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national news

Steffan loses, Meinhold wins

*Conflicting decisions leave military ban
up to each individual court*

by Bob Roehr

Conflicting decisions in the Steffan and Meinhold legal challenges to the ban on gay men and lesbians openly serving in the military apparently will be allowed to stand. The issue seems unlikely to go before the Supreme Court at this time.

The U.S. Court of Appeals for the District of Columbia circuit upheld the expulsion of Midshipman Joseph Steffan from the U.S. Naval Academy in 1987 for saying that he was homosexual.

The 7-3 decision, released Nov. 22, showed a sharply divided court. Writing for the majority, conservative Judge Lawrence Silberman tartly ruled against Steffan on the merits before taking the unusual step of then ruling that Steffan in fact had no status to even bring the case.

Silberman's decision twice very pointedly derided the 9th Circuit decision on Meinhold, both in its text and in caustic footnotes.

"The Meinhold court also did not consider the rationality of treating all persons who identify themselves as homosexuals as likely violators of the prohibition on homosexual conduct," wrote Silberman.

"The 9th Circuit, rather astoundingly in our view, rejected the exhaustion argument...this sort of reasoning would destroy the exhaustion-of-remedies doctrine.... [It is] an extraordinary reversal of the role of an appellate court."

The language seemed as if he were goading his colleagues: spotlighting disagreements and virtually challenging the parties to take the Steffan and Meinhold cases to the Supreme Court to resolve the differences.

"We were particularly disappointed with the vehemence [of the language]," said Beatrice Dohrn, legal director with the Lambda Legal Defense and Education Fund, which assisted in Steffan's defense. She called many of Silberman's arguments circular.

"It is not unusual for Silberman to write in this kind of inflammatory style," said Michele Benecke, co-director of the Servicemembers Legal Defense Network.

"It would be far more credible if he did not resort to such outbursts," she continued. "They point to what I contend is the basis for the opinion, which is more a certain ideological stance rather than the facts of law. It certainly is an ideologically driven opinion."

Steffan himself was not commenting. He is now an officer of the federal court system, clerking for a judge in Newark, N.J. His lead attorney, Marc Wolinsky, said they would thoroughly review the case before making a decision as to whether or not to appeal to the Supreme Court.

Dohrn asked, "As time gets further away and he [Steffan] gets more involved in his career, should he fight this forever or say enough is enough?"

Benecke pointed out that "[S]ome of the newer cases have a better factual record, in large part because of information developed since Steffan filed his case."

Keith Meinhold, on the other hand, solidified his victory when the Justice Department announced at a press conference Nov. 28 that it would not appeal to the Supreme Court his favorable decision in the 9th Circuit Court. The decision was reportedly made by Solicitor General Drew Days.

The Clinton administration itself has long been divided on the entire subject of gay men and lesbians in the military. The Department of Justice, and Days in particular, would like to drop the matter entirely and allow sexual minorities to serve. The Pentagon has taken a hard-line position in opposition to service.

Similar past conflicts had been resolved in the

White House to the benefit of the military. One can only speculate on the role played by the new presidential legal advisor, Abner Mikva, in deciding this round.

Mikva was Chief Judge of the D.C. court, and wrote the decision of the three-member panel which last found (in December 1993) in Steffan's favor, ruling the discrimination against him was unconstitutional. It was a strongly worded, moving opinion, that was immediately vacated by the conservative majority in the en banc review.

Meinhold's attorney, John Maguire, wel-

comed the Justice Department's decision. However, he said it reflected not a change in heart by the Clinton administration but "a change in strategy which is no more or less gay-friendly than the previous strategy. They want to put all of their eggs in the new policy basket."

He said, "The fact that they are abandoning Meinhold, I think, is more a reflection of the fact that they just figure, why fight an old policy we are not interested in defending anymore."

On Nov. 21 Meinhold had been before Judge Terrence Hatter for the issuing of a final order in his case. The government wanted Hatter to limit the order to the old policy. Maguire argued that the 9th Circuit decision "didn't distinguish between the old and the new policies." Hatter concurred and left the wording ambiguous, not explicitly referring to either policy.

"Now that the order is uncertain, the government risks the chance of being in contempt of court if it takes action against Meinhold under the new policy," Maguire said.

The Navy has already warned Meinhold he could face new discharge proceedings if he publicly states he is gay. "It's like, I'm going to pretend you didn't say that, just don't say it again," commented Maguire. "It is the theater of the absurd."



Joseph Steffan