

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 5, 1990

No 89-5476

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

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

v.

RICHARD CHENEY, SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees

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

BRIREF FOR THE APPELLEES

STUART M. GERSON
Assistant Attorney General

JAY B. STEPHENS
United States Attorney

ANTHONY J. STEINMEYER
(202) / (FTS 368) 514-3388
E. ROY HAWKENS
(202) / (FTS 368) 514-4331
Attorneys, Appellate Staff
Civil Division, Room 3127
Department of Justice
Washington, D.C. 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

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

C. Related Cases. This case was never previously before this Court or any other court. Counsel is unaware of any related cases currently pending in this or any other court.


E. Roy Hawkens
E. ROY HAWKENS, Attorney

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that the Navy had a legitimate need for information regarding Steffan's homosexual conduct when that information directly affected Steffan's standing and his entitlement to relief.

2. Whether the district court correctly held that the Navy's need to discover information regarding Steffan's homosexual conduct outweighed Steffan's Fifth Amendment interest in withholding the information.

3. Whether the district court permissibly exercised its discretion in dismissing Steffan's suit pursuant to Federal Rule of Civil Procedure 37(b) when Steffan (1) repeatedly disobeyed

the court's order to answer critical questions regarding his homosexual conduct: (2) advised the court that he would not, under any circumstances, answer the questions; and (3) asked the court to "enter an order of dismissal and we will take our appeal."

REGULATIONS INVOLVED

All applicable regulations are contained in the Appellant's Brief and the Joint Appendix.

JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Nature Of The Case. Joseph Steffan entered the United States Naval Academy in July 1983. In the spring of 1987, several months prior to his graduation, Steffan admitted he was homosexual. Steffan's admission of homosexuality raised a rebuttable regulatory presumption that he had a predilection to commit, and had committed, homosexual acts. Unless a servicemember rebuts this regulatory presumption, the regulations mandate that he be separated. Steffan did not attempt to rebut the presumption. Rather, he resigned from the Naval Academy in April 1987.

In December 1988, Steffan brought suit in the United States District Court for the District of Columbia contending that his "forced separation" from the Naval Academy based on homosexuality

violated the First and Fifth Amendments. He requested, inter alia, (1) a declaration that the regulations barring homosexuals from military service are unconstitutional on their face and as applied: (2) a permanent injunction enjoining the Navy from prohibiting him from graduating and receiving a diploma from the Naval Academy: and (3) a permanent injunction enjoining the Navy from denying him a commission in the United States Navy.

During discovery, the Government deposed Steffan and asked him whether he had committed homosexual acts while attending or since departing from the Naval Academy. Steffan refused to answer, even though the district court (United States District Judge Oliver Gasch) previously had advised Steffan that such refusal would result in dismissal of his suit. Thereafter, the court again directed Steffan to answer the Government's question, because the response directly affected Steffan's entitlement to relief. Steffan again refused to answer, and he asked the court "to enter an order of dismissal and we will take our appeal." The court thereafter entered an order dismissing the suit. From this order, Steffan appeals.

B. Statement Of The Facts.

1. **Events Leading Up To Steffan's Resignation From The Naval Academy In April 1987.** Steffan entered the United States Naval Academy in July 1983. In February 1987, when Steffan was a senior, or midshipman first class, the Naval Investigative Service (NIS) began investigating allegations that Steffan was homosexual. The investigation resulted from admissions Steffan

had made to several underclass midshipmen regarding his homosexuality. See Joint Appendix (JA) at 384-86, 423. During the course of the investigation, the NIS attempted to interview Steffan to determine whether he was, in fact, homosexual within the meaning of military regulations -- that is, whether he "engage[d] in, desire[d] to engage in, or intend[ed] to engage in homosexual acts." Department of Defense Directive 1332.14, Appellant's Brief at xvii. Steffan, invoking his right to remain silent, refused to discuss the matter with the NIS. See JA at 423, 435.

In March 1987, understandably concerned about the NIS investigation, Steffan approached the Chief of Chaplains, Captain Byron Holderby, and informed him that he, Steffan, was homosexual. See JA at 30, 120, 432. Pursuant to Steffan's request, the Chaplain agreed to speak to the Commandant of Midshipman and inquire whether Steffan could graduate notwithstanding his homosexuality. See JA at 30, 120.¹ The Commandant declined to give the Chaplain any assurances regarding Steffan's prospect for graduation. See JA at 31, 121. He suggested, however, that Steffan seek legal counsel. See JA at

¹ Steffan's concerns about graduation were justified. As an upperclassman who occupied a leadership position at the Naval Academy, Steffan had a "thorough knowledge of [Naval Academy] regulations and directives" and, indeed, was responsible for enforcing the conduct regulations regarding homosexuality. See JA at 319, 322, 323, 330. He was thus aware that "homosexuality," of itself, warranted separation from the Naval Academy because it "severely limit[s] a midshipman's aptitude and potential for commissioned service." COMDTMIDNINST 1610.6F CH-1, JA at 454.

349, 432. Pursuant to the Commandant's advice, Steffan consulted with the midshipman legal advisor prior to March 23, 1987. See JA at 352, 353.

On March 23, 1987, Steffan approached the Commandant, Captain H.W. Habermeyer, Jr., and he asked to meet with the Superintendent to request permission to graduate. See JA at 31, 121. During the meeting, Steffan stated that he was homosexual. See JA at 31, 40, 121, 336. The Commandant denied Steffan's request to see the Superintendent at that time because "it would be inappropriate for the Superintendent, who would sit in judgment of the case, to be offering opinions before the case had been presented to him formally." JA at 433. The Commandant advised Steffan, however, that the Superintendent probably would not allow Steffan to complete the academic year or receive a diploma. See JA at 433. Steffan replied that, under those circumstances, "[he] would have to leave the Naval Academy." JA at 337. See also JA at 433.

The Commandant informed Steffan that, in view of Steffan's admission of homosexuality, a Brigade Military Performance Board would convene the following day. See JA at 41, 429, 433. The purpose of the Brigade Performance Board was to determine whether Steffan was, in fact, homosexual. See JA at 454, 493. If the Board determined that Steffan was homosexual, it was obliged under binding regulations to recommend that he be separated. See JA at 454.

Prior to the Brigade Performance Board, Steffan received formal notice that he had the right to consult an attorney, and that he was entitled to call witnesses and submit documentary evidence. See JA at 429. He also received a copy of Naval Academy regulations governing Performance Board procedures. See JA at 429, 437-84. Finally, he received copies of the following documents that were to be considered by the Performance Board:

- (1) a letter from Steffan's battalion officer stating that, in light of Steffan's "acknowledg[ment] that he is a homosexual, . . . he should be separated from the Naval Academy," JA at 431;
- (2) two written statements by the Commandant documenting that Steffan had admitted his homosexuality and expressed a desire to leave the Naval Academy as soon as possible if he were not permitted to complete the academic year, see JA at 432, 433; and
- (3) an evaluation by a clinical psychologist who, having examined Steffan, stated that administrative separation by reason of homosexuality was warranted because Steffan "admitted to homosexuality. This orientation pre-dates his tenure at the Naval Academy. . . . [H]is homosexuality does not appear to be unwanted [and, moreover,] appears to be a preferred orientation to which he has adjusted." JA at 434.

On March 24, 1987, the Brigade Performance Board accepted into evidence the documents that Steffan had received the previous day. See JA at 494-95. Steffan informed the Board that he had reviewed the documents, and that he had no questions regarding them. See JA at 495. He also stated that he did not

wish to present any witnesses or submit any evidence on his behalf. See JA at 493-96. In response to the Board's question, "are you homosexual?", Steffan replied "yes, sir." JA at 496. The Board also asked Steffan whether he "desire[d] to be commissioned as an officer of the Naval service by continuing as a midshipman of the Naval Academy," to which Steffan answered, "No, sir." JA at 494.

Based on the documentary and testimonial evidence, the Brigade Performance Board concluded that Steffan was homosexual, and it forwarded Steffan's case to the Commandant recommending that Steffan be separated from the Naval Academy. See JA at 496, 498. Steffan declined to avail himself of the opportunity to make a statement to the Commandant regarding the Performance Board's recommendation. See JA at 499.²

On March 26, 1987, after a full review of the record, the Commandant forwarded the case to the Brigade Academic Board recommending that Steffan be separated from the Naval Academy:

Midshipman Steffan admitted to the Brigade Military Performance Board that he was a homosexual and that he did not desire to graduate from the Naval Academy. Based on his own admission and the evaluation of the

² At the conclusion of the Brigade Performance Board, the senior member (the Deputy Commandant) directed Steffan to move out of Bancroft Hall (the midshipman dormitory) and into a neighboring building, Ricketts Hall. See JA at 366-67, 496. In Steffan's estimation, the "primary reason" for the move was to ensure his physical safety. JA at 375. Steffan stated: "I had spent four years at the Academy, and I realized that there were people there who had verbally expressed their dislike of homosexuals to the point where they would have a desire to physically assault them." JA at 377. See also JA at 366, 368, 376, 380 (Steffan discusses midshipmen's intolerance of homosexuals).

clinical psychologist, I recommend that Midshipman Steffan be separated from the Naval Academy due to insufficient aptitude for commissioned service.

JA at 56.

On March 30, 1987, Steffan received formal notice that the Naval Academy Academic Board would convene on April 1, 1987. See JA at 568. The notice advised Steffan that he was entitled to present any facts on his own behalf, including documentary evidence, written statements of third parties, and oral statements of witnesses. Additionally, the notice stated that Steffan could consult with an attorney, and that an attorney could accompany Steffan at the Board proceedings. See id.

Steffan obtained legal assistance from two civilian attorneys in Annapolis, and one attorney accompanied Steffan to the Academic Board. See JA at 42, 353, 354. Steffan informed the Board that he desired to complete the academic requirements to earn his diploma, but the Superintendent responded that, given the undisputed fact that Steffan was homosexual, "the regulations were very clear [that immediate separation from military service was mandated] and that . . . there was nothing the board could do to allow [Steffan] to graduate." JA at 44. The Board voted unanimously that Steffan be recommended for discharge. See JA at 52, 53.

Later that day, Steffan was formally advised, orally and in writing, of his options in light of the Academic Board's decision to recommend to the Secretary of the Navy that Steffan be discharged from the Naval Academy due to insufficient aptitude

for military service. See JA at 45, 53-55. His options included (1) being recommended for discharge, in which case he was entitled to prepare a statement within four working days addressed to the Secretary of the Navy detailing why he should not be discharged from the Naval Academy: or (2) submitting a qualified resignation. See JA at 53-54. Steffan was advised that, should he opt to submit a qualified resignation, his official transcript would read "RESIGNED" rather than "DISCHARGED." Id. If he chose to resign, however, he "forfeit[ed] his right to show cause to higher authority why he should not be disenrolled from the Naval Academy." JA at 53.

That same day, after speaking with an attorney from the American Civil Liberties Union, see JA at 354-55, Steffan submitted a resignation. See JA at 61. Shortly thereafter, the Naval Academy placed him in a Leave Pending Separation status, whereupon Steffan left the Academy. See JA at 51, 267.

On April 7, 1987, the Superintendent forwarded Steffan's resignation to the Secretary of the Navy. See JA at 52. The Secretary accepted Steffan's resignation, and Steffan received an Honorable Discharge on May 28, 1987. See JA at 51.

On June 16, 1987, the NIS formally closed its investigation of Steffan following notification that Steffan had resigned from the Naval Academy and that no further action against Steffan was being contemplated. See JA at 127. Significantly, although the investigation was terminated prior to completion due to Steffan's resignation, the closing report nevertheless stated that the NIS

"inquiry had resulted in a determination that [Steffan] is in violation of Article 125, [Uniform Code of Military Justice, 10 U.S.C. § 925 (criminalizing sodomy)]." JA at 424.

2. Steffan's Administrative Challenge In December 1988 To His Disenrollment From The Naval Academy. Over one and one-half years later, on December 9, 1988, Steffan wrote to the Secretary of the Navy requesting to withdraw his resignation and to complete the requirements necessary to obtain a diploma. See JA at 36-38. Steffan characterized his resignation as "the result of coercion and a sudden, intense pressure brought to bear . . . by the Academy which was so extreme and intimidating as to render [the] resignation involuntary? JA at 36. Steffan explained:

The entire separation process occurred within a matter of days. It should also be understood that I grew up in a small, rural farming community of 2,000 people, every one of whom knew me and my family and shared my pride in attending the Naval Academy. Neither of my parents knew of my sexual orientation until a few days prior to the Board's determination. My parents were extremely upset, and I feared for my father's well-being. This fact, coupled with the fact that I was being forced to leave the Academy, created intense pressure and confusion for me and my family.

Against this background, I was offered Hobson's choice: to either resign or be summarily discharged and carry this word of dishonor in perpetuity. I was repeatedly told that any appeal from a determination of "insufficient aptitude" by the Academic Board would be futile. Despite the extreme unfairness and coerciveness of the circumstances, and the unreasonable punishment of being abruptly and forcefully separated from my peers, denied my education and the theft of any possibility of attaining the goals I had worked so diligently to attain, I was assured that any appeal would prove futile and probably damaging to my future as a civilian. Out of concern for my family and shock over what was happening to me, I resigned.

JA at 37-38.

Steffan stated that he would consider his request for administrative relief denied unless the Secretary responded by December 27, 1988. See JA at 38. On December 29, 1988, Steffan had not yet heard from the Secretary, and he filed the instant suit. See JA at 33.³

C. District Courts Proceedings. Steffan's suit complained that his constitutional rights had been violated because he had been involuntarily separated from the Naval Academy solely due to his admission of homosexuality. Absent an allegation of homosexual acts, asserted Steffan, the military violates the First and Fifth Amendments when it discharges a servicemember based on homosexuality. See JA at 33-34. As relevant here, Steffan sought the following relief: (1) a declaration that the regulations that mandated his discharge are unconstitutional on their face and as applied: (2) a permanent injunction enjoining the Navy from prohibiting Steffan from graduating and receiving his diploma from the Naval Academy: and (3) a permanent injunction enjoining the Navy from denying Steffan a commission in the United States Navy. See JA at 34.

On July 21, 1989, the district court (United States District Judge Oliver Gasch) denied the Government's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b) (6). See Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989), JA at 119-34. Thereafter, the court issued a briefing schedule

³ On February 8, 1989, the Secretary of the Navy denied Steffan's request for reinstatement to the Naval Academy to complete the requirements for graduation. See JA at 62.

that directed the Government to submit its summary judgment motion on September 18, 1989. See JA at 9.

Prior to submitting its motion for summary judgment, the Government sought to depose Steffan. Steffan moved for a protective order and the Government moved for sanctions under Federal Rule of Civil Procedure 37(d) for Steffan's failure to appear at a duly noticed deposition. See JA at 10.

On September 14, 1989, the district court held a hearing to resolve the discovery dispute and to determine whether sanctions were warranted. The court concluded that the Government was entitled to depose Steffan. See JA at 160. Notably, the court advised Steffan that he appeared to be "avoiding this deposition at all costs and there's a basis for imposing sanctions but I'm liberal about imposing sanctions and I will not impose sanctions this time but don't do it again." JA 168-69. When the court attempted to establish a deposition date, the following exchange occurred between the court and Steffan's counsel:

THE COURT: I want to fix a date for . . . deposition of [Steffan]. What do you come up with?

MR. WOLINSKY: Your honor, let me just be clear on one thing. They're trying to turn a status case into a conduct case. In the administrative proceeding that they initiated they discharged my client on the basis of his [homosexual] status. If he is asked at a deposition have you ever engaged in conduct I'm going to direct him not to answer.

THE COURT: And I'll direct him to answer.

MR. WOLINSKY: And we will then see where we are.

THE COURT: You know where you are right now. You've got to answer it or I'll dismiss your case.

JA at 160-61.

The deposition occurred two days later on September 16, 1989. The Government asked Steffan a series of questions, see JA at 297-302, concerning whether he had ever committed "homosexual acts" as that term is defined in Navy regulations -- that is, whether he had ever engaged in "[b]lodily contact, actively undertaken or passively permitted, [with a] member[] of the same sex for the purpose of satisfying sexual desires? JA at 11 n.1, 298. Although Steffan denied having committed homosexual acts prior to entering the Naval Academy, see JA at 299, he refused, on the grounds of relevance and Fifth Amendment privilege, to answer any questions concerning his homosexual conduct while attending or since departing from the Naval Academy. See JA at 299-302, 386-87, 410.

Steffan admitted, during the deposition, that he had received three tests for the HTLV-3 antibody since leaving the Naval Academy, and that the test results had been negative. See JA at 290. When the Government asked Steffan whether homosexual conduct had prompted him to take the tests, Steffan again refused to answer on the grounds of relevance and Fifth Amendment privilege. See JA at 294-95.

Thereafter, due to Steffan's refusal to answer the deposition questions regarding homosexual conduct, the Government filed a renewed motion for sanctions pursuant to Federal Rule of Civil Procedure 37(b). Both parties submitted briefs, and the district court held a hearing on November 8, 1989. At the

hearing, the court stated that the commission vel non of homosexual acts was a "key" question because Steffan sought reinstatement to the Naval Academy to complete the requirements for graduation, as well as a commission in the United States Navy. JA at 724. If he had committed homosexual acts, explained the court, he was not entitled to this relief. Steffan conceded that he was not entitled to reinstatement or a commission if he had committed homosexual acts, see JA at 294, but he nevertheless refused to answer questions regarding his homosexual conduct:

MR. WOLINSKY: Your honor, . . . Mr. Steffan is not going to be answering those questions.

THE COURT: All right. That's the clea[r] resolution then of what's before me at this point.

MR. WOLINSKY: Fine. Then I would ask your honor to enter an order of dismissal and we will take our appeal.

* * * * *

THE COURT: All right. You made a suggestion. The Government concurs in it. The court will go along with it. All right.

JA at 725-26.

On November 15, 1989, the district court filed a memorandum opinion, see Steffan v. Cheney, 733 F. Supp. 121 (D.D.C. 1989), JA at 8-24, elaborating the reasons for its holding that dismissal was warranted:

The Court finds that the information regarding [Steffan's] past homosexual conduct is highly relevant to the relief [Steffan] seeks. Defendants' need for the information is therefore substantial. [Steffan] cannot utilize his Fifth Amendment privilege as a sword to frustrate defendants' right to obtain relevant information or prepare a defense where [Steffan] himself has initiated the lawsuit. [Steffan] has

refused, and continues to refuse, to answer questions the Court holds are clearly relevant and properly discoverable.

JA at 23-24. The court therefore ordered that Steffan's complaint be dismissed. JA at 25. From this order, Steffan appeals.

STANDARD OF REVIEW

The standard of review regarding whether the Navy was entitled to question Steffan concerning his homosexual conduct is de novo. The standard of review regarding the district court's selection of sanctions pursuant to Federal Rule of Civil Procedure 37(b) is abuse of discretion.

SUMMARY OF THE ARGUMENT

Steffan's suit was properly dismissed because he lacks standing. The gravamen of his suit is that the Navy violated the Constitution when it honorably separated him based solely on his "homosexual orientation."⁴ Steffan's claim, however, is premised on a misunderstanding of the regulations and a concomitant misunderstanding of the basis of his separation from the Naval Academy. We show in Part 1.A that, although Steffan was separated based on his admission of homosexuality, he was not separated based solely on his homosexual orientation. Rather,

⁴ Because Steffan fails in his brief to define "homosexual orientation," the Navy is left to wonder what he means when he alleges that the Constitution proscribes discrimination on the basis of homosexual orientation. To the extent that he equates "homosexual orientation" with either the proclivity to commit, or the commission of, homosexual acts, his argument is unavailing for the reasons discussed infra in this brief. To the extent he equates "homosexual orientation" with "homosexual celibacy," he lacks standing to bring this claim. See *infra* note 5.

his admission of homosexuality gave rise to a rebuttable regulatory presumption of homosexual proclivity and conduct, which Steffan refused to rebut in 1987 and which he still refuses to rebut. Accordingly, because Steffan was separated based on homosexual proclivity and conduct, he has no standing to challenge the regulations to the extent they allegedly discriminate solely on the basis of homosexual orientation. The district court's dismissal of Steffan's suit should therefore be affirmed because, in view of Steffan's lack of standing, he fails to allege a justiciable claim.

In Part I.B, we show that the district court correctly held that the Navy had a legitimate need to discover whether Steffan had committed homosexual acts because, in addition to demonstrating that Steffan lacks standing to bring this suit, the information was highly relevant to the relief sought by Steffan. Steffan sought reinstatement as a midshipman, the award of a diploma from the Naval Academy, and a commission in the United States Navy. However, if the un rebutted regulatory presumption is correct -- that is, if Steffan has a proclivity to commit, or has committed, homosexual acts -- the regulations stand as an insuperable bar to Steffan receiving any of the relief he seeks.

In Part II, we show that the district court correctly held that, in the context of this civil suit, the Navy's need to discover whether Steffan has engaged in homosexual conduct outweighs Steffan's Fifth Amendment interest. First, this information was essential to determine whether Steffan had

standing. Second, the Navy needed this information to effectively defend against the injunctive relief sought by Steffan. Third, because Steffan's decision to resign from the Naval Academy in 1987 resulted in the termination of an on-going NIS investigation that was actively seeking information concerning Steffan's homosexual conduct, it would be unfair to allow Steffan to manipulate the Fifth Amendment in a manner that allows him to conceal information that is highly relevant to this lawsuit. Finally, Steffan failed to show a serious threat to his Fifth Amendment right because, although many states criminalize sodomy, the crime of sodomy is not coextensive with the regulatory definition of "homosexual acts," and for purposes of this suit, the Navy was concerned primarily with whether Steffan had committed homosexual acts.

Finally, in Part III, we show that the district court permissibly exercised its discretion in dismissing Steffan's suit after Steffan (1) repeatedly disobeyed the court's order to answer critical deposition questions; (2) advised the court that he would not, under any circumstances, answer the questions; (3) received unequivocal warnings from the court that his failure to answer the questions would result in dismissal; and (4) asked the court to "enter an order of dismissal and we will take our appeal."

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE NAVY HAD A LEGITIMATE AND SUBSTANTIAL NEED TO INQUIRE WHETHER STEFFAN HAD COMMITTED HOMOSEXUAL ACTS.

- A. Because Steffan's Standing To Bring This Suit Hinged On Whether He Could Rebut The Regulatory Presumption Of Homosexual Proclivity And Conduct That Was Triggered By His Admission Of Homosexuality, The Navy Legitimately Inquired Whether Steffan Had Committed Homosexual Acts.

Introduction. Preliminarily, it is critical to understand how the Navy interprets and applies the regulations that mandated Steffan's separation from the Naval Academy. As we explain below, a correct understanding of the regulations reveals that Steffan's admission of homosexuality triggered a rebuttable regulatory presumption of homosexual proclivity and conduct. Steffan made no effort to rebut the regulatory presumption and, accordingly, the administrative board properly concluded that Steffan was homosexual within the meaning of the regulations.

Thus, when Steffan brought suit challenging the Navy's regulations insofar as they discriminate on the basis of homosexual orientation, the Navy had a surpassing interest in inquiring whether Steffan belatedly wished to rebut the regulatory presumption of homosexual proclivity and conduct that was triggered by his admission of homosexuality. Steffan's refusal, in 1978 and now, to rebut the regulatory presumption that he has a propensity to commit, and actually commits, homosexual acts, mandates the dismissal of this suit because

Steffan lacks standing to contend that the regulations are constitutionally infirm insofar as they discriminate solely on the basis of homosexual orientation. In other words, because a correct view of the regulations reveals that Steffan was separated for homosexual proclivity and conduct, no justiciable case or controversy exists for this Court to consider Steffan's contention that the regulations impermissibly discriminate on the basis of homosexual orientation. See supra note 4.⁵

Although this standing argument was not advanced in district court, it is jurisdictional in nature and is therefore properly raised in the first instance in this Court. See Insurance Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 702 (1982). For the following reasons, we submit that Steffan's lack of standing is the preferable ground on which to affirm the district court's dismissal order. Foremost, such a holding would reflect the correct interpretation and application of the regulations which, on their face, reasonably view homosexuality as a seamless

⁵ In light of the regulatory presumption of homosexual proclivity and conduct that was triggered by Steffan's admission of homosexuality, the Navy was not presented with the issue of whether the regulations would have mandated the discharge of a 'homosexually oriented,, servicemember who declared that he was a celibate homosexual who, having taken a vow of abstinence, had wholly subordinated his sexual desires. Thus, the applicability vel non of the regulations to such an unlikely hypothetical is not presented here. cf. Rich v. Secretary of the Army, 516 F. Supp. 621, 628 (D. Colo. 1981), aff'd, 735 F.2d 1220 (10th Cir. 1984) ("The principal reason for the Army's rejection of homosexuals is the belief that societal intolerance will be reflected in peer behavior which will be inimical to the legitimate governmental interests in discipline and morale. While there can be disputes about the provability of that belief, it is not irrational. It is equally applicable to declamations as to deeds."); supra note 2.

construct of sexual proclivity and conduct.⁶ Such a holding would, moreover, be faithful to the axiom that judicial deference to an agency's interpretation of its regulations is "at its apogee" when reviewing regulations that implicate military discipline and the composition of the Armed Forces, Goldman v. Weinberger, 475 U.S. 503, 508 (1986).⁷ Finally, if this Court affirms on the basis of Steffan's lack of standing, it need not evaluate the merits of Steffan's Fifth Amendment privilege claim. This Court would thereby be adhering to the polestar principle that a court ought "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied?" Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02 (1985) (quoting United States v. Raines, 362 U.S. 17, 21 (1960), and Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885)). Accord Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

⁶ A reviewing court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned?" Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974)). Accord Miller v. Lehman, 801 F.2d 492, 497 (D.C. Cir. 1986) ("[I]f the necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference.") (quoting Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528, 537 (D.C. Cir. 1972)).

⁷ Accord, e.g., Chappell v. Wallace, 462 U.S. 296, 300 (1983); Rostker v. Goldberg, 453 U.S. 57, 70 (1981); Brown v. Glines, 444 U.S. 348, 354 (1980); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975); Parker v. Levy, 417 U.S. 733, 743 (1974); Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

1. Department of Defense regulations mandate that a servicemember "shall" be separated if he states he is a homosexual 'unless there is a further finding that the member is not a homosexual' Department of Defense (DOD) Directive 1332.14, Appellant's Brief at xvii, xviii (emphasis added). Accord SECNAVINST 1920.6A, Encl. 3 at 3. A "homosexual" is defined as "a person . . . who engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directive 1332.14, Appellant's Brief at xvii. Accord SECNAVINST 1920.6A, Encl. 1 at 2. Thus, by clear structural implication, the regulations establish that when a servicemember declares he is homosexual, he is presumed to be homosexual within the meaning of the regulations, and he must be separated unless he demonstrates that he "is not a homosexual." DOD Directive 1332.14, Appellant's Brief at xviii. More precisely, a servicemember who declares he is homosexual must be separated unless he provides evidence that enables the administrative board to make an affirmative finding that he neither "engages in, desires to engage in, [n]or intends to engage in homosexual acts." *Id.*, Appellant's Brief at xvii.

As applied to the instant case, Steffan's admission of homosexuality triggered a rebuttable regulatory presumption of homosexual proclivity and conduct, The presumption was rebuttable, and Steffan was given numerous opportunities to demonstrate he was not homosexual within the meaning of the regulations. As recounted below, however, Steffan simply declined to avail himself of these opportunities.

First, an NIS agent contacted Steffan twice in March 1987 and attempted to set up an interview to determine whether Steffan had committed homosexual acts. On both occasions, Steffan invoked his right to remain silent. See JA at 423, 435, Notably, although the NIS investigation was terminated prior to completion after Steffan resigned from the Academy, the NIS report stated that the "inquiry ha[d] resulted in a determination that [Steffan] is in violation of Article 125 [Uniform Code of Military Justice, 10 U.S.C. § 925]." JA at 424.⁸

Second, after obtaining counsel from the midshipmen legal advisor, see JA at 353, Steffan appeared before the Brigade Performance Board, whose purpose was to determine whether Steffan was homosexual within the meaning of the regulations. See JA at 454. Steffan was aware of the purpose of the Board, see JA at 429, 491-93, and he knew that if the Board determined he was homosexual, it was required to refer him to the Commandant with a recommendation for separation. See JA at 429, 454, 496. Steffan nevertheless did not deny that he was homosexual within the meaning of the regulations. To the contrary, he affirmed that he was homosexual, and he declined to make any further statement regarding his homosexuality to the Board. See JA at 496.

⁸ We emphasize that, although the NIS discovered sufficient evidence to warrant further investigation based on a preliminary determination that Steffan had committed homosexual acts, the NIS investigatory record was not part of the administrative record on which Steffan's discharge was based. Rather, his discharge was based solely on his admissions of homosexuality, and the regulatory presumption of homosexual proclivity and conduct that the admissions triggered.

Moreover, Steffan declined to make a statement to the Commandant regarding the Board's recommendation of discharge based on homosexuality. See JA at 498, 499.

Third, at the Naval Academy Academic Board, which convened seven days after the Brigade Performance Board, Steffan had yet another opportunity to show he was not homosexual within the meaning of the regulations. Significantly, Steffan sought legal advice from two civilian attorneys in Annapolis prior to attending the Academic Board. Moreover, an attorney accompanied Steffan to the Board. See JA at 353. Again, however, Steffan neither denied his homosexuality, nor attempted to rebut the regulatory presumption of homosexual proclivity and conduct. Under these circumstances, the Board was entitled to conclude (indeed, required to conclude) that Steffan was homosexual within the meaning of the regulations: that is, he had a proclivity to commit, or had committed, homosexual acts. See DOD Directive 1332.14, Appellant's Brief at xvii.

Finally, Steffan had another opportunity to rebut the regulatory presumption of homosexual proclivity and conduct insofar as he had the right to submit a statement to the Secretary of the Navy detailing why, contrary to the Academic Board's recommendation, discharge based on homosexuality was not appropriate. See JA at 53-54. Again, however, Steffan made no effort to rebut the regulatory presumption. Instead, after conferring with an attorney from the American Civil Liberties

Union, see JA at 354-55, Steffan resigned from the Naval Academy. See JA at 61.

Hence, Steffan's contentions, see Appellant's Brief at 24, 27, that he was separated from the Naval Academy based solely on his homosexual orientation reveal a fundamental misunderstanding both of the relevant regulations and the underlying reason for his separation.⁹ While it is true, as the district court found, that Steffan "was separated from the Naval Academy based on his admissions that he is a homosexual rather than on any evidence of homosexual misconduct," 733 F. Supp. at 124, JA at 14, it is not true, as Steffan would have this Court believe, that he was separated based solely on his homosexual orientation. Rather, his admission of homosexuality raised a rebuttable regulatory presumption of homosexual proclivity and acts. Steffan's failure, both in 1987 and now, to rebut the regulatory presumption bars him, on standing grounds, from alleging that he suffered injury based solely on his homosexual orientation. See supra notes 5-7 and accompanying text.

2. Steffan is wrong, both factually and legally, in stating that the Government's "answer to the complaint admitted that the sole ground for Steffan's separation was his sexual orientation." Appellant's Brief at 2. Concededly, the Government admitted, see JA at 32, 141, that "[t]here was no allegation [at the Brigade

⁹ In view of the abundant procedural protections Steffan received, which included assistance from four attorneys, Steffan's unsupported allegation that his resignation was coerced by improper threats he received from Naval Academy officials, see Appellant's Brief at 8-10, is disingenuous in the extreme.

Performance Board] that [Steffan] had committed any homosexual acts or conduct? As a factual matter, however, this admission was not a concession that Steffan was separated solely for homosexual orientation, because the Government denied elsewhere in the answer that Steffan was discharged solely due to homosexual orientation. See, e.g., JA at 34, 142 (denying that Steffan was separated solely on account of his sexual orientation). The Government's admission simply acknowledged that Steffan was processed by the administrative board based solely on his declarations that he was a homosexual, which triggered a regulatory presumption of homosexual proclivity and conduct. See supra note 8.

More important, as a matter of law, the regulations on their face show that Steffan was not discharged solely due to his homosexual orientation. The regulations charged the Brigade Performance Board with a two-step task. First, the Board was required to determine whether Steffan had stated that he was homosexual. Once the Board found as a matter of undisputed fact, that Steffan had admitted his homosexuality, the burden shifted to Steffan (if he desired to remain in the military) to show that he neither had committed, nor had a propensity to commit, homosexual acts. See infra note 10.

Thus, for the Navy to disenroll Steffan on the basis of homosexual propensity and conduct, the Navy was not required to allege homosexual conduct or submit evidence of homosexual acts. Rather, Steffan's admission of homosexuality carried with it the

regulatory mandate of separation unless he met the regulatory burden of coming forward with evidence to show that he did not "engage[] in, desire[] to engage in, or intend[] to engage in homosexual acts." DOB Directive 1332.14, Appellant's Brief at xvii. This Steffan failed to do.

3. It cannot be contended that the regulatory presumption of homosexual proclivity and conduct that was triggered by a Steffan's admission of homosexuality is impermissible.

"Inferences and presumptions are a staple of our adversary system of factfinding." Ulster County Court v. Allen, 442 U.S. 140, 156 (1979). Rebuttable presumptions are valid when "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.'" NLRB v. Curtin Matheson Scientific, Inc., 110 s. ct. 1542, 1550 (1990) (quoting E. Cleary, McCormick On Evidence § 343, p. 969 (3d ed. 1984)). Stated again, a rebuttable presumption is permissible provided "there is a 'rational connection' between the basic facts that [are] proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." Ulster County Court, 442 U.S. at 165 (quoting Leary v. United States, 395 U.S. 6, 36 (1969)).

As a matter of common sense, it is eminently reasonable to presume that a servicemember who declares he is homosexual not only has a proclivity to engage in, but actually "engages in

. . . homosexual acts." DOD Directive 1332.14, Appellant's Brief at xvii. To pretend that homosexuality (or heterosexuality) is unrelated to sexual conduct borders on the absurd. As the court stated in ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990): "[A servicemember's admission of homosexuality] is compelling evidence that [he] has in the past and is likely to again engage in [homosexual] conduct, To this extent, therefore, the regulation does not classify . . . based merely upon [homosexual status], but upon reasonable inferences about . . . probable [homosexual] conduct in the past and in the future." Accord Woodward v. United States, 871 F.2d 1068, 1074 (Fed. Cir. 1989), cert. denied, 110 s. ct. 1295 (1990). See A. Bell & M. Weinberg, Homosexualities, 106-11, 327-30 (1978); M. Saghir & E. Robins, Male & Female Homosexuality, 52-54 (1973).

Moreover, the presumption that a servicemember's admission of homosexuality indicates homosexual proclivity and conduct is empirically supported. We are aware of no case, and Steffan cites none, in which a servicemember discharged for homosexuality has categorically denied having committed homosexual acts. See, e.g., ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990) (servicemember refused to disavow committing homosexual acts); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 110 S. Ct. 1295 (1990) (servicemember refused to disavow committing homosexual acts); Falk v. Secretary of the Army, 870 F.2d 941 (2d Cir. 1989)

(servicemember committed homosexual acts); Gay Veterans Association v. Secretary of Defense, 850 F.2d 764 (D.C. Cir. 1988) (servicemembers committed homosexual acts); Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985) (servicemember committed homosexual acts); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (servicemember committed homosexual acts); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984) (servicemember committed homosexual acts); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 454 U.S. 855 (1981) (servicemembers committed homosexual acts); Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978) (servicemember committed homosexual acts); Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987), appeal pending, No. 87-5914 (9th Cir.) (servicemember refused to disavow committing homosexual acts). The above cases are, we submit, compelling evidence that the and conduct that flows from a servicemember's admission of homosexuality is reasonable.

Importantly, in addition to being rational, the military's regulations serve to conserve scarce resources and protect individual privacy. The regulatory recognition that a servicemember's declaration of homosexuality is reliable evidence of homosexual proclivity and conduct avoids the need for launching an extensive and costly administrative investigation to discover evidence of homosexual conduct each time a servicemember admits his homosexuality. And because the military need not

obtain actual evidence of homosexual conduct to separate a servicemember on grounds of homosexuality, the privacy of servicemembers is not unnecessarily infringed due to potentially intrusive investigations. In short, compelling policy reasons support a regulatory scheme that presumes homosexual proclivity and conduct based on a servicemember's admission of homosexuality:

[The military] need not shut its eyes to the practical realities of [a servicemember's admission of homosexuality], nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here. [Steffan] does not deny that [he] has engaged or will engage in homosexual conduct. [Steffan] has admitted that [he] has a homosexual desire, but not necessarily that [he] intends to commit homosexual acts. The [military] need not try to fine tune a regulation to fit a particular [homosexual servicemember's] subjective thoughts and propensities.

ben-Shalom v. Marsh, 881 F.2d at 464.

4. Contrary to Steffan's contention, see Appellant's Brief at 23, 25, the Navy is not now proscribed, nor was it proscribed in 1987, from inquiring whether Steffan had committed homosexual acts. The Supreme Court's decision in Orloff v. Willoughby, 345 U.S. 83 (1953), is dispositive on this issue. There, the Supreme Court held that, although the Army may not criminally punish a servicemember who refuses to answer questions regarding his membership in the Communist Party, the Army may nevertheless decline to accord an officer's commission to that servicemember. The Supreme Court explained:

The President's commission to Army officers 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. Could this Court, whatever power it might have in this matter, rationally hold that the President must, or even ought to, issue the certificate to one who will not answer whether he is a member of the Communist Party?

It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. . . . No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question "No."

It is not our view of Orloff's fitness that governs. . . . [T]he President of the United States, before certifying his confidence in an officer and appointing him to a commissioned rank, has the right to learn whatever facts the President thinks may affect his fitness. . . . [T]he President would be within his rights in asking any questions he saw fit about the habits, associations and attitudes of the applicant for his trust and honor.

345 U.S. at 91-92.

Here, as in Orloff, Steffan "claimed a privilege which the Constitution guarantees" when he declined, on Fifth Amendment grounds, to answer questions regarding his homosexual conduct. 345 U.S. at 91. Here, as in Orloff, "[n]o one believes [that Steffan] can be punished" for exercising that privilege. *Id.* Here, as in Orloff, the critical "question is whether [Steffan] can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must [retain] him [in] a post of honor and trust." *Id.* Like the Supreme Court in Orloff, this Court should "have no hesitation in answering that question 'No.'" *Id.* See 10 U.S.C.

§ 6953 ("Midshipmen at the Naval Academy shall be appointed by the President alone.").

Steffan thus errs in contending, see Appellant's Brief at 25, that the Navy acts unconstitutionally when it administratively separates a midshipman who, after admitting his homosexuality, asserts a Fifth Amendment privilege regarding his homosexual conduct. Similarly, Steffan errs in contending, see Appellant's Brief at 23, that the Navy violates statutory and regulatory provisions insofar as it draws an adverse inference from Steffan's refusal to answer questions regarding his homosexual conduct. The inference of homosexual conduct did not arise from Steffan's silence. Rather, the inference of homosexual conduct arose from Steffan's admission of homosexuality, which triggered a rebuttable presumption of homosexual proclivity and conduct that Steffan obdurately refused to rebut.

5. No First Amendment interest is implicated by the regulations. See ben-Shalom v. Marsh, 881 F.2d at 459-62; Woodward v. United States, 871 F.2d at 1071 n.2; Rich v. Secretary of the Army, 735 F.2d at 1229. The regulations do not affect, and are not intended to affect, servicemembers who associate with homosexuals, sympathetically relate to homosexuals, provide assistance and support to homosexuals, express an interest in homosexuality, are politically committed to homosexual causes, or advocate changes in civilian laws or military regulations regarding homosexuals. Rather, the regulations affect servicemembers who have engaged, or likely

will engage, in sexual conduct that Congress has either criminalized, see 10 U.S.C. § 925, or that the military has deemed is incompatible with the effective accomplishment of the military mission. See supra note 2. In other words, the regulations "protect a substantial Government interest unrelated to the suppression of free expression." Brown v. Glines, 444 U.S. 348, 354 (1980).¹⁰

As a matter of common sense, moreover, it cannot be contended that the Navy violates the First Amendment when it bases a retention decision on a servicemember's admission of a propensity to engage in illegal or impermissible conduct. The logical extension of such a rule would require the Navy to ignore not only admissions of homosexual propensities, but admissions of homosexual conduct as well. This, of course, the military need not do. See, e.g., Dronenburg v. Zech, 741 F.2d at 1389; Beller v. Middendorf, 632 F.2d at 793-94.

Similarly, the Navy is not required to ignore assertions by servicemembers that they desire and intend to commit homosexual acts, especially when the Navy has concluded that the presence in the military of such servicemembers will seriously jeopardize the military mission. A contrary conclusion would create a perverse exclusionary rule that would bar the use of reliable evidence by

¹⁰ Thus, a social activist in the military who identified himself as a homosexual for the sole purpose of expressing his support for and solidarity with the homosexual movement would not be discharged under these regulations once he rebutted the regulatory presumption that he "engages in, desires to engage in, or intends to engage in homosexual acts." DOD Directive 1332.14, Appellant's Brief at xvii.

the military when it makes determinations regarding the appropriate composition of the Armed Forces. Such a rule has no legal basis and, as a practical matter, has nothing to commend it. See Johnson v. Orr, 617 F. Supp. 170, 174-75 (E.D. Cal. 1985). cf. Matter of Longstaff, 716 F.2d 1439, 1448 (5th Cir. 1983) ("To require the INS to disregard the most reliable source of information, statements of the person involved, would be to substitute secondary evidence for primary."), cert. denied, 467 U.S. 1219 (1984); Fed. R. Evid. 801(d)(2) (admissions by party are deemed trustworthy and therefore are not excluded from introduction into evidence as hearsay).

Of course, the Navy could not impose criminal sanctions on a servicemember based solely on his admission of homosexuality. Cf. Robinson v. California, 370 U.S. 660 (1962). When making retention decisions, however, nothing bars the Navy from considering a servicemember's proclivity toward misconduct or unlawful acts. "[N]othing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops . . . under his command." Greer v. Spock, 424 U.S. 828, 840 (1976).

It follows that nothing in the Constitution bars the Navy, when making retention decisions, from looking beyond a servicemember's actual misconduct, and concerning itself as well with the servicemember's expressed proclivity to violate regulations and commit improper acts, and the impact of that

proclivity on the military mission. For example, the Constitution would not compel the Navy to retain a servicemember who publicly admitted that he was an arsonist or a kleptomaniac. This is so even if the servicemember averred that he had successfully resisted the temptation, thus far, to commit any unlawful or improper acts. See Orloff v. Willoughby, 345 U.S. 83 (1953); Blameuser v. Andrews, 630 F.2d 538 (7th Cir. 1980) (ROTC enrollment may be denied to a person because of his Nazi sympathies and his belief in white supremacy). Similarly, "[i]n determining the composition of the Armed Forces, the [military] does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission." ben-Shalom v. Marsh, 881 F.2d at 460-61.

In short, Steffan's contention that the military must ignore admissions of homosexuality would, we submit, engender disrespect for military regulations, render difficult the enforcement of regulations proscribing homosexual conduct, necessitate undesirable intrusions into individual privacy, and jeopardize the ability of the military to maintain a disciplined and effective fighting force. Steffan's argument must be rejected.

6. Finally, Steffan contends, see Appellant's Brief at 20-23, that the district court's decision cannot be reconciled with White v. Secretary of the Army, 878 F.2d 501 (D.C. Cir. 1989), and Giles v. Secretary of the Army, 627 F.2d 554 (D.C. Cir. 1980), where this Court held that the military may not retroactively justify an invalid separation decision by relying

on incidents of misconduct in a servicemember's personnel file that were not charged in the original proceeding itself. Applying those decisions to this case, Steffan contends that whether he has committed homosexual acts is irrelevant because he was administratively separated from the Naval Academy "based on his admissions that he is a homosexual" rather than any evidence of homosexual conduct. See Appellant's Brief at 15. The district court's order, argues Steffan, improperly allows the Navy to use discovery "as the predicate for a fishing expedition to determine if the discharge could be justified retroactively upon grounds wholly different from those asserted at the time of discharge." *Id.* at 18. This argument lacks merit for the reasons discussed supra Part LA.1 & 2.

Unlike the situation in Giles and White, the Navy here is not "belatedly [attempting to] raise charges against [Steffan that] . . . were never contemplated or raised in the original discharge proceeding." White, 878 F.2d at 504 (quoting Giles, 627 F.2d at 558).¹¹ The basis for Steffan's separation from the Naval Academy remains unchanged: he stated he was homosexual. The regulations mandated that he be separated unless he met his burden of coming forward with evidence to show that he neither "engages in, desires to engage in, [n]or intends to engage in homosexual acts." DOD Directive 1332.14, Appellant's Brief at

¹¹ Rather, it is Steffan who is belatedly attempting to challenge the outcome of the original discharge proceeding. But unless he stands ready to rebut the regulatory presumption of homosexual proclivity and conduct, his belated effort must fail.

xvii. Steffan's refusal, in 1987 and now, to rebut the regulatory presumption of homosexual proclivity and conduct left the Navy with no choice but to conclude that he was homosexual within the meaning of the regulations.^{1 2}

Notably, if a currently enrolled midshipman at the Naval Academy stated he was homosexual, he would receive the same administrative treatment that Steffan received -- that is, he would have the opportunity to rebut the regulatory presumption of homosexual proclivity and conduct that his admission triggered. If he failed to rebut the regulatory presumption, he would be separated. "Since [there is] no basis to question the legitimacy of the existing policy, and since there is no good reason to justify an award of relief which accords substantially more favorable treatment to [Steffan] than is available to servicemembers presently in the [Navy]," the district court

¹² Another important distinction in this case is that the district court's decision, which functionally upheld Steffan's disenrollment from the Naval Academy based on his admissions of homosexuality, did not "improperly deprive[] [Steffan] of the procedural safeguards available in administrative discharge proceedings? White, 878 F.2d at 504. As discussed supra text accompanying notes 8-9, Steffan was accorded ample procedural protections during the discharge proceedings, and he received legal advice from four attorneys.

Contrary to Steffan, see Appellant's Brief at 17, the decision in Dilley v. Alexander, 627 F.2d 407 (D.C. Cir. 1980), is inapposite. In Dilley, this Court held that retroactive reinstatement is generally an appropriate remedy for servicemembers who have been illegally discharged. In the instant case, however, because Steffan was not illegally discharged, the condition precedent for invoking the Dilley rule is absent.

correctly rejected Steffan's claims and dismissed his suit.

Giles, 627 F.2d at 558.¹³

B. In Any Event, The Navy Had A Legitimate And Substantial Need To Inquire Whether Steffan Had Committed Homosexual Acts Because That Information Is Highly Relevant To The Relief Steffan Seeks.

The district court correctly held that the Navy has a legitimate and substantial need, for purposes of this suit, to discover whether Steffan has committed homosexual acts. See 733 F. Supp. at 125, JA at 17. This is so because Steffan seeks affirmative relief in the form of reinstatement to the Naval Academy to complete the requirements for graduation, and a commission in the United States Navy. See JA at 34. Steffan is not entitled to this relief, however, if he has a proclivity to

¹³ The Vietnam Veterans Of America, as amicus on Steffan's behalf, argues that the the district court's conclusion that the Navy was entitled to question Steffan regarding his homosexual conduct contravenes the Chenery Rule, which provides that a reviewing court "must judge the propriety of [administrative] action solely on the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). The amicus, like Steffan, misunderstands the relevant regulations and the basis for Steffan's separation. The regulations show, and the administrative record corroborates, that Steffan was separated based on the regulatory presumption of homosexual proclivity and conduct that was triggered by Steffan's admission of homosexuality. To conclude otherwise would be to impermissibly ignore the Navy's reasonable interpretation and application of its own regulations, see supra notes 6 & 7, and would impermissibly "propel [this Court] into the domain which Congress has set aside exclusively for the administrative agency" -- namely, professional military decisions regarding the composition of the Armed Forces. Chenery Corp., 332 U.S. at 196.

commit, or has committed, homosexual acts. As the district court stated:

[Steffan] seeks reinstatement [as a midshipman to obtain his diploma and a commission in the United States Navy] and other equitable relief through this Court. [Steffan] has not challenged the Navy's right to refuse reinstatement on the grounds that an individual has engaged in homosexual acts, and that issue is squarely raised by. [Steffan's] plea for affirmative injunctive relief. As such, whether or not [Steffan] has engaged in homosexual acts is highly relevant to the disposition of this case.

733 F. Supp. at 126, JA at 17-18 (citing Matthews v. Marsh, 755 F.2d 182, 183 (1st Cir. 1985)).

In short, because Steffan did not dispute that the regulations stand as an insuperable bar to him performing any military service (either as a midshipman or an ensign) if he has engaged in homosexual conduct, the district court correctly held that "the issue of whether [Steffan] engaged in homosexual acts during or since his enrollment in the Naval Academy is highly relevant to this lawsuit." 733 F. Supp. at 125, JA at 17.

2. Contrary to Steffan's contention, see Appellant's Brief at 23-25, the district court's conclusion that the Navy could inquire whether Steffan had committed homosexual acts is not inconsistent with the Ninth Circuit's decision in Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (~~en banc~~), cert. pet. pending, No. 89-1806 (S. Ct.). In Watkins, a sharply divided court held in a narrow fact-specific decision that the Army was equitably estopped from refusing to reenlist a 14-year veteran based on his homosexuality when the servicemember had candidly admitted his homosexuality on his induction paperwork

and throughout his career.¹⁴ Critically, for present purposes, the Ninth Circuit did not hold that the military could never ask an admitted homosexual whether he had ever engaged in homosexual conduct, nor did it broadly hold that a servicemember, separated on the basis of homosexual admissions, could later sue the military for reinstatement and, at the same time, refuse to answer questions regarding the regulatory presumption of homosexual proclivity and conduct that his admissions triggered. In short, the decision in Watkins is wholly inapposite to the instant case.

II.

THE DISTRICT COURT CORRECTLY HELD THAT, UNDER THE CIRCUMSTANCES OF THIS SUIT, THE NAVY'S NEED TO DISCOVER WHETHER STEFFAN HAD ENGAGED IN HOMOSEXUAL CONDUCT OUTWEIGHED STEFFAN'S FIFTH AMENDMENT INTEREST.

1. Steffan contends that the district court, when evaluating Steffan's Fifth Amendment privilege claim, "[s]tart[ed] from [an] invalid legal premise . . . [and] went on to misapply the prescribed balancing test." Appellant's Brief at 27. Steffan is wrong.

First, Steffan misrepresents the district court's analysis when he asserts, see Appellant's Brief at 26-27, that the court applied an "automatic waiver" rule that required Steffan to

¹⁴ Steffan was substantially less forthcoming concerning his homosexuality than Watkins. Even though Steffan knew that regulations mandated his dismissal from the Naval Academy and rendered him ineligible for a commission, he nevertheless concealed his homosexuality from Naval Academy officials until several months before graduation, thereby reaping the benefits, at substantial taxpayer expense, of nearly four years of free education at one of the nation's finest educational institutions.

choose between proceeding with his lawsuit and claiming his Fifth Amendment privilege. The district court explicitly stated, 733 F. Supp. at 126 n.4, JA at 20 n.4, that it was applying the balancing test enunciated by this Court in Black Panther Party v. Smith, 661 F.2d 1243 (D.C. Cir. 1981), vacated on other grounds, 458 U.S. 1118 (1982). Thus, contrary to Steffan, the district court did not "[s]tart[] from [an] invalid legal premise." Appellant's Brief at 27.

Similarly, Steffan is incorrect when he contends that the district court "misapplied the applicable balancing test." Appellant's Brief at 26. The district court, after conscientiously "balanc[ing] [both] parties' interests," 733 F. Supp. at 127, JA at 22 (quoting Attorney General of the United States v. Irish People, Inc., 684 F.2d 928, 953 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983), correctly held that the Navy's interest in discovering whether Steffan had engaged in homosexual conduct outweighed Steffan's Fifth Amendment interest in refusing to answer the Navy's questions.

Importantly, noted the court, if Steffan had committed homosexual acts, he was not entitled to the affirmative injunctive relief he sought (i.e., reinstatement at the Naval Academy, the award of a diploma, an officer's commission). As the district court stated, the Navy "clearly [is] entitled to information necessary to defend against [Steffan's] claims to such relief." 733 F. Supp. at 127, JA at 21. Moreover, because Steffan's decision to resign from the Naval Academy in 1987

resulted in the termination of an on-going NIS investigation that "was actively seeking information concerning [Steffan's] homosexual conduct," "it would be unfair to allow [Steffan] to use the Fifth Amendment as both sword and shield to conceal information that is highly relevant" *Id.* See supra text accompanying note 8. Given these circumstances, held the court, the Navy's interest in discovering whether Steffan had engaged in homosexual conduct was "substantial." 733 F. Supp. at 127, JA at 21.

By contrast, the court found that Steffan's interest in concealing the information sought by the Navy was, in the context of this civil suit, less weighty. Steffan, through his claims, had elected to place directly in issue whether he was qualified for the declaratory and injunctive relief he sought. See 733 F. Supp. at 127, JA at 21. As an equitable matter, Steffan's utilization of his Fifth Amendment privilege as a "sword to frustrate the [Navy's] right to prepare a defense" would be eminently unfair. *Id.* Moreover, Steffan "failed to show any serious threat to his Fifth Amendment rights." *Id.* JA at 20. Although many states criminalize sodomy, the crime of sodomy is not coextensive with the regulatory definition of "homosexual acts," see DOD Directive 1332.14, Appellant's Brief at xvii, and for purposes of this suit, the Navy was concerned primarily with whether Steffan had committed homosexual acts.¹⁵

¹⁵ The Navy stipulates that, contrary to Steffan's intimations, see 733 F. Supp. at 126, JA at 19, it harbored no
(continued...)

Of surpassing importance, however, and what decisively tips the scale in the Navy's favor, is the fact that Steffan's admission of homosexuality raised a regulatory presumption of homosexual proclivity and conduct, and because Steffan did not rebut that presumption in 1987, the Navy was entitled in the context of this suit to inquire whether Steffan belatedly wished to rebut that presumption. This information was critical for determining Steffan's standing and the existence of a justiciable controversy. See supra Part I.A.

2. Steffan also argues that the district court erred in "fail[ing] to consider evidence of [the Government's] bad faith during the course of document discovery" Appellant's Brief at 28-31. This argument is specious and may be summarily rejected.

The record fails to show, and the district court correctly declined to hold, that the Government acted in bad faith. Moreover, Steffan's argument, if accepted, would require this Court to ignore the following critical factors that influenced the district court: (1) Steffan was duly noticed regarding the time and location of the deposition, yet he "avoided[ed] the

¹⁵ (... continued)
intention to criminally prosecute Steffan based on his admissions at deposition of homosexual conduct. Rather, the Navy simply sought to show (1) the rationality of its regulations, which reasonably presume that Steffan has a proclivity to commit, and has committed, homosexual acts: (2) that Steffan lacks standing to bring this suit, because he was not disenrolled from the Naval Academy based solely on homosexual orientation; and (3) that Steffan is not entitled to either declaratory or injunctive relief, because he fails to state a justiciable controversy due to his lack of standing.

deposition at all costs" until ordered to attend by the district court, JA at 168; (2) Steffan's avoidance of the deposition rose to the level of bad faith and constituted "a basis for imposing sanctions," but the district court leniently declined to penalize Steffan and accorded him a second chance to comply with discovery rules, JA at 169; (3) Steffan received repeated and unequivocal warnings from the district court that he must answer the Navy's questions or his suit would be dismissed, see JA at 160-61, 725; and (4) Steffan defiantly disobeyed the district court's orders, see JA at 725.

In sum, Steffan's obdurate and contumacious behavior throughout the discovery process diminishes to a nullity the strength of his contention that the district court failed properly to consider evidence of the Government's alleged bad faith.

III.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING STEFFAN'S SUIT AFTER STEFFAN (1) REPEATEDLY DISOBEYED THE COURT'S ORDER TO ANSWER CRITICAL DEPOSITION QUESTIONS: (2) ADVISED THE COURT THAT HE' WOULD NOT, UNDER ANY CIRCUMSTANCES, ANSWER THE QUESTIONS; AND (3) ASKED THE COURT TO "ENTER AN ORDER OF DISMISSAL AND WE WILL TAKE OUR APPEAL."

Steffan argues that the district court abused its discretion in dismissing the suit in its entirety. See Appellant's Brief at 32. There is no reason, asserts Steffan, "why the district court could not have [stayed that portion of the lawsuit that sought reinstatement at the Naval Academy and a commission in the United

States Navy] and permitt[ed] Steffan's claim for his diploma and declaratory relief to proceed." Id. Steffan is wrong.

To receive a diploma from the Naval Academy, a midshipman must, inter alia, complete the academic requirements for graduation. See 10 U.S.C. § § 6959(a), 6967: USNAINST 1531.16S, Encl. 1 (Nov. 27, 1984). Steffan resigned from the Naval Academy prior to completing the academic year and prior to taking his final examinations. He is not, therefore, academically eligible to receive a diploma, nor is he suitable, under the regulations barring homosexuals, for reinstatement as a midshipman to complete the requirements for graduation.¹⁶ In short, Steffan's claim for a diploma is inextricably intertwined with his reinstatement claim. In abandoning the latter claim, as he must, he also abandons the former claim.

Steffan's claim for declaratory relief is similarly meritless. Steffan's admission of homosexuality carried with it a rebuttable presumption of homosexual proclivity and conduct, and Steffan doggedly refuses to rebut that he is homosexual within the meaning of the regulations. Thus, as discussed supra Part I.A, Steffan had no standing to challenge the constitutionality of the regulations to the extent they discriminate on the basis of homosexual orientation.

¹⁶ To graduate and receive a degree from the Naval Academy, a midshipman must also comply with established standards of military performance and aptitude. See 10 U.S.C. § 6967; USNAINST 1531.16S, Encl. 1 (Nov. 27, 1984); Agreement To Serve And Degree Requirements. As a result of his admission of homosexual proclivity and conduct, Steffan lacked the military aptitude to remain a midshipman.

Importantly, the district court's dismissal of Steffan's suit was not a reflexive or automatic sanction in response to Steffan's contumacious refusal to obey the court's orders. The district court's opinion shows, and the record corroborates, that the court reasonably attempted to accommodate Steffan's interest in pursuing the suit. Equally important, the district court repeatedly and explicitly warned Steffan that dismissal of the suit was a distinct possibility if Steffan refused to answer the Navy's questions. As the district court stated:

The Court is aware that despite its earlier-warnings dismissal of this suit is by no means automatic, that "some balancing of the parties' interests" is required, and that "efforts at accommodation of both sides must be made." . . . Efforts at accommodation have failed and it is clear they will continue to fail. [Steffan] received a clear warning that dismissal of his suit would result should he fail to answer [the Navy's] deposition questions. [Steffan] was fully aware of this potential result. Dismissal by a district court is proper where a party has been given a "Crystal clear warning" of the sanction it could expect.

This Court has also taken into consideration the possibility of lesser sanctions than dismissal. Although some courts have stayed a civil action until the plaintiff is no longer in danger of prosecution, neither defendants nor plaintiff endorses this alternative. Defendants suggest that the court enter an order . . . establishing as a fact that plaintiff has engaged in homosexual acts, and then dismissing the case pursuant to Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (in which the Court upheld a Navy regulation mandating discharge for homosexual conduct). But this court will not go so far. There is certainly no indication that [Steffan] would prefer this alternative to dismissal for failure to comply with discovery.

733 F. Supp. at 127-28, JA at 22-23 (citations omitted).

Under these circumstances, Steffan's contention that the district court abused its discretion in dismissing his suit is utterly disingenuous and lacking in merit. The district court was scrupulously mindful that dismissal is a sanction of last resort to be applied only after the district court (1) is convinced that no lesser sanction is appropriate; and (2) has provided the affected party with unambiguous warning that dismissal is an expected sanction. It cannot, therefore, be contended that the district court abused its discretion, especially when Steffan himself "ask[ed] [the court] to enter an order of dismissal and we will take our appeal." JA at 725.

CONCLUSION

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

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

JAY B. STEPHENS
United States Attorney

ANTHONY J. STEINMEYER
(202)/(FTS 368) 514-3388
E. ROY HAWKENS
(202)/(FTS 368) 514-4331
Attorneys, Appellate Staff
Civil Division, Room 3127
Department of Justice
Washington, D.C. 20530-0001

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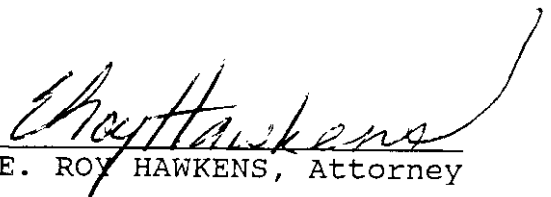
CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September 1990, I served the foregoing Brief For The Appellees upon counsel by causing copies to be mailed, first-class, postage prepaid, to:

Paula Ettelbrick, Esq.
Sandra Lowe, Esq.
Lambda Legal Defense and
Education Fund, Inc.
666 Broadway
New York, New York 10012

Marc Wolinsky, Esq.
Norman Redlich, Esq.
Wachtell, Lipton, Rosen & Katz
299 Park Avenue
New York, New York 10171

Calvin Steinmetz, Esq.
Steinmetz, Weinberg & Moats
2141 P Street, N.W.
Washington, D.C. 20037


E. ROY HAWKENS, Attorney