Try it again

"Don't ask, don't tell" is on appeal in Manhattan

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by Bob Roehr

The Clinton administration was back in court Jan. 16 defending "don't ask, don't tell," the policy that bans gay men and lesbians from serving openly in the military. Last March, after a three-day trial of *Able vs. USA*, a district court judge ruled the policy unconstitutional because it restricted the free speech and equal protection of homosexuals.

The government was challenging that decision before a three-member panel of the 2nd U.S. Circuit Court of Appeals, which sits in Manhattan. The hearing had originally been scheduled for December but was postponed when one of the judges withdrew over a possible conflict of interest.

Deputy Solicitor General Edwin Kneedler, the second-ranking litigator in the Department of Justice, argued that Article I grants broad latitude "within the constitutional framework" to provide for the common defense. The court traditionally grants "great deference" both to Congress and to the military in implementing that mandate.

"The district court had failed to respect the balance [of competing interests] that Congress had struck" in crafting the "don't ask, don't tell" policy, said Kneedler.

Judge Pierre N. Leval, a Clinton appointee, was concerned that a statement alone is enough to boot someone from the military because it indicates a "propensity" to engage in "prohibited [homosexual] acts."

Leval wondered whether the scrutiny of speech would extend to statements a service member had made in the past, say, at the age of 15.

"Does that go back for all time?" he asked.

Kneedler responded, "I don't think the policy would categorically rule it out," but advised that "distance in time would be a factor."

Leval expressed concern for the "chilling effect" on speech "far beyond the borders of the military." He asked if it would apply forever, even after a member has left the service.

That is "yet unanswered," Kneedler replied. There is "no official policy decision at this point."

Judge John M. Walker Jr., a Bush appointee and cousin, thought the "reasoning [for the policy was] grounded in the prejudice of heterosexuals. Is that the rationale?" he asked.

Kneedler said he fundamentally disagreed. He said that Congress had thoroughly examined the issue and had based the law on concerns for privacy that would "undermine unit cohesion" and prohibit homosexual acts.

He spoke of integrating women into the military as a parallel. In that situation, the military "solve[d] the problem of sexual tension" by keeping the genders apart.

Kneedler also argued that the "district court was in error in even entering the case," because there was no discharge. The court should have waited until administrative remedies within the military had been exhausted. He called the case "a very abstract challenge to the prohibition."

However, when pressed by the judges, he admitted that military courts could entertain only procedural challenges to the policy, not the constitutional ones that are the basis for this suit.

Matthew Coles, director of the Lesbian and Gay Rights Project at the American Civil Liberties Union, argued for the plaintiffs. He said the policy was meant "to prevent communication."

"The military is saying, we are going to shut them up—always and forever," he said.

Judge Walker raised the hypothetical parallel of a white supremacist in the military who said he wished to see all blacks dead. Could the Pentagon not separate him from the military?

"If he said, 'I am a racist,' there would be no action," Coles replied. "But if he moved [beyond speech] to actions, they would apply general conduct regulations." They would have to evaluate "on a case by case basis." He called the "don't ask, don't tell" policy unique.

Coles reminded the court that the military "does not claim gays and lesbians are any more likely to violate" sexual prohibitions within the Uniform Code of Military Justice.

He attacked the "sexual tension" argument by saying that separation of men and women really isn't a parallel to homosexuals and heterosexuals. He readily conceded that society does separate men and women, and that the military apes these patterns. But "cultural separation [of homosexuals] does not exist within our broader society." Therefore, he concluded, there is no need for it in the military.

Walker returned to the issue of deference to Congress and the military. "Why should judges inject themselves into this?" he asked.

Coles replied, "If we say there is no judicial role, then we should give up the principle that people in the military have any constitutional rights at all."

Kneedler came back for a brief rebuttal period. He reminded the court that it had been the military itself that had moved to desegregate the armed forces, not the courts.

Judge Wilfred Feinberg, a Johnson appointee and former chief judge of the circuit, asked, "If the military changed its mind today and decided to have a racially segregated force, would the court stay out?"

Kneedler conceded, "I would think not."

Judge Leval listed many activities, such as going to a gay bar or marching in a gay rights parade, that would be allowed under the regulations. "But it [the military] only moves against the one who says, 'I am gay.' "

Kneedler described the policy as "an accommodation" to the privacy of homosexuals and heterosexuals, and the needs of the military.

Judge Walker asked, "What is the justification for prohibiting sexual acts far beyond those of heterosexuals, such as hand holding?"

For Kneedler it was the threatened privacy, the "ripple effect of heightened anxiety" of heterosexuals.

After oral arguments, Michele Benecke, co-director of the Servicemembers Legal Defense Network, called the policy "a gag order" on lesbians and gay men. She compared it to sexual harassment of women both in and outside of the military.

"It is the most astounding case of blaming the victim that I've ever heard," Benecke said.

Beatrice Dohrn, co-council on the Able case and legal director with the Lambda Legal Defense and Education Fund, summarized the main objective of the case: "We want to be able to serve under the same set of rules that everyone else serves under."

Most observers believe the 2nd Circuit will uphold the earlier decision ruling "don't ask, don't tell" unconstitutional. Its decision is not expected until the spring. A decision in the other lead challenge to the ban, the 4th U.S. Circuit Court appeal of *Thomasson vs. Perry*, is expected sooner, possibly as early as February.