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December 30, 1993

Honorable Abner J. Mikva
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Third & Constitution Avenues, N.W.
Washington, D.C. 20001

Re: Joseph C. Steffan v. Les Aspin, Secretary
of Defense, No. 91-5409 (D.C. Cir.)

Dear Judge Mikva:

I am in receipt of the government's petition for rehearing with suggestion for rehearing en banc in the above-referenced appeal. In accordance with Rule 40(a) of the Federal Rules of Appellate Procedure, appellant will reserve any answer to the petition on the merits until he is requested to submit one to the Court. However, appellant would like to note that while Steffan's opening brief to this Court argued (at pages 32 and 36) that Steffan was entitled to a commission, the government concedes that the first time that it argued that it was improper for this Court to order that Steffan be awarded a commission was when it raised the issue in its petition for rehearing. See Petition at 7-8. Accordingly, the sole issue raised on the petition has been waived and the petition should

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be denied without any consideration of its merits. E.g.,
United States v. North, 920 F.2d 940, 949-50 (D.C. Cir. 1990)
(denying petition for rehearing and/or suggestion for rehearing
en banc with respect to issue that was not raised before the
original panel).

Respectfully submitted,



Marc Wolinsky

MW:lrp

cc: Honorable Patricia M. Wald
Honorable Harry T. Edwards
Anthony J. Steinmeyer, Esq.
Counsel for Amici

THE WHITE HOUSE

WASHINGTON

January 21, 1994

Dear Mr. Chairman:

Thank you for your letter regarding the Steffan v. Aspin case.

As you may know, on December 30, 1993, the Department of Justice announced that it would not seek further review with respect to most aspects of the Steffan decision. The only issue in Steffan on which the Department did seek further review was the judicial order of a commission. Because the commission requires Presidential nomination and Senate confirmation, Justice determined that this part of the decision clearly exceeded judicial authority.

The old policy applied to Steffan has now been superseded by our new policy. The government did not seek further review of the court's decision regarding the old policy. Nor did the government seek review of the other forms of relief ordered by the court.

On January 7, 1994, the court issued an order stating that, although the government had sought review only on the remedy issue, one judge had "requested the taking of a vote on the question of also placing the merits of the case" before the full ten-judge court and that a majority of judges had voted in favor of doing so. As a result, the court vacated the Steffan decision and stated that it will issue a future order to govern further proceedings.

With best wishes,

Sincerely,



S

CHAI R. FELDBLUM

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TO: Cliff Sloan
FROM: Chai Feldblum *CF*
DATE: January 10, 1994
RE: Steffan case

So, did you know ahead of time that D.C. Circuit rules allowed the Court to take on the constitutionality issue on its own? I was unsure on that point -- but it was partly why I recommended that DOJ simply file a motion to clarify the panel order regarding the commission rather than file an official appeal. What a bummer. Is there a D.C. Circuit rule for: "Never Mind -- we were just kidding." (About the appeal, that is.)

Attached is a letter I sent to John Rogovan at DOJ. As I mentioned to him, I would really appreciate it if you could review the Heymann letter I sent you last week with an eye to whether my proposals could possibly be incorporated into the Steffan brief.

cc: George Stephanopoulos
John Rogovan

*Gays-in-the-
military*

CHAI R. FELDBLUM

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January 10, 1994

John Rogovan
Civil Division
U.S. Department of Justice
Room 3143
Tenth and Constitution
Washington, DC 20530

Dear John:

More for an interesting historical perspective than for anything else, I am sending you the attached letter I wrote last week. Of course, the landscape has changed again entirely -- with the D.C. Circuit voting to hear the constitutionality issue in Steffan *en banc*. My issues, of course, in terms of mitigating the harm of the arguments you would make in briefing that case remain the same. I would appreciate it if you could review the Heymann letter with an eye to whether my proposals could possibly be incorporated into your Steffan brief.

I had some trouble finding my copy of the Colorado trial court opinion -- hence my delay in getting this letter out to you. I am sending you someone else's marked-up copy. I hope that's not too distracting.

Why does the world operate this way? I look forward to working with you in an effort to right it.

Best wishes,



Chai Feldblum

cc: Cliff Sloan

CHAI R. FELDBLUM

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January 5, 1993

John Rogovan
Civil Division
U.S. Department of Justice
Room 3143
Tenth and Constitution
Washington, DC 20530

Dear John:

Attached is the letter I sent to Phil Heymann in October. In it, I lay out the three harmful arguments DOJ made in the Steffan and Meinhold briefs and offer some ideas for mitigating the harm of at least the first two arguments.

These ideas are just in the beginning stages. I look forward to discussing them with you with the end result of devising an approach that would meet your need to defend the new military policy, while doing the least amount of harm otherwise.

I think we should have a serious discussion about having DOJ adopt an ambiguous Rostker-type approach for the standards issue in the military cases. I.e., the approach would be something like: "We don't really have to focus that much on the standard. See Rostker. Even if the appropriate standard for gay people is intermediate scrutiny, which we accept for purposes of this case, the military still wins." Then, we should start a serious conversation about having DOJ officially endorse an intermediate scrutiny (or strict scrutiny) standard for gay people in all other cases.

I am also sending you the opinion from the Colorado trial court on Amendment 2, as well as the earlier Colorado Supreme Court ruling upholding the injunction. As I mentioned to you, I plan to write to Solicitor General Drew Days to ask that DOJ file an amicus brief in the case. I believe this would allow the Department to make a positive gesture on an issue of national importance. In addition, DOJ could file such a brief before we arrived at a final resolution on the equal protection standards issue.

I will call you in a week or so and see if you have time for me to come over to talk about these ideas. Thanks for everything.

Best wishes,



Chai Feldblum

CHAI R. FELDBLUM

111 F Street, N.W., Washington, D.C. 20001-2095 (Ph) 202-662-9595 (F) 202-662-9682

October 14, 1993

The Honorable Philip B. Heymann
Deputy Attorney General
United States Department of Justice
10th and Constitution Avenues, N.W.
Room 4111
Washington, D.C. 20530-0001

Dear Phil:

As we discussed on the telephone last week, here are my thoughts on the standard of review to use in equal protection cases concerning gay men and lesbians -- particularly in light of the briefs the Department has already filed in the Meinhold and Steffan cases. The visibility and importance of this issue has only increased since we talked last week given the Ninth Circuit's refusal this past Friday to stay the Meinhold injunction.

In its briefs in Meinhold and Steffan, the Department made a concerted effort to limit its analysis to the military context. The briefs attempt to signal to the courts that DOJ is not intending to implicate the civilian sector by the arguments presented in the briefs.

For example, in the opening paragraph attacking the district court's ruling in Meinhold, the DOJ brief states:

"[W]hatever standards might apply in the civilian context, on questions of the appropriate composition and regulation of the Armed Forces, the courts must extend great deference to any rational exercise of professional military judgment."
(DOJ Meinhold Brief at 20; emphasis added.)

Similarly, the brief states:

The narrow question presented here is whether, in the special context of the Armed Forces, equal protection principles require the military to retain members who it believes have committed homosexual acts or are sufficiently likely to commit future homosexual acts, when it has made the policy determination that retention of such individuals impairs its ability to maintain an effective fighting force.

(DOJ Meinhold Brief at 24; emphasis added; underlining in original.)

Despite these efforts by the Department, the stark fact remains that the DOJ briefs in Meinhold and Steffan, and the positions advanced by DOJ lawyers during oral argument (a few weeks ago in the Steffan case and upcoming in December for the Meinhold case), absolutely and clearly adversely affect DOJ's ability, and the ability of gay rights advocates, to effectively combat discrimination against gay people in the civilian sector.

There are three reasons why this is so. I set forth the these three reasons below and offer my solutions for the first two. I have no solution for the third problem. To be honest, my only hope is that you lose the argument you are making in the courts.

1. Standard of Review

DOJ clearly wanted, in its defense of the old ban, to restrict the damage it was causing. It does this by stating in its briefs that the military is a special entity that requires special deference -- which, according to DOJ, translates into a court requiring only the presentation of "rational reasons" for DOD's decision to discharge gay people on the basis of status or private conduct.

DOJ could have made this point by arguing in the following manner: "Discrimination against gay people should be judged under strict scrutiny (as race and religion are), or at a minimum, under intermediate scrutiny (as gender is). This is because gay people meet the constitutional requirements for some heightened scrutiny. The military's ban against gay people is, nevertheless, still constitutional because of the special circumstances of the military."

This argument would essentially track the approach used by the Supreme Court in Rostker v. Goldberg, 453 U.S. 57 (1981), which challenged the exclusion of women from registration for the draft. In that case, the Solicitor General asked the Court to apply a rational basis test, rather than the intermediate scrutiny test generally used for gender cases, because the case involved the military. 453 U.S. at 69. The Court declined to do so. The Court first noted that it did not think "that the substantive guarantee of due process or certainty in the law will be advanced by any further 'refinement' in the applicable tests as suggested by the Government." Id., at 69. In addition, it noted that previous cases "did not purport to apply a different equal protection test because of the military context, but did stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance." Id. at 71.

Applying that traditional deference to the military, the Court concluded that exempting women from draft registration was constitutional even under the intermediate scrutiny standard of Craig v. Boren and Reed v. Reed. The Court noted that no one could deny that under the Craig v. Boren test, "the Government's interest in raising and supporting armies is an 'important governmental interest.'" Id. at 70. In addition, the exemption of women from the draft was "not only sufficiently but also closely related to Congress' purpose in authorizing registration." Id. at 79. The reason is that women were not similarly situated to men in the unique circumstances of the military. Women were excluded from combat positions in the military and the "purpose of registration was to prepare for a draft of combat troops." Id. at 77.

While I think the Court's decision in Rostker is wrong (the reasoning seems somewhat circular to me) the fact remains that the Court's decision in Rostker upholding the exclusion of women from the draft did not undermine the general standard of review for women in all constitutional equal protection cases. That is, in all cases dealing with gender discrimination, the Court still uses the intermediate scrutiny standard and if women manage to be "similarly situated" to men in the particular case, they will usually win. Discrimination in the military against women is thus truly cabined to the military and does not extend to the civilian sector.

This same approach could have been, but was not, taken by DOJ in defending the ban against gay people in the military. I continue to believe, however, that DOJ sincerely wants to cabin its arguments solely to the military. With a slight reformulation of your approach, I think you can achieve that objective.

At the moment, DOJ argues in its Meinhold and Steffan briefs that gay people deserve only rational basis review. In the Meinhold brief, DOJ states in one sentence that the Ninth Circuit requires only rational basis review for gay people and then simply moves on to apply that standard. (Meinhold Brief at 24.) There is no discussion as to whether this is the correct standard to apply to gay people.

By contrast, in the Steffan brief, DOJ spends six pages explaining why the rational basis standard should apply to gay people -- because this is a military case. These six pages are truly contorted. The section opens with a reference to Rostker's admonition against "undue reliance on abstract 'levels of scrutiny'" in evaluating equal protection claims "in the special context of qualifications and requirements for military service." Steffan Brief at 29. But the brief then goes on to analyze the various elements that constitutional doctrine requires for

heightened scrutiny and to shoot them down "in the context of the military."

The resulting problem is two-fold:

(1) DOJ argues that the traditional criteria for determining suspect classification, "a history of invidious discrimination, immutability of the class, and political powerlessness" (Steffan Brief at 32), are all not met -- in the special context of the military. But we are not aided by the fact that DOJ continually throws in the phrase "in the special context of the military" as if that were some protective mantra. The fact is, with regard to these general criteria to determine the proper standard of review, there is no difference between military and civilian life. (The difference, if it exists at all, would come in the application of the standard, not in the determination of the standard in the first place.) Thus, although DOJ tries to restrict the ramifications of its argument to the military context, its rejection of these general criteria makes arguing for a higher standard of review in the future much more difficult.

(2) There is no situation in equal protection law (that I am aware of) in which one standard is adopted for a group in the military context and a higher standard applied to the same group in other contexts. The Government tried such an approach in Rostker for women (probably because it was afraid it would lose under intermediate scrutiny), but the Court rejected that. So DOJ is essentially asking for solely rational basis review for gay people in all contexts -- not just the military. Unless and until DOJ clarifies its stance, courts will assume that this is what DOJ means and wants in all contexts.

PROPOSED SOLUTION: My solution is relatively straightforward: adopt the Rostker approach. My sense is that this modification can be done consistent with what DOJ has already stated. As I explained, DOJ itself is trying to argue that the military represents a special case. The arguments DOJ makes regarding deference to the military are identical to the arguments the Supreme Court made in applying the intermediate scrutiny standard in Rostker in a more lenient fashion because of military deference. So, I think one can say that DOJ meant to adopt a Rostker-type approach but just did not go all the way.

It would not be impossible to make that logical jump now. DOJ could either file a supplemental brief, or state at oral argument followed by some supplemental papers, that gay people deserve heightened scrutiny, but that such scrutiny should be applied in the manner applied in Rostker given the military context. This change would go a very long way towards mitigating the real and widespread harm of having DOJ defend the old ban.

2. Rational Basis of Review

It was disappointing to see DOJ adopt a rational basis standard for gay people in its Meinhold and Steffan briefs. It was truly disheartening, however, to see DOJ compound that harm by using the recent Supreme Court case of Heller v. Doe (1993) to undermine what little protection does exist for some groups -- particularly people with disabilities and gay people -- under the rational basis test.

As you know, in City of Cleburne v. Cleburne Living Center 473 U.S. 432 (1985), the Supreme Court applied the rational basis test in a manner that our friend Larry Tribe has dubbed: "rational relationship with teeth." Under this "active" rational basis review, the government must present at least some objective evidence to demonstrate the rationality of its policy. The Supreme Court in Cleburne also made clear that catering to the prejudices of others could never be a legitimate governmental objective.

Cleburne was the key case used by the Ninth Circuit in Pruitt when it required the government, on remand, to demonstrate some evidence for its anti-gay military ban. Similarly, the district courts in Meinhold (Calif. 1992), Dahl (Calif. 1993), and Selland (D.C. 1993) all used Cleburne as part of their analysis to strike down the ban.

This past June, in Heller v. Doe, the Supreme Court upheld a state law that drew a distinction between the standards needed to involuntarily commit people who were mentally retarded and people who were mentally ill. The Court found that there was a rational basis for the distinction and that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." 61 USLW at 4730.

I do not think that Heller necessarily threatens the power of Cleburne (although Justice Souter argues in dissent that it does) -- as long as Heller is properly explained and distinguished. Judge Schwartz in Dahl and Judge Oberdorfer in Selland both adequately dealt with Heller. The sad part, however, is that both these judges made their rulings over the objections of DOJ. In both the Meinhold and Steffan briefs, DOJ quotes extensively from Heller to argue that the government has almost no burden to bear in proving the constitutionality of its policy under a rational basis standard. DOJ could not have been more clear in its Steffan brief:

In Pruitt v. Cheney, *supra*, the Ninth Circuit reiterated that the military's policy regarding homosexuals should be reviewed under a rational basis standard, but instructed the district court on remand to subject the policy to an

"active" rationality review that would require DOD to produce objective record evidence, to be weighed by the district court, to support its policy. The Supreme Court's recent decision in Heller v. Doe, ... however, restates in unmistakable terms the limits of the rational basis inquiry, and makes clear that the Ninth Circuit's decision to make that inquiry more onerous to the Government in this context was simply erroneous. Steffan Brief at 30.

Thus, not only is DOJ advocating for the lowest standard of review for gay people (i.e., rational basis) in these cases -- but it is advocating for the **weakest** application of that standard by using and expanding on an unfortunate 5-4 Supreme Court case that could actually be distinguished away. It does not help that the DOJ drops in the phrase "in this context" -- as if that will automatically cabin the damage to the military context. It does not. The end result of DOJ's briefs is to place DOJ squarely on the side of advocating for an almost emasculation of the rational basis standard -- thus hurting both gay people and people with disabilities in non-military contexts where the rational basis standard will presumably continue to be used.

PROPOSED SOLUTION: This is all moot if DOJ moves to the intermediate standard of review for these cases and drops the rational basis standard. Just in case DOJ does not do so -- or at least, in the interim -- DOJ should make clear in oral argument and in supplemental papers that it does not believe that Heller has completely undermined the requirements of Cleburne with regard to rational basis review. Rather, DOJ should adopt the approach used by Judge Schwartz in Dahl to explain what new flexibility was given to the government by the Heller decision -- and what was not given. Then, in applying the rational basis standard, DOJ can explain how the unique circumstances of the military justifies a decision to uphold the ban.

3. Justification for the Ban: Catering to Prejudice

This is the area where I really don't have a "mitigating solution." My only hope is that the government loses its argument in court. I think it's important to set forth this issue, however, so that you can be aware of the ramifications.

Even under the weakened rational basis standard used by the government, DOJ has to present **some** semblance of a reason for DOD's policy of discharging all gay people based on either status or private conduct. The main reason given by DOJ is that there would be "tensions and effect on morale" by members of the armed services who "rightly or wrongly" find the service of gay people to be "disturbing." Steffan Brief at 40. The DOJ also cites "privacy concerns" because of "'fear or embarrassment that

[servicemembers] are being viewed as sexual objects.'" Id. (citation omitted). Finally, DOJ notes that DOD could rationally conclude "that a ban that did not prohibit service by those who are likely to engage in homosexual acts might adversely affect retention and recruitment, which might have a serious impact on our all-volunteer military force." Id. at 41.

The problem with all of these reasons is that they are ultimately grounded in the fear and prejudice of others -- which is not supposed to be a legitimate governmental objective. I am not sure how DOJ plans to limit the ramifications of this reasoning to the military, because it is hard to imagine that this would be a legitimate governmental objective even in the military. For example, I do not imagine DOJ would feel comfortable using the same reasoning regarding African-Americans, even during a time when racism was more blatant and could have had a similar feared effect.

This reasoning is particularly striking and odd in light of the fact that the RAND Corporation's extensive and comprehensive study, commissioned by DOD, concludes that unit cohesion, privacy concerns, and recruitment would not be adversely affected by the presence of openly gay people in the military. Instead of dealing with the RAND Report, however, DOJ simply relies on the "judgement" of "military professionals" for its first reason, even though those professionals admit to not having considered the RAND Report. For the second two reasons described above DOJ offers just one citation. The citation is to a study done by a psychologist named Cameron. Cameron is notorious for publishing poorly researched work, and in fact, was kicked out of the American Psychological Association because he published fraudulent studies. For the long-term development of this law, I think it is harmful for DOJ to be relying on, and giving credence, to work such as Cameron's.

As I noted, there does not seem to be a way to mitigate the legal damage, even within the military context, of adopting a defense that rests on catering to the prejudice of others. Of course, if you take that defense away, there is nothing left for DOJ to argue. That is probably why DOJ has now lost its defense of the ban in three district courts -- because in each one the judge concluded that the only possible basis for the ban was the prejudice of others.

I do think, however, that DOJ could mitigate some political damage by not appealing to the Supreme Court the Ninth Circuit's denial of a stay of Judge Hatter's injunction in Meinhold. Under Hatter's injunction, DOD is supposed to stop discharging gay people based on statements or conduct that does not interfere with the military mission. This presents a perfect "window of opportunity" for DOD. If the Ninth Circuit's ruling is not appealed, the ban would essentially be lifted by a court for

about 4-5 months. While I do not anticipate many people coming out during this time period (servicemembers will know this period might be short-lived), the injunction may result in at least some openly gay people serving. The resulting lack of impact on unit cohesion (which is what all the studies tell us will occur) will be very useful to the Administration once it decides that it does want to change the policy.

In addition, it seems to me the Administration would benefit politically by not appealing. Despite the best efforts of myself and others to the contrary, the White House has done a good job of convincing the general public that the President's new policy is different from the old ban. The continuing Meinhold saga, however, is undermining that effort. An Administration appeal to the Supreme Court to stay the injunction will generate significant publicity and will ensure that more people realize the two policies are essentially the same.

Finally, I do not agree with those that believe Congress will act to codify "something worse" if DOJ does not appeal. Let's be honest -- there is nothing worse for Congress to do. Congress (with the approval of the Administration) has already acted to codify the exact language of the old ban (DOD Directive 1332.14). Foregoing the extraordinary step of appealing to the Supreme Court is not going to generate anything worse from Congress.

I mentioned these thoughts this week to Rudy DeLeon and Jamie Gorelick over at DOD. I heard from Jamie her concerns about complying with the third paragraph of the injunction (regarding retention of records), but I truly believe those concerns could be resolved and should not stand in the way of foregoing an appeal.

Finally, one comment on a case that directly implicates the issues I raise in this letter. That is the Buttino case. In that case, a twenty-year veteran of the FBI was fired after a former lover wrote a letter to the FBI saying the agent was gay. According to both John Rogovan and Cindy, everyone is "very aware of this case" at the Department. I think that's great. What I hope, however, is that this high awareness translates into a settlement of the case that includes a clear policy regarding security clearances, the FBI, and a policy of non-discrimination. It would be very odd for DOJ to be working, on the one hand, to achieve these goals through an Executive Order and, on the other hand, to be litigating a case upholding these forms of discrimination. The three concerns I raise in this letter would

all be present -- and only heightened -- in a non-military FBI case.¹

I hope this letter is useful to you and others who are working on these issues in the Department. I look forward to working with you to achieve the best we can for gay and lesbian rights under this Administration.

Best wishes,



Chai R. Feldblum

¹ At the meeting we had, someone thought settlement might be difficult because Buttino had originally lied about being gay when confronted with the letter from his former lover. I do not see that as presenting any problem for settlement. The district court judge dealt with that issue extensively, and well, in her opinion. She noted that it was not surprising for Buttino to lie initially when he knew that acknowledgement of being gay would almost certainly result in dismissal. After the first denial, Buttino has been completely honest about being gay. Judge Armstrong also pointed out that other agents who initially deny charges, in the shock of interrogation, and who later admit to them are not terminated, as Buttino was.

THE WHITE HOUSE

WASHINGTON

December 23, 1993

Gays-in-the-
military -
Steffan

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN *CS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Steffan gays-in-the-military case

Overview

As you know, DOJ and DOD have been considering whether to file a petition for rehearing en banc to the full U.S. Court of Appeals for the D.C. Circuit. (A copy of a prior memo on Steffan is attached). Until yesterday, DOD had been vigorously favoring a full appeal on all grounds, and DOJ had been resisting. At a DOD/DOJ/White House meeting yesterday, a tentative agreement was reached. Unless you disagree or have concerns, we will proceed based on this agreement.

The agreement

The meeting yesterday included DOD (Secretary Aspin, Shali, and the other Chiefs); DOJ (Webb Hubbell and Drew Days); and the White House (Tony Lake, George, Bruce, Joel Klein, and me). After considerable discussion, the following tentative agreement was reached:

First, DOJ will file a very limited petition for rehearing en banc, addressing only a narrow remedy issue regarding Steffan's commission. (The court ordered that Steffan receive his commission, along with his diploma and reinstatement. A commission, however, requires Presidential nomination and Senate confirmation. A court has no power to do away with these requirements or to order the President and the Senate to comply. The rehearing petition thus will ask the court to vacate the part of its decision ordering that Steffan be awarded his commission.)

Second, DOJ will not seek rehearing en banc on the fundamental point that the action taken against Steffan was unconstitutional, and will not seek to set aside the other relief awarded him. Instead, DOJ will explain that, although the government disagrees with the court of appeals' decision that the action under the old policy was unconstitutional, we have decided not to seek relief on anything besides the commission because the new policy is in place and the old policy has been formally superseded.

Both DOD and DOJ are satisfied with this approach. George, Bruce, Joel, and I agree that it is a sound strategy. The current

plan is to file the limited rehearing petition on Thursday, December 30. Let us know if you have any comments or concerns.

THE WHITE HOUSE

WASHINGTON

November 17, 1993

*I want to be
consulted before
final decision
on what to do
to make -*

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN *CS*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: New gays-in-the-military decision

Overview

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

The Steffan Decision

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

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

(1) the military's former policy addresses status, not conduct;

(2) it is unreasonable to use status as a basis for predictions about conduct or a "propensity" to conduct;

(3) the perceived effect on morale, discipline, and recruitment of heterosexuals cannot be accepted because "[t]he Constitution does not allow Government to subordinate a class of persons simply because others do not like them";

and

*This is in
President
Standard*

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

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

Effect of the Steffan decision on the new policy

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

Next steps

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

Talking points

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

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
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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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EDWARD DUFFY, Major, USMC
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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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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

These constitutional principles mandate that government may not disadvantage a person on the basis of his status or his views solely for fear that others may be offended or angered by them. That is precisely the substance of the Secretary's argument in this case: that heterosexual servicemembers 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.

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U.S. Department of Justice

*Gay - in the -
military*

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Steffan

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January 5, 1994

Mr. Ron Garvin
Clerk, United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Room 5423
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Steffan v. Aspin, No. 91-5409 (D.C. Cir.)

Dear Mr. Garvin:

I am writing to object to the letter of December 30, 1993, from Mr. Steffan's counsel, Marc Wolinsky, to the three judges who were on the panel that decided this case (Chief Judge Mikva and Judges Wald and Edwards). The letter cites Federal Rule of Appellate Procedure 40(a), which provides, "No answer to a petition for rehearing will be received unless requested by the court * * *." Similar prohibitions against unrequested responses to petitions are contained in Federal Rule of Appellate Procedure 35(b) and the local rules of this Court. See old D.C. Rule 15(a)(4). Cf., new D.C. Cir. Rule 35(f).

Despite its citation to Rule 40(a), Mr. Wolinsky's letter proceeds to argue that our petition "should be denied" (Letter, pp. 1-2). The letter, therefore, plainly violates the prohibition against responding to petitions for rehearing in the absence of a request by the Court. We ask that the Court disregard the letter and return it to Mr. Wolinsky.

In addition, in the event the Court does consider it, Mr. Wolinsky's letter is without merit. Mr. Wolinsky argues that, by not raising the point sooner, we waived the argument that this Court erred in ordering that Steffan be awarded a commission as a Navy officer. In response, we note first that our argument (see Petition for Rehearing 8-10) is that the Court lacked judicial power under Article III to order the award of a commission, and thus it is an argument that the Court properly can and should consider at this point. The case cited by Mr. Wolinsky, United

States v. North, 920 F.2d 940, 949-50 (D.C. Cir. 1990), is distinguishable on this ground because that case involved waiver of an argument that did not go to the constitutional power of the court to grant relief. Second, Mr. Wolinsky's letter (p. 1) confirms our argument (Pet. 7-8) that Steffan made only a passing reference to a commission in his brief in this Court. That reference, combined with Steffan's complete failure to request a commission at the administrative level, shows that he has waived any claim to a commission. See Pet. 7-8. The government was under no obligation to address an issue that Steffan waived. Third, Steffan appealed from the dismissal of his action by the district court, which, of course, did not address the issue of what remedy would have been appropriate had Steffan prevailed. The briefs of both parties in this Court argued the merits of that dismissal, rather than the remedy to be awarded if Steffan prevailed. It is appropriate to address a point for the first time in a petition for rehearing when, as here, it is the panel's decision that raises the issue. Cf., Benavides v. DEA, 976 F.2d 751 (D.C. Cir. 1992) (considering issue first raised on rehearing); Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1182-83 (D.C. Cir. 1987) (en banc) (considering argument first raised on rehearing en banc by intervenors); United States v. Byers, 740 F.2d 1104, 1115-16 n.11 (D.C. Cir. 1984) (en banc) (plurality opinion) (considering argument first raised on rehearing en banc).

For these reasons, Mr. Wolinsky's letter of December 30, 1993, should be disregarded by the Court and returned to him, or alternatively, his waiver argument should be rejected. If Mr. Wolinsky's letter is not returned to him, we request that this letter be distributed to the full Court, and we are providing sufficient copies of it for that purpose.

Yours very truly,

Anthony J. Steinmeyer

Anthony J. Steinmeyer
Assistant Director, Appellate Staff
Civil Division

cc: Marc Wolinsky, Esquire
Wachtell, Lipton, Rosen
& Katz
299 Park Avenue
New York, NY 10171

Counsel for Amici

September 13, 1993

MEMORANDUM FOR CLIFFORD M. SLOAN

FROM: JOHN NIBLOCK

SUBJECT: NOTES FROM STEFFAN V. ASPIN ORAL ARGUMENT

Following is a typed copy of my notes from the oral argument. There are some gaps, and I am not sure about the spellings of all the names, but I think this is the gist of the matters covered.

Judges: Abner J. Mikva, Chief Judge
Patricia M. Wald
Harry T. Edwards

Counsel for Appellant (Steffan): Walinski

Counsel for Appellee (U.S.): Steinmeyer

Walinski: Joe Steffan was discharged six weeks before graduation, simply because he said he was gay. Homosexual orientation is not grounds for discharge. Homosexuals are not predisposed to misconduct. They can serve and have served effectively -- and the government has admitted as much. This being the case, should the government be able to exclude homosexuals from the military simply on the basis of the prejudice and fears of others?

Wald, J.: What is your best case?

Walinski: Cleburne. Fears of the private prejudices of others are not grounds for discrimination.

Wald, J.: Are there any differences between this case and Cleburne? Aren't fears of neighbors about a group home for the retarded different from fears of gays by straights in the military, with close quarters and necessity for "going to the wall" for fellow soldiers?

Walinski: No difference between the cases. The Court is concerned with the conduct of individuals.

Individuals should not be excluded because of private prejudice.

Mikva, J.: Doesn't the government say that the presence of homosexuals in the military will interfere with good order?

Walinski: Fears of interference with "good order" is an issue only if "good reason" for those fears exists.

Mikva, J.: Isn't there a difference when the military is involved?

Walinski: Goldman is the best case on that.

Wald, J.: What if a soldier quietly stated that he was anti-Semitic?

Walinski: The army could not take any action against the soldier.

Mikva, J.: What if he said he was an anarchist?

Walinski: The army could not take action against him -- as long as he continued to do his duties. If conduct conforms . . . then soldiers should not be excluded.

Wald, J.: I can't recall that the Supreme Court has made a definitive statement on the "heckler's veto." Can the public interest be endangered by the reaction of the crowd to the speaker to such an extent as to justify silencing the speaker?

Walinski: I can't help you with a case on that.

Edwards, J.: What is the impact of the fact that there was no conduct involved in this case?

Walinski: Discrimination based on status alone is troubling. In Goldman, could a soldier be discharged for wanting to bear a yarmulke?

Wald, J.: Or for saying they want to wear a yarmulke?

Walinski: The government will be distinguishing between wanting and saying. [cites Dahl (sp?)].

Edwards, J.: What was the military's practice regarding diploma's?

Walinski: If a midshipman enters his last year, and is found unsuitable for [commission?] such as for medical reasons, he could still be graduated, but not commissioned. That was the practice -- not necessarily the policy.

Wald, J.: Can this case be won after Heller?

Walinski: Especially after Heller. Heller [established a standard of] "in reality." The government has conceded below that this is no difference between the effectiveness of gays and straights in the military.

Dronenberg was decided on an assumption that conduct was involved.

Wald, J.: And Padula also made reference to acts.

Walinski: Yes. The government's syllogism is this: if you can exclude someone for conduct, you can exclude them for predisposition to engage in conduct . . . but the "reality" is that homosexuals conform their conduct.

Wald, J.: What about this national debate we've just had -- isn't the reaction to homosexuals a "reality"? Can the court just ignore the reactions of others?

Walinski: The judges can consider the reactions of others -- but within the framework of the Constitution. [Discussion of Dahl (sp?)].

The testimony of experts [before Congress] is that status does not predict misconduct. The Per... study says the same. The D.O.D. policy memo itself says that gays have served and do serve without incident. Under the new policy, sexual orientation by itself is not a bar to service. All of this means that sexual orientation itself does not indicate a predisposition to engage in misconduct.

Edwards, J.: The new policy doesn't necessarily compel this conclusion. Maybe you're reading into it.

Walinski: Even President Clinton's speech says there is no evidence of misconduct by homosexuals . . .

Wald, J.: But the new policy says that a statement by a soldier that he is gay creates a rebuttable presumption of homosexual conduct.

Mikva, J.: In light of Heller did the District Court below appropriately consider whether AIDS was an issue in this case?

Walinski: AIDS was not properly considered. Even the government had said that fear of AIDS was not a rationale to exclude gays. The court should have deferred to the government on this.

Wald, J.: But has the government conceded that homosexual orientation indicates a predisposition to conduct?

Walinski: No . . . but conduct is different from misconduct.

Wald, J.: Could the army say, "You can be gay and say you are gay," and still forbid all homosexual acts? Even two men holding hands together? [discussion of rule prohibiting holding hands in or out of uniform].

Walinski: Yes, if it is a broadly applied policy. But I don't agree with such a policy -- and that is not the case before us.

Wald, J.: But doesn't the hypo of holding hands (o.k. while out of uniform, but not while not in uniform) inform this argument?

Walinski: I don't get your point.

Wald, J.: Can the army take any action at all based on a soldier's statement that he is homosexual?

Walinski: The statement says nothing about conduct.

Mikva, J.: But the new policy says that a statement creates a rebuttable presumption . . .

Walinski: But there is not a predisposition to misconduct.

Edwards, J.: What about a privacy rationale?

Walinski: The Government can't rely on the Cameron article is cited -- comparing gays to prostitutes and saying they can't restrain themselves. This can't be the rationale because the new policy itself says that homosexual orientation is not itself grounds for discharge.

Edwards, J.: [raises analogy of men and women together in barracks to illustrate privacy concerns].

Walinski: I disagree with your analogy to males and females together. In our society men and women are raised separated by gender.

Mikva, J.: Aren't men brought up separated by sexual preference?

Walinski: People are not generally separated by sexual preference.

Mikva, J.: But aren't there people who don't want to associate with homosexuals?

Walinski: Yes, but that is an improper prejudice.

Wald, J.: Under the regulations at the time the Steffan case arose, could Steffan's statement have been rebutted?

Walinski: Only by saying that his admission of homosexuality had been untrue.

Wald, J.: Under the regulations at the time, could have just said, "Look, I have absolutely no propensity to engage in homosexual conduct."

Walinski: No.

Wald, J.: What about a straight person who said he was gay as a joke, or engaged in an isolated gay act while drunk, could he have won under the old rules?

Walinski: Yes.

Wald, J.: But if you said you were gay, and you were not?

Edwards, J.: Evidently under the old rules, if you engaged in conduct [while drunk] you could stay in, but if you said you were gay you were out.

[Laughter]

Steinmeyer: I am appearing for the Secretary of Defense. I have four points:

1. This is a military, not a civilian case
2. Look at the posture: we are dealing with a resignation, not a discharge

3. This case falls under the old rules

4. Did the old party cater to prejudices?

First, in civilian cases we look at individual liberties first, but in military cases we look first at national security, not individual rights. Greer v. Spock shows how the Supreme Court allows prior restraints in a military context.

Mikva, J.: We acknowledge that the Court gives special deference to the military.

Steinmeyer: The Goldberg case would have been inconceivable in a civilian context.

Wald, J.: But there are some limits, even in the military context. For example, if the military imposed restrictions on Blacks. What is the principled line here for allowing prejudice?

Steinmeyer: The line here is "utmost deference."

Mikva, J.: But isn't it true that racial tension causes some disorder in the army?

Steinmeyer: The military is working hard to eliminate racial tension.

Mikva, J.: Then why is disorder caused by concern over homosexuals any different?

Steinmeyer: For several reasons. First, the clear constitutional command for racial integration, but not for homosexual conduct.

Mikva, J.: But we are talking about racial status versus homosexual status.

Steinmeyer: Under the old policy the government was concerned with conduct. Moreover, General Powell gave the best refutation of comparisons between homosexuality and race [quote from Powell, "Unlike race or gender, sexuality is not a benign trait, it is manifested in behavior . . . "].

Wald, J.: Then you assume that behavior will follow from orientation.

Steinmeyer: Yes. Under the prior policy manual, the military was concerned . . .

Mikva, J.: If Steffan had said he would be celibate?

Steinmeyer: Steffan has never claimed he would be celibate.

Wald, J.: Would Steffan have a defense under the new policy by saying he would never engage in homosexual conduct?

Steinmeyer: The presumption [that someone who says they are homosexual will engage in homosexual conduct] can be rebutted.

Wald, J.: How?

Steinmeyer: By testifying that he has never engaged in and will never engage in homosexual conduct.

Wald, J.: But how do you rebut the presumption? Other than by denying that you really are gay? Ca a proven record and an announced intent to be celibate be sufficient rebuttal?

Steinmeyer: That is a factual question for the trier of fact to decide.

Wald, J.: But what is the legal standard?

Steinmeyer: There is a limit . . .

Edwards, J.: But what if Judge Wald's hypo is accepted -- [that the soldier says he will not engage in misconduct and there is no other testimony or evidence to rebut his word].

Steinmeyer: In St. Mary's ... Academy the court said that once a plaintiff has [made a prima facie case of discrimination and the employer produces a couple of justifications] the factfinder can disbelieve the plaintiff.

Edwards, J.: But in this hypo there is not contradicting testimony.

Steinmeyer: The factfinder can choose to disbelieve the soldier if it wants to -- for any reason.

Mikva, J.: So the military would always win?

Edwards, J.: But how will the military do this with unrebutted testimony that the serviceman has not and will no engage in misconduct?

Steinmeyer: It is a similar situation to that when a soldier tries to get out of the military by claiming to be homosexual. If his testimony is un rebutted, the factfinder must decide one way or the other whether to discharge.

Wald, J.: Just like Corporal Klinger on M*A*S*H. [Laughter]. But I am worried about the standard. I didn't get this [what the standard is] from the C-Span hearings.

Steinmeyer: The directive to be issued October 1 will give more direction.

Wald, J.: What was the old policy?

Steinmeyer: The old policy said a member shall be separated if he states he is gay unless there is a finding that the member is not homosexual. [Under the old policy someone who "desires" to engage in homosexual acts is considered a homosexual]. In interpreting the old policy, Steffan gives "desires" a broad reading -- essentially encompassing all homosexual orientation -- but the military gives "desires" a narrow reading.

Wald, J.: A "statement" that one is homosexual is a separate ground for discharge . . .

Steinmeyer: It all comes back to the definition of "desires". A "celibate homosexual" has desires in a general sense, but not a specific sense. Therefore, the "celibate homosexual" does not meet the standard for homosexual. Therefore, a "celibate homosexual" could get out [from under an attempted discharge].

Wald, J.: Has anyone ever succeeded in this defense?

Steinmeyer: No, nobody has attempted this defense. Why? Because making the statement is an indication of past or present conduct.

Mikva, J.: What is the concern of the government with off-base homosexual conduct? [For example, if a servicemember has a lover in Nebraska they saw only every six months].

Steinmeyer: The Supreme Court has said that the military can be concerned with sexual misconduct off base.

Mikva, J.: But that is misconduct. What about a purely private homosexual act? What is the interest in the government in getting at that? Doesn't the "celibate homosexual" present the same problem?

Steinmeyer: No, because of the different propensity to act. The government should not take action purely against the thoughts in one's head.

Edwards, J.: What is the impact of a statement that one is homosexual. In this case [Steffan] what is the concern?

Steinmeyer: Unit cohesion.

Edwards, J.: But in this case?

Steinmeyer: If you were interviewing clerks, and at the end of an interview one of them said to you, "I am a racist," or "I am an anti-Semite" or "I am an anarchist" wouldn't that indicate a propensity to conduct that might disrupt your chambers?

Mikva, J.: But you said the "celibate homosexual" gets a pass. How can the military draw a line between the "celibate homosexual" and a gay soldier who engages in private sexual behavior off base?

Steinmeyer: But there is a greater propensity to misconduct when off-base conduct is an issue, than in the case of a "celibate homosexual." One has shown a propensity by a voluntary statement.

Wald, J.: What if a soldier says he is gay and then gives a celibacy defense? Will he not be discharged?

Steinmeyer: He will not be discharged under either the new or the old policy.

Wald, J.: By the way, many of us do hire gay clerks.

Steinmeyer: But Steffan was not discharged because he was gay. He resigned. He got the typical honorable discharge. It ended the sodomy investigation. Therefore, we'll never know if any misconduct was involved. Steffan could have raised his "desires" argument without resigning. This is not as hard a case as the Brady [kidnapping] case. Admittedly, Steffan had to make a tough choice -- but he should be held to that choice.

Wald, J.: But at the hearing the decision had been made that he could not graduate.

Steinmeyer: But the process did not run its full course. We don't know if he was discharged for thoughts or conduct.

Wald, J.: But he is saying that he was constructively discharged.

Steinmeyer: But this could not be rebutted now.(?)

Wald, J.: But, there is in principle a past and a current celibacy defense?

Steinmeyer: Yes.

(Rebuttal)

Walinski:

- Steffan wrote a letter to the Sec. of Defense asking to withdraw his resignation, and that request was denied on the grounds that he was homosexual
- the investigation into Steffan's conduct continued for three months after his termination
- Steffan was told that any appeal to his hearing would be futile and told that if he resigned there would be no scarlet letter on his record

Wald, J.: Do you agree with the government that there was a celibacy defense available?

Walinski: That is preposterous.

Wald, J.: Had Steffan been counselled before his hearing, and was the "celibacy" defense the prevailing interpretation at the time?

Walinski: He had been counselled. That was not the prevailing interpretation. The "celibacy" defense is preposterous. The government agreed just now that it is unconstitutional to take action against thoughts in one's head. The government conceded

this. All that Joe Steffan did was reveal the thoughts in his head.

Wald, J.: I think your argument proves too much. By saying you are gay -- if being gay is defined in the regs. as being "inclined to engage in conduct"-- aren't you admitting a propensity?

Mikva, G.: Is propensity just a thought process?

Walinski: Yes.

The government did not provide a rational basis for its restrictions on completely off-duty conduct.

Wald, J.: Would the government be able to question a soldier and engage in dialogue after the soldier makes the statement that he is gay.

Walinski: Yes, subject to protections against self-incrimination.

End

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 13, 1993

NO. 91-5409

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

JOSEPH C. STEFFAN,

Plaintiff-Appellant

v.

SECRETARY OF DEFENSE ET AL.

Defendants-Appellees

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

BRIEF FOR THE APPELLEES

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

No. 91-5409

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

v.

SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees.

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

BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUES PRESENTED

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

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

REGULATIONS INVOLVED

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

SUBJECT MATTER JURISDICTION

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

STATEMENT OF THE CASE

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

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

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

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

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

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

B. Statement of the Facts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

App. 555.

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 95.

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

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

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

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

(continued...)

STANDARD OF REVIEW

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

App. 31.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Heller v. Doe, 61 USLW at 4730 (quoting FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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JULY 1993

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A D D E N D U M

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

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THE SECRETARY OF DEFENSE

WASHINGTON, THE DISTRICT OF COLUMBIA

July 19, 1993

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

SUBJECT: Policy on Homosexual Conduct in the Armed Forces

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

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

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

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

I direct the following:

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

Servicemembers will be separated for homosexual conduct.

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

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

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

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

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

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

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

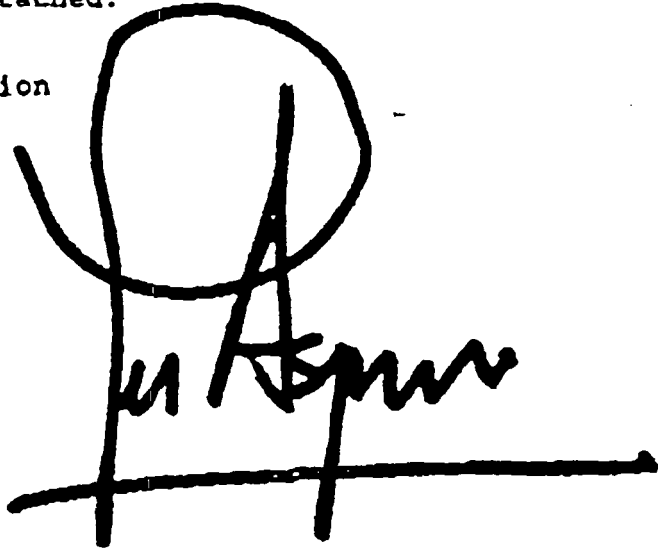
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Defense shall, by October 1, 1993, take such actions as may be necessary to carry out the purposes of this directive. Secretaries of the Military Departments will ensure that all members of the armed forces are aware of their specific responsibilities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

Policy Guidelines are attached.

cc: Secretary of Transportation

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

**POLICY GUIDELINES ON HOMOSEXUAL CONDUCT
IN THE ARMED FORCES**

Summary of Policy

- Accession Policy
 - Applicants for military service will no longer be asked or required to reveal if they are homosexual or bisexual, but applicants will be informed of the conduct that is proscribed for members of the armed forces, including homosexual conduct.
- Discharge Policy
 - Sexual orientation will not be a bar to service unless manifested by homosexual conduct. The military will discharge members who engage in homosexual conduct, which is defined as a homosexual act, a statement that the member is homosexual or bisexual, or a marriage or attempted marriage to someone of the same gender.
- Investigations Policy
 - No investigations or inquiries will be conducted solely to determine a servicemember's sexual orientation. Commanders will initiate inquiries or investigations when there is credible information that a basis for discharge or disciplinary action exists. Sexual orientation, absent credible information that a crime has been committed, will not be the subject of a criminal investigation. An allegation or statement by another that a servicemember is a homosexual, alone, is not grounds for either a criminal investigation or a commander's inquiry.

Activities

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

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

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

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

Off-Base Conduct

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

Investigations and Inquiries

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

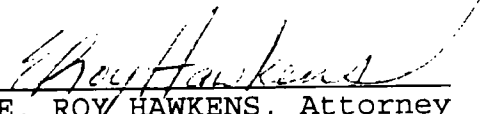
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

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

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


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To be argued by:
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No. 91-5409

Oral argument
scheduled for
September 13, 1993

United States Court of Appeals
for the
District of Columbia Circuit

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

—v.—

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

Defendants-Appellees.

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

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SUMMARY OF REPLY ARGUMENT

The government's defense of its continuing policy of discrimination against gay men and lesbians ultimately rests on a single argument: that because homosexuals —“rightly or wrongly”— are disfavored and disliked by some members of our society, it is rational for the armed services to cater to this prejudice. Thus:

- The government contends that because “many members of the military services” would find the presence of individuals who have a “propensity” to engage in homosexual conduct to be “disturbing,” gay men and lesbians whose conduct is faultless must be excluded to avoid “the tensions and effect on morale” that could result if they were permitted to serve their country. Def. Br. 40.
- The government contends that “there are privacy concerns to be considered” in support of the ban. The government candidly admits, however, that the “concern” is not that gay men and lesbians *will* invade the privacy of heterosexuals, but that heterosexuals will “*fear*” that they will. Def. Br. 40 (emphasis added).
- The government contends that “retention and recruitment” could suffer if individuals who state that they are gay are not excluded (Def. Br. 41), relying upon the work of a thoroughly discredited, anti-gay crusader who posits that this adverse effect will result because “homosexuals and prostitutes lack modesty and proper decorum and . . . are generally socially disruptive given the perversity of their sex lives.” P. Cameron, *et al.*, *Homosexuals in the Armed Forces*, 62 Psychological Reports 211, 218 (1988).

If the principle of equal protection has any meaning, arguments like these — rooted in prejudice and stereotype — cannot prevail. It is undisputed that the fundamental tenets of our constitution prohibit discrimination against one group in order to cater to the biases of another. *Palmore v. Sidoti*, 466 U.S. 429 (1984), a case that is not even mentioned in the govern-

ment's opposition, acknowledges "the reality of private biases and the possible injury they might inflict." The Supreme Court went on to hold, however, that while "[t]he Constitution cannot control such prejudices . . . neither can it tolerate them" and that under the principle of equal protection, however real prejudices may be, "the law cannot, directly or indirectly give them effect." 466 U.S. at 433.

While the government contends that the recent adoption of a new policy on lesbians and gay men in the military argues for restraint, that new policy in fact underscores the constitutional flaws in the old policy. The new policy provides that "homosexual orientation is not a bar to service entry or continued service"; that "the Department of Defense recognizes that individuals with a homosexual orientation have served with distinction in the armed services of the United States;" that "Commanders and investigating agencies will not initiate inquiries or investigations solely to determine a member's sexual orientation"; and that "[s]ervicemembers will not be asked or required to reveal their sexual orientation." The new policy goes on, however, to subject individuals who merely state that they are gay to discharge because "[t]he constraints of military service require servicemembers to keep certain aspects of their personal lives private for the benefit of the group."

Thus, by acknowledging that gay men and lesbians are well-suited to serve, the new policy puts the lie to the government's contention here that individuals who have a "propensity" to engage in homosexual conduct must be denied the honor of serving their country. And by requiring the discharge of gay men and lesbians who do not stay deep in the closet, the new policy even more plainly demonstrates that it is the feared reaction of heterosexual servicemembers to their gay and lesbian colleagues that creates the alleged threat to good order, discipline and morale. In short, the new policy and the old policy are identical for purposes presented here. Both cater to the "irrational prejudice" and "negative attitudes" that some heterosexuals harbor against homosexuals. *City of Cleburne v.*

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Cleburne Living Center, Inc., 473 U.S. 432, 448, 450 (1985).
And both are unconstitutional.

Assuming that the principle of deference is applicable in the
equal protection context — an assumption that is unwarranted
under the applicable precedents — no amount of deference can
save this policy. *United States v. Robel*, 389 U.S. 258, 263
(1967), rejects the notion that "the phrase 'war power' " can
"be invoked as a talismanic incantation to support any exercise
of . . . power which can be brought within its ambit." The
"concept of 'national defense' cannot be deemed an end in
itself, justifying . . . the subversion" of the "democratic ide-
als enshrined" in the constitution that "make[s] the defense of
the Nation worthwhile." 389 U.S. at 264. One such ideal is that
government action cannot be based on nothing more than pri-
vate prejudice, and only an abandonment of that ideal can save
the military's invidious discrimination against lesbians and gay
men.

The government's argument that the regulation in issue is
directed at sexual conduct only and not sexual orientation is
equally unavailing. Under the regulations, a celibate "homo-
sexual" is still that, a "homosexual," and as such is subject to
mandatory discharge. Moreover, by stating that gay men and
lesbians may serve so long as they keep their sexual orientation
"private for the benefit of the group," the new regulation
proves beyond peradventure that the military is concerned with
status, not conduct, and that homosexuals may serve so long as
they do not "disturb" others by acknowledging their sexual ori-
entation. *Cleburne*

Finally, the government has utterly failed to rebut Steffan's
showing that he was singled out for treatment that was more
harsh than that afforded others similarly situated. Accordingly,
the decision to deny him a diploma was both arbitrary and
capricious and violative of the constitutional guarantee of equal
protection.

Argument

POINT I

THE MILITARY'S CONTINUING POLICY OF DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION VIOLATES EQUAL PROTECTION.

A. The regulation in issue discriminates on the basis of status, not conduct.

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DOD Directive 1332.14 defines a "homosexual" as a person who "engages in, desires to engage in, or intends to engage in homosexual acts." It further requires the discharge of any servicemember who states that he or she is a homosexual "unless there is a further finding that the member is not a homosexual or bisexual." The government's argument that it was open to Steffan to "rebut" a regulatory presumption that he had a propensity to commit homosexual acts with "credible proof" that he was and intended to remain celibate was rejected on the prior appeal in this case because it had "no support in the record," 920 F.2d at 76 n.*, and is simply belied by the regulation. So long as Steffan harbored a sexual "desire" for individuals of the same gender, *i.e.*, so long as he was a "homosexual," the regulation required his discharge, even if he convinced the military that he had committed himself to celibacy. Thus it is simply indisputable that Steffan was discharged for "being a homosexual."¹ See also *Gay Veterans Association, Inc.*

¹ The government's citation to Judge Reinhardt's *dissent* in *Watkins v. United States Army*, 847 F.2d 1329, 1362 (9th Cir. 1988), *vacated*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990), is unavailing. The majority opinion *rejected* Judge Reinhardt's view. 847 F.2d at 1339 n.13. And the later decision by the Ninth Circuit in *Pruitt v. Cheney*, 963 F.2d 1160, 1163 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992), held that the "Army . . . is not discharging members just for homosexual conduct, or even primarily for homosexual conduct. It is discharging members because of their *status* as homosexuals." (Emphasis added.) See also *Opinion of the Justices*, 522 A.2d 989, 990 (N.H. 1987) ("'homosexual' is understood generally to refer to a person who sexually prefers another of his or her own sex").

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(regulations distinguish between "separation . . . based solely
on homosexuality" and separations where "the discharged
servicemember engaged in a homosexual act").

Any doubt as to whether the military is concerned with con-
duct as opposed to status is put to rest by the fact that the new
policy that goes into effect on October 1, 1993, provides that
gay men and lesbians can serve so long as they keep "certain
aspects" of their "personal lives private for the benefit of the
group"—i.e., that is not what they do but who they are that bars
them. Accordingly, the policy infringes on fundamental rights
protected by the First and Fifth Amendments. See *Wooley v.*
Maynard, 430 U.S. 705, 714 (1977); *Abood v. Detroit Board of*
Education, 431 U.S. 209, 234-35 (1977); *Planned Parenthood*
of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2807
(1992). See also *Uniformed Sanitation Men Ass'n v. Commis-*
sioner of Sanitation, 392 U.S. 280, 284 (1968) (impermissible
to coerce waiver of Fifth Amendment privilege on penalty of
loss of employment); *Sandstrom v. Montana*, 442 U.S. 510
(1979) (rebuttable presumption of intent violates due process).

The government's related contention that it is reasonable to
presume that an individual who acknowledges a "desire" or
"propensity" to engage in homosexual conduct will compro-
mise the military mission by engaging in "homosexual conduct
within a naval or military unit," *Dronenburg v. Zech*, 741 F.2d
1388, 1398 (D.C. Cir. 1984), or by violating the criminal pro-
visions of the UCMJ is equally meritless. As shown in Steffan's
opening brief (at 30, 31-32), case law and common sense teach
that "propensity" cannot be equated with "action," particularly
given the adverse consequences that can befall a servicemember
who violates the military's code of conduct.²

² Indeed, any such notion would unconstitutionally penalize individuals
on the theory that they are predisposed to committing unlawful or pro-
hibited acts because they identify themselves as being members of a dis-
favored group. See *Noto v. United States*, 367 U.S. 290, 298-99 (1961);
United States v. Robel, 389 U.S. 258, 264-66 (1967); *Aptheker v. Secretary*
of State, 378 U.S. 500, 507-8, 514 (1964). See also *Robinson v. California*,
370 U.S. 660 (1962).

Moreover, in light of the fact that the policy that goes into effect on October 1, 1993, *permits* homosexuals — *i.e.*, individuals who have a “sexual attraction to individuals of [the same] sex” — to serve, and the Commander-in-Chief’s admission that homosexuals are not predisposed to engage in “misbehavior,”³ the government cannot credibly argue that a servicemember who merely harbors a “propensity” or “desire” to engage in prohibited conduct will, in fact, engage in such conduct. While the new policy continues to provide for the discharge of servicemembers who state that they are gay, certainly the government cannot rationally contend that homosexuals who acknowledge that they are gay are more likely to engage in prohibited conduct than those who stay in the closet. Thus, although the court’s conclusion in *Ben-Shalom v. Marsh*, 881 F.2d 454, 460-61 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990), that the military “does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission” was itself indefensible, any conceivable justification for this logic has been vitiated now that the military concedes that this “risk” is ephemeral and has adopted a “don’t ask, don’t tell, don’t pursue” policy.⁴

³ Remarks of President William Clinton, July 19, 1993, *reprinted in Washington Post*, July 20, 1993 at A 11.

⁴ The government’s argument that Steffan’s compelled resignation from the Academy precludes him from “avoid[ing] the burdens of his settlement by seeking his diploma and commission through the courts” is absurd. Def. Br. 24-25. There was no “settlement” and nothing in the documents that the government prepared and presented to Steffan for his signature expressly or impliedly waived his right to seek judicial relief. A. 106. Moreover, the district court considered and rejected the government’s motion to dismiss on this ground over four years ago, 733 F. Supp. 115 (D.D.C. 1989), the government never raised the issue again in the district court, and the government has never appealed from the ruling denying its motion even though it has had two opportunities to do so. Accordingly, the law of the case doctrine precludes the government from selectively relitigating the issue. See *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985). In any event, the Secretary’s refusal to accept Steffan’s request to withdraw his resignation on the ground that “homosexuality is incompatible with naval service” (A. 95) is itself subject to judicial review. See *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979).

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B. The military's continuing policy of discrimination against homosexuals should be subjected to the same equal protection analysis applicable in any other context.

In its recent decision in *Heller v. Doe*, 61 U.S.L.W. 4728 (U.S. June 24, 1993), the Supreme Court held that heightened scrutiny must be applied to a governmental classification if it involves " 'fundamental rights' " or " 'proceed along suspect lines.' " 61 U.S.L.W. at 4730. The Court in *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993), explained that a suspect classification is evidenced where there is " 'some reason to infer antipathy' " against the group in question.

The government seeks to justify the ban on the service of lesbians and gay men by arguing unabashedly that prejudice against gay men and lesbians justifies discrimination against them. Def. Br. 22, 40.⁵ Moreover, as shown in Point I.A above, the regulations penalize individual servicemembers on the basis of their thoughts and desires and thereby trample upon fundamental rights guaranteed by the First and Fifth Amendments. Accordingly, *Heller* and *Beach Communications* require that heightened scrutiny be applied here.

The government's attempt to avoid the application of heightened scrutiny rests on the proposition that there is a "military exception" in equal protection jurisprudence. No such "exception" exists. *Frontiero v. Richardson*, 411 U.S. 677 (1973) — the first case to articulate the principle that laws that discriminate on the basis of gender must be subjected to heightened scrutiny—arose in the military context. Nowhere in that decision does the Supreme Court even hint that any special deference was due even though Congress was acting pursuant to its express constitutional powers.

Similarly, in *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981), the Supreme Court noted that it has not applied "a different

⁵ The government admits that "homosexuals undoubtedly have been subject to discrimination in many contexts," and does not dispute that sexual orientation is "immutable" for purposes of constitutional analysis, that gays are politically powerless and that sexual orientation is unrelated to an individual's ability to contribute to society. Def. Br. 33, 34.

equal protection test" simply because a case arises in "the military context." *Id. citing Schlesinger v. Ballard*, 419 U.S. 498 (1975). *Rostker* then went on to uphold Congress' decision to exclude women from registering for the draft only after it found that "[t]he exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration," that it did not reflect "invidious" discrimination, and that it "was not the 'accidental byproduct of a traditional way of thinking about females.'" " 453 U.S. at 74, 79.⁶

Rostker thus recognizes that military judgments are not immune to passion, prejudice and stereotype⁷ and that because of this, the doctrine of deference to the military does not have talismanic significance in the context of an equal protection challenge. Indeed, given that the principle of equal protection stands as the bulwark to protect disfavored groups from discrimination, acceptance of the argument advanced by the government "in the name of national defense" "would sanction the subversion" of one of the ideals "which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

⁶ Similarly, in *Dronenburg v. Zech*, 741 F.2d 1388, 1391, 1398 (D.C. Cir. 1984), this Court applied a rational basis test in reviewing a military regulation only *after* it concluded that stricter scrutiny was not required because no fundamental rights were implicated. Since both fundamental rights and a suspect classification are implicated here, *Dronenburg* indicates that heightened scrutiny is warranted. See also *Goldman v. Weinberger*, 475 U.S. 503, 512-13 (1986) (Stevens, J., concurring) (equal protection and First Amendment issues would be raised if the military permitted Jews to wear yarmulkes but prohibited Sikhs from wearing turbans).

⁷ E.g., A. 1064 (senior Naval officer testifies in 1942 that "[t]he colored race is very musical and they are versed in all forms of rhythm"; because of this, "possibly" they could serve with whites in the "musician branch"); *Hohri v. United States*, 782 F.2d 227, 230-37 (D.C. Cir. 1986), *vacated*, 482 U.S. 64 (1987) (armed services contended in World War II that military necessity required that 120,000 Japanese-Americans had to be forcibly removed from their homes and placed in internment camps); *Owens v. Brown*, 455 F. Supp. 291, 306 (D.D.C. 1978) (Navy contended in 1948 that excluding women from naval vessels other than hospital ships was necessary because "duty at sea is part of an essentially masculine tradition").

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The deference doctrine is also inapplicable to this case because the premises underlying the doctrine are inapposite. Thus, the regulations in issue do not stem from the application of any military expertise, but from the indulgence of prejudices that infect some members of our society. The subject regulation therefore is entitled to no more deference than would be appropriate if the military were to attempt to resurrect the racist or sexist regulations and practices of decades past. Moreover, a decision in Steffan's favor will not involve the courts in a continuing oversight of "the composition, training, equipping, and control of" the armed services. *Gilligan v. Morgan*, 413 U.S. 110 (1973). Inappropriate or illegal sexual conduct will remain grounds for discharge and — consistent with the requirements of the constitution and applicable statutes and regulations — the military will remain free to recruit, promote, assign and discharge servicemembers as it sees fit.⁸ Finally, affirmance of the principles of equal protection will not undermine the " 'respect for duty and . . . discipline' " that is necessary for the military to "foster instinctive obedience, unity, commitment and esprit de corps," *Goldman*, 475 U.S. at 507, since invalidation of the military's discriminatory policies will not inject the courts into policing the relationships among servicemembers.⁹

⁸ See Remarks of President William Clinton, July 19, 1993, *supra* (sexual "misconduct [by homosexuals] is already covered by the laws and rules which also cover activities that are improper by heterosexual members of the military"). Cf. *Owens v. Brown*, 455 F. Supp. 291, 301 (D.D.C. 1978) (invalidation of ban on service of women on navy vessels would not "involve the court in supervision of military activities").

⁹ The doctrine also rests on the premise that the Commander-in-Chief is satisfied with the policy in question. Cf. *United States v. Robel*, 389 U.S. 258, 261 n.1 (1967) (invalidating act of Congress adopted over Presidential veto). That is decidedly not the case here. See Remarks of President William Clinton, July 19, 1993, *supra* (describing new policy as a "compromise" that "is not identical with some of my own goals" and acknowledging that an attempt to repeal the ban would have been overridden by Congress).

C. The military's continuing policy of discrimination on the basis of sexual orientation cannot survive scrutiny under any constitutional standard.

Even if the Court were to find that the rational relationship test and the deference doctrine are applicable here, the military's continuing policy of discrimination on the basis of sexual orientation cannot withstand scrutiny. Deference does not equate to "abdication." *Rostker*, 453 U.S. at 67. Nor does the doctrine of deference mean that servicemembers are "stripped of basic rights simply because they have doffed their civilian clothes." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U. Law Rev. 181, 188 (1962). See also *Emory v. Secretary of the Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals.") (citations omitted).¹⁰

Thus, even where deference has been extended, the courts have recognized that there are some lines that the constitution prohibits the military and Congress from crossing. Nothing in *Heller v. Doe*, *supra*, changes this. To the contrary, by holding that a governmental classification "must find some footing in the realities of the subject addressed" and by citing *Cleburne* with approval, 61 U.S.L.W. at 4730 (emphasis added), the Supreme Court recognized that whatever level of scrutiny or

¹⁰ Fulfilling their responsibility, the courts have consistently struck down military policies that run afoul of constitutional mandates. See *Frontiero*, 411 U.S. at 677; *Trop v. Dulles*, 356 U.S. 86 (1958) (penalty for desertion violates Eighth Amendment); *Reid v. Covert*, 354 U.S. 1 (1957) (extension of court martial jurisdiction violates Articles III and Fifth and Sixth Amendments); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972) (mandatory chapel attendance at service academies violates First Amendment); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (mandatory discharge for pregnancy violates equal protection and due process); *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978); *Meinhold v. U.S. Dep't of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993). See also *Waldie v. Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974) (remanding equal protection challenge to policy of excluding women from service academies for plenary trial); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992).

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rt, 354 U.S. 1 (1957) (extension
Articles III and Fifth and Sixth
d 283 (D.C. Cir.), cert. denied,
attendance at service academies
ushman, 531 F.2d 1114 (2d Cir.
y violates equal protection and
o. 291 (D.D.C. 1978); *Meinhold*
155 (C.D. Cal. 1993). See also
2. Cir. 1974) (remanding equal
women from service academies
2d 1160 (9th Cir. 1991), cert.

deference is applied, prejudice and stereotype can *never* pro-
vide a legitimate rationale for discrimination. The policy chal-
lenged here thus fails any conceivable test because each of the
four rationales that the government offers is insufficient.

First, the government claims that discrimination against gay
men and lesbians is necessary to avoid the "tensions and effect
on morale" that would arise from the fact that "many members
of the military services, *whether rightly or wrongly*,"¹¹ would
find the presence of homosexuals to be "disturbing." Def.
Br. 39-40 (emphasis added). *Palmore* and *Cleburne* prohibit the
military from relying on any such rationale.

Second, the government argues that it is rational to exclude
gay men and lesbians to avoid the "fear or embarrassment" that
heterosexuals may feel if they believe that they "are being
viewed as sex objects." Def. Br. 40. As shown in Steffan's
opening brief (at 26-28), there is simply no "footing in the real-
ities of" homosexuality, *Heller*, 61 U.S.L.W. at 4730, for con-
cluding that gay men and lesbians by their very nature represent
such a threat to privacy. Such unfounded "fears" rest on the
stereotype that "homosexuals are psychologically disturbed and
socially disturbing" and that "homosexuals and prostitutes lack
modesty and proper decorum and . . . are generally socially
disruptive given the perversity of their sex lives" propounded
in the article from the "vanity" press by Paul Cameron that the
government cites. This stereotype, like Cameron himself, has
been totally discredited and should be rejected here.¹² Indeed,
the government concedes that it is not that gay men and les-
bians *will* invade the privacy of their fellow servicemembers,

¹¹ Notably, the government has abandoned the district court's contention
that servicemembers would be "rightly" disturbed because gay men and
lesbians are immoral people.

¹² The hateful propaganda that individuals like Cameron have advanced as
"science" has been rejected by the scientific community, the courts, the
United States Public Health Service and the military's own studies. See
A. 624-44, 1412-22, 1870, 1877-83; Public Health Service, 56 Interpreter
Releases 398-99 (Aug. 17, 1979); *Gay Rights Coalition v. Georgetown*
University Law Center, 536 A.2d 1, 34-35 (D.C. 1987) (*en banc*); *Com-*
monwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

(footnote continued)

but the *fear* that they will that requires their exclusion. Fears like these that rest on irrational stereotypes cannot provide a legitimate rationale for the policy. *Rostker*, 453 U.S. at 74, 79.

Third, the government contends that permitting service by individuals who merely state that they are gay "might adversely affect retention and recruitment," again citing Paul Cameron. Def. Br. 41. The fact that in its new policy the government provides that "homosexual orientation is not a bar to service entry or continued service" puts the lie to this contention. Even if the government's speculation were to be given credence, however, it remains that any theoretical impact on recruitment and retention would result from the "reality" that gay men and lesbians are disliked by certain members of our society.¹³ The "reality" of these private biases cannot provide legitimate grounds for discrimination.

Finally, the government contends that discrimination on the basis of status is rational because it spares the military the task of conducting "intrusive investigations" to ferret out homosexual conduct. Def. Br. 41. The government's claim is inherently illogical. The lack of privacy in certain aspects of military life makes the detection of disruptive sexual conduct non-intrusive; no "ferreting" is required in an open barracks. What *is* intrusive is questioning of and inquiry into service-members' thoughts and it is precisely for this reason that the military has adopted a "don't ask, don't pursue" policy. Thus,

(footnote continued)

The patent disregard for the truth reflected in Cameron's writings and activities led to his censure by the American Psychological Association, the Nebraska Psychological Association and the American Sociological Association. Cameron's "expert" testimony was rejected in *Baker v. Wade*, *supra*, and *Gay Student Services v. Texas A & M University*, 737 F.2d 1317, 1330 (5th Cir. 1984). The government's reliance on the rantings of "one of the country's most outspoken anti-homosexuals," C.E. Koop, *Koop: The Memoirs of America's Family Doctor* 208 (1991), is shameful and demonstrates beyond peradventure the indefensibility of the policy under review.

¹³ Cf. A. 1068 (if Southerners were "forced to serve with Negroes, they will cease to volunteer . . . and will not serve with the enthusiasm and high morale that has always characterized the soldiers and sailors of the southern states' ").

quires their exclusion. Fears stereotypes cannot provide a *Rostker*, 453 U.S. at 74, 79.

s that permitting service by they are gay "might adversely again citing Paul Cameron. policy the government pro- is not a bar to service entry to this contention. Even if the be given credence, however, act on recruitment and reten- " that gay men and lesbians our society.¹³ The "reality" vide legitimate grounds for

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Ben-Shalom's acceptance of this strained rationale for the policy can no longer be justified.

POINT II

STEFFAN WAS UNLAWFULLY DEPRIVED OF HIS DEGREE.

The government's attempt to defend the district court's finding that Steffan's whirlwind discharge was actually "an accommodation to an accomplished young man" is belied by the facts. It remains undisputed that at every stage of the proceedings, Steffan was seeking to preserve his ability to complete the remaining six weeks of his senior year and receive his degree. A. 87-90, 378-79, 381-82, 534. Likewise, it remains undisputed that Steffan waived 72 hours notice of the Performance Board hearing only after he was told by the Commandant of Midshipmen that he would not be permitted to complete his studies, and that he submitted his involuntary resignation only after he was suspended from class and told that any appeal of the Academic Board's ruling would be futile. A. 88-91, 381-82, 535, 1352, 2354. Plainly, the only "accommodation" that was afforded Steffan was the rushed implementation of his expulsion from the Academy once it was determined that he would not be permitted to graduate.¹⁴

The government's further claim that Steffan was not treated more harshly than other servicemembers facing discharge is untenable. Since all officers facing discharge for homosexuality have a right to 30 days notice of their initial hearing, and Navy and Army officers have the right to "reasonable additional time" to prepare their defense, it would have been *impossible* for the discharge proceedings of a Navy, Army or Air Force officer to be initiated and concluded in one week as was the case here. A. 1718, 1767-68, 1820.

¹⁴ Thus, the government's speculation that Steffan sought to expedite the demise of his career in order "to forestall the NIS investigation that was already in progress" (Def. Br. 45) is unsupported and unsupportable.

The government's final claim that Steffan's sexual orientation distinguishes this case because homosexuals are *sui generis* is also unavailing. The fact remains that Steffan was subjected to psychological evaluation, *i.e.*, that he was treated as though he had a disqualifying psychological condition. A. 536. The related contention that it was not arbitrary to deprive Steffan of his degree because his presence at the Academy for a few more weeks would have undermined discipline, good order and morale is laughable in light of the Navy's "goal" that discharge proceeding be concluded in four months (A.1648) and in light of the terms of the policy that goes into effect on October 1.

CONCLUSION

Accordingly, for the reasons set forth herein and in Steffan's opening brief, the district court's order granting the government's motion for summary judgment should be reversed, and plaintiff-appellant should be granted summary judgment.

Dated: New York, New York
August 12, 1993

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No. 91-5409

Oral argument
scheduled for
September 13, 1993

**United States Court of Appeals
for the
District of Columbia Circuit**

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

—v.—

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

Defendants-Appellees.

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

**BRIEF OF PLAINTIFF-APPELLANT
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**CERTIFICATE AS TO PARTIES, RULINGS AND
RELATED CASES**

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

A. *Parties and Amici*

The plaintiff-appellant is Joseph C. Steffan.

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

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

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

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

Dated: New York, New York
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

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

STATEMENT OF THE ISSUES PRESENTED

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

STATEMENT OF FACTS

A. Joseph C. Steffan

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

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

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

B. The initiation of discharge proceedings

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

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

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

C. The Brigade Military Performance Board hearing

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

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

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

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

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

D. The Academic Board hearing

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Argument

POINT I

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

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

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

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

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

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

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

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

(footnote continued)

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

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

(footnote continued)

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

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

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

(footnote continued)

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

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

(footnote continued)

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

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

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

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

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

(footnote continued)

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

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

(footnote continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

POINT II

STEFFAN WAS UNLAWFULLY DEPRIVED OF HIS DEGREE.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Dated: New York, New York
May 3, 1993

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ADDENDUM OF PERTINENT REGULATIONS

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**Excerpt from Department of Defense Directives 1332.14
and 1332.30, 32 C.F.R. Part 41, Appendix A**

H. *Homosexuality*

1. *Basis*

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

b. As used in this section:

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

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

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

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

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

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

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

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

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

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

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

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

2.15 SEPARATION CRITERIA

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

* * *

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

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

* * *

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

CERTIFICATE OF SERVICE

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

Dated: May 3, 1993

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THE WHITE HOUSE

WASHINGTON

November 17, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: New gays-in-the-military decision

Overview

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

The Steffan Decision

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

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

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

and

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

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

Effect of the Steffan decision on the new policy

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

Next steps

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

Talking points

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

Beatrice Dohrn

THE PRESIDENT HAS SEEN ^{11/30}

No More Exclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

Beauvoir
late in 1993
live on this?

to Cliff
Sloan
right?

MONDAY, NOVEMBER 29, 1993 THE WASHINGTON POST