

# Elkins case poses legal questions <sup>9/24/76</sup>

By Robert Melton  
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The possible removal of second-year student Bob Elkins from the Resident Staff program may have legal ramifications.

Members of the University Law School faculty a constitutional law expert and American Civil Liberties Union (ACLU) officials agree the Elkins case has legal overtones, particularly in light of broader questions concerning homosexual rights.

National ACLU Legal Director Mel Wolff said that Hereford as "the president of a large state university, has the responsibility to acknowledge the rights of all minorities, including homosexuals." He said the question of "one's particular sexual preferences should be a matter of total indifference" to the University administration.

Wolff said removal of Elkins from the program would violate Elkins' constitutional "right to privacy and the right to engage" in his own private activities.

Wolff cited an Oregon case, *Singer v. The Civil Service Commission*, in which an "openly gay" person was fired, because the Commission said his presence

brought "discredit" to the organization in which he was working, Wolff said.

According to Wolff, the appellant lost the case when it was appealed to the U.S. District Court of Appeals. However, the U.S. Solicitor General said the case should be reheard under a recently issued set of Civil Service regulations which "forbids

## Analysis

government agencies to refuse employment to, or dismiss someone because they are homosexual," Wolff said.

Hereford, by appointing the committee to study Elkins' possible removal from the program, is "only exacerbating the hostility about discrimination against homosexual", Wolff noted, adding the whole affair represents a "bad principle."

Executive Director of the Richmond ACLU Betsy Brinson said Elkins has the substantive right to be a "person in his own identity" and that discrimination against him would be similar to discrimination against a any person for being a "Black Muslim or a woman."

The Supreme Court, noted Brinson, has never said an individual has any "certain rights because he's a homosexual per se"

noting a "definite constitutional issue" exists in this case.

A key problem is, however, a lack of any legal precedent, she said, and added that discrimination because of one's homosexuality "should to be illegal."

The Elkins case, if it ever reaches court, is the sort of case the ACLU would like to handle, both Wolff and Brinson said.

Brinson said efforts are being made around the country to acquire legal protection for homosexuals. Because Elkins' case is currently in "the public sphere" at the University, which is a state agency it might be "easier to get a remedy" than in a similar case in a "private setting," she added.

Brinson mentioned a case, *The Gay Alliance of Students v. Mathews* at Virginia Commonwealth University (VCU) in which the VCU Board of Visitors refused to grant recognition to the Gay Alliance. The case is currently being appealed to the Fourth Circuit Court.

Brinson noted that concern about legislators who decide appropriations for the University may be justifiable.

The "sensitivity of legislators to homosexuals is virtually nil," she said.

(Cont. on p. 6, col. 1)

# Case poses legal problems <sup>7/24</sup>

(Continued from page 1)

Claiming that legislators are "not tuned in" on the problems of homosexuals, she said, "in fact they're (generally) tuned out."

For Government Prof. and constitutional law expert Henry J. Abraham, the legal and constitutional questions involved are "difficult and close."

Judicial precedent that does exist is far from clean especially since the courts have tread lightly on the issue of homosexual rights, he noted.

Abraham cited two cases related to the question of homosexual rights. In *Doe v. Commonwealth* the Supreme Court upheld Virginia's statute prohibiting sodomy between two consenting adults who acted in private.

In the other case, that of the Army's discharge of professed homosexual Gary Matlovich, decided July 16, presiding U.S. District Court Judge Gerhard Gesell ruled the Army had the right to establish "certain standards of behavior."

On this basis, Abraham said he believes the University could probably legally remove Elkins from the Resident Staff program.

University is not, however, the U.S. Army, and Doe and Matlovich "may well not address themselves to the case at hand," Abraham noted. A crucial point in Elkins' situation is the need to be "both fair and compassionate in the matter," he said.

The Elkins situation, Abraham noted, turns "as much on a matter of fairness as legality. The question is extremely difficult."

According to Law Prof. Charles H.

Whitebread, the legal issue is whether "he (Elkins) has a due process right to hold the job (as RA) as long as he performs it in good faith and maintains the minimum standard" set by the program.

This procedural right, Whitebread noted, is the basic issue "is his due process right to continue his job as long as he does it well."

Whitebread said the case would probably not reach the courts. If it did, and the court ordered a hearing for Elkins prior to his removal from the Resident Staff and based on a due process right, Elkins' removal "should be on the basis of his job, and not on his sexual preferences," Whitebread said.

Assoc. law Prof. Lillian Bevier said Whitebread "is probably right" on the question of Elkins' procedural rights.

She said the question is "a matter of constitutional law-whether it is impermissible to choose a resident advisor on the grounds of his sexual preferences-and there are no cases to indicated the contrary."

"There's nothing in the constitution to prevent" the University from dismissing Elkins, she said.

For Bevier, the issue contains two important points she said-"the right to be a homosexual and the right to have being homosexual be made an irrelevant criteria in the selection process."

The courts "haven't even taken the first step, she noted and even with the first, "the second doesn't necessarily follow."

While Elkins may have procedural rights, Bevier said, she noted she did not think he had any substantive rights to be

violated by his possible removal from the program.

If removed from the program, Elkins might have procedural rights of "a sort of ex-post facto" nature, referring to removing a professed homosexual after admitting him into the program.

"The position the University takes as a state institution will be important, Bevier noted. And that seems to be the key. The University committee appointed by Hereford has important questions before it.

Some of these questions are: What rights might be violated if Elkins is removed from the program? Would Elkins be discriminated by being dismissed? Does Elkins' homosexuality come under the rubric of "unacceptable behavior" and therefore, grounds for removal from the program?

The lack of legal precedent and the complexities of the issues involved complicate the situation. For many, it seems a question of fairness needs to be considered along with the University's right to dismiss Elkins.

The Elkins situation, in a broader context, points up the growing need to address the rights of homosexuals.

As one constitutional law scholar noted, "a case or two (on homosexual rights) would bring this thing down to earth and out in the open."

ACLU Legal Director Wolff said the actions taken thus far on considering the removal of Elkins' from the Resident Staff "are hardly worthy of a great University. Thomas Jefferson, a real libertarian, would turn over in his grave."