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## Repeal of "Don't Ask, Don't Tell:" A Smooth Transition

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# Repeal of "Don't Ask, Don't Tell:" A Smooth Transition

Sharon E. Debbage Alexander and Kathi S. Westcott\*

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## *I. Introduction*

"Don't Ask, Don't Tell" is the common name ascribed to the federal statute and implementing regulations that govern the military service of gay, lesbian, and bisexual Americans.<sup>1</sup> The product of an awkward attempt at political compromise in the early months of President Clinton's administration, 10 U.S.C. 654 as passed by Congress in 1993 is an almost verbatim codification of its predecessor regulations requiring discharge for service members found to have (1) stated that they were lesbian, gay, or bisexual, (2) engaged in any broadly defined "homosexual act," or (3) married or attempted to marry any person of the same sex.<sup>2</sup>

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\* The Authors are the former directors of legislative affairs and legal services, respectively, at the Servicemembers Legal Defense Network. The Authors are grateful for research assistance provided by Mischere Kawas at Georgetown Law School, Lisa Franchini at Catholic University, Elizabeth White at the University of Illinois, Urbana Champaign, School of Law, and Daniel Pond at Oklahoma City University School of Law.

1. See SHARON E. DEBBAGE ALEXANDER, SHARRA E. GREER, C. DIXON OSBURN, STEVE E. RALLS & KATHI S. WESTCOTT, SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE TENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL" 13 (2004), available at [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/1411.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1411.pdf) (explaining broadly the terms of "Don't Ask, Don't Tell").

2. See 10 U.S.C. § 654 (2000) (codifying "Don't Ask, Don't Tell"); see also

The statute's implementing regulations resulted in the official cessation of threshold "asking" at accession and in the institution of some positive limitations on investigations.<sup>3</sup> Aside from these minor regulatory improvements, however, the law effectively codified the *status quo ante* that persisted prior to the start of the Clinton administration.<sup>4</sup> Meanwhile, the environment for gay<sup>5</sup> Americans in uniform became increasingly hostile as a result of the high profile political fighting on this issue between members of the Administration, the Pentagon, and Congress.<sup>6</sup>

The law has resulted in the discharge of more than 12,000 service members since its inception in 1993,<sup>7</sup> at a cost of over \$360 million.<sup>8</sup>

Dep't of Defense, Directive 1332.14, Enlisted Administrative Separations, enclosure 3 § 8.a.2(a)(b)(c) (Aug. 28, 2008) [hereinafter DoDD 1332.14], *available at* <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf> (discussing the homosexual conduct that will lead to separation from Military Services); Dep't of Defense Instr. 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers, enclosure 2, at E2.3 (Sept. 16, 1997) [hereinafter DoDI 1332.40], *available at* <http://www.dtic.mil/whs/directives/corres/pdf/133240p.pdf> (reiterating that homosexual conduct can lead to discharge from Military Service). *Cf.* Dep't of Defense Instr. 5505.8, Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations, at §§ 4, 6, & enclosure 2 (Jan. 24, 2005), *available at* [http://www.dtic.mil/whs/directives/corres/pdf/i55058\\_012405/i55058p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/i55058_012405/i55058p.pdf) (describing the procedure for those accused of homosexual conduct and defining "adult private consensual sexual misconduct" and "credible information").

3. *See* DoDD 1332.14, *supra* note 2, at enclosure § 3.c (2008) (establishing that commanders "shall not ask . . . whether a Service member is . . . homosexual"); *see also id.* at E8.4.3 (same).

4. *See* Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of "Don't Ask, Don't Tell,"* 21 HOFSTRA LAB. & EMP. L.J. 403, 406–13 (2004) (describing how in practice "Don't Ask, Don't Tell" acts as a ban from gays serving in the military almost identical to the regulations which preceded it).

5. Whenever "gay" is used throughout this article, it is used as an all-inclusive term for lesbian, gay, and bisexual. The term "transgender" is not included because the language of the "Don't Ask, Don't Tell" law and its implementing regulations does not specifically refer to transgender service members. However, it is worth noting that "Don't Ask, Don't Tell" has been applied to transgender service members self-identifying as gay, and the law has also been misapplied to transgender service members who are incorrectly perceived to be gay. Servicemembers Legal Defense Network, *Transgender Service Members*, <http://www.sldn.org/page/-/Website/Fact%20Sheets/Transgender%20Service%20Members.pdf> (explaining how "transgender service members may be perceived as being lesbian or gay by others in the military and therefore may end up being investigated under 'Don't Ask, Don't Tell'").

6. *See* ALEXANDER ET AL., *supra* note 1, at 16–19 (describing the separation, harassment, and violence experienced by accused gay Service members after the political firestorm that surrounded the debate and passage of "Don't Ask, Don't Tell").

7. Servicemembers Legal Defense Network, *Total "Don't Ask, Don't Tell" Discharges, 1994–1996*, [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/3864.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/3864.pdf) (citing Freedom of Information Act productions from Department of Defense, U.S.

While constitutional challenges to the law went on throughout the 1990s, anti-gay harassment continued virtually unabated inside the military, peaking in 1999 with the murder of Private First Class Barry Winchell at Fort Campbell, Kentucky, killed by two fellow soldiers because they believed he was gay.<sup>9</sup>

Since the United States went to war in 2001, increasing numbers of military and political analysts, political leaders and military veterans have questioned the continued relevance of "Don't Ask, Don't Tell" as the military has been stretched to its limits by extensive long-term engagements in Iraq and Afghanistan.<sup>10</sup> Discharges under "Don't Ask, Don't Tell" dropped by almost half from 2001 to 2003.<sup>11</sup> More telling, the news media has covered a number of high profile stories about gay service members effectively bucking the law and serving with the full knowledge and support of their peers, superiors, and subordinates.<sup>12</sup> Polling shows that

Military Services, and unofficial Congressional sources).

8. *Compare* U.S. GEN. ACCOUNTABILITY OFFICE, GAO-05-299, MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 8 (2005) (explaining that a 2005 report issued by the General Accountability Office estimated the cost of "Don't Ask, Don't Tell" over the course of its first 10 years at roughly \$250 million), *with* William Perry BLUE RIBBON COMMISSION REPORT, FINANCIAL ANALYSIS OF "DON'T ASK, DON'T TELL": HOW MUCH DOES THE GAY BAN COST? (2006), <http://www.palmcenter.org/files/active/0/2006-FebBlueRibbonFinalRpt.pdf> (explaining the Blue Ribbon Commission's conclusion that the GAO's estimate fell drastically short of the at least \$363 million actual cost of implementing "Don't Ask, Don't Tell").

9. *See* Alexander, *A Ban by Any Other Name: Ten Years of "Don't Ask, Don't Tell," supra* note 4, at 422–28 (2004) (noting that even though anti-gay witch-hunts and illegal investigations decreased during the 1990s, sexual-orientation-based discharges and harassment continued to rise until their peak in 1999); *see also* ALEXANDER ET AL., *supra* note 1 at 19–20 (describing the anti-gay effects of the "Don't Ask, Don't Tell" policy during the 1990s). *See generally* JANET E. HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* (1999).

10. *See* ALEXANDER ET AL., *supra* note 1, at 22–23 (noting that even within the military, a change of attitude toward gay service members is evident).

11. U.S. GEN. ACCOUNTABILITY OFFICE, GAO-05-299, MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 8 (2005).

12. *See, e.g.,* Bryan Bender, *Navy Returned Openly Gay Sailor to Active Duty*, BOSTON GLOBE, May 8, 2007, at A2 (discussing an instance when a reservist sailor was put on active duty and sent to Kuwait even after having informed his superiors of his sexual orientation); Andrea Stone, *Many Troops Openly Gay, Group Says*, USA TODAY, Jan. 8, 2008, at 3A (discussing the airing of a 60 Minutes interview with a soldier who discussed how he had served in the military openly gay for the past eighteen months). The soldier continued serving for months following the airing of the 60 Minutes segment, prior to being honorably discharged from the Army due to the public statement he made about his sexual

American voters support allowing openly gay people to serve in the Armed Forces by a margin of two to one.<sup>13</sup>

Despite the growing momentum in favor of repealing "Don't Ask, Don't Tell," it is a federal statute and will only cease to be law of the land through one of two mechanisms: legislative action or judicial invalidation on constitutional grounds. This Article examines the practical implications for the military services of repealing "Don't Ask, Don't Tell," with specific emphasis on the mechanisms for repeal and the regulatory adjustments that will be necessary for the successful transition to a policy of open service for lesbian, gay, and bisexual Americans.

## II. Legislative Repeal

There are a number of ways by which Congress might repeal "Don't Ask, Don't Tell" and replace it with a new policy regarding the military service of lesbian, gay, and bisexual Americans. This Part examines pending legislation aimed at repealing "Don't Ask, Don't Tell," and discusses other possible avenues for legislative action.

In March 2005, a bi-partisan group of fifty-seven House members led by Congressman Marty Meehan introduced the Military Readiness Enhancement Act.<sup>14</sup> As of this writing, the bill is in its second Congress of introduction,<sup>15</sup> claims 148 cosponsors,<sup>16</sup> and has as its lead sponsor

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orientation on the television program. *Id.* See generally *60 Minutes: Don't Ask, Don't Tell* (CBS television broadcast Dec. 16, 2007).

13. See Scott S. Greenberger, *One Year Later Nation Divided on Gay Marriage*, BOSTON GLOBE, May 15, 2005, at A1 (reporting a recent poll where 79% of respondents said that gay people should be allowed to serve openly in the military); see also Dana Blanton, *Majority Opposes Same-Sex Marriage*, FOXNEWS.COM, Aug. 26, 2003, <http://www.foxnews.com/story/0,2933,95753,00.html> (last visited Dec. 18, 2008) (reporting on a recent poll where 64% of respondents agreed that gay and lesbian individuals should be allowed to serve openly in the military) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Poll Majority: Gays' Orientation Can't Change*, CNN.COM, June 27, 2007, <http://www.cnn.com/2007/US/06/27/poll.gay/index.html> (last visited Dec. 18, 2008) (reporting on a poll where 79% of respondents stated they believed that openly gay people should be allowed to serve in the military) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

14. Military Readiness Enhancement Act of 2005, H.R. 1054, 109th Cong. (2005).

15. Military Readiness Enhancement Act of 2007, H.R. 1246, 110th Cong. (2007) (THOMAS, through current).

16. *Id.*

Congresswoman Ellen Tauscher.<sup>17</sup> There is currently no legislation to repeal "Don't Ask, Don't Tell" pending before the United States Senate.<sup>18</sup>

The Military Readiness Enhancement Act would repeal "Don't Ask, Don't Tell" and replace it with a sexual orientation non-discrimination policy for the U.S. Armed Forces. Responding to the unique history of the status/conduct distinction associated with the issue of gays serving in the military, as illustrated in multiple court decisions in cases challenging restrictions on gays in the military, the bill's drafters defined sexual orientation to include "statements and consensual sexual conduct manifesting heterosexuality, homosexuality, or bisexuality."<sup>19</sup> The legislation adds sexual orientation to the military's Equal Opportunity mandate<sup>20</sup> and specifies that the Secretaries of Defense and Homeland Security retain the right to regulate the conduct of military personnel, so long as regulations are "designed and applied without regard to sexual orientation."<sup>21</sup> The bill also provides for the voluntary application for re-accession of otherwise qualified personnel,<sup>22</sup> and requires that implementing regulations be issued no more than 90 days following enactment.<sup>23</sup>

While the Military Readiness Enhancement Act would provide for non-discrimination based on sexual orientation in most aspects of military

17. See Press Release, Servicemembers Legal Defense Network, Congresswoman Ellen Tauscher to Become Lead Sponsor of Legislation to Repeal "Don't Ask, Don't Tell" (June 13, 2007), <http://sldn.bluestatedigital.com/news/archives/congresswoman-ellen-tauscher-to-become-lead-sponsor-of-legislation-to-repeal/> (last visited Dec. 18, 2008) (reporting on Rep. Tauscher's take over as lead sponsor of the legislation in light of then current lead sponsor Rep. Meehan's departure from Congress) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

18. A search performed on December 17, 2008 for "Don't Ask, Don't Tell" on THOMAS.gov revealed no new repeal legislation.

19. H.R. 1246 § 4(f).

20. See *id.* § 7(a)(1) (requiring the Secretary of Defense "to add sexual orientation nondiscrimination to the Department of Defense Equal Opportunity policy and to related human relations training programs").

21. *Id.* § 4(d).

22. See *id.* (referring to sexual orientation and re-accession into the armed forces). It states:

Any person separated from the armed forces for homosexuality, bisexuality, or homosexual conduct in accordance with laws and regulations in effect before the date of the enactment of this section, if otherwise qualified for re-accession into the armed forces, shall not be prohibited from re-accession into the armed forces on the sole basis of such separation.

*Id.*

23. *Id.* § 7.

life, it does not provide for the recognition of the same-sex partners of service members. Under current law, the so-called Defense of Marriage Act prohibits federal recognition of same-sex marriages.<sup>24</sup> Federal law does not recognize any other form of same-sex relationship at this time. Although it is possible that a future version of the Military Readiness Enhancement Act could include an expansion of the military dependent definition to include same-sex partners, the current bill's authors have chosen to leave that issue to be addressed at a later date.

Momentum to repeal "Don't Ask, Don't Tell" is growing on Capitol Hill, and President Obama has publicly committed to its repeal.<sup>25</sup> Although support for the Military Readiness Enhancement Act grew consistently throughout the 109th and 110th Congresses, the path of least resistance to legislative repeal is probably through the Defense Authorizations process: President Obama's Department of Defense (DoD) could include repeal language in its Defense Authorizations proposal. With strong Democratic majorities in the House and Senate, and leadership from key veterans on the Armed Services Committees such as Congressmen Joe Sestak and Patrick Murphy, it is possible that the language would survive the authorizations process and become law. Even though it is possible to repeal "Don't Ask, Don't Tell" without providing legislative language to replace it, such a repeal runs the risk of inviting the re-institution of discriminatory policies and practices through regulations under a future administration. Therefore it is important for the Obama administration to consider including non-discrimination language comparable to that contained in the Military Readiness Enhancement Act in any Defense Authorization proposal.

### *III. Judicial Invalidation Without Replacement*

The constitutionality of "Don't Ask, Don't Tell" has been raised repeatedly throughout the lifespan of the law. This Part reviews the

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24. See 1 U.S.C. § 7 (1996) (defining marriage for all federal purposes to only refer to a legal union between two individuals of the opposite sex).

25. See *Renewing America's Promise*, The 2008 Democratic National Platform 36, <http://www.democrats.org/a/party/platform.html> (last visited Dec. 18, 2008) (including in its 2008 party platform repeal of "Don't Ask, Don't Tell" as a party objective) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). With firm Democratic majorities in both houses of Congress, it is more likely that the Party's platform will be enacted into law.

litigation history of "Don't Ask, Don't Tell," including several pending cases challenging the constitutionality of the law.

Beginning shortly after its passage in 1993, a series of cases were filed arguing that "Don't Ask, Don't Tell" violates lesbian, gay, and bisexual service members' constitutional rights of Due Process, Equal Protection, and Freedom of Speech and Association.<sup>26</sup> Unfortunately for the service members affected and their supporters, the majority of these cases were unsuccessful,<sup>27</sup> and "Don't Ask, Don't Tell" was found constitutional based on the existing Supreme Court precedent of *Bowers v. Hardwick*.<sup>28</sup>

With federal courts relying on this existing negative precedent, opponents of "Don't Ask, Don't Tell" refrained from further legal challenges to the law until 2003, when the Supreme Court explicitly overturned *Bowers* in *Lawrence v. Texas*.<sup>29</sup> Justice Kennedy declared in the Supreme Court's decision in *Lawrence* that "*Bowers* was not correct when

26. See, e.g., *Able v. U.S. (Able II)*, 155 F.3d 628, 630 (2d Cir. 1998) (presenting this court with its second appellate encounter "with the merits of plaintiffs' constitutional challenge to the military's 'don't ask, don't tell' policy toward homosexual members of the United States military"); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1127 (9th Cir. 1997) (reviewing "the constitutional challenges of two service members to the military's current 'don't ask/don't tell' policy on homosexuals"), *cert. denied*, 525 U.S. 1067 (1999); *Philips v. Perry*, 106 F.3d 1420, 1424 (9th Cir. 1997) (arguing that "Don't Ask, Don't Tell" violates equal protection); *Richenberg v. Perry*, 97 F.3d 256, 260-63 (8th Cir. 1996) (arguing that "Don't Ask, Don't Tell" violates the Fifth Amendment's Due Process Clause and the Free Speech Clause of the First Amendment), *cert. denied*, 522 U.S. 807 (1997); *Able v. U.S. (Able I)*, 88 F.3d 1280, 1283-84 (2d Cir. 1996) (same); *Thomasson v. Perry*, 80 F.3d 915, 927-35 (4th Cir. 1996) (challenging "Don't Ask, Don't Tell" as violative of Equal Protection, Due Process, and Freedom of Speech guaranteed by the Constitution); see also *Hoffman v. U.S.*, 1997 WL 136418 (E.D. Pa. 1997) (contending that "Don't Ask, Don't Tell" impermissibly abridges freedom of speech and violates the Equal Protect clause of the Fifth Amendment), *aff'd mem.*, 124 F.3d 187 (3d Cir. 1997).

27. See cases cited *supra* note 26 and accompanying text. See generally *Holmes*, 124 F.3d at 1136; *Richenberg v. Perry*, 909 F. Supp. 1303, 1313 (D. Neb. 1995), *aff'd*, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Philips*, 106 F.3d at 1426 & n.11.

28. See *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986) (upholding the constitutionality of criminal prohibitions on sexual conduct between members of the same sex); see also *Holmes*, 124 F.3d at 1136 (rejecting substantive due process argument because, under *Schowengerdt v. U.S.*, 944 F.2d 483 (9th Cir. 1991), any "substantive due process claim . . . was foreclosed by *Bowers*"); *Richenberg v. Perry*, 909 F. Supp. 1303, 1313 (D. Neb. 1995) (rejecting right of privacy claim based on *Schowengerdt* and other cases relying on *Bowers*), *aff'd*, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Philips*, 106 F.3d at 1426 & n.11 (holding that *Bowers* forecloses "heightened scrutiny" of "government regulation of homosexual conduct").

29. 539 U.S. 558, 577 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

it was decided, and it is not correct today . . . *Bowers v. Hardwick* should be and now is overruled."<sup>30</sup> The decision in *Lawrence* went on to acknowledge that all adults are entitled "to liberty under the Due Process Clause" giving them the full right to engage in "[private sexual] conduct without intervention of the government."<sup>31</sup>

Many have interpreted the Supreme Court's decision in *Lawrence* as recognizing a fundamental liberty interest in private relationships between consenting adults, regardless of gender or sexual orientation. Indeed, in its decision, the Supreme Court used language historically linked to discussions of fundamental rights protected by the constitution under strict scrutiny rationale.<sup>32</sup> Relying on *Lawrence*, three new cases attacking "Don't Ask, Don't Tell's" constitutionality were filed in 2004 and 2006.<sup>33</sup> A fourth case concerning military retirement benefits, which was ongoing at the time of the *Lawrence* decision, also used the *Lawrence* fundamental rights reasoning to challenge the Army's dismissal of an officer only days before his 20 year retirement date.<sup>34</sup>

The three cases filed following the *Lawrence* decision seek to show that "Don't Ask, Don't Tell" unconstitutionally infringes on the privacy rights of gay service members. Many of the arguments used in these pending cases are similar to the early constitutional challenges of the 1990s.<sup>35</sup> Specifically, the plaintiffs in these cases argue that "Don't Ask,

30. *Id.* at 578.

31. *Id.* at 560.

32. *See, e.g., Bowers*, 539 U.S. at 562 ("Liberty presumes an autonomy of self that includes . . . certain intimate conduct."); *id.* at 564 (discussing the "substantive reach of liberty"); *id.* at 567 (explaining that "the most private human conduct . . . is within the liberty of persons to choose"); *id.* at 572 ("[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."); *id.* at 574 (recognizing "the respect the Constitution demands for the autonomy of the person"); *id.* at 577 (describing right as "an integral part of human freedom"); *id.* at 578 ("The State cannot demean [gay persons'] existence or control their destiny by making their private sexual conduct a crime.").

33. *E.g. Witt v. Dep't of the Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006); *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2006), *aff'd* *Cook v. Gates*, 528 F. 3d 42 (1st Cir. 2008) (en banc); *Log Cabin Republicans v. U.S.*, No. CV04-8425 (C.D. Cal. filed Oct. 12, 2004), dismissed without prejudice *Log Cabin Republicans v. U.S.*, No. CV04-8425 GPS (C.D. Cal. Mar. 22, 2006), refiled May 2006.

34. *See Loomis v. U.S.*, 74 Fed. Cl. 350, 351 (2006) (holding plaintiff had a right to a suspension of a military investigation into homosexual conduct when plaintiff was days away from accruing 20 years of military service, but denying plaintiff's direct "Don't Ask, Don't Tell" challenge).

35. *See* cases cited *supra* note 26 (listing various cases in the early 1990s and the plaintiff's constitutional basis for their suits).

Don't Tell" explicitly prohibits them from engaging in adult intimate relationships, from talking about those relationships, and from talking about their own identity as gay American service members.<sup>36</sup> These cases challenge the constitutionality of the law both as it is applied to individual plaintiffs and as it is written.<sup>37</sup> If any of these new cases are successful and "Don't Ask, Don't Tell" is found to be unconstitutional, the result would be that the military could no longer use "Don't Ask, Don't Tell" to prohibit gays from serving. It would not necessarily follow, however, that the Armed Forces would automatically implement any form of sexual orientation non-discrimination policy.

#### IV. Regulatory Changes Post-Repeal or Invalidation

When "Don't Ask, Don't Tell" is repealed, whether through legislative or judicial action, the regulatory changes needed to implement the law will be relatively modest. In this Part, we analyze the regulatory adjustments we anticipate will be needed to give full effect to a legislative repeal or judicial invalidation of "Don't Ask, Don't Tell."

Generally speaking, we think it is safe to say that the military's transition to open service and/or a policy of non-discrimination is one that can be accomplished with few regulatory changes. Existing military regulations already contain the backbone and blood for enforcing non-discrimination, and only a limited number of regulatory modifications will be necessary to flesh out what "open service" will mean. We begin by discussing areas needing little-to-no adjustment post-repeal or invalidation: the Uniform Code of Military Justice (UCMJ), conduct regulations and security clearance regulations. We then move on to those areas where some adjustment, but not extensive rewriting, will be necessary: personnel regulations and Equal Opportunity regulations.

In expressing concern over allowing gays to serve openly in the military, some argue that the military will not be able to address

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36. See *Witt v. U.S. Dep't of the Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) (challenging "Don't Ask, Don't Tell" on grounds of due process, equal protection, and 1st Amendment deprivation); *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2006) (same), *aff'd*, *Cook v. Gates*, 528 F. 3d 42 (1st Cir. 2008); *Log Cabin Republicans v. Rumsfeld*, No CV04-8425 (C.D. Cal. 2006) (same).

37. See *Witt*, 444 F. Supp. 2d at 1138 (challenging "Don't Ask, Don't Tell" on an applied basis); *Cook*, 429 F. Supp. 2d at 390 (challenging "Don't Ask, Don't Tell" as applied and on its face); *Log Cabin Republicans*, No CV04-8425 (challenging "Don't Ask, Don't Tell" on its face).

inappropriate conduct or misconduct by gay service members if "Don't Ask, Don't Tell" is repealed or invalidated. There is no factual basis for this fear because the military has applicable conduct rules and regulations already directly addressing such inappropriate conduct.<sup>38</sup> Furthermore, almost all of the military's conduct rules and regulations would survive the transition intact without alteration because the language of the existing rules and regulations are gender and sexual orientation neutral.<sup>39</sup>

First, the UCMJ contains the laws under which members of the military can be criminally charged. Because almost every provision of the UCMJ is gender and sexual orientation neutral, it could still be used to punish inappropriate behavior or conduct by gay service members, just as it could for heterosexual service members, following repeal or invalidation of "Don't Ask, Don't Tell." For example, the crimes of sexual assault, forcible sodomy, indecent assault, indecent acts, rape, fraternization, and even adultery in the UCMJ are generally written without regard to the gender of the victim or the perpetrator.<sup>40</sup> Most provisions discuss these crimes as happening "with another person," and some even explicitly state that the crime can occur "without regard to gender" or "with another person of the same or opposite sex."<sup>41</sup> The courts have further clarified the gender neutrality within the UCMJ with respect to both rape and fraternization in the case of *Able v. United States*.<sup>42</sup>

Second, although most of the military's conduct-related rules are encapsulated within the UCMJ, the military does have a few conduct-related regulations external to the UCMJ. For example, some DoD and service regulations elaborate on fraternization and allow the crime to be

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38. See *infra* notes 40–42 and accompanying text.

39. See *infra* notes 40–42 and accompanying text.

40. See UCMJ art. 125, 10 U.S.C. § 925 (2007) (defining sodomy as carnal copulation with a person of the same or different sex); UCMJ art. 120, 10 U.S.C. § 920 (2007) (defining rape, sexual assault, and other sexual misconduct as between one person to another person). Fraternization may be punished under UCMJ art. 134, 10 U.S.C. § 934 (2007). See MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 83 (b)(2)(2008) ("That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner.").

41. See, e.g., 10 U.S.C. § 925 Art. 125 (defining "sodomy" as "unnatural carnal copulation with another person of the same or opposite sex").

42. See *Able v. U.S. (Able I)*, 968 F. Supp. 850, 856 (E.D.N.Y. 1997) (stating specifically that the prohibitions against fraternization applies to both heterosexuals and homosexuals). The Court also highlighted Congress' 1992 deletion of the words "with a female not his wife" as clearly indicating that the UCMJ's rape provision applied to heterosexual rape and homosexual rape equally. *Id.*

punished through non-judicial means instead of through courts-martial.<sup>43</sup> There are also regulatory references to sexual harassment and public displays of affection separate from the UCMJ.<sup>44</sup> For the most part, these regulations are also gender and sexual orientation neutral except there are a few regulations referring to marriage and relationships "between men and women" likely needing adjustment.<sup>45</sup> These changes, however, do not necessarily need to be made in such a way as to recognize same-sex marriages, but instead will merely bring within the ambit of the regulations the treatment of same-sex partnerships similar to relationships based on marriage in the context of regulations governing fraternization and the like.

As with existing conduct rules and regulations, it will be unnecessary to change or update regulations concerning the investigation and issuance of security clearances to gay service members once open service begins. Gay service members are already entitled to receive a security clearance as long as they are otherwise qualified, and they are also legally protected from having their sexual orientation used adversely against them either in the security clearance investigation itself or within the military if the

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43. See DoD, MANUAL 7730.47-M, MANUAL FOR DEFENSE INCIDENT-BASED REPORTING SYSTEM (July 25, 2003), available at <http://www.dtic.mil/whs/directives/corres/pdf/773047m.pdf> (defining fraternization and listing reporting requirements for certain crimes); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (June 7, 2006), available at [http://www.apd.army.mil/pdf/files/r600\\_20.pdf](http://www.apd.army.mil/pdf/files/r600_20.pdf) (defining fraternization and specifically setting out various ways of addressing instances of fraternization); OPNAV, INST. 5370.2C (Apr. 26, 2007) (defining fraternization and listing both judicial and non-judicial punishments, such as requiring counseling or issuing comments on fitness reports); U.S. DEP'T OF AIR FORCE, INSTR. 36-2909, PROFESSIONAL AND UNPROFESSIONAL RELATIONSHIPS (May 1, 1999), available at <http://www.e-publishing.af.mil/shared/media/epubs/afi36-2909.pdf> (setting forth a detailed discussion of fraternization and unprofessional relationships); U.S. MARINE CORPS, MANUAL W/CH1-3, MARINE CORPS MANUAL, ALMAR 185/96 (May 13, 1996), available at <http://www.marines.mil/news/publications/Documents/MARINE%20CORPS%20MANUAL%20W%20CH%201-3.pdf> (directing active participation from Marine leaders on fraternization issues).

44. See, e.g., U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (April 18, 2008), available at [http://www.army.mil/usapa/epubs/pdf/r600\\_20.pdf](http://www.army.mil/usapa/epubs/pdf/r600_20.pdf) (discussing duties related to sexual harassment prevention, and reporting and procedures following a complaint); SECNAV, INST. 5300.26D (Jan. 8, 2006) (providing a comprehensive sexual harassment identification, prevention and elimination policy for the Department of Navy, including enforcement mechanisms); U.S. DEP'T OF AIR FORCE, INSTR. 36-2706, MILITARY EQUAL OPPORTUNITY PROGRAM (July 29, 2004), available at <http://www.e-publishing.af.mil/shared/media/epubs/AFI36-2706.pdf> (setting-out the Air Force's policies and procedures related to sexual harassment); U.S. MARINE CORPS, ORDER P5354.1D, MARINE CORPS EQUAL OPPORTUNITY MANUAL, para. 2009(1) (Apr. 14, 2003), available at <http://www.marines.mil/news/publications/Documents/MCO%20P5354.1D%20W%20CH%201.pdf> (defining sexual harassment and setting forth department policies and procedures related thereto).

45. *Id.*

investigation reveals their sexual orientation.<sup>46</sup> In 1995, President Clinton issued an Executive Order (the 1995 Executive Order)<sup>47</sup> ending discrimination in the issuance of security clearances and ordered relevant policy changes be made to mirror this non-discrimination order.<sup>48</sup> The policy changes resulting from the 1995 Executive Order made it improper to question service members about their sexual orientation or same-sex sexual activities unless such questions become relevant to resolve a legitimate national security concern.<sup>49</sup> Legitimate security concerns are defined as including sexual conduct, whether heterosexual or homosexual, that "could make an individual susceptible to exploitation or coercion, or indicate a lack of trustworthiness, reliability, or good judgment that is required of anyone with access to classified information."<sup>50</sup>

Since the 1995 Executive Order, the military has been prohibited from using information about a service member's sexual orientation against the service member if that information was turned over to the military during the security clearance process: "[I]nformation about homosexual orientation or conduct obtained during a security clearance investigation will not be used by the Military departments in separation proceedings."<sup>51</sup> In light of these existing protections, the prohibition against asking about a service member's sexual orientation and the prohibition against using such information adversely, it does not appear as though changes will need to be made to security clearance regulations following repeal or judicial invalidation.

Amendments to the military's administrative separation regulations, however, will be imperative once "Don't Ask, Don't Tell" is no longer the law. Currently, DoD and individual service regulations list "homosexual conduct" as a basis for discharge from the military through the

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46. See Exec. Order No. 12,968, 60 Fed. Reg. 40,245 § 3.1(d) (Aug. 7, 1995) ("In determining eligibility for access . . . [n]o inference concerning the standards in this section may be raised solely on the basis of the sexual orientation of the employee.").

47. See *id.* (establishing a uniform security program for federal employees who have access to classified information).

48. See *id.* at § 3.1(c) ("The United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information.").

49. See *supra* notes 46–48 and accompanying text.

50. Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Military Departments, Policy on Homosexual Conduct in the Armed Forces, attachment Policy Guidelines on Homosexual Conduct in the Armed Forces (Jul. 19, 1993).

51. See *id.* (discussing the implementation of DoD's policy on homosexual conduct in the military).

administrative separation process.<sup>52</sup> The DoD and each of the Services will need to amend regulations to eliminate homosexual conduct as a basis for separation. It will also be necessary for DoD and each of the services to remove "homosexual conduct" as a reason for taking adverse action against a service member during the discharge process and after discharge. Specifically, gay service members should no longer face lower discharge characterizations, less separation pay, or mandatory repayment of special pay and bonuses just because they are gay.<sup>53</sup> Although it may be a tedious process to ensure that all of the relevant application and separation regulations are updated given the redundancy and overlap built into military personnel regulations, it will not require significant rewriting. In practice, it will primarily mean removing language like "homosexual conduct" from the regulations as opposed to inserting additional language.

In order to ensure that there is a means of addressing discrimination based on sexual orientation within the military, regardless of whether "Don't Ask, Don't Tell" is repealed or adjudged unconstitutional, sexual orientation should be added to the DoD Equal Opportunity Program (Equal Opportunity) mandate. The well-established Equal Opportunity program provides effective structures for preventing, reporting, and addressing discrimination, including harassment, based on characteristics such as race, religion, and gender.<sup>54</sup> Currently, Equal Opportunity does not include provisions to protect service members from discrimination or harassment because they are gay or are perceived to be gay.<sup>55</sup> As reported previously, the Military Readiness Enhancement Act of 2007 would require the addition of "sexual orientation" as a category within Equal Opportunity.<sup>56</sup> Such an addition would ensure that sexual orientation discrimination claims

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52. See *supra* note 2 and accompanying text.

53. See DoDD 1332.14, *supra* note 2 (describing the process under which an enlisted service member is separated from the military and the consequential characterization of the discharge); DODI 1332.40, *supra* note 2 (describing the characterization of a discharge); see also Aspin Implementation Memorandum, *supra* note 50 (same); DoD Financial Management Regulation 7000.14-R, vol. 7A, ch. 35, para. 350201.B (explaining separation pay entitlement); DoD Financial Management Regulation 7000.14-R, vol. 7A, ch. 9, para. 0905 (describing recoupment requirements).

54. See DoD Equal Opportunity Program Homepage, <http://www.defenselink.mil/phome/eo.html> (last visited Dec. 18, 2008) (providing overview of and details about the program).

55. See *supra* note 54 and accompanying text.

56. See H.R. 1246 § 7(a)(1) (requiring "[r]evision of all equal opportunity and human relations regulations, directives, and instructions to add sexual orientation nondiscrimination to the Department of Defense Equal Opportunity policy and to related human relations training programs").

are handled in the same manner and through the same program as other discrimination complaints and would bring efficiency and credibility to the effort of facilitating repeal for military members.

#### V. Relationship Recognition Post-Repeal or Invalidation

This article would not be complete without briefly addressing the issue of relationship recognition—a more difficult issue to resolve given the existence of the so-called "Defense of Marriage Act."<sup>57</sup> Military family members are afforded access to an array of extensive benefits designed to help mitigate the difficulties associated with military life. Access to on-post housing, healthcare, educational benefits, and job training are just a few of the many benefits associated with membership in a military family. Unfortunately, same-sex partners would still be denied these benefits under the Military Readiness Enhancement Act of 2007, which states that "[n]othing in the Act . . . shall be construed to require the furnishing of dependent benefits in violation of [the federal Defense of Marriage Act]."<sup>58</sup> Even if "Don't Ask, Don't Tell" was judicially declared unconstitutional, no law or existing regulation would recognize or provide for the recognition of same-sex partnership within the military.

Upon repeal or judicial invalidation of "Don't Ask, Don't Tell," Congress could choose to recognize same-sex partners of service members in a number of ways. The most simple—but most politically challenging—means by which same-sex partners of service members could gain equal treatment under the law is the repeal of the federal prohibition on the recognition of same-sex marriages contained in the "Defense of Marriage Act."<sup>59</sup> If this prohibition were repealed, service members who obtained valid same-sex marriages under state law could seek benefits for their spouses, just as heterosexual service members do today.<sup>60</sup>

Barring independent repeal of the Act, Congress could allow for the extension of military family benefits by defining a new class of military family members encompassing same-sex partners.<sup>61</sup> The nomenclature

57. 1 U.S.C. § 7 (1996).

58. H.R. 1246 § 5.

59. 1 U.S.C. § 7 (1996).

60. *See id.* (defining "marriage" as "a legal union between one man and one woman" and "spouse" as "a person of the opposite sex who is a husband or a wife").

61. Federal law defines military dependent in a number of ways, contingent upon the type of benefit at issue. For example, dependent status for the purpose of health care eligibility is defined by 10 U.S.C. 55 (2008), Medical and Dental Care, whereas dependent

should be consistent with any existing federal law regarding the recognition of same-sex partners, and it might require some form of evidence of intent to maintain a long-term, committed relationship. Such evidence could be found in the form of an affidavit or a record of civil union, domestic partnership, or other same-sex union, including marriage. Service members in same-sex relationships, however, should not be required to show evidence of actual financial interdependence, as such evidence is not required of heterosexually married persons.

### VI. Conclusion

Legislative repeal or judicial invalidation of "Don't Ask, Don't Tell" will eventually happen; whether next year or ten years from now, this country will see open service by lesbian, gay, and bisexual people in the United States military. When we proposed writing this article we believed that few regulatory changes were necessary for the United States military to make that transition. Indeed, the legal and regulatory research done in preparation for this article has confirmed that belief. From a practical perspective, the military can respond to legislative repeal or judicial invalidation without complicated or lengthy changes to existing policies, rules, and regulations.

We also believe that those currently serving in the United States military can carry out a transition to open service without issue on the ground level. In fact, we are confident that once repeal or invalidation occurs, the United States military will be able to make as smooth a transition as have the majority of our partner militaries in Operation Enduring Freedom and Operation Iraqi Freedom since lifting their own bans.<sup>62</sup> The United States military is a professional fighting force governed,

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status for the purposes of pay and allowances is defined in 37 USC 41 (2008), Pay and Allowances of the Uniformed Services.

62. See generally Aaron Belkin & Melissa Levitt, *Homosexuality and the Israel Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 27 ARMED FORCES & SOC'Y 541 (2001) (finding that there was no adverse effect on performance suffered from lifting the gay ban in the Israeli army); Aaron Belkin & Jason McNichol, *The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence*, CTR. FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY (2000) (determining that the lifting of the gay ban in the Australian Defence Forces had no discernible negative effect and related policy changes might have even effectuated an improvement in service member performance); Aaron Belkin & R.L. Evans, *The Effects of Including Gay and Lesbian Soldiers in the British Armed Forces: Appraising the Evidence*, CTR. FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY (2000) (noting the lack of

generally, by good and comprehensive conduct rules and regulations. Most of these rules and regulations, criminal or otherwise, are gender and sexual orientation neutral thereby negating need for change after repeal or invalidation.<sup>63</sup> Inappropriate conduct is inappropriate conduct and will remain so; alterations that will be necessary are primarily to the rules and regulations currently singling out gay service members solely because of their sexuality.

The soldiers, sailors, Marines, airmen, and coastguardsmen who serve our country do so with dedication to the good of our country and for the support and benefit of their fellow service members, *regardless* of sexual orientation. We should not underestimate their professionalism and commitment by thinking or implying that they cannot or will not comport themselves professionally once "Don't Ask, Don't Tell" is no longer law. Members of the U.S. Armed Forces today are fully capable of operating without prohibitions on military service by openly gay Americans and require nothing more than competent leadership to move beyond "Don't Ask, Don't Tell."

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negative repercussions from the lifting of the gay ban for British armed forces).

63. *See supra* notes 40–42 and accompanying text (pointing to the fact that most military regulations are already couched in gender neutral terms, excepting certain administrative regulations for separation from the military).

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