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## **HOMOSEXUAL LITIGATION UPDATE**

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In January 1993, President Clinton directed the Secretary of Defense to review the Department of Defense's (DOD) policy concerning the service of homosexuals in the military. After extensive hearings in both houses, Congress enacted, as part of the 1994 National Defense Authorization Act, the so-called "Don't Ask, Don't Tell" policy.<sup>1</sup>

As expected, numerous legal challenges to the policy have been making their way through the judicial system and appeals have reached four different federal appellate courts. Two federal circuit courts have upheld the policy, one has upheld the policy but remanded the case to the district court for further findings, and a fourth circuit has yet to render a decision in three pending cases. These appellate cases are discussed below.

In *Thomasson v. Perry*,<sup>2</sup> a Naval officer brought equal protection and First Amendment challenges to the statements provision<sup>3</sup> of the new policy. The United States Court of Appeals for the Fourth Circuit, sitting en banc, upheld the policy. The Fourth Circuit's ruling relied heavily on the fact that the policy was a "carefully crafted national political compromise" and "[the] courts were not created to award by judicial decree what was not achievable by [the] political" process.<sup>4</sup> Thomasson petitioned the United States Supreme Court for review, which was recently denied.

The Eighth Circuit recently joined the Fourth Circuit in upholding the policy. In *Richenberg v. DOD*,<sup>5</sup> an Air Force officer sought to enjoin his discharge under the statements provision of the new policy. The district court granted summary judgment for the Government. On appeal, the Eighth Circuit held that the policy was consistent with equal protection under rationality review because "Congress and the President may rationally exclude those with a propensity or intent to engage in homosexual acts."<sup>6</sup> The court also held that the policy did not violate free speech, accepting our argument that statements are evidence of propensity to engage in prohibited

conduct.

The Second Circuit upheld the policy against a facial challenge to the statements provision when it reversed and vacated the district court's judgment that the new policy violated the First Amendment.<sup>7</sup> The court of appeals held that, assuming the validity of the prohibition against military personnel engaging in acts,<sup>8</sup> the statements provision of the new policy did not violate the First Amendment but rather struck a reasonable balance between competing interests, was important to the military's accomplishment of its objectives and restrained speech no more than reasonably necessary. The court, however, also held that the district court erred in ruling that plaintiffs did not have standing to challenge the acts prohibition and thus remanded the case to the district court for it to consider the constitutionality of the acts prohibition. The case has been briefed at the district court on remand, and was argued on 18 November 1996. A decision is pending.

Finally, the Ninth Circuit has heard argument on three different district court cases that challenge the policy. The primary case, *Philips v. Perry*,<sup>9</sup> involves a Navy enlisted member who was recommended for discharge because (1) he committed homosexual acts, and (2) he stated that he was a homosexual and did not rebut the presumption of homosexual acts. The district court upheld the military's policy in a limited ruling by holding \*47 that the military could permissibly discharge Philips for committing homosexual acts. The court refused to consider his challenge against the statements provision in order to avoid ruling on an unnecessary constitutional issue. The case was argued on appeal on 4 March 1996, and a decision is pending.

Two other cases that were consolidated on appeal, *Holmes v. California Nat'l Guard*,<sup>10</sup> and *Watson v. Perry*,<sup>11</sup> are also at the Ninth Circuit. In *Holmes*, a former lieutenant in the California National Guard filed suit challenging his discharge based on a statement to his commander that he was gay. On 29 March 1996, the federal district court for the Northern District of California found the DoD's homosexual conduct policy unconstitutional on both equal protection and First Amendment grounds.

In *Watson*, a Navy Lieutenant assigned to the Naval Reserve Officers Training Corps at Oregon State University filed suit challenging his discharge based on a one-page document titled, "Submission of Sexual Orientation Statement" that included the statement, "I have a homosexual orientation. I do not intend to rebut the presumption."<sup>12</sup> He had given this statement to his commanding officer. The district court found the policy constitutional as applied to Lieutenant Watson. The court determined that statements Watson made could be rationally interpreted to presume that he committed homosexual acts.

These consolidated cases were argued in the Ninth Circuit on 8 July 1996, and Court TV filmed the argument for later broad-cast. However, on 16 August 1996, the court issued an order vacating submission of these cases. The Court gave no reasons for its decision. Therefore, it appears that the Philips case will be the first pronouncement on the constitutionality of the new policy in the Ninth Circuit.

## Conclusion

The appellate courts have consistently upheld the policy against various constitutional challenges. If this trend continues, review by the United States Supreme Court might be more remote than current commentators suggest.

Major Mickle.

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1. 10 U.S.C. s 654(b)(2) (1995).

2. 80 F.3d 915 (4th Cir. 1996), cert. denied, 1996 WL 396112 (U.S. Oct. 21, 1996) (No. 96-1)

3. The "statements provision" of the statute provides that a servicemember "shall be separated from the armed forces" if there is a finding "[t]hat the member stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding ... that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. s 654(b)(2) (1995).

4. Thomasson, 80 F.3d at 921, 923.

5. 97 F.3d 256 (8th Cir. 1996), aff'g 909 F. Supp. 1303 (D. Neb. 1995).

6. Id. at 262.

7. Able v. United States, 88 F.3d 1280 (2d Cir. 1996), rev'd and vacated 880 F. Supp. 968 (E.D.N.Y. 1995).

8. The "acts provision" of the statute provides that, unless certain findings are made, a member of the armed forces "shall be separated from the armed forces" if that member "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts ...." 10 U.S.C. s 654(b)(1) (1995).

9. 883 F. Supp. 539 (W.D. Wash. 1995), appeal docketed, No. 95-35293 (9th Cir.)

10. 920 F. Supp. 1510 (N.D. Cal. 1996), appeal docketed, Nos. 96-15762, 96-15855 (9th Cir.) (consolidated for oral argument).

11. 918 F. Supp. 1403 (W.D. Wash. 1996), appeal docketed, No. 96-35314 (9th Cir.).

12. *Id.* at 1408.