

THE LONG HAUL

**Military ban on out gay men and lesbians
batted about in federal appeals court—again** by Bob Roehr

The issue of gay men and lesbians in the military was again before the courts on April 2 in the form of *Able vs. the United States*, which challenges the “don’t ask, don’t tell, don’t pursue” policy banning openly gay and lesbian people from serving in the military.

In New York, a three-member panel of the 2nd U.S. Circuit Court of Appeals heard arguments in the case. It could well be the last step before the matter lands before the Supreme Court, probably next year.

The *Able* case was initiated in 1994 by Lambda Legal Defense and Education Fund and the Gay and Lesbian Civil Rights Project of the American Civil Liberties Union. The plaintiffs are six active-duty and reserve service members who won at the trial court level when Judge Eugene Nickerson declared the policy violates the free speech rights of gay and lesbian service members.

Following an appeal of that ruling, the 2nd Circuit sent the case back to Nickerson and directed him to decide if the policy violates equal protection under the Constitution.

“The Constitution does not grant the military special license to act on prejudices or cater to them,” Nickerson wrote last July in his second opinion on the case.

He dismissed the government’s argument that the ban was necessary to preserve “unit cohesion,” calling the policy “a euphemism for catering to the prejudices of heterosexuals.”

He added, “It is hard to imagine why the mere holding of hands off base and in private is dangerous to the mission of the armed forces if done by a homosexual but not if done by a heterosexual.”

The government again appealed the ruling, which in turn prompted the April 2 proceedings.

Questioning was spirited that day, with presiding Judge John M. Walker—who happens to be the cousin of former President George Bush—taking the lead.

Walker said the case involves three conceptual pieces: deference to the military, the level of scrutiny in examining potential discrimination, and the nature of the government’s justification for such action.

John Hoyle, a U.S. Justice Department attorney, argued the military was unique. He maintained Congress had thoughtfully and rationally decided there were sufficient concerns pertaining to the “privacy” of heterosexual service members and the possible detrimental effects on “unit cohesion” if gay men and lesbians were allowed to serve openly in the military.

Hoyle added that allowing gay people to serve openly would be like putting men and women together in the service.

“You can expect sexual conduct to occur,” he said.

Hoyle did not explain how the Uniform Code of Military Justice is deemed adequate to restrain sexual tensions between men and women but not between people of the same gen-

der. And the Pentagon has conceded in court that gay men and lesbians are no more likely to misbehave than their straight counterparts.

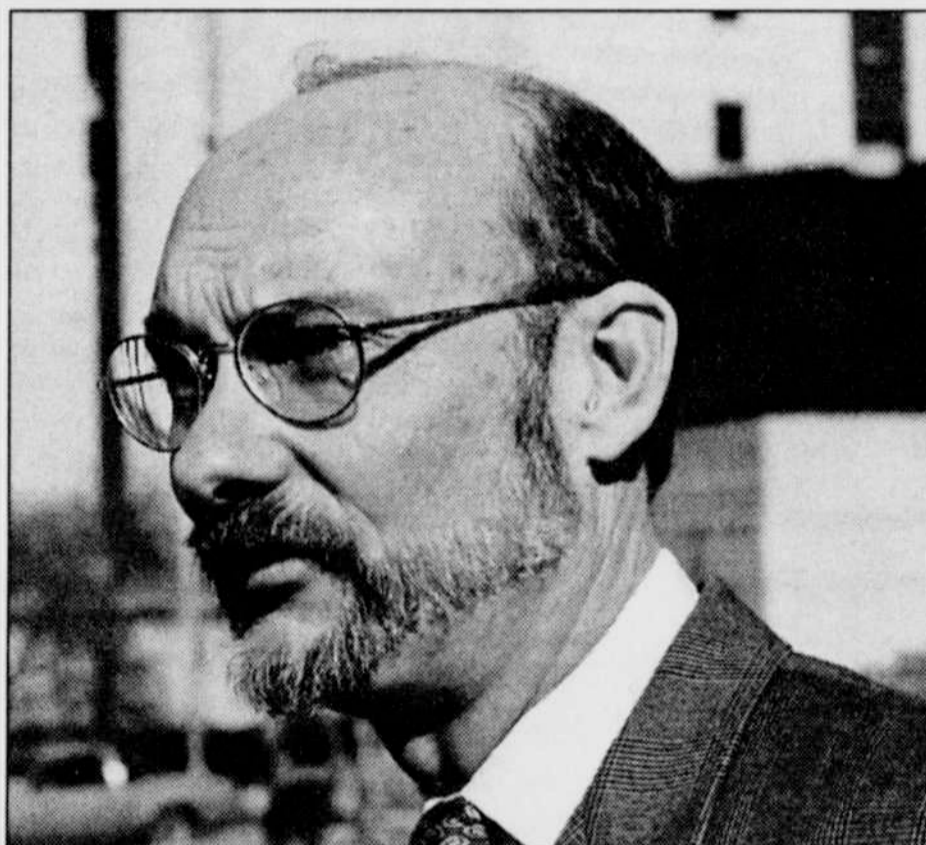
Judge Pierre N. Leval asked for a description of “unit cohesion,” which prompted Hoyle to recite the privacy and sexual tension arguments.

“Suppose we deal with the problem by treating everybody alike?” asked Judge Wilfred Feinberg.

“Congress came to a different conclusion,” answered Hoyle, adding the government does “not consider homosexuals [to be] predators.”

However, he said, “One is inclined to act on their sexuality. The military wants to prohibit people from serving who are going to continuously engage in homosexual acts.”

Lambda’s Beatrice Dohrn, arguing for the



ACLU attorney Matt Coles

plaintiffs, said the policy is nothing more than a form of pandering to the presumed lowest instincts of heterosexuals.

She argued that when one strips away the rhetoric, all that is left is the simple fact that “a person is made uncomfortable” by the presence of those perceived to be gay or lesbian.

Dohrn reminded the court that “privacy concerns are the same ones raised about integration of the military” nearly 50 years ago.

The judges, meanwhile, twice suggested to Dohrn that perhaps a heightened level of scrutiny was required in examining the issue.

“You are asking this court to substitute itself for the judgment of the military,” said Walker.

Dohrn disagreed, and during a media briefing following her court presentation, she expressed frustration.

“We are arguing the Constitution should still apply,” she told reporters.

“There is a lot of homophobia in the country, but that isn’t the only negative feeling,” added ACLU attorney Matt Coles. “There are a lot of things that make a lot of people uncomfortable with each other. What the military has effectively said is: ‘We will deal with all of them, but we are not going to deal with this one.’ They haven’t said they can’t deal with this one, they’ve said they don’t want to. And what we say is that the Constitution doesn’t let them do that.”

Government attorneys declined to speak with the press following the court appearance.

Neither side would speculate as to when a ruling might come down.



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WHO WOULD WANT TO BE POOR?

People never seem to tire of reports detailing the incredible wealth of Bill Gates and others who have scaled to the top of the American dream. Even as we gasp at the excesses of the fabulously rich, we secretly envy them and, in truth, often measure our own success by our material status.

How different from Jesus in the Gospel of Luke. He turned upside down the common sense notion that wealth is blessing by declaring “Blessed are the poor.” Was he serious? Did he really believe that poor people who can barely scrape enough together to survive are more blessed than those with money to burn?

Jesus was no pie-in-the-sky idealist. He knew firsthand the suffering of the poor, but he also knew the deadly self-sufficiency of the rich who enjoyed their surfeit at the expense of others. For Jesus, *all* who are unjustly oppressed are especially beloved of God and possess an innate spiritual gift enabling them to apprehend that love. The stirring spirituals of African slaves poured from hearts that knew only God as salvation.

As gay people we too have suffered our share of oppression at the hands of a homophobic society. We may soothe these wounds by harkening to the Sirens of our materialistic culture, but only the abiding love and grace of God can bring real inner peace and healing. It is our choice whether to view ourselves as “poor” and claim the promised spiritual gift, or strive to be “rich” and cast our lot in with the bankrupt values and vain aspirations of a society which so often despises us.

A message from the Anawim Community—gay men seeking to follow Jesus through lives of prayer and service to our gay brothers.