Cornell University
ILR School

Cornell University ILR School
DigitalCommons@ILR

Federal Publications

Key Workplace Documents

4-5-2012

The Repeal of "Don't Ask, Don't Tell": Issues for Congress

David F. Burrelli
Congressional Research Service

Follow this and additional works at: http://digitalcommons.ilr.cornell.edu/key_workplace

This Article is brought to you for free and open access by the Key Workplace Documents at DigitalCommons@ILR. It has been accepted for inclusion in Federal Publications by an authorized administrator of DigitalCommons@ILR. For more information, please contact jdd10@cornell.edu.

The Repeal of "Don't Ask, Don't Tell": Issues for Congress

Abstract
[Excerpt] On December 22, 2010, President Obama signed P.L. 111-321 into law. It calls for the repeal of the existing law (Title 10, United States Code, §654) barring open homosexuality in the military by prescribing a series of steps that must take place before repeal occurs. One step was fulfilled on July 22, 2011, when the President signed the certification of the process ending the Don't Ask, Don't Tell policy, which was repealed on September 20, 2011. However, in repealing the law and the so-called 'Don't Ask, Don't Tell' policy, a number of issues have been raised, but were not addressed by P.L. 111-321. This report considers issues that Congress may wish to consider as the repeal process proceeds.

Keywords
Don't Ask, Don't Tell, military, homosexuality, repeal, Congress

Comments

Suggested Citation
Burrelli, D. F. (2012). *The repeal of "Don't Ask, Don't Tell": Issues for Congress*. Washington, DC: Congressional Research Service.

This article is available at DigitalCommons@ILR: http://digitalcommons.ilr.cornell.edu/key_workplace/903

Congressional Research Service

The Repeal of "Don't Ask, Don't Tell": Issues for Congress

David F. Burrelli
Specialist in Military Manpower Policy

April 5, 2012

Congressional Research Service
7-5700
www.crs.gov
R42003

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

On December 22, 2010, President Obama signed P.L. 111-321 into law. It calls for the repeal of the existing law (Title 10, United States Code, §654) barring open homosexuality in the military by prescribing a series of steps that must take place before repeal occurs. One step was fulfilled on July 22, 2011, when the President signed the certification of the process ending the Don't Ask, Don't Tell policy, which was repealed on September 20, 2011. However, in repealing the law and the so-called 'Don't Ask, Don't Tell' policy, a number of issues have been raised, but were not addressed by P.L. 111-321. This report considers issues that Congress may wish to consider as the repeal process proceeds.

Under the Constitution, Congress has the authority for making "rules for the government and regulation" of the military services. Legislation has been proposed in the 112th Congress that could affect the repeal process by requiring the certification of the repeal by all members of the Joint Chiefs of Staff and not just the Chairman, as was the case. It has also been suggested that Congress could hold hearings before or after the final repeal occurs concerning such matters as the repeal process and anticipated changes in other laws regarding military benefits, for example.

Issues for consideration include, but are not limited to, congressional oversight of the repeal process, differences in benefits and privileges some individuals may experience (especially differences created under the Defense of Marriage Act), changes involving sodomy prohibitions, and efforts by some to expand the repeal to include transgender individuals.

Certain military benefits and privileges are extended to spouses as defined by law. Under the Defense of Marriage Act, the federal government recognizes marriage as the union of one man and one woman. However, certain states recognize same-sex marriages. Thus, it is possible for a same-sex couple to be legally married but not eligible for certain military benefits and privileges.

Laws prohibiting sodomy (defined as "unnatural carnal copulation") in the military context have varied over time. There existed proposed language in the Senate version of the National Defense Authorization Act in the 112th Congress that would remove sodomy from the Uniformed Code of Military Justice, effectively decriminalizing sodomy. Similar language did not exist in the House version. This language was not included in the final law.

The repeal of the ban on homosexual behavior has encouraged some to expand efforts to end discrimination against transgender individuals. Based on military fitness policies, individuals who have a history of mental disorders that, in the opinion of the medical examiner, would interfere with or prevent satisfactory performance of military duties are not allowed to serve. Among the disorders cited are "sexual and gender identity disorders." (These disorders are listed in the International Classification of Diseases, 9th Revision, Clinical Modification or ICD-9-CM, 302.) At one time, homosexuality was listed as a psychiatric disorder, but this was removed from the Diagnostic and Statistical Manual (DSM) in 1973. Some have argued that other "gender disorders" should also be removed. Along these lines, advocates believe it is unfair for the military to continue to discriminate against these individuals. Others, however, believe that until the DSM and ICD-9-CM are changed, such individuals should continue to be barred from serving.

Contents

Background 1
Issues 2
The Role of Congress 3
    Congressional Oversight 4
Benefits and Privileges 5
    Defense of Marriage Act 6
    Privacy and Cohabitation 8
Sodomy 8
Application to Transgender Individuals 10
Conclusions 11

Contacts

Author Contact Information 11

Background

Prior to 1993, homosexuality was banned in the military under Department of Defense (DOD) regulations. The then-existing policy had been in place since the Carter Administration. During his campaign for the presidency, Bill Clinton promised that, if elected, he would "lift the ban." In response, Congress began considering legislation on the issue. Following his election, President Clinton implemented an interim policy seemingly suspending the existing policy until Congress could finish its work. Following a lengthy public consideration of the issue, Congress passed P.L. 103-160, codified in 10 United States Code Section 654. This language codified the grounds for discharge from the military as follows: (1) the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts; (2) the member states that he or she is a homosexual or bisexual; or (3) the member has married or attempted to marry someone of the same sex. In implementing the law, the Clinton Administration added language in regulations that went beyond the law and prohibited questioning military members and recruits about their sexuality. This policy became known as "Don't ask, Don't tell" or DADT.[1]

On January 27, 2010, during his State of the Union speech, President Obama stated his desire to work with Congress "to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are."[2]

Shortly thereafter, on March 2, 2010, the Secretary of Defense appointed the Honorable Jeh Charles Johnson (General Counsel) and General Carter F. Ham to co-chair a working group to "undertake a comprehensive review of the impacts of repeal, should it occur, of Section 654 of Title 10 of the United States Code…."[3] The unidentified group formed to conduct this study became known as the Comprehensive Review Working Group or CRWG. The CRWG report was issued on November 30, 2010.

Legislation was introduced (H.R. 2965), modified[4], and after congressional passage, signed into law by President Obama as P.L. 111-321 on December 20, 2010, setting in motion the process for repealing Section 654, Title 10 United States Code and the "Don't Ask, Don't Tell" policy that was promulgated as a result of this law. According to P.L. 111-321, repeal would take effect 60 days after the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff certify that

- they have "considered the recommendations contained in the CRWG report and the report's proposed plan of action,"
- "the Department of Defense has prepared the necessary policies and regulations to exercise [the repeal of section 654, title 10 USC]," and;

[1] "Don't Ask, Don't Tell," refers to the Clinton administration policy and not to the law enacted by Congress.

[2] President Barack Obama, White House, Office of the Press Secretary, Remarks of the President in the State of the Union Address, January 27, 2010.

[3] U.S. Department of Defense, Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell," November 30, 2010: 1.

[4] H.R. 2965, Rep. Jason Altmire, June 19, 2009. Some confusion exists over H.R. 2965. As originally introduced, H.R. 2965 was entitled "Enhancing Small Business and Innovation Act of 2009." Prior to taking up the issue of repeal, the language in H.R. 2965 was replaced with the repeal language in other legislation (see H.R. 6520 and S. 4022, for example) and later re-titled "Don't Ask, Don't Tell Repeal Act of 2010."

- the policies and regulations pursuant to such a repeal are "consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces."

The then-Secretary of Defense, Robert M. Gates, released a memorandum calling on DOD military and civilian leaders to deliver a plan for carrying out the repeal by February 4, 2011.[5] This memorandum called for the creation of a Repeal Implementation Team (RIT) to develop plans for the repeal, update policies for publication following the repeal, train and prepare members of the force, and provide bi-weekly progress reports. (It is also noteworthy that the Pentagon would not keep statistics on gay service members.[6])

The certification occurred on July 22, 2011. As a result, Section 654 and the DADT policy were repealed on September 20, 2011, 60 days after certification.[7]

According to reports, the Department of Defense decided on a three-tiered approach to implementing the repeal of DADT that focused on training and education of its personnel. Under this plan, tier one focused on those in senior leadership positions having to deal with the overall repeal process; this group includes military lawyers and chaplains. Tier two was for senior leadership who will oversee the education and training of troops in their commands. Finally, tier three was for the rank and file active duty, reserve component, and civilian defense employees.[8]

Issues

The enactment of P.L. 111-321 and subsequent DOD actions on DADT raise questions, including the following:

- What is the role of Congress in the oversight of the repeal process?
- Does DADT repeal apply to state National Guardsmen when not in federal service?
- What benefits are available to gay service members and their partners/dependents?
- Does the federal statute prohibiting the recognition of gay marriages create equal treatment issues?

[5] U.S. Department of Defense, Secretary of Defense, Memorandum for Under Secretary of Defense (Personnel and Readiness), Implementation of a Repeal of Title 10, United States Code, Section 654, January 28, 2011.

[6] Philpott, Tom. "Pentagon: Number Of Gay Servicemembers Won't be Tracked Inside Military." *Special to Stars and Stripes*, February 2, 2011.

[7] For more background information, see CRS Report R40782, *"Don't Ask, Don't Tell": Military Policy and the Law on Same-Sex Behavior*, by David F. Burrelli, and CRS Report R40795, *"Don't Ask, Don't Tell": A Legal Analysis*, by Jody Feder.

[8] Shaughnessy, Larry. "DoD Finalizes Plans for Implementing Repeal of 'Don't Ask, Don't Tell.'" *CNN.Com*, February 11, 2011.

- How will language in the Uniform Code of Military Justice, particularly the article prohibiting sodomy, be affected?
- Will a lack of federal language on the topic possibly allow administrative regulations prohibiting certain behaviors to be reinstated?[9]

This report will examine these issues.

The Role of Congress

Under the Constitution, Congress has the authority "To make Rules for the Government and Regulation of the land and naval Forces."[10] Congress, via its Members and committees, maintains oversight of the Armed Forces. It is the duty of the President to execute the laws and to draft the means of implementing these laws. In the case of the repeal of Section 654, Congress is removing the statutory language prohibiting open homosexuality and allowing the Administration to implement the rules and regulations, subject to this oversight. (Congress did not add new language to federal statutes.)

Prior to the adoption of Section 654 (and the DADT policy), there were no federal statutes banning gay individuals from serving openly in the military. Instead, the ban was contained in various military regulations. Repeal of Section 654 returns to a situation in which there are no federal statutes regarding open service by gays. In this environment, it could theoretically be possible for this or any future Administration to draft regulations that resemble the pre-1993 ban or any number of similar restrictions. Some have suggested that it is necessary for Congress to go beyond repealing Section 654 and put into place statutory language that prevents a return to restrictions on service based on sexuality. Others dismiss the possible return to a gay ban as unlikely, particularly given such a change would be vulnerable to legal challenges, and therefore claim that the need for such legislation is unnecessary.[11]

Still others have noted that, lacking any prohibitions in law, it is possible for state governors to establish such rules for state National Guard members.[12] Advocates for repeal of Section 654 suggested that Congress could go further in considering language that would prevent a governor from taking such actions. Concerns have also been expressed that such actions could potentially challenge or usurp a governor's authority when the National Guard is under state control.

[9] Prior to 1993, the so-called "gay ban" was not enshrined in law, but rather in various regulations.

[10] U.S. Constitution, Article 1, Section 8, clause. 14.

[11] "But because Congress did not require the military to allow open service, a new president could order his or her secretary of defense to issue new regulations that effectively reinstate the ban..." The Caucus. "Bachmann's 'Don't Ask' Position A Legal Possibility." *The New York Times*, August 16, 2011: 12. In fact, it has also been suggested that governors could do so as a matter of state policy as leaders of state national guard personnel.

[12] Marshall, Bob. "Ban Homosexuals From National Guard, States have power to block Obama's social policy." *Washington Times*, December 29, 2010: B3.

Congressional Oversight

Congress may also respond to the repeal by exercising its oversight duties. For example, it could hold hearings, as well as propose legislative changes to policy affected by the repeal of Section 654. Arguably, the inclusion of the 60-day waiting period following certification allowed Congress time to review any changes or new policies potentially brought about by the repeal.

To date, Congress has taken a number of actions:

The House Armed Services Committee included the following proposed language in its version of the 2012 National Defense Authorization Act (H.R. 1540):

> **Section 533—Additional Condition on Repeal of Don't Ask, Don't Tell**
>
> This section would amend the Don't Ask, Don't Tell Repeal Act of 2010 (P.L. 111-321) to require the Chief of Staff of the Army, the Chief Naval Operations, the Commandant of the Marine Corps, and the Chief of Staff of the Air Force to submit to the congressional defense committees their written certification that repeal of the Don't Ask, Don't Tell law specified in section 654 of title 10, United States Code, will not degrade the readiness, effectiveness, cohesion, and morale of combat arms units and personnel of their respective armed force that are engaged in combat, deployed to a combat theater, or preparing for deployment to a combat theater.[13]

However, the final version of the National Defense Authorization Act did not contain this language.

Other steps Members of Congress have taken include the following:

- During this repeal process, Representative Joe Wilson, chairman of the House Armed Services Committee's Military Personnel Subcommittee, stated that he planned to hold hearings on the repeal declaring it "'irresponsible' for Congress to repeal the ban on openly gay service without giving the House of Representatives time to hold hearings."[14] To date, no hearings have been scheduled specifically on the topic of the repeal.
- On January 19, 2011, Representative Duncan Hunter introduced H.R. 337,[15] a bill that would amend P.L. 111-321 to expand the list of those needed to certify the repeal to include other members of the Joint Chief of Staff (JCS): the Chief of Staff of the Army, the Chief of Staff of the Air Force, the Chief of Naval Operations, and the Commandant of the Marine Corps.[16] Supporters of H.R. 337

[13] This section is similar to H.R. 337, discussed earlier. U.S. Congress. House. Committee on Armed Services, National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, H.Rept. 112-78, 112th Cong., 1st Sess., May 17, 2011: 138.

[14] Maze, Rick. "Wilson says he hopes to reinstate DADT." *Army Times*, January 6, 2011.

[15] H.R. 337, Rep. Duncan D. Hunter, January 19, 2011.

[16] Earlier attempts to add this language into the Senate's consideration of H.R. 2965 and the 2011 Defense Authorization Act were blocked when the amendment tree for H.R. 2965 was filled by one Senator and by one Senator's objection to adding the amendment to the National Defense Authorization Act for FY 2011. "'Amendment trees' are charts that illustrate certain principles of precedence which guide the Senate amendment process." See CRS Report RS22854, *Filling the Amendment Tree in the Senate*, by Christopher M. Davis, Summary. See also U.S. Congress, *Congressional Record*, December 18, 2010; and, Shear, Michael D. "Last-Ditch Move to Block Repeal of 'Don't Ask, Don't Tell' Fails." The Caucus, the Political and Government Blog of the Times, *The New York Times*, (continued...)

contend that it was important to have all military leaders in agreement and they have criticized relying on the certification of only three individuals who stated their support for repeal before the CRWG's work was underway.[17] Opponents of H.R. 337, and the earlier attempts to add similar language requiring the consent of the entire JCS viewed it as a "poison pill" given the hesitancy expressed by some JCS members during Senate Armed Services Committee hearings on DADT in December 2010.[18] This bill was referred to the Committee on Armed Services without further action.

- According to a recent report, the chairman of the House Armed Services Committee, Representative Buck McKeon, "is seeking copies of the written assessments performed by each service about the impact of the policy change on recruiting, retention and readiness, which he believes could provide ammunition for an attempt to block the scheduled Sept. 20 date when the ban would lift once and for all."[19] Again, it appears that this request has been overtaken by events with the repeal.

With repeal of Section 654, Congress retains its oversight authority and may take other actions such as requesting reports or holding hearings with regard to the effects of repeal on military cohesion and effectiveness, disciplinary issues (such as any problems resulting from harassment or assault), and any regulatory changes that arise as a result of repeal, for example.

Benefits and Privileges

A panoply of pay, benefits, and privileges are available to military personnel. Military dependents are also eligible to receive certain benefits and privileges as a result of their relationship with the military member. In certain cases, the description of the qualifying relationship exists in law. In other cases, a military member may be able to name a beneficiary or beneficiaries. Benefits based upon marriage could prove contentious with the repeal of Section 654.

On September 21, 1996, the Defense of Marriage Act (DOMA) became law.[20] Under this law, marriage is defined as the union between one man and one woman. The federal government, therefore, does not recognize same-sex marriages for the purpose of extending benefits and privileges, although several states do.[21]

Certain DOD benefits, such as Servicemembers Group Life Insurance (SGLI), require the service member to designate a recipient in the event of his or her death. In other cases, such as the Death Gratuity, the service member may designate a beneficiary. If the service member does not

(...continued)

December 21, 2010.

[17] Burns, Robert. "Questions Remain On 'Don't Ask.'" *Philadelphia Inquirer*, December 20, 2010.

[18] "A little over a month after saying that repealing 'Don't Ask, Don't Tell' would be a distraction and put lives at risk on the battlefield, Marine Corps Commandant Gen. James Amos released a video message assuring Marines that he would personally oversee implementation of the repeal within the Corps." Turner, Derek. "Amos delivers message to Corps on DADT." *Stars and Stripes, Stripes Central*, January 29, 2011.

[19] "Key lawmaker still not sold on 'don't ask' repeal." *Navy Times*, August 8, 2011: 17.

[20] P.L. 104-199; 110 Stat. 2419, September 21, 1996.

[21] See CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.

designate a beneficiary, then the law stipulates the beneficiary from a list, beginning with the spouse. The services may use this list to pay the first eligible beneficiary. In the case of a same-sex marriage, the spouse would not be recognized as an eligible beneficiary under this method because federal law does not recognize such marriages.

Other benefits, such as military health care, travel, survivor benefits, and military housing, explicitly designate, in law, who is an eligible beneficiary.[22] In addition, policies on compassionate re-assignment and former spouse protection laws, for example, would not apply to same-sex couples.[23] As a result of the DOMA and the explicit definitions of eligible beneficiaries in service statutes, a member of the military who is in a same-sex marriage will not be afforded the full benefits available to heterosexual couples.

Other questions arise. For example, if a military same-sex couple adopts a child, arguably, the child would be eligible to attend DOD Dependent Schools. But the same-sex marriage would not be recognized in considerations for assignments, command-sponsored or otherwise.[24] To go further, if the member dies in such a hypothetical case, the adopted child would be awarded the Death Gratuity ($100,000) unless the service member had explicitly designated the same-sex spouse as the beneficiary. Arguably, such varying treatment creates inequalities among service members that Congress or the courts may be asked to consider.

Defense of Marriage Act

In an effort to contend with the issue of variations in military benefits that may occur as the result of certain states recognizing same-sex marriages, it has been suggested that the most direct way to address the issue is to repeal DOMA. Over the years, various efforts have been made to repeal the law.[25] Recent executive and legislative branch actions related to DOMA follow.

In February 2011, Attorney General Eric Holder informed Congress that he considered DOMA to be "unconstitutional." He noted that Members of Congress could, if they wish, defend the law.[26] Shortly after, language was introduced in the House and Senate supporting DOMA,[27] and the Speaker of the House of Representatives, Representative John Boehner, announced that former Solicitor General Paul Clement would represent the House in its defense of DOMA.[28] In

---

[22] See Title 10 U.S.C., secs. 1072 et seq., for example.

[23] Also to be affected but only mentioned here are those benefits available to spouses of veterans.

[24] Command-sponsored assignments refer to assignments in which the military provides for the dependents to accompany the service member. In non-command-sponsored assignments, the military member is responsible for all dependents and does not receive assistance from the military.

[25] For example, see H.R. 3567, Rep. Jerrold Nadler, October 19, 2009, S; 598, Sen. Dianne Feinstein, July 7, 2011. In addition, the issue has been raised in a number of court cases. See CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.

[26] "'I will instruct department attorneys to advise courts in other pending Defense of Marriage litigation of the President's and my conclusions that the law's definition of marriage as between a man and a woman is unconstitutional, Holder said in a statement. Members of Congress 'who wish to defend the statute may pursue that option,' he said." Rosenblatt, Joel. "Obama, Holder Calls 1996 Defense of Marriage Act Unconstitutional." *Businessweek.com*, February 24, 2011.

[27] H.Con.Res. 25, Rep. Vicky Hartzler, March 3, 2011, and, S.Con.Res. 11, Sen. James M. Inhofe, April 4, 2011.

[28] Clement resigned from the law firm where he was employed, King & Spalding, "over its abrupt decision to stop defending the Defense of Marriage Act on behalf of the House of Representatives." Gerstein, Josh. "Clement quits firm over Defense of Marriage flap." *Poitico*, April 25, 2011. King & Spalding's decision invoked controversy. Geidner, (continued...)

February, 2012, Attorney General Holder wrote in a letter to House Speaker John A. Boehner, "that the Justice Department shared the view of plaintiffs in a lawsuit in Massachusetts that such laws—including a part of the Defense of Marriage Act, and statutes governing veterans' benefits are unconstitutional."[29]

On April 13, 2011, Navy Chief of Chaplains Rear Admiral M. L. Tidd announced a change in policy allowing same-sex marriages to be performed in Navy Chapels. Following criticism by certain Members of Congress, on May 11, 2011, this policy change was "suspended."[30]

The House Armed Services Committee has included the following proposed language in its version of the 2012 National Defense Authorization Act (H.R. 1540):

> **Section 534—Military Regulations Regarding Marriage**
>
> This section would affirm the policy of Section 3 of the Defense of Marriage Act (1 U.S.C. 7) that the word 'marriage' included in any ruling, regulation, or interpretation of the Department of Defense applicable to a service member or civilian employee of the Department of Defense shall mean only a legal union between one man and one woman.
>
> **Section 535—Use of Military Installations as Site for Marriage Ceremonies and Participation of Chaplains and Other Military and Civilian Personnel in their Official Capacity**
>
> This section would establish that marriages performed on DOD installations or marriages involving the participation of DOD military or civilian personnel in an official capacity, to include chaplains, must comply with the Defense of Marriage Act (1 U.S.C. 7), which defines marriage as only the legal union between one man and one woman.[31]

These sections were not included in the final version of the bill as passed.

And lastly, the House Appropriations Committee included language in H.R. 2219, its proposed FY2012 DOD Appropriations Act, stating, "No funds under the act may be used for activities in contravention of Section 7 of title 1, United States Code (the Defense of Marriage Act)."[32] Section 7 of Title 1, U.S.C., defines marriage as the union of one man and one woman, and states that the term spouse refers to someone of the opposite sex. This language was not enacted.[33]

(...continued)

Chris. "News Analysis: What Actually Happened With King and Spalding?" *Metroweekly*, April 26, 2011.

[29] Savage, Charlie, Justice Dept. Backs Equal Benefits For Gay Couples In Military, *New York Times*, February 18, 2012: 16. Goodnough, Abby, Appeals Court Hears Arguments on Gay Marriage Law, NYTimes.com, April 4, 2012.

[30] Volsky, Igor. "Navy Rescinds Same-Sex Marriage Ruling Pending Legal and Policy Review." May 11, 2011, available at http://think progress.org/lgbt/2011/05/11/177408/navy-marriage-rescind/ .

[31] U.S. Congress. House. Committee on Armed Services, National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, H.Rept. 112-78, 112th Cong., 1st Sess., May 17, 2011: 138.

[32] H.R. 2219, Rep. C.W. Bill Young, Department of Defense Appropriations Act, 2012, Sec. 10013, 112th Cong., 1st Sess., July 11, 2011.

[33] Instead, this appropriations bill and others were passed as the Consolidated Appropriations Act, 2012, (P.L. 112-74, December 23, 2011) without the provision pertaining to the Defense of Marriage Act.

Senate versions of these bills did not contain similar language. The Senate version included the sentence, "A military chaplain who, as a matter of conscience or moral principle, does not wish to perform a marriage may not be required to do so." This language was enacted into law.[34]

Privacy and Cohabitation

The issues of privacy and cohabitation were addressed by the CRWG, which recommended against segregated housing for gay and lesbian service members:

> Accordingly, we recommend that the Department of Defense expressly prohibit berthing or billeting assignments based on sexual orientation, except that commanders should retain the authority to alter berthing or billeting assignments on an individualized case-by-case basis, in the interest of maintaining morale, good order, and discipline, and consistent with performance of mission.[35]

In the report, the CRWG received comments from service members regarding privacy and cohabitation. Although the CRWG recommended commanders make such berthing and billeting decisions based on military interests, the recommendation allows for "case-by-case" considerations. The CRWG was concerned that separate facilities would lead to stigmatizing gays and lesbians, citing the "separate, but equal" treatment of blacks. However, privacy and cohabitation issues remain. For example, a same-sex couple could receive billeting or berthing assignments that would allow them to remain together, whereas such arrangements would not be considered for opposite-sex couples who are not married.[36]

Sodomy

Congressional treatment of sodomy in the military context has varied over time. In 1917, the Articles of War of 1916 were implemented prohibiting "assault with the intent to commit any felony, or assault with the intent to do bodily harm."[37] In 1919, following revelations of "inappropriate behavior" among naval personnel in Newport, RI, then Assistant Secretary of the Navy Franklin D. Roosevelt organized a group of enlisted men to submit to "immoral acts" as part of the investigation.[38] However, because the men submitted, charges involving "assault" did

[34] P.L. 112-81, Sec. 544, December 31, 2011.

[35] CRWG: 141.

[36] In a related matter, Rep. Hunter was considering introducing legislation that "would require that members of the Armed Forces are not pressured to approve of another person's sexual conduct if that conduct is contrary to the personal principles of the members." Keyes, Charley. *CNN.com*, September 6, 2011. Arguably, a commander could refuse to allow gays to share berthing assignments.

[37] 64 Stat. 619; at 664; P.L. 64-242; August 29, 1916. Some have erroneously claimed that this law explicitly made "assault with intent to commit sodomy" a punishable offense. (Human Rights Watch at http://www.hrw.org/en/node/12380/section/3). Rather, it appears only broadly to refer to 'assault.' However, as described in A Manual for Courts-Martial, Corrected to April 15, 1917, page 266, "An assault with intent to commit any felony is an assault made with a specific intent to murder, rape, rob, or to commit manslaughter, sodomy, or other common-law felony."

[38] "During the time the organization was under the direct supervision of Franklin D. Roosevelt, and particularly between the dates of May 5 and July 20, 1919, the enlisted men acting as operators or detectives were instructed…to go forth into Newport and to allow immoral acts to be performed upon them, if in their judgment it was necessary for the purpose of running down and trapping or capturing specified alleged sexual perverts." U.S. Congress, Senate, Committee on Naval Affairs, Alleged Immoral Conditions at Newport (R.I.) Naval Training Station, 67th Cong., 1st (continued...)

not apply as specified under the Articles of War. In 1920, Congress prohibited the act of sodomy itself.[39] Later, Congress created the Uniformed Code of Military Justice (UCMJ) and included the sodomy provision as Article 125.[40]

Article 125 of the UCMJ prohibits sodomy:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.[41]

However, the CRWG recommended that Congress repeal Article 125 in a manner consistent with the Supreme Court decision in *Lawrence v. Texas.*[42] Although the *Lawrence* decision did not address the military context, the court did strike down as unconstitutional a state law that prohibited private consensual homosexual sodomy. Other acts involving sodomy, such as forcible sodomy, sodomy involving minors, or where it is "service discrediting," could be prosecuted under Articles 120, "Rape and carnal knowledge," or 134, "The General Article."

The General Article states:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Legislative provisions have been included in the Senate version of the FY2012 National Defense Authorization Act that would repeal the crime of sodomy under the UCMJ (Article 125) and expand Article 120 ("Rape and Carnal Knowledge") to include three sections applying to: (1) rape and assault against any person, (2) sexual offenses against children, and (3) other non-consensual sexual misconduct. According to the Senate Armed Services Committee report: "All offenses previously punishable as forced sodomy under this statute would be punishable under the proposed changes to Article 120, UCMJ."[43] This language was not included in the final version of the law.[44]

(...continued)

Sess, 1921. "Lay Navy Scandal to F.D. Roosevelt: Senate Naval Sub-Committee Accuses Him Daniels in Newport Inquiry. DETAILS ARE UNPRINTABLE. Minority Report Asserts Charges of Immorally Employing Men Do Officials Injustice." *New York Times*, July 20, 1921: 4.

[39] P.L. 66-242, June 4, 1920. The term was not explicitly defined.

[40] P.L. 81-506, May 5 1950, which became effective May 31, 1951.

[41] See Title 10 U.S.C., §925.

[42] 539 U.S. 558 (2003).

[43] U.S. Congress. Senate. Committee on Armed Services, National Defense Authorization Act for Fiscal Year 2012, S. 1253, S.Rept. 112-26, 112th Cong., 1st Sess., June 22, 2011: 115.

[44] Critics claimed that by repealing Art. 125, both sodomy and bestiality would be legalized. Cassata, Donna, National Defense Authorization Act: Provision Repeals Military Ban on Sodomy, *Huffington Post*, on-line, December 12, 2011.

However, had Art. 125 been repealed, consensual sodomy could not be prosecuted. In some ways, this change would have returned prosecution of sodomy to the pre-1920s situation where sexual behavior could only be prosecuted if force was used or an assault occurred such as rape, except for those behaviors covered under the mentioned General Article. The act of sodomy itself would no longer have existed as a separate crime under the Uniformed Code of Military Justice.

Application to Transgender Individuals

The repeal of Section 654 has encouraged some to advocate for other changes to the law and/or military policy. Activists have complained that despite the repeal, the military discriminates against transgender individuals. The term transgender, which encompasses a broad range of sexual identities and behaviors, applies to individuals whose gender identity does not conform to their assigned sex at birth.

> The president of the Transgender American Veterans Association says that with the repeal of the military's ban on open service by gays, transgender and transsexuals are 'the last minority that the Defense Department can and does discriminate against.' … Opponents of repealing the military's 'don't ask, don't tell' policy on gays have mentioned – usually in an effort to prevent repeal – the possibility that transvestites and transgender people would also have to be accepted.[45]

Based on military fitness policies, individuals who have a history of mental disorders that, in the opinion of the medical examiner, would interfere with or prevent satisfactory performance of military duties are not allowed to serve. Among the disorders cited are "sexual and gender identity disorders." (These disorders are listed in the International Classification of Diseases, 9th Revision, Clinical Modification or ICD-9-CM, 302.) At one time, homosexuality was listed as a psychiatric disorder, but this was removed from the Diagnostic and Statistical Manual (DSM) in 1973. The 1973 decision to make the change concerning the removal of homosexuality from the DSM as a mental disorder was contentious among its members.[46] Any similar change concerning transgender individuals by the APA, or successful court challenges, could affect military policies. (DSM and ICD have merged their codes.)

In one example, following the passage of P.L. 111-321 establishing the process of repealing Section 654, a few college/university campus activists have used the "transgender discrimination" argument as a reason for continuing to block military service recruiters or Reserve Officer Training Corps (ROTC) programs from campus.[47] However, there seems to be little evidence of this issue having adverse effects on military-academia relations.[48]

---

[45] "Activist: Military still discriminates against transgender people." *Navy Times*, February 14, 2011: 14.

[46] Grimes, William. "Alfred Freedman, a Leader in Psychiatry, Dies at 94." *New York Times*, April 20, 2011. "In 1972, with pressure mounting from gay rights groups and from an increasing number of psychiatrists to destigmatize homosexuality, Dr. Freedman was elected president of the association,... Its 20,000 members were deeply divided about its policy on homosexuality...." Although some have claimed that this decision was medically based, others note that it was a political decision, see Bayer, Ronald. *Homosexuality and American Psychiatry, The Politics of Diagnosis*. Princeton University Press, 1987.

[47] Zhong, Mikey. "Transgender group considers legal action against ROTC decision." *Columbia Spectator*, April 23, 2011; Leff, Lisa. "Transgender Veterans Seek Recognition." *Boston Globe*, January 30, 2011.

[48] Michaels, Jim. "ROTC Unite with Top Campuses." *USA Today*, August 3, 2011: 3. Brown president backs continued ban on ROTC, *Boston Globe* at Boston.com, October 20, 2011.

Conclusions

With the enactment of P.L. 111-321, the process for repealing Section 654 is proceeding. It is anticipated that the repeal will become official on September 20, 2011. However, Congress, the Department of Defense, and perhaps the courts may be presented with additional issues to consider after repeal takes effect. As a result, the final resolution to these additional issues may extend well beyond the date of repeal.

Author Contact Information

David F. Burrelli
Specialist in Military Manpower Policy
dburrelli@crs.loc.gov, 7-8033