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Court affirms military's 'don't ask, don't tell' rule

Appeals Court: policy deserves 'judicial respect'

by Lisa Keen

One judge's opinion claimed the Clinton administration is "creating a sanctuary for homosexuals within the military." Another suggested that if the courts get involved in issues where there is "deep social division," such as with Gays in the military, "the nation inherently runs the risk of longterm social discord because large segments of our population have been deprived of a democratic means of change."

Both opinions came Friday, April 5, in *Thomasson v. U.S.*, and represented the highest federal court decision thus far to uphold the constitutionality of the military's new policy on Gays.

That policy states that Gay people can serve in the armed forces only if they can prove that they will never engage in sex with a person of the same gender and if they never tell anyone — on or off duty — that they have a homosexual orientation.

The 72 pages of decision included three opinions upholding the constitutionality of the policy — the majority being joined by nine judges of the 4th Circuit U.S. Court of Appeals — and one dissenting opinion — joined by four.

In the majority opinion, the nine judges (all Republican appointees except one) expressed the court's great reluctance to "upset" a policy that "embodies the exhaustive efforts of the democratically accountable branches of American government" and one which "reflects month upon month of political negotiation and deliberation." The majority opinion, written by Judge J. Harvie Wilkinson, was re-

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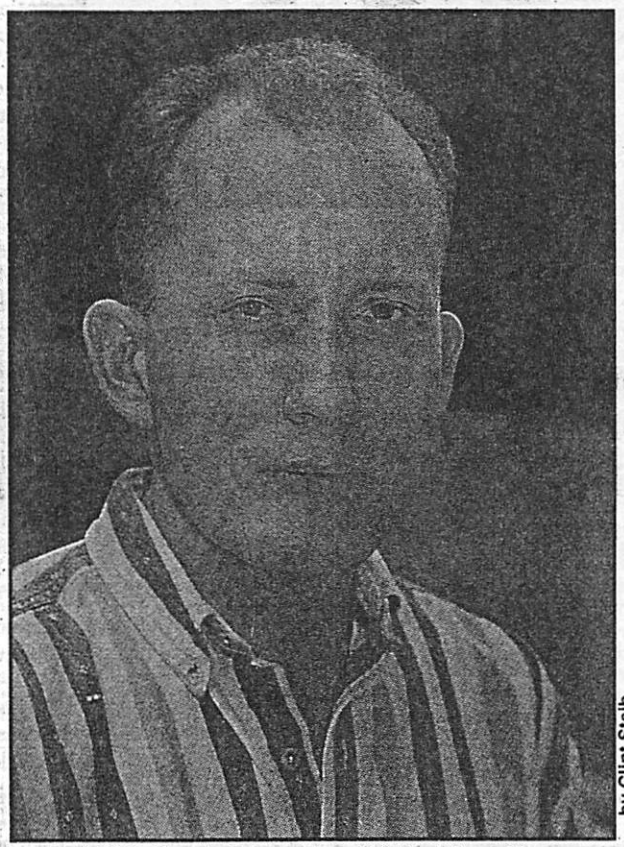

by Clint Stelb

A U.S. Court of Appeals ruled that the military was within its rights when it discharged Navy Lt. Paul Thomasson.

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Court upholds military ban

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ferring to Congressional hearings on the issue in 1993 and negotiations between the White House, the Congress, and the Pentagon in reaching a "compromise" policy which is now known as the "Don't Ask/Don't Tell" policy.

"Such products of the democratic process are seldom completely tidy or universally satisfactory," wrote Wilkinson, "but it is precisely on that account that they deserve judicial respect. An Act of Congress reflects a range of views that a judicial decision cannot replicate."

"For the court to say it doesn't have a role to examine that is an outrage," said Beatrice Dohrn, legal director for Lambda Legal Defense and Education Fund. "It's one thing for them to say that they should defer to Congress's legitimate evaluation of what is necessary in any given situation. But it's a different thing for them to say that because something results from a political compromise within the democratic process that they're not going to apply constitutional scrutiny."

Most courts have exercised considerable deference to the judgment of military leaders about what laws are necessary to ensure a well-controlled fighting force. The Wilkinson opinion expressed a profound willingness to trust the military's judgment that openly Gay people are a risk to "good morale" and "unit cohesion" — a risk he apparently believes could bring a fighting force to its knees.

The opinion did not address an argument by those challenging the policy that it was aimed not at unit cohesion, but at alleviating the discomfort of some heterosexual soldiers who are uneasy around people they know to be Gay.

"Should the judiciary interfere with the intricate mix of morale and discipline that fosters unit cohesion," wrote Wilkinson, "it is simply impossible to estimate the damage that a particular change could inflict upon national security."

The case at the 4th Circuit was brought by Navy Lt. Paul Thomasson, a highly regarded aide to some of the Pentagon's top military brass. Thomasson was discharged under the new policy after he told his commanding officer that he is Gay. There was no evidence that he had ever engaged in sex with a person of the same gender. When a discharge board gave him the new policy's opportunity to "rebut the presumption" that he had ever engaged in sex with someone of the same gender — or might do so in the future — Thomasson refused, saying he would not "degrade" himself by attempting to disprove "a charge about sexual conduct that no one has made."

Military law prohibits sodomy — between people of the same or opposite sex.

Thomasson argued that the new policy violates the U.S. Constitution's guarantee to equal protection under the law and to freedom of speech.

Concerning the equal protection argument, the majority said the government could legally trespass on this right by simply offering a "rational" reason why it needed to do so. It then stated that it was rational "for Congress to conclude that sexual tensions and attractions could play havoc with a military unit's discipline and solidarity." In addition, wrote Wilkinson, the policy "accommodates the reasonable privacy concerns of heterosexual service members and reduces the sexual problems that may arise ..."

"Given that it is legitimate for Congress to proscribe homosexual acts, it is also legitimate for the government to seek to forestall these same dangers by trying to *prevent* the commission of such acts."

Wilkinson said it was also legitimate for the government to presume "that declared homosexuals have a propensity or intent to engage in homosexual acts ..." In throwing out Thomasson's freedom of speech argument, the court said the new policy is not directed at his statement, "I am Gay," but "at the propensity or intent of service members to engage in homosexual acts." A statement of "I am Gay," said the majority, is used only as "evidence" of the propensity.

In addition to Wilkinson (a Reagan appointee), the majority included Judges Francis Murnaghan (Carter appointee); Donald Russell and Emory Widener (Nixon appointees); William Wilkins (Reagan); and Clyde Hamilton, Michael Luttig, Paul Niemeyer, and Karen Williams (Bush appointees).

Allan Moore, an attorney representing Thomasson in the case, said he was "disappointed" in the decision and said it "could have ramifications far beyond" the military context.

"They're saying that where the political heat is the highest and controversy the greatest and the threat to a minority's rights the most intense from the majority will that — in those situations, the court has the *least* role to play. I would suggest precisely the opposite ought to be the case," said Moore.

Matt Coles, executive director of ACLU's National Lesbian and Gay Rights Project and the attorney who argued a similar case now awaiting a decision in the 2nd Circuit, called the majority's "peroration" about deference to he military and a hard sought political compromise "utter nonsense."

"That's true of any law," said Coles. "And it blows off the core constitutional question." That question, said Coles, revolves around the policy's deference to some heterosexuals who have discomfort being around people they know to be Gay.

It was through Luttig's concurring opinion that six judges stated that they believe the regulations promulgated to implement the "Don't Ask/Don't Tell" policy amount to an attempt by the Clinton administration to create "a sanctuary for homosexuals within the military."

"Through this regulation," wrote Luttig, "the Administration has effectively secured the very policy regarding military service by homosexuals that it was denied by the Congress."

Luttig's concurrence also included a number of interesting statements and footnotes explaining that:

- heterosexual sodomy as defined under military law equals a heterosexual committing a "homosexual act."
- Luttig does "not know what homosexual orientation is if it is not the propensity to commit homosexual acts. ... But if there are indeed persons who are homosexually oriented but do not have a homosexual propensity, I would agree that the statute does not require their discharge."
- "Discharge from the military is not 'punishment'." And, that
- "For as long as it has had a military, the United States has excluded homosexuals from military service." A Pentagon spokesperson said this week that the military official dates the beginning of the U.S. military as the establishment of the Continental Army in June 1775. Military law first prohibited consensual sodomy — by heterosexuals or homosexuals — with the Articles of War in 1920. Regulations specifying a prohibition on "homosexuality" did not arrive until 1942.

In dissent on the Thomasson decision, Judge Kenneth Hall (a Ford appointee) chastised the majority's stark deference to the military and to the political compromise, saying that "no matter how carefully or pedantically they be constructed, and notwithstanding their popularity," laws must be scrutinized by the courts which have a "duty to defend the Constitution against the trespasses of those branches. ..."

"... [W]e have a role — a vital one — in ensuring that the military remains submissive to the Constitution and civil authority," wrote Hall.

"Aside from cheapening our national values, a broad 'military exception' from the Constitution in the interest of defending us from foreign danger could transform the military into a domestic danger," he said.

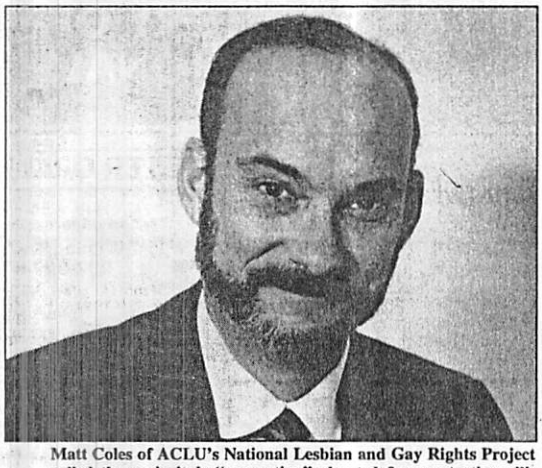
Hall agreed with opponents of the policy that it is based on the prejudice of some service members against Gay people.

"Private prejudice is a private matter; we are free to hate," wrote Hall. "... but the law cannot, directly or indirectly, give [such prejudices] effect."

Hall also faulted the policy because it "impermissibly presumes that homosexuals are unable to obey rules of conduct" and because it "creates a classification *among homosexuals* based *solely* on speech."

Joining Hall in the dissent were Judges Sam Ervin (Carter appointee), and Michael Blane and Diana Motz (Clinton appointees).

Thomasson's attorney, Moore, said he would be studying the lengthy decision more thoroughly and consulting with Lambda and the ACLU before deciding whether to appeal to the U.S. Supreme Court.▼



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