

Don't ask, discharge

Appeals court backs the "new" military ban on queers, while some of the judges say it doesn't go far enough

by Bob Roehr

Don't ask, don't tell" was upheld by the highest court to date, the 4th U.S. Circuit Court of Appeals sitting in Richmond, Va. In a decision in *Thomasson vs. Perry*, released April 5, the 9-4 majority cited "separation of powers" in accepting as constitutional the "new" ban against gay men and lesbians in the military.

Lt. Paul G. Thomasson, a pilot of 10 years service, was dismissed from the U.S. Navy when he wrote his commanders a letter saying, "I am gay." His legal challenge to the "don't ask, don't tell" policy has sped its way through lower courts and seems likely headed for the U.S. Supreme Court next fall.

The majority opinion, written by Judge J. Harvie Wilkinson III, called the policy "a carefully crafted national political compromise" by the executive and legislative branches of government: "Such products of the democratic process are seldom completely tidy or universally satisfactory, but it is precisely on that account that they deserve judicial respect."

Wilkinson wrote, "The courts were not created to award by judicial decree what was not achievable by political consensus.... To overturn those solutions in the absence of a clear constitutional mandate would transform the judiciary into an instrument of disenfranchisement for all who use the political process to register the democratic will."

A central issue in oral arguments was whether Thomasson's statement carried with it the "presumption" that he would commit homosexual acts, and whether he had "rebutted" that presumption.

Wilkinson called the presumption "logical." He wrote, "It is also legitimate for the government to seek to forestall these same dangers [to unit cohesion] by trying to prevent the commission of such acts."

He looked at Thomasson's refusal to rebut the presumption, and the Navy's offering of no other evidence that Thomasson engaged in prohibited conduct, and concluded that the lieutenant "did not demonstrate that he lacked a propensity to engage in homosexual acts."

He dismissed the First Amendment challenge to freedom of speech "because the statute aims at this propensity, not at speech, it is not a viewpoint-based or content-based regulation."

Six members of the majority argued that the regulations written by the Pentagon to implement the Act of Congress were themselves illegal because they allow some homosexuals to continue to serve in the military in "what is in effect a sanctuary for known homosexuals."

The judges would "simply invalidate" the regulations "as in excess of statutory authority." It is a position argued by the conservative Family Research Council in its amicus brief to the case.

Judge J. Michael Luttig concurred: "That regu-

lation redefines the statutory terms 'propensity' so that only those homosexual service members who are likely to engage in homosexual acts will be discharged. Through this regulation the administration has effectively secured the very policy regarding military service by homosexuals it was denied by the Congress."

Four members of the court vehemently disagreed with the majority in an opinion penned by Judge Kenneth K. Hall. He acknowledged deference to the other two branches of government but pointed as well to "our duty to defend the Constitution against the trespasses of those branches, no matter how carefully or pedantically they be constructed, and notwithstanding their popularity. The Founders gave us lifetime tenure to assure that we would not shrink from that duty."

"We have a role—a vital one—in ensuring that the military remain submissive to the Constitution and civil authority," wrote Hall. "While I will defer, as I ought and must, to the professional judgment of military commanders on things military, I may never

defer to their judgment on things constitutional."

He focused upon the facts of the case before them: "a real homosexual [Lt. Thomasson], a real unit, and hence a real test of the 'unit cohesion' hypothesis." And he concluded that the presence of this particular acknowledged homosexual was not a threat to that unit cohesion.

"The actual experience in Thomasson's unit should not surprise us. The ability of the American soldier to put duty before prejudice has been tested before."

Hall wrote, "Unit cohesion" is a facile way for the ins to put a patina of rationality on their efforts to exclude the outs."

He called the policy unconstitutional in its "presumption that everyone will fail to comply with rules of conduct.... A presumption of misconduct from a person's status, or even from his private prejudices, does not comport with due process.... In America, we presume that individuals obey the rules until they prove otherwise."

He concluded: "Lt. Paul Thomasson's career is over because it is presumed that he will misbehave in a manner that is assumed to incite the prejudices of his colleagues, who it is speculated will abandon their duties to defend the United States rather than tolerate him in their midst. There is not proof of any of these hypotheses in the record, and there is abundant disproof."

Thomasson reacted to the decision with disappointment but not surprise: "Someday the ideal of equal justice under law will be a reality in America for gays and lesbians. That day may not come tomorrow, but it will come."

He has 90 days in which to appeal the case to the U.S. Supreme Court. During that time he and his attorney will likely consult with others involved with challenges to "don't ask, don't tell" in the 2nd and 9th circuits.



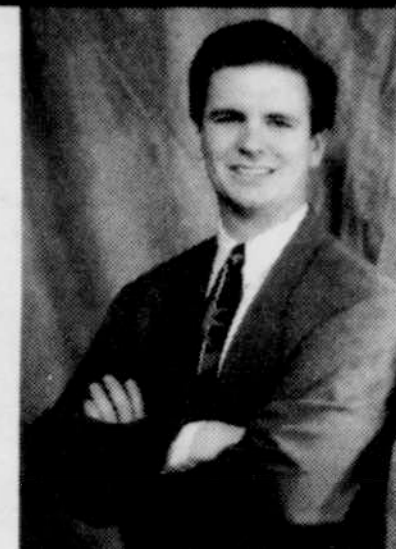
Lt. Paul Thomasson

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