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Sodomy Ruling Spurs Challenges To Military's Policy on Gays

By CHARLES LANE
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The first aftershocks of the Supreme Court's landmark decision striking down a Texas sodomy law have reached the U.S. military, where the ruling is sparking new court challenges to the armed forces' ban on openly gay personnel and other rules affecting sexuality.

A gay former officer is citing the ruling, known as *Lawrence v. Texas*, in a lawsuit challenging his dismissal from the Army. Another soldier is invoking *Lawrence* to fight his court-martial conviction for a sexual offense. And the Pentagon's own lawyers are pondering whether the case requires adjustments to military criminal law.

Lawrence is unlikely to create any immediate changes in policy, legal analysts said. Legal challenges must overcome federal courts' historical deference to Congress and the executive branch on national security matters—as well as the presumption that members of the military do not necessarily enjoy the same constitutional protections as civilians.

But at a minimum, *Lawrence* will make the government rethink the legal defenses it used successfully in the 1990s during the furious debates over gays in the military, obliging it to rely more heavily on the notion that the presence of acknowledged gays is inherently

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disruptive to the military's effectiveness, legal analysts said.

"It's very clear that *Lawrence* does not create an inevitable invalidation" of the military's ban on openly gay personnel, said Chai Feldblum, a law professor at Georgetown University who opposes the ban. "But the government has suffered a wound to its argument."

The military's current homosexual conduct policy, popularly known as "don't ask, don't tell," was worked out after President Bill Clinton's plan to allow openly gay service members ran into opposition from Congress and the armed forces in 1993.

As ultimately framed in law by Congress, the policy calls for the military to refrain from investigating service members' sexual orientation as long as they do not declare it themselves. On paper, this was a liberalization of past policy, but gays complain that more than 9,000 people have been discharged since "don't ask, don't tell" was enacted in 1993.

Both before and after the law was passed, federal appeals courts upheld the military ban on gays by citing *Bowers v. Hardwick*, the 1986 Supreme Court case that said that the constitutional right to privacy did not extend to homosexual sodomy and that the states were therefore free to express moral disapproval of certain sexual behavior by criminalizing it.

But *Bowers* was overruled by *Lawrence*. As a result, legal analysts said, the case for "don't ask, don't tell" hinges principally on the notion that the cohesion of military units, and thus their ability to wage war, would be undermined if they had to include open gays.

This idea was codified in 1993 by Congress, which formally determined that the military was a distinct "society," where the exigencies of combat push people together in "forced intimacy with little or no privacy."

"The presence ... of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability," the 1993 "don't ask, don't tell" law says.

In *Lawrence*, the court ruled that the Texas sodomy law was unconstitutional because the restrictions it placed on liberty "furthered no legitimate state interest." It was one of the rare cases in which the court has found that a statute could not meet that minimal constitutional standard.

To prevail, legal analysts said, opponents of "don't ask, don't tell" would have to show that the concerns Congress expressed about unit cohesion were similarly unfounded—so baseless that no rational legislator could have believed them.

But that could be a harder legal argument in the context of national security—where the Supreme Court has generally refused to second-guess judgments made by the political branches of government.

Civilians have a constitutional right to religious freedom, for example, but in 1986, the Supreme Court said the military could prohibit Jewish soldiers' wearing yarmulkes with their uniforms, citing the armed forces' need to maintain discipline. Congress later overturned that policy.

To strike down the homosexual conduct policy "would be to hold that this compromise between the president and Congress in the realm of national security is irrational," said Michael J. Glennon, a specialist in constitutional and national security law at Tufts University's Fletcher School of Law and Diplomacy. "I can't see the court doing that. There are virtually no cases in which the Supreme Court has overturned the joint will of Congress and the president in the area of national security."

But after *Lawrence*, some opponents of the policy are optimistic that at least one appeals court will decide that "don't ask, don't tell" is unconstitutional, creating a conflict of legal authority that the Supreme Court might have to settle—assuming, as most observers do, that Congress will steer clear of the politically charged area.

As opponents see it, the ban on openly gay service personnel is indeed irrational—as preposterous as racial segregation in the military, which was once defended in terms of military necessity but then discredited and discarded.

BY DIANE E. OLSEN FOR THE WASHINGTON POST

Former Army Lt. Col. Steve Loomis, discharged before his 20-year retirement date, launched first *Lawrence*-based lawsuit against "don't ask, don't tell."

"The unit cohesion argument is a worn-out stereotype," said David Sheldon, a Washington lawyer who represents gay service members.

Sheldon's client Steve Loomis, a former Army lieutenant colonel discharged eight days shy of his 20-year retirement date, has launched the first *Lawrence*-based lawsuit against "don't ask, don't tell," seeking to recoup $1.1 million in lost pension benefits. The suit says that the policy is "not rationally related to any legitimate government interest."

Loomis, who received two Bronze Stars and a Purple Heart as an infantry platoon leader in Vietnam, sees his career as evidence that homosexuality is no inherent threat to military proficiency. He said he was a victim of "an institutional predisposition and bias against gays in the military," as demonstrated by the fact that three members of the board that ruled on his case publicly expressed revulsion toward homosexuality.

But he also acknowledges that, if he wins his case in the U.S. Court of Federal Claims in Washington, it could be because of issues such as the alleged bias of the board—not necessarily his *Lawrence*-related claims.

A direct ruling on *Lawrence*'s applicability to "don't ask, don't tell" probably awaits a case that exclusively presents the constitutional issues, and lawyers say such challenges are being prepared.

"We are headed toward a showdown on whether or not it is a military necessity," Sheldon said. "The issue will define itself within a few years, and it could be a Supreme Court case."

But Loomis is also challenging the military's sodomy statute, known as Article 125 of the Uniform Code of Military Justice, as a violation of *Lawrence*. Article 125 prohibits "unnatural carnal copulation with another person of the same or opposite sex or with an animal." Though rarely enforced, Article 125 has been used to court-martial soldiers for consensual acts, both homosexual and heterosexual.

Loomis's suit says that even though he was never prosecuted for sodomy, an Army criminal investigation of his alleged violations of Article 125 led to his expulsion from the ranks for being gay. Lawyers consider that law a more vulnerable target than "don't ask, don't tell" after *Lawrence*.

"The Article 125 case is a better case," said Matt Coles, director of the gay rights project of the American Civil Liberties Union. "The question for the military is a tough one: 'What interest do you have in regulating private consensual activity?' "

In a separate case, Army Pvt. Anthonynoel Meno was recently given a bad-conduct discharge and reduction in pay for allegedly engaging in consensual sodomy with a female soldier.

His appeal was rejected by the U.S. Army Court of Criminal Appeals, but after the Supreme Court issued its ruling in *Lawrence*, Lt. Col. Robert D. Teetsel, the chief of the Army defense counsel appellate division, asked the court to reconsider the case.

The U.S. Court of Appeals for the Armed Forces, the highest military appeals court, upheld Article 125 in a case of consensual heterosexual oral sex in 1992, citing *Bowers*.

Because of *Lawrence*, that court may ultimately have to revisit the question, Teetsel said, adding that among military defense lawyers, "we're all jostling in the different services to get a case to them."

In a sign that the Defense Department itself may question the viability of Article 125, Pentagon general counsel Charles Haynes has instructed the Joint Service Committee on Military Justice, a body of military lawyers known as judge advocates general, to review Article 125 in light of *Lawrence*, a Pentagon official said.

The review, to be completed by the end of the year, could result in recommendations to Congress for changes in the law, the official said.

On July 9, Rep. Barney Frank (D-Mass.) proposed a bill that would amend Article 125 to decriminalize consensual sexual activity between adults.