

# Love and War: An Argument for Extending Dependent Benefits to Same-Sex Partners of Military Service Members

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## I. INTRODUCTION

With the repeal of Don't Ask, Don't Tell (DADT),<sup>1</sup> gay<sup>2</sup> men and women may now join the military, serve their country, and in some cases make the ultimate sacrifice. For the partners of gay soldiers, however, the struggle to make ends meet is a day-to-day task. If they choose to follow their loved ones to their new assignments, they must pack up their things and leave the security of a current job; travel to a new home most likely in a different state; and find some way to pay their bills without the financial support that straight military families receive.<sup>3</sup> This article argues that the current policy, which prevents same-sex partners of gay soldiers from receiving military benefits, contravenes the express will of Congress as evidenced in the DADT debates and the statutes conferring benefits. This policy impairs military readiness, unit cohesion, and soldier retention, which are vital characteristics of a well-functioning and successful military.

Part II of this article scrutinizes the DADT policy from enactment to repeal and concludes with an in-depth examination of the intent of the policy's framers.

Part III focuses on the benefits obtained through service by analyzing the history of such benefits—benefits unavailable to dependents of gay soldiers—and examining research conducted by the military itself as to what role benefits play in military objectives.

Part IV examines how the Defense of Marriage Act (DOMA) prevents same-sex partners of soldiers from receiving benefits meant to support the families of service members and ensure retention, unit cohesion, and military readiness.

Finally, Part V briefly examines a possible legislative method of conferring benefits to same-sex partners of gay soldiers that will grant benefits

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<sup>1</sup> Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

<sup>2</sup> Gay as used in this paper refers to gay males, lesbians, and bisexuals.

<sup>3</sup> See SERV. MEMBERS LEGAL DEF. NETWORK, FREEDOM TO SERVE: THE DEFINITIVE GUIDE TO LGBT MILITARY SERVICE (July 27, 2011) [hereinafter SLDN], available at [http://sldn.3cdn.net/5d4dd958a62981cff8\\_v5m6bw1gx.pdf](http://sldn.3cdn.net/5d4dd958a62981cff8_v5m6bw1gx.pdf).

without requiring repeal of DOMA. This is achieved by expanding the definition of “dependent” as that term is used in Title X of the U.S. Code.

## II. DON’T ASK, DON’T TELL

Congress enacted and repealed the policy known as Don’t Ask, Don’t Tell<sup>4</sup> with the intended purpose of promoting key elements of military success. These goals, discussed during enactment and repeal, are now being hindered by Congress’s refusal to extend benefits to the same-sex partners of current service members.

### A. *History Preceding Don’t Ask, Don’t Tell and the History of Its Enactment*

Historically, there was never a time when gay soldiers were openly welcomed into the armed forces of the United States.<sup>5</sup> During the Revolutionary War, the Continental Army drummed out Lieutenant Gotthold Frederick Enslin for homosexuality.<sup>6</sup> After George Washington signed the discharge papers, Lieutenant Enslin had an officer’s sword broken in half over his head and was marched out of camp by all the drummers, never to return.<sup>7</sup> Although this ceremony did not continue to be performed for long, the military did continue to discharge gay soldiers based on their orientation.<sup>8</sup>

The modern ban on gay military service members started with a promise by President Carter to get “tough on gays.”<sup>9</sup> The ban was based on the claim that “[h]omosexuality is incompatible with military service.”<sup>10</sup> In addition, the ban cited concerns about the “effect of gay service on heterosexual service members’ privacy, the military’s recruitment effort, the public image of the military, and possible security breaches (presumably on the theory that enemies of the United States could use a closeted service member’s homosexuality as a basis for blackmail).”<sup>11</sup>

President Clinton attempted to lift the ban imposed by Carter, but many members of his own party and the Joint Chiefs of Staff rejected any pro-

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<sup>4</sup> 10 U.S.C. § 654 (2006), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

<sup>5</sup> *See Key Dates in U.S. Policy on Gay Men and Women in Military Service*, U.S. NAVAL INST., <http://www.usni.org/news-and-features/dont-ask-dont-tell/timeline> (last visited Nov. 10, 2011).

<sup>6</sup> *See* RANDY SHILTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY* 12 (2005).

<sup>7</sup> *Id.*

<sup>8</sup> *See* Zachary A. Kramer, *Heterosexuality and Military Service*, 104 NW. U. L. REV. COLLOQUY 341, 345 (2010).

<sup>9</sup> NATHANIEL FRANK, *UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA* 10 (2009).

<sup>10</sup> DEP’T OF DEF., DIRECTIVE 1332.14(1)(H)(1)(A), ENLISTED ADMINISTRATIVE SEPARATIONS (Jan. 28, 1982).

<sup>11</sup> Kramer, *supra* note 8, at 346.

posed removal of the ban; several of them even promised their resignation should he lift the ban.<sup>12</sup> In response, Congress ordered an investigation into the consequences of repeal, which revealed “prohibition against homosexual conduct is a longstanding element of military law and continues to be necessary in the unique circumstances of military service.”<sup>13</sup> In addition, the investigation found that gays “create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>14</sup>

In response to the findings, Congress enacted Don’t Ask, Don’t Tell, which required gay service members to be discharged from the military for engaging in homosexual acts, stating that they are gay, engaging in gay acts, or marrying or attempting to marry someone of the same sex (even though no state permitted same-sex unions at the time).<sup>15</sup> The policy was focused not on orientation, but on conduct.<sup>16</sup> The stated objectives of the policy were not to remove overt homosexuality because it was immoral, but to remove it in order to protect unit cohesion, military morale and discipline, and to promote recruitment and enhance retention.<sup>17</sup> From the policy’s implementation until its recent repeal, Admiral Mullen estimated that the armed services had lost upwards of 14,000 qualified soldiers through discharge, not counting the countless others who likely did not reenlist because the policy proved to be incompatible with their life goals.<sup>18</sup>

### B. History of Repeal

When President Obama sought legislative repeal of the DADT, Congress ordered a survey of the armed forces to determine whether repeal could be achieved without having a detrimental effect on unit cohesion, retention, recruitment, and military preparedness.<sup>19</sup> The results of the survey were striking. They showed that ninety-two percent of those who worked with soldiers they knew to be gay claimed that the presence of gay soldiers had no negative effect on each unit’s ability to work together.<sup>20</sup> Among those in combat units who claimed to have worked with someone they knew

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<sup>12</sup> See Eugene R. Milhizer, “Don’t Ask, Don’t Tell”: A Qualified Defense, 21 HOFSTRA LAB. & EMP. L.J. 349, 352–53 (2004).

<sup>13</sup> 10 U.S.C. § 654(a)(13) (2006).

<sup>14</sup> *Id.* § 654(a)(15).

<sup>15</sup> *Id.* § 654.

<sup>16</sup> See Milhizer, *supra* note 12, at 358–59.

<sup>17</sup> See *id.* at 361.

<sup>18</sup> *Hearings To Receive Testimony on the Report of the Dep’t of Def. Working Grp. that Conducted a Comprehensive Review of the Issues Associated with a Repeal of Section 654 of Title 10, United States Code, “Policy Concerning Homosexuality in the Armed Forces”*: Hearing Before the S. Armed Servs. Comm., 111th Cong. 20–21, 56 (2010) [hereinafter *Hearings*] (statement of Adm. Michael Mullen, Chairman, Joint Chiefs of Staff).

<sup>19</sup> See Ed O’Keefe, *Live Blog: ‘Don’t Ask, Don’t Tell’ Senate Hearing*, WASH. POST (Feb. 2, 2010, 1:51 PM), [http://voices.washingtonpost.com/federal-eye/2010/02/live\\_blog\\_dont\\_ask\\_dont\\_tell\\_s.html](http://voices.washingtonpost.com/federal-eye/2010/02/live_blog_dont_ask_dont_tell_s.html).

<sup>20</sup> *Hearings*, *supra* note 18, at 3 (statement of Sen. Carl Levin, Member, S. Comm. on Armed Services).

to be gay, eighty-nine percent said their colleague's sexuality had no effect on the unit's ability to work together.<sup>21</sup>

Despite objections by several members of the Senate Armed Services Committee, the chairman of the Joint Chiefs of Staff and the Secretary of Defense concluded that repeal would not hurt unit cohesion, military readiness, morale, or retention.<sup>22</sup> Admiral Michael Mullen noted that the current policy was inconsistent with the stated goals of the military because the military is an institution that values integrity, but it was telling some of its soldiers to lie about who they were during their entire service.<sup>23</sup> In addition, Admiral Mullen stated: “[R]epeal of the law will not prove an unacceptable risk to military readiness. Unit cohesion will not suffer if our units are well led. And families will not encourage their loved ones to leave the service in droves.”<sup>24</sup> The department heads of the military branches were concerned that inclusion would hurt military objectives, but ultimately they agreed that if Congress repealed the law they could implement training that would prevent any negative effects.<sup>25</sup>

Repeal was passed and became effective sixty days after the President, the Chairman of the Joint Chiefs of Staff, and the Secretary of Defense certified that the military's standards of readiness, effectiveness, unit cohesion, and recruiting and retention would not be affected by the repeal.<sup>26</sup> While repeal ensured that gay service members could be recruited and serve openly with the same benefits available to all service members of the military, it did not extend benefits to same-sex partners of enlisted soldiers.<sup>27</sup>

### C. *Congress's Intention in Enacting and Repealing Don't Ask, Don't Tell*

It is important to emphasize that the debate over both enactment and repeal of the DADT was not about whether homosexuality was immoral and thus incompatible with military service, despite many decision makers' beliefs that it was.<sup>28</sup> Congress created and repealed the Act based on the effect inclusion would have on fundamental aspects of military success. The framers of the DADT and those who opposed the repeal were worried about the impact that openly gay service would have on the “high standards of morale,

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<sup>21</sup> *Id.* at 5 (statement of Sen. John McCain, Member, S. Comm. on Armed Services).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 21 (statement of Adm. Michael Mullen, Chairman, Joint Chiefs of Staff).

<sup>24</sup> *Id.* at 9.

<sup>25</sup> See *Hearing To Continue to Receive Testimony on the Report of the Dep't of Def. Working Grp. that Conducted a Comprehensive Review of the Issues Associated with a Repeal of Section 654 of Title 10, United States Code, "Policy Concerning Homosexuality in the Armed Forces"*; *Hearing Before the S. Armed Services Comm.*, 111th Cong. (2010).

<sup>26</sup> See Katherine Shaver, *Same-Sex Military Couples Celebrate End of 'Don't Ask Don't Tell'*, WASH. POST, Sep. 25, 2011, available at [http://www.washingtonpost.com/local/same-sex-military-couples-celebrate-end-of-dont-ask-dont-tell/2011/09/25/gIQA2LxK\\_story.html?wprss=rss\\_local](http://www.washingtonpost.com/local/same-sex-military-couples-celebrate-end-of-dont-ask-dont-tell/2011/09/25/gIQA2LxK_story.html?wprss=rss_local).

<sup>27</sup> See SLDN, *supra* note 3, at 20.

<sup>28</sup> See Milhizer, *supra* note 12, at 357; see generally *Hearings*, *supra* note 18 (not discussing morality).

good order and discipline, and unit cohesion that are the essence of military capability.”<sup>29</sup> As such, the debate over allowing gay people to serve concerned practical issues such as retaining trained soldiers and maintaining strong bonds between soldiers necessary for battlefield success.<sup>30</sup> This was codified in the DADT, which stated that “the military’s ultimate objective is to prepare for and to prevail in combat should the need arise” and that service by openly gay soldiers prevented that objective from being met.<sup>31</sup> These concerns are also the fundamental reason why Congress conferred benefits to spouses of military members,<sup>32</sup> and the withholding of these benefits from same-sex partners prevents these stated objectives from being fulfilled.

### III. IMPACT OF BENEFITS ON THE MILITARY FAMILY AND MILITARY SUCCESS

The history of military benefits is linked to the increased recognition that families play a key role in service members’ relations with the military. Military studies have concluded that conferring benefits to spouses of service members has a direct and indirect result on key elements of military success. The denial of comparable benefits to same-sex partners prevents these objectives from being achieved, and the benefits must be extended to ensure our military’s continuing success.

#### A. *The History Behind Benefits*

Currently, there are more military family members than service members themselves.<sup>33</sup> For the majority of the military’s existence, however, it has been openly opposed to the presence of spouses and family members in everyday military life. In 1847, for example, Congress enacted a law that prohibited married men from enlisting in the army.<sup>34</sup> These laws existed in some form until 1942.<sup>35</sup>

Early American army policy focused on young single men, not on families.<sup>36</sup> The Army did not provide for the soldier’s partner or children and provided little compensation to the soldier himself, which ultimately dis-

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<sup>29</sup> Kramer, *supra* note 8, at 343.

<sup>30</sup> *See id.* at 347–48.

<sup>31</sup> *Id.* (quoting 10 U.S.C. § 654(a)(4), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010)).

<sup>32</sup> *See supra* Part II.

<sup>33</sup> Sondra Albano, *Military Recognition of Family Concerns: Revolutionary War to 1993*, 20 ARMED FORCES & SOC’Y 283, 283 (1994).

<sup>34</sup> *See* Janet A. Kohen, *The Military Career Is a Family Affair*, 5 J. FAM. ISSUES 401, 403 (1984).

<sup>35</sup> *See* Albano, *supra* note 33, at 287.

<sup>36</sup> *See* U.S. ARMY, WHITE PAPER 1983: THE ARMY FAMILY 1 (1983) [hereinafter WHITE PAPER].

couraged marriage.<sup>37</sup> The few benefits that were available to military families were reserved for officers due to the belief that non-officer families created an unwanted burden on service.<sup>38</sup> In addition, any enlisted member or non-commissioned officer who wished to be married had to secure permission from his company commander.<sup>39</sup> By the end of 1953, only thirty-eight percent of all active duty military personnel were married.<sup>40</sup>

The complexity of modern military technology ushered in many of the changes currently seen in military benefits. The military spent large sums of money on extremely technical machines, and the cost of training soldiers to use those machines rose exponentially.<sup>41</sup> In addition, with the abolition of conscription, the military had to rely on recruitment and retention to maintain its numbers.<sup>42</sup> In spite of these efforts, military studies indicated that family dissatisfaction with military support led to an increase in the likelihood that service members would resign.<sup>43</sup> Thus, many military benefits initially arose out of a need to retain technically trained soldiers.<sup>44</sup> By 1960, military family members outnumbered military personnel, and by 1978, married military members accounted for sixty percent of all military personnel.<sup>45</sup> As a result, the army created the Army Community Service organization to centralize and formalize resources for army families.<sup>46</sup> By 1979, after the Air Force Office of Chaplains conducted research that documented a link between family satisfaction and air force objectives, General Lew Allen issued an air force directive that formally recognized the role of the family in mission readiness and directed increased support to families.<sup>47</sup> There was no longer any doubt that military families played a critical role in the essential elements of the modern military, and by 2010, the military budget for military family support programs totaled \$7.6 billion.<sup>48</sup>

### *B. Unavailability of Statutorily Conferred Benefits to the Same-Sex Partners of Service Members*

Despite the repeal of the DADT, many of the benefits given to opposite-sex partners of service members do not flow to the same-sex partners of gay service members. As the law currently stands, of all the benefits available to the spouses of service members, only fourteen benefits are available to

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<sup>37</sup> See Albano, *supra* note 33, at 284.

<sup>38</sup> See WHITE PAPER, *supra* note 36, at 2.

<sup>39</sup> Albano, *supra* note 33, at 284.

<sup>40</sup> Kohen, *supra* note 34, at 403.

<sup>41</sup> *Id.*

<sup>42</sup> See WHITE PAPER, *supra* note 36, at 4.

<sup>43</sup> See Albano, *supra* note 33, at 291–92.

<sup>44</sup> See Kohen, *supra* note 34, at 401, 403.

<sup>45</sup> Albano, *supra* note 33, at 289.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* at 291.

<sup>48</sup> U.S. DEP'T OF DEF., FISCAL YEAR 2012 BUDGET REQUEST \*19 (2012).

same-sex partners.<sup>49</sup> Additionally, it is worth noting these fourteen benefits available to same-sex partners are also available to any recipient named by the service member, whether that recipient is a family member or not.<sup>50</sup>

One of the primary benefits withheld from same-sex partners of gay soldiers is medical and dental insurance, which the military calls TRICARE. The purpose of TRICARE, as stated by the statute authorizing it, is “to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members . . . and for their dependents.”<sup>51</sup> Under Title X of the U.S. Code, a “dependent” refers to a spouse, single widow or widower, a child who meets certain qualifications, a parent or parent-in-law who is dependent on the soldier, a single former spouse who meets certain conditions, or an unmarried person who is placed in the legal custody of the service member.<sup>52</sup> Federal legislation, however, specifically prevents a same-sex partner from being deemed a spouse.<sup>53</sup>

Service members who have dependents are also entitled to a basic allowance for non-military housing at a higher rate than single service members.<sup>54</sup> While a gay soldier who must relocate for assignment is ineligible to receive the extra income to help cover the expense of the apartment or home that he or she shares with his or her same-sex partner, soldiers with heterosexual spouses are entitled to a monthly allowance so long as they meet the requirements for travel assistance.<sup>55</sup>

Because they are not considered part of the soldier’s family, same-sex partners are also unable to access morale, welfare, and recreation programs, which, according to the Department of Defense, “ensure high quality, consistent community support for service members and their families.”<sup>56</sup> These services, such as gyms and libraries, help build informal social networks, which are important to military family adaptation and lead to an increase in retention.<sup>57</sup> Same-sex partners are also deprived of access to the on-base commissary, which sells discounted goods and groceries to service members and their dependents.<sup>58</sup> The purpose of the commissary as set out in the authorizing statute is to “enhance the quality of life of members of the uni-

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<sup>49</sup> *Department Reminds Troops of Member-Designated Benefits*, U.S. DEP’T OF DEF. (Oct. 28, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=65857>.

<sup>50</sup> See SLDN, *supra* note 3, at 25.

<sup>51</sup> 10 U.S.C. § 1071 (2006).

<sup>52</sup> *Id.* § 1072.

<sup>53</sup> See 1 U.S.C. § 7 (2006).

<sup>54</sup> See *2012 Basic Allowance for Housing Rates*, MILITARY.COM, <http://www.military.com/benefits/content/military-pay/basic-allowance-for-housing/basic-allowance-for-housing-rates.html> (last visited Apr. 4, 2012).

<sup>55</sup> See 37 U.S.C. § 427 (2006).

<sup>56</sup> *Military Homefront: Background*, U.S. DEP’T OF DEF., <http://www.militaryhomefront.dod.mil/mwr> (last visited Apr. 4, 2012).

<sup>57</sup> See DENNIS K. ORTHNER & GARY L. BOWEN, U.S. ARMY RESEARCH INST. FOR THE BEHAVIORAL & SOC. SCIS., RESEARCH REPORT 1559: FAMILY ADAPTATION IN THE MILITARY 6–7 (1990) [hereinafter *ARMY REPORT*], available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA225085>.

<sup>58</sup> See 10 U.S.C. § 2481 (2006).

formed services . . . and dependents of such members, and to support military readiness, recruitment and retention.”<sup>59</sup>

In the event of the soldier’s death, the same-sex partner is not permitted to receive the remains of the soldier because the applicable statute only allows a blood relative, adoptive relative, a spouse, or an individual acting *in loco parentis* to receive the remains.<sup>60</sup> While the opposite-sex spouse of a soldier who dies in combat is entitled to travel assistance to attend the funeral, the same-sex partner is not entitled to the same assistance.<sup>61</sup> In addition, if a soldier is incapacitated at a military hospital that does not accept Medicare, the same-sex partner has no right to see his or her partner without the consent of the incapacitated soldier.<sup>62</sup>

These benefits are unavailable to the same-sex partners of soldiers for no other reason than their sexual orientation. Without extending these benefits to all spouses of soldiers, regardless of sexual orientation, this country risks creating substantial conflict between the military and gay soldiers’ families. And, as research shows, this likely military-family conflict poses a real risk of undermining unit cohesion, military readiness, recruitment, and retention.

### C. *Empirical Evidence Supporting the Efficacy of Benefits for Dependents of Military Personnel*

Empirical data gathered by the United States Army have shown a strong link between the adaptation of military families to military life and key aspects of mission effectiveness. In order to study the role that military families play in mission effectiveness, the United States Army Research Institute for the Behavioral and Social Sciences conducted a five-year integrated research program beginning in 1986 (“Army Report”).<sup>63</sup> Its main goals included identifying positive motivators and negative detractors to retention, increasing operational readiness, and developing new programs to improve adaptation of families into the Army way of life.<sup>64</sup>

At the time the program concluded, prior to the implementation of many of the benefits available today, almost one in five spouses of specialists fourth class and corporals said that they had serious problems adapting to Army life, while only one in four said there was no problem at all.<sup>65</sup> The Army Report noted that when asked whether the Army lifestyle posed serious problems to achieving personal goals, one in five of both enlisted and officer spouses agreed that it did.<sup>66</sup> Based on these data, Army researchers concluded that families were able to meet the role demands placed on them

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<sup>59</sup> *Id.*

<sup>60</sup> See 10 U.S.C. 1482(c) (2006).

<sup>61</sup> See *id.*

<sup>62</sup> See 42 C.F.R. § 482.13 (2004).

<sup>63</sup> ARMY REPORT, *supra* note 57, at v.

<sup>64</sup> See *id.*

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Id.*



by the military, but were less able to change their family needs in response to Army expectations.<sup>67</sup> In other words, families were adapting to military demands, but they did not necessarily agree that doing so was best for themselves and their families. As a result, rather than viewing the military as an ally, many military families saw the military as an adversary competing for their spouses' limited time.

Looking at factors that determined adaptation, the Army Report concluded that social isolation was one of the most relevant factors that predicted poor family adaptation. The Report examined military wives in overseas military communities, and found that wives who measured low on a measure of psychological sense of community were five times more likely to return to the United States compared to wives who felt a greater sense of community.<sup>68</sup> The Army Report also determined that families who participated earlier in informal networks adapted more quickly to the military environment and reported higher levels of satisfaction with the military.<sup>69</sup> Thus, it recommended that the Army increase its support for informal networks by incorporating the families of unit members in unit activities and extending tour lengths to promote stability and solidify informal social networks.<sup>70</sup>

Ultimately, the Army Report concluded that there is a clear and consistent relationship between family adaptation measures, such as family targeted benefits, and commitments to a military career.<sup>71</sup> Indeed, when the Army introduced new family support services, both service members and their spouses reported an increase in their satisfaction with military life and their perception of unity of purpose between family and military objectives.<sup>72</sup> In addition, it found that when satisfaction with the military increased so did spousal support; the reverse was also true: when spousal support increased, the service member was more likely to make a career out of his military service.<sup>73</sup> Of those spouses who said they were satisfied with the Army's way of life, eighty percent said they wanted their partner to serve until retirement.<sup>74</sup> In contrast, of those spouses who did not feel satisfied with the Army way of life, only one third wanted their partner to remain in the military until retirement.<sup>75</sup> The Report also indicated that family support had implications beyond retention. The investigators who interviewed the service members and their families suggested that families support readiness by providing emotional support, compensating for job stresses, and motivating work performances.<sup>76</sup> Families who did not adapt well were found to put additional "pressure on the soldier and the unit which hampered individual

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<sup>67</sup> *See id.* at 4–5.

<sup>68</sup> *Id.* at 6.

<sup>69</sup> *See id.* at 6–7.

<sup>70</sup> *See id.* at 12.

<sup>71</sup> *See id.* at 7.

<sup>72</sup> *See id.*

<sup>73</sup> *See id.* at 9.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at 9–10.

and unit performance and readiness.”<sup>77</sup> Finally, the Report concluded that “military services need to seriously consider policy directions that better support military family adaptation.”<sup>78</sup>

Based on the conclusions of the report, it is evident that military support, including benefits, is instrumental in ensuring that the military meets its objectives. It is also clear that gay soldiers depend on their partners to provide emotional support, compensate for job stresses, and motivate work performance just as much as their heterosexual counterparts. Not granting benefits to the same-sex partners of gay soldiers not only deprives gay soldiers of the many benefits that come from being part of military families with low levels of military-family conflict, but it also deprives the military of the ability to ensure strong levels of unit cohesion, readiness, recruitment, and retention. However, this blame should not rest on the military alone. Even should the military wish to offer benefits to the same-sex partners of its service members, its hands are effectively tied by DOMA.<sup>79</sup>

#### IV. THE DEFENSE OF MARRIAGE ACT

DOMA must be addressed because it currently stands as an obstacle to any extension of benefits to committed partners of gay soldiers. The end of the DADT might have rectified many important inequalities facing gay soldiers and their families; however, repeal did not extend many of the resources available to the partners of heterosexual soldiers to their gay counterparts. Although certain benefits available to partners of soldiers could easily be extended by a simple change in policy by the respective branches of the armed forces, congressional action would still bar same-sex partners of gay soldiers from receiving a multitude of dependent benefits.

In 1993, the Hawaii Supreme Court issued a decision stating that same-sex couples might be entitled to marry under the state’s constitution.<sup>80</sup> In response, Congress passed DOMA in 1996.<sup>81</sup> The Act established that “[i]n determining the meaning of any Act of Congress or . . . regulation . . . the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite-sex who is a husband or a wife.”<sup>82</sup> In addition, the law ensured that no state was required to give effect to any marriage of a same-sex couple by another state.<sup>83</sup> As of 2004, over 1,138 federal laws tied benefits, protections, rights, or responsibilities to marital status.<sup>84</sup>

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<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.*

<sup>79</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>80</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>81</sup> *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010).

<sup>82</sup> 1 U.S.C. § 7 (2006).

<sup>83</sup> *See* 28 U.S.C. § 1738C (2006).

<sup>84</sup> *See, e.g., Gill*, 699 F. Supp. 2d at 379; *Commonwealth v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 236 (D. Mass. 2010).

Without some modification to DOMA, the partners of gay soldiers will continue to be deprived of many benefits designed to ensure the sustainability of military families. Pending bills in both the House and Senate attempt to “repeal the Defense of Marriage Act and ensure respect for State regulation of Marriage.”<sup>85</sup> However, it is unlikely that either of these bills will be voted on or pass with the current makeup of Congress.

Several federal district courts have weighed in on the topic and struck the Act down as unconstitutional.<sup>86</sup> After these successful suits in federal district courts, the United States Attorney General Eric Holder consulted with the President about problems that could arise if the administration were to defend the law in the Second Circuit. The Attorney General noted that the Second Circuit currently has no established standard on how sexual orientation suits should be treated;<sup>87</sup> thus, there is no clear evidence of what standard of review these suits would receive. Based on the Attorney General’s advice, President Obama concluded that due to the long documented history of discrimination against gay persons, it is likely that the Second Circuit would utilize a higher standard of review.<sup>88</sup> The President also concluded, and the Attorney General agreed, that DOMA would fail to meet the heightened standard and be deemed unconstitutional.<sup>89</sup> Consequently, the President ordered the Department of Justice (DOJ) to stop defending DOMA.<sup>90</sup> Today, only the House of Representatives, and not the DOJ, is defending DOMA in all suits involving the Act’s constitutionality.<sup>91</sup>

Nevertheless, DOMA currently remains an insurmountable obstacle to same-sex partners of gay soldiers. While the law stands, same-sex partners are unable to receive the same benefits that their heterosexual counterparts are entitled to receive. While a discussion on the constitutionality of DOMA is beyond the scope of this article, if Congress continues to support DOMA, it should seriously consider alternative strategies to ensure the military’s future success by providing for same-sex partners of gay soldiers.

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<sup>85</sup> S. 598, 112th Cong. (2011); H.R. 1116, 112th Cong. (2011).

<sup>86</sup> See *In re Ballas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011); *Gill*, 699 F. Supp. 2d at 374; *Commonwealth v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d at 235.

<sup>87</sup> See Press Release, U.S. Dep’t of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.* In addition, the DOJ has also refused to defend DOMA in regard to suits by service members demanding benefits for same-sex spouses. See Zeke Stokes, *Breaking: Department of Justice Will Not Defend DOMA in Military Context*, SLDN (Feb. 17, 2012), <http://www.sldn.org/news/archives/breaking-department-of-justice-will-not-defend-doma-in-military-context>.

<sup>91</sup> See Jill Jackson, *House GOP Moves to Defend DOMA*, CBS NEWS (Mar. 4, 2011), [http://www.cbsnews.com/8301-503544\\_162-20039457-503544.html](http://www.cbsnews.com/8301-503544_162-20039457-503544.html).

V. POSSIBLE LEGISLATIVE CIRCUMVENTION OF THE DEFENSE OF  
MARRIAGE ACT

Under the current legal regime, most benefits extended to the dependent of a service member are unavailable to the same-sex partner of a gay soldier. This is because the definition of “dependent” is limited to a “spouse” (and other persons, inapplicable in this situation), which DOMA expressly describes as being a husband and a wife in federal legislation and regulations. Nonetheless, there is a possible solution that would extend benefits to same-sex partners while leaving DOMA unaffected until either Congress repeals the Act or a court deems it unconstitutional.

The definition of “dependent,” as used in Title X benefits, could be expanded to include a person legally committed to a service member through a state-recognized marriage or civil union. If this definition were adopted, DOMA would not be triggered. The same-sex partner would be classified as a dependent, not because he or she would be the “spouse” of the soldier, but because he or she would be “a person legally committed to a service member by a state-recognized marriage or civil union.”

This is by no means a perfect solution; however, it allows the more conservative members of Congress to defend their definition of “spouse” and “marriage” and their commitment to DOMA, while at the same time continuing their support of the military by ensuring military readiness, unit cohesion, recruitment, and retention.

While some soldiers whose home states prohibit same-sex marriage or civil unions will be unable to receive the benefits under the changed definition of “dependent,” these soldiers and their partners could travel to one of the six states that recognize gay marriage or the District of Columbia<sup>92</sup> and marry there so that their partners could be classified as dependents.

Alternatively, they could travel to one of the five states that issue civil union licenses,<sup>93</sup> as those states impose no residency requirements.<sup>94</sup> As long as DOMA is in effect, inequality will persist; however, under this Article’s solution, the degree of inequality can be lessened and controlled. Partners of same-sex soldiers who would never have been able to receive many of the benefits available under the current definition of “dependent” would be-

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<sup>92</sup> The states that recognize gay marriage are Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and New York. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT’L CONFERENCE OF STATE LEGISLATORS, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated Feb. 24, 2012).

<sup>93</sup> The five states are Delaware, Hawaii, Illinois, New Jersey, and Rhode Island. *Id.*

<sup>94</sup> None of the states that allow for same-sex marriage have residency requirements. *See Marriage License Requirements*, USMARRIAGELAWS.COM, [http://usmarriagelaws.com/search/united\\_states/index.shtml](http://usmarriagelaws.com/search/united_states/index.shtml) (last visited Apr. 4, 2012). States that issue civil union licenses also do not have residency requirements. *See* DEL. CODE ANN. TIT. 13, § 202 (2011); HAW. REV. STAT. §572B-5 (2011); 750 ILL. COMP. STAT. 75/30 (2011); N.J. STAT. § 37: 1-30 (2011); R.I. GEN. LAWS § 15-3.1-3 (2011).

come eligible for benefits, making it the best transitory solution to the current situation.

Although the President has worked hard to extend benefits to federal employees through Executive Memorandums to the Office of Personnel Management,<sup>95</sup> this procedure has not worked in extending benefits not contained in the Code of Federal Regulations.<sup>96</sup> This is because it will take an act of Congress to extend benefits to same-sex partners of service members, either through formal repeal of DOMA or through altering the definition of “dependent.”

Another possible solution is to amend and pass the Domestic Partnership Benefits and Obligations Act of 2009 (DPBOA), as advocated by Maureen Brocco.<sup>97</sup> This would create a federal domestic partner enrollment system that same-sex partners could register for and then receive their partners’ federal benefits.<sup>98</sup> The downside of this solution is that it would apply to all federal employees and not just service members’ same-sex partners. Conservative members of Congress may be less likely to vote in favor of it than if the bill were directed only at service members due to the high costs of covering all federal employees’ partners, as well as the fact that the legislation would then lack a specifically pro-military focus.

The last possible solution would be litigation. Currently, a Massachusetts district court is hearing a case challenging the constitutionality of denying benefits to same-sex partners of service members.<sup>99</sup> The petitioners argue that denial of such benefits violates the Equal Protection Clause because it treats similarly situated couples differently.<sup>100</sup> The Supreme Court has only afforded rational basis scrutiny to equal protection claims brought by gays, and as such the petitioners will need to show that the government has no legitimate governmental interest in denying benefits to same-sex partners of service members.<sup>101</sup> The government cannot simply say that it is easier for them to administer the benefits only to heterosexual couples, because drawing lines “solely for the purpose of achieving administrative convenience . . . involves the ‘very kind of arbitrary legislative choice forbidden

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<sup>95</sup> President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, Extension of Benefits to Same-Sex Domestic Partners of Federal Employees (June 2, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>.

<sup>96</sup> See, e.g., *Is My Same-Sex Partner Eligible for Coverage Under My FEHB Enrollment?*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/faqs/QA.aspx?fid=fd635746-de0a-4dd7-997d-b5706a0fd8d2&pid=b1130333-83b9-40d7-a942-77e9dc7fc347> (last visited Apr. 4, 2012).

<sup>97</sup> See Maureen Brocco, Note, *Familiar Stories: An International Suggestion for LGB Family Military Benefits After the Repeal of “Don’t Ask, Don’t Tell”*, 67 NAT’L LAW. GUILD REV. 156 (2010).

<sup>98</sup> See *id.* at 166–67.

<sup>99</sup> See *McLaughlin v. Panetta*, No. 1:11-CV-11905 (D. Mass. 2011).

<sup>100</sup> See Complaint at 22, *McLaughlin v. Panetta*, No. 1:11-CV-11905 (D. Mass. 2011).

<sup>101</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis standard of review).

by the [Constitution].’”<sup>102</sup> Experts, such as Erwin Chemerinsky, believe that there is no such legitimate interest and that the Court will ultimately find for plaintiffs in these kinds of cases.<sup>103</sup> The downside to this solution, though, is the time and uncertainty involved. These cases could take years to get to the Supreme Court, and even if they do, whether the Court will extend benefits is uncertain due to the bench’s current makeup. The military’s continuing success should not be left to a game of chance.

Ultimately, changing the definition of a “dependent” seems to be the best possible solution to the current problem. This solution will undoubtedly raise the cost of providing benefits, although there are currently no data to suggest how many gay soldiers there are and how many of them have partners. However, this nation has a strong history of ensuring that the military has what it needs to be successful. If the military is hindered by lack of coverage for same-sex partners of service members then Congress should provide the funding necessary to ensure the military’s continuing success.

## VI. A PRESSING NEED

The freedom of this nation depends on the continuing success of the military. Both Congress and the military itself have recognized that the military’s accomplishments depend in part on the level of support provided to the partners of soldiers. So long as this nation continues to deny military benefits to partners of service members for no reason other than their sexual orientation, the very purpose of the benefits will continue to be lost. As such, Congress should amend the current definition of “dependent” to ensure that American soldiers have all they need to succeed and contribute to the strongest military force on Earth.

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<sup>102</sup> *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (quoting *Reed v. Reed*, 404 U.S. 71,77 (1971)).

<sup>103</sup> Erwin Chemerinsky, *Proposition 8 and DOMA*, SCOTUSBLOG.COM (Nov. 2, 2011, 11:37 AM), <http://www.scotusblog.com/community/proposition-8-and-doma/>.