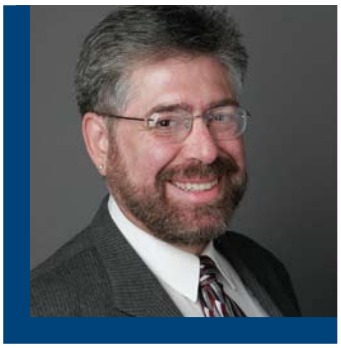

Legal Landscape

The Liberty to Love and Serve

In two recent cases challenging the military's "Don't Ask, Don't Tell" (DADT) policy, both federal appellate courts accepted the argument Lambda Legal made in our friend-of-the-court briefs: Our victory in *Lawrence v. Texas* requires heightened scrutiny of the policy. In other words, the courts cited *Lawrence* in concluding that the policy's intrusion into a servicemember's private sexual life had to be balanced against the government's reasons for the policy.

The first case, decided by the Ninth Circuit Court of Appeals, was successfully brought by the ACLU on behalf of Major Margaret Witt. Notwithstanding 19 years of decorated service, Major Witt was discharged based on the Air Force's investigation into her committed, long-term relationship with a civilian woman with whom she shared a home 250 miles away from base. In our brief, we argued that the DADT policy impinges on servicemembers' freedom to have a private, intimate relationship with another adult of their choice, and the court agreed. As a result, the court held that "when the government attempts to intrude upon the personal and private lives of homosexuals ... the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." The court reversed the lower court's dismissal of Major Witt's lawsuit and sent the case back to the lower court to determine whether the military's interest in "unit cohesion" met this test.

The second case, *Cook v. Gates*, was brought by Servicemembers Legal Defense Network (SLDN) on behalf of 12 members of the military who were discharged because of DADT. The First Circuit also agreed with Lambda Legal, saying that "*Lawrence* did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy" in a way that is intruded upon when DADT is applied to "homosexual conduct occurring off base between two consenting adults in the privacy of their home." Unfortunately, this court backed the lower court's dismissal of the lawsuit, because it deferred entirely "to congressional decision-making in the area of military affairs."

Though only one of these cases has had a good outcome so far, both show that, even when *Lawrence* is given force, the result is likely determined by how closely a court examines the DADT policy. Rather than waving the talisman of unit morale, both the courts and Congress should look carefully at how the policy actually operates. As the Ninth Circuit noted, "Major Witt was a model officer whose sexual activities hundreds of miles away from base did not affect her unit" adversely. Indeed, as the court explained, "it was her suspension pursuant to DADT, not her homosexuality, that damaged unit cohesion."

In July a House panel held the first congressional hearing to examine the repeal of DADT, where retired officers, gay and straight, advocated for doing away with the policy once and for all. Though there were representatives from organizations that spoke in favor of maintaining DADT, perhaps tellingly, no one from the military or Department of Defense testified.

Because Lambda Legal, SLDN, the ACLU, courageous servicemembers and allies have continued to ask and tell — that is, ask the right questions and tell the truth about this misguided policy — a recent CNN poll reported that more than 79% of Americans now believe that those who are openly gay should be allowed to serve. It's well past time that all Americans should be allowed to do so — openly and with pride.

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