

U.S. judge expands rejection of military's policy on gays

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NEW YORK — Responding to a challenge by a higher court, a federal judge ruled yesterday that the military's "don't ask, don't tell" policy violates gays' rights to equal participation in national defense.

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," U.S. District Judge Eugene Nickerson wrote.

Spokesmen at the Pentagon and White House said it was too soon to comment on an appeal. The issue is expected to be decided eventually by the Supreme Court. Several plaintiffs are challenging the Clinton administration's 1993 compromise.

Nickerson was forced by an appeals court to review the 1995 ruling in which he became the first federal judge to strike down the policy.

He concluded in his follow-up opinion that it discriminates against homosexuals by violating their First Amendment free-speech right and Fifth Amendment equality protections.

He found that for the policy "to single out gay and lesbian members denies them . . . the right to openly participate as equals in the defense of the nation."

The American Civil Liberties Union and the Lambda Legal Defense and Education Fund, which sued on behalf of two active duty and four reservist plaintiffs, said the decision, if upheld, would eliminate a cruel set of double standards applied to homosexuals.

Nickerson has "said there should be one set of rules for everyone, straight or gay," said Matt Coles of the ACLU's National Lesbian and Gay Rights Project.

Under the "don't ask, don't tell,

don't pursue" policy, homosexuals can serve if 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 about sexual orientation.

Nickerson said in his original decision that the policy violates free-speech rights because it bars service members from saying "I am gay."

Last year, a three-judge panel of the 2nd U.S. Circuit Court of Appeals said he failed to address the part of the policy banning homosexual acts. It said the issue of free speech was "incidental and wholly subservient to the restriction on acts."

Nickerson responded by arguing the policy not only infringes on free speech but also on equal treatment under the due process clause of the Fifth Amendment by subjecting one class of troops to a separate, discriminatory set of regulations.