

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

No. 91-5409

JOSEPH C. STEFFAN,

Plaintiff-Appellant,

v.

SECRETARY OF DEFENSE, ET AL.,

Defendants-Appellees.

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

BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUES PRESENTED

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

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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

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

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


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REGULATIONS INVOLVED

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

SUBJECT MATTER JURISDICTION

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

STATEMENT OF THE CASE

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

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

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

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

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

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

B. Statement of the Facts.

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

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

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

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

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

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

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

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

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

who, having examined him on March 23, 1987, stated that administrative separation by reason of homosexuality was appropriate because he "admitted to homosexuality. This orientation pre-dates his tenure at the Naval Academy. . . .

[H]is homosexuality does not appear to be unwanted . . . [and it] appears to be a preferred orientation to which he has adjusted."

Id. at 480.

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

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

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

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

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

App. 555.

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

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

separation was mandated] and that . . . there was nothing the board could do to allow [Steffan] to graduate." Id. at 89.

Following the hearing, the Academic Board voted unanimously that Steffan be recommended for discharge from the Naval Academy. See id. at 89, 98.

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

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

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

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

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

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

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

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

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

Id. at 95.

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

specific allegation of homosexual acts, violated the equal protection component of the Due Process Clause of the Fifth Amendment. Alternatively, Steffan argued that the Navy violated the APA by not allowing him to graduate or receive a commission. See id. at 78-79. Steffan therefore asked the court to:

(1) declare his resignation null and void; (2) declare that regulations mandating the discharge of service members based solely on admissions of homosexuality are unconstitutional; and (3) enjoin the Navy from denying him a diploma from the Naval Academy and a commission in the United States Navy. See id. at 79.

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

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

(continued...)

STANDARD OF REVIEW

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I.

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

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

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

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

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

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

The Court further stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

App. 31.

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

that. . . persons of 'homosexual orientation' engage in or seek to engage in homosexual conduct is as unremarkable as the fact that . . . persons of 'heterosexual orientation' engage in or seek to engage in heterosexual conduct. To pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd." Watkins, 847 F.2d at 1361 n.19

(Reinhardt, J., dissenting). Of course, not everyone of a particular sexual orientation will necessarily act on that orientation. But it is rational for military authorities to presume that, absent contrary evidence, a person who states without qualification that he is a homosexual is likely to commit homosexual acts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Heller v. Doe, 61 USLW at 4730 (quoting FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993)). Classifications subjected to rational basis review are accorded "a strong presumption of validity," and they must be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller, 61 USLW at 4730. The Government "has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" Heller, id. (quoting Beach Communications, 113 S. Ct. at 2102). "'[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." Heller, 61 USLW at 4730 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). Finally, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends [and despite the fact that] 'in practice [the classification] results in some inequality.'" Heller, 47 USLW at 4730 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970), and Lindsley v. Natural

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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JULY 1993

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