

## DON'T ASK; DON'T TELL ("DADT") -- AN UPDATE

Brenda Feigen February 15, 2012

The history of the treatment of gays and lesbians in the U.S. Armed Forces reads like a textbook in how not to treat a minority group. First (before 1992), gays and lesbians were prohibited from serving at all. Then, as I wrote earlier, this thoroughly unconstitutional policy, starting out as an executive order, as was the equally awful Defense Of Marriage Act, by President Clinton, allowed gay and lesbian service members to remain in the armed forces as long as they didn't tell anyone of their sexual orientation. At the same time the military was not supposed to ask any service member about her/his sexual orientation. Next, upon his election and, again from the Executive Branch of our government, President Obama vowed that this highly unconstitutional policy would end "on his watch". He charged the Pentagon with the task of conducting a survey of active-duty forces and their families. An article in the N.Y. Times, dated November 12, 2010, probably leaked by someone working on that report, noted that the survey came to the conclusion that repealing DADT would not cause overall harm to the military but "might cause temporary disruptions". More inside information revealed that the many individuals surveyed did not care if gays and lesbian served openly. The head of the Joint Chiefs of Staff, meanwhile and to my great joy, aligned himself against DADT.

The judicial branch had already started to come to the rescue of the chaos caused by the executive and legislative branches of our government. Virginia Phillips, a federal district judge in Los Angeles, in a case brought by the Log Cabin Republicans, ruled that DADT is unconstitutional and went so far as to order the military to stop enforcing DADT the day her decision was handed down. DADT not only discriminated in violation of the 5th amendment's equal protection and due process clauses (the fifth amendment comes into play because DADT is a federal statute, whereas discrimination by state and local governments is analyzed under the 14th amendment, and the standards of review are the same) but it was a shocking assault on 1st amendment freedom of speech and assembly rights. Judge Phillips agreed to stay her decision for a few days. The Obama administration, despite Obama's vow that DADT would end "on his watch", appealed to the 9th circuit and that court ruled that the decision must be stayed until they got into the merits of the law. Judge Phillips then lifted the stay. What choice did she have? The 9th circuit hearing was then scheduled for December 2010. This was followed by an impatient and still dissatisfied Obama administration, which, on November 10, 2010, asked the Supreme Court to let the military continue to bar openly gay and lesbian people under the DADT policy, arguing that a change in the law should come from Congress, not the courts. The Supreme Court ordered that the stay remain in effect until the appeal was heard and decided. Justice Kagan then said she would recuse herself with respect to all cases going to the Supreme Court on which she worked as Solicitor General. This DADT case would be one of them. If the 9th circuit agreed with the district court judge and that decision were not stayed, the armed forces will be required to stop enforcing DADT all over the country, not just in the 9th circuit. OR, if the administration were to appeal and the U.S. Supreme Court stayed the 9th circuit's decision, as well, until it were to hear the case, the process could take years.

Meanwhile, from the legislative branch a powerful cadre of Republicans, including John McCain, would have none of our liberal nonsense. Even though he previously expressed support for repeal providing that it had the military leadership's approval,

McCain vowed to filibuster the Pentagon's spending bill unless a measure repealing the "Don't Ask; Don't Tell" policy was stripped out of the bill. McCain had clout as the ranking Republican on the Senate Armed Services Committee, although his wife, Cindy, then spoke up in disagreement with her husband and in favor of the elimination of DADT. And three Senators on November 10, 2010, Joseph Lieberman, Mark Udall and Kristen Gillibrand, apparently thinking they were doing right by gays and lesbians issued a joint statement calling for an "orderly" repeal of the policy, to be carried out only after President Obama, Defense Secretary Robert M. Gates and the chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, certified that ending the ban was "consistent with the standards of military readiness, military effectiveness, unit cohesion and recruiting and retention of the armed forces."

On the other side of Capitol Hill, the House of Representatives in the 2010 session voted to eliminate DADT. The problem was that the Senate has not yet voted even though Obama, wanted Congress to take the heat, i.e. be brave enough to do what's right (and let him off the hook) while others of us felt sure that there will be another filibuster in the Senate. Meanwhile, the new Congress was coming in January. So, if the matter was to be resolved legislatively, the Senate would have had to act immediately and in a lame duck session. There was little chance that the newly Republican House would leave the vote against DADT alone should this debate have continued into 2011.

Of course, there were military officials now starting to come out of the woodwork. The Commandant of the Marines had strong objections to eliminating DADT: "Ending the ban in the middle of two wars would involve 'risk' for Marines, who, unlike other service members (who generally have private quarters) share rooms to promote unity." To General James F. Amos "there is nothing more intimate than young men and young women - and when you talk of infantry, we're talking our young men - laying (sic) out, sleeping alongside of one another and sharing death, fear and loss of brothers." He went on: "I don't know what the effects of that will be on cohesion. I mean, that's what you're looking at. It's unit cohesion, it's combat effectiveness." The NewYorkTimes stated that General Amos was quickly rebuked for his comments by Admiral Mike Mullen, chairman of the Joint Chiefs of Staff.

Meanwhile, the overall conclusions in the draft report, which includes a "survey of hundreds of thousands of active-duty service members and their families, were quickly seized on by gay rights groups to further their cause on Capitol Hill. The Times stated that it was unclear whether the leaked report would sway Senate Republicans who wanted to keep the ban in place.

For clarification, DON'T ASK; DON'T TELL raises crucially important constitutional issues:

- 1) Equality of rights is guaranteed to gays and lesbians under the 5th amendment of the U.S. constitution, as is the right to life, liberty and property under the due process clause. (If it's the state that's behind the discrimination, as opposed to a federal law like DADT, it's unconstitutional under the 14th amendment).
- 2) Freedom of speech does not exist if a service member is prohibited from telling anyone that s/he is lesbian or gay or in a same-sex relationship.

3) Freedom of association/assembly guaranteed also by the first amendment is denied when one cannot openly be seen with one's significant other or with a group of gay or lesbian friends. Imagine the scenario of a young married lesbian couple deciding that they both want to join the Marines. Under the present law, they may tell no one that they are married, let alone lesbians. That constitutes "telling" under DADT. They will be prevented from joining the Marines. Or, if they choose to follow DADT, they will have to lie about possibly the most important part of their young lives; they may even have to share quarters with two strangers, not each other, since we learned from General Amos that Marines do not get private quarters.

4) The right to privacy is completely invaded if one can be discharged because some third party snooped into that person's private life. Such a third party could be someone not in the military who then tells an officer about the person who is gay or lesbian, or privacy can be invaded if someone asks and is told whose arms (in a photo, for example) are around the Marine in question who wants to answer truthfully.

5) The insinuation, if not downright statement, that gay men, especially, will come on to their straight roommates is defamatory and a perpetuation of the stereotype that gays and lesbians try to convert others to their "lifestyle" or that they are sexual predators. This might well even constitute group libel if some zealous lawyer wants to take on that issue.

6) The fact that Congress passed this law is an obvious example of how gays and lesbians were accorded no protection in the daily living of their lives, harming no one. This, if only the Republicans in Congress had been honest, constituted the sort of government intrusion that they claimed so very much to abhor.

Of course, these days the Republicans seem to love government intrusion into our private lives. None of them now believes in a woman's right to choose (abortion); many want to deny women and men the right to use contraception. Or at least they say they do. Meanwhile, Don't Ask; Don't Tell has been repealed!!! The obvious reason is that there is absolutely no justification (except "animus") for keeping gays and lesbians from serving their country. It was a long battle, but it was well worth it to have this nation clean up its dirty work and end that odious discrimination. As of this writing, gays and lesbians serve; no one seems to have suffered from that fact, and we can all hold our heads higher as Americans.

The next battle and one that continues is for all of us to be allowed the right to marry (by every state in this country) and for the federal government to recognize those marriages. This continuing discrimination is as much a blight on our nation and the consciences of its proponents as DADT was for all those years that succeeded the outright ban on service by a minority group. This is a group that does not deserve the kind of outright hostility it still suffers.