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LEGAL SCHOLARS QUESTION WHETHER SODOMY RULING WILL AFFECT MILITARY GAY BAN

Experts Assess Military Anti-Sodomy Law and "Don't Ask, Don't Tell"

SANTA BARBARA, CA, June 26, 2003 - In the wake of the Supreme Court's ruling striking down a Texas ban on same-sex sodomy, *Lawrence v. Texas*, legal experts on sexuality in the military said today that the Pentagon's ban on openly gay soldiers could come under increasing legal scrutiny. In remarks made to researchers at the Center for the Study of Sexual Minorities in the Military at the University of California, Santa Barbara, prominent legal scholars suggested that the ruling may erode the rationale for continuing to ban both sodomy and openly gay soldiers, while others disagreed.

"The legal ramifications of today's opinion are enormous," said Chai Feldblum, a law professor at Georgetown University, who has written extensively on gays and lesbians in the military and who filed an amicus brief in the *Lawrence* case. "Once the right of gay people to express their love for each other is acknowledged as integral to a person's liberty interest, government may not unduly burden that interest." Professor Feldblum said that the Court's decision makes it more likely that future equality challenges based on sexual orientation will win. "Government has just lost its weapon of mass destruction," she said. "It can no longer use the existence of sodomy laws to justify discrimination. As of today, all sodomy laws are unconstitutional."

Some legal scholars believe that military policies concerning gays and lesbians may, in particular, be affected by today's ruling. James Garland, who teaches law at Hofstra University Law School, said that today's ruling "affirms that there may be a federal right to privacy. It raises serious constitutional questions about the military's ability to regulate private sexual conduct off-duty that cannot be shown to affect one's military performance."

Tobias Wolff, Visiting Professor of Law at Stanford Law School, said today's opinion has lessons for the military's policy toward gay and lesbian soldiers: "It suggests that the same values that are enshrined in our Constitution should apply in our armed forces: namely, that every soldier should be held to the same code of conduct. The justifications for singling out gay soldiers and imposing special restrictions upon them have been deteriorating for years. Perhaps the Court's opinion in *Lawrence v. Texas* will serve as an occasion to examine those justifications even more closely." Professor Wolff



added that the decision "might undermine the aspects of the military's justifications that depend upon the negative attitudes of straight service members toward gay soldiers, which is the entirety of their justification at the moment."

Bridget Wilson, an attorney with Rosenstein, Wilson & Dean in San Diego who has worked extensively on litigation surrounding gays in the military, agreed that "when you make clear how dubious the criminal prosecution of sodomy is, it raises questions about the implications of tossing out people on the basis of status, and about the functional and legal rationale for the military's blanket exclusion of gays and lesbians under 'don't ask, don't tell.'" While the "don't ask, don't tell" law requires the military to fire known gay soldiers regardless of their sexual conduct, Article 125 of the Uniform Code of Military Justice (UCMJ) criminalizes the practice of sodomy itself.

Wilson explained that according to the military justice system, an individual can receive more jail time for consenting adult sexual activity than for violent crimes. "The military criminalizes a number of things that would be unconstitutional in civilian society but the fact is that the Court's analysis very much casts doubt on a potential prosecution of sodomy under Article 125 that could give more time in jail for private consensual sexual activity with no harm to the military than for negligent homicide."

Other legal experts, however, cautioned that the ruling may not have direct implications for policies and laws concerning gay troops, because the government may be able to defend discrimination if it can show that it has a compelling interest in doing so. George Fisher, Professor of Law at Stanford University Law School, said that "because the Court did not subject the Texas law to strict scrutiny and did not demand that Texas articulate a compelling interest to defend its invasion of liberty, the Court presumably would not impose that burden on the military. The Court's ruling suggests that the military could justify its regulations by showing only a rational basis for them."

Garland agreed, saying "if the military can argue off-duty, off-base homosexual activity poses a risk to its mission, the military is likely to continue to win at least under that theory." Feldblum concurred that the Court "could well decide that a governmental reason to deny gay people the right to serve openly in the military or to get married is legitimate. The reason may not seem logical to others, but as long as five members of the Court accept that reason, it will be the law of the land."

Whether or not today's ruling ends up undermining "don't ask, don't tell" or the UCMJ may depend on the Court's future willingness to defer to military judgment. Aaron Belkin, Director of the Center for the Study of Sexual Minorities in the Military, said that "increasingly, federal courts have come to defer to the military when it argues that national security requires trumping the constitutional rights of



citizens."

But Diane Mazur, Professor of Law at the University of Florida who has written extensively on the issue of judicial deference to the military, said we should not assume that the tradition of military deference annuls all rights to privacy. "It's important that this not be an occasion for reinforcing the current Court's dubious statements about 'deference to the military,'" she said. "It is often assumed that the military gets a free pass from the Constitution. This issue has never been contested in the case of the military's ban on gays; it has only been assumed."