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Unexpected Turns for Suit Over 'Don't Ask' Rule

By LIZETTE ALVAREZ

The timing could not have been worse. Just as the Log Cabin Republicans' lawsuit challenging "don't ask, don't tell" was finally racing out of judicial limbo in 2009, the group was in disarray.

The prominent gay and lesbian conservative organization had lost almost all its money in the stock market crash and was struggling to redefine its mission. It was down to one full-time staff member in Washington. Any victory, judicial or otherwise, seemed a long way off.

"We accrued a significant amount of debt for the organization, and 2008 hurt the portfolios of our major donors," said Christian A. Berle, the group's acting executive director. "They were stockbrokers who, like myself, went into a fetal position."

But the group's lawsuit challenging the law, which had languished since 2004, began to take one unexpected turn after the next.

On Tuesday, a federal judge in California ordered the United States military to stop enforcing the 17-year-old policy that bars openly gay men and women from serving in the armed forces. The Justice Department is expected to appeal the ruling.

"We have been surprised at every stage of this," said Alexander Nicholson, a member of the Log Cabin Republicans and a former Army intelligence specialist who was discharged because of the policy. "We thought the judge would follow every other pattern the other judges have followed: deference to the military."

For years, the lawsuit sat "at the bottom of the judicial docket," Mr. Berle said. In 2008, the case landed in the lap of Judge Virginia A. Phillips of Federal District Court for the Central District of California.

"The fact that she did not dismiss the case was a huge surprise," Mr. Nicholson said. "Then she continued to surprise us."

Dan Woods, a partner at White & Case, decided to take the case pro bono after a colleague, a Log Cabin Republican, presented him with the idea. He felt strongly that the policy violated the Constitution. But few legal challenges to the policy had survived.

“We are not on some gay rights agenda here,” Mr. Woods, 57, explained. “This is a civil rights issue. We are pro-military, and this will only help the military, not hurt the military.”

He added, with a laugh, that he adhered to the old Barry Goldwater maxim: “I don’t care if they are gay or straight, as long as they can shoot straight.”

The war in Iraq bolstered the lawsuit, too, because it forced some military commanders in the field to ignore “don’t ask, don’t tell” because they sorely needed troops.

In court, that undermined the argument that allowing openly gay people to serve in combat would harm teamwork and military readiness.

Defense Secretary Robert M. Gates and Admiral Mike Mullen, the chairman of the Joint Chiefs of Staff, called on Congress this year to allow gay men and lesbians to serve openly.

“The government is willing to give a convicted felon a gun but won’t give a gay guy a typewriter,” Mr. Woods said, echoing a common refrain of the law’s critics.

Sensing that the case would turn on the stories of dedicated service members, he called six witnesses, all veterans who spoke of their hardships.

One was an Air Force pilot who flew 61 combat missions in Iraq but quickly made himself invisible on land for fear he would let a personal detail slip. His fellow pilots called him “vapor.”

A straight former service member — a farm boy from Nebraska who had never met a gay man until he roomed with one in the service — told about his roommate’s fears. “He cried on the stand,” Mr. Woods said.

One expert witness, a retired Canadian colonel, spoke about the Canadian military, which allows gay men and lesbians to serve openly, as do the militaries of the United Kingdom and Australia.

At each step, the government fought back by filing motions to dismiss the case, for summary judgment, to exclude witnesses. It stuck to one approach: That the lawsuit was a challenge to the Constitution and that the only evidence that could be presented was the law’s legislative history. The government called no witnesses or experts.

“The government had one strategy, and this time it failed,” Mr. Woods said.

But with the ultimate fate of the “don’t ask, don’t tell” rule still unclear, some celebrations are being delayed.

With a briefcase full of commendations under his arm, Omar Lopez walked into an Austin, Tex., recruiting office Wednesday. Mr. Lopez, 29, had served nearly five years in the Navy. He was honorably discharged in 2006 for "homosexual admission," according to documents he carried. He wanted to re-enlist.

But recruiters turned him away hastily, saying they had no knowledge of any injunction or any change in military policy.

"I like the civilian world, but I miss it," Mr. Lopez said of the military, as he arrived with a worker for Get Equal, a gay rights advocacy group. "I feel lost without it."

Michael Brick contributed reporting.