

OPINION

■ DON'T ASK, DON'T TELL ■

Retire a bad military policy

By *John D. Hutson* SPECIAL TO THE NATIONAL LAW JOURNAL

IN ITS RECENT decision in *Lawrence v. Texas*, the U.S. Supreme Court gave Congress, the Department of Defense and the Bush administration a great opportunity to do the right thing by reconsidering the lamentable “Don’t Ask, Don’t Tell” policy regarding gays in the military. In dramatically overturning *Bowers v. Hardwick*, the court virtually compels a hard look at a policy that has plagued the Department of Defense (DoD) for a decade, burdening it with what is perhaps the quintessential example of a bad compromise.

Early in his administration, President Bill Clinton promised to open the military to homosexuals. Although gays have always been an active part of the military, for the modern U.S. forces, it would have been a dramatic change for gays to be “out” while in uniform. Unfortunately, the military wasn’t ready for the change, and, in light of *Bowers*, it wasn’t legally required to be. Clinton’s heavy-handed, ill-conceived effort generated squeals of protest within the Pentagon and a cacophony of debate throughout the country. But the bell couldn’t be unring. Once raised, the issue had to be resolved.

I was in the office of the judge advocate general of the Navy in those days and it’s clear to me now that a satisfactory resolution was impossible then. There was no support in the military and little on Capitol Hill for Clinton’s position.

Well-intentioned people, led by the DoD’s general counsel, retired behind closed doors to seek a resolution away from the glare of politics, media and critics. Not often is such a public debate resolved in such dark secrecy. By the time Don’t Ask, Don’t Tell was revealed, everyone was exhausted by the effort and by the pressure to

achieve something—anything.

It’s hard to believe now, but in those days the idea of going from prohibiting gays in the military to completely opening the ranks was a bit like Chuck Yeager’s first breaking the sound barrier—no one was quite sure what would happen. Those entrusted with resolving the issue feared a major exodus or a collapse of good order and discipline. We were concerned about the future of the armed forces and national defense, as well as human rights.

Policy missile landed like a dud

Don’t Ask, Don’t Tell was a badly flawed policy, but it was the best DoD could do on an issue whose time had not yet come. It was a compromise designed to avoid embarrassing the president, to mollify gay activists and yet to be acceptable to the military. It didn’t completely succeed in any of those respects.

Don’t Ask, Don’t Tell is virtually unworkable in the military—legally, administratively and socially. Rather than preserving cohesion, it fosters divisiveness. Heterosexual service members occasionally come out of a closet they were never in to avoid unpleasant duty or because a better job opportunity presents itself in the civilian sector. In the Navy, we called these “saltwater gays.”

The charade required by Don’t Ask, Don’t Tell demeans the military as an honorable institution and its personnel. The second-class citizenship of gays flies in the face of the Navy core values of honor, courage and commitment. Don’t Ask, Don’t Tell bought us some time to mature, but having endured a decade of this policy and having been given a prod by the Supreme Court, the time for re-examination is upon us.

Sexual activity of any kind is a problem in the military. It’s often inimical to good order and discipline. It can defeat unit cohesion. We faced it with the increased number of women in the

force and their assignment alongside men in almost all jobs. “Friggin’ in the riggin,” as it is sometimes referred to in the Navy, is a problem, to be sure. Men and women, mostly young, often far from home and doing important and often dangerous work, are under stress. Adding sexual tension to the mix only makes matters worse. However, that’s true whether it’s heterosexual or homosexual tension. The Uniform Code of Military Justice provides a wide array of tools, administrative and judicial, to deal with sexual assault and harassment, fraternization, and all the other sexual misconduct that plagues all societies and is exacerbated in the caldron of the armed forces. Just as the military enforces various laws prohibiting heterosexual misconduct, it can do the same with homosexual misconduct.

Time to move forward

It would be a great tragedy if we didn’t take advantage of this second chance to correct a flawed policy. Military personnel in 2003 have reached a level of maturity and tolerance that undermines the earlier “unit cohesion” arguments. Still, there will be howls of outrage and concern about the viability of our fighting forces just as there were a decade ago. It will take an act of moral courage for anyone inside the administration to propose it.

We all know that in 2003 there are plenty of dedicated gay patriots in the armed forces and the walls have not come tumbling down. The military owes it to its own personnel and to its reputation to take the lead, as it did with drug, gender and race issues, and do the right thing. **NLJ**

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