



America's "Don't Ask, Don't Tell" comes to a long overdue end

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America may be at the forefront of many things, but when it comes to gay rights, it is leaps and bounds behind New Zealand.

A prime example of New Zealand's leadership in the gay rights movement is its recognition of partners who are de facto, married, or in a civil union. In the United States, however, partnerships do not exist at the federal level; the government recognises marriage only between a man and a woman. This means that gay couples in the United States who want to marry can't subsequently file for tax breaks, property and intestate rights, immigration sponsorship, and the 1,135 other benefits the United States General Accounting Office offers that are not automatic for gay couples, because gay marriage, at the federal level, is banned ("Why Same Sex Should Be Legal", 6 December 2009, www.lgbtpov.com/2009/12/christine-terry-why-same-sex-should-be-legal/#).

It may be a shock to some that a country whose foundational document rests on equality is still struggling to accept those who are different, and

goes so far as to implement legal bans to prevent classes of people from openly serving their country. "Don't Ask, Don't Tell" (DADT) was one such ban. Commonly understood as a "national compromise", DADT allowed gay military personnel to serve in the US armed forces, but only by legally preventing disclosure of any service person's sexual orientation – but what was meant to protect, actually encouraged discriminatory practices.

However, on 22 December 2010, President Obama signed DADT's repeal, overturning the 60-year ban on openly gay men and women in the military ("The President Signs Repeal of 'Don't Ask Don't Tell': Out of Many, We are One", Jesse Lee, 22 December 2010: www.whitehouse.gov/blog/2010/12/22/president-signs-repeal-dont-ask-dont-tell-out-many-we-are-one). Civil Rights advocates praised Obama's leadership and hoped this would begin to bridge the generational and political gap.

How did America end up with DADT?

In 1950, President Harry S Truman signed the *Uniform Code of Military Justice* (UCMJ) into law, effectively giving the United States military licence to operate under a different set of legal standards

in everything from evidence rules to what cases the Judge Advocate General (JAG) could prosecute.

Most laws are implemented as a reaction to social norms of the day. The UCMJ was a reflection of the 1950s' post-war "Baby-Boom" era. At this time in history, America had just defeated Hitler, the nation's stock market was strong, and most homes had Carson on in the living room and a Chrysler in the garage. Modern times dictated uniformity and anything that threatened that cushy way of life was immediately in question.

The UCMJ gave greater authority to an already overwhelming military superpower and with it triggered a 43-year ban on openly gay men and women in the military. Conformity was rewarded.

It was not until a year after President Bill Clinton's election in 1993 that DADT – a compromise between Congress and Clinton to overturn the ban on gay military personnel in the armed forces – became effective. Clinton partially ran on a gay rights platform and, among other promises, was elected to replace George Bush Sr's conservative stance on the issue and prevent a repeat of the Gulf War. After Clinton's election, however, Congress passed a bill that included adherence to the 1982 Reagan military directive which discharged gay military personnel because "homosexuality was incompatible with military service". Clinton, however, chose to issue a defence directive of his own, which prevented military personnel from asking whether or not an enlisted service person was gay. This became known as "Don't Ask, Don't Tell".

Bills sent to the President are usually wrought with state earmarks and hidden agenda passed by the House and Senate in hopes of attaining funds for a state cause. The Supreme Court has since held in *Clinton v City of New York*, 524 U.S. 417 (1998) that line-item vetoes are a fundamental violation to the Presentment Clause of Article 1. The President is, therefore, forced to sign all or none of the bill.

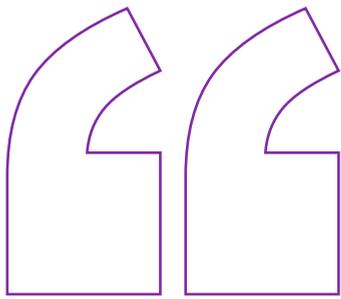
Over the next 17 years, the federal court system upheld the ban five times over and the Supreme Court agreed, affecting US military personnel like my good friend, Joe.

Joe's story

Like every American man at the age of 17, former Lance Corporal Joseph Price (Joe) was required to register for the US selective service, giving the government the ability to call him up to serve in the armed forces in the event of a draft.

Although there was no draft in place, Joe joined the United States Marine Corps as soon as he graduated high school because he wanted to serve his country, make a new life for himself, and get money for college – a noble and practical endeavour for a young man whose sincerity and kindness are as awesome as his MC Hammer dance moves. I can officially attest to this statement seeing as I was his high school prom date.

Joe and I met in Swing Choir our sophomore year in high school and became friends throughout our tenure together. Yes, we were "Gleeks" before there was any television show to chronicle our social desire to carve out our net worth in America's public



“homosexuality was incompatible with military service”

school popularity contest. As Joe and I danced the night away at Prom 1998, it never occurred to me that he might not like girls. Perhaps that was not an option for Joe, who grew up in the traditional confines of the Midwest.

After graduation, Joe entered the Marine Corps. He says, “I remember watching this video from this higher-up official right before the swearing-in ceremony that basically said, ‘if you’re gay, we don’t want you in the military’. I remember being very surprised by that.”

So why didn’t Joe stand up during that video and refuse to serve a country whose blatant discriminatory practices violated his constitutional rights? Because Joe, like many young gay men and women, never self-identified as gay, lesbian, bisexual, or transgender until after entering the military.

The military is not about an individual, but about conformity; one group, moving towards one goal. The military breaks you down and builds you up the way they want you to be. “As the saying goes, ‘To ask why is to do or die,’” Joe explains.

Unfortunately, when the Supreme Court chose to hear a case on DADT’s discriminatory practices, its decision did little for Joe’s plight.

The Supreme Court’s take on DADT

As well-seasoned lawyers know, most litigation comes down to the all mighty dollar. Although gay civil rights

holds its foundation for change within the Constitution’s Fourteenth Amendment, which prohibits discrimination for immutable characteristics, the movement’s progress has traditionally been tied to financial implications.

Rumsfeld v Forum for Academic and Institutional Rights, Inc (FAIR) 547 U.S. 47 (2006) asked the question, “Does the Solomon Amendment, which withholds certain federal funds from colleges and universities that restrict the access of military recruiters to students, violate the First Amendment?” To understand this question, one must understand how the US Military recruits its young men and women to churn the wheels of a \$708 billion industry (“Obama Seeks Record \$708 Bln in 2011 Defense Budget”, Reuters, 1 February 2010).

Military recruiters are the backbone of the US armed forces. Their presence permeates high school cafeterias, college campuses, and even law schools on career day. They bring with them enticing offers to join the Army, Navy, Marines, or JAG Corps with a nationalist presentation that would make even Bin Laden want to fight for the Red, White, and Blue. Coupled with the sentiment is a very effective upsell of tuition reimbursement and home loans. For many young men and women who cannot afford higher education (which can be upwards of \$150,000 for a Bachelor’s Degree) or want to move on from small-town America, it is a compelling offer. Most recently, 17 military

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recruiters made headlines for committing suicide within the past few years (Donna Mills, "Suicide Prevention Begins with Recruiters, Supervisors", American Forces Press Service, 3 February 2011). Maureen Boyle of *Enterprise News* recently noted that, "Experts point out that the Iraq and Afghanistan wars are the longest fought by an all-volunteer military in the nation's history." ("Army recruiter's apparent suicide attempt part of troubling military trend", 2 February 2010).

The Military Industrial Complex is often to blame for the pressure of recruiting large numbers of active duty members. On 17 January 1961, President Dwight D Eisenhower, a decorated five-star Army General whose leadership on D-Day won over the votes of the American public, warned the United States of the implications of increased military funding and manpower (National Public Radio, "50 Years Later: Eisenhower's Military Industrial Complex", 17 January 2011).

A warning became a reality in December 1961, when Kennedy issued the "White Papers", written by a team of advisers who argued for large-scale advancement in military and economic aid to the National Liberation Front. An unassuming America soon witnessed one of the largest-scale police actions in its history – Vietnam. Vietnam was never officially declared a war, as Congress alone reserves this power under Article 1, Section 8 of the *United States Constitution* and the *War Powers Resolution of 1973*, passed as a response to Vietnam. However, the *Constitution* did not prevent three Presidents from using their "Commander in Chief" powers and instituting the draft from 1964 to 1975, sending nine million men and women to Vietnam, which left more than 58,000 US servicepeople dead.

In today's military climate, the pressure of meeting the demand for an all-volunteer army have some suspecting that another Vietnam-like draft would have been evident if Obama had not won the Presidency.

In 2003, FAIR, comprised of 30 law schools, challenged the US Government's right to withhold funding if the school did not allow recruiters on its campuses. FAIR sued the Department of Defense seeking a preliminary injunction to prevent further compliance with the Solomon Amendment (*Rumsfeld v Forum for Academic and Institutional Rights (FAIR)*). The Supreme Court noted the following facts:

"Since 1990, the American Association of Law Schools ("AALS") has required its members to withhold placement assistance or use of the schools' facilities from employers who discriminate on the basis of sexual orientation. AALS believes that the military violates this policy as a result of the military's 'don't ask, don't tell' policy. See 10 U.S.C. § 654. As a result, some law schools refused to provide access to their facilities and assistance to military recruiters. In 1994, Congress enacted the Solomon Amendment (10 U.S.C. § 983), withholding Department of Defense funding



from any university that denied the military access to its campuses...

"However, after September 11, 2001, the Department of Defense informed schools that they would lose federal funding unless they provided military recruiters exactly the same access to career placement services as other employers enjoyed. Schools thereafter allowed military recruiters full access to career services."

FAIR made the Constitutional argument that by allowing military recruiters full access to college campuses, the school itself was perpetuating a discriminatory practice under the direction of DADT. The Government claimed that the Solomon Amendment was necessary to sustain an all-volunteer military.

The Supreme Court agreed with the Government; having military recruiters on campuses did not violate the First Amendment Free Speech rights of FAIR members by making federal funds conditional on military recruiter's access to its students. The Supreme Court's ruling left DADT in place and 2.2 million members of the US Military speechless.

Individual freedom presses onward

Despite America's highest court ruling in favour of the US Military at the expense of an individual's First Amendment free speech rights, society pushed the gay rights movement forward enacting state laws that allow gay marriage and domestic partnerships and bringing the issue of gay civil rights to the forefront of political agendas and human rights associations.

To move forward – to make change – takes not only education but sheer willpower to revamp the meaning of "normality". Although a law can prevent

a person from saying or not saying something, it cannot prevent a person from acknowledging who they are as an individual.

"I kind of came of age, if you will, in the military... I came out after my first year", Joe explains. "I was scared to tell some people, but I had a uniquely positive experience in the military. There were many gay and lesbian Marines. We went to a gay bar on my birthday. People just didn't give a shit."

"Even though I served under Don't Ask, Don't Tell, if I were called up again I would only consider it as long as DADT was not there. Don't get me wrong, although I had a good experience, everything was not peachy keen. I remember hearing about others who were attacked because of their sexuality and seeing it on the news. DADT separates, segregates, and forces you to lie."

After 60 years, the Government now agrees with Joe. On 22 December 2010, President Obama repealed DADT. He quoted one long-term service member:

"As one special operations warfighter said during the Pentagon's review... 'We have a gay guy in the unit. He's big, he's mean, he kills lots of bad guys. No one cared that he was gay.' And I think that sums up perfectly the situation."

As an advocate for civil liberties, I believe the repeal of DADT will set in motion America's long-overdue federal recognition of gay civil rights. It is almost as if America is finally starting to "hold these truths to be self-evident, that all men are created equal".

Christine Terry is an American law graduate completing her international clerkship with Queen City Law. She is passionate about civil liberties and loves the law because it is grounded in change. She can be contacted at christine@queencitylaw.co.nz.