

Military ban loses again in court

A federal judge secures the right of six servicemembers to challenge the ban without reprisal

by Bob Roehr

U.S. District Court Judge Eugene Nickerson issued a preliminary injunction prohibiting the Pentagon from taking any action toward investigating or discharging six service members mounting the first legal challenge to the "new" discriminatory military policy of "don't ask, don't tell" which took effect Feb. 28.

The ruling came April 4, in Brooklyn, in the case of *Able vs. USA*. The plaintiffs in *Able* are two active-duty and four reserve members of various branches of the military services. They maintain the policy is unconstitutional, violating their rights of free speech under the First Amendment and of equal protection under the Fifth Amendment.

"The court holds that plaintiffs have established serious questions going to the merits," wrote Nickerson in his highly detailed 25-page injunction order. "The court does not prejudge the merits. But the evidence presented in other courts casts doubt on the extent of any harm to be anticipated from the presence of homosexuals in the military."

The Act under challenge, passed by Congress last fall, prohibits service for a person who engages, attempts to engage, has a propensity to engage, or intends to engage, in homosexual acts. It "creates a rebuttable presumption" that a person who has stated that he or she is homosexual will engage in such prohibited action.

Nickerson was dubious in his evaluation of this argument by the government: "Neither the Act nor the Directives suggest how one who is born with an innate tendency, a 'propensity,' to commit a homosexual act can prove that he or she does not have such a propensity. To invite someone to prove that he or she does not have an inborn tendency seems like a hollow offer."

He countered the government's arguments that the policy affects only conduct and not orientation: "The fact that the officials implementing the policy are directed not to ask service members 'to reveal their sexual orientation' shows that the Act is really concerned not so much with 'conduct' but with the attitudes of others when they learn of statements of homosexual orientation."

He directly negated the government's assertion that the "new" policy represents a departure from the old: "The allegedly new policy makes the same distinction between homosexuals and heterosexuals as did the prior policy."

One important theme of Nickerson's order was the importance of plaintiff's freedom of speech, to speak of homosexuality, in order to have access to the courts and pursue their constitutional challenge. He wrote, "This court holds that there is a serious question as to whether a regulation goes beyond what is reasonably necessary to protect any possible government interest when it inhibits six service members from continuing to speak in court to make a constitutional challenge."

To Nickerson, the balance of hardship clearly fell hardest upon damage the plaintiffs would suffer

should they be discharged or inhibited from making their case. He downplayed the government's assertion of disruption to "good order" and "unit cohesion" in the military. "The preservation of rights of free speech and equal protection seems to this court quite as much in the public interest as a claim that the pursuit of this lawsuit by six plaintiffs constitutes a serious threat to the military integrity of the armed forces," Nickerson stated.

However, he made clear that the injunction only applied to the six plaintiffs. "Were this a class action

suit affecting all homosexuals in the services the balance of hardship analysis might be different."

This seemed to be a signal by Nickerson that he would not view favorably any attempt to expand the case by adding plaintiffs or by expanding it to a class action suit. He was clearly aware of the broader injunction issued by U.S. Circuit Judge Terry Hatter in the Keith Meinhold case. That injunction was subsequently cut back on appeal by a higher court, so that it ap-

plied only to Meinhold and not all military personnel.

The parties will be back in court April 15 to argue on an earlier government motion to dismiss the case. In light of the injunction there is virtually no chance of dismissal. Arguments on the merits of the case will come at a later date.

This is believed to be the first written injunction that the long-sitting Carter appointee has issued. Nickerson does not have a reputation as a judicial activist.

"It indicates that the court has an understanding of the way this policy actually punishes identity and speech in the guise of punishing behavior or conduct," said Beatrice Dohrn, legal director of the Lambda Legal Defense and Education Fund, part of the legal representation on this case.

Pending cases

Other pending challenges to the military ban include:

Joseph Steffan: A favorable panel decision from the D.C. Circuit Court was vacated and the appeal will be reheard *en banc* by the entire circuit. Oral arguments are scheduled for May 11.

Keith Meinhold: He is awaiting a decision from a three-member appeals panel in the 9th U.S. Circuit Court in California. Oral arguments were heard in December, a decision could come at any time.

Tracy Thorne: The Navy returned him to active duty under the old regulations but, according to his attorney, notified Thorne that they will soon begin to process him for discharge under the new regulations. Litigation seems likely.

Dirk Sellin: He and the Pentagon mutually agreed to drop the suit and injunction under the old regulations, with the understanding that the Navy will eventually move to discharge him under the new regulations. They will be back in court.

Justin Elzie: He continues to serve on active duty at Camp Lejeune under a court ordered injunction under the old regulations.



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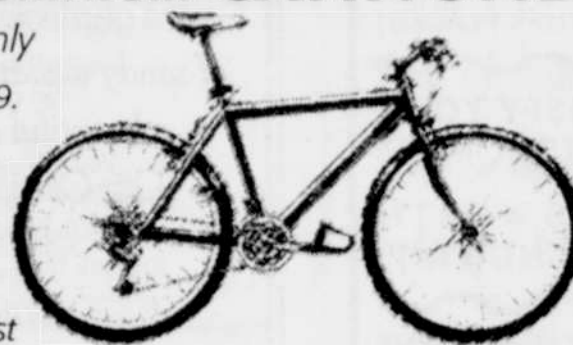
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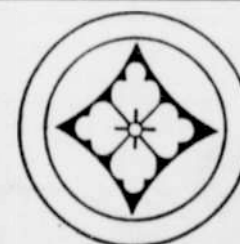


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