

RECORD TYPE: FEDERAL (TRP NOTES MAIL)

CREATOR: Doug.Case (Doug.Case@sdsu.edu@INET@LNGTWY [UNKNOWN])

CREATION DATE/TIME: 2-JUL-1997 20:08:00.00

SUBJECT: ACLU News: Entire Military Ban on Gays Voided by Court

TO: Richard Socarides (Richard.Socarides@EOP [UNKNOWN])

READ:UNKNOWN

TEXT:

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News from the ACLU and LLDEF...

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For First Time, NY Federal Judge Strikes Down

Entire Law Barring Gays From Military Service

FOR IMMEDIATE RELEASE

Wednesday, July 2, 1997

NEW YORK -- In the first full defeat of the military's 'Don't Ask, Don't Tell' statute, a federal judge in New York today struck down the law, saying it unconstitutionally imposes special rules on gay troops.

U.S. Judge Eugene Nickerson of the Eastern District of New York rejected both the conduct and speech portions of the

law, ruling that they violate the Constitution's equal protection guarantee and serve no purpose but to placate the fears of some heterosexual troops.

Lambda Legal Defense and Education Fund and the American Civil Liberties Union, which jointly brought the case, *Able v. U.S.A.*, praised the ruling as a breakthrough toward ending the government's discriminatory treatment of lesbians and gay men in the military.

"We are now one step closer to having this archaic law overturned once and for all," said Matt Coles, director of the ACLU's Lesbian and Gay Rights Project. "This case is about the most basic American value: equal treatment, one set of rules for everybody. The entire law, both its conduct rules and speech rules, violate that principle."

Lambda Legal Director Beatrice Dohrn said, "This is the first court to strip away all of the military's euphemistic justifications. Judge Nickerson explains that the military's cloaking its discrimination in gay-only-conduct rules cannot shield it from the Constitution. Any law based on prejudice is unconstitutional. The decision gives us strong ammunition for the inevitable appeal."

Following argument in his Brooklyn courtroom November 18, Judge Nickerson issued a 48-page ruling, saying, "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 homosexuals but not if done by a heterosexual."

Nickerson also sharply rebuked the government's argument that the law is needed to maintain military readiness, saying the government had made "an outright confession that 'unit cohesion' is a euphemism to catering to the prejudices to the heterosexuals."

The ruling today was prompted by a federal appeals court decision last July that sent the case back to Judge Nickerson for further action. Although Nickerson ruled in March 1995 that the law's restrictions on speech were unconstitutional, the Second Circuit U.S. Court of Appeals held the validity of the entire scheme depended on the "conduct" portion of the ban and directed Nickerson to reexamine the law on those grounds.

The "conduct" portion of the ban sets up special rules for lesbian and gay service members, requiring them to remain celibate and refrain from any affectionate behavior. Similar rules do not exist regarding heterosexual conduct. Under the "statements" portion, gay troops are prohibited from saying anything that may reveal their sexual orientation.

While other cases have been winding their way up the courts, Able is the only case that presents a direct challenge to

both portions of the ban. Two "statements" cases are currently pending before the Ninth Circuit: *Holmes v. Perry* and *Watson v. Perry*.

In February, the Ninth Circuit upheld the military's ban in *Philips v. Perry* (an individual "conduct" case). Two other "statements" cases -- *Richenberg v. Perry* in the Eighth Circuit and *Thomasson v. Perry* in the Fourth Circuit -- have also resulted in decisions upholding the policy. The U.S. Supreme Court declined to hear an appeal of a Fourth Circuit ruling last October.

While today's decision will be studied by other courts, its impact will be felt first by the six lesbian and gay plaintiffs in the case, who could have faced discharge proceedings because of their involvement in the suit. Such proceedings were barred by *Nickerson's* ruling.

Lambda's Dohrn said, "Thanks to the courage of the six service members in this case, a very simple argument has prevailed: The government must use the same rules for lesbian and gay service members as for non-gay service members. The nation's major employer is not exempt from the Constitution."

"The military's ban on gay troops will eventually fall," added the ACLU's Coles. "Like most fair-minded Americans, this

ruling understands that it doesn't make sense to discharge able-bodied service members simply for their sexual orientation. Once again, the public and the courts are ahead of our elected officials in embracing this simple fact."

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National Office 125 Broad Street NYC 10004 (212) 549-2666

===== ATTACHMENT 1 =====
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RECORD TYPE: FEDERAL (TRP NOTES MAIL)

CREATOR: Fenceberry (Fenceberry@aol.com@INET@LNGTWY [UNKNOWN])

CREATION DATE/TIME: 2-JUL-1997 13:57:00.00

SUBJECT: Articles 7.2.97.8

TO: Richard Socarides (Richard Socarides@EOP [UNKNOWN])

READ:UNKNOWN

TEXT:

1. REUTERS Judge says "Don't ask, Don't tell" is unconstitutional
2. ASSOCIATED PRESS Judge Strikes Down "Don't Ask, Don't Tell' For 2nd Time

Reuters, July 2, 1997

Judge Rejects Gay Policy

A U.S. District Court judge in New York has struck down the "don't ask, don't tell" policy on gays in the military. It's the second time Judge Eugene Nickerson has ruled against the policy. The first time was in 1995, when he said it violated the rights of free speech and due process. A higher court vacated Nickerson's decision a year ago and asked him to consider whether the policy's use of the longtime ban on homosexual acts was constitutional. Nickerson ruled today that ``don't ask, don't tell" imposes special rules on gay troops. The policy went into effect in 1994 allowing homosexuals to serve in the military but to keep their sexual orientation private.

ASSOCIATED PRESS, July 2, 1997

UPDATE

Judge Strikes Down "Don't Ask, Don't Tell" For Second Time

From Associated Press

NEW YORK--The Clinton administration's "don't ask, don't tell" policy for gays in the military is unconstitutional, a federal judge ruled today, reaffirming his earlier ruling.

The 48-page ruling by U.S. District Court Judge Eugene Nickerson concludes that the policy violates the First Amendment's free speech protections.

A military "called on to fight for the principles of equality and free speech embodied in the United States Constitution should embrace those principles in its own ranks," the judge wrote.

The judge also argued that for the policy "to single out gay and lesbian members denies them, without legitimate reason, the right to openly participate as equals in the defense of the nation."

Nickerson first declared the policy unconstitutional in 1995, calling it "nothing short of Orwellian" and a violation of free-speech rights that barred people from saying "I am gay." But last year, a three-judge panel of the 2nd U.S. Circuit Court of Appeals sent the case back for review because it disagreed with the judge's reasoning.

"It is plain to us that governmental restrictions on speech that would run afoul of the Constitution if imposed in civilian life can pass constitutional muster in the military context," the appeals court said.

Under the "don't ask, don't tell, don't pursue" policy, gays can serve as

long as they keep their sexual orientation to themselves and do not engage
in

homosexual acts. Otherwise, they can be honorably discharged. In addition,
commanders may not ask a service member his or her sexual orientation.

The New York case is one of several around the nation challenging the
policy, which the Clinton administration adopted in 1993 as a compromise
between the views of gay-rights advocates and those flatly opposed to
homosexuals in the military.

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RECORD TYPE: FEDERAL (TRP NOTES MAIL)

CREATOR: Doug.Case (Doug.Case@sdsu.edu@INET@LNGTWY [UNKNOWN])

CREATION DATE/TIME: 2-JUL-1997 20:05:00.00

SUBJECT: Judge Strikes Down "Don't Ask, Don't Tell," Again

TO: Richard Socarides (Richard.Socarides@EOP [UNKNOWN])

READ:UNKNOWN

TEXT:

Reuters, July 2, 1997

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Under the "don't ask, don't tell, don't pursue" policy, gays can serve as long as they keep their sexual orientation to themselves and do not engage in homosexual acts. Otherwise, they can be honorably discharged. In addition, commanders may not ask a service member his or her sexual orientation.

The New York case is one of several around the nation challenging the policy, which the Clinton administration adopted in 1993 as a compromise between the views of gay-rights advocates and those flatly opposed to homosexuals in the military.

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RECORD TYPE: FEDERAL (TRP NOTES MAIL)

CREATOR: rwockner (rwockner@netcom.com@INET@LNGTWY [UNKNOWN])

CREATION DATE/TIME: 3-JUL-1997 03:39:00.00

SUBJECT: NC4122: Don't Ask/Don't Tell Struck Down / AP&Reuters stories

TO: Richard Socarides (Richard Socarides@EOP [UNKNOWN])

READ:UNKNOWN

TEXT:

Reuters, July 2, 1997

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ASSOCIATED PRESS, July 2, 1997

UPDATE

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RECORD TYPE: FEDERAL (TRP NOTES MAIL)

CREATOR: rwockner (rwockner@netcom.com@INET@LNGTWY [UNKNOWN])

CREATION DATE/TIME: 3-JUL-1997 03:47:00.00

SUBJECT: NC4123: Don't Ask, Don't Tell Invalidated by Federal Court

TO: Richard Socarides (Richard Socarides@EOP [UNKNOWN])

READ:UNKNOWN

TEXT:

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From:SLDN1@aol.com

To: rwockner@netcom.com

Subject: Don't Ask, Don't Tell Invalidated by Federal Court

PRESS RELEASE

Federal Court Rules That "Don't Ask, Don't Tell, Don't Pursue" is

Unconstitutional

Washington, D.C., July 2, 1997 - Judge Eugene Nickerson for the District Court for the Eastern District of New York today ruled that the military's "Don't Ask, Don't Tell, Don't Pursue" policy is unconstitutional creating "special rules" that treat gay servicemembers differently than heterosexual servicemembers for saying and doing the same things.

C. Dixon Osburn, Co-Executive Director of Servicemembers Legal

Defense Network (SLDN), responded to today's ruling: "We are very encouraged by today's decision. The bottom line is evenhandedness, and today's ruling reaffirms that basic concept."

Osburn continued, "'Don't Ask, Don't Tell, Don't Pursue' is not some sort of gentleman's agreement where gays can serve so long as they are quiet. It is an insidious policy of McCarthyistic proportions. Under the policy, the Pentagon has ordered psychologists to turn in gay people. The Air Force has issued guidance directing inquiry officers to interrogate parents about their children's sexual orientation. And military officers have threatened servicemembers with prison unless they confess to being gay. The Constitution cannot countenance such actions."

On February 26, 1997, SLDN released its Third Annual Report on Don't Ask, Don't Tell, Don't Pursue. The report reveals Pentagon statistics showing that gay discharges have increased not decreased under "Don't Ask, Don't Tell, Don't Pursue." The 850 servicemembers discharged last year under the policy is the highest rate of discharge since 1987. The report concludes that one of the reasons for the increased discharges under current policy is that "many military members continue to ask, pursue and harass servicemembers in direct violation of 'Don't Ask, Don't Tell, Don't Pursue.'"

Today's decision in *Able v. USA* represents the second time Judge Nickerson has ruled on the case. On July 1, 1996, the Second Circuit Court of Appeals vacated Judge Nickerson's original opinion finding that the policy violates the First Amendment and remanded the case for further

deliberation under the Equal Protection Clause. The government is likely to appeal Nickerson's ruling to the Second Circuit Court of Appeals.

The United States Supreme Court is expected to take a case challenging "Don't Ask, Don't Tell, Don't Pursue" once an appellate court has ruled that the policy is unconstitutional. To date, the United States Supreme Court has declined to review two cases from the Fourth Circuit Court of Appeals which upheld the current policy -- Thomasson v. Perry and Selland v. Perry.

Of the current cases in federal court, Holmes v. Cohen and Watson v. Cohen in the Ninth Circuit Court of Appeals, and today's case, Able v. USA, are considered the most likely candidates for eventual Supreme Court

review. ===== ATTACHMENT 1 =====
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