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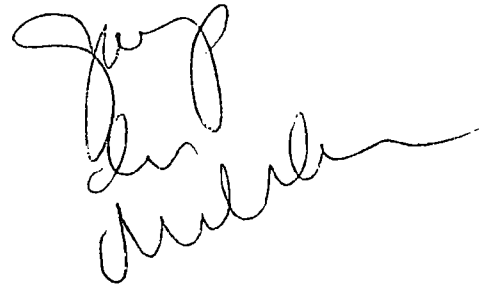
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THE WHITE HOUSE
WASHINGTON

June 9, 1994



MEMORANDUM FOR GEORGE STEPHANOPOULOS

CC: ALEXIS HERMAN
CLIFF SLOAN

FROM: KEITH BOYKIN 
PAUL RICHARD 

RE: CAMMERMEYER APPEAL DECISION

The Justice Department has apparently decided to appeal the Cammermeyer decision. We think this would be a terrible mistake.

Cammermeyer, you will recall, is the distinguished former head nurse of the Washington State Army National Guard and recipient of the Bronze Star award for her service in Vietnam. During a routine security investigation in 1989, she was asked if she was homosexual. She answered honestly that she is, and because of her response she was discharged from the military under the old policy banning homosexuals. On June 1 of this year, U.S. District Court Judge Thomas Zilly in Seattle ordered Cammermeyer re-instated in the military.

To appeal this case would be worse than appealing the Steffan case that caused so much debate in the Administration. We list below five reasons why an appeal would be the wrong decision. First, President Clinton has been personally involved in this case, to the point that he even called Cammermeyer during the presidential campaign to commiserate. US News & World Report reported that Clinton said at the time, "It's outrageous and unbelievable what happened to her." Of all the possible gays in the military cases, Bill Clinton singled this one out.

Second, Cammermeyer is more distinguished than Steffan, having served for 26 years and having receiving a medal for service, whereas Steffan's achievement came due to his academy performance. Cammermeyer is also a colonel in the military, which would make her the highest ranking, high-profile officer ever to be discharged by the government for homosexuality.

Third, unlike Steffan, there is no question about whether Cammermeyer engaged in any proscribed conduct. She did nothing but answer a question she was required to answer for a security interview.

In fact, Cammermeyer is a poster child against the old policy. She is not an activist by nature and has described herself as a member of the "silent, middle-class majority" that "didn't realize there was such a thing as social causes." Her case has already garnered so much media attention that Barbara Streisand and Glenn Close have teamed up as executive producers for an NBC movie this fall based on the true story of Col. Cammermeyer. If the Clinton Administration fails even to protect Greta Cammermeyer, then who will it protect?

Fourth, Cammermeyer would still be permitted to serve if this case arose under the current policy, for three reasons. First, Cammermeyer never voluntarily disclosed her sexual orientation until she was compelled to do so. The new policy would have prohibited the military from asking about her sexual orientation. Second, even if she had been asked, Cammermeyer would not have been required to answer any questions about her sexual orientation. Third, any information obtained from security clearance interviews could not be used against Cammermeyer. According to the Defense Department's own regulations, "the new policy makes clear that information about homosexual orientation or conduct obtained during a security clearance investigation will not be used by the Military Department in separation proceedings."

Fifth, coming a week before hundreds of thousands of gays and lesbians converge on New York for the observance of Stonewall 25, the timing of this decision has the potential to destroy the credibility the Administration has already built up on gay and lesbian issues.

For these reasons, we think an appeal of the Cammermeyer decision would have disastrous consequences.

THE WHITE HOUSE
WASHINGTON

June 9, 1994

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MEMORANDUM FOR GEORGE STEPHANOPOULOS

CC: ALEXIS HERMAN
CLIFF SLOAN

FROM: KEITH BOYKIN *KB*
PAUL RICHARD *PR*

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THE WHITE HOUSE
WASHINGTON

May 3, 1994

*Gap in the
military*

Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

This responds to your letter of March 30, 1994, inquiring about the role of Bernard W. Nussbaum, former Counsel to the President, in Steffan v. Aspin. As you note, Mr. Nussbaum was a partner at Wachtell, Lipton, Rosen and Katz before his appointment as Counsel. The Wachtell law firm is one of several lawyers for Mr. Joseph Steffan in his challenge to the policy regarding homosexuals in the military.

Under the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.502, an employee generally should not participate, for one year after leaving a law firm, in a particular matter involving specific parties in which his former firm represents a party. Disqualification is accomplished by non-participation, and does not require a written statement. *Id.* § 2635.502(e). Mr. Nussbaum adhered to this requirement.

When Mr. Nussbaum became Counsel to the President, the Steffan case was pending before the United States Court of Appeals for the District of Columbia Circuit. The case was being handled for the United States by the Department of Justice and one of the Associate Counsels in the Office of White House Counsel informally monitored developments. Mr. Nussbaum took no action and made no recommendations concerning the case. Subsequently, when a three-judge-panel of the circuit court issued its decision, the United States was faced with a decision whether to seek review by the full court of appeals or by the United States Supreme Court. Although members of the Counsel's office participated in discussions concerning these matters, Mr. Nussbaum formally recused himself from any participation in or consideration of the decision to seek further review or the determination as to what position should be taken if further review were sought.

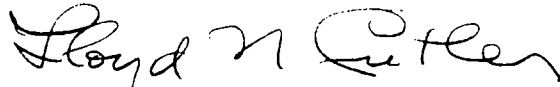
With respect to matters other than the Steffan case, as you may be aware, section 502 calls for consideration of disqualification only from particular matters in which the parties or their representatives have a covered relationship with the employee. Mr.

Nussbaum therefore properly participated in discussions and decisions relating to the general policy, legislation, and implementing regulations and directives regarding the Administration's policy on Gays in the Military, as well as in cases involving individuals other than Mr. Steffan. Mr. Nussbaum's participation in the Administration's efforts to design a new policy, of course, had no bearing on the Steffan case, which involved a challenge to the old policy.

Finally, Mr. Nussbaum advised that he did not provide the Wachtell firm with any information concerning the Steffan case. Mr. Nussbaum has also stated that he will not participate in the Steffan case upon his return to the firm.

I hope this letter answers your concerns.

Sincerely,

A handwritten signature in dark ink, appearing to read "Lloyd N. Cutler". The signature is fluid and cursive, with the first name "Lloyd" being more prominent and the last name "Cutler" following in a similar style.

Lloyd N. Cutler
Special Counsel to the President

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RICHARD L. REYNARD, STAFF DIRECTOR FOR THE MINORITY

United States Senate

COMMITTEE ON ARMED SERVICES

WASHINGTON, DC 20510-1100 96 APR 6 11:53

March 30, 1994

Honorable Lloyd Cutler
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Cutler:

This letter is to request your assistance in a matter of considerable concern to many members of Congress. Last year, both the House and Senate passed, by a two thirds margin, legislation that prevents homosexuals from serving in the military. Following the passage of that law, the Department of Defense wrote a number of directives and instructed the services to write regulations implementing the directives and the new law. Early in the process, some members of Congress expressed concern over the manner in which the directives and regulations were being written. As discussions progressed, it became obvious that all decisions and agreements of any kind had to be approved by the White House, specifically the office of the Legal Counsel to the President.

During a good deal of the discussion with the Administration over the implementation of this legislation, the case of Steffan v. Aspin was before the Washington D.C. Circuit Court. The Steffan case achieved prominence during 1993 and was a direct challenge to the military services' policy to exclude homosexuals from serving on active duty. Mr. Steffan is represented by the law firm of Wachtell, Lipton, Rosen and Katz. Part of their appellate brief is a direct challenge of the Administration's directives and legislation.

Until recently, Mr. Bernard Nussbaum had the position of White House Counsel and now plans to return to his old law firm of Wachtell, Lipton, Rosen and Katz. Prior to becoming the White House Counsel, he had been a partner in that firm. The above facts would tend to indicate that there is the distinct possibility Mr. Nussbaum was involved in a conflict of interest. Simply put, his old law firm was representing a client that was challenging the actions of the Administration he was serving. Mr. Nussbaum was in a position from which it would have been easy to influence the implementation of the regulations and directives in such a manner as to serve the client of his old law firm. This gives rise to a number of questions, not the least of which are:

- Did Mr. Nussbaum recuse himself from working on any matters that may have been the subject of the litigation concerning Joseph Steffan?
- Did Mr. Nussbaum provide the firm of Wachtell, Lipton, Rosen and Katz any information concerning the gay policy, the formulation of the directives and regulations, and/or the Steffan case?
- Were the discussions with Congress and the formulation of the new Department of Defense Regulations and Directives in any way influenced by Mr. Nussbaum's prior affiliation with Wachtell, Lipton, Rosen and Katz? Did this influence have any impact on the Steffan case?
- What are his plans for possible future involvement in the Steffan case, now that he has returned to his old law firm?

It is worth noting that a three judge panel from the DC Circuit Court ruled against the Department of Defense's policy but the three judges were not necessarily representative of the entire court's views. The Department of Justice hesitated in appealing the decision of the panel and certain members of Congress became concerned. Senators Nunn, Thurmond and Coats wrote the Administration and President Clinton, urging the appeal. Still, the Administration hesitated until one of the Circuit Court judges took the extremely unusual action of having the entire court poled. The result was that the court voted to consider the case en banc.

In retrospect, if the case is not appealed, the former law firm of Mr. Nussbaum prevails. If there is an appeal, however, there is a chance that his old law firm loses. Thus, it becomes very important to know if Mr. Nussbaum was also involved in any way in the Department of Justice failure to appeal the case.

I would appreciate answers to the above questions as well as any other information of Mr. Nussbaum's involvement with the Steffan case. If you have any questions concerning this request, please contact me or have your staff contact Mr. Don Deline, Minority Counsel for the Armed Services Committee at 224-8629.

Sincerely,


Strom Thurmond

ST/asd

FACSIMILE TRANSMITTAL

**299 Park Avenue
New York, New York 10171
Telephone (212) 371-9200**

TO: Bernard W. Nussbaum

FROM: Marc Wolinsky

COMPANY: Counsel to the President

DATE: July 2, 1993

FAX NO.: 202-456-6279

TIME:

MAIN NO.: 202-456-2632

DIRECT FAX LINE: (212) 371-1658

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MESSAGE:

NINTH CIRCUIT

Rule 27-7, Committee
Note

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Bernie - You can ask for reconsideration of the deputy clerk's refusal to grant an extension of the time to file your brief in Meinhold. With the time difference, this can be done today. The motion goes to the duty judge, altho the Clerk says there isn't

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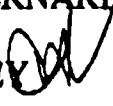
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THE WHITE HOUSE
WASHINGTON

June 28, 1993

MEMORANDUM FOR THE HONORABLE WEBSTER HUBBELL, AND
THE HONORABLE BERNARD NUSSBAUM

FROM:

CHRISTINE A. VARNEY 
Secretary to the Cabinet

In the Department of Justice Weekly Cabinet Report for the week of June 27th through July 3rd, the Meinhold case was discussed. In my summary of the weekly reports to the President, the Meinhold case was discussed. The President has requested a written summary of our arguments prior to our submission of the appellate brief.

Please provide me with a one page memorandum to the President summarizing the Department of Justice position in the Meinhold case by the close of business on June 28th.

cc: Steve Neuwirth

THE WHITE HOUSE

WASHINGTON

June 29, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM
COUNSEL TO THE PRESIDENT

SUBJECT: Department of Justice brief in Meinhold case

The current plan is that no briefs will be filed on the constitutional merits of the gays-in-the-military issue until the new policy has been determined. After that determination is reached, we will work to ensure that the Administration's policy is vigorously defended.

In the Meinhold case, DOJ has asked for an extension to July 19, 1993 for the filing of the government's brief. Meinhold has agreed to the extension. DOJ expects to receive the extension and will not file a brief in the meantime.

You should also be aware that, in another gays-in-the-military case pending in the U.S. Court of Appeals for the District of Columbia Circuit (Steffan v. Aspin), the government's brief is likewise due on July 19, 1993.

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THE WHITE HOUSE
WASHINGTON

March 12, 1993

MR. PRESIDENT:

I have also sent copies of
this to the Vice President,
Mack, Tony, Howard and
George.

John Podesta

THE PRESIDENT HAS SEEN

THE WHITE HOUSE
WASHINGTON

93 MAR 12 09:54

March 8, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: Bernard Nussbaum and
Walter Dellinger, *W.D.*

Re: Appeal by the United States in Meinhold

This is in response to your attached note on Meinhold.

The District Court in Meinhold held the military's ban on service by homosexuals unconstitutional. The District Court (1) rescinded the discharge of Keith Meinhold and (2) issued a nationwide order permanently enjoining the Department of Defense from discharging or denying enlistment to any person based on sexual orientation "in the absence of sexual conduct which interferes with the military mission of the armed forces. . . ."

On March 3, 1993, the Department of Justice filed a notice of appeal from the District Court's ruling in Meinhold and requested a stay of the District Court's order with respect to persons other than Meinhold. Meinhold himself remains on active duty pending the resolution of the appeal.

It was necessary to appeal and to seek a stay in order to permit compliance with the January 29, 1993 Presidential Directive which regulates treatment of homosexuals in the service between now and July 15, 1993. If Judge Hatter's order is not stayed, DOD and DOJ officials could be held in contempt for placing acknowledged homosexuals on standby reserve as required by the interim Presidential Directive.

The appeal and stay request do not commit the government to arguing that the military ban on homosexuals is constitutional. The government, in fact, suggests that the Court of Appeals hold the case in abeyance and delay the filing of briefs until after July 15, at which time the Department of Justice can file a brief consistent with policy at that time.

93 MAR 8 15:38

B. Thurnbaum

The last time we talked
this decision hadn't
been made — which is
true.

U.S. Opposes Court Move to Reinstate Gay Sailor

✓ By ERIC SCHMITT

Special to The New York Times

WASHINGTON, March 4 — Five weeks after President Clinton hailed a judge's ruling that the Pentagon's ban on homosexuals in the military is unconstitutional, the Justice Department is trying to keep that ruling from taking effect.

Administration officials say in interviews and court papers that allowing the decision in the case of Petty Officer Keith Meinhold to take effect could upset a fragile compromise reached in January by Mr. Clinton and Congress to delay lifting the ban until July 15.

Mr. Clinton and senior aides count on using that interim period to persuade Congress to support his campaign pledge to lift the ban. In January, Mr. Clinton delayed issuing his promised executive order on the subject in the face of opposition from Republicans and some Democrats in the Senate.

The Administration's argument was rejected last month by a Federal district judge, Terry Hatter Jr., who in January ordered the Navy to reinstate Mr. Meinhold, a 36-year-old sailor who was discharged last year after proclaiming his homosexuality on national television. Judge Hatter had also permanently enjoined the Pentagon from discharging homosexuals "in the absence of sexual conduct which interferes with the military mission."

Ruling Is Appealed

The Justice Department on Wednesday filed an appeal of Judge Hatter's decision with the United States Court of Appeals for the Ninth Circuit in San Francisco.

Under the compromise Mr. Clinton and Congress reached, in a six-month interim period military personnel who reveal their homosexuality cannot be discharged but may be placed on

standby reserve without pay or benefits. If Judge Hatter's decision is allowed to stand, Administration officials fear that individuals placed on standby reserve might sue the Government, challenging the basis of the proceedings against them or claiming that the limbo status would effectively discharge them.

The Government has filed briefs in four or five other cases involving service members who are trying to block their administrative discharge hearings pending completion of the gay-policy review, an Administration official said.

An effort to preserve a fragile compromise.

cial said. In each case, the official said, the Government has opposed the litigation as interfering with its long-term goal of lifting the ban.

On Jan. 29, when Mr. Clinton reached his agreement with Senate leaders, led by Sam Nunn, the Georgia Democrat who is chairman of the Armed Forces Committee, he praised Judge Hatter's ruling, which he said had strengthened his hand in the negotiations. "It makes the practical point I have been making all along," Mr. Clinton said.

But in the talks the previous night that produced the compromise with Congress, Mr. Clinton had agreed to seek delays in court proceedings for those discharged for being homosexuals.

Legal briefs filed by the Justice Department pointedly do not argue the merits of Judge Hatter's decision, and

do not object to granting relief to Mr. Meinhold. But the Administration argued that Judge Hatter had overstepped his authority.

"The order is clearly overbroad, restricts the authority of the President in consultation with Congress to make rules governing the armed forces, and should be stayed pending appeal to the extent applicable to persons other than Meinhold," the Government argued.

During the time Mr. Clinton and Congress work out an acceptable policy, "the judiciary should refrain from preempting that process by imposing its own policy," the Government said.

In a telephone interview from his lawyer's offices in Los Angeles, Mr. Meinhold said, "Wouldn't this be nice and convenient to trample all over the constitutional rights of American service members just to make a politically expedient compromise that even the President didn't like?"

Chai Feldblum, legal director of the Campaign for Military Service, a Washington-based lobbying organization that opposes the current policy, said, "The President and the Department of Justice are caught between a rock and a hard place, and they're trying to make their best efforts."

"They don't like the ban and think it's unconstitutional, but they are hamstringed by a compromise that they voluntarily entered into to keep policy in place for six months," said Ms. Feldblum. "In the long run, though, that six months will allow us to convince Congress to support lifting the ban."

"The main point here is that the Government's appeal shows how weak an interim measure the compromise is," said William Rubenstein, director of the American Civil Liberties Union's Lesbian and Gay Rights Project in Manhattan.

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Beatrice Dohrn

THE PRESIDENT HAS SEEN

11/30

No More Exclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

MONDAY, NOVEMBER 29, 1993 THE WASHINGTON POST

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.

SAM NUNN.
J. EXON, NEBRASKA
CARL LEVIN, MICHIGAN
EDWARD M. KENNEDY, MASSACHUSETTS
JEFF BINGAMAN, NEW MEXICO
BLINN, OHIO
RICHARD C. SHELBY, ALABAMA
IT C. BYRD, WEST VIRGINIA
GRAHAM, FLORIDA
CHARLES S. ROSS, VIRGINIA
JOSEPH E. LIEBERMAN, CONNECTICUT
RICHARD H. BRYAN, NEVADA

L CH.
STROM THURMOND, SOUTH CAROLINA
JOHN W. WARNER, VIRGINIA
WILLIAM S. COHEN, MAINE
JOHN MCCAIN, ARIZONA
TRENT LOTT, MISSISSIPPI
DAN COATS, INDIANA
BOB SMITH, NEW HAMPSHIRE
DIRK KEMPTHORNE, IDAHO
LAUCH FAIRCLOTH, NORTH CAROLINA
KAY BAILEY HUTCHISON, TEXAS

ARNOLD L. FUNARO, STAFF DIRECTOR
RICHARD L. REYNARD, STAFF DIRECTOR FOR THE MINORITY

United States Senate

COMMITTEE ON ARMED SERVICES

WASHINGTON, D.C. 20510-5100

March 30, 1994

Honorable Lloyd Cutler
Counsel to the President
The White House
Washington, D.C. 20500

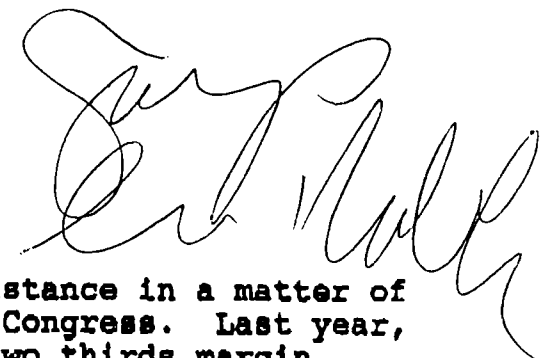
Dear Mr. Cutler:

This letter is to request your assistance in a matter of considerable concern to many members of Congress. Last year, both the House and Senate passed, by a two thirds margin, legislation that prevents homosexuals from serving in the military. Following the passage of that law, the Department of Defense wrote a number of directives and instructed the services to write regulations implementing the directives and the new law. Early in the process, some members of Congress expressed concern over the manner in which the directives and regulations were being written. As discussions progressed, it became obvious that all decisions and agreements of any kind had to be approved by the White House, specifically the office of the Legal Counsel to the President.

During a good deal of the discussion with the Administration over the implementation of this legislation, the case of Steffan v. Aspin was before the Washington D.C. Circuit Court. The Steffan case achieved prominence during 1993 and was a direct challenge to the military services' policy to exclude homosexuals from serving on active duty. Mr. Steffan is represented by the law firm of Wachtell, Lipton, Rosen and Katz. Part of their appellate brief is a direct challenge of the Administration's directives and legislation.

Until recently, Mr. Bernard Nussbaum had the position of White House Counsel and now plans to return to his old law firm of Wachtell, Lipton, Rosen and Katz. Prior to becoming the White House Counsel, he had been a partner in that firm. The above facts would tend to indicate that there is the distinct possibility Mr. Nussbaum was involved in a conflict of interest. Simply put, his old law firm was representing a client that was challenging the actions of the Administration he was serving. Mr. Nussbaum was in a position from which it would have been easy to influence the implementation of the regulations and directives in such a manner as to serve the client of his old law firm. This gives rise to a number of questions, not the least of which are:

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- Did Mr. Nussbaum recuse himself from working on any matters that may have been the subject of the litigation concerning Joseph Steffan?
 - Did Mr. Nussbaum provide the firm of Wachtell, Lipton, Rosen and Katz any information concerning the gay policy, the formulation of the directives and regulations, and/or the Steffan case?
 - Were the discussions with Congress and the formulation of the new Department of Defense Regulations and Directives in any way influenced by Mr. Nussbaum's prior affiliation with Wachtell, Lipton, Rosen and Katz? Did this influence have any impact on the Steffan case?
 - What are his plans for possible future involvement in the Steffan case, now that he has returned to his old law firm?

It is worth noting that a three judge panel from the DC Circuit Court ruled against the Department of Defense's policy but the three judges were not necessarily representative of the entire court's views. The Department of Justice hesitated in appealing the decision of the panel and certain members of Congress became concerned. Senators Nunn, Thurmond and Coats wrote the Administration and President Clinton, urging the appeal. Still, the Administration hesitated until one of the Circuit Court judges took the extremely unusual action of having the entire court poled. The result was that the court voted to consider the case en banc.

In retrospect, if the case is not appealed, the former law firm of Mr. Nussbaum prevails. If there is an appeal, however, there is a chance that his old law firm loses. Thus, it becomes very important to know if Mr. Nussbaum was also involved in any way in the Department of Justice failure to appeal the case.

I would appreciate answers to the above questions as well as any other information of Mr. Nussbaum's involvement with the Steffan case. If you have any questions concerning this request, please contact me or have your staff contact Mr. Don Deline, Minority Counsel for the Armed Services Committee at 224-8629.

Sincerely,

Strom Thurmond
Strom Thurmond

ST/asd

Joel -

FYI - here's the
decision entering
a preliminary injunction
enjoining the new
policy with respect
to the plaintiffs.

- Cliff

PHOTOCOPY
PRESERVATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X

LIEUTENANT COLONEL JANE ABLE,
PETTY OFFICER ROBERT HEIGL,
FIRST LIEUTENANT KENNETH OSBORN,
SERGEANT STEVEN SPENCER,
LIEUTENANT RICHARD VON WOHL, and
SEANAN WERNER ZEHR,

Plaintiffs,

-against-

UNITED STATES OF AMERICA, and
WILLIAM J. PERRY, SECRETARY OF
DEFENSE, in his official capacity,

Defendants.
-----X

SULLIVAN & CROMWELL

(David H. Braff, Michael Lacovara, Penny Shane,
Julie B. Crockett, Eulalia Mack, of counsel)
125 Broad Street
New York, New York 10004
for plaintiffs.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

(Ruth E. Harlow, William B. Rubenstein, Marc E.
Elovits, of counsel)
132 West 43rd Street
New York, New York 10036
for plaintiffs.

LAMBDA LEGAL DEFENSE & EDUCATION FUND

(Evan Wolfson, Beatrice Dohrn, of counsel)
666 Broadway
New York, New York 10012
for plaintiffs.

DEPARTMENT OF JUSTICE

(Richard G. Lepley, Vincent M. Garvey, of counsel)
901 E Street, N.W., Room 1022
Washington, D.C. 20530
for defendants.

CV 94 0974

MEMORANDUM
AND
ORDER

DEPARTMENT OF THE ARMY
(Captain Tara O. Hawk, Office of the Judge
Advocate General, of counsel)
for defendants.

ZACHARY W. CARTER, United States Attorney
(Charles S. Kleinberg, of counsel)
Brooklyn, New York
for defendants.

NICKERSON, District Judge:

Six plaintiffs, alleging they are lesbian and gay members of the United States Armed Services (the Services), brought this action against the United States and William J. Perry, Secretary of Defense, for (a) a declaration that Section 571 of the National Defense Authorization Act for the Fiscal Year 1994 (the Act), 10 U.S.C. § 654, concerning a new policy as to homosexuals, and Regulations issued under the Act, are invalid under the First and Fifth Amendments, and (b) an order enjoining the defendants from enforcing the Act and the Regulations.

This action appears to be the first to challenge the new policy, which became effective February 28, 1994.

This court has jurisdiction under 28 U.S.C. §§ 1331 and 1346. Venue lies in this district under 28 U.S.C. § 1391.

Moving pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs ask the court to enjoin defendants pending resolution of the case from investigating, discharging, or taking other adverse action against plaintiffs because they have identified themselves as gay or lesbian.

THE COMPLAINT

The complaint states, in substance, the following.

Each plaintiff is a lesbian or gay member of the Services who has served honorably for years. The Act and the Regulations violate plaintiffs' equal protection and free speech rights and impose on lesbians and gays punitive rules unrelated to fitness and ability to serve, rules promoting no legitimate military interest and based on presumed prejudices of heterosexual service members and civilians.

THE ACT AND THE REGULATIONS

The Act, 10 U.S.C. § 654, entitled Policy Concerning Homosexuality in the Armed Forces, contains

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in subsection (a) "findings" that, among other things, the prohibition against homosexual "conduct" is a long-standing and still necessary element of military law, and that the presence in the Services of persons who demonstrate a propensity or intent to engage in homosexual "acts" would create an unacceptable risk to the standards of "good order" and "unit cohesion" essential to military capability.

Subsection (b), setting forth the Act's policy, recites, in substance, that a member of the Services "shall be separated" from them if one or more of the following three findings is made:

(1) The member is found to have engaged, attempted to engage, or solicited another to engage, in homosexual acts, unless the member has demonstrated, among other things, that he or she "does not have a propensity or intent to engage in homosexual acts."

(2) The member "has stated that he or she is a homosexual or bisexual or words to that effect," unless "the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."

(3) The member has married or attempted to marry someone of the same sex.

Subsection (f) contains definitions. "Homosexual" includes "the terms 'gay' and 'lesbian'" and means a person who engages, attempts to engage, has a "propensity" to engage, or "intends" to engage, in homosexual acts. The term "homosexual act" means any bodily contact between members of the same sex to satisfy sexual desires or any such contact that a reasonable person would understand to "demonstrate a propensity" or "intent" to engage in such an act.

The Act has no definition of the word "propensity."

On December 21, 1993 the Secretary of Defense issued a memorandum concerning the implementation of the new policy stating that no one applying to become a member "will be asked about his or her sexual orientation," that "homosexual conduct may be a basis for rejection," and that the suitability of persons to serve will be based not on "sexual orientation" but on "homosexual acts" and "statements that reflect on intent or propensity to engage" in such acts.

The Directives, 1332.14 and 1332.30, issued with the memorandum confirm that while "homosexual

orientation is not a bar" to continued service, "homosexual conduct" is. Such conduct includes not merely homosexual "acts" but also "a statement by a member that demonstrates a propensity or intent to engage" in such acts. A member who "has made a statement" that he or she is a homosexual shall be separated unless the member demonstrates that he or she does not engage, or intend to engage, or have a "propensity" to engage in homosexual acts.

Thus, as the Guidelines annexed to the Directive put it, a statement by a service member that he or she is a homosexual "creates a rebuttable presumption" that the member "engages in homosexual acts or has a propensity or intent to do so."

While the word "propensity" is distinguished in the Act from "intent," it is not defined. The word is generally understood and defined to mean a "natural inclination" or an "innate or inherent tendency." Webster's Third New International Dictionary 1817 (1986); see also Random House Dictionary of the English Language 1152 (1966). "Innate" means "existing in one from birth" or "inborn." Random House at 733; see also Webster's at 1166.

Neither the Act nor the Directives suggest how one who is born with an innate tendency, a "propensity," to commit a homosexual act can prove that he or she does not have such a propensity. To invite someone to prove that he or she does not have an inborn tendency seems like a hollow offer.

The Directives state that "propensity" to engage in homosexual conduct "means more than an abstract preference or desire to engage" in homosexual acts and "indicates a likelihood that a person engages in or will engage in" them. But the Guidelines make clear that the very statement of homosexual orientation establishes such a likelihood. The Guidelines treat as "homosexual conduct" not merely statements that in context may reasonably be considered as revelations of intent to or as invitations to engage in homosexual acts. The Guidelines go so far as to make any statement of homosexual orientation, wherever and whenever made in the past and to whatever person, even a statement to this court, as proof of an intent to engage in homosexual acts.

Thus, "statements such as 'I am a homosexual,' 'I am gay,' 'I am a lesbian,' 'I have a homosexual orientation,' and the like" constitute "homosexual

conduct." This is hardly consistent with the avowed policy of the Act that not "homosexual orientation" but only homosexual "conduct" is a "bar" to service.

To treat a statement as to homosexual orientation made to a court to test the law as itself "homosexual conduct" is to call into question the Act's assurance that it deals only with homosexual acts. The fact that the officials implementing the policy are directed not to ask service members "to reveal their sexual orientation" shows that the Act is really concerned not so much with "conduct" but with the attitudes of others when they learn of statements of homosexual orientation. The message to those with such an orientation appears to be not to avoid private homosexual acts but to stay in the closet and to hide their orientation.

THE CONSTITUTIONAL CLAIMS

Plaintiffs raise on the present motion claims that the Act and the Regulations violate their equal protection rights under the Fifth Amendment to the United State Constitution and their right to free speech under the First Amendment.

Free Speech

Plaintiffs say that the Act inhibits their right to free speech because they face retaliation for statements they must make in this action to test the Act's constitutionality.

The fact that the complaint identifies plaintiffs as having a homosexual orientation has caused the Services to take action against some of them. For example, on March 10, 1994 the commanding officer of plaintiff Robert S. Heigl sent a notice to him entitled "Notification of Administrative Discharge by Reason of Unsuitability Due to Homosexuality." The notice says that the officer is recommending that Heigl be discharged on the basis of his declaration in this case that he is a homosexual. The notice makes no mention of homosexual "acts."

The First Amendment guarantees the right "to petition the Government for a redress of grievances," and that includes the right of access to the courts. Hill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 741, 103 S. Ct. 2161, 2169 (1983). Indeed, "[t]he Supreme Court has described the right to petition government for redress of grievances as 'among the most precious of the liberties safeguarded by the Bill of

Rights.'" Eranda v. Kelly, 854 F.2d 584, 589 (2d cir. 1988) (quoting United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222, 88 S. Ct. 353, 356 (1967)).

The statement "I am a homosexual" or "I am gay" or "I am a lesbian" contains both "speech" and "nonspeech" elements. The verbalization is clearly speech. As the Supreme Court has held, a person's "inclinations" are "his own and beyond the reach of government." Jacobson v. United States, ___ U.S. ___, 112 S. Ct. 1535, 1542 (1992) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67, 93 S. Ct. 2628, 2641 (1973)); see also R.A.V. v. City of St. Paul, 505 U.S. ___, 112 S. Ct. 2538, 2542 (1992) ("[c]ontent-based regulations are presumptively invalid" and "hate speech" statute facially invalid under the First Amendment) (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 505 U.S. ___, 112 S. Ct. 501, 508 (1992)).

But the statement is also an act of identification, a "nonspeech" element. The Supreme court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental

limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678 (1968). That case set forth the criteria for determining whether a limitation is sufficiently justified.

✓ [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id., 391 U.S. at 377, 88 S. Ct. at 1679.

To say that plaintiffs may not even petition this court and litigate this case without incurring the disabilities that defendants seek to visit upon them seems to this court at least to raise a serious First Amendment question.

This court is aware that a review of military regulations challenged on First Amendment grounds is "far more deferential" than a review of similar regulations designed for civilian society. Goldman v. Weinberger, 475 U.S. 503, 507, 106 S. Ct. 1310, 1313 (1986). That case, while recognizing that certain "aspects of military life do not, of course, render entirely nugatory in the military context the

guarantee of the First Amendment," *id.*, 475 U.S. at 507, 106 S. Ct. at 1313, upheld against a First Amendment challenge an Air Force regulation preventing the plaintiff from wearing a yarmulke while on duty and in uniform. See also *Brown v. Glines*, 444 U.S. 348, 100 S. Ct. 594 (1980) (upholding Air Force regulation requiring Air Force members to obtain command approval before circulating petitions on base); *Greer v. Spock*, 424 U.S. 828, 96 S. Ct. 1211 (1976) (upholding Army regulation that prohibited political speeches and demonstrations on base).

But here plaintiffs face wider and more constant restraints. The Act and Regulations restrict their speech not only while they are in uniform and on duty, or on base, but in every conceivable aspect of their lives, including the prosecution of this lawsuit.

The Supreme Court in *Brown v. Glines*, *supra*, said that a military regulation may "restrict speech no more than is reasonably necessary to protect the substantial governmental interest." 444 U.S. at 355, 100 S. Ct. at 600. This court holds that there is a serious question as to whether a regulation goes beyond what is reasonably necessary to protect any possible government interest when it inhibits six service members from

continuing to speak in court to make a constitutional challenge.

Equal Protection

Plaintiffs assert that the Act and Regulations violate their right to equal protection, serve no rational, legitimate government interest, and reflect only the actual or perceived private prejudices of those who are not lesbian or gay.

The court analyzes Fifth Amendment equal protection challenges by the same standards as those applicable to claims of violation of the equal protection clause of the Fourteenth Amendment. See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 95 S. Ct. 1225, 1228 n.2 (1975).

The court assumes for the purposes of the motion that the Act and Regulations are subject to only minimal equal protection scrutiny. Under that standard they are valid if the distinction they make is "rationally related to a legitimate governmental purpose," City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446, 105 S. Ct. 3249, 3258 (1985), and plaintiffs must negate "every conceivable basis

which might support" the challenged rules. Heller v. Doe, ___ U.S. ___, 113 S. Ct. 2637, 2643 (1993).

There is a split of authority as to whether the military's prior policy, making the status of being a homosexual "incompatible with military service," denied homosexuals equal protection because no similar policy obtained as to heterosexuals.

Some courts have flatly held that the distinction has no rational basis. See, e.g., Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993) (finding no rational basis for homosexual ban and granting plaintiff summary judgment); Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993) (same), stay denied, CV-92-6044, 1993 WZSTLAW 195368 (9th Cir. Mar. 5, 1993) (per curiam), stay granted in part, stay denied in part, 114 S. Ct. 374 (1993) (staying injunction, pending appeal, except as applicable to named plaintiff); Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993) (finding ban unconstitutional), vacated for rehearing in banc, Jan. 7, 1994.

Others have found that a ban on homosexuals at least raises a serious equal protection question. See, e.g., Fruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992)

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(raising equal protection question sua sponte and remanding to district court), cert. denied, 113 S. Ct. 655 (1992); Elzie v. Aspin, 841 F. Supp. 439 (D.D.C. 1993) (finding, on motion for preliminary injunction, that plaintiff "presents a strong case that he will probably succeed" on equal protection claim).

Other cases have held the ban rational. See, e.g., Woodward v. United States, 871 F.2d 1068, 1076-77 (Fed. Cir. 1989) (raising sua sponte equal protection claim and finding ban on homosexual conduct constitutional), reh'g denied, No. 86-1283, 1989 U.S. App. LEXIS 6149 (Fed. Cir. May 2, 1989), cert. denied, 494 U.S. 1003, 110 S. Ct. 1295 (1990); Rich v. Secretary of Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (finding ban constitutional).

This court does not now undertake to assess the relative merits of these divergent holdings. It is enough to say that the allegedly new policy makes the same distinction between homosexuals and heterosexuals as did the prior policy. The conflict of authority signifies the seriousness of the questions going to the merits of plaintiffs' equal protection claim.

STANDARDS FOR ENTRY OF A
PRELIMINARY INJUNCTION

The standards for issuing a preliminary injunction in this circuit are clear. A party seeking a preliminary injunction must show

- ✓ (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief."

Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1338 (2d Cir. 1992), vacated as moot, 113 S. Ct. 3028 (1993) (quoting Resolution Trust Corp. v. Elman, 949 F.2d 624, 626 (2d Cir. 1991)); see also Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 73 (2d Cir. 1979) (per curiam).

The plaintiffs have satisfied the first element, irreparable harm, as to their claims under both the Fifth Amendment and the First Amendment. A showing of a possible violation of constitutional rights constitutes irreparable harm justifying a preliminary injunction. Covino v. Patriassi, 967 F.2d 73, 77 (2d Cir. 1992); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984).

There is no merit to the government's assertion, citing Sampson v. Murray, 415 U.S. 61, 90-92, 94 S. Ct. 937, 952-53 (1974), that this court can never preliminarily enjoin a discharge from federal employment. In that case the Court held that a probationary government employee about to be discharged, allegedly in violation of United States Civil Service Regulations, could not have a preliminary injunction. No constitutional issue was at stake, and the employee could be made whole with money damages. Money damages cannot recompense the six plaintiffs here for violations of their rights to free speech and equal protection.

The government also says plaintiffs must exhaust their administrative remedies in the Services before coming to court. Exhaustion is not required when, as here, plaintiffs raise constitutional questions and irreparable injury will occur without preliminary judicial relief. See Guitard v. United States Secretary of Navy, 967 F.2d 737, 741 (2d Cir. 1992).

Plaintiffs make a substantial claim that to subject them to the Act and Regulations will deny them equal protection every day. The court holds that this constitutes irreparable harm.

With respect to the free speech claim, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976); see also Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991). Mr. Justice Brennan's opinion in the Burns case said that public employees threatened with discharge from their positions because they were exercising their First Amendment rights of association in a political party had shown irreparable injury.

Defendants say that whatever chill there may have been of plaintiffs' right to speak must have come from the threat of permanent discharge, that this threat did not serve to prevent plaintiffs from speaking through their complaint, and that a preliminary injunction would not now retroactively thaw the supposed chill. Defendants cite American Postal Workers Union v. United States Postal Service, 766 F.2d 715, 722 (2d Cir. 1985), cert. denied, 475 U.S. 1046, 106 S. Ct. 1262 (1986), and Gavage v. Gorski, 850 F.2d 64 (2d Cir. 1988).

Defendants' contention embodies an erroneous premise. Plaintiffs' free speech claim is not based

merely on their statements in the complaint. They are faced with a continuing inhibition on speech throughout of the litigation. The Act and Regulations provide that a statement of homosexual orientation creates a "rebuttable" presumption that the speaker engages in or intends to engage in homosexual acts, or has a propensity to do so. For reasons stated above, that presumption is virtually irrebuttable. But at least in theory there is a slim chance that a plaintiff might be able to rebut it.

Section H(b)(2) of the Standards and Procedures accompanying the Directives provides that the nature and circumstances of a statement that a member is a homosexual may be considered by the officer determining whether the member has rebutted the presumption of intent to or propensity to engage in homosexual acts. Yet for plaintiffs to litigate the issue they must make repeated assertions of their homosexuality in affidavits and in testimony. Unlike Savage and American Postal Workers Union, where the plaintiffs had concluded the exercise of their First Amendment rights before the litigation had commenced, plaintiffs here must, to pursue their case, continue speaking about their homosexuality.

Under the Act and Regulations for a plaintiff to persist in this lawsuit, filing affidavits and presenting testimony, is to make it less likely that he or she will have any chance of rebutting the presumption. The reiteration of homosexual orientation may be used by the Services to find a strengthening of any inference of an intent to commit homosexual acts. In short, the more vigorous plaintiffs' prosecution of their claims, the greater is their risk of the ultimate punishment of discharge. Their First Amendment right to seek redress in the court and to speak freely is under a constant and ever-increasing chill.

Just as in Elrod v. Burns, *supra*, where the plaintiffs had a continuing First Amendment right to associate during the course of the litigation, here plaintiffs have a continuing right to exercise their right to speak in order to persevere in the case. By preliminarily enjoining defendants the court can thereby protect this right.

For reasons already discussed, the court holds that plaintiffs have established serious questions going to the merits. The court holds that this showing is adequate to satisfy a part of the second half of the criteria for issuance of a preliminary injunction.

In the Haitian Centers case, supra, the Court of Appeals for the Second Circuit approved a preliminary injunction against the United States Immigration Service and various United States government officials, enjoining them from repatriating certain Haitians. The court held that plaintiffs, who would be irreparably damaged without the injunction, needed to show only sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward them. The court rejected the United States government officials' contention that because they were asserting a "public interest" they could not be enjoined from taking action in fulfillment of their statutory duties unless the movant showed nothing less than a likelihood of success on the merits.

As the Second Circuit held, the government may not assume that the public interest lies solely with it. Haitian Centers, 969 F.2d at 1339. "[T]he public interest also requires obedience to the Constitution." Carey v. Glutznick, 637 F.2d 834, 839 (2d Cir. 1980). As in the Haitian Centers case so here, "no party has an exclusive claim on the public interest," and the "likelihood of success" standard "need not always be

followed merely because a movant seeks to enjoin government action." 969 F.2d at 1339.

In the present case the military asserts a public interest in the maintenance of "good order" and "unit cohesion." The plaintiffs invoke the public interest in protecting rights granted by the First and Fifth Amendments. The preservation of rights of free speech and equal protection seems to this court quite as much in the public interest as a claim that the pursuit of this lawsuit by six plaintiffs constitutes a serious threat to the military integrity of the armed forces.

On the authority of the Haitian Centers case this court holds that plaintiffs may have a preliminary injunction if they show irreparable damage and sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in their favor.

Those decisions said by the government to require plaintiffs to show a likelihood of success are, as the Haitian Centers opinion said, distinguishable. Plainly not in point are cases where the movant relies not on the Constitution but on statutory language to obtain a preliminary injunction. See, e.g., Medical Soc'y of the State of New York v. Tala, 560 F.2d 535 (2d Cir.

1977). In Swaney v. Egan, 996 F.2d 1384 (2d Cir. 1993), and Union Carbide Agric. Prods. Co. v. Castle, 632 F.2d 1014 (2d Cir. 1980), the court found no substantial constitutional claim at issue. In Plaza Health Laboratories, Inc. v. Parales, 878 F.2d 577 (2d Cir. 1989), a plaintiff dumping hazardous medical wastes into the Hudson River sought preliminarily to enjoin its suspension by New York State as a Medical provider. The court held that plaintiff had no ex post facto claim and a speculative at best due process claim. The public interest lay heavily on the side of the state.

In addition to the other preconditions to a preliminary injunction plaintiffs must, as already noted, show a balance of hardships tipping decidedly in their favor. Haitian Centers, 969 F.2d at 1338.

Only the six plaintiffs can obtain preliminary relief in this case. Were this a class action affecting all homosexuals in the Services the balance of hardship analysis might be different.

If plaintiffs obtain a preliminary injunction the current regulations will remain in force against all other service members. The potentially adverse effect on "good order" and "unit cohesion" of allowing these

six plaintiffs to remain on duty and not subject to investigation while the case is pending can be minimal at most.

In any event there seems to be little reason to believe that the presence in the services of these six members during the litigation will cause any acute actual disruption. The court does not prejudge the merits. But the evidence presented in other courts casts doubt on the extent of any harm to be anticipated from the presence of homosexuals in the military. See, e.g., Meinhold, 808 F. Supp. at 1457-58 (granting permanent injunction against discharging homosexuals absent conduct interfering with the military mission); see also National Defense Research Institute, "Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment" (RAND, 1993) (report prepared at the direction of the Secretary of Defense).

The hardship to the six plaintiffs is evident and immediate. As explained above, their free speech rights to pursue this case will be chilled. They will be subjected to adverse action, including likely discharge from their chosen profession, on the basis of what substantial judicial authority has deemed unconstitutional discrimination. To deprive someone of

constitutional rights is to inflict a hardship, and an especially heavy one where the rights are to free speech and equal protection.

The court finds that the balance of hardships tips decidedly in favor of the six plaintiffs.

CONCLUSION

Plaintiffs' motion is granted preliminarily enjoining the defendants pending resolution of the case from investigating or discharging or taking other adverse or punitive action against plaintiffs based on their self-identification as gay or lesbian in connection with legal proceedings challenging the constitutionality of the Act and the Regulations.

So ordered.

Dated: Brooklyn, New York
April 4, 1994

Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

THE WHITE HOUSE
WASHINGTON

Joel —

We need to sit down for a
few minutes to discuss the
gays-in-the-military cases.

Attached is a segment that may go
into a district court brief
tomorrow, taken from the current
Steffan drafts.

Let's discuss.

— Cliff



U.S. Department of Justice

Civil Division

*Says in
Muntary*

Deputy Assistant Attorney General

Washington, D.C. 20530

FACSIMILE TRANSMITTAL COVER SHEET

DATE: 3/21/94

TO: CLIFF SLOAN

FACSIMILE NO.: 456 - 1647

TELEPHONE NO.: 456 - 7900

FROM: John A. Rogovin
Deputy Assistant Attorney General

FACSIMILE NO.: (202) 514-8071

TELEPHONE NO.: (202) 514-5421

NO. OF PAGES: 6

COMMENTS:

Cliff
See p. 11
pp. 35-39

[Signature]

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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).

→ Moreover, DOD did not cater to impermissible prejudice in formulating this policy. See Dronenburg, 741 F.2d at 1397-98. At least outside the context of heightened scrutiny review, the military may take into account those factors that are rationally related to such essential components of military readiness as unit cohesion and privacy concerns. The rational basis summarized above amply supports the considered judgment of military officials that accomplishment of the military mission would be impaired by the service of persons who have demonstrated a propensity to engage in prohibited homosexual acts.

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

Furthermore, it was not arbitrary for the Navy to deny Steffan his diploma while granting diplomas to midshipmen who had medical disabilities rendering them uncommissionable. Midshipmen with such medical disabilities had not been found unfit for ser-

commit, or will likely commit, homosexual acts; by definition, the so-called "celibate homosexual" has rebutted the presumption that he commits, or will likely commit, homosexual acts. More fundamentally, this exception reveals a balance struck by DOD between two competing interests: the privacy interest of heterosexuals, on the one hand and, on the other hand, the interest of acknowledged homosexuals to serve in the military if they conform their conduct to military standards. The fact that the military has carved out this exception surely does not render the policy impermissible. A policy need not be carried to its logical limits, without regard to other competing interests, to be rational. Rather, in the context of rational basis review, "the latitude of discretion is notably wide in . . . the granting of . . . exemptions upon grounds of policy." Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992).

D. DOD's Policy Is Not Based On Constitutionally Impermissible "Prejudice."

1. Steffan argues (Br. 10) that DOD caters to impermissible "prejudice" by taking into account societal attitudes to justify its policy. This argument cannot be reconciled with the overwhelming weight of precedent that upholds DOD's conduct-directed policy under equal protection principles, and recognizes DOD's great latitude to develop rules for the governance and composition of the Armed Forces. See Ben-Shalom, 881 F.2d at 460-61; Woodward, 871 F.2d at 1076; Rich, 735 F.2d at 1229; Beller, 532 F.2d at 811. As explained above, the "statements" portion of the policy serves to prevent the occurrence of

homosexual acts that the military may properly proscribe (and rests on concerns indistinguishable from those upheld in Dronenburg, 741 F.2d at 1398.) Steffan's claim of "prejudice" therefore does not undermine the old policy. 

(Moreover, although Steffan invokes the pejorative term "prejudice," people's views about homosexual conduct in fact reflect a number of different considerations -- including religious doctrines, moral precepts, ethical values, and privacy concerns -- about an extraordinarily complex issue.) If rational basis review and deference to the military mean anything, it is that the Armed Forces must be allowed sufficient latitude to deal with practical problems that may arise due to deep-seated attitudes of a significant number of service members insofar as these attitudes affect military preparedness, unit cohesion, discipline, and morale. Under rational basis review, DOD is not required to psychoanalyze its troops to determine the basis for those strong feelings on the complicated question of homosexuality; rather it is concerned only with their effect on the military mission. See S. Rep. 103-112, supra, at 279. The military's "vital role," Goldman, 475 U.S. at 507, is to be prepared to defend our country in the real world and, given such realities, it is within the province of the military to conclude that service by those who engage or likely will engage in prohibited homosexual conduct "seriously impairs the accomplishment of the military mission." Directive 1332.14.H.1.a. See Rostker, 453 U.S. at 72-74. Accordingly, as the Seventh Circuit

held in Ben-Shalom, 881 F.2d at 465, "the concerns set forth in the military policy and regulation cannot . . . be dismissed as mere prejudice"

Contrary to Steffan's argument, the rational basis test does not compel the military to be in the forefront of change on controversial social issues. See S. Rep. 103-112, supra, at 286-87. As President Clinton recently stated: "Our military is a conservative institution . . . in the very best sense . . . [and] it is right for the military to be wary of sudden changes." 29 Weekly Comp. Pres. Doc. 1369, 1374 (July 19, 1993). The consequence of Steffan's argument, if accepted by this Court, is that the military would be precluded from addressing what even the panel accepted, under rationality review, are "the Secretary's . . . well-founded . . . fears" (8 F.3d at 67) of a serious impairment of the military mission. The concept of "prejudice", properly understood, does not extend so far as to undermine the rationality of the military's policy for dealing with this issue or undermine the deference due the military's judgment on matters affecting the effectiveness and readiness of our Armed Forces.

Accordingly, the proper inquiry here, as in other cases, is whether there is a rational basis for the challenged classification. See, e.g., Vance v. Bradley, 440 U.S. 93 (1979); Dandridge v. Williams, 397 U.S. 471 (1970). As shown above, the old policy "clearly promotes a legitimate government interest

sufficient to survive rational basis scrutiny." Ben-Shalom, 881 F.2d at 465.

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

DOD's conduct-directed policy does not embody "a bare . . . desire to harm" homosexuals -- a plainly "[il]legitimate" objective. See Cleburne, 473 U.S. at 447. Moreover, DOD's policy does not represent "unthinking[]" or "reflexive[]" government action, nor is it an "accidental by-product of a traditional way of thinking about [homosexuals]." Rostker, 453

U.S. at 72, 74. Rather, it reflects the considered professional judgment of military authorities, which was recently subjected to "careful, thorough, and open-minded review" as to "what is best for military effectiveness." See S. Rep. 103-112, supra, at 279. As the Senate Committee observed, "the policy is based upon prudence, not prejudice." Id.¹⁵

Steffan nevertheless asserts (Br. 16, 25) that the old policy is akin to "racist" regulations of the past, and he argues that, just as societal attitudes could not justify racial discrimination, they cannot justify discrimination based on homosexual sexual "status." Id. at 21. This argument fails to recognize that the regulations are directed at homosexual acts, and it is undisputed here that the military is constitutionally empowered to regulate such acts. 8 F.3d at 64. Cf. S. Rep. 103-112, supra, at 281 ("[u]nlike race . . . , [homo]sexuality . . . is manifested by behavior") (testimony of General Powell).

¹⁵ Steffan's reliance (Br. 10) on Palmore v. Sidoti, 466 U.S. 429 (1984), is even more misplaced because the challenged policy in that case occurred in the civilian context and involved a racial classification. Unlike race, which occupies a unique position in our legal system and in our history, homosexual conduct, or the propensity to engage in homosexual conduct, is not per se an illegitimate consideration for DOD to take into account when establishing military regulations. The "heckler's veto" cases upon which Steffan and the panel rely (Br. 26; 8 F.3d at 68) are also inapposite because they involve the exercise of the fundamental right of free speech and thus are subject to a higher standard of scrutiny than the rational basis test. Similarly, cases such as Frontiero v. Richardson, 411 U.S. 677 (1973), and Califano v. Goldfarb, 430 U.S. 199 (1977), which Steffan cites (Br. 6, 12) are beside the point because they too involve heightened scrutiny review (and indeed in Frontiero, the Government's argument "was based solely on considerations of administrative convenience" and not deference to military judgment, see, Schlesinger, 419 U.S. at 506).



U.S. Department of Justice
Civil Division

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See p. 11

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Respectfully,
John A. Rogovin

→ WITH CMS PRELIMINARY COMMENTS

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Delete?

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DOD's conduct-directed policy does not embody "a bare . . . desire to harm" homosexuals -- a plainly "[il]legitimate" objective. See Cleburne, 473 U.S. at 447. Moreover, DOD's policy does not represent "unthinking[]" or "reflexive[]" government action, nor is it an "accidental by-product of a traditional way of thinking about [homosexuals]." Rostker, 453

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reconcile w/ Drew's position in civilian context?

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5409

September Term, 1993

Joseph C. Steffan,

Appellant

v.

Les Aspin, Secretary,
Department of Defense, et al.United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 28 1994

RON GARVIN
CLERKBEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley,
Williams, Ginsburg, Sentelle, Henderson, and Randolph,
Circuit JudgesO R D E R

It is ORDERED, by the Court in banc, that oral argument herein will be heard on Wednesday, May 11, 1994, at 10:00AM. It is

FURTHER ORDERED, by the Court in banc, that thirty copies each of new briefs be filed pursuant to the following schedule:

Appellant's Brief	February 24, 1994
Briefs of <u>Amici Curiae</u> in Support of appellant	March 3, 1994
Appellees' Brief	March 28, 1994
Appellant's Reply Brief Joint Appendix (30 copies), if necessary	April 8, 1994

In addition to any other issues raised, the parties should specifically address that of the power to grant commissions.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Robert A. Bonner
Deputy Clerk

I. ACCESSION POLICY

Existing provisions:

"8. Provisions Related to Homosexual Conduct

a. 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 (as defined in subsection b., below). Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

b. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

Proposed revisions:

Option 1:

"8. Provisions Related to Homosexual Conduct

a. A person's sexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct (as defined in subsection b., below). Applicants for enlistment, appointment, or induction shall not be asked or required to state whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to state whether they have engaged in homosexual conduct, unless credible independent information is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

b. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

Option 2:**"8. Provisions Related to Homosexual Conduct**

a. **Sexual orientation is considered a personal and private matter.** Applicants for enlistment, appointment, or induction shall not be asked or required to state whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to state whether they have engaged in homosexual conduct (as defined in subsection b, below), unless credible independent information is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

b. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

Option 3:**"8. Provisions Related to Homosexual Conduct**

a. **It is DoD policy to judge a person's suitability to serve in the Armed Forces on the basis of his or her conduct and ability to meet required standards of duty performance and discipline, not on the basis of his or her mere status or mental state, which are personal and private.**

b. Applicants for enlistment, appointment, or induction shall not be asked or required to state whether they are heterosexual, homosexual, or bisexual. Applicants also will not be asked or required to state whether they have engaged in homosexual conduct (as defined in subsection b, below), unless credible independent information is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

c. Homosexual conduct is grounds for barring entry into the Armed Forces, except as otherwise provided in this paragraph. Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. * * *

II. SEPARATION POLICY

Existing provisions:

"H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subsection b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's **sexual orientation**, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. **Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct, as defined above.**

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

Proposed revisions:

Option 1:

"H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subsection b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's **sexual orientation**, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. **A member's sexual orientation is not a bar to continued service unless manifested by homosexual conduct, as defined above.**

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

Option 2:**"H. Homosexual Conduct****1. Basis**

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subsection b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's **sexual orientation**, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. **Sexual orientation is considered a personal and private matter.**

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

Option 3:**"H. Homosexual Conduct****1. Basis**

a. It is DoD policy to judge a person's suitability to serve in the Armed Forces on the basis of his or her conduct and ability to meet required standards of duty performance and discipline, not on the basis of his or her mere status or mental state, which are **personal and private**. A member who engages in homosexual conduct is subject to separation from the Military Services under the terms set forth in subsection b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's **status or mental state**, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts * * *

As stated in
(seen July 16 directive)

Current language: "Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct."

Option 1: Delete entire sentence from accession and separation Directives.

Option 2: Delete second half of the sentence ("and homosexual orientation . . .").

Option 3: Redefine "sexual orientation." The Directives currently define "sexual orientation" as "A sexual attraction to individuals of a particular sex." The revised definition would be: "An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." This revised definition is essentially the flip-side of our current definition of "propensity": the Directives state that "propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts."

Option 4: Add the word "individual's" before "homosexual orientation" in the current language, so that the sentence would read: "Sexual orientation is considered a personal and private matter, and an individual's homosexual orientation is not a bar to continued service unless manifested by homosexual conduct." The theory is that adding "individual's" creates less of an impression that we are creating a "protected class."

Gay in
Matter



U.S. Department of Justice

*Gary
in Military*

Washington, D.C. 20530

CIVIL DIVISION/APPELLATE STAFF
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DATE:

DEC. 28

TIME:

9 am

TO:

JOEL KLEINDEPUTY COUNSEL

FAX NO.:

456-6279

* * * * *

FROM:

TONY STEINMEYERCivil Division, Appellate Staff
Room 3617United States Department of Justice
Washington, D.C. 20530

PHONE NO.:

(202) 514-3388

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draft 12-27-93 pm

Circulated

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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

FRANK W. HUNGER
Assistant Attorney General

ERIC H. HOLDER, JR.
United States Attorney

ANTHONY J. STEINMEYER
(202) 514-3388

JOHN C. HOYLE
(202) 514-3469

E. ROY HAWKENS
(202) 514-5714

Attorneys, Appellate Staff
Civil Division, Room 3127
Department of Justice
Washington, D.C. 20530-0001

EDWARD DUFFY, Major, USMC
Office of the JAG
Dep't of the Navy

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 regulatory interpretation is entitled to great deference and should be accepted especially where, as here, it avoids more difficult constitu-

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

tional 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 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 content-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 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 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) 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); slip op. at 14; and (3) 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 F.R.A.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 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 the 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 only a small number of individual cases pending in the district court in this Circuit that will 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, and in any event it exceeds the scope of judicial authority. 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. 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

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.

the [Armed Forces] is a matter of discretion within the province of the President as Commander in Chief," 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. F.R.A.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 the possible commission of homosexual acts in violation of the Uniform Code of Military Justice. App. 469.⁵ The investigation was triggered by Steffan's statements to military subordinates that he was homosexual. Steffan declined to speak to the Naval investigators, but he acknowledged to other Naval officials that he was homosexual. Id. Based upon his statements, the Academy's Academic Board then recommended that Steffan be discharged for violation of the military's homosexual policy. App. 89, 98. After consulting with his civilian

⁵ The commission of homosexual acts may be a criminal (as well as a regulatory) violation pursuant to the Uniform Code of Military Justice. See 10 U.S.C. §§ 925 (sodomy), 933 ("conduct unbecoming an officer and a gentleman"), 934 ("all conduct of a nature to bring discredit upon the armed forces").

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 it was not supported by a rational basis. Rejecting the military's construction of its own regulations, the panel construed the regulation at issue to be "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 a commission to Steffan 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,⁶ 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 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, the appointment of commissioned officers. In accordance with the Appointments Clause of the Constitution,⁷ 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. Atty Gen. 223, 231 (1856); Dubarry's Case, 4 Op. Atty Gen. 603, 610 (1847). Thus, 10 U.S.C. § 531 provides:

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.

⁶ App. 79 (Complaint); Brief of Appellant 36.

⁷ Article II, section 2, clause 2 of the Constitution provides: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law"

The Supreme Court's decision in Orloff v. Willoughby, 345 U.S. 83 (1953), also establishes that it is beyond the authority of courts to grant a military commission to an individual. In Orloff, a doctor was denied a commission in the Army because he refused, on grounds of possible self-incrimination, to state whether he was or had been a member of the Communist party. In rejecting Orloff's request for a judicial order directing that he be given a commission, the Court stated:

It is obvious that the commissioning of officers in the Army 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.

345 U.S. at 90.

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 ("[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"); 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 "[t]he President's action in determining whether a person deserves appointment to a military commission, or any other position of

trust and honor, 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. 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 to commission officers in the military, see Buckley, 424 U.S. at 132, and indeed the President and the Senate were not even named as parties to this action. Accordingly, the portion of the panel's remedy ordering the Secretary to "commission" Steffan as an officer exceeds judicial authority.

CONCLUSION

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

Respectfully submitted,

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DECEMBER 1993

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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 mailed, first-class, postage prepaid, to:

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THE WHITE HOUSE
WASHINGTON
December 20, 1993

Steffan
"Say in"
Steffan

MEMORANDUM FOR THE PRESIDENT

FROM: CLIFFORD M. SLOAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Steffan gays-in-the-military case

Overview

In the next two weeks, the government needs to decide whether to appeal in the Steffan case, the recent gays-in-the-military decision in the U.S. Court of Appeals for the D.C. Circuit. (A copy of a prior memo on the case is attached). An appeal to the full D.C. Circuit would be due on January 3, 1994. If no appeal is filed in the full D.C. Circuit, a Supreme Court petition would be due on February 14, 1994.

The Joint Chiefs of Staff strongly request an appeal. Although the Department of Justice has not reached a final position, the Solicitor General has indicated that there may be sound legal and practical reasons not to appeal.

Gay rights groups and advocates vigorously oppose an appeal.

Three issues need to be considered: (1) whether to appeal; (2) the stated basis for a decision to appeal or not to appeal; and (3) two complicating factors with respect to the particular remedy ordered by the court.

1. The decision on an appeal

An appeal is possible to the full D.C. Circuit ("rehearing en banc") or to the Supreme Court. Positions have been advanced on both sides of this issue.

(a) Reasons not to appeal

As DOJ has explained, the argument in favor of not appealing is that Steffan is an "old policy" case, and that it does not make sense to take the extraordinary step of seeking en banc or Supreme Court review with respect to an abandoned policy:

(1) The Steffan decision explicitly addresses only the old policy. The court stated that "[t]he military's newly announced policy toward homosexuals in the armed forces . . . is not at issue in this case. . . . Mr. Steffan's appeal turns solely upon the legality of the regulations under which

the military discharged him. Those regulations -- and only those regulations -- are properly before us in this case."

(2) Only a relative handful of cases (less than a dozen) involving homosexual statements under the old policy are currently in litigation.

(3) Either en banc review or certiorari is an exceptional step requiring special justification. Since this case involves an about-to-be superseded policy with only a few remaining cases in litigation, the case does not meet the criteria for such an exceptional step.

(4) An appeal at this time would not be in the long-term interest of defending the new policy. As Attorney General Reno stated in her memorandum of July 19, 1993, changes in the new policy -- such as the explicit rebuttable presumption, the clear statement that sexual orientation alone is not a ground for discharge, and the change in investigative policy -- will enhance DOJ's ability to defend the constitutionality of the military's policy. By going to the full D.C. Circuit or the Supreme Court on the old policy, we would be generating a high-level precedent on the old policy -- and vigorously defending the old policy -- without the benefit of the improvements of the new policy.

(b) Reasons to appeal

The Joint Chiefs of Staff have strongly expressed their view that an appeal to the full D.C. Circuit should be pursued at this time. They rely on four reasons:

(1) Although the Steffan decision says that it is limited to the old policy, the court's reasoning -- and especially the impermissibility of using statements as a presumption about "propensity" -- is equally applicable to the new policy. Thus, to clear the path for the new policy, it is necessary to seek further review. In the words of the JCS legal counsel, "The basis of [the court's] decision was that the policy's presumption that homosexual status is evidence of intent to engage in homosexual activity violates the Constitution's Fifth Amendment equal protection clause. Although the decision technically applies only to our previous policy, a similar presumption is the heart of the President's new policy recently endorsed by Congress." The JCS fear that Steffan will be used to invalidate the new policy.

(2) The Steffan decision is also a harmful precedent because, as a general matter, the court fails to give appropriate deference to military judgments. The decision thus could be harmful in other contexts.

(3) Leaving the Steffan decision in place may have consequences that extend beyond the handful of cases in

litigation. DOD reports that some 3,000 members of the military were discharged in the last six years on the basis of homosexual statements. Because the statute of limitations is six years, the JCS express concern that thousands of individuals will invoke Steffan and seek reinstatement, correction of discharge records, and/or backpay.

(4) The Steffan decision conflicts with the decisions of other courts of appeals that have upheld the constitutionality of the old policy. Steffan would be a significant factor in the old policy cases still in litigation.

* The JCS legal counsel summarizes: "Steffan seriously weakens the legal underpinnings of the new homosexual policy. If allowed to stand, it will provide considerable support to past, present, and future status-based homosexual discharges in their efforts to strike down the policy and reverse their discharges. All the government interests underlying the new policy still exist. Unless Steffan is appealed, we may not be able to defend those interests in the future." [Note: In light of the new policy's explicit distinction between orientation and conduct, a more precise statement of the legal counsel's meaning than "status-based homosexual discharges" would probably be "statements-based homosexual discharges."]

(c) The options

As DOJ has suggested, a decision not to appeal might be made on the basis of sound legal and practical reasons:

* This is an old policy case, the court explicitly stated that it was not ruling on the new policy, rehearing by the full court or certiorari is an extraordinary remedy, and it would be best to proceed with implementation and defense of the new policy.

* With respect to the 3,000 discharged military members, that problem could be addressed as (and if) it arises. Steffan would not control in any claim for money. (Instead, decisions from the Court of Appeals for the Federal Circuit, which have upheld the old policy, would control). With regard to claims for reinstatement or correction of discharge records, it might be possible to set up some kind of administrative exhaustion requirement to review such claims. (DOJ is reviewing this possibility; DOD has stated that such an option "would be so onerous as to be impractical.")

A major problem with not appealing is that the military will reportedly be very upset. Vigorous congressional supporters of the ban on gays-in-the-military, such as Senators Nunn and Coats, also will reportedly be quite upset about such a decision. And, although DOJ's preliminary views on the tactical questions about

the litigation are reasonable and entitled to considerable weight, the JCS legal counsel's views about the reasons for a further appeal (a possible impact on the new policy and a possible trigger for claims by previously discharged service members) are not frivolous or insignificant.

2. The stated basis for a decision about whether to appeal

In addition to the decision about whether to appeal itself, the publicly stated basis for the decision will be important:

* **Decision to appeal**: If the decision is made to appeal to the full D.C. Circuit, it might be best to avoid any reliance on a possible impact on the new policy. Instead, the request for review could focus exclusively on the possible effect on the 3,000 individuals discharged for homosexual statements in the last six years. (Emphasizing an impact on the new policy might lead to an emphasis on similarities between the old policy and the new policy, rather than on the changes resulting from the new policy).

* **Decision not to appeal**: If a decision not to appeal is made, it could be announced that the decision is based on the fact that Steffan is explicitly limited to the old policy and that the old policy will now be officially superseded by the new policy. We could make it clear that we intend to implement the new policy and defend it vigorously.

Whatever decision is made, the decision could be appropriately announced by DOJ as the Department's considered litigation decision, after consultation with DOD and the White House.

3. Additional problems with the court's remedy

The court of appeals ordered that Steffan (1) be awarded his diploma, (2) be given his commission, and (3) be reinstated. Two problems with this remedy are presented.

(a) The commission issue

The commission requires a Presidential nomination and Senate confirmation. The court order cannot do away with these requirements. As a general matter, we would, on separation-of-powers grounds, ordinarily object to a court order requiring a Presidential nomination. Even more to the point, the Senate might decide to turn Steffan's nomination into a political football, further stoking the controversy.

If a decision to appeal is made, a request to correct the remedy to eliminate the commission could be included in the overall request for relief. If a decision not to appeal is made, some kind of rehearing petition on this limited point might be appropriate.

In addition, Steffan's lawyer has indicated that Steffan might waive his right to a commission and to reinstatement if the government does not appeal and if Steffan receives some financial compensation.

(b) Steffan's quotes in a book

Still another complication is that Steffan has been quoted in a book appearing to admit that he engaged in homosexual acts while at the Naval Academy. Although this book apparently has not been used in the Steffan litigation (which comes up as a pure "statement"/no acts case), a recent Washington Times column emphasized the book in discussing Steffan.

Steffan's statement could be relevant in two respects. First, if the commission remedy is not corrected, this statement of possible conduct might be controversial with respect to both the nomination and the confirmation. The statement suggests another reason why it is desirable to have the commission issue resolved in one of the ways outlined above.

Second, since the court of appeals' decision orders reinstatement, this statement might be relevant to his service in the military under the new policy (because it might provide independent evidence of past homosexual conduct). One possible response would simply be that Steffan could be investigated and processed under the new policy on the basis of this independent evidence. In addition, as noted, Steffan's lawyer has indicated that Steffan might be willing to forego reinstatement, and this option could be explored further.

Resolution of these remedy issues ultimately depends on resolution of the central issue -- whether to appeal the court of appeals' holding that the action taken against Steffan for his statements was unconstitutional.

THE WHITE HOUSE

WASHINGTON

November 17, 1993

I want to be
consulted before
final decision
on what to do
is made

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
D. 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.

Sile
Steffan
Aspin

3 December 1993

MEMORANDUM FOR THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

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

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

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

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

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

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

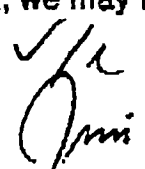
- (3) insuring the integrity of the system of rank and command;
- (4) facilitating assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy;
- (5) recruiting and retaining members of the military service; and
- (6) maintaining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

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

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

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

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


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Legal Counsel

APPEAL IN STEFFAN V. ASPIN

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

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

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

- STEFFAN MUST BE APPEALED FOR THREE REASONS:

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

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

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

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

APPEAL IN STEFFAN V. ASPIN

- In the Steffan case, the U.S. Court of Appeals for the District of Columbia Circuit found the former DOD homosexual exclusion policy unconstitutional and ordered the reinstatement and commissioning of a discharged Naval Academy Midshipman.
- In a critical holding, the court concluded that it is "inherently unreasonable" to presume under the policy that persons who identify themselves as homosexuals are likely to engage in homosexual conduct.
- This holding is in direct conflict with the conclusion of a court of equal stature, the U.S. Court of Appeals for the Seventh Circuit, which held in Ben-Shalom v. Marsh that an admission of homosexuality "can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct." In its report on the recently signed legislation concerning homosexuality in the Armed Forces, the Senate Armed Services Committee agreed completely with this conclusion, and the recently enacted legislation allows us to continue to discharge admitted homosexuals.
- We believe there are three extremely important reasons why the Steffan case must be appealed in an effort to overturn this ruling and its reasoning:
 - The very same presumption (that an admitted homosexual engages in or has a propensity to engage in homosexual conduct) is a crucial underpinning of the new policy reflected in the legislation and soon to be released DOD policy. If Steffan is not challenged, therefore, the new policy is in jeopardy.
 - No matter what happens with the new policy, the Services will still have to deal with the cases of service members who were separated under the old policy. There are approximately 3200 potential cases service-wide (about 1500 Army cases) which would come within the Federal courts' six-year statute of limitations for filing a lawsuit based on an unlawful discharge. If Steffan is not challenged, we would have great difficulty defending cases brought in that circuit. Furthermore, any effort by the Services to avoid additional litigation by some type of administrative action instead (i.e. review by the Army Board for Correction of Military Records or new separation boards) would be so onerous as to be impractical.

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

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