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Ask, Tell, But Do Not Get Greedy: The Inequalities That Pervade in the Military in Light of the Repeal of “Don’t Ask, Don’t Tell”

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Ask, Tell, But Do Not Get Greedy: The Inequalities That Pervade in the Military in Light of the Repeal of “Don’t Ask, Don’t Tell”

By David Barnes*

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For we are not a nation that says, ‘don’t ask, don’t tell.’ We are a nation that says, ‘Out of many, we are one.’ We are a nation that welcomes the service of every patriot. We are a nation that believes that all men and women are created equal. Those are the ideals that generations have fought for. Those are the ideals that we uphold today. And now, it is my honor to sign this bill into law.

- President Barack Obama¹

* Washington and Lee University School of Law, Juris Doctor, May 2013. I would like to thank my faculty advisor, Prof. Robin Wilson, my Note editor, Laura Hawkins, and the Editorial Board of the Journal of Civil Rights and Social Justice for all of their support during the Note writing process.

1. Gautam Raghavan, *Don’t Ask, Don’t Tell Repeal One Year Later: “Out of Many, We Are One,”* THE WHITE HOUSE (Dec. 22, 2011, 12:23 PM), <http://www.whitehouse.gov/blog/2011/12/22/one-year-later-out-many-we-are-one>.

I. Introduction

Mere hours after Congress and President Barack Obama officially repealed “Don’t Ask, Don’t Tell” (“DADT”), a young American soldier stationed in Germany anxiously made an important phone call to his father.² Before mustering up the courage to call his dad, the soldier talks to his camera about his fears of coming out to his family to whom he had remained in the closet his entire life.³ After much hesitation, he mutters into the phone, “Dad, I’m gay. Like always have been, have known since forever.”⁴ His father replies simply with “I still love you, son.”⁵ His dad then reassures him that it will not change the way he thinks or feels about him.⁶ One can imagine that this was one of many conversations that once closeted soldiers had with their loved ones after the repeal was announced.

Homosexuals fighting for equality in the United States claimed a tremendous victory on December 22, 2010, when DADT, the law that banned openly gay men and women from serving in the armed forces, met its demise by a Congressional vote and was ultimately signed into law by President Obama.⁷ The repeal of DADT marked an end to the fervent battle toward the equal treatment of openly gay service members since the policy was signed into law by then President Bill Clinton in 1993.⁸ This progressive movement puts the United States in line with allies, like Australia, Canada, and the United Kingdom, who permit service by openly gay service members without fear of being discharged.⁹ The repeal has also put a new spin on some of the military’s age-old traditions. For example, under the Navy tradition known as “first kiss,” one sailor aboard a vessel about to be docked is chosen for the honor of being the first to step onto

2. AreYouSurprised, *Tell My Dad That I Am Gay-LIVE*, YOUTUBE (Sept. 19, 2011), <http://www.youtube.com/watch?v=DVAgz6iyK6A>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654).

8. *See* Thom Shanker & Patrick Healy, *A New Push to Roll Back “Don’t Ask, Don’t Tell,”* N.Y. TIMES, Nov. 30, 2007, <http://www.nytimes.com/2007/11/30/us/30military.html> (discussing the early political movement behind the repeal of “Don’t Ask, Don’t Tell”).

9. *See Countries that Allow Military Service by Openly Gay People*, PALM CENTER, <http://www.palmcenter.org/files/active/0/CountriesWithoutBan.pdf> (last visited Jan. 8, 2012) (listing the countries in which openly gay service members are allowed to serve) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

land and greet a loved one.¹⁰ On December 22, 2011, this old tradition got a modern twist when two female sailors became the first gay couple to celebrate the “first kiss.”¹¹ This example is one of many that demonstrate the degree to which gay service members may now be open with their personal relationships without fear of being discharged entirely.

One of the main concerns voiced by supporters of DADT is that permitting open service by lesbian, gay, and bisexual (“LGB”) service members would hurt unit cohesion and erode the trust and care between unit members.¹² Some also believed that knowing a fellow service member was a homosexual would “freak people out more.”¹³ Contrary to what supporters of DADT may have believed prior to its repeal, recently reported stories indicate a very different environment in a post-DADT military. Defense Secretary Leon Panetta commented that across the military, the repeal is “going very well.”¹⁴ Reports from the Naval Academy and Annapolis are painting a very similar picture.¹⁵ In April 2012, for the first time, staff and faculty members of the Naval Academy attended a dinner that had been organized secretly in the past by and for gay midshipmen.¹⁶ These personal accounts indicate that the repeal of DADT has not had a detrimental but rather positive effect on morale and cohesion in the military.

However, despite its significance in LGB history, the repeal of DADT is only one step toward establishing the equal treatment of both heterosexuals and homosexuals in the armed forces. The federally recognized Defense of Marriage Act (“DOMA”) explicitly defines marriage

10. See *Female Sailors Dockside Smooch Sails Past Navy Tradition*, STARS AND STRIPES, Dec. 21, 2011, <http://www.stripes.com/news/us/female-sailors-dockside-smooch-sails-past-navy-tradition> (reporting on the two female sailors who participated in the Navy’s “first kiss” tradition).

11. *Id.*

12. See DEP’T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” 51, Nov. 30, 2010, available at http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130 (secure-hires).pdf [hereinafter DoD Report] (reporting the concerns voiced by service members when asked their opinions about the possible repeal of DADT).

13. *Id.* at 52.

14. Matthew H. Brown, *Mids Describe Smooth Transition from “Don’t Ask, Don’t Tell,”* BALTIMORE SUN, May 21, 2012, http://articles.baltimoresun.com/2012-05-21/news/bs-md-naval-academy-gay-20120519_1_gay-alumni-gay-midshipman-naval-academy.

15. See *id.* (reporting that anti-gay comments are “not cool” anymore).

16. *Id.*

as between a man and a woman, thereby making same-sex couples in the armed forces ineligible to receive a substantial portion of the benefits that are currently available to opposite-sex couples.¹⁷ Because of DOMA's federal application, couples whose marriages or unions are legally recognized in certain states are nevertheless barred from receiving military benefits that are only available to "married" service members.¹⁸ Until Congress repeals DOMA, or at the very least explicitly prohibits its application to military personnel and regulations, LGB service members will continue to be denied the same benefits that are currently afforded to heterosexual service members.

This Note charts benefits that remain unavailable to LGB service members and their dependents in light of DOMA and the inequalities that still exist despite the repeal of DADT. Additionally, this Note proposes courses of action that must be taken in order for LGB service members to stand on equal footing with their heterosexual counterparts. The first, and most significant, change that must occur is the repeal of DOMA. If DOMA is repealed or, at a minimum, waived for military regulations, then the benefits exclusive to married couples will be extended to LGB service members who are involved in a legally recognized marriage. Until DOMA is repealed, the Department of Defense ("DoD") is not without power to effectuate amendments and policies within the military to promote equality amongst the service members and protect LGB personnel from discrimination. With respect to certain benefits, including free legal assistance and housing rates, DoD could leave service members the power to designate who may qualify as a "dependent" under these benefits. Additionally, DoD could follow in the tracks of other federal agencies and create a new "qualify relationship," or a "domestic partnership," to incorporate service members who are in a legally recognized union or a long-term committed relationship. These amendments would mean that LGB service members would finally be able to receive the benefits and protections that have been denied to them for so long.

Part I of this Note begins by discussing the myriad of military benefits that are currently available to legally recognized military families. Part II introduces the benefits that are currently available to LGB service members

17. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)) ("In determining the meaning of any Act of Congress . . . the word 'marriage' means only a legal union between one man and one woman as husband and wife . . .").

18. See *id.* (limiting the federal definition of marriage to the union between a man and a woman).

in light of the repeal of DADT. It then analyzes DOMA and its application to military benefits, the DoD's definition of dependents within certain military regulations, and the benefits that consequently remain unavailable to LGB service members and their families. Part III outlines the legal steps that have been taken in an effort to repeal DOMA. Part IV analyzes the treatment of employee benefits in states that recognize same-sex relationships. Part V advocates for the reforms that need to be implemented in order to open up these military benefits to same-sex partners and their families in the military, in addition to suggestions to protect LGB service members from possible criminal prosecution, to establish equality amongst all of the members of the armed forces despite their sexual orientation.

II. All in the Family: Military Benefits Available to Legally Married Service Members

This Part outlines the benefits that are currently available to legally married service members and their dependents, including, but not limited to, moving and housing allowances, medical and dental insurance, and pensions and survivor benefits.¹⁹ In order to qualify for many of these benefits, the service member must register with the Defense Enrollment Eligibility Reporting System ("DEERS").²⁰ DEERS is a central database that tracks service members and their dependents.²¹ The dependents of a service member who are eligible for registration under DEERS include "lawful spouses, some former spouses, unmarried children under the age of twenty-one, and parents or children residing with the service member who receive over fifty percent of their support from the service member."²² Service members and their valid dependents are therefore eligible to receive a myriad of benefits through the armed forces.

19. See SERV. MEMBERS LEGAL DEF. NETWORK, FREEDOM TO SERVE: THE DEFINITIVE GUIDE TO LGBT MILITARY SERV. 24–27 (2011) [hereinafter GUIDE TO LGBT MILITARY SERVICE], available at http://sldn.3cdn.net/5d4dd958a62981cff8_v5m6bw1gx.pdf (listing the benefits that are currently available to legally married service members and their opposite-sex spouses).

20. See Kathi Westcott & Rebecca Sawyer, *Silent Sacrifices: The Impact of "Don't Ask, Don't Tell" on Lesbian and Gay Military Families*, 14 DUKE J. GENDER L. & POL'Y 1121, 1125 (2007) ("Key to obtaining many of these benefits is enrollment in the Defense Enrollment Eligibility Reporting System (DEERS).").

21. See *id.* (describing the requirements that must be met in order for a service member to enroll in DEERS).

22. *Id.*

Because a factor in determining a service member's housing allowance is whether he or she has any dependents, service members are also eligible to receive a greater basic allowance for housing if they qualify for the "with dependent rate."²³ Congress has defined "dependent" for purposes of military benefits to include a spouse, dependent parents and parents-in-law, biological and adopted children, and stepchildren.²⁴ Thus, a service member with at least one qualified dependent would receive a greater housing allowance than a service member without any qualified dependents.²⁵ For example, the most junior enlisted rank, an E-1, living in Charlottesville, Virginia, would receive a \$1,236 housing allowance with dependents,²⁶ but \$996 without dependents (a difference of \$240).²⁷ If a service member dies while on duty, his or her qualified family remains eligible to receive the housing assistance for up to one year after the service member's death.²⁸ When a service member is on permanent duty away from his or her family, the dependents qualify to receive a family separation basic allowance at a monthly rate.²⁹

The valid dependents of service members also qualify for dental and medical care through TRICARE, the health care program for active duty service members.³⁰ Service members must register themselves and their

23. *See id.* at 1126 (reviewing the increased housing allowance that is afforded to service members with qualifying dependents); MAUREEN BROCCO, FAMILIAR STORIES: AN INTERNATIONAL SUGGESTION FOR LGB FAMILY MILITARY BENEFITS AFTER THE REPEAL OF "DON'T ASK, DON'T TELL" 4-5 (2010), available at http://works.bepress.com/maureen_brocco/1 ("Service members with dependents receive increased housing allowances because housing allowances are based partly on whether a service member has dependents.").

24. *See* 37 U.S.C. § 401 (2012) (limiting the definition of "dependent" with respect to the armed forces to only the enumerated people).

25. *See* Westcott & Sawyer, *supra* note 20, at 1126 (stating that service members with at least one qualified dependent receive a greater housing allowance than service members with no qualified dependent).

26. *See* 2012 Basic Allowance for Housing with Dependents Rates, MILITARY.COM (2012), <http://images.military.com/media/benefits/pdf/bah-2012-with.pdf> (last visited Jan. 8, 2012) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

27. *Id.*

28. *See* 37 U.S.C. § 403(l) (2012) (authorizing the families of deceased service members to continue to receive a greater housing allowance for up to a year after the service member's death).

29. *See id.* § 403(d) ("A member of a uniformed service with dependents who is on permanent duty . . . may be paid a family separation basic allowance for housing . . .").

30. *See* 10 U.S.C. § 1076 (2012) (establishing medical and dental care for the qualifying dependents of service members); *see also* *What is TRICARE?*, TRICARE, <http://www.tricare.mil/mybenefit/home/overview/WhatIsTRICARE> (last visited Jan. 8, 2012) (explaining TRICARE and the various medical benefits that are provided to service

dependents with DEERS to be eligible to receive medical care, including dental care, under TRICARE.³¹ Once a dependent qualifies for TRICARE medical assistance, he or she may continue to receive the benefits even after the service member retires or dies.³² Additionally, service members and their dependents receive an out-of-pocket expense cap of \$3,000.³³ Upon referral by a physician, service members and their dependents are also eligible for psychiatric counseling.³⁴ These benefits are merely a few of the advantages that service members and their valid dependents receive through the military's TRICARE program.³⁵

In addition to housing assistance and medical insurance, service member and their qualified dependents also receive life insurance through the military.³⁶ The Armed Forces provide two primary forms of life insurance to service members: Service members' Group Life Insurance (SGLI) and the Survivor Benefit Plan (SBP).³⁷ SGLI is funded by the U.S. Department of Veterans Affairs and can cover up to the maximum of \$400,000.³⁸ Under this plan, a service member may name anyone as the beneficiary of the insurance upon his or her death, and coverage is automatic.³⁹ If the service member does not specify a beneficiary, the

members and their qualifying dependents) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

31. See *What is TRICARE?*, *supra* note 30 (stating that registration through DEERS is a requirement for service members and their dependents to be eligible for TRICARE).

32. See 10 U.S.C. § 1076 (2012) (authorizing dependents of a service member who has died to continue to receive the medical and dental care prescribed under TRICARE for up to three years).

33. See BROCCO, *supra* note 23, at 4 ("Furthermore, service members are protected from incurring large medical bills for themselves or their dependents by an out-of-pocket expense cap of \$3,000.").

34. See 10 U.S.C. § 1079 (2012) (requiring that a service member and his dependents receive a physician referral before being eligible to receive psychiatric treatment).

35. See *TRICARE Benefit At-a-Glance*, TRICARE, <http://www.tricare.mil/mybenefit/home/overview/WhatIsTRICARE/TRICAREBenefitAtAGlance?> (last visited Jan. 8, 2012) (summarizing TRICARE benefits) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

36. See Westcott & Sawyer, *supra* note 20, at 1126 (describing the two types of life insurance programs that are available to service members).

37. See *id.*

38. See *Service Members' Group Life Insurance*, U.S. DEP'T. OF VETERANS AFFAIRS, <http://www.insurance.va.gov/sglisite/SGLI/SGLI.htm> (last visited Jan. 8, 2012) (providing an overview of the requirements and coverage of the Service members' Group Life Insurance) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

39. See Westcott & Sawyer, *supra* note 20, at 1126 (authorizing service members to designate anyone as the beneficiary of the life insurance coverage).

payout will automatically pass on to the service member's "insurable dependent," which is defined as his or her spouse, child, or stillborn child.⁴⁰

The second form of life insurance, the SBP, provides the surviving spouse or child of a service member with a monthly annuity.⁴¹ When a retired service member dies, his or her retirement payments stop unless the service member has enrolled a designated beneficiary in this program.⁴² Those eligible to be designated as a beneficiary under the SBP include the service member's spouse, former spouse, children, or a person who has an "insurable interest" in the service member (such as a business partner).⁴³

III. Going Forward After DADT

In light of the repeal of DADT, LGB service members are now able to enjoy many of the same freedoms and benefits that have traditionally been extended to heterosexual service members and their families. However, even with this newly found freedom to be open with their personal lives and families, LGB service members and their dependents, particularly spouses, are precluded from receiving many of the substantial benefits for which their heterosexual counterparts qualify. This Part begins by discussing the legal landscape that currently exists in the armed forces regarding LGB service members, particularly the benefits for which they may now qualify. Second, this Part discusses DOMA and its impact on many of the military regulations and benefits. Third, this Part covers additional benefits conferred by DoD regulations that are unavailable to LGB service members because of the wording.

A. Benefits Currently Available to LGB Service Members

40. See 38 U.S.C. § 1965(10) (2012) (defining "insurable dependent" as a service member's spouse, child, or stillborn child).

41. Westcott & Sawyer, *supra* note 20, at 1126.

42. See *id.* (explaining that the monthly annuity paid under SBP will discontinue after the service member's death unless his or her dependents are registered through the program).

43. See 10 U.S.C. § 1448 (2012) (defining the eligible dependents under SBP as the service member's spouse, former spouse, children, or a person who has an "insurable interest" in the service member); Westcott & Sawyer, *supra* note 20, at 1126 (explaining that persons with an "insurable interest" in the service member include a business partner or a co-property owner).

Prior to the repeal of DADT, a major fear of LGB service members in choosing whether to receive some of the benefits offered through the military was that of being “outed,” or revealed as being a homosexual, to officers and thus being discharged.⁴⁴ With DADT now repealed, LGB service members are free to enjoy many of the same benefits as their heterosexual counterparts. The most obvious example is the freedom to be open and honest with their sexuality.⁴⁵ LGB service members are no longer required to dodge questions about their personal lives or what they did over the weekend; they may now bring their same-sex partner to social events and attend gay bars without the fear of being “outed” and subsequently discharged.⁴⁶ Two months after the repeal, Aaron Abreu, a navy corpsman at Camp Pendleton, nervously took his boyfriend to a Marine Corps ball in Carlsbad.⁴⁷ In response to the entire experience, he simply stated, “But it was no big deal People didn’t and just aren’t making any big deal about it.”⁴⁸ This story and other stories like it paint a very promising and comforting picture for service members and their partners.

While those service members who remained quiet about their sexual orientation will now be able to serve openly, there still exists a class of service members who, either voluntarily or involuntarily, disclosed their sexual orientation and were discharged. Of the reported “outed” individuals, more than 13,000 were discharged under DADT.⁴⁹ Generally service members discharged under DADT received an Honorable or General Under Honorable Conditions discharge.⁵⁰ However, some service members received an Other Than Honorable (“OTH”) discharge for a

44. See Westcott & Sawyer, *supra* note 20, at 1127 (“Gay service members who want to protect their loved ones or same-sex partners face significant risks under ‘Don’t Ask, Don’t Tell’ if they choose to apply for these benefits.”).

45. See GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 4–5 (explaining that gay service members may now be open about their sexuality and their same-sex partners).

46. See *id.* at 4. (“With the repeal of DADT, service members can be assured that the mere act of attending pride or going to a gay bar will not be grounds for separation.”).

47. See Mark Walker, *Military: No Signs of Disruption from “Don’t Ask, Don’t Tell” Repeal*, NORTH COUNTY TIMES, May 19, 2012, http://www.nctimes.com/news/local/military/military-no-signs-of-disruption-from-don-t-ask-don/article_1daa81ff-13a0-5da2-877f-9135b5399d8e.html (recounting stories of cadets and service members bringing their same-sex partners to social events).

48. *Id.*

49. Charlotte Social Security Disability Lawyers, *The Push for Honorable Discharge Status for Those Expelled Under “Don’t Ask, Don’t Tell”*, FINDLAW, June 28, 2011, <http://knowledgebase.findlaw.com/kb/2011/Feb/269341.html>.

50. GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 31.

homosexual act that involved an “aggravating factor,” including, but not limited to, “acts committed openly in public view (*e.g.*, holding hands at a restaurant) and acts committed on base or on post (*e.g.*, a quick hug while being dropped off).”⁵¹ Currently, service members who received a less than Honorable discharge are authorized to apply to have the discharge upgraded.⁵² Other service members who wish to reenlist can now do so.⁵³ Those service members who wish to reenlist should be evaluated “under the same criteria that other Service members who had received honorable discharges would be.”⁵⁴ Even before DADT was repealed, the Pentagon directed recruiters in October of 2010 to accept LGB candidates.⁵⁵

Of the once discharged service members to promptly reenlist was Lieutenant Dan Choi.⁵⁶ Choi originally served in 2003 before leaving active service to attend Harvard University and continue his military service in the New York Army National Guard.⁵⁷ Soon after the official repeal of DADT in September of 2011, the Pentagon released a statement that military chaplains will be allowed to perform same-sex marriage ceremonies in states that recognize gay marriage.⁵⁸ The accompanying DoD memo explicitly states that “a military chaplain may participate in or officiate any private ceremony, whether on or off a military installation, provided that the ceremony is not prohibited by applicable state and local law.”⁵⁹ Although this authorizes chaplains to perform same-sex wedding ceremonies, the memo does not require that all chaplains comply with this decision. Military chaplains “are not required to take actions inconsistent

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* DoD Report, *supra* note 12, at 16.

55. *See* Adam Levine, *Military Recruiters Told They Can Accept Openly Gay Applicants*, CNN.COM, Oct. 19, 2010, http://articles.cnn.com/2010-10-19/us/pentagon.gays.recruiting_1_military-recruiters-openly-gay-service-members-enlistmentprocess?_s=PM:US (reporting the Pentagon’s advice for recruiting commands to now accept openly gay service members).

56. *See* Alex Pareene, “*Don’t Ask, Don’t Tell*” No Longer Enforced, *Dan Choi Reenlists*, SALON, Oct. 20, 2010, http://www.salon.com/2010/10/20/dadt_choi_appeal/ (describing Dan Choi’s immediate efforts to reenlist after “U.S. District Judge Virginia Phillips refused to stay her decision to end [DADT]”).

57. *See* Charles K. Bouley, *Why Is Obama Firing Dan Choi?*, HUFFINGTON POST, Oct. 6, 2009, http://www.huffingtonpost.com/charles-karel-bouley/why-is-obama-firing-dan-c_b_311084.html (chronicling Dan Choi’s extensive military and educational background).

58. *See id.* (allowing military chaplains to perform same-sex marriage ceremonies).

59. *Id.*

with their religious beliefs when conducting their religious ministry.”⁶⁰ Despite the opportunities that chaplains still have to refuse to officiate a same-sex wedding ceremony, the official authorization by the DoD allowing such ceremonies to occur is another significant benefit now extended to LGB service members and their same-sex partners.

The grant of authority to permit military chaplains to perform same-sex marriages is not without its recent challenges. The House of Representatives is seeking to amend the National Defense Authorization Act to undermine successful repeal implementation of DADT.⁶¹ These “conscience protections” protect chaplains who do not wish to minister and work with LGB service members.⁶² Moreover, the amendment would permit chaplains to discriminate against LGB service members by arguing that assisting them would be contrary to their “conscience, moral principles, or religious beliefs.”⁶³ This amendment is essentially superfluous, as protections already exist for chaplains who do not wish to minister LGB service members.⁶⁴ The language of the bill, however, does weaken “implementation of ‘Don’t Ask, Don’t Tell’ . . . which Americans support

60. GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 9.

61. See Amend. to National Defense Authorization Act, H.R. 4310 (2012).

“Protection of Rights of Conscience.—The Armed Forces shall accommodate the conscience and sincerely held moral principles and religious beliefs of the members of the Armed Forces concerning the appropriate and inappropriate expression of human sexuality and may not use such conscience, principles, or beliefs as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment. Nothing in this subsection precludes disciplinary action for conduct that is proscribed by chapter 47 of this title (the Uniform Code of Military Justice).” *Id.* at § 1034(a).

“No member of the armed forces may—(A) direct, order, or require a chaplain to perform any duty, rite, ritual, ceremony, service, or function that is contrary to the conscience, moral principles, or religious beliefs of the chaplain, or contrary to the moral principles and religious beliefs of the endorsing faith group of the chaplain; or (B) discriminate or take any adverse personnel action against a chaplain, including denial of promotion, schooling, training, or assignment, on the basis of the refusal by the chaplain to comply with a direction, order, or requirement prohibited by subparagraph (A).” *Id.* at (b)(2).

62. See *U.S. House Adopts Defense Spending Bill with Anti-LGBT Provisions*, CAPITAL WIRE, May 21, 2012, http://www.capitalwirepr.com/pr_description.php?id=ba7817ff-886b-a76c-42cd-4fba5d7b22b4 (summarizing the potential legal effects that the proposed amendments would have on military personnel).

63. *Id.*

64. See *id.* (explaining amendment is unnecessary since chaplains who do not wish to minister LGB service members are protected).

and which our nation's military leaders have said is being implemented smoothly."⁶⁵ A similar amendment seeks to limit the use of DoD property with respect to same-sex marriage ceremonies.⁶⁶ Service members Legal Defense Network Executive Director Aubrey Sarvis commented, "The Department of Defense has already made it clear that decisions surrounding the use of facilities should be made on a sexual orientation neutral basis."⁶⁷ Although seemingly innocuous, passage of these amendments may pave the way for harsher legislation that could leave LGB service members vulnerable to discrimination.

Because of the statutory definition of a qualified dependent under military regulations, dependent children of LGB service members may be eligible for most, if not all, the same benefits as a child of any service member.⁶⁸ These benefits extend to both biological and adopted children, provided that proof of a legal adoption is shown and the dependent child is registered through DEERS.⁶⁹ Among the benefits that are available for the children of LGB service members are medical and dental care through TRICARE, emergency notification if the service member were to be wounded or killed in combat, and housing. Additionally, an LGB service member may statutorily designate his or her child as the beneficiary of the death gratuity under SGLI and the retirement annuity under the SBP.⁷⁰ No longer operating under the perpetual fear that someone will discover their homosexuality, LGB service members can declare their children, whether biological or adopted, in DEERS to ensure that they receive all of the same benefits as the children of their fellow heterosexual service members. If questioned, LGB service members can be honest about the dynamics of their families without facing the risk of discharge.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See* GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 21 (stating that dependent children of gay service members who are registered through DEERS are eligible to receive the same benefits as those of any other service member).

69. *See id.* (stating that benefits are granted to dependent children of gay service members, biological or adopted, who are registered through DEERS).

70. *See id.* at 22 (discussing that an LGB service member may designate his or her child as the beneficiary of the death gratuity or the retirement annuity).

B. Pervasive Effects of the DOMA

The numerous benefits that are now available to LGB service members and their dependents mark a significant landmark in the fight for equal rights in the military. Gone are the days when LGB service members hid under a shroud of secrecy for fear of being outed and subsequently discharged. However, despite the change in legal landscape for LGB service members and their dependents, significant barriers to the equal treatment of LGB service members still exist that were not resolved by the repeal of DADT. One of the major roadblocks that still exists despite the repeal of DADT is DOMA.⁷¹ The federally recognized definitions under DOMA preclude same-sex couples from receiving many of the federal employment benefits that are afforded to heterosexual couples.⁷² Military benefits are considered a form of federal employment benefits; thus, DOMA prevents the spouses or partners of LGB service members from receiving numerous military benefits even after the repeal of DADT.⁷³

An LGB service member and his or her same-sex partner would not be eligible to receive the increased basic allowance for housing at the “with dependent rate.”⁷⁴ Unless the couple had a child, DOMA would prevent this increased rate from being extended to otherwise qualifying LGB service members and their same-sex spouses because of the statutory definition of “spouse.”⁷⁵ Additionally, other benefits that are currently unavailable to LGB service members are those that initially require registration through DEERS, including medical and dental insurance through TRICARE.⁷⁶ Although the biological and adopted children of LGB service members are eligible to receive medical assistance through TRICARE, same-sex partners and any step-children would be precluded

71. See Defense of Marriage Act, *supra* note 17.

72. See BROCCO, *supra* note 23, at 2 (“[DOMA] limits the federal definition of marriage to opposite-sex couples and explicitly bars same-sex couples from receiving federal recognition, regardless of the benefits and obligations conferred upon the pair by state law.”).

73. See *id.* at 7 (explaining that DOMA applies to military benefits because they are classified as a form of federal employee benefits).

74. See *id.* (“Same-sex spouses of service members are excluded from [the basic allowance for housing at the ‘with dependent’ rate] . . .”).

75. See *id.* at 10 (“DOMA’s federal definition of a spouse as [sic] ‘a person of the opposite sex who is a husband or a wife’”).

76. See GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 24 (explaining that “service members *must* register their children in DEERS”).

from receiving medical care through the military program and would thus have to find other, possibly more expensive, sources of treatment.⁷⁷

In addition to being denied housing and medical benefits, certain dependents of LGB service members are also denied assistance when relocating.⁷⁸ Because of DOMA's definition of "spouse" and its consequential effects on the military definition of "dependent," these statutory benefits are not available to legally married same-sex couples.⁷⁹ Thus, a same-sex couple relocating to a different base would be denied the additional funds that are given to similarly situated heterosexual couples.⁸⁰

LGB service members are also precluded from designating their same-sex spouses as an eligible beneficiary for survivor benefits because of DOMA's definition of "spouse."⁸¹ The inability of service members to enable their spouses to receive support in the event of their death can have detrimental effects. Chief Warrant Officer Charlie Morgan and her wife are well aware of this unequal treatment of spousal benefits.⁸² Charlie is currently battling cancer, and because of her ineligibility to register her wife under the Survivor Benefit Plan, her wife would not receive any survivor benefits if Charlie were to die.⁸³

Other service members who are harmed by this disparity are taking a more proactive approach by filing lawsuits against the Department of Veteran Affairs. Tracey Cooper-Harris, who once served in the Army as an animal care specialist and now suffers from multiple sclerosis, is suing Veteran Affairs for her wife to receive the same military benefits that are

77. *See id.* at 25 (stating that DOMA precludes gay service members from registering their same-sex partners and step-children through the military's medical program).

78. *See* 37 U.S.C. §§ 405(a), 406, 407, 554 (2012) (preventing service members and their same-sex spouses from receiving funds to offset the cost of relocating).

79. *See* GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 25 (stating that legally married same-sex spouses are not eligible to receive increased funding to offset the costs of relocating).

80. *See id.* (stating that legally married same-sex spouses do not receive funding for relocation to a different base).

81. *See id.* at 26 ("DOMA prevents the military from providing a number of benefits to same-sex spouses of deceased service members, including annuities based on retired or retainer pay.").

82. *See* Igor Volsky, *Openly Gay Servicemember: Military Has Been "Wonderful and Incredibly Supportive" Since DADT Repeal*, THINK PROGRESS, Dec. 7, 2011, <http://thinkprogress.org/lgbt/2011/12/07/384006/openly-gay-servicemember-military-has-been-wonderful-and-incredibly-supportive-since-dadt-repeal/> (recounting the potential problems that Chief Warrant Officer Charlie Morgan and her partner face due to DOMA's restriction of military benefits).

83. *Id.*

granted to disabled veterans.⁸⁴ She and her wife are legally married under California state law, and they are arguing that DOMA and the Veteran Affairs policy “discriminate on the basis of gender and sexual orientation in violation of the Fifth Amendment’s equal protection clause.”⁸⁵ As one can imagine, this situation has become a major predicament in the couple’s life.⁸⁶ After being diagnosed, Tracey “wanted to get all of [her] end-of-life stuff in order and make sure Maggie was taken care of before something happened to [her].”⁸⁷

These benefits that remain unavailable to LGB service members are just a few of the major statutory benefits not available to LGB service members and their partners. DOMA also prevents a service member from naming a same-sex partner as the primary next of kin to be notified if the service member were to be wounded, killed in action, or taken as a prisoner of war.⁸⁸ Same-sex spouses are also precluded from receiving financial assistance in finding new employment or obtaining additional education during a permanent change of station.

C. Pervasive Effects of DoD Regulations

While DOMA has placed a significant bar on the availability of certain benefits for LGB service members, as well as their spouses and dependents, DoD regulations pose an additional obstacle to LGB service members. These regulations, which govern the benefits extended to couples in the military, include the term “spouse” or “marriage,” and DoD has explicitly adhered to the federal definition espoused by DOMA.⁸⁹ Since the repeal of DADT, DoD has not made any mention of its intention to add a new “qualifying relationship” status to the regulations to include same-sex couples or to amend the regulations and remove references to “marriage” or

84. See Joe Piasecki, *Pasadena Same-Sex Couple Sues VA over Benefits*, PASADENA SUN, Feb. 1, 2012, http://articles.pasadenasun.com/2012-02-01/news/31014248_1_marriage-act-sexual-orientation-spouses (describing the difficulty that the couple goes through without receiving the military benefits).

85. *Id.*

86. *Id.*

87. *Id.*

88. See GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 23 (describing the limitations placed on emergency notification procedures because of DOMA).

89. See *id.* at 26 (explaining that in terms of benefits, DoD has adhered to DOMA’s federal definition of spouse and marriage).

“spouse.”⁹⁰ Thus, despite LGB service members being able to serve openly, they are still precluded from receiving additional benefits afforded to other heterosexual service members.

Under current DoD regulations, dual-military married heterosexual couples are generally stationed in the same area.⁹¹ This benefit is even more important for those couples on active duty who have children because it ensures that families are able to stay together when the service members receive their base assignment. Due to the wording of the regulations, however, married same-sex couples are ineligible to receive this benefit.⁹² They can opt to make hardship-based accommodation requests regarding geographical assignments, but these requests are not granted as readily as those for married heterosexual service members.⁹³ Similarly, same-sex military spouses are not allowed to be exempt from serving in “hostile-fire areas when their spouse is wounded or disabled by hostile fire.”⁹⁴

Military Family Housing is also unavailable to same-sex couples without children because the benefit only applies to those couples who qualify for the “with dependent” rate, although LGB service members with children may qualify for this housing benefit.⁹⁵ Same-sex spouses are also ineligible to receive the free legal services available to other military spouses, and must obtain private attorneys to handle any legal matters.⁹⁶ A final example of an unavailable benefit for same-sex couples, although not as relevant to all LGB service members, is found in legal proceedings. Under the Rules of Evidence in the Manual for Courts-Martial, one spouse is given the privilege not to testify against the other in most criminal cases,

90. *See id.* (determining that DoD has not included new statuses to the regulations referencing marriage or spouse despite the repeal of DADT).

91. *See* DEP’T OF DEF. INSTRUCTIONS, *Procedures for Military Personnel Assignments*, 6.2.3.2, Jan. 12, 2005, *available at* <http://www.dtic.mil/whs/directives/corres/pdf/131518p.pdf> (“To facilitate the assignment of dual-career military married couples to the same geographic area.”).

92. *See id.* at E2.1.29 (“Joint Spouse Assignment. Assignments made expressly for allowing military members to establish a joint household with their spouses who are also military members.”).

93. *See* GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 26.

94. *Id.*

95. *See* DEP’T OF DEF. HOUS. MGMT., DEPARTMENT OF DEFENSE MANUAL 11 (Oct. 28, 2010), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/416563.pdf> (stating that military personnel with dependents received an increased housing allowance).

96. *See* 10 U.S.C. § 1044 (2012) (authorizing service members and their qualified dependents to receive free legal assistance through the military).

but this privilege does not apply to same-sex couples.⁹⁷ Because of this discrepancy a same-sex spouse could be forced to testify against his or her partner and disclose potentially confidential and personal information.⁹⁸

IV. Legal Challenges to DOMA

Recognizing the disparity that still exists between LGB service members and their heterosexual counterparts, constitutional attacks on DOMA and its effects on military benefits were initiated prior to the repeal of DADT. The plaintiffs in *Gill v. Office of Personnel Management*⁹⁹ argue that DOMA violates the Fifth Amendment's Due Process Clause by denying them the same marriage-based benefits that are provided to opposite-sex couples.¹⁰⁰ Prior to the commencement of the suit, each plaintiff, or his or her spouse, attempted to enroll in one or more of the federal benefits available to married individuals, including health benefits, dental and vision insurance, and flexible spending programs.¹⁰¹ In response to the plaintiffs' requests, each respective federal agency denied access to these benefits by invoking the DOMA mandate of only recognizing marriages between a man and a woman.¹⁰² The United States District Court for the District of Massachusetts concluded that because "DOMA fails to pass constitutional muster even under the highly deferential rational basis test," it therefore "violates core constitutional principles of equal protection."¹⁰³ This case, which is currently pending in the United States

97. See MIL. R. EVID. 504 ("A person has a privilege to refuse to testify against his or her spouse.").

98. See *id.* (contrasting same sex spouse's treatment in being forced to testify against his or her partner).

99. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 376–77 (D. Mass. 2010) (holding DOMA violated core constitutional principles of equal protection).

100. See *id.* at 376–77 (focusing on plaintiff's argument that, "due to the operation of Section 3 of the Defense of Marriage Act, they have been denied certain federal marriage based benefits that are available to similarly-situated heterosexual couples, in violation of the equal protection principles embodied in the Due Process Clause of the Fifth Amendment").

101. *Id.* at 379–82.

102. *Id.* at 379.

103. *Id.* at 387.

Court of Appeals for the First Circuit,¹⁰⁴ represents a landmark case in the fight against DOMA because it will become the first appellate ruling on the constitutionality of DOMA.¹⁰⁵ The lead attorney in this case stated that the plaintiffs “are great examples of how DOMA’s double standards make no sense . . . [by violating] the Constitution that our men and women in the military are risking their lives to uphold.”¹⁰⁶

The Service members Legal Defense Network (“SLDN”) seeks to expand upon the district court holding of *Gill* in a more recent action, arguing that “the denial of ‘same recognition, family support and benefits’ for service members with same-sex spouses and their children is unconstitutional.”¹⁰⁷ In their complaint of *McLaughlin v. Panetta*,¹⁰⁸ SLDN’s lawyers assert that the unequal treatment of spousal benefits in the military violates several constitutional mandates, including “the Due Process Clause of the Fifth Amendment[,] limitations on congressional authority in Article I of the Constitution and the Tenth Amendment[,] and prohibitions on conditions placed on federal benefits.”¹⁰⁹ The SLDN relies heavily on the ruling in *Gill v. Office of Personnel Management* that DOMA is facially unconstitutional because of its unequal treatment of spouse-based military benefits.¹¹⁰ Although the Supreme Court has not established precedent governing the standard under which laws discriminating against sexual orientation should be measured, President Obama announced that sexual orientation must be measured under

104. See *GLAD Statement on McLaughlin v. Panetta*, GLAD, Oct. 27, 2011, <http://www.glad.org/current/press-release/glad-statement-on-mclaughlin-v.-panetta/> (reviewing the cases that have been brought in federal court challenging DOMA).

105. See *id.* (stating that *Gill v. Office of Personal Management* will be the first case to receive an appellate ruling on DOMA).

106. *Id.*

107. See Chris Geidner, *SLDN Files DOMA Challenge, Seeking Equal Benefits for Same-Sex Military Spouses*, METRO WEEKLY, Oct. 27, 2011, <http://metroweekly.com/poliglot/2011/10/sldn-files-doma-challenge-see.html> (“To the extent that the Defense of Marriage Act prohibits such equal treatment, the complaint filed this morning argues, DOMA is unconstitutional.”).

108. See Complaint for Plaintiffs, *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. 2011), available at http://sldn.3cdn.net/2d3f59bfb3218eae20_c5m6b5twm.pdf (seeking equal benefits for equal work).

109. Chris Geidner, *SLDN Lawyers Tell Court “American Servicemembers and Their Families Are Among DOMA’s Victims,”* METRO WEEKLY, Nov. 21, 2011, <http://www.metroweekly.com/poliglot/2011/11/sldn-lawyers-tell-court-america.html>.

110. See Motion for Summary Judgment at 2–20, *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. 2011), available at <http://metroweekly.com/poliglot/09514602225.pdf> (relying on *Gill v. Office of Personnel Management* as authority to rule DOMA unconstitutional).

heightened strict scrutiny.¹¹¹ President Obama has already issued a statement declaring that the government will no longer defend cases involving DOMA's application to legally married same-sex couples;¹¹² however, the President had remained silent regarding DOMA's application to military personnel until February 17, 2012, when the Department of Justice issued a statement in which Attorney General Eric Holder stated that he will not defend the constitutionality of DOMA within the military context.¹¹³ This statement marks a huge step in the fight to repeal DOMA and is in line with the court's holding in *Gill*.¹¹⁴ If the SLDN is successful in its challenge to DOMA, then LGB service members and their spouses will finally be eligible to receive the same benefits that similarly situated opposite-sex couples have received.

V. Same-Sex Relationships and Employee Benefits in the Public Sector

The military is not the only context in which people have challenged the constitutionality of same-sex spousal benefits. Outside of the armed

111. See Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>

("[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional."). This heightened strict scrutiny standard applies: "(1) whether the group in question has suffered a history of discrimination; (2) whether individuals 'exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group'; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's 'ability to perform or contribute to society'"

(citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985)).

112. See *id.* ("Moreover, the Department has declined to defend a statute 'in cases in which it is manifest that the President has concluded that the statute is unconstitutional,' as it is the case here.").

113. See Chris Geidner, *DOJ Won't Defend DOMA, Other Laws Preventing Equal Treatment for Service members With Same-Sex Spouses*, METRO WEEKLY, Feb. 17, 2012, <http://metroweekly.com/poliglot/2012/02/doj-wont-defend-laws-preventin.html> (reporting the Attorney General's statement as being consistent with President Obama's determination "that the federal definition of marriage in [DOMA] is unconstitutional").

114. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 376-77 (D. Mass. 2010) (holding DOMA violated core constitutional principles of equal protection).

forces, many litigants have been attempting to bring the benefits for opposite-sex couples in line with those of same-sex couples.¹¹⁵ The majority of the case law handling the conferral of spousal benefits in the context of the armed forces centers on opposite-sex couples and Survivor Benefit Plans; however, the other cases involving public municipalities and the availability of benefits indicate that the legal landscape is shifting and will likely hit the armed forces in the wake of the repeal of DADT.

For example, in *Alaska Civil Liberties Union v. Alaska*,¹¹⁶ public employees in Alaska brought suit over benefits that were restricted only to the spouses of employees.¹¹⁷ The State of Alaska offered employment benefits, including health insurance, to its employees and spouses.¹¹⁸ The State of Alaska offered employment benefits, including health insurance, to its employees and spouses.¹¹⁹ Only couples that were legally married were allowed to receive these benefits.¹²⁰ Because same-sex couples are not legally allowed to marry in Alaska, they are ineligible to receive these benefits.¹²¹ Nine same-sex couples, along with the Alaska Civil Liberties Union, filed suit against the state and the Municipality of Anchorage alleging that the eighteen individual plaintiffs were involved in same-sex domestic partnerships and were precluded from marrying under state law.¹²² Although the couples are not legally married, they argue that the state's refusal to legally recognize their unions is a violation of their right to equal protection.¹²³ The Supreme Court of Alaska held that the benefits programs were unconstitutional and violated the plaintiffs' equal protection rights because the defendant government treated same-sex and opposite-sex

115. See Westcott & Sawyer, *supra* note 20, at 1130 (describing courts' attempts to "equalize benefits for same-sex couples with those given to opposite-sex couples").

116. See *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 784 (Alaska 2005) (listing the claims that, among others, a municipal system denying same-sex spouses benefits coverage while covering spouses of heterosexual couples violates Alaska's Equal Protection Clause).

117. See *id.* (summarizing the plaintiffs' claims against the state of Alaska).

118. See *id.* at 783 (explaining Alaska offered employment benefits to its employees and spouses).

119. *Id.*

120. *Id.*

121. See *id.* (stating that only married couples are eligible for health insurance and other employment benefits in Alaska).

122. See *id.* ("[T]he eighteen individual plaintiffs were involved in "intimate, committed, loving" long-term relationships with same-sex domestic partners.").

123. See *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 784 (Alaska 2005) (stating that the plaintiffs challenged article 1, section 25 of the Alaska Constitution (also referred to as the marriage amendment)).

couples differently.¹²⁴ Because Alaska's constitution guarantees citizens equal rights and opportunities, "same-sex couples were being denied equal opportunities because they could not marry under state law and therefore could not meet the spousal limitation placed on the benefits given to state and local employees."¹²⁵

Further supporting the argument that legal benefits should be extended to heterosexual and homosexual couples alike, the Superior Court of New Hampshire in *Bedford v. New Hampshire Community Technical College System*¹²⁶ held that benefits programs only available to employees with legal spouses amount to employment discrimination on the basis of sexual orientation.¹²⁷ The plaintiffs in that case were employees at the New Hampshire Technical Institute.¹²⁸ Even though they qualified to receive employee benefits, such as health and dental insurance, the agency in charge of administering employee benefits prohibited the plaintiffs' partners from receiving the same benefits.¹²⁹ Additionally, the agency prevented one plaintiff from "dependent care leave benefits so that she may care for her partner's biological child."¹³⁰ The plaintiffs' lawsuit alleged that the denial of benefits for their same-sex partners constituted unlawful employment discrimination.¹³¹ The court relied on the reasoning in *Alaska Civil Liberties Union* that "the proper comparison . . . [is] between same-sex and opposite-sex couples, *regardless of marital status*, and not between same-sex and opposite-sex unmarried couples."¹³² Because same-sex couples never had the ability to legally avail themselves of these benefits, the court reasoned that unmarried, homosexual employees were not

124. *See id.* at 783 (holding that "the spousal limitations are unconstitutional as applied to public employees with same-sex domestic partners").

125. Westcott & Sawyer, *supra* note 20, at 1130 (citing *Alaska Civil Liberties Union*, 122 P.3d at 785 (Alaska 2005)).

126. *Bedford v. N.H. Cmty. Technical Coll. Sys.*, 2006 WL 1217283, *10 (2006).

127. *See id.* ("The petitioners have brought a valid statutory claim based upon employment discrimination and have expressly disavowed any constitutional challenge.").

128. *Id.* at *1.

129. *See id.* (describing the factual background which led to this suit).

130. *Id.*

131. *Id.* at *2.

132. *Bedford v. N.H. Cmty. Technical Coll. Sys.*, 2006 WL 1217283, *10, *6 (2006) (emphasis added).

similarly situated to unmarried heterosexual employees.¹³³ Thus, the court concluded that the employer discriminated against its employees based on sexual orientation.¹³⁴

Other courts have been faced with the problem of states stripping same-sex couples of benefits to which they were initially entitled. In *Diaz v. Brewer*,¹³⁵ the State of Arizona amended its administrative code to authorize opposite-sex and same-sex domestic partners to receive the same healthcare benefits.¹³⁶ Shortly thereafter, Arizona voters approved the Marriage Protection Amendment, which explicitly defined “marriage” under the Arizona Constitution as a union between a man and a woman.¹³⁷ A group of LGB state employees filed suit claiming that the amendment violated their substantive due process and equal protection rights under the Fourteenth Amendment.¹³⁸ The United States Court of Appeals for the Ninth Circuit held that withholding benefits that are conferred onto opposite-sex couples from same-sex couples was a violation of equal protection.¹³⁹ The court recognized that state employees and their families are not constitutionally guaranteed the right to health benefits, but concluded that “when a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.”¹⁴⁰

These cases are only a few depictions of how our legal system is adapting to the changing marriage laws. While these cases lie beyond the scope of the armed forces, they provide a useful parallel for how courts have dealt with the unequal application of spousal benefits.

133. *See id.* (“Thus, same-sex partners have no ability to ever qualify for the same employment benefits unmarried heterosexual couples may avail themselves of by deciding to legally commit to each other through marriage.”).

134. *See id.* at *7 (concluding that the petitioners established a *prima facie* case of sexual orientation discrimination).

135. *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011).

136. *See id.* at 1010 (summarizing the background events behind Arizona repealing the benefits program).

137. *Id.*

138. *Id.* at 1011.

139. *See id.* at 1013 (affirming the lower court’s holding that “the withholding of benefits for same-sex couples was a denial of equal protection”).

140. *Diaz v. Brewer*, 656 F.3d 1008, 1013 (9th Cir. 2011).

VI. Recommendations

Even with “Don’t Ask, Don’t Tell” now a thing of the past, egregious inequalities will continue to exist between the benefits afforded to opposite-sex couples and same-sex couples without the passage of additional legislation and amendments waiving the application of DOMA to military regulations. The major roadblock still in existence in the wake of the repeal of DADT is DOMA.¹⁴¹ The major solution to opening these benefits to LGB services members and their spouses is to repeal DOMA. The repeal would automatically allow same-sex couples in a legally recognized union to reap the benefits offered by the military. As it stands now, the limiting federal definition of “marriage” will continue to prevent LGB service members and their spouses from receiving many of the same military benefits that are provided to opposite-sex couples.¹⁴² The repeal of DOMA would trigger the numerous benefits, such as medical insurance and increased housing allowances that are currently unavailable to LGB service members and their spouses.

Notwithstanding the possible appeal of DOMA, DoD is capable of amending its own regulations to allow for same-sex couples in the military to reap the benefits already afforded to opposite-sex couples. Although many of the military benefits are explicitly limited by Congress’s definition of “spouse” and “marriage,” other benefits are governed exclusively by DoD regulations. For example, free legal services by a military legal assistance office may be extended to “dependents,” granting the military the discretion to determine who is a “dependent.”¹⁴³ An increased Basic Allowance for Housing at the “with-dependent” rate is another benefit included within this category.¹⁴⁴ To open these benefits up to LGB service members and their same-sex spouses, DoD can leave to the service members to designate their “dependents” or “family members.”¹⁴⁵ This would grant service members the power to list their spouses and children as

141. *See supra* Part II.B (discussing the pervasive effects of the federal DOMA).

142. *Id.*

143. *See* DoD Report, *supra* note 12, at 144 (detailing benefits available to LGB service members once DADT is repealed).

144. *See id.* (detailing how a repeal of DADT will allow LGB service members to claim their significant others as dependents for the purpose of determining the amount of BAH to be allotted).

145. *See id.* (discussing two potential approaches for allowing LGB service members to claim dependent benefits if DADT is repealed).

qualified dependents under these benefits, bypassing DOMA's limitation on who constitutes a "spouse."

In addition to leaving the service members with the discretion to designate their dependents, DoD can amend these regulations by creating a new "relationship" category to include same-sex couples.¹⁴⁶ If DoD were to pass amendments inserting the "qualifying relationship" category into the regulations, then many of the benefits would become available to LGB service members and their same-sex partners.¹⁴⁷ The addition of a qualifying relationship is similar to the approach being taken in federal agencies for civilian employees.¹⁴⁸ In June 2010, President Obama issued a memorandum directing federal civilian agencies to implement a "domestic partner" category for extension of benefits under existing law.¹⁴⁹ The criteria for what constitutes a "domestic partnership" include "that the two individuals are at least 18 years of age, maintain a common residence (or would but for an assignment abroad or other relevant obstacle), and share responsibility for a significant measure of each other's financial obligations."¹⁵⁰ DoD could adopt a similar category into its benefits to include LGB service members and their partners. To avoid abuse by service members who are not in a committed relationship but want to reap the same benefits, DoD could require that to be eligible for a "qualifying relationship," the couple must have a legal marriage or civil union recognized by a state. Additionally, DoD could require service members to present a legally protected document such as a sworn affidavit to support that their relationship meets the criteria for a domestic partnership.¹⁵¹ Because DoD would essentially be creating a new relationship category as opposed to redefining the preexisting "spouse" requirement, DOMA would

146. See GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 26 ("At this time, DoD has chosen not to create a new 'qualifying relationship' status for same-sex couples.").

147. See *id.* (stating that DoD sees no statutory reason for denying benefits to same-sex couples).

148. See DoD report, *supra* note 12, at 144 (describing federal agencies' method of allowing for member-designated benefits).

149. See *id.* (citing EXEC. OFFICE OF THE PRESIDENT, *Presidential Memorandum – Extension of Benefits to Same-Sex Domestic Partners of Federal Employees* (June 2, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>).

150. *Id.* at n.382.

151. See *id.* (granting federal agencies the power to "require employees to provide documentation, such as a sworn affidavit, attesting that their relationship meets these criteria").

not be triggered, and same-sex couples would be able to receive the benefits.

To effectuate equality amongst service members regardless of sexual orientation, the military should also add sexual orientation to the Military Equal Opportunity program as a suspect class. The Military Equal Opportunity program provides service members “an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible.”¹⁵² This program specifically protects against discrimination under five categories: race, color, religion, sex, and national origin.¹⁵³ Absent from this list is sexual orientation, and DoD has explicitly recommended against listing sexual orientation alongside the five previously listed categories.¹⁵⁴ If this recommendation is followed, the LGB service members would not be eligible for tracking initiatives or diversity programs, and their only course of action for resolving unlawful discrimination would be “the chain of command, the Inspect General, and other means as may be determined by the Services.”¹⁵⁵ Through its report, DoD declares that its focus is putting LGB service members on equal footing with other service members and not giving them any special treatment because of their sexual orientation.¹⁵⁶ DoD makes it clear that it seeks to quell any subliminal concern within the military that LGB service members will receive special treatment because of their sexual orientation.¹⁵⁷ However, by enumerating specific classes that receive special protection against discrimination under this program, DoD is providing preferential treatment to certain groups within the military. Although DoD’s intentions are admirable, the recommendation not to include sexual orientation as a protected class is not consistent with the overarching goal of effectuating equality within the military. Thus, the

152. *See id.* at 136 (quoting DEP’T OF DEF., *Directive: Department of Defense Military Equal Opportunity (MEO) Program 2* (1995), available at <http://www.dtic.mil/whs/directives/corres/pdf/135002p.pdf>).

153. *See* DoD Report, *supra* note 12, at 137 (describing the five classes protected under the Military Equal Opportunity program).

154. *See id.* (stating that DoD does not recommend granting sexual orientation protected status under the Military Equal Opportunity program).

155. *Id.* at 138.

156. *See id.* at 137 (stating that LGB service members “will be accepted more readily if the military community understands that they are simply being permitted equal footing with everyone else”).

157. *See id.* (stating that the perception of equality amongst all service members is essential in the smooth transition to a post-DADT military).

Military Equality Opportunity program should be amended to include a sixth factor, sexual orientation, in its list of protected classes.

An additional issue that needs to be challenged is Article 125 of the Uniform Code of Military Justice, which prohibits all service members from engaging in sodomy.¹⁵⁸ As it currently stands, any service member found violating Article 125 may be punished by court-martial and possibly imprisoned.¹⁵⁹ After the Supreme Court invalidated a Texas sodomy law as unconstitutional in *Lawrence v. Texas*, multiple challenges were made to Article 125.¹⁶⁰ The military's highest criminal court addressed the issue of sodomy within the military in *United States v. Marcum*.¹⁶¹ The U.S. Court of Appeals for the Armed Forces held that even though *Lawrence* does apply to the military, the right to engage in certain intimate conduct "must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy."¹⁶² By upholding Article 125, the military's court has made it possible to prosecute service members for consensual sodomy if the alleged conduct was not within the scope of the protections guaranteed by *Lawrence*.¹⁶³ Although the court in *Marcum* concedes that the defendant engaged in non-forcible sodomy, it nevertheless concludes that a subordinate to an officer in the military might feel coerced to engage in sexual acts where consent might not easily be refused.¹⁶⁴ Service members still maintain a liberty interest to engage in intimate conduct, but "this right must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and

158. See 10 U.S.C. § 925 (2012) (outlawing all instances of sodomy in the military); See also GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 17 ("The UCMJ prohibits all service members from engaging in sodomy as defined in Art. 125 (primarily oral and anal sex between members of the same or opposite sex).").

159. See 10 U.S.C. § 925 (2012) ("Any person found guilty of sodomy shall be punished as a court-martial may direct.").

160. See *Lawrence v. Texas*, 539 U.S. 558, 558 (holding that the Texas statute criminalizing consensual sodomy was unconstitutional); *United States v. Marcum*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/united-states-v-marcum> (last visited Jan. 8, 2012) (summarizing the legal actions that have been taken against the military's sodomy laws) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

161. See *United States v. Marcum*, 60 M.J. 198, 199 (addressing the conviction of officers under Article 125).

162. *Id.* at 208 (citing *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996)).

163. See *id.* at 207 (analyzing factors such as defendant's ranking in the military to determine if defendant was protected under *Lawrence*).

164. See *id.* at 208 (acknowledging that influences of rank and superiority may potentially lead to sexual relationships amongst service members).

civilian supremacy.”¹⁶⁵ With the sodomy law still in effect, gay service members are vulnerable to unwarranted accusations and prosecutions. The sodomy law has historically been a factor upon which supporters of DADT have relied when arguing for its constitutionality, and with the repeal of DADT, it is important that the antiquated sodomy laws are overruled to prevent potentially frivolous prosecution against LGB service members.

Not only do the military’s consensual sodomy laws need to be repealed but the statutes governing misconduct also need to be tightened to avoid potential abuse by leaders and fellow service members. Article 120 is a broad statute that criminalizes sexual assault and other sexual crimes within the armed forces.¹⁶⁶ Of particular importance are the two sections that define “wrongful sexual conduct” and “indecent act.”¹⁶⁷ “Wrongful sexual conduct” is defined as “sexual contact with another person without that other person’s permission.”¹⁶⁸ This vague definition leaves open the possibility that accidental collisions could be construed as intentional “sexual contact,” potentially resulting in a surge of prosecutions aimed at removing homosexual service members that otherwise would not have been discharged based on sexual orientation alone.¹⁶⁹ Similarly, service members can be charged with an “indecent act” if they engage in “indecent conduct.”¹⁷⁰ “Indecent conduct,” for purposes of Article 120, can include “observing” another person without receiving his or her explicit consent; thus, an “indecent act” charge could result “from someone making a false allegation about leering in the showers or watching a roommate change.”¹⁷¹ An example of the frivolous allegations that could arise is Private James Reyes who was court-martialed for accidentally touching another service member’s hand during a casual conversation.¹⁷² “Private Reyes’ alleged ‘victim’ testified at court martial that the touch was merely the result of a misunderstanding . . . [, but] Private Reyes spent more than a year in prison

165. *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996).

166. *See* 10 U.S.C. § 920 (2012) (describing conduct that constitutes “rape[,]” “sexual assault,” and “aggravated sexual contact”).

167. *Id.*

168. *Id.* § 920(m).

169. *See* GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 19 (discussing the vague sexual harassment military statutes and the possibility that the ambiguity could result in frivolous allegations against gay service members).

170. 10 U.S.C. § 920(k) (2012).

171. GUIDE TO LGBT MILITARY SERVICE, *supra* note 19, at 18.

172. *See id.* at 19 (recounting the allegations brought against Private James Reyes).

before SLDN attorneys successfully petitioned for his release”¹⁷³ Although possible that something more intimate was going on than a vaguely-worded statute, additional facts have not been released to develop a better understanding of the situation. These statutes need to be amended with more specific provisions to prevent innocent service members from being prosecuted for accidents or misunderstandings.

While much of the focus has been placed on the unequal treatment of spousal benefits in the wake of the repeal of DADT, many service members still fear that they remain vulnerable to discrimination within the military.¹⁷⁴ Some activists and service members believe that the open identification of gays in the military will lead to “covert harassment and less-than-covert discrimination over matters such as postings and promotion.”¹⁷⁵ With these fears building within the LGB community, commanders and other high-ranking officials need to be educated on harassment and discrimination. Even though the military has a strict policy against harassment or abuse stemming from the perceived sexual orientation of a service member, commanders nevertheless need to be experienced in identifying and handling any potential situations of discrimination. DoD suggests that “[p]art of the education process should include a reminder to commanders about the tools they already have in hand to punish and remedy inappropriate conduct that may arise in a post-repeal environment.”¹⁷⁶ Not only would additional education, such as “safe space” training, be helpful to commanders in handling these types of situations, but it would also stress that sexual orientation should never be a factor to consider when promoting a service member. LGB service members, like all members of the armed forces, should “be evaluated only on individual merit, fitness, and capability.”¹⁷⁷ These preemptive measures would help to negate any growing apprehension within the gay community of clandestine abuse or discrimination.

Leaders in the armed forces also need to be reminded to apply certain policies evenly regardless of sexual orientation. The military’s policy

173. *Id.*

174. See Rich Thomas, *Gays Still Vulnerable to Discrimination After Don’t Ask, Don’t Tell Ends*, YAHOO! NEWS, Sep. 20, 2011, <http://news.yahoo.com/gays-still-vulnerable-discrimination-dont-ask-dont-tell-183000219.html> (reporting that some gay rights activists claim “that while the ban is lifted, the military retains plenty of power to discriminate against homosexuals”).

175. *Id.*

176. See DoD Report, *supra* note 12, at 11.

177. *Id.* at 14.

regarding public displays of affection is of particular concern when it comes to enforcement.¹⁷⁸ While the military generally prohibits public displays of affection while on base, it is expected that such demonstrations of affection might occur at events like promotional ceremonies. Thus, whatever policies each branch of the armed forces follows, it is imperative that the leaders follow them without regard to sexual orientation. For example, if a leader would not normally reprimand a male soldier for kissing his girlfriend at a promotional ceremony, then that leader should not correct a male soldier for kissing his boyfriend at a promotional ceremony.

VII. Conclusion

The legal landscape with respect to gay service members has changed significantly over the past 20 years, beginning with the passage of DADT in 1993. With DADT in effect, LGB service members operated under a constant shroud of fear that they may be outed as homosexuals and ultimately discharged. The repeal of DADT is a momentous event in the fight for LGBT rights in the military; however, its repeal is only the first battle in a continuous fight to ensure that gay service members and their same-sex spouses are afforded the same benefits as other similarly situated couples. A major roadblock still in existence is the Defense of Marriage Act, which limits the definition of “spouse” for purposes of military benefits to a legal union between a man and a woman. DOMA has prevented service members and their same-sex partners who are otherwise legally married under state law from obtaining significant spousal benefits. These benefits, including medical insurance and increased housing allowances, would provide LGB service members and their same-sex partners with significant assistance throughout their time in the military. Moreover, extending these benefits to LGB service members would put them on equal footing with their heterosexual counterparts, ensuring equal treatment of military personnel within the military.

The repeal of DOMA would arguably be the best and most widespread solution to the problems mentioned above. Notwithstanding the potential logistical issues with granting these benefits, the repeal would deem LGB service members and their same-sex spouses eligible to receive significant benefits to assist with living, moving, and medical expenses. However,

178 *Id.* at 11.

Congress and the armed forces are still capable of implementing changes to facilitate the extension of these benefits to same-sex couples. Congress could amend DOMA and allow for its waiver by service members. This would essentially allow service members and their same-sex spouses to “opt out” of DOMA and receive the benefits regardless of sexual orientation. Although the military’s definition for some benefits is controlled by DOMA, it could still amend certain DoD regulations to account for a “qualifying relationship,” which could include same-sex couples in legally recognized unions. The military could also amend its Military Equal Opportunity program so that LGB service members are afforded the same protection as other groups that have historically faced discrimination.

As this Note clearly indicates, the repeal of DADT is but a small victory in the larger war waged in support of equal treatment of LGB service members in the military. Until these changes are implemented, same-sex couples will not enjoy the same benefits within the military that similarly situated opposite-sex couples do. So even though LGB service members are now free to reveal their sexuality to whomever they choose without fear of discharge¹⁷⁹, this newfound freedom is only a small consolation to those who still fight to receive the same benefits as heterosexual service members.
