on matters of military effectiveness and readiness, see slip op. at 8-9, 10-11, 19, the decision it rendered is plainly incompatible with those principles.³ Indeed, the panel did not even mention -- let alone attempt to distinguish -- decisions of other circuits that, in square contradiction to the panel's decision, have held that the military's old policy is conduct-based and, as such, compatible with equal protection. See Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1074 n.6, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).

Nevertheless, we are not seeking further review in this Court of those portions of the panel's opinion. As explained below, the panel's rulings are inextricably tied to its (erroneous) construction of the military's old policy and the text of the regulations embodying that policy. Indeed, the panel itself expressly stated that its decision is confined to the old-policy regulations. See slip op. at 6. Subsequent to the panel's

² See, e.g., Stinson v. United States, 113 S. Ct. 1913, 1919 (1993) (agency's reasonable regulatory interpretation entitled to "controlling weight") (citing cases); DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) (constitutional adjudication should, where possible, seek to avoid "serious constitutional problems").

³ See, e.g., Heller v. Doe, 113 S. Ct. 2637, 2642-43 (1993) (rational-basis review); Goldman v. Weinberger, 475 U.S. 503, 506-08 (1986) (deference to military); Rostker v. Goldberg, 453 U.S. 57, 64-68 (1981) (same).

decision, a new policy worked out by the President, the Department of Defense, and the Congress was enacted into law to supersede the old policy. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547 (to be codified at 10 U.S.C. § 654). The Defense Department recently promulgated implementing regulations, which will become effective in early February. DOD Directive 1332.14 (Dec. 22, 1993).

The new statute and regulations make clear that, unlike the panel's incorrect interpretation of the old policy, the military's policy on service by homosexuals is directed to conduct rather than status or orientation. To this end, the new policy: (1) specifically states that "[h]omosexual conduct is grounds for separation" but that "[s]exual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct," DOD Directive 1332.14 § H(1)(a); (2) makes clear that the bases for separation are homosexual acts and the likelihood of such acts, id. at §§ H(1)(a) and H(b)(2); (3) deletes the term "desires" that appeared in the old regulations and was a central element of the panel's construction of the old policy, id. at Definitions (E); and (4) expressly provides a rebuttable presumption that allows declared homosexuals to remain in the military in prescribed circumstances. Id. at § H(1)(b)(2). Taking into account the governing standards of Fed. R. App. P. 35(a) and D.C. Cir. Rule 15(a)(3), we have concluded that the panel's decision concerning the interpretation and validity of

the relevant provisions of the old policy, although erroneous, does not warrant rehearing en banc in light of the facts that: (1) the new policy has now been adopted to supersede the old policy; (2) the new policy reflects changes from portions of the old policy that were critical to the panel's decision on the old policy; (3) the panel's decision, by both the panel's explicit recognition and the reasoning of its opinion, is limited "only" to the old policy and does not address the new policy, which "[was] not at issue in this case," slip op. at 6 (emphasis in original); and (4) there are currently only a small number of individual cases pending in the district court in this Circuit that could be affected by the panel's decision.⁴

There is, however, one aspect of the panel's decision that warrants rehearing and, if necessary, rehearing en banc. As part of its remedy, the panel ordered the Secretary to "commission [Steffan] as an officer." Slip op. at 24. This relief was waived by Steffan and was not briefed by either party in this Court. More fundamentally, this relief exceeds the scope of judicial authority, for the President may not be ordered to nominate, or the Senate to confirm, a person for a commission. In accordance with the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, officers of the United States -- including commissioned officers of the Armed Forces -- are appointed by the President by and with the advice and consent of the Senate.

⁴ We also disagree with the panel's conclusion that Steffan was constructively discharged. We do not, however, seek rehearing of that fact-bound determination.

Thus, 10 U.S.C. § 531 provides that original appointments to offices in the grade of ensign through captain in the Navy "shall be made by the President, by and with the advice and consent of the Senate." "[T]he commissioning of officers in the [Armed Forces] is a matter of discretion within the province of the President as Commander in Chief" and subject to "the advice and consent of the Senate," and courts "have never assumed by any process to control the appointing power either in civilian or military positions." Orloff v. Willoughby, 345 U.S. 83, 90 (1953). Because the panel's opinion orders a commission that is solely within the province of the President and the Senate (who are not even parties to this suit), it is legally improper and presents an issue of "exceptional importance" that warrants further review. Fed. R. App. P. 35(a); D.C. Cir. Rule 15(a)(3).

STATEMENT

Joseph Steffan entered the United States Naval Academy as a midshipman in July 1983. App. 81. Several months before he was scheduled to graduate in 1987, Steffan learned that he was under investigation for violation of the Navy's policy concerning service by homosexuals. See App. 468-70. The investigation was triggered by Steffan's voluntary statements to military subordinates that he was a homosexual. Steffan declined to speak to the Naval investigators, but he told other Naval officials that he was a homosexual. Id. Based upon his statements, the Academy's Academic Board then recommended that Steffan be discharged for violation of the military's policy regarding service by homo-

sexuals. App. 89, 98. After consulting with his civilian attorney, Steffan resigned instead of contesting the Board's recommendation. App. 106, 397-99. He was honorably discharged on May 28, 1987. See App. 96.

One and a half years later, in December 1988, Steffan wrote to the Secretary of the Navy requesting that he be allowed to withdraw his resignation from the Naval Academy and to receive his diploma. App. 81-83. The Secretary denied that request on February 8, 1989. App. 107.

Steffan then commenced this action. The district court (Gasch, J.) granted the Government's motion for summary judgment. App. 4; 780 F. Supp. 1 (D.D.C. 1991).

Steffan appealed, and a panel of this Court reversed, holding that the relevant provisions of DOD's old policy on military service by homosexuals violated equal protection because they were not supported by a rational basis. Rejecting the military's construction of its own regulations, the panel construed the regulations at issue as being "far more concerned with status -- with thoughts and desires -- than with conduct." Slip op. at 13. Based on that construction, the panel held that a presumption of future conduct is not "justifiable when based . . . on mere thoughts and desires," id. at 16, and that "status alone, whether determined by [a service member's] thoughts or by his membership in a certain group, is an inadequate basis upon which to impute misconduct." Id. at 18. Additionally, because the panel construed the regulations to "go[] beyond preventing homosexual

conduct" by prohibiting "the mere presence of persons of homosexual orientation," id. at 19, it concluded that the old policy "depends solely upon the prejudice of third parties," id., and thus violates "constitutional principles mandat[ing] that government may not disadvantage a person on the basis of his status or his views solely for fear that others may be offended or angered by them." Id. at 21. As relief, the panel ordered the Secretary of Defense to award Steffan a Naval Academy diploma, reinstate him to military service, and commission him as an officer. Id. at 24.

ARGUMENT

THE PANEL EXCEEDED ITS AUTHORITY IN ORDERING THAT STEFFAN BE AWARDED A COMMISSION IN THE UNITED STATES NAVY.

The portion of the panel's remedy that requires the Secretary to grant Steffan a commission exceeds the scope of judicial authority. Because that issue was not properly raised or briefed by the parties, the panel's one-sentence award of relief regarding the commission may have been inadvertent. In light of the important legal principles involved, we request rehearing and, if necessary, rehearing en banc on that issue.

To begin with, the commission issue is not properly presented in this case. When Steffan sought approval from the Secretary of the Navy to withdraw his resignation from the Naval Academy, he asked only that he be permitted "to withdraw my resignation and to . . . receive my diploma" App. 83. Then, in the district court and this Court, Steffan referred only in passing

to a commission,⁵ and neither side focused on the question or addressed the significant legal issues raised by such relief. Under these circumstances, where Steffan failed to present the question of a commission at the administrative level, and where both parties found it unnecessary to brief the issue for this Court's consideration, any claim to such relief has been waived and was not properly before the panel. See Kendall v. Army Board for Corr. of Military Records, 996 F.2d 362, 366 (D.C. Cir. 1993); United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

Moreover, the panel's order raises the gravest legal questions concerning the fundamental powers of the President to make, and the Senate to approve, appointments of commissioned officers. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166-70 (1803). In accordance with the Appointments Clause of the Constitution,⁶ military officers are appointed by the President with the advice and consent of the Senate. See Mimmack v. United States, 97 U.S. 426, 437 (1878); The Navy Efficiency Act, 8 Op. Att'y Gen. 223, 231 (1856); Du Barry's Case, 4 Op. Att'y Gen. 603, 610 (1847). Thus, 10 U.S.C. § 531 provides:

⁵ App. 79 (Complaint); Brief of Appellant 36.

⁶ Article II, section 2, clause 2 of the Constitution provides: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law"

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

The Supreme Court's decision in Orloff v. Willoughby, 345 U.S. 83 (1953), establishes that it is beyond the authority of courts to grant a military commission to an individual. There, the Court specifically rejected a request for a judicial order directing that a military commission be given, stating:

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

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

Whether Orloff deserves appointment is not for judges to say

345 U.S. at 90, 92.

As the Supreme Court and this Court have observed, the awarding of a commission is a sensitive matter that is entrusted not to the judiciary but to the discretion of the President with the advice and consent of the Senate. See Orloff, 345 U.S. at 91, 90 ("[t]he President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee he is named to the specified rank during the pleasure of the President," and appointments to designated ranks require "the advice and consent of the Senate

. . . ."); Parker v. Levy, 417 U.S. 733, 744 (1974); Curran v. Laird, 420 F.2d 122, 129 (D.C. Cir. 1969) (en banc). See also Blameuser v. Andrews, 630 F.2d 538, 543 (7th Cir. 1980). This Court has thus recognized that the decision whether to commission a military officer "is . . . not subject to judicial scrutiny." Curran, 420 F.2d at 129.

The Appointments Clause and 10 U.S.C. § 531 are not merely matters of "etiquette or protocol," but play a "substantive" role in the separation of powers among the three branches of government. See Buckley v. Valeo, 424 U.S. 1, 125, 126 (1976). The courts have no authority to encroach on the power vested in the President and the Senate with respect to the appointment and commissioning of officers in the military, see Buckley, 424 U.S. at 132, and indeed the President and the Senate were not even named as parties to this action. Accordingly, the portion of the panel's remedy ordering the Secretary to "commission" Steffan as an officer exceeds judicial authority.

CONCLUSION

For the foregoing reasons, rehearing or rehearing en banc should be granted as to the portion of the panel's opinion ordering that Steffan be commissioned as an officer in the Navy.

Respectfully submitted,

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DECEMBER 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December 1993, I served the foregoing Appellees' Petition For Rehearing With Suggestion For Rehearing En Banc upon counsel by causing copies to be sent by overnight delivery service upon lead counsel (Mr. Wolinsky) and by mail, first-class, postage prepaid, to all other counsel:

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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 service-members, 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 "imaginers" 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.