

NATIONAL news

OVER THE LINE

A judge rules that the Navy went too far in seeking to dismiss a sailor based on an AOL profile by Bob Roehr

U.S. District Judge Stanley Sporkin said Jan. 26 the Navy "embarked on a search and 'outing' mission" in ordering the dismissal of Senior Petty Officer Timothy R. McVeigh, who was accused of homosexuality based on information obtained from America Online.

Sporkin issued a preliminary injunction, ruling that McVeigh should remain on active duty pending the final outcome of the case, which has McVeigh contending that the Navy violated the "don't ask, don't tell" policy on gay men and lesbians in the military as well as a federal electronic privacy law. Three days later, Sporkin made permanent his preliminary injunction. The Navy plans to appeal.

"This court finds that the Navy has gone too far," Sporkin wrote in his 15-page decision. "Although Officer McVeigh did not publicly announce his sexual orientation, the Navy nonetheless impermissibly embarked on a search and 'outing' mission."

The Navy is trying to kick out McVeigh, a 17-year-veteran, because an America Online profile has the word "gay" in it.

According to The Associated Press, McVeigh wound up in hot water last fall when the Navy found a "profile page" posted on America Online "in which a 'Tim' from Honolulu described himself as gay and expressed a sexual interest in young men. A Navy investigator called AOL anonymously and obtained the author's full name, a disclosure AOL later said it regretted and was a violation of its own confidentiality policies."

Christopher Wolf, McVeigh's lawyer, says his client has demonstrated "superior leadership" and "the core Navy values that guarantee success."

Wolf read those words during a Jan. 21 court proceeding before Sporkin. His source? A September fitness report written by McVeigh's commanding officer, who was assessing the sailor's performance.

Wolf also argued that McVeigh never stated publicly he was gay and thus the Navy had no right to ask about his sexual orientation. Wolf also says the Navy violated the 1986 Electronic Communications Privacy Act by obtaining information without a warrant or court order.

Sporkin, 65, is a Reagan appointee with a reputation for even-handedness. During the Jan. 21 proceeding he seemed unfamiliar with the fluid nature of online profiles.

As regular America Online users know, each account may have up to five different profiles, which may be fact, fantasy or a mix of the two. Merely because something has been keyed into a profile does not make it true. But the government's case seems based on the idea that the word "gay" in McVeigh's profile is all that is necessary to prove he is gay.

Sporkin asked Department of Justice attorney David Glass, "Is [an online profile] enough of a ticket for getting kicked out?"

"Yes," said Glass, "[because a] statement implies conduct."

Glass also argued the electronic privacy law in question does not prohibit the government from calling AOL and asking for certain information. He said it merely restricts the govern-

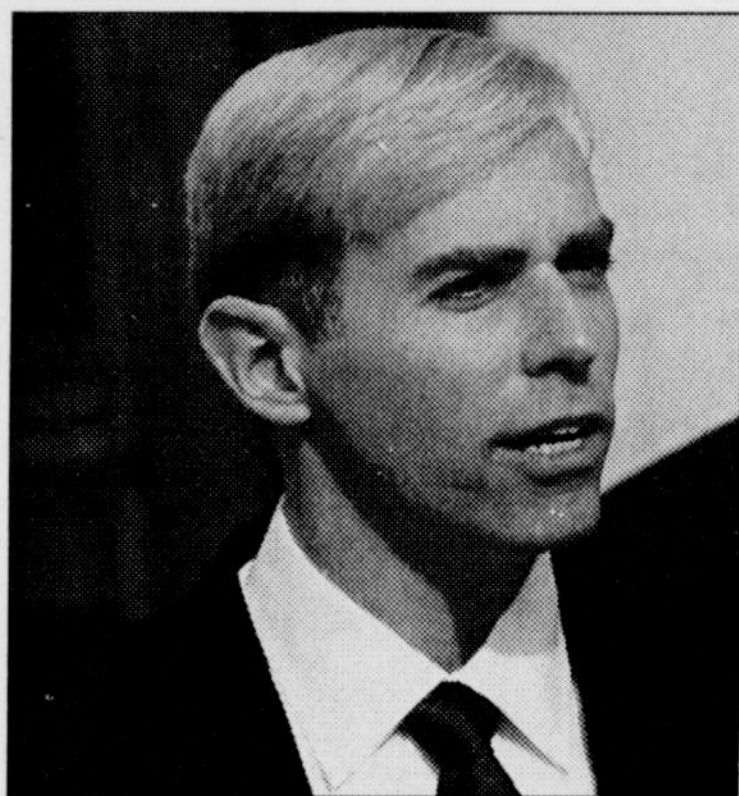
ment from requiring compliance with the request without a court order.

Sporkin disagreed. In his ruling, he said, "In these days of 'big brother,' where through technology and otherwise the privacy interests of individuals from all walks of life are being ignored or marginalized, it is imperative that statutes explicitly protecting these rights be strictly observed."

The electronic privacy law, said Sporkin, requires investigators to obtain search warrants or court orders before seeking information from online services.

After an internal review, AOL admitted that it had violated its own policy of privacy in revealing the sailor's name and apologized.

"This was a case of human error under very unusual circumstances.... This clearly should not have happened, and we regret it," said AOL officials, who also charged that "the Navy had misrepresented itself" in obtaining the information and "deliberately ignored both federal law and well-established procedures for handling government inquiries about AOL members."



Timothy R. McVeigh

Those procedures include working through an AOL-designated liaison for the Navy. Similar procedures have been followed in prosecuting child pornographers and predators.

"The government knew, or should have known, that by turning over the information without a warrant, AOL was breaking the law," Sporkin wrote. "Yet the Navy, in this case, directly solicited the information anyway. What is most telling is that the Naval investigator did not identify himself when he made his request." Thus the Navy, not just AOL, "failed to comply" with the privacy law.

Sporkin also said McVeigh had not, in fact, "told" anyone of his sexual orientation, thus the Navy had no right to "ask" anyone about it.

"Suggestions of sexual orientation in a private, anonymous e-mail account did not give the Navy a sufficient reason to investigate to determine whether to commence discharge proceedings," Sporkin wrote.

According to the AP, a "Navy official, who spoke on condition of anonymity, said McVeigh would remain in his current assignment to Submarine Squadron 3 in Pearl Harbor, Hawaii."

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