

# Background

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## A Clash of Integrities: Moral and Religious Liberty in the Armed Forces

Charles A. Donovan

**Abstract:** *The repeal of the 1993 law prohibiting open homosexuality in the military poses significant risk for military service members and chaplains who, as matters of religious or moral conviction, hold to traditional values regarding marriage and sexual behavior. The report of the Pentagon's Comprehensive Review Working Group and the steps taken to date to implement the repeal do not allay concerns that the religious liberty and free speech rights of these service members and chaplains will be compromised to the detriment of their military careers. Congress therefore has a profound responsibility to monitor the implementation process and to assure not only that these rights are respected, but also that the 2010 repeal law itself is subject to continuing and candid reassessment. In addition to specific steps that it can take now to minimize future problems, Congress should insist on the full freedom of service members and chaplains to express their views on maintaining or amending every aspect of the policy.*

Just before the end of the 111th Congress, the House and Senate passed and sent to President Barack Obama legislation that provided for the repeal of the 1993 law prohibiting open homosexuality in the military. Known colloquially (and inaccurately) as “don’t ask, don’t tell,” the 1993 legislation subjected to administrative separation from the service any person who engaged in a homosexual act, stated that he or she is a homosexual, or married a person of the same sex. The effective repeal of this law was signed by President Obama on December 22, 2010, after votes in both houses of Congress.<sup>1</sup>

### Talking Points

- Congress repealed the 1993 military law regarding service by homosexual persons after a flawed lame-duck process that discouraged dissenting views and did not allow for amendments.
- As a result, the repeal’s impact on key issues, including the future of religious liberty and free speech rights for service members and chaplains who hold contrary views, was unresolved.
- The Defense Department’s implementation process fails to provide reassurance that the military careers of service members and chaplains will not be adversely affected by the exercise of their religious liberty and free speech rights.
- Congress has the constitutional responsibility to review and set policy for the armed forces; it should assure not only that the rights of service members and chaplains are respected, but also that sufficient information is available to determine whether the new law should be amended to bring it into line with wise public policy.

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214 Massachusetts Avenue, NE  
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(202) 546-4400 • [heritage.org](http://heritage.org)

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The repeal of the 1993 law poses significant risk for military service members and chaplains who, as matters of religious or moral conviction, hold to traditional values regarding marriage and sexual behavior. The report of the Pentagon's Comprehensive Review Working Group (CRWG) and the steps taken to date to implement the repeal do not allay concerns that the religious liberty and free speech rights of these service members and chaplains will be compromised to the detriment of their military careers.

Congress therefore has a profound responsibility to monitor the implementation process and to assure not only that these rights are respected, but also that the 2010 repeal law itself is subject to continuing and candid reassessment. In addition to five specific steps that it can take now to minimize future problems, Congress should insist on the full freedom of service members and chaplains to express their views on maintaining or amending every aspect of the policy.

The freedoms of religion and speech, subject as they are to the special conditions of military service, are nonetheless the heritage and birthright of every American. They are among the unalienable rights our armed forces exist to defend. It would be the height of irony if, in deference to hurriedly adopted policy changes centered around one of the most controversial topics of our time, men and women in uniform were denied the ability to express their views to fellow service members, military leaders, the public, and lawmakers. Service to the nation should never be made contingent on an enforced code of silence about such profound matters of belief and behavior.

### **The 111th Congress's Forced March to Repeal**

The "Don't Ask, Don't Tell" Repeal Act of 2010 was adopted after a flawed review process in which serious concerns about the changes it made were neither accurately communicated nor carefully evaluated. Once the report of the Pentagon's Comprehensive Review Working Group was released on November 30, 2010, two brief hearings with a narrow range of witnesses were held in the U.S. Sen-

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ate to discuss the issues raised in the report. Those hearings included the CRWG co-chairmen and the chiefs of the military service branches, but no experts to present testimony on the impact of the repeal on a variety of issues, including religious liberty and military family policy.

Finally, the votes in Congress to repeal the 1993 law occurred in a lame-duck session as part of a log-jammed legislative schedule. Debate was limited, and no amendments were allowed to be offered or debated.

As a result, no action was taken by the legislative branch to mitigate concerns about the potential impact of repeal on issues ranging from military readiness and family policy to the First Amendment freedoms of service members and chaplains serving in the military. The failure to consider and resolve these concerns leaves to the discretion of the Department of Defense a host of issues for which it is inadequately prepared by virtue of the unique challenges posed by sexual orientation and conduct concerns.

To its credit, the report of the CRWG on the prospective repeal of the 1993 policy did acknowledge the differences between the process of racially integrating the U.S. military in the mid-20th century and the effort now underway with respect to sexual orientation. The report cited General Colin Powell's widely noted statement that "Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument."<sup>2</sup>

The Congress of the United States retains the constitutional authority and responsibility to "make Rules for the Government and Regulation of the

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1. Public Law 111-321.

land and naval forces.”<sup>3</sup> Under the law adopted by Congress late last year, the details for implementation are within the purview of the Department of Defense. However, further steps involving the executive and legislative branches are needed before the repeal is final.

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First, the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff must provide written certification that the necessary implementing policies and regulations are in place and “consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.” Sixty days after this certification is transmitted to the congressional defense committees, the repeal is deemed by law to take effect.

The 1993 law,<sup>4</sup> in contrast, was adopted after an exhaustive process in which Congress conducted extensive hearings, made numerous findings regarding the compatibility of open homosexuality with military service, and engaged in ample debate with time for public input.<sup>5</sup> The failure of the House of Representatives and the Senate to conduct an analogously exhaustive debate with similar hearings and on-the-record findings in 2010 is an abdication of their legislative authority in military affairs. The cost of mistaken judgment in such sensitive areas of public policy could be unacceptably high.

If the legislation adopted in the 2010 lame-duck session cannot be substantially modified or repealed in the near term, Congress has the responsibility to lead a process that goes forward with extreme caution. Congress also has the duty to make clear that intensive reviews of the law will be regularly conducted and that it will not be bound by any theory of social inevitability<sup>6</sup> to retain an unworkable policy that undercuts the mission of the U.S. armed forces or other vital values.

In the short run, Congress, particularly the defense committees in both Houses, should conduct

2. Remarks of Senator Dan Coats (R-IN), *Congressional Record*, June 2, 1993, p. S7903, at <http://dont.stanford.edu/regulations/HomosexualityDebate.html> (February 9, 2011). Although General Powell reiterated his opposition to service by openly homosexual persons in his 1995 memoir, *My American Journey* (New York: Ballantine, 1995), he expressed the belief that the policy was likely to be relaxed in the future. In February 2010, shortly after Secretary of Defense Robert Gates and Admiral Mike Mullen offered their personal views on repeal, General Powell released a qualified statement to the effect that the ban should be lifted. He told an interviewer for *The Washington Post*, “If the chiefs and commanders are comfortable with moving to change the policy, then I support it.” As this paper relates, the views of the chiefs and commanders remained mixed through final passage of the repeal. The force of Powell’s argument regarding the profound difference between skin color and sexual orientation and conduct concerns remains. See Karen DeYoung, “Colin Powell Now Says Gays Should Be Allowed to Serve Openly in the Military,” *The Washington Post*, February 4, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020302292.html> (March 29, 2011).
3. Article I, Section 8 of the Constitution of the United States reads in full: [“The Congress shall have Power] [t]o make rules for the Government and Regulation of the land and naval Forces[.]” Constitution of the United States (Washington, D.C., The Heritage Foundation, 2010), p. 20.
4. Public Law 103-160, §654, Title 10. The 1993 law included 15 specific congressional findings that form its basis, the vast majority of them having to do with the unique conditions of military service and the deference given to the armed forces in areas of import to morale, unit cohesion, good order, and discipline. Finding no. 8 notes, however, that “military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.” See “A Law Worthy of Public Support: Public Law 103-160, Section 654, Title 10,” Center for Military Readiness, September 17, 2001, at <http://www.cmrlink.org/HMilitary.asp?docID=29> (March 29, 2011).
5. Elaine Donnelly, “Legislative History of the Law Regarding Homosexuals in the Military,” Center for Military Readiness, August 22, 2008, at <http://www.cmrlink.org/HMilitary.asp?docID=336> (February 9, 2011).
6. Eve Conant, “Uncivil Rights,” *Newsweek*, December 14, 2010, at <http://www.newsweek.com/2010/12/14/are-gay-rights-civil-rights.html> (February 9, 2011).

a thorough review of the implementation policies and regulations. Among other issues, the defense committees and Congress as a whole should pay close attention to the impact of the planned policies and regulations on the religious liberty and free speech rights of service members and chaplains in the unique conditions of military service.

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Continuing oversight will also be needed with respect to the potential for proposed policies on open homosexuality to conflict with and weaken federal law with respect to the institution of the family and marriage as the union of a man and a woman. This concern is aggravated by the recent decision by President Obama to abandon legal defense of the Defense of Marriage Act, in the course

of which Attorney General Eric Holder asserted that the repeal of the 1993 law on military service is a sign of the “evolution” in “community practices and attitudes” toward sexual orientation issues.<sup>7</sup>

### **A Flawed Review Process**

A detailed review of the steps Congress failed to take in 2010 to assess the impact of a full repeal of the 1993 law provides the best guidance for what Congress should do going forward. In his 2010 State of the Union Address, President Obama announced his intention to work with Congress and the military to repeal the 1993 law.<sup>8</sup> Shortly after the President’s remarks, Secretary of Defense Robert Gates announced that the Pentagon would undertake a review of the existing policy, which prohibited open homosexuality in the military, with the goal of determining “not whether the military [should] make this change, but how we best prepare for it.”<sup>9</sup> Testifying to the Senate Armed Services Committee less than a week after the State of the Union, Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, offered personal support for repeal of the 1993 law, stating his opinion that it was a matter of “integrity” for the armed forces.<sup>10</sup>

7. Eric Holder, letter from the Attorney General of the United States to Speaker of the House of Representatives John Boehner, “Re: Defense of Marriage Act,” February 23, 2011, at <http://www.scribd.com/doc/49404879/Attorney-General-Holder-s-Letter-to-John-Boehner-on-DOMA-Appeal> (March 2, 2011).
8. Barack Obama, “Remarks by the President in State of the Union Address,” January 27, 2010, at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (February 9, 2011).
9. Brian Montopoli, “Mullen: Ending Don’t Ask, Don’t Tell ‘Right Thing to Do’,” CBS News Political Hotsheet, February 2, 2010, at [http://www.cbsnews.com/8301-503544\\_162-6166493-503544.html](http://www.cbsnews.com/8301-503544_162-6166493-503544.html) (February 11, 2011).
10. *Ibid.* Chairman of the Joint Chiefs of Staff Mike Mullen and several U.S. Senators who supported the repeal of “Don’t Ask, Don’t Tell” focused on the personal identity aspects of homosexuality rather than homosexual conduct. See, for example, *Hearing on Department of Defense Authorization for Appropriations for Fiscal Year 2011, and to Receive Testimony Relating to the “Don’t Ask, Don’t Tell” Policy*, Committee on Armed Services, U.S. Senate, February 2, 2010, p. 59 (statement of Chairman Mullen that DADT “forces young men and women to lie about *who they are*” (emphasis added)); *Congressional Record*, December 18, 2010, p. S10674 (statement of Senator Leahy that repealing DADT would let service members “be honest about *who they are*” (emphasis added)); *ibid.*, p. S10669 (statement of Senator Murray that DADT burdens people “not because of something they did but because of *who they are*” (emphasis added)); *ibid.*, p. S10672 (statement of Senator Boxer recalling previous statement that DADT discriminates “based on *your status* instead of your behavior” (emphasis added)). However, one of the leading sources criticizing DADT, a monograph by law professor Janet E. Halley, states that arguments against DADT that are focused on status instead of conduct are “an insult” to the “personal sexual dignity” of most homosexual service members because such arguments represent them as people “who do not and would not engage in ‘homosexual conduct.’” Janet E. Halley, *Don’t: A Reader’s Guide to the Military’s Anti-Gay Policy* (Durham, N.C.: Duke University Press, 1999), p. 125. Such arguments, Halley states, “abandon[] a normatively crucial project of any pro-gay movement: building a social consensus that homosexual erotic acts are good.” *Ibid.* Halley also argues that challenges to DADT that depend on denying a “normative, conceptual, and statistical relationship between homosexual self-identification and same-sex erotic conduct” seek vindication “only for a gay and lesbian movement that is, at least in its public self-representations, sexually inert. That is not,” writes Halley, “the gay and lesbian movement we have. . . .” *Ibid.*, p. 63. The failure of proponents of DADT repeal to acknowledge the tensions inherent in these aspects of the debate is yet another flaw in a deeply flawed repeal process.

While at least one U.S. Senator expressed concern that the Pentagon leadership's embrace of repeal could prejudice the review process, that leadership subsequently continued a pattern of sending sharply mixed signals about the respect that would be accorded views that diverged from the Administration's planned repeal. In 2007, Secretary Gates

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had scorned the public expression of personal views by a high-ranking officer on the morality of various forms of sexual conduct. Gates commented that a remark by then-Joint Chiefs Chairman General Peter Pace on the morality of homosexual conduct "really doesn't have a place here."<sup>11</sup> Throughout 2010, even as the chiefs of the service branches were encouraged to provide congressional committees with their judgment on the wisdom of repeal, Secretary Gates and Admiral Mullen signaled their displeasure with other officers who offered their personal views supportive of the existing law.

In February 2010, one after another of the service chiefs testified before the defense committees in both houses of Congress and expressed, to varying degrees, their concern about or opposition to repeal.

- Air Force Chief of Staff General Norton Schwartz told the House Armed Services Committee that it was "not the time to perturb the force"<sup>12</sup> as it engaged in a two-front war in Iraq and Afghanistan.
- Army Chief of Staff George Casey told the Senate Armed Services Committee during the same week that he had "serious concerns"<sup>13</sup> about repeal and its effect on "readiness and military effectiveness."
- Marine Corps Commandant James Conway stated forthrightly that his "best military advice" to the civilian leadership of the legislative and executive branches "would be to keep the law such as it is."<sup>14</sup>

On March 8, 2010, however, a letter from Benjamin Mixon, commanding general of the U.S. Army Pacific, was published in *Stars and Stripes* on the topic of repealing the 1993 policy. In the brief and mildly worded letter, General Mixon indicated his

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11. General Peter Pace was ensnared in controversy when he defended the 1993 law on open homosexuality in the military by saying, "I believe homosexual acts between two persons are immoral and that we should not condone immoral acts. I do not believe the United States is well served by a policy that says it is OK to be immoral in any way." A report of the comment appeared in *The Chicago Tribune*. See Aamer Madhani, "Don't Drop 'Don't Ask, Don't Tell,' Pace Says," *Chicago Tribune*, March 13, 2007, at [http://articles.chicagotribune.com/2007-03-13/news/0703130169\\_1\\_immoral-homosexual-acts-gay-behavior](http://articles.chicagotribune.com/2007-03-13/news/0703130169_1_immoral-homosexual-acts-gay-behavior) (March 30, 2011). Pace was roundly criticized for the comment by *The New York Times*. See "General Pace and Gay Soldiers," *The New York Times*, March 15, 2007, at <http://www.nytimes.com/2007/03/15/opinion/15thu4.html> (March 30, 2011) and by political figures as well, including then-Senator and former Navy Secretary John Warner (R-VA). See Bryan Bender, "General's Comments Boost Debate on Gays in Military: Reaction Strong as Congress Set to Reexamine Rule," *The Boston Globe*, March 14, 2007, at [http://www.boston.com/news/nation/washington/articles/2007/03/14/generals\\_comments\\_boost\\_debate\\_on\\_gays\\_in\\_military/](http://www.boston.com/news/nation/washington/articles/2007/03/14/generals_comments_boost_debate_on_gays_in_military/) (March 30, 2011). In June 2007, Secretary Gates announced that he had decided not to renominate General Pace as chairman. *The New York Times* reported that rumors concerning the announcement came "after General Pace was forced to defend his comments that homosexual conduct was immoral, akin to adultery—a statement far from the legal underpinnings of the military's ban on openly gay soldiers based on arguments for discipline and unit cohesion." See Thom Shanker and Sheryl Gay Stolberg, "Chairman of Joint Chiefs Will Not Be Reappointed," *The New York Times*, June 9, 2007, at <http://query.nytimes.com/gst/fullpage.html?res=9800E3DE163FF93AA35755C0A9619C8B63&pagewanted=1> (March 30, 2011). Gates then recommended Admiral Mullen to replace General Pace. Mullen was subsequently nominated by President George W. Bush and confirmed by the U.S. Senate as chairman of the Joint Chiefs on August 3, 2007.

12. Justin Fishel, "Military Leaders Divided on Repeal of Gay Ban," FoxNews.com, February 26, 2010, at <http://www.foxnews.com/politics/2010/02/25/military-leaders-divided-repeal-gay-ban/> (February 11, 2011).

13. *Ibid.*

14. *Ibid.*

belief that the existing law had “achieved a balance between an individual’s desire to serve and acceptable conduct.”<sup>15</sup> He wrote that it was inaccurate to state that a majority of service members favored repealing the policy and urged readers to “speak up” through the chain of command and to their elected officials in support of retaining the policy.

The reaction to General Mixon was strong. Secretary Gates conveyed his disapproval of the letter at a press briefing two weeks later, and Admiral Mullen, at the same briefing, called the letter “not appropriate.”<sup>16</sup> Mullen suggested that it reflected a failure to understand “what the President’s strategic intent”<sup>17</sup> was in leading the review toward repeal. According to an account of the briefing, Mullen’s advice to service members concerned about a new policy was to “vote with your feet”<sup>18</sup> and resign from the service.

As the review proceeded over the following months, the views of service members were tallied through a process that included townhall-style sessions and a service-wide survey open to all military personnel. Townhall meetings were intentionally not recorded and were off the record. Military leaders only rarely offered their impressions of these sessions and the views of those under their command. General Conway, for example, gave an interview to the Web site *military.com* in which he described his meetings with young Marines and said that an “overwhelming number” of them had “significant concerns”<sup>19</sup> about such issues as unit cohesion and personal privacy.

Advocates of repeal in Congress moved in the late spring of 2010 to repeal the law without waiting for the Pentagon report. Legislation introduced as H.R. 1283 by Iraq war veteran Patrick Murphy was offered in the House on May 26 as an amendment to the high-priority Defense Reauthorization

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bill, H.R. 5136. The amendment passed by a vote of 234–194. This development occurred despite the dispatch of letters from Secretary Gates, Admiral Mullen, and all four service chiefs attempting to dissuade the Congress from proceeding to change the policy while the review was pending.

Senators supporting the repeal made their own effort in September 2010 to force a vote on the Defense Reauthorization bill with the Murphy amendment included. Opponents of repeal succeeded in defeating an attempt to invoke cloture and allow floor consideration of the repeal.

### **Rushed Action in the Lame-Duck Session**

With the failure to invoke cloture in the Senate, the focus of repeal efforts turned to the completion and release of the CRWG’s report, due December 1. This timing coincided with a lame-duck session of Congress that was crowded with agenda items from the extension of expiring tax legislation to immigration policy and appropriations bills for the current fiscal year.

While military leaders had stressed the importance of completing the CRWG report without public campaigning for a particular outcome, an interpretation of the results of the service-wide survey of military members was leaked to *The Washington Post* and published on November 11, 2010.<sup>20</sup> The leak led to the dissemination of a purported survey “finding” that 70 percent of service members thought the effect of repeal would be “positive, mixed or nonexistent.” The Pentagon’s spokesper-

15. Lt. Gen. Benjamin R. Mixon, “Let Your Views Be Known,” Letter to the Editor, *Stars and Stripes*, March 8, 2010, at <http://www.stripes.com/opinion/let-your-views-be-known-1.100083> (January 31, 2011).

16. “Secretary Gates, Admiral Mullen Rebuke Top Army Officer Over ‘Don’t Ask, Don’t Tell,’” March 25, 2010, ABC News Political Punch, at <http://blogs.abcnews.com/politicalpunch/2010/03/secretary-gates-admiral-mullen-rebuke-top-army-officer-over-dont-ask-dont-tell.html> (February 4, 2011).

17. Justin Fishel, “Top General in Hot Water Over Gay Policy,” FoxNews.com, March 25, 2010, at <http://liveshots.blogs.foxnews.com/2010/03/25/top-general-in-hot-water-over-gay-policy/> (February 4, 2011).

18. *Ibid.*

19. Bryant Jordan, “Conway Concerned with Gays in Barracks,” *Military.com*, March 26, 2010, at <http://www.military.com/news/article/conway-concerned-with-gays-in-barracks.html> (February 4, 2011).

son, Geoff Morrell, issued a statement lamenting the leak and stating that it was presumably done “to shape perceptions of the report prior to its release.”<sup>21</sup> The next day, Secretary Gates ordered an investigation of the leak, the results of which have not been announced to date.

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The keen interest in the CRWG report and the possibility of swift congressional action prompted the Obama Administration to move up its release by one day to November 30. A close examination of the report reveals that service members’ views on and reactions to repeal were far more complex and mixed than the leaked information had suggested.

However, the *Washington Post’s* assessment of the findings quickly dominated media coverage. The “70 percent” figure that was used to downplay service members’ concerns, for example, was calculated by including within it a sizable bloc—nearly half of that 70 percent—who said that repealing the law would affect them “equally positively and negatively.” The percentage who said repeal would be purely negative outpolled those who said it would be purely positive by a margin of 30 percent to 18 percent. It would have been equally valid on the basis of these data to conclude that 62 percent of responding personnel thought that repeal would have some negative effects or completely negative effects.<sup>22</sup>

In fact, focusing only on those service personnel who did not view repeal as neutral or mixed, the proportion raising serious questions about issues of morale, recruitment, and retention was significantly higher than the proportion discounting such concerns. For example, on the question of whether a service member would recommend to a family member or friend that he or she join the military, answers in the negative (27.3 percent) were more than four times higher than answers in the positive (6.3 percent). Moreover, members were more than six times as likely to say that repeal would have a negative impact (23.7 percent) on their military career plans as they were to say that it would be positive (3.5 percent). Similar ratios prevailed in the question about the impact on morale (27.9 percent negative versus 4.8 percent positive).

As the media ultimately did report, the ratio of negative to positive reaction to repeal was highest among combat units, particularly the U.S. Army infantry and the Marine Corps. Negative views of repeal in these subsets ranged as high as 60 percent—and this was the result when the Pentagon leadership’s ultimate stance in favor of repeal was known in advance, if not preordained. If that circumstance had any influence at all, it would lie in the direction of chilling expression of opposition to repeal. When a quarter of the service openly acknowledges the belief that there will be a negative impact on their military career plans, that is likely to be a threshold number.

Rather than accept the counsel of these numbers for a thorough and cautious congressional review, advocates pushed for rapid passage of a free-standing repeal measure. The potential impact of an adverse judicial ruling was cited as a key justification for prompt congressional action, even though

20. Ed O’Keefe and Greg Jaffe, “Study: Little Risk in Ending ‘Don’t Ask,’” CBS News Politics, November 11, 2010, at <http://www.cbsnews.com/stories/2010/11/11/politics/washingtonpost/main7043394.shtml> (February 14, 2011). The article quotes Admiral Mike Mullen, then traveling in Australia, criticizing Marine Commandant James Amos for statements the previous week questioning repeal in the midst of U.S. engagement in two overseas conflicts. This author could find no record of any criticism of the leak itself from the chairman of the Joint Chiefs.

21. Larry Shaughnessy, “Pentagon to Investigate Leak of ‘Don’t Ask, Don’t Tell Survey,’” CNN U.S., November 12, 2010, at [http://articles.cnn.com/2010-11-12/us/gates.dont.ask.leak\\_1\\_survey-secretary-gates-leak?\\_s=PM:US](http://articles.cnn.com/2010-11-12/us/gates.dont.ask.leak_1_survey-secretary-gates-leak?_s=PM:US) (March 29, 2011).

22. Chuck Donovan, “Don’t Ask, Don’t Tell: Time for Cautious Judgment,” The Foundry, The Heritage Foundation, December 2, 2010, at <http://blog.heritage.org/2010/12/02/dont-ask-dont-tell-time-for-cautious-judgment/> (February 14, 2011).

23. Jody Feder, “Don’t Ask, Don’t Tell: A Legal Analysis,” Congressional Research Service Report for Congress, September 30, 2010, at <http://www.fas.org/sgp/crs/misc/R40795.pdf> (March 29, 2011).

the majority of court rulings on the policy had reflected long-standing judicial deferral to military necessity.<sup>23</sup>

In the week immediately following the release of the CRWG report, the Senate Armed Services Committee held two hearings. In the first, held on December 1, Secretary Gates, Admiral Mullen,

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Pentagon general counsel Jeh Johnson, and General Carter Ham, commander of the U.S. Army Europe,<sup>24</sup> testified about the CRWG findings. The second hearing, held the next day, featured the vice chairman of the Joint Chiefs and the commanding officers of the Air Force, Army, Navy, Marine Corps, and Coast Guard. The House Armed Services Committee held no hearings.

Because of the timetable imposed by the lame-duck session and the predilection of the President, the majority in Congress, and the most senior military leadership, the two Senate hearings constituted the entirety of the congressional assessment of the more than 400 pages of the CRWG documents. Congress did not seek or hear testimony from military historians, retired military officers and personnel, retired or current chaplains, rank-and-file service members, organizations on either side of the repeal or interested in sub-issues affecting such topics as religious liberty and family law, or the general public.

Legislative action followed in short order, with the House of Representatives voting to approve a stand-alone repeal bill on December 15, 2010,

and the Senate following suit three days later. No amendments to the repeal measures were permitted in the Senate.

Within 48 hours of the final vote, a veteran columnist for *The Washington Post*, apparently unfamiliar with General James Amos's testimony and dedication to the rule of law, called for the general's dismissal as commandant of the Marine Corps. The writer criticized separate comments by General Amos expressing concern about the risk of injury to combat personnel due to the effect of repeal on unit cohesion, labeled him "one step short of being a bigot," claimed to know the general's personal views about homosexuality, and concluded "that's why he has to go."<sup>25</sup> A prominent liberal blog instituted a petition to President Obama asserting that General Amos "needs to either apologize or resign immediately."<sup>26</sup>

President Obama signed the repeal measure into law at a White House ceremony on December 22, 2010.

### **The New Policy's Threat to Military Careers and First Amendment Protections**

Among the issues left unresolved by the new policy is the question of protection of the First Amendment freedoms of military service members at every level, including chaplains. Because of the speed with which the CRWG report was released and followed by the passage of repeal legislation, Congress undertook no independent look at the potential implications of a new, quasi-nondiscrimination policy on the freedoms for speech and religion in the military context. Nor did it consider the potential for adverse impacts on the careers of military personnel who lodge conscientious objections to some, many, or even all aspects of the repeal. On several occasions since the implementation of the CRWG

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24. Robert M. Gates, Jeh C. Johnson, Michael G. Mullen, and Carter F. Ham, "Statements on the Department of Defense Comprehensive Review Working Group," testimony before the Committee on Armed Services, U.S. Senate, December 2, 2010, at [http://armed-services.senate.gov/e\\_witnesslist.cfm?id=4879](http://armed-services.senate.gov/e_witnesslist.cfm?id=4879) (February 15, 2011). Mr. Johnson and General Ham were co-chairmen the Comprehensive Review Working Group.

25. Richard Cohen, "Marine Corps Commandant Has to Go," *The Washington Post*, December 20, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/20/AR2010122003908.html> (March 31, 2011).

26. "Amos Under Fire for DADT Comments," *Marine Corps Times*, December 15, 2010, at <http://www.marinecorpstimes.com/news/2010/12/marine-amos-dont-ask-criticism-121510/> (March 29, 2011).



recommendations entered full swing, spokespersons for the Defense Department have ventured that no additional clarifications of existing policies in these areas are necessary. There is good reason to question this conclusion, and not merely because of the recent history of mistreatment of individuals who expressed disagreement with proposals for change.

Prior to the production of the CRWG report, a distinguished group of former chaplains wrote to President Obama and Secretary of Defense Gates and set forth numerous ways in which the replacement of “don’t ask, don’t tell” with a law “preventing discrimination on the basis of ‘sexual orientation’”

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***The Pentagon’s Comprehensive Review Working Group report places the new policy in a middle ground regarding equal opportunity, subjecting it to balancing tests.***

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would conflict with and threaten the religious liberty of chaplains and the service men and women they support and guide.<sup>27</sup> The retired chaplains asked a series of probing questions about the impact of the proposed repeal, particularly as envisioned by the Military Readiness Enhancement Act (H.R. 1283). Would chaplains be able, they asked, to:

- Present religious teachings that identify homosexual behavior as immoral,
- Teach classes in moral leadership and ethics on military bases and in branch schools, and
- Participate freely in such programs as the Army’s “Strong Bonds” initiative to help service members strengthen and preserve their marriages?

Moreover, how would the expression of such teachings or, for example, a chaplain’s insistence on the right to conduct marriage counseling in accord

with the doctrinal beliefs of his or her denomination be insulated from adverse personnel actions? The same questions pertain to service members generally. Specifically:

- If military personnel civilly express disagreement with changes in policy that they regard as approving of homosexuality and not necessary to comply with the law, how will those expressions affect their careers?
- Although the CRWG did recommend against the creation of protected-class status for homosexuality and bisexuality, will the new law and implementing policies induce promotion boards to include some kind of sexual attitude assessment in their evaluations of candidates for promotion?
- Will promotion selection boards be required to promote a certain percentage of openly serving homosexuals each promotion cycle?

Fortunately, as adopted by Congress, the final policy measure did not include language contained in H.R. 1283 that would have established sexual orientation as a formal classification for nondiscrimination purposes.<sup>28</sup> The CRWG report places the new policy in a middle ground regarding equal opportunity, subjecting it to balancing tests. The report acknowledges that “boundaries are not always clearly defined” when conflicts arise between, for example, the requirements of a chaplain’s faith tradition and a homosexual service member’s feelings of discrimination and bias upon being exposed to that tradition.

The report declines to classify sexual orientation as an attribute subject to the Military Equal Opportunity program complaint process but recommends instead that it be treated “under the same general principles of military equal opportunity policy” that require evaluation of service members “only on individual merit, fitness, and capability.” The report

27. Tom Breen, “Retired Chaplains Warn Against DADT Repeal,” *Army Times*, October 29, 2010, at <http://www.armytimes.com/news/2010/10/ap-retired-chaplains-warn-against-dont-ask-repeal-102910/> (March 30, 2011).

28. Section 656 of H.R. 1283 would have amended Chapter 37, Title 10, of the U.S. Code and established an armed forces “policy of nondiscrimination based on sexual orientation.” The recommendations of the CRWG reject that approach and state that “in the event of repeal, we do not recommend that the Department of Defense place sexual orientation alongside race, color, religion, sex and national origin as a class eligible for various diversity programs, tracking initiatives, and the Military Equal Opportunity program complaint resolution processes.” *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell,”* U.S. Department of Defense, November 30, 2010, p. 137, at [http://www.defense.gov/home/features/2010/0610\\_gatesdadt/DADTReport\\_FINAL\\_20101130%28secure-hires%29.pdf](http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130%28secure-hires%29.pdf) (February 15, 2011).

makes clear, however, that this lesser form of equal opportunity protection can lead to punitive measures and even criminal prosecution of personnel for “dereliction of duty” if they fail to handle complaints made under this standard properly.

The CRWG supplies “vignettes” intended to provide preliminary guidance on particular situations that could arise in the aftermath of repeal, but these vignettes are not comprehensive. For example, they are not applied to instances where service members hold and civilly express views contrary to the policy change or discretionary components of its implementation. Vignette 13 approvingly describes the instance of a service member participating in a gay rights parade while in civilian dress and carrying a placard that acknowledges “positive support for gay and lesbian Service members serving in the military.”<sup>29</sup> The vignette makes no mention of the contrasting circumstance in which, for example, a service member in civilian dress attends a public event and carries a placard urging the military to retain the current language of the Uniform Code of Military Justice on prohibited conduct or to honor man–woman marriage. Such lack of parallel analysis infects the CRWG report.

### **Precedent for Conflict: Partial-Birth Abortion, 1996**

In 1996, a controversy arose that touched upon a similarly contested issue: a proposed federal ban on a practice called partial-birth abortion. In the summer of 1996, the U.S. Catholic Conference initiated a postcard campaign to override President William J. Clinton’s veto of H.R. 1833, which would have barred the use of this abortion technique and subjected physicians to potential criminal penalties for violation of the law. Catholic chaplains in the armed forces, which had previously seen debates over federal funding of and permission for the performance

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***For many service members, and for citizens generally, issues of moral character and religious identification are matters of integrity. At the very least, developing policies to implement the repeal of the 1993 law involves a clash of integrities.***

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of abortions in military hospitals, were encouraged by their bishops to urge their congregants to send postcards supporting the override to their Member of Congress.

Defense Department officials, beginning with an Air Force Judge Advocate General, responded to the initiation of the campaign by issuing an opinion letter that chaplains and service members were prohibited by military directives and regulations from participating in lobbying campaigns and political activity, irrespective of the moral nature of the issue involved. In March 1997, chaplains Fr. Vincent Rigdon and Rabbi David Kaye filed lawsuits against the Department of Defense over these military directives, alleging that the department’s policies interfered with the constitutionally protected exercise of their religious liberty to speak on moral questions.<sup>30</sup> Rabbi Kaye believed, as the district court later wrote, that “he must be able to speak out against or in favor of legislation concerning what he considers to be immoral practices, including ‘partial birth’ abortion, euthanasia, and ‘various forms of sexual immorality.’”<sup>31</sup>

On April 7, 1997, the U.S. District Court for the District of Columbia ruled in *Rigdon v. Perry* that the Defense Department directives did in fact violate the religious exercise and free speech rights of military chaplains and the congregants who receive their messages.<sup>32</sup> “What we have here,” Judge Stanley Sporkin wrote, “is the government’s attempt to override the Constitution and the laws of the land

29. *Support Plan for Implementation: Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell,”* U.S. Department of Defense, November 30, 2010, p. 82–83, at [http://www.defense.gov/home/features/2010/0610\\_gatesdadt/DADTReport-SPI\\_FINAL\\_20101130%28secure-hires%29.pdf](http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport-SPI_FINAL_20101130%28secure-hires%29.pdf) (February 15, 2011). The Vignette’s text states, “Participation in the parade as described is within the Service member’s right of expression and consistent with good order and discipline.” A revised Vignette could make clear that the same right exists to march in a different direction.

30. See *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997).

31. *Ibid.*, p. 3.

32. *Ibid.*, pp. 160–165.

by a directive that clearly interferes with military chaplains' free exercise and free speech rights, as well as those of their congregants. On its face, this is a drastic act and can be sanctioned only by compelling circumstances."<sup>33</sup> The Defense Department did not appeal the court's judgment.

Strong adherence to the standards set forth in *Rigdon* would tend to alleviate, not aggravate, the inevitable conflicts that will arise about what Secretary Powell called the "most profound of human behavioral characteristics." Admiral Mullen received wide attention with respect to the issues at stake in repeal of the 1993 policy when he described it as a matter of "integrity" for the military in allowing its service members to acknowledge "who they are" with respect to sexual orientation. But for many service members, and for citizens generally, issues of moral character and religious identification are no less matters of integrity. At the very least, developing policies to implement the repeal of the 1993 law involves a clash of integrities.

As the Pentagon's plan for implementing congressional repeal of "don't ask, don't tell" continues to unfold, however, it is not yet clear that the standards enunciated in *Rigdon* will be observed and that the religious liberty and free speech rights of chaplains and service members will be rigorously protected. For example:

- The CRWG Support Plan for Implementation recommends an arbitrary speech code for armed forces personnel. The CRWG specifically recommends "following American Psychological

Association conventions on sexual orientation and suggests using the terms 'gay' (or gay men), 'lesbian' (or lesbians), and 'bisexual' (or bisexual individuals) instead of the term 'homosexual' (or homosexuals) as the use of 'homosexual' tends to be associated with more negative stereotypes."<sup>34</sup>

Observance of these conventions would require military chaplains and service personnel to avoid use of language found in, among other documents, the Catholic Catechism, the Christian Cyclopedia of the Lutheran Church–Missouri Synod, and other authoritative texts and commentaries from major world religions.<sup>35</sup> Why "bisexual" is linguistically acceptable and "homosexual" is not is, to say the least, not logically clear, especially when laws proposed by homosexual rights activists in other contexts define "sexual orientation" as "homosexuality," "heterosexuality," and "bisexuality."<sup>36</sup>

- Vignette 8 included in the Support Plan for Implementation raises the scenario of a lesbian service member attending a religious service at the base chapel and hearing a sermon in which the chaplain says that "homosexuality is a sin and marriage should be only between a man and a woman."<sup>37</sup> The lesbian wishes to file a complaint against the chaplain for being "discriminatory and biased."

The guidance offered to the supervisor receiving this complaint notes helpfully that chaplains have the "right to express their religious beliefs during their conduct of a worship service or

33. *Ibid.*, p. 165.

34. *Support Plan for Implementation*, p. 69.

35. See generally David F. Wright, "Homosexuality," in *Encyclopedia of Early Christianity*, ed. Everett Ferguson (New York: Routledge, Garland Reference Library of the Humanities, 1999), Vol. 1, p. 542. See also Eugene F. Rivers III and Kenneth D. Johnson, "On Hijacking the Civil Rights Legacy," Church of God in Christ, undated, at <http://www.cogic.com/highjacking-the-civil-rights-movement.html> (February 15, 2011). Rivers and Johnson state, for example: "People are equal in worth and dignity, but sexual choices and lifestyles [emphasis in original] are not. That is why the law's refusal to license polygamous, polyamorous, and homosexual unions is entirely right and proper." A summary of religious group teachings regarding homosexuality is beyond the scope of this paper; rather, it is clear that the use of specific terminology disfavored by the CRWG is common to religious texts and discussion, including sources favorable to very expansive interpretations of permissible conduct within their traditions. See, for example, "Stances of Faiths on LGBT Issues: Episcopal Church," Human Rights Campaign, at <http://www.hrc.org/issues/religion/4990.htm> (March 29, 2011).

36. Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong., June 19, 2009. Section 3, clause 9 states that "The term 'sexual orientation' means homosexuality, heterosexuality, and bisexuality." Under the CRWG's recommended speech code, a service member would run afoul of policy if he or she read the text of this bill aloud.

37. *Support Plan for Implementation*, p. 80.

religious study.” It further states that the incident provides an excellent opportunity to have a discussion with the service member about the “proper boundaries of religious expression within the military” and that “these boundaries are not always clearly defined.”

The lack of clear definition is precisely where the greatest policy concerns lie as few, if any, chaplains and pastoral leaders would consider their vocation as confined to the conduct of specifically religious exercises. The implications of confining understanding of full religious liberty to worship services or study groups have deservedly drawn considerable scholarly scrutiny and criticism.<sup>38</sup> Vignette 8 does little to dispel concern that military chaplains will be subject to new limitations on their freedom to counsel and represent their faith traditions across the span of their duties in the armed forces.

### Clarifying and Strengthening Freedoms of Speech and Religion

Without question, personal expression in the armed forces is subject to conditions that do not prevail in the rest of society. Rules governing everything from dress to public displays of affection to political activity have been created and justified on the general understandings that military service is an around-the-clock enterprise and that the requirements of good order and discipline in the service justify certain restrictions that would be unacceptable in the private sphere. Indeed, the very existence of the military policy on open homosexuality was sometimes justified, and accepted by many courts of law, on the grounds that military standards governing individual conduct and expression need not replicate those that would be acceptable or legal as applied to the remainder of society.

Questions continue to be raised, however, about the extent of the limitations necessary to maintain

good order and discipline, particularly with respect to issues of deep public controversy. These issues, of course, are not static but typically wax and wane

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***The role of the U.S. military is to defend the nation's security and not to drive or lead its social debates.***

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with issues under debate in society at large. In the debate over the performance of elective abortions in military hospitals prior to the partial-birth abortion bill that sparked the *Rigdon* litigation, military physicians were actively involved in efforts to overturn a directive from President Clinton that privately funded abortions be permitted in military hospitals using military personnel. In fact, a Congressional Research Service history of the period notes that the refusal of military physicians to perform such procedures was universal in both the European and Pacific theaters.<sup>39</sup>

While the responses of military chaplains and service members to the issues of abortion and sexual orientation and conduct do not precisely parallel, the authors of the CRWG report repeatedly acknowledge the analogies between these subjects in terms of the military's efforts to allow personnel to live and work together despite the deepest of differences on morally fraught matters. Both issues have past, present, and future legal implications for individuals and for the nation.

The role of the U.S. military is to defend the nation's security and not to drive or lead its social debates. The *Rigdon* decision, though it did not proceed beyond the federal district court, is best understood as advising the armed forces to allow its officers and personnel the maximum freedom to hold, civilly express, and engage in policy advocacy without fear of favoritism from or interference by their superior officers.

38. United States Commission on International Religious Freedom, *Annual Report 2010*, U.S. Department of State, p. 17, at <http://www.uscirf.gov/images/annual%20report%202010.pdf> (February 15, 2011). The report notes, “Freedom of worship is only one aspect of religious freedom, and a purposeful change in language could signify a much narrower view of the right, ignoring for example, the components of religiously motivated expression and religious education. This is not the message our nation should be sending to the world's religious freedom abusers.”

39. David F. Burrelli, “Abortion Services and Military Medical Facilities,” Congressional Research Service *Report for Congress*, April 24, 2002, p. 8, at <http://www.policyarchive.org/handle/10207/bitstreams/266.pdf> (February 3, 2011).

## What the Department of Defense Should Do

Specifically, in the wake of the repeal of the long-standing law on open homosexuality, the Department of Defense could:

1. **Emphasize the new law as a privacy standard and not a sexual orientation nondiscrimination code.** Respect for privacy in sexual matters is a clear standard that is nearly universally accepted in American life with the exception of policies regarding coercion and the protection of minors. The CRWG report evinces the expectation that the new law will not prompt every member of the armed forces to reveal his or her sexual orientation and counsels recruiters and others who encounter such revelations to advise the recruit or service member that such declarations are not necessary. The report further states that the new law, in contrast with the major congressional proposals on which it is based, does not place or recommend placing sexual orientation “alongside race, color, religion, sex, and national origin as a class eligible for various diversity programs, tracking initiatives, and the Military Equal Opportunity program complaint resolution processes.”<sup>40</sup>

This distinction is critical for minimizing the conflicts that will arise, and that have arisen with increasing sharpness, in general society between sexual orientation laws and religious liberty, especially in the handful of jurisdictions where same-sex marriage statutes, coupled with non-discrimination laws, have forced the closing of religious social service agencies and infringed on the hiring freedoms or benefits policies of religious organizations and business enterprises.<sup>41</sup>

Despite the helpful wording of much of the CRWG report in this regard, suggestions in its text that the Department of Defense, for example, “may consider creating a ‘qualifying relationship’ status for same-sex relationships, or for both same-sex and unmarried opposite-sex relationships” prejudice the outcome of a vital national policy debate and violate both the spirit and the letter of the Defense of Marriage Act.

The creation of any new status along the lines of same-sex marriage or domestic partnerships represents bad public policy that, if pursued, is wholly the prerogative of Congress. The Department of Defense should not suggest otherwise.

2. **Avoid politically correct speech codes.** As previously discussed, the CRWG ventures into logically inconsistent and troubling territory in recommending the use of certain words to discuss the “most profound of human behavioral characteristics.” Not only does the recommendation scorn the use of a commonly used, technical and non-pejorative term for same-sex attraction and behavior, but it also raises the prospect that the Department of Defense will go further and demand adherence to findings and conclusions of organizations and professional bodies that, in an area of great controversy, themselves remain controversial.

Here again, the example of abortion and public policy is instructive. Organizations like the American College of Obstetrics and Gynecology have taken public stances on issues as sensitive as conscience protections for medical personnel (opposed)<sup>42</sup> and partial-birth abortion (qualifiedly for).<sup>43</sup> Many medical professionals and millions of Americans consider neither of these

40. *Support Plan for Implementation*, p. 17.

41. Thomas Messner, “Same-Sex Marriage and the Threat to Religious Liberty,” Heritage Foundation *Backgrounder* No. 2201, October 30, 2008, at <http://www.heritage.org/Research/Reports/2008/10/Same-Sex-Marriage-and-the-Threat-to-Religious-Liberty> (February 15, 2011).

42. Press release, “HHS Secretary Calls on Certification Group to Protect Conscience Rights,” U.S. Department of Health and Human Services, March 14, 2008, at <http://www.hhs.gov/news/press/2008pres/03/20080314a.html> (February 15, 2011).

43. Jonathan H. Adler, “Kagan, ACOG, and the Partial-Birth Abortion Ban,” *The Volokh Conspiracy*, June 29, 2010, at <http://volokh.com/2010/06/29/kagan-acog-and-the-partial-birth-abortion-ban/> (February 15, 2011). Adler wrote, “If [ACOG] issued a specific statement based upon a White House staffer’s judgment of what was politically expedient, as opposed to what was true about the necessity or advisability of a given procedure, then it perpetrated a fraud and let itself be used for political purposes.”

judgments authoritative. The same concerns pertain with respect to Department of Defense guidance and training materials regarding sexual orientation and use of the research and findings of professional bodies on the issue.

The Defense Department should not presume to prescribe what is orthodox in a highly controvertible area of human experience. The freedom of military counselors, chaplains, and even service members to reach contrary conclusions regarding these matters should be fully respected and free from the threat or reality of adverse evaluation or career disruption.

3. **Make clear that “political” and freedom of speech and assembly standards are the same for persons of differing moral conviction.** As noted previously, one of the vignettes created by the CRWG upholds the liberty of a service member, not in uniform, to attend a gay pride event and express a conviction about military policies regarding gay and lesbian service members. While it may be the case that clarification of this matter is more timely given uncertainties about such participation under the 1993 policy, the core issue at stake is the freedom of service members to attend public events and state their personal views without employing their uniforms or other badges of service to imply that they represent the views of the Department of Defense.

Presumably, a member of the military who adheres to an opposing or contrasting idea on this topic possesses the same ability, under the same conditions, to attend public events that express or permit expression of that idea. The Department of Defense should underscore this presumption so that it is clear that the same standards of appropriate behavior will apply to all forms of civic participation.

4. **Clarify that civilly expressed personal moral or religious views on questions of sexual behavior are not limited to worship contexts.** The CRWG report leaves the impression that

military chaplains and, by extension, service members and congregants enjoy the freedom to express their religious tenets only in the context of distinctly religious services. Disobedience of the law is not acceptable, nor should commanders lack the authority to set reasonable limits on debates or conversations that could detract from the military mission. At the same time, there is no justification for a view that would limit all discussion or mention of issues of a moral character to the confines of a chapel or Bible study. Furthermore, there is no basis for the assumption that service members without a religious affiliation cannot maintain what some would view as a conservative view on matters of ethics.<sup>44</sup>

Full respect for the expression of civilly expressed moral or religious views should be accorded without regard to the religious character of the setting. Vignettes and policies developed to support the implementation of the repeal of the 1993 law should reflect and reinforce this understanding.

5. **Make clear that civilly expressed personal moral or religious views on questions of sexual behavior may not be taken into account in any context involving recognition or promotions.** In the past decade, current members of the armed forces have expressed diverse views on the wisdom of the policy prohibiting open homosexuality in the military. However, only service members, including senior officers, opposed to changing the policy have been subjected to criticism by senior officers or invited to “vote with your feet” by leaving the service.

Refusal to carry out the clear command of the law is grounds for discipline, but the mere expression of contrary views is not. In fact, a willingness to express concerns about the appropriateness of others’ sexual expressions or conduct is a vital component of enforcing military policies regarding harassment or unprofessional conduct. The difficulty of doing so in the midst of enormous peer pressure was recently reaffirmed in a context outside of repeal of the 1993 policy.<sup>45</sup>

44. Nat Hentoff, “Pro-Lifers Herald a Breakthrough,” *Jewish World Review*, February 2, 2011, at <http://www.jewishworldreview.com/cols/hentoff020211.php3> (February 15, 2011). A prolific author and columnist, Hentoff describes himself as a “Jewish atheist, civil libertarian, pro-lifer.”

The best remedy for this situation is more concrete assurance by the Department of Defense that civil expressions of disapproval of any form of sexual conduct will never be taken into account in evaluation of a service member's fitness or eligibility for recognition or promotion.

The future course of the new policy is subject to many forces, including popular opinion, congressional oversight, court decisions, and the nature and effectiveness of the implementation processes and materials developed by the Department of Defense. An aggressive posture by the CRWG or its follow-on entities to erode the statutory definition of marriage and family and/or constrain the ability of officers, chaplains, and service members to support different policies in this area carries the potential to raise controversy over the law to a new level.

The CRWG report assumes a smooth and effective implementation of the law. Congress should conduct its own assessment by authorizing a full-scale poll of service members no later than 2013 to determine whether the new law is working as promised or requires amendments to bring it into line with wise public policy.

## Conclusion

The long-standing military law prohibiting open homosexuality was repealed in 2010 after a flawed process. The outcome of the review was known in advance, if not preordained by the predilection and personal views of the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff. Attempts were made in Congress to repeal the policy while the review was underway. Permission for senior officers to express their personal views was inconsistently given. A false impression of the service member polling conducted during

the review was leaked to a media outlet supportive of repeal, and an investigation without result has ensued.

The repeal was then considered according to a crushing timetable during a lame-duck session of Congress. No hearing of any kind was held in the House of Representatives. No hearing involving expert testimony on the impact of the repeal on a variety of issues, including religious liberty and military family policy, was held in either chamber of Congress. Finally, floor debate on the repeal in the Senate occurred without the opportunity for any Senator to offer an amendment, though some wished to do so.

As a result of these circumstances, Congress, which is ultimately responsible for making rules and regulations for the governance of the U.S. armed forces, exercised inadequate oversight. Congress can begin to remedy that inadequacy by paying close attention to the impact of the Department of Defense implementation process on the religious liberty and free speech rights of service members and chaplains in the unique conditions of military service. Continuing oversight will also be needed with respect to the potential for proposed policies on open homosexuality to conflict with and weaken federal law regarding the institution of the family and marriage as the union of a man and a woman.

Finally, Congress should ensure that regular reviews of the law occur, with service members and the public given full freedom to express their views on maintaining or amending every aspect of the policy.

—*Charles A. Donovan is Senior Research Fellow in the Richard and Helen DeVos Center for Religion and Civil Society at The Heritage Foundation.*

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45. Edecio Martinez, "Owen Honors' Lewd Videos Shown on USS Enterprise, Reports Virginian-Pilot," CBS News.com, at [http://www.cbsnews.com/8301-504083\\_162-20026949-504083.html](http://www.cbsnews.com/8301-504083_162-20026949-504083.html) (February 3, 2011). See also Diana West, "Officers and Gentlemen' No More Thanks to Activists," *The Washington Examiner*, January 8, 2011, at <http://washingtonexaminer.com/opinion/columnists/2011/01/diana-west-officers-and-gentlemen-no-more-thanks-activists> (February 3, 2011).