

Tulsa Law Review

Volume 30 | Number 1

Fall 1994

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Gary Frost

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Recommended Citation

Gary Frost, *Steffan v. Aspin: Gays in the Military Win a Victory--Or Did They*, 30 Tulsa L. J. 171 (1994).

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STEFFAN v. ASPIN: GAYS IN THE MILITARY WIN A VICTORY—OR DID THEY?

I. INTRODUCTION

A person with the bravery of Audie Murphy,¹ the charisma of Colin Powell,² the tactical mind of Robert E. Lee,³ and the leadership ability of Douglas MacArthur⁴ would surely be the ultimate military commander. Nevertheless, the United States military would consider such a person lacking sufficient aptitude to serve their country if he or she was a homosexual. Despite President Clinton's recent "Don't ask, don't tell, don't pursue" policy,⁵ homosexuals are separated from every branch of the military based on status or conduct.⁶

Until recently,⁷ members of the United States military have had little success challenging the constitutionality of the military's policy of excluding homosexuals.⁸ In *Steffan v. Aspin*,⁹ the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) held that the military's policy of excluding gays based on status¹⁰

1. Audie Murphy was the most decorated American soldier of World War II, with twelve decorations for valor, including the Congressional Medal of Honor. COLONEL HAROLD B. SIMPSON, AUDIE MURPHY, AMERICAN SOLDIER (1975).

2. Chairman of the Joint Chiefs of Staff from 1989 to 1993.

3. Commanding General of all Confederate forces during the Civil War.

4. Supreme Allied Commander, Pacific during World War II.

5. President's Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WEEKLY COMP. PRES. DOC. 1369-73 (July 19, 1993).

6. See 32 C.F.R. pt. 41, app. A, § 1.H (1993).

7. See, e.g., *Meinhold v. United States Dept. of Defense*, Nos. 93-55242, 93-56354, 1994 WL 467311 (9th Cir. Aug. 31, 1994); *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y. 1994); *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994); *Dahl v. Secretary of United States Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993); *Elsie v. Aspin*, 841 F. Supp. 439 (D.D.C. 1993); *Seland v. Aspin*, 832 F. Supp. 12 (D.D.C. 1993).

8. The military's policy has consistently been upheld as constitutional. See, e.g., *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Woodward v. United States Army*, 871 F.2d 1068 (Fed. Cir. 1989); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich v. Secretary of the Army*, 735 F.2d 1220 (9th Cir. 1984).

9. 8 F.3d 57 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

10. 32 C.F.R. pt. 41, app. A, § 1.H.1.c.(2) (1993). This regulation provides:

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

(1) . . .

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

is unconstitutional. Subsequently, however, the court vacated its opinion and voted to rehear the entire case *en banc*.¹¹

This note scrutinizes the military's policy toward gays while specifically focusing on the *Steffan v. Aspin* opinion. Furthermore, this note concludes that on rehearing the D.C. Circuit should hold that the military's regulation discharging homosexuals is unconstitutional. However, such a decision should not be reached because the regulation fails the rational basis test. Instead, the court should find that discrimination based on sexual orientation is subject to strict scrutiny and the military's interest in such a regulation does not withstand this most rigid standard.¹²

II. CONSTITUTIONAL REVIEW OF EQUAL PROTECTION CLAIMS

The validity of the military's regulation, or for that matter any law that is subject to a constitutional challenge under the equal protection clause of the Fifth or Fourteenth Amendments,¹³ depends on the standard of review applied by the examining court. Three levels of review are used to analyze equal protection claims: "strict scrutiny," "intermediate scrutiny," and "rational basis."¹⁴ Strict scrutiny,¹⁵ the highest tier of review, is applied whenever a governmental regulation imposes on fundamental individual rights¹⁶ or certain classes of

Id. (emphasis added).

11. *Steffan v. Aspin*, 8 F.3d at 70.

12. *But see* Spiro P. Fotopoulos, Note, *The Beginning of the End for the Military's Traditional Policy on Homosexuals: Steffan v. Aspin*, 29 WAKE FOREST L. REV. 611 (1994) (characterizing the *Steffan* case as a major victory).

13. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.*

14. It appears, however, that another level of review has been developed to fit in between intermediate review and the rational basis test. *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (characterizing its analysis of a denial for a zoning permit for a mentally retarded home as the rational basis test, but applying a "heightened" level of scrutiny); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir.) (characterizing its analysis as "active rational basis review"), *cert. denied* 113 S. Ct. 655 (1992); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

15. The regulation must be necessary to promote a compelling governmental interest and must be the least restrictive alternative. *See, e.g.,* *Korematsu v. United States*, 323 U.S. 214 (1944) (applying the "most rigid scrutiny" to determine the constitutionality of military regulations which discriminate based on race).

16. The Supreme Court has recognized that fundamental rights include the right to interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), the right to vote, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and the right of access to the courts, *Griffin v. Illinois*, 351 U.S. 12 (1956).

individuals which comprise a suspect class.¹⁷ The lowest level of review in analyzing equal protection claims is the rational basis test,¹⁸ which is used when the challenge does not qualify for stricter review.¹⁹ Intermediate scrutiny²⁰ was developed as the bridge between strict scrutiny review and rational basis review because once a court decides that strict scrutiny is the level of review, the statute will invariably be struck down, and conversely where rational basis is used, the statute will most likely be upheld.²¹ This test is applied to cases where the regulation imposes on rights that are not considered fundamental,²² and where a class of people can not be considered a "suspect class."²³ Since a court's determination of the applicable standard of review is often dispositive with respect to the underlying issues, the standard of review applied by the D.C. Circuit is of the utmost importance.²⁴

17. Three main suspect classes exist. Regulations that discriminate based on race are subject to strict scrutiny. See *Loving v. Virginia*, 388 U.S. 1 (1967) (applying strict scrutiny to statute prohibiting interracial marriage); *Brown v. Board of Ed.*, 347 U.S. 483 (1954) (applying strict scrutiny to state laws requiring separate but equal education between whites and non-whites). Statutes that discriminate based on national origin are subject to strict scrutiny. See *Hernandez v. Texas*, 347 U.S. 475 (1954) (applying strict scrutiny to discrimination against Mexican Americans with regards to jury duty). Finally, statutes that discriminate based on alienage are also subject to strict scrutiny. See *In re Griffiths*, 413 U.S. 717 (1973) (applying strict scrutiny to state statutes that denied resident aliens the opportunity to practice law).

18. As long as the regulation furthers a legitimate purpose, the regulation will be upheld as constitutional. "[I]n general, a government regulation will be presumed to be valid under equal protection analysis as long as the classification drawn by the regulation 'rationally furthers some legitimate, articulated state purpose.'" *Ben-Shalom v. Marsh*, 881 F.2d 454, 463 (7th Cir. 1989) (quoting *McGinnis v. Royster*, 410 U.S. 263, 270 (1973)).

19. See, e.g., *Hetherton v. Sears, Roebuck & Co.*, 493 F. Supp. 82, 87 (D. Del. 1980) (stating that all other classifications will be reviewed under the standard of minimum rationality), *aff'd*, 652 F.2d 1152 (3rd Cir. 1981).

20. To survive scrutiny, the means chosen, must be substantially related and carefully tailored to achieving an important governmental objective. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

21. Professor Gerald Gunther has characterized strict scrutiny as "'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). See also *Ferguson v. Garmon*, 643 F. Supp. 335, 338 (D. Kan. 1986); *Hetherton v. Sears, Roebuck & Co.*, 493 F. Supp. at 87.

22. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down Texas law that allowed school districts to deny free public education to illegal-alien children).

23. Those classes that are not "suspect classes" are labeled "quasi-suspect." See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982). Intermediate scrutiny applies to classifications based on gender. See *Reed v. Reed*, 404 U.S. 71 (1971). It also applies to classifications based on illegitimacy. See *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Trimble v. Gordon* 430 U.S. 762 (1977); *Mathews v. Lucas*, 427 U.S. 495 (1976).

24. This determination is not dispositive in every instance. For instance, in *Steffan* the court applied the rational basis test and held that the Navy's regulation was unconstitutional. Although the court came to the correct conclusion, a stricter standard of review should have been used. See *infra* part V.

III. BACKGROUND

A. *Facts of the Case*

Joseph C. Steffan was admitted to the United States Naval Academy in 1983. From the beginning, it was apparent Steffan would be an exceptional midshipman and was destined for greatness as a Naval officer.²⁵ Steffan consistently received outstanding marks for his leadership ability and military performance.²⁶ Not only did Steffan distinguish himself in the classroom,²⁷ but he also excelled at extracurricular activities.²⁸ Upon graduation, Steffan was slated for duty aboard a nuclear submarine,²⁹ one of the most prestigious assignments in the Navy. Steffan's career as a Naval officer seemed set—until his final semester at the Academy, when the Naval Intelligence Service (the NIS) received a report that Steffan had told another student he was gay.³⁰

After receiving this report in February of 1987, the NIS immediately began its investigation.³¹ In March, Steffan learned he was under investigation and approached an Academy chaplin for advice.³² Steffan admitted his homosexuality to the chaplin, who in turn offered to help Steffan plead his case before the Commandant of Midshipmen³³ to assure his graduation.³⁴ The chaplin was unsuccessful, and the Commandant advised the chaplin that Steffan should obtain

25. *Steffan v. Aspin*, 8 F.3d 57, 59 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

26. In his sophomore year, instructors characterized him as "gifted," and an "outstanding performer" who had "exhibited excellent leadership." In addition to being praised as an "asset to the Academy" in his junior year, Steffan was selected as the Regimental Commander of one half of his class—roughly 500 midshipmen. The glowing reviews continued when he was said to be a "model for his classmates and subordinates," and having a "dedication to superior performance." Steffan would "undoubtedly make an outstanding naval officer." In his senior year, he became Battalion Commander, one of the ten highest ranking midshipmen at the Academy, with direct command over one-sixth of the Academy's 4,500 midshipmen. *Id.*

27. Academically he ranked in the top ten percent of his class. *Steffan v. Cheney*, 780 F. Supp. 1, 5 (D.D.C. 1991), *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

28. In his junior and senior years he sang the National Anthem as a soloist at the annual Army-Navy football game on national television. For these performances, he was awarded a Citation from the Superintendent of the Academy. In his senior year, he also served as President and Cantor of the Catholic Choir and was the lead soloist for the Naval Academy Glee Club. *Steffan v. Aspin*, 8 F.3d at 59.

29. *Steffan v. Cheney*, 780 F. Supp. at 5.

30. *Steffan v. Aspin*, 8 F.3d at 59.

31. *Id.*

32. *Id.*

33. The Commandant of Midshipmen is the second highest ranking officer at the Naval Academy.

34. *Steffan v. Aspin*, 8 F.3d at 59.

legal counsel.³⁵ On March 23, Steffan met with the Commandant and admitted his homosexuality.³⁶ The Commandant informed Steffan that it was unlikely that he would graduate and that a Brigade Military Performance Board would be convened the next day.³⁷

At the Performance Board hearing, Steffan refused to present any evidence that he was not a homosexual and again admitted that he was a homosexual.³⁸ After closed deliberations, the Board decided to change Steffan's military performance rating from "A" to "F", to suspend him from classes, and to recommend his discharge for "insufficient aptitude for commissioned service."³⁹ On March 26, the Commandant agreed with the Performance Board's decision, and recommended that Steffan be separated⁴⁰ from the Academy.⁴¹

On April 1, Steffan was notified that the Academy intended to recommend his discharge to the Secretary of the Navy.⁴² He was also advised that his discharge was a foregone conclusion, which would require his military record to reflect his homosexuality as the reason for the discharge.⁴³ Steffan was told, however, that his resignation would result in an honorable discharge without any notation of his homosexuality appearing in his record.⁴⁴ If he did not resign, his involuntary discharge would assuredly damage his future job prospects.⁴⁵ That same day, just six weeks before his graduation and after four years of exemplary performance, Steffan submitted his qualified resignation⁴⁶ from the Academy.⁴⁷

More than eighteen months later, on December 9, 1988, Steffan wrote to the Secretary of the Navy, requesting that his resignation be

35. *Id.*

36. *Id.* at 60.

37. *Id.*

38. Steffan v. Aspin, 8 F.3d at 60.

39. *Id.*

40. Discharge of homosexuals from the military is termed "separation." See 32 C.F.R. pt. 41, app. A, § 1 (1993).

41. Steffan v. Aspin, 8 F.3d at 60.

42. *Id.*

43. *Id.*

44. *Id.*

45. Steffan v. Aspin, 8 F.3d at 60.

46. "A 'qualified' resignation is one that is conditioned on something. In this case the resignation was qualified in the sense that it was in lieu of the Superintendent's recommendation of discharge based on [Steffan's] insufficient aptitude for commissioned naval service, as determined by the Academic Board." Steffan v. Cheney, 780 F. Supp. 1, 3 n.7 (D.D.C. 1991), *rev'd sub nom.* Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

47. Steffan v. Aspin, 8 F.3d at 60.

withdrawn and that his diploma be awarded.⁴⁸ On February 9, 1989, the Secretary denied his request.⁴⁹ The sole basis stated for this denial was Steffan's "status" as a homosexual, as exhibited by his unrebutted admission before the Performance Board.⁵⁰

B. *Procedural History of the Case*

On December 29, 1988, Steffan filed suit in the United States District Court for the District of Columbia against the Secretary of Defense, the Secretary of the Navy, the Superintendent of the Naval Academy, and the Commandant of Midshipmen (the Navy).⁵¹ His complaint alleged that his separation from the Academy, which was based solely on his status as a homosexual, violated his constitutional rights of free speech and association, due process, and equal protection.⁵²

Steffan's suit survived an initial motion to dismiss challenging his standing to sue.⁵³ Shortly thereafter, a dispute arose regarding Steffan's deposition. At the deposition, Steffan was asked whether he had ever engaged in homosexual acts.⁵⁴ Steffan denied having engaged in homosexual acts prior to his admission to the Academy.⁵⁵ At the direction of his attorney, he refused to answer whether he had engaged in any acts while enrolled at the Academy or since departing from the Academy.⁵⁶ His refusal to answer these questions prompted the Navy to seek sanctions.⁵⁷ Specifically, the Navy asked the court to dismiss the suit, or in the alternative, to enter an order establishing as fact that Steffan had engaged in homosexual acts.⁵⁸ Steffan argued that such information was irrelevant.⁵⁹

48. *Id.*

49. *Id.*

50. *Id.*

51. *Steffan v. Aspin*, 8 F.3d at 60.

52. *Id.* In the alternative, Steffan claimed that the Navy both denied him equal protection and violated the Administrative Procedure Act when the Academy truncated his discharge proceedings. *Id.*

53. *Steffan v. Cheney*, 733 F. Supp. 115 (D.D.C. 1989).

54. "A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." 32 C.F.R. pt. 41, app. A, § 1.H.1.b.(3) (1993).

55. *Steffan v. Cheney*, 733 F. Supp. 121, 123 (D.D.C. 1989), *rev'd*, 920 F.2d 74 (D.C. Cir. 1990).

56. *Id.*

57. *Id.* at 122. The sanctions sought by the Navy were pursuant to FED. R. CIV. P. 37(d). *Steffan v. Cheney*, 733 F. Supp. at 122.

58. *Id.* at 121.

59. During the hearing, the following exchange between the Court and plaintiff's counsel took place:

While admitting that Steffan was discharged based on status instead of conduct,⁶⁰ the Court determined that the information sought by the Navy was relevant.⁶¹ Accordingly, in November of 1989 the case was dismissed with prejudice.⁶² In support of its holding, the court noted at the outset the deferential treatment consistently given to the military's enforcement of its own regulations.⁶³ Furthermore, since refusal to allow a person to reenlist after an admission of homosexuality had been upheld as constitutional,⁶⁴ the court concluded that Steffan's homosexual acts were relevant.⁶⁵ Finally, the court maintained that since Steffan brought the suit, he could not use his constitutional rights "as a sword to frustrate the defendant's right to prepare a defense."⁶⁶

On appeal, the D.C. Circuit reversed and remanded the case for further proceedings.⁶⁷ The court held that "[j]udicial review of an administrative action is confined to '[t]he grounds . . . upon which the record discloses that [the] action was based.'"⁶⁸ In addition, the appellate court correctly pointed out that Steffan's suit was based on his "status" as a homosexual. Consequently, it was error for the district court to determine that "conduct" was at issue.⁶⁹

THE COURT: I want to fix a date for discovery. The deposition of the plaintiff. 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 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. When are you going to have his deposition?

Steffan v. Cheney, 733 F. Supp. at 123.

60. *Id.* at 124. The court noted, "[t]he record is clear that plaintiff was separated from the Naval Academy based on his admission that he is a homosexual rather than on any evidence of homosexual misconduct." *Id.*

61. Without further explanation, the court concluded "that whether plaintiff had engaged in homosexual conduct was the 'key' question in this case because plaintiff sought restoration to duty." *Id.* at 123.

62. *Id.* at 128.

63. Steffan v. Cheney, 733 F. Supp. at 125 (citing Goldman v. Weinberger, 475 U.S. 503 (1986)).

64. *Id.* (citing Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990)).

65. *Id.* at 127.

66. *Id.*

67. Steffan v. Cheney, 920 F.2d 74 (D.C. Cir. 1990).

68. *Id.* at 76 (alteration in original) (quoting SEC v. Chenery Corp., 318 U.S. 80, 87 (1943)).

69.

That he seeks reinstatement as relief for an allegedly invalid separation does not put into issue the question whether he engaged in potentially disqualifying conduct unless

Steffan suffered another major setback slightly more than a year later when the district court granted the Navy's motion for summary judgment.⁷⁰ The majority of the court's opinion was devoted to analyzing the constitutionality of the military's ban on homosexuals. The court grudgingly admitted that Steffan was discharged based on his homosexual status and not because of his homosexual conduct,⁷¹ but the court concluded that homosexuals are not a suspect class.⁷² Thus, the military's regulations relating to homosexuals are subject only to rational-basis review.⁷³ Using this standard, the court held that the military's ban against homosexuals is rationally related to its legitimate goals.⁷⁴ From this decision Steffan once again appealed to the D.C. Circuit.⁷⁵ It is the D.C. Circuit's reversal upon which this note is based.

IV. THE *STEFFAN* DECISION

In reviewing the trial court's grant of summary judgment, the D.C. Circuit determined that the Navy's regulations, which compelled Steffan to resign solely because of his homosexual orientation, violated the equal protection component of the Fifth Amendment's due process clause.⁷⁶ However, the court specifically declined to answer whether homosexuals, as defined by orientation, are members of a "suspect" or "quasi-suspect" class, since the court concluded that even under the rational basis test the Navy's regulation is unconstitutional.⁷⁷

such conduct was a basis for his separation. If Steffan was discharged wrongfully, he 'ha[s] never been discharged[;] . . . in the eyes of the law, [he] remain[s] in service.'

Id. (alteration in original) (quoting *Dilley v. Alexander*, 627 F.2d 407, 411 (D.C. Cir. 1980)).

70. *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991), *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

71. "Plaintiff declined to answer questions at deposition about whether he had engaged in homosexual conduct at the Academy. As a result, this is primarily a case about the plaintiff's status as a homosexual." *Id.* at 5.

72. *Id.*

73. *See supra* part II.

74. *Steffan v. Cheney*, 780 F. Supp. at 12.

75. *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

76. *Id.* at 70.

77. *Id.* at 63.

A. *The Court Applies the Rational Basis Test*

Unlike the district court, which made an attempt to explain why Steffan was not a member of a suspect or quasi-suspect class,⁷⁸ the Court of Appeals took a short-sighted approach, and concluded that the military's regulations could not survive even the rational basis test.⁷⁹ Since under this standard, the court need only determine whether the Navy's regulation rationally furthers a legitimate governmental purpose,⁸⁰ the Navy is not required to justify its regulation.⁸¹ In applying the rational basis test, the court began its analysis by considering the purposes of the regulation as asserted by the Navy.⁸²

1. The Regulation Prevents Illegal Conduct

The Navy contended that the primary purpose of its regulation is to exclude from the military those who have a propensity to engage in illegal conduct, since this conduct damages the good order and discipline of the military.⁸³ The Navy argued that when a person admits their homosexuality, they also admit that they engage in, desire to engage in, or intend to engage in acts that are damaging to morale.⁸⁴

78. *Steffan v. Cheney*, 780 F. Supp. at 5-10. The district court concluded that Steffan was not a member of a suspect or quasi-suspect class for two reasons. First, the court noted that "[t]here is ample authority to support the defendant's position . . . that those with a homosexual orientation are not a suspect class." *Id.* at 5. Second, the court used the analysis developed in *Bowen v. Gilliard*, 483 U.S. 587 (1987), to determine whether Steffan was a member of a suspect class. *Steffan v. Cheney*, 780 F. Supp. at 5-10.

79. *Steffan v. Aspin*, 8 F.3d at 63. The court stated:

Nevertheless, we will leave unaddressed one important aspect of that question. We find it unnecessary to inquire whether homosexuals, as defined solely by orientation, comprise a 'suspect' or 'quasi-suspect' class. We need not decide, because we find that even if homosexuals are not accorded suspect status, the [Department of Defense] Directives cannot survive constitutional scrutiny.

Id.

80. *See supra* note 18 and accompanying text.

81. *Steffan v. Aspin*, 8 F.3d at 63. "The government is under no obligation to justify its behavior; instead, before striking down a statute or regulation on rationality review the court must evaluate and find wanting any potentially legitimate grounds upon which to uphold the government's action." *Id.* (citing *Heller v. Doe*, 113 S.Ct. 2637, 2642-43 (1993)). As a result, it is extremely difficult to strike down a law using this test. *See supra* part II.

82. *Steffan v. Aspin*, 8 F.3d at 63.

83. *Id.* at 64. It is important to note that the Supreme Court has refrained from establishing any general protection of adult consensual sexual activity. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court upheld a Georgia law making sodomy a crime. Although, the statute did not distinguish between heterosexual and homosexual behavior, the Court phrased the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . ." *Bowers*, 478 U.S. at 190.

84. The district court, apparently relying on the language of the regulation and without any supporting evidence, makes the conclusory statement "that allowing admitted homosexuals to serve alongside heterosexual members and officers in the Armed Forces would jeopardize morale, discipline and the system of rank and command." *Steffan v. Cheney*, 780 F. Supp. 1, 12

The D.C. Circuit determined that this was not a sufficient purpose to justify the regulation for two reasons: (1) the Navy's asserted purpose is contradictory with the plain language of its regulation and (2) the Navy's purpose is based on an invalid presumption.⁸⁵

The Navy asserted that its regulation was intended to prevent homosexual conduct.⁸⁶ Since the Navy presumed that all homosexual servicemembers desire or intend to engage in homosexual conduct, it reasoned that servicemembers who have only a propensity to engage in such conduct should receive the same treatment—separation—as those who actually do.⁸⁷ The D.C. Circuit concluded that this argument was insincere, because such an argument is contrary to the plain language of the regulation.⁸⁸ While the Navy maintained that the regulation results in equal treatment for cases involving homosexual conduct as compared to homosexual status, the court determined that the regulation treats status differently.⁸⁹ Consequently, such a contradictory purpose does not justify the regulation.

(D.D.C. 1991), *rev'd sub nom.* Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994). In oral arguments before the court, the Navy described a person who admits their homosexual orientation, but does not engage in homosexual activity, as a "celibate homosexual." Steffan v. Aspin, 8 F.3d at 64. These people would not be discharged under the regulation. *Id.* This label may have derived from the district court's use of the words "non-practicing homosexuals." See Steffan v. Cheney, 780 F. Supp. at 10. The district court failed to explain what characteristics make a person a "non-practicing homosexual." The absurdity of the this phrase is obvious. Does a non-practicing homosexual mean only that the person does not engage in homosexual sex, or that the person does not have any homosexual orientations, and is thus now acting as a heterosexual?

85. Steffan v. Aspin, 8 F.3d at 64.

86. *Id.*

87. *Id.* The district court found that such a presumption was reasonable and warranted the military's regulation. Steffan v. Cheney, 780 F. Supp. at 12-13. "Unless it can be shown that the plaintiff 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." *Id.* at 13. The district court went even further by saying that if homosexuals are ever to be accepted in society, it should come through "moral choices of the people and their elected representatives, not through the ukase of this court." *Id.* at 13 (citing Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984)). Many prejudices are based on moral convictions, and for the most part biases against homosexuals would be included in this type of prejudice. However, a court should not shirk its social responsibility when such a prejudice serves no real purpose. In *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954), the U.S. Supreme Court did not wait for elected representatives to remedy the segregation of public schools. Likewise, the district court should have taken steps to remedy the Navy's discrimination against homosexuals.

88. Steffan v. Aspin, 8 F.3d at 64.

89. *Id.*

[B]oth c(1) and c(2) are aimed at the same thing: homosexual orientation. Whether the servicemember has engaged in homosexual conduct or has stated that he is a homosexual, he can escape dismissal by showing that he is a heterosexual. But he can never escape dismissal, once he truthfully admits his orientation or his conduct, if he "desires" to engage in homosexual acts. The Directives thus attack status, not conduct; and the status they are after is defined only by one's thoughts.

The D.C. Circuit also attacked the presumption⁹⁰ underlying the asserted purpose, stating that the Navy's proposition "is hardly self-evident."⁹¹ In addition, the court rejected this presumption because of the ramification that a servicemember could be penalized without ever engaging in homosexual conduct.⁹² Moreover, the court explained that since our Constitution abhors the thought of the government controlling people's minds,⁹³ not even cases involving treason or violations of the Smith Act⁹⁴ allow convictions based solely on thoughts.⁹⁵

The court's reliance on the plain language of the regulation was well-founded. While a servicemember who engages in homosexual conduct can avoid separation by establishing that he or she is heterosexual, a servicemember who admits his or her homosexuality has no such opportunity. After an admission of homosexuality, a servicemember is practically precluded from denying their sexuality at a later time by presenting evidence to the contrary.

The D.C. Circuit's decision is not without fault. The Navy's presumption that homosexuals will desire or intend to engage in sexual conduct is valid, since it is reasonable to assume that a homosexual will desire to engage in sexual conduct just as much as a heterosexual. While the D.C. Circuit's determination that the Navy's presumption was false invites criticism, this analysis is not necessary to the court's rejection of the Navy's purpose for the regulation. The court could simply have granted the presumption and still renounced the regulation based on the Navy's unconstitutional attempt to regulate the thoughts of its servicemembers.

On its face, the court's comparison of homosexuals who desire to engage in sex to those who consider committing treason seems wildly unrelated, but in fact it makes an important point. It is a hallmark of

Id. at 65.

90. The Navy presumes that a person who admits their homosexuality also admits that they engage in, desire to engage in, or intend to engage in acts that are damaging to morale.

91. *Steffan v. Aspin*, 8 F.3d at 65.

92. *See id.*

93. *Id.* at 66 (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)).

94. Smith Act, 18 U.S.C. § 2385 (1988).

95. *Steffan v. Aspin*, 8 F.3d at 66.

constitutional law that the thoughts of individuals must not be restricted by government regulation.⁹⁶ Therefore, the Navy's attempt to restrict the thoughts of its members is contrary to the Constitution.⁹⁷

2. The Regulation Upholds Morale, Discipline, and Recruitment of Heterosexuals

The Navy so feared the mere presence of homosexuals, that a purported purpose of its regulation is to protect morale and discipline and aid in the recruitment of new members.⁹⁸ The district court considered this to be the key interest in upholding the regulation.⁹⁹ The Navy did not claim that homosexuals would have poor morale or discipline, only that heterosexuals "will be appalled at the requirement that they serve alongside homosexuals."¹⁰⁰ The D.C. Circuit noted that the same objections were made when the military was integrated in 1948.¹⁰¹ The court rejected this proffered reason and held that the "government may not disadvantage a person on the basis of his status or his views solely for the fear that others may be offended or angered by them;"¹⁰² however, it failed to adequately define the scope of its holding.

The simple retort to such fears is that the courts have consistently held that the prejudice of third parties cannot justify discrimination. In *Palmore v. Sidoti*,¹⁰³ the United States Supreme Court reversed a state court's child custody order that removed the child from her mother solely because the mother had remarried a black man. "The

96. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)).

97. *See id.* at 67. The court determined that, "the Secretary has accorded Mr. Steffan differential treatment solely because of his thoughts, as revealed by his truthful statement that he is a homosexual. We think this is repugnant to the various common law and constitutional principles that guard the sanctity of a person's thoughts against government control . . ." *Id.*

98. The regulation provides: "The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale . . ." 32 C.F.R. pt. 41, app. A, § 1.H.1.a (1993).

99. *Steffan v. Cheney*, 780 F.Supp. 1, 12 (D.D.C. 1991), *rev'd sub nom.* *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994). "Surely the government has a legitimate interest in good order and morale, the system of rank and command, and discipline in the Military Services . . . [W]e cannot say that these are not in fact legitimate interests, or that the regulations in question do not promote them." *Id.*

100. *Steffan v. Aspin*, 8 F.3d 57, 67 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

101. *Id.* at 67-68.

102. *Id.* at 68-69.

103. 466 U.S. 429 (1984). The D.C. Circuit also cited *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) noting that the rationale used in *Palmore* also extended to the "rational basis review" of the claim made in *Cleburne*. *But see supra* note 14 and accompanying text.

Constitution cannot control such prejudices but neither can it tolerate them."¹⁰⁴ Moreover, the D.C. Circuit drew the parallel between this type of equal protection claim and claims made under the First Amendment.¹⁰⁵ The court referred to the "heckler's veto" where a vocal group attempts to prevent the expression of disfavored view points.¹⁰⁶

No doubt many members of the military will harbor such inclinations. However, given that equal protection principles have not shielded homosexuals in the past, it was not readily apparent to the Navy that its argument lacked any merit. While the court makes sensible arguments, the bridge between these arguments and the court's conclusion is "hardly self-evident."

It is uncertain whether application of these principles to regulations that discriminate against homosexuals has a fundamental constitutional foundation. Although the end result of the court's holding is desirable, historically the conclusion it now reaches has never had a constitutional foundation. For instance, the First Amendment expresses a clear mandate that one cannot be silenced solely based on how a crowd will react. The prohibition against the "heckler's veto" has a constitutional foundation. However, the D.C. Circuit did not make it clear whether such a foundation exists to prohibit discrimination against homosexuals. In fact, the court went out of its way to state that Steffan's case was based on status, not conduct. Speech was involved when he admitted his homosexuality on a number of occasions, but this is only a truism. Steffan was discriminated against solely for who he was, not for what he said.

The court did state that a large umbrella exists against discriminating against a class solely because of the prejudice of others.¹⁰⁷ The court used *Palmore* and *Cleburne* to support this assertion, yet makes

104. *Palmore*, 466 U.S. at 433.

105. *Steffan v. Aspin*, 8 F.3d 57, 68 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir 1994). "The First Amendment forbids the government to silence speech based on the reaction of a hostile audience, unless there is a 'clear and present' danger of grave and imminent harm." *Id.*

106. *Id.*

107.

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

Steffan v. Aspin, 8 F.3d at 68.

the leap that this rationale applies equally to homosexuals. In essence, the court seems to be following the constitutional principles laid down in those cases,¹⁰⁸ even though these principles have never applied to homosexuals previously.¹⁰⁹ It is not exactly clear whether the court is now unequivocally holding that homosexuals cannot be discriminated against based on the prejudice of others. If this is the claim, the court's holding should have been much more explicit.¹¹⁰

The D.C. Circuit failed to address the Navy's claim that the regulation prevents problems with command structure. The district court, on the other hand, cited *Dronenburg v. Zech*¹¹¹ as a controlling case. In a patently inappropriate example, Judge Robert Bork attempted to illustrate the supposed danger of a homosexual using his rank to seduce lower ranking members.¹¹² This "danger" has absolutely nothing to do with homosexuality. If the word heterosexual were substituted into Judge Bork's example, the problem would be exactly the same. The danger he identifies is "fraternization"¹¹³ which should be punished regardless of whether a heterosexual or homosexual uses their rank to impose themselves on lower ranking members.

108. The court is using constitutional principles that have been reserved for suspect classes, fundamental rights, or classifications that receive heightened scrutiny. *See, e.g., Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (noting that the plaintiff failed to cite any cases that homosexuals constitute a suspect or quasi-suspect classification).

109. The rational basis test has been consistently applied to homosexual equal protection claims. *See, e.g., Meinhold v. United States Dept. of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Woodward v. United States Army*, 871 F.2d 1068 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984).

110. The court states that it is using the rational basis test to determine the constitutionality of the military's regulation. On the other hand, if the court finds an implied constitutional basis for prohibiting the discrimination, as it appears to be doing by examining *Palmore* and *Cleburne*, then it need not even reach the rational basis test. The court does not actually analyze whether moral, discipline, and recruitment provide a rational basis for the regulation. Instead the court merely states the regulation goes too far. *Steffan v. Aspin*, 8 F.3d at 67-69.

111. 741 F.2d 1388 (D.C. Cir. 1984).

112.

This very case illustrates dangers of the sort the Navy is entitled to consider: a 27 year old petty officer had repeated sexual relations with a 19 year old seaman recruit. The latter then chose to break off the relationship. Episodes of this sort are certain to be deleterious to morale and discipline, to call into question the even-handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and, it must be said, given the powers of military superiors over their inferiors, to enhance the possibility of homosexual seduction.

Id. at 1398.

113. UNIFORM CODE OF MILITARY JUSTICE art. 134, § 83 (Fraternization), 10 U.S.C. § 934 (1988). The offense of fraternization in the military is committed when an officer, warrant officer, or in some cases a non-commissioned officer fraternizes with enlisted members on terms of

3. The Regulation Upholds Privacy Interests of Servicemembers

The regulation excluding homosexuals states the presence of gays in the military invades the privacy of heterosexual servicemen.¹¹⁴ The D.C. Circuit observed that the regulation means either that gay servicemembers will look at heterosexuals in the shower or other less private quarters, or that heterosexuals will dread such staring.¹¹⁵ The court dismissed these concerns by first viewing them in the same manner as it did the presumption that one who is gay will engage in sexual acts.¹¹⁶ The court went on to say that this is also similar to giving "effect to the irrational fears and stereotypes of third parties" which *Palmore* and *Cleburne* foreclose.¹¹⁷

In addition, the court pointed to an apparent contradiction in the Navy's arguments. The Navy, during oral arguments, declared that a "celibate homosexual" could serve alongside heterosexuals without problems as long as they kept their thoughts to themselves.¹¹⁸ The court questioned how the regulation upholds privacy, when a homosexual might very well be showering next to a heterosexual.¹¹⁹

Though the court correctly concludes that privacy is not a solid basis for the regulation, its arguments are for the most part, less than persuasive. The court's conclusion that the *Palmore/Cleburne* rationale also forestalls using privacy as a legitimate purpose for the regulation can be viewed in the same light as discussed earlier. Again the court gives little constitutional basis for this assertion. If this is to be the clear rule as applied to homosexuals, the court should have put

military equality, to the prejudice of good order and discipline, or brings discredit upon the armed forces. *Id.*

114. 32 C.F.R. pt. 41, app. A, § 1.H.1.a (1993). "The presence of such members adversely affects the ability of the Military Services . . . , to facilitate assignments and worldwide deployment of servicemembers who frequently must live and work under close condition affording minimal privacy." *Id.*

115. *Steffan v. Aspin*, 8 F.3d 57, 69 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

116. "The argument that homosexuals will stare is very similar to the argument that they will engage in homosexual acts. Again, it equates thoughts and desires with propensity to engage in misconduct." *Id.*

117. *Id.*

118. *See supra* note 84 and accompanying text.

119. *Steffan v. Aspin*, 8 F.3d at 69. "[I]f the Navy is not concerned about heterosexual servicemembers perceiving an invasion of privacy from the presence of a 'celibate homosexual,' then the marginal increase in invasiveness from a homosexual who 'lusts in his heart' but does not intend conduct should be minimal." *Id.*

more emphasis on its importance. In an unspectacular manner, it settles for an eight word conclusion.¹²⁰ As to its final statement that the Navy makes an apparently contradictory claim, the court finally slammed the door on privacy as a basis for the regulation. Not only does it point out the poor "lawyering" of the Navy, but it firmly concludes that the regulation does not accomplish one of its stated purposes.¹²¹

Apparently, however, the D.C. Circuit failed to rebut both possible meanings of the Navy's articulated purpose.¹²² While the *Palmore/Cleburne* rationale prevents the fears of others that homosexuals will leer from being a valid purpose behind the regulation, the court did not attack the alternative meaning that homosexual servicemembers will actually stare at their heterosexual counterparts. To be sure, homosexuals may do that very thing. However, this presupposes that homosexuals will be sexually attracted to heterosexuals under any circumstance. Granted, a homosexual may be sexually attracted to a heterosexual as complete strangers, but it would seem that homosexuals are no more attracted to those they know are heterosexual, as heterosexuals are to those they know to be gay. Not to mention the fact that homosexuals surely find certain acquaintances unattractive just as heterosexuals do.¹²³ Furthermore, sexual leering is not sufficient conduct to justify the regulation. Nevertheless, when a servicemember acts upon his or her attractions, he or she should face the consequences of improper conduct.

A rationale raised in the district court, but not addressed by the D.C. Circuit was that the military separates men and women for privacy reasons.¹²⁴ Two striking flaws accompany this argument. First, this statement is not a valid comparison. The regulation makes no provisions for separating homosexuals and heterosexuals. Neither group has the option of living separately from the other; homosexuals are simply discharged.

120. "That argument is foreclosed by *Palmore* and *Cleburne*." *Steffan v. Aspin*, 8 F.3d at 69.

121. "Thus, even if the privacy rationale were legitimate in the abstract, these Directives plainly do not protect privacy." *Id.*

122. See *supra* note 115 and accompanying text.

123. It also seems ironic that women have complained about this very behavior from men with little change, but here, when men become the object of sexual leering, much is made of the seriousness of such behavior.

124. "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." *Steffan v. Cheney*, 780 F. Supp. 1, 13 (D.D.C. 1991), *rev'd sub nom.* *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir 1994).

Second, the policy of separating the sexes is based not only on the possible embarrassment of being naked in front of the opposite sex, or to avoid sexual conduct, but also the elementary physiological difference between men and women. Embarrassment cannot be a reason, since no such physiological difference exists between the same sex, and any prohibited sexual conduct should be punished regardless of whom it is.

The district court noted that "the most significant policy separating the sexes in the Navy is that which excludes women from combat."¹²⁵ This proposition clearly has no relevance to the discussion. First, the reasons for the policy excluding women from combat roles has nothing to do with excluding gays from the military in a strict sense. Second, even during the United States' most recent major military conflict, the Persian Gulf War, the military delayed the discharge of homosexuals until the completion of the war because of operational necessities.¹²⁶ Third, it holds even less weight now because on April 28, 1993, then Secretary of Defense Les Aspin announced that women would be allowed to take positions that are considered traditional combat roles.¹²⁷

B. *The Court Looks For Other Rationales*

After finding that none of the rationales proffered by the Navy provided a basis for the regulation, the D.C. Circuit tried to determine, on its own, if there were any other unmentioned rationales that could provide such a basis. The court observed that the district court had examined the fear of the spread of AIDS as one rationale. The district court took judicial notice of the fact that the vast majority of those who are HIV positive are homosexuals.¹²⁸ The court rejected this as a basis by stating that being homosexual does not in itself

125. *Id.* at 13 n.21.

126. Wade Lambert, *Gay GI's Told, Serve Now, Face Discharge Later*, WALL ST. J., Jan. 24, 1991, at B1.

127. Aspin's order allows women for example to fly combat aircraft, serve in air-defense units and aboard combat vessels. As recently as March 1994, the first of 500 women were assigned to the aircraft carrier U.S.S. Eisenhower. *60 Women Assigned to Carrier Are First for a Navy Combat Ship*, WASH. POST, March 7, 1994, at A4.

128. The district court relied on statistics from the Centers for Disease Control which, at the time, stated "that of the AIDS cases reported through August 1991, 59% of all adults and adolescents were exposed because they were men who had sex with other men." *Steffan v. Cheney*, 780 F. Supp. at 15. More recently, total adult/adolescent AIDS cases caused by men having sex with men has dropped from 53% from October 1991-September 1992, to 48% from October 1992-September 1993. CDC Report, *Surveillance Report HIV/AIDS*, Third Quarter Ed. (Oct. 1993).

spread AIDS.¹²⁹ However, on a more basic level, the D.C. Circuit did not even address how the district court could find that preventing the spread of AIDS provides a basis for excluding homosexuals.¹³⁰ Nowhere does the regulation state that one of its purposes is to alleviate such a risk and it would be unreasonable to imply that such a purpose was at issue when the regulation was first adopted.

The D.C. Circuit also considered the potential susceptibility of homosexuals to blackmail.¹³¹ The court quickly pointed out that if there is a danger here, the regulation itself is to blame.¹³² "The gay ban raises the stake of silence enormously, and gives potential blackmailers leverage they would not otherwise have."¹³³

C. *The D.C. Circuit's Holding*

With that, the court finally concluded that the Navy's regulation caused Steffan to resign solely because he was gay.¹³⁴ Finding no rational basis for the regulation, the court held that Steffan's right to equal protection under the Fifth Amendment's Due Process Clause was violated.¹³⁵ The court ordered that the Navy award him his diploma from the Naval Academy and to commission him as an officer.¹³⁶ However, on January 7, 1994, the court voted to rehear the entire case sitting *en banc*. The order granted to Steffan was immediately vacated.¹³⁷

129. "Homosexual *orientation* cannot spread the AIDS virus. Homosexual or heterosexual, *conduct* can - then only if one of the participants carries the AIDS virus." *Steffan v. Aspin*, 8 F.3d 57, 69 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

130. The district court argued "the defendant's policy of excluding homosexuals is rational in that it is directed, in part, at preventing those who are at the greatest risk of dying of AIDS from serving in the Navy and the other armed services." *Steffan v. Cheney*, 780 F. Supp. at 16.

131. The court mentions that the regulation alludes to such a threat. *Steffan v. Aspin*, 8 F.3d at 69. "The presence of such members adversely affects the ability of the Military Services to . . . prevent breaches of security." 32 C.F.R. pt. 41, app. A, § 1.H.1.a (1993).

132. "[T]he military's policy only *increases* the risk of blackmail by making gays and lesbians remain in the closet for fear of forfeiting their careers." *Steffan v. Aspin*, 8 F.3d at 69. (citing *Watkins v. United States Army*, 875 F.2d 699, 730-31 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990)).

133. *Id.*

134. *Id.* at 70.

135. *Id.*

136. *Steffan v. Aspin*, 8 F.3d at 70.

137. *Id.*

V. STRICT SCRUTINY ANALYSIS SHOULD APPLY TO HOMOSEXUALS

It is imperative that homosexuals be accorded suspect class status so as to qualify for strict scrutiny under equal protection claims. Although the *Steffan* court initially found the regulation could not hold up against the rational basis test, satisfying this test does not impose a great burden on the Navy. As a result, it is possible that the Navy will provide a "legitimate" purpose for its regulation when the D.C. Circuit rehears the case *en banc*. Regardless of whether the Navy can now create a legitimate purpose, the court should apply a more rigid standard of review. It is important that the court take the first step in ruling that laws which discriminate based on sexual orientation be subject to strict scrutiny by classifying homosexuals as a suspect class.¹³⁸ Accordingly, the Navy's regulation must be necessary to promote a compelling governmental interest and must be the least restrictive alternative before it will be deemed constitutional.

A. *Homosexuals as a Suspect Class*

Courts have looked to a number of factors to determine whether a group should be classified as a suspect class.¹³⁹ The factors are primarily, (1) a history of discrimination, (2) the particularly malicious nature of the discrimination, and (3) the political power of the group.¹⁴⁰

B. *History of Discrimination*

As a group, it is difficult to argue that homosexuals have not been the target of sustained discrimination. However, not only must there be discrimination, but there must also be a long history of discrimination that is invidious in nature. In one case, the military even conceded such a position.¹⁴¹ In sum, discrimination against homosexuals has been extensive throughout public and private sectors, legislative bodies, employment, housing, and religion.¹⁴²

138. In fact, the court may be much closer to taking this step than it realizes, since its decision was justified, in part, by constitutional principles reserved for equal protection challenges that do not receive ordinary rational basis review. See *supra* note 103 and accompanying text.

139. See *Bowen v. Gilliard*, 483 U.S. 587 (1987).

140. *Id.* at 602.

141. See *Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989), *cert. denied* 498 U.S. 957 (1990).

142. "[D]iscrimination faced by homosexuals is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin." *Id.*

C. *Discrimination of a Particularly Malicious Nature*

As to the malicious and invidious nature of the discrimination, courts often focus on immutable characteristics of the group.¹⁴³ An immutable trait may be described as those "that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."¹⁴⁴ The *Steffan* court did not reach whether homosexuality is an immutable trait. However, the *Watkins* court had "no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine."¹⁴⁵ It is true that scientific evidence is not absolutely conclusive, but the increasing amount of evidence suggests that sexual orientation is not derived by choice.¹⁴⁶ Yet, the Supreme Court has never required that an immutable trait be completely unalterable.¹⁴⁷ In fact, the possibility of such a change does not make the trait mutable.¹⁴⁸

D. *Political Power of Homosexuals*

Strict scrutiny accords protection to certain classes because they lack meaningful power in the political process. The district court declared that homosexuals have a great deal of political power since they have brought the national spotlight on the problem of AIDS.¹⁴⁹ In addition, the district court noted that a number of cities have passed anti-discrimination ordinances concerning homosexuals.¹⁵⁰ Equally important, the court states that there are openly gay members of Congress.¹⁵¹ In fact the district court went on to compare the number of

143. In practice, this qualification had rested on race or national origin. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Korematsu v. United States*, 323 U.S. 214 (1944).

144. *Watkins*, 875 F.2d at 726.

145. *Id.* But see *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (characterizing homosexuality as primarily behavioral).

146. See, e.g., Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexuals and Homosexual Men*, 253 *Sci.* 1034 (1991); Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 *ARCHIVES GEN. PSYCHIATRY* 1089 (1991).

147. Cf. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503 (1994) (characterizing arguments over biological causation of homosexuality as irrelevant, since immutability does not require an individual to be born with the trait).

148. For example, "[p]eople can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed." *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

149. *Steffan v. Cheney*, 780 F.Supp. 1, 8 n.14 (D.D.C. 1991), *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

150. *Id.* at n.15.

151. *Id.* at 9.

openly gay congressmen to the number of doctors who are congressmen, to make the point that although there are very few of both, doctors have great political power, and consequently so must gays.¹⁵²

Meeting this requirement should be far less important. The most striking point about the element is that it is obvious that determining when a class has crossed that magical line of having political power is difficult. The three arguments proffered by the district court in no way show that gays have meaningful political power. The fact that homosexuals have brought the AIDS crisis into the public spotlight shows only that homosexuals can be vocal when need be. Moreover, it is reasonable to assume that the group that has suffered the most from the disease would necessarily be the ones to bring their plight to the public eye. The fact that a few cities have enacted anti-discrimination ordinances shows only that some municipalities recognize that one's sexual orientation has nothing to do with one's ability to be a productive member of society.¹⁵³

Finally, it is erroneous to say that because few doctor/congressmen have political power, that the openly gay congressmen provide equal political power to homosexuals in general. The district court ignored the reality of the situation. Counting congressmen is not necessarily an appropriate measuring stick of political power; not to mention that getting the attention of a congressman, thus gaining political power, is difficult without a strong lobby.¹⁵⁴ Granted, homosexuals are gaining political power, but regardless where that magical line that a class finally has real power is drawn, it seems hard to argue that homosexuals have any significant power today.

152. *Id.*

153. In *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 377-78 (8th Cir. 1990) (Canby, J., dissenting from denial of reh'g en banc) the dissent noted that isolated anti-discrimination ordinances do not deprive homosexuals of the status of a suspect classification. The dissent also questioned how any other conclusion could be made. The dissent pointed out that blacks are a suspect class, but "are protected by three federal constitutional amendments, major federal Civil Rights Act[s] . . . , as well as antidiscrimination laws in 48 of the states. By that comparison, and by absolute standards as well, homosexuals are politically powerless." *Id.* at 378.

154. "Certainly homosexuals as a class wield less political power than blacks, a suspect classification, or women, a quasi-suspect one. One can easily find examples of major political parties' openly tailoring their position to appeal to black voters, and to female voters. One cannot find comparable examples of appeals to homosexual voters; homosexuals are regarded by the national parties as political pariahs." *Id.*

VI. CONCLUSION

When President Bill Clinton announced his new "Don't ask, don't tell, don't pursue" policy on gays in the military,¹⁵⁵ it was a serious step back from his 1992 campaign pledge to remove the ban on homosexuals from the military. The policy was seen as a compromise between a new president with little military experience and obstinate military leadership. Calling his policy "a real step forward,"¹⁵⁶ the President actually misrepresented an element of the policy¹⁵⁷ and imposed a presumption that the *Steffan* court specifically refused to accept.¹⁵⁸

President Truman, against equally firm opposition, ordered that the military be fully integrated. Time has proven his decision correct. Blacks have made tremendous strides in the military, not to mention that Colin Powell held the Chairman of the Joint Chiefs of Staff position under two administrations, and played an integral role in leading our forces to victory in the Persian Gulf. If President Clinton is unwilling to make such an order fully integrating homosexuals into the military, then the courts must step forward to activate such a process.

The military's ban on homosexuals is not only irrational, but may even have the effect of depriving this country of valuable servicemen and leaders. Had any of the leaders mentioned in the introduction been gay, and the military known about it, men who survived World War II may have died, the Confederate Army may have never given such a valiant fight against insurmountable odds, young blacks may not have had such a great role model, and Japan may not have become a booming capitalistic country. While each of these is admittedly far-fetched, the military's justification for its regulation is equally far-fetched. The *Steffan* court must not only declare the military's policy unconstitutional, but it must also find that strict scrutiny should be applied to equal protection claims made by homosexuals.

155. President's Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WEEKLY COMP. PRES. DOC. 1369-73 (July 19, 1993).

156. *Id.* at 1369.

157. "One, service men and women will be judged based on their conduct, not their sexual orientation." *Id.* at 1372. This is not true. Homosexuals will be judged on their conduct up until the day they are discovered to be homosexual—then they will be discharged.

158. "Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption." *Id.* This element does not alter the present regulation in any way, as one who admits homosexuality "may" already introduce evidence that they really are not homosexual. *But see supra* note 89.

America's hallmark has been to judge people by what they do, and not by who they are. Just as Mr. Steffan won his Battalion Commander ranking by his conduct, so must he be judged by his conduct. It is fundamentally unjust to abort a most promising military career solely because of a truthful confession of a sexual preference different from that of the majority, a preference untarnished by even a scintilla of misconduct.¹⁵⁹

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159. *Steffan v. Aspin*, 8 F.3d 57, 70 (D.C.Cir. 1993), *vacated and reh'g in banc granted*, 8 F.3d 70 (D.C. Cir. 1994).

