Federal judge strikes down US military “don’t ask, don’t tell” law

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On September 9, a United States district judge in Riverside, California, located east of Los Angeles, ruled unconstitutional the “don’t ask, don’t tell” law enacted by Congress in 1993 at the urging of the Clinton administration.

The provision in question states that a member of the US armed services who “engaged in...or solicited another to engage in a homosexual act,…has stated that he or she is a homosexual or bisexual,” or has married someone “known to be of the same biological sex,” must be discharged from active military service.

The decision was authored by United States District Judge Virginia A. Phillips, a judicial moderate nominated by Clinton in 1999 and confirmed with significant Republican support.

After examining the effect of the law on six individual members of the armed forces, and considering the impact on the military as a whole, Phillips held that the law, found at Title 10 of the United States Code, section 654, violated the constitutional rights of gays and lesbians in the military to due process and freedom of speech and association.

Although at issue was discrimination against people in the US military, many of whom participate in colonial-style occupations and invasions, the ruling marks a definite expansion in the democratic rights of the population as a whole to be free from discrimination based on sexual orientation.

The case was filed by the Log Cabin Republicans, a gay advocacy group, who sought to enjoin the law and have it declared unconstitutional. The defendants—the United States and Secretary of Defense Robert Gates—were defended by attorneys from the Obama administration’s Justice Department “Federal Programs Branch” in Washington, DC.

Talking out of both sides of their mouths, the Obama administration lawyers asserted that section 654 “should be repealed,” but also that it should be upheld as constitutional because it “furthered military effectiveness by maintaining unit cohesion, accommodating personal privacy and reducing sexual tension.” Their equivocation reflects the kowtowing of the Obama administration before the US military establishment, while paying lip service to the administration’s liberal base.

The decision follows a ruling in San Francisco last month striking down California’s ban on gay and lesbian marriages. (See: “Federal judge strikes down anti-gay Proposition 8 in California”) Like Judge Vaughn R. Walker in that case, Judge Phillips first held a trial and heard extensive courtroom testimony, so the issue could be determined on a full factual record rather than simply with abstract assertions based on stereotypes.

Judge Phillips’s 86-page memorandum of decision dismantled the Obama administration’s arguments—and the anti-gay and lesbian bigotry underlying them—brick by brick.

First, Phillips repudiated the administration’s technical challenges to the group’s right to file the lawsuit, what the law calls “standing.” She found that the Log Cabin Republican’s mission includes “assisting in the development and enactment of policies affecting the gay and lesbian community” and supporting “activities or initiatives which provide equal rights under law to persons who are gay or lesbian.” At least two of the organization’s members, one of whom is an Army lieutenant colonel forced to use a pseudonym to prevent being discharged, were directly affected by the law.

Next, Phillips reviewed the courtroom testimony of six ex-service members, who described injustices

caused by the law. One, an Air Force major with an exemplary record, was discharged following 13 years of service after his personal email was illegally accessed, revealing his homosexuality. Another was taunted as a “faggot” and beaten by his unit, because he would not consort with prostitutes, but did not complain, fearing discharge under the “don’t ask, don’t tell” policy.

Based on recent court precedents recognizing the due process right to “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” including the 2003 Supreme Court decision striking down anti-homosexual criminal statutes (See: “US Supreme Court strikes down anti-gay laws”), Phillips ruled that the law must be struck down unless it is necessary to advance an important governmental interest.

Phillips reviewed military reports and expert testimony relied on when Congress enacted “don’t ask, don’t tell.” Most “assumed, without investigation, that the presence of homosexuals had a negative effect and their exclusion was desirable, without elaborating on the basis for those assumptions,” Phillips wrote. None of the experts who testified before the Armed Services Committee when the law was drafted could cite any empirical research supporting the view that gays and lesbians would adversely affect “unit cohesion.”

The most strident defense of discrimination against gays and lesbians in the military in 1993 came from General Colin Powell, who claimed without supporting evidence that “open homosexuality was incompatible with military service and would undermine unit cohesion.”

Powell added that “behavior too far away from the norm undercuts the cohesion of the group,” and that “the official position of nondiscrimination towards homosexuals in the militaries of countries such as Canada, Germany, Israel, and Sweden, practice does not always match policy.”

Finally Powell explained away parallels between discrimination against homosexual and black members of the armed services on the spurious basis that “skin color is a benign non-behavioral characteristic, while sexual orientation is perhaps the most profound of human behavioral characteristics.” Phillips’s decision states that Powell subsequently changed his views.

Phillips concluded that discrimination based on sexual orientation, rather than advancing the interests of the military, impedes recruitment and results in the discharge of qualified service members, ultimately lowering the “moral, educational and physical fitness standards” of service members.

Phillips also found that the law violated the free speech rights of gay and lesbian service members by “preventing them from discussing their personal lives or comfortably socializing off duty with their respective colleagues,” and “from complaining about the extreme harassment and hazing” they sometimes suffered at the hands of service members who suspected or knew about their sexual orientation.

Finally, “the Act prevents service members from openly joining organizations, such as the plaintiff in this lawsuit, that seek to change the military’s policy on gay and lesbian service members; in other words, it prevents them from petitioning the Government for redress of grievances,” Phillips concluded.

Thus far, the response to Phillips’s ruling has been far more muted than the right-wing hysteria that followed the gay marriage ruling, no doubt reflecting her findings that the discrimination weakens the US military.

The Obama administration has not yet announced whether the ruling will be appealed.