Civilian Research Project
USAWC Fellow

Potential Impact of Repeal of the Defense of Marriage Act

by

Colonel Francis P. King
U.S. Army Judge Advocate General's Corps

United States Army War College
Class of 2013

REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188

1. REPORT DATE *(DD-MM-YYYY)*	**2. REPORT TYPE**	**3. DATES COVERED** *(From - To)*
xx-04-2013	CIVILIAN RESEARCH PROJECT	

4. TITLE AND SUBTITLE
Potential Impact of Repeal of the Defense of Marriage Act

5a. CONTRACT NUMBER

5b. GRANT NUMBER

5c. PROGRAM ELEMENT NUMBER

6. AUTHOR(S)
Colonel Francis P. King
U.S. Army Judge Advocate General's Corps

5d. PROJECT NUMBER

5e. TASK NUMBER

5f. WORK UNIT NUMBER

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)
Mr. Stuart Delery
Principal Assistant Attorney General, U.S. Department of Justice

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)
Mr. Douglas Lovelace

U.S. Army War College, 122 Forbes Avenue, Carlisle, PA 17013

10. SPONSOR/MONITOR'S ACRONYM(S)

11. SPONSOR/MONITOR'S REPORT NUMBER(S)

12. DISTRIBUTION / AVAILABILITY STATEMENT
Distribution A: Approved for Public Release. Distribution is Unlimited.

13. SUPPLEMENTARY NOTES
Word Count: 9,470

14. ABSTRACT

In the wake of the repeal of Don't Ask, Don't Tell, personnel policy decision makers have relied upon the Defense of Marriage Act (DOMA), a federal law defining marriage as the union of one man and one woman, to address personnel decisions relating to now openly serving gay and lesbian Soldiers. With recent attacks on the constitutionality of DOMA, decisions by several federal courts holding DOMA unconstitutional, two pending cases before the U.S. Supreme Court challenging the constitutionality of DOMA, there is a rising debate among personnel policy decision-makers regarding the consequences of a Supreme Court ruling finding DOMA unconstitutional. This paper seeks to address the potential consequences on the Army's personnel policy that a repeal of DOMA, whether by Supreme Court ruling or Congressional action, would have in the Department of the Army.

15. SUBJECT TERMS
Same-sex partners, homosexual, constitutionality, benefits, Don't Ask Don't Tell, gay, lesbian, Soldier

16. SECURITY CLASSIFICATION OF:			**17. LIMITATION OF ABSTRACT**	**18. NUMBER OF PAGES**	**19a. NAME OF RESPONSIBLE PERSON**
a. REPORT	**b. ABSTRACT**	**c. THIS PAGE**			**19b. TELEPHONE NUMBER** *(Include area code)*
UU	UU	UU	UU	52	

USAWC CIVILIAN RESEARCH PROJECT

Potential Impact of Repeal of the Defense of Marriage Act

by

Colonel Francis P. King
U.S. Army Judge Advocate General's Corps

Mr. Stuart Delery
Principal Assistant Attorney General, U.S. Department of Justice
Project Adviser

Mr. Douglas Lovelace
U.S. Army War College Faculty Mentor

This manuscript is submitted in partial fulfillment of the requirements of the U.S. Army War College Fellowship. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

Abstract

Title:	Potential Impact of Repeal of the Defense of Marriage Act
Report Date:	April 2013
Page Count:	52
Word Count:	9,470
Key Terms:	Same-sex partners, homosexual, constitutionality, benefits, Don't Ask Don't Tell, gay, lesbian, Soldier
Classification:	Unclassified

In the wake of the repeal of Don't Ask, Don't Tell, personnel policy decision makers have relied upon the Defense of Marriage Act (DOMA), a federal law defining marriage as the union of one man and one woman, to address personnel decisions relating to now openly serving gay and lesbian Soldiers. With recent attacks on the constitutionality of DOMA, decisions by several federal courts holding DOMA unconstitutional, two pending cases before the U.S. Supreme Court challenging the constitutionality of DOMA, there is a rising debate among personnel policy decision-makers regarding the consequences of a Supreme Court ruling finding DOMA unconstitutional. This paper seeks to address the potential consequences on the Army's personnel policy that a repeal of DOMA, whether by Supreme Court ruling or Congressional action, would have in the Department of the Army.

Potential Impact of Repeal of the Defense of Marriage Act

I. Introduction

In the wake of the repeal of Don't Ask Don't Tell (DADT)[1], personnel policy decision makers in the Department of Defense and the Military Services have relied upon the Defense of Marriage Act (DOMA)[2], a federal law defining marriage as the union of one man and one woman, to address personnel decisions relating to now openly serving gay and lesbian service members. Recent attacks, however, on the constitutionality of DOMA, including several federal appeals court decisions holding DOMA unconstitutional have raised uncertainty regarding how to address issues related to same-sex spouses and partners of Service Members. Additionally, the U.S. Supreme Court has granted certiorari in two such cases, further heightening the concern regarding the consequences of a repeal of DOMA on Army personnel policy. No doubt a repeal of DOMA, whether legislated by Congress or based on a Supreme Court decision, will change personnel policy in the Army and, particularly in the application of benefits to same-sex partners.

Notwithstanding the fact that the Department of Defense has intensively studied the impact of the repeal of DADT on personnel policy across the services, that analysis has not specifically addressed the consequences of a repeal of DOMA.[3] Some would say that a repeal of DOMA simply eliminates a statutory hurdle to extending spousal benefits to a class of people who should otherwise be entitled to receive the benefits, but for their, and their Spouse's, sexual orientation. DOMA, however, brings to the fore significant constitutional issues regarding states' rights, the power of the federal government, and equal protection of the laws under the Constitution.

This paper will first briefly look at the history of the Defense of Marriage Act and the purposes for which Congress passed the legislation. Next, the paper will review the several pending federal cases attacking the constitutionality of DOMA. While this will not be an exhaustive legal review and analysis of the issues in each case, it will give a general understanding of the issues and the current posture of the litigation issues, including those of the cases now pending before the Supreme Court. Next, the paper will review the application of DOMA to the Department of the Army, particularly in relation to the extension of benefits to the same-sex spouses of now openly-serving homosexual Soldiers. Notwithstanding the extensive work that the Department of Defense has already done to "extend" certain benefits to same sex spouses of Service Members, there remain a number of benefits that are defined by statute and thus cannot be extended to same-sex spouses because of the limitations imposed by DOMA. Finally, this article will discuss the potential impact that a repeal of DOMA, or a ruling by the Supreme Court that DOMA is unconstitutional, could have on the Army.

II. Defense Of Marriage Act

Congress passed the Defense of Marriage Act on July 12, 1996[4]. The Defense of Marriage Act has three parts. Section 1 defines the title of the Act.[5] Section 2 of DOMA grants states the right to refuse recognition of same-sex marriages performed in other states under the Full Faith and Credit Act[6]. Section 3, in turn, establishes a federal definition of "marriage" and "spouse." Specifically, DOMA defines "marriage" as a union of one man and one woman, and the statute further defines "spouse" as someone of the opposite sex.[7]

In part, it was Congress' attempt to respond to the concerns raised by the Hawaii Supreme Court's decision in the case, *Baehr v. Lewin*[8]. In *Baehr*, the Hawaii Supreme Court determined that Hawaii's ban against same-sex marriage was a form of sex discrimination and, thus, was unconstitutional[9]. As a result, Congress grew concerned that if same-sex marriages were recognized in Hawaii, then many gays and lesbians would flock to Hawaii, get married, and return to their home states having been lawfully married.[10] Congress viewed the *Baehr v. Lewin* decision as part of an "orchestrated legal assault" on the institution of traditional heterosexual marriage waged by activists in the lesbian, gay, bisexual, and transgender (LGBT) community.[11] Congress believed that couples who traveled to Hawaii to get married would be imposing their lawful Hawaiian marriages on their home state thereby stripping their home state of the authority to determine for itself whether to permit same-sex marriages.[12] In short, Congress was concerned that Hawaii's decision to recognize same-sex marriages would be unilaterally imposed on all other states, including those opposed to same-sex marriages.[13]

On July 9, 1996, the House Judiciary Committee issued its report outlining the reasons why Congress should pass DOMA.[14] The report articulated two purposes of the Act: "defending and nurturing the institution of traditional heterosexual marriage;" and, "protecting the right of the States to formulate their own public policy regarding the legal recognition of marriage."[15] As of July 1, 1996, 14 states had enacted laws designed to protect their marriages laws.[16] In taking similar measures, the Committee believed that DOMA was merely codifying that which was already obvious; in prior

legislation, Congress never contemplated that "marriage" and "spouse" would ever include same-sex partners.[17]

The proponents of DOMA in Congress went on to explain that there were four governmental interests advanced by DOMA: 1) "defending and nurturing the institution of traditional heterosexual marriage;" 2) "defending traditional notions of morality;" 3) "protecting state sovereignty and democratic self governance;" and 4) "preserving scarce government resources."[18] Additionally, the report stated that "heterosexuality better comports with traditional (especially Judeo-Christian) morality."[19] Notwithstanding the reasons articulated by the Proponents of DOMA,[20] however, no data, research, or evidence to support the reasoning upon which they relied to define the specific governmental interests was ever presented during the Committee hearings.[21]

Following implementation of DOMA, the Government defended the statute's constitutionality by arguing that a rational basis review was the appropriate judicial standard of review to be applied to a statute creating a classification based on sexual orientation. In each case, however, the positions argued by the Government in defense of DOMA were consistent with case precedent in the respective jurisdictions in which those lawsuits were filed. As such, in each of those cases, all the Government needed to show was that the statute was rationally related to attaining some governmental objective.

In February, 2011, however, President Barack Obama changed the administration's policy regarding DOMA and determined that DOMA, as applied to same-sex couples lawfully married in a state authorizing such marriages, violated the equal protection clause of the 5th Amendment of the Constitution.[22] Thus, the President

directed the Department of Justice to take no action to defend the statute. The President's decision not to defend the statute is consistent with his position regarding DOMA articulated during his Presidential Campaign, and the commitment then that he would seek to repeal DOMA if elected.[23]

On February 3, 2011, Attorney General Eric Holder sent a letter to the Honorable John Boehner, Speaker of the House of Representatives, to advise Congress of the President's determination regarding DOMA and how the Department of Justice would proceed in two pending lawsuits attacking the constitutionality of DOMA.[24] The two lawsuits addressed in the letter were: *Windsor v. United States*,[25] and *Pederson v. Office of Personnel Management*.[26] The Attorney General articulated that in prior cases, the Department of Justice was able to make reasonable arguments that DOMA was constitutional because of applicable case law in the jurisdiction in which those cases had been brought. Unlike the previous cases, however, both *Windsor* and *Pederson* had been filed in a jurisdiction that had not yet decided the applicable standard of review in cases based on sexual orientation. Indeed, these cases had been filed in the only Federal Circuit that had never decided the appropriate legal standard to be used to review the constitutionality of a classification based on sexual orientation.[27] As a result, in both *Windsor* and *Pederson*, the Department of Justice would be required to take an affirmative position regarding the level of scrutiny to be applied by the courts before which both cases were pending instead of simply arguing the applicability of a legal standard that had previously been determined by the Court.

Additionally, Attorney General Holder reasoned that any Court analyzing the constitutionality of DOMA would likely follow the Supreme Court's guidance in previous

cases even though the Supreme Court had not yet decided the level of scrutiny to be applied to a classification based on sexual orientation. Specifically, the Attorney General discussed four criteria a Court would likely consider to determine if heightened scrutiny should be applied in a case involving a class that had not already been determined by the Court as a suspect class.[28] First, a Court will consider "whether the group in question has suffered a history of discrimination."[29] Next, it will ask "whether individuals 'exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group'."[30] Next, a Court will ask "whether the group is a minority or is politically powerless."[31] Finally, a Court will ask "whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's 'ability to perform or contribute to society'."[32]

In reviewing each of these factors, the Attorney General concluded that each one "counsels in favor of being suspicious of classifications based on sexual orientation."[33] The Attorney General then articulated his views regarding each of the four indicators, discussing that gay and lesbian people have suffered "a significant history of purposeful discrimination," and that gays and lesbians "have limited political power" as evident in the ban on gays in the military[34] and the absence of protection from employment discrimination. The Attorney General also discussed that scientists who had been studying homosexuality had developed a consensus in their respective studies that sexual orientation is an immutable characteristic.[35] The Attorney General finally reasoned that sexual orientation had nothing to do with a person's ability to perform or contribute to society.[36] As a result, the Attorney General concluded that "[t]his is the rare case where the proper course is to forego the defense of this statute."[37] Attorney

General Holder, therefore, advised Congress that the Department of Justice would inform Courts in the future that a heightened scrutiny standard of review should be applied in DOMA litigation and that the Department of Justice would cease to defend Section 3 of DOMA.

Because the Department of Justice announced that it would no longer defend the constitutionality of DOMA, the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives, began defending the statute independently on behalf of Congress.[38] Both BLAG and the Department of Justice have participated in pending litigation to preserve any Court's ability to hear the cases and to ensure that the constitutionality of the statute is fully defended on behalf of Congress.

III. Constitutionality of the Defense of Marriage Act

The constitutionality of a statute is presumed when the statute is properly passed by Congress.[39] When a statute, however, draws a line between classifications of people in the applicability of the statute, the constitutionality is called into question.[40] In determining the constitutionality of a statute, Courts will look to the purpose of the statute, the classification determined by the statute and whether the classification determined by the statute is related to the purpose for which the statute was passed.[41] This, in turn, will determine the level of scrutiny to be applied to the statute. For example, if the classification is based on a traditionally suspect classification (like race) then the Court will analyze whether such classification is narrowly drawn to attain the purpose of the statute.[42] If there is a less restrictive manner to attain the purpose of the statute, then the law is unconstitutional. If, on the other hand, the statute is drawn sufficiently narrow to the purpose of the statute, then it will be constitutional. Similarly,

when the statute has an uneven impact on a class of citizen, then the courts will analyze whether the statute is rationally related to attaining the objectives of the statute.[43] In other words, the statute has to fulfill some (any) legitimate governmental purpose.[44] If it does, then the statute will be constitutional notwithstanding that the statute has some impact on a class of people.[45]

Like other statutes having an impact on some discernible group of people, there are numerous arguments both for and against the constitutionality of DOMA.

A. Arguments For the Constitutionality of DOMA

The arguments favoring the constitutionality of DOMA focus on the purposes articulated by Congress during the legislative committee hearings before passing DOMA. The legislative history outlines four basic reasons why Congress passed the statute: defending and nurturing the institution of traditional heterosexual marriage; defending traditional notions of morality; protecting state sovereignty and democratic self governance; and, preserving scarce government resources.[46]

The principle argument in favor of the constitutionality of DOMA focuses on the standard of review that Courts should apply in analyzing the statute. Proponents of the constitutionality of DOMA argue that the rational basis standard should apply because sexual orientation is not a suspect classification requiring a higher level of review. In applying the rational basis standard of review, the Courts should find that DOMA fulfills some governmental objective; namely those articulated by Congress when the law was passed.[47] The basic argument goes something like this. The Supreme Court has determined that sexual orientation is not a suspect classification.[48] Thus, the rational basis standard of review applies. When one reviews the statute using the rational basis

standard, it is easy to conclude that the statute serves some governmental purpose. The institution of traditional heterosexual marriage is preserved, responsible procreation is enhanced, states' rights not to recognize homosexual marriages from other states is enhanced, and the traditional moral values of Americans are preserved.

Another argument favoring the constitutionality of DOMA is that it really does not impact anyone's right to marry because same-sex partners who wish to get married may do so by going to a state that allows same-sex couples to marry. DOMA does not impact traditional states' rights to determine for themselves who can and cannot be married within their state. It simply defines marriage for federal purposes only. The proponents in Congress argued that this was a significant distinction because of the federal government's fiscal interests in managing eligibility for federal benefits based on marriage.

If the analysis were that straight forward, however, then the current lawsuits attacking the constitutionality of DOMA would have been settled long ago.

B. Arguments Against the Constitutionality of DOMA

Equally compelling are the arguments that DOMA is unconstitutional. The arguments against the constitutionality of DOMA are centered on the premise that sexual orientation has evolved into a suspect classification triggering heightened scrutiny review, notwithstanding prior Supreme Court precedent holding otherwise.[49] In other words, because classification based on sexual orientation is suspect, then the statute must be narrowly drawn to attain its objectives.

Opponents of DOMA argue that our society has changed significantly in recent years since the time the Supreme Court issued its previous ruling regarding sexual

orientation as a non-suspect classification. As a result of these societal changes, homosexuality has become more accepted in society. Recent studies have shown that homosexuality is an immutable characteristic and that one's sexual orientation has little to do with one's ability to perform or contribute to society, or raise children in a loving and wholesome environment. In fact, same-sex couples have been allowed to adopt children for many years. Additionally, studies have also shown that homosexuals are not predatory sexual offenders. Finally, laws criminalizing private homosexual sexual activity have been found unconstitutional.[50] Social acceptability aside, however, homosexuals continue to be treated poorly because of their sexual orientation. Even though the LGBT community has made significant political strides to change laws addressing sexual orientation, they remain a politically disfavored group. Thus, the only thing barring equal status for homosexuals is discriminatory animus, evident is statutes like DOMA.

Opponents of DOMA further argue that the statute is not narrowly tailored because it is rooted in discriminatory animus against homosexuals and thus, is unconstitutional since its inception. They argue that the discriminatory animus is evident in the House Report summarizing the comments of those in Congress who argued for its passage. Significantly, they point to specific comments made in the report that highlight proponents' apparent moral aversion to homosexuality and those who practice it. Specifically, they point to comments like: "[c]ivil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality," and "[t]his judgment entails both moral disapproval of homosexuality, and a

moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[51]

Additionally, opponents argue that the reasons for passing DOMA, as articulated during the Congressional hearings, are fallacious and unsupported by research and fact. For example, there is no evidence that DOMA preserves the traditional institution of heterosexual marriage. DOMA does not incentivize heterosexuals to marry and, therefore, does not make it any more likely that a heterosexual couple will get married. Further, the argument that DOMA promotes responsible child rearing is also unsupported. In fact, opponents of DOMA offer numerous instances where same-sex partners are raising children along with studies that demonstrate children are thriving in homes with same sex parents.[52] Because none of the reasons articulated by Congress to justify DOMA can be sustained, the law can only be based on animus and moral aversion to homosexuality.

C. Overview of Pending Litigation

This section provides summaries of pending litigation attacking the constitutionality of DOMA. While the cases summarized in this section are not intended to provide the reader with an exhaustive list of cases that have addressed the issue, it is intended to highlight the most significant cases.

1. ***Windsor v. United States***

Edith Schlain Windsor and Thea Spyer met in 1963 at a restaurant in Greenwich Village. Later in 1965 the couple spent a weekend together on Long Island, after which Edith and Thea entered a committed relationship. In 1967, Thea proposed marriage, but at the time they were not lawfully allowed to marry. The couple continued to live in a

committed, loving relationship, but hid their engagement from family and friends because they were afraid of the potential consequences on their careers. Instead of a traditional engagement ring, Thea gave Edith a circular diamond broche to signify their engagement. Twelve years later, Thea was diagnosed with multiple sclerosis, which continued to cause deterioration in her physical abilities until she was ultimately confined to a wheelchair.

Throughout their relationship, Thea and Edith remained committed to each other hoping a time would come when they could finally marry each other. Because of Thea's failing health, however, the couple feared they would never be able to marry in New York. Thus, Thea and Edith traveled to Canada with a small group of friends so they could legally be married. Thea, then 75 years old, and Edith, then 77 years old, were married in May, 2007. Edith remained supportive of her partner throughout the evolution of the disease until Thea died on February 5, 2009.

After Thea's death, Edith probated the will in which Thea left her entire estate to Edith and also appointed Edith as executor. Notwithstanding their marriage, Thea's estate owed $363,053.00 in federal estate taxes because the federal government did not recognize Edith as a surviving spouse due to the definitions in Section 3 of DOMA.[53] Had the Government recognized Edith as Thea's surviving spouse, the estate that passed to Edith would have been deducted from the value of Thea's estate to determine estate taxes. Since Thea left everything to Edith, there would have been no taxable estate. Edith paid the estate tax in her capacity as the Executor and later sued seeking a refund of the estate tax paid. Edith's lawsuit alleged that Section 3 of DOMA was unconstitutional.

On June 6, 2012, United States District Judge Barbara S. Jones, Southern District of New York, issued an opinion finding DOMA unconstitutional and entering judgment in favor of Windsor for $353,053.00 plus interest and costs.[54] In deciding the constitutionality of DOMA, the Court applied the "rational basis review," and determined Section 3 of DOMA to be unconstitutional. It is interesting to note that the Court did not, however, conclude that the rational basis standard was the appropriate standard to be applied in classifications involving sexual orientation. Windsor had requested the Court to find that homosexuals were a suspect class and to apply a heightened scrutiny to the statute. Instead, the Court refused to find homosexuals were a suspect class, stating that it did not have to do so because in this case, DOMA could not even be justified if reviewed under the rational basis standard which is the lowest (easiest) standard of review.

In analyzing DOMA using the rational basis standard, the Court reviewed in sequence each of Congress' justifications as well as the arguments put forth by BLAG. The Court determined that DOMA did nothing to preserve the traditional institution of marriage but instead simply created a federal definition of marriage. Additionally, the Court found that DOMA had no direct impact on heterosexual couples and their decisions on whether, when or how to have children. Furthermore, the Court found that Congress' interest in ensuring federal benefits are distributed consistently, ultimately intruded upon states' rights to define marriage. Finally, the Court found that Congress' efforts to conserve government resources could not justify a classification such as that created by DOMA.

Both the United States and BLAG appealed. On October 18, 2012, the 2d Circuit Court of Appeals affirmed the District Court decision holding that Section 3 of DOMA did not withstand the heightened scrutiny required in equal protection challenges and was therefore unconstitutional.[55]

While the case was still pending before the 2d Circuit, the United States filed a petition for writ of certiorari before judgment with the Supreme Court of the United States. On December 7, 2012, the Supreme Court granted certiorari and established a briefing schedule in the case. On the same day, the Supreme Court granted certiorari in a second case (*Hollingsworth*, *et al*. v. *Perry*, *et al*., California's Proposition 8 case). Oral argument in the *Windsor* case occurred on March 27, 2013, and a decision is still pending before the Court.

2. ***Hollingsworth, et al. v. Perry, et. al.***

On November 4, 2008, voters in California adopted an amendment to the California Constitution which eliminated the right of same-sex couples to be married in California. The measure was known as Proposition 8. Prior to November 4, 2008, the California Constitution guaranteed all people the right to marry, including same-sex couples. The right of same-sex couples to marry in California, however, had not always existed. To the contrary, since the time of California's founding, marriage was understood to be limited to a relationship between and man and a woman. In 1977, the California legislature amended its marriage statute to define marriage as "a personal relation arising out of a civil contract between a man and a woman . . ." Later in 2000, after Congress passed DOMA, California adopted Proposition 22 which provided, "only marriage between a man and a woman is valid and recognized in California."

In 2004, several same-sex couples, along with the City and County of San Francisco, challenged the marriage statutes including Proposition 22, alleging that they violated the California Constitution. Ultimately, the California Supreme Court found the statutes unconstitutional, thereby creating a right to marry for same-sex couples under California law, after which California counties issued more than 18,000 marriage licenses to same-sex couples.[56]

The Proponents[57] of Proposition 8 gathered a sufficient number of signatures to place the initiative on the November 4, 2008 ballot. Proposition 8 proposed to add a provision to the California Constitution Declaration of Rights that stated only a marriage between a man and a woman would be recognized in California. Voters in California approved Proposition 8 by a slim margin, attaining only 52.3 percent of the votes. That margin, however, was sufficient to change the California Constitution effective November 5, 2008. Opponents challenged Proposition 8 by filing a writ of mandate before the California Supreme Court, which ultimately held that Proposition 8 was a valid initiative.

In May 2009, two same-sex couples[58] filed a lawsuit in the U.S. District Court for the Northern District of California alleging that Proposition 8 violated the 14th Amendment to the U.S. Constitution. After a 12-day bench trial, the District Court issued its decision in August, 2010, making eighty findings of fact and relevant conclusions of law. In short, the District Court determined that Proposition 8 was unconstitutional under the due process clause because there was no compelling state interest that justified denying same-sex couples the fundamental right to marry. The Proponents appealed to the 9th Circuit Court of Appeals.

In an 80-page opinion detailing both the history and evolution of the right to marry in California, and an underlying constitutional analysis of Proposition 8, the 9th Circuit affirmed the District Court's decision finding that Proposition 8 violated the 14th Amendment to the U.S. Constitution. In short, the 9th Circuit determined that Proposition 8 served no purpose, and had no effect other than to strip same-sex couples of the ability and right "to obtain and use the designation of 'marriage' to describe their relationships." Because Proposition 8 served no legitimate purpose, instead operating to deprive same-sex couples of a right that the laws of California had previously granted to them, the 9th Circuit found Proposition 8 to be unconstitutional.

On December 7, 2012, the Supreme Court of the United States granted a writ of certiorari and heard oral arguments on March 26, 2013. A decision by the Supreme Court is still pending.

3. ***Dragovich v. Department of Treasury***

The Plaintiffs in this case allege that DOMA adversely impacts their ability to participate in the California Public Employees' Retirement System (CalPERS) Long-Term Care program. Plaintiffs are three California public employees, each of whom is in either a valid same-sex marriage or a registered domestic partnership.[59] Same-sex spouses are not eligible to participate in CalPERS Long-Term Care program because their participation is restricted by federal law. In deciding the case, the District Court applied the rational basis test because the Ninth Circuit Court of Appeals, the Circuit in which the Court was located, had previously determined that homosexuals are not a suspect or quasi-suspect class, and thus heightened scrutiny did not apply.[60] Under the rational basis standard, the District Court found first that tradition is not a legitimate

government interest. The government's desire to protect the institution of traditional heterosexual marriage is not, therefore, a legally acceptable justification for DOMA. The Court further reasoned that Congress' alleged efforts to protect the public fisc likewise are not sufficient justification for DOMA. Similarly, the Court concluded that Congress' efforts to promote uniformity in eligibility for federal benefits were not justification for DOMA because the federal government had already demonstrated its willingness to accept a lack of uniformity by already recognizing the various state definitions of marriage involving heterosexual couples. Finally, regarding the government's argument that DOMA encourages responsible procreation and childrearing, the Court found the reasoning "too attenuated to be credited as a plausible rationale for the law," because DOMA has no effect on whether heterosexual couples marry or have children. DOMA did not create any new rights or privileges for heterosexual couples. "Rather, it blocked the application of existing federal rights to married same-sex couples to whom such privileges could have otherwise been accorded."

As a result, the Court found that the evidence of anti-gay animus in the Congressional Hearing Record precluded BLAG's ability to demonstrate that DOMA was rationally related to a legitimate government interest. On May 24, 2012, the U.S. District Court for the Northern District of California held that Section 3 of DOMA violated the Equal Protection rights of both same-sex spouses and registered domestic partners because it excluded them from participating in CalPERS Long-Term Care program. Subsequently, on June 26, 2012, BLAG appealed. Later on July 20, 2012, the United States appealed. On September 21, 2012, the 9th Circuit Court of Appeals consolidated both appeals but stayed the case pending the Supreme Court's decision in *Windsor*.

4. ***Golinski v. United States Office of Personnel Management***

Plaintiff, Karen Golinski, is a staff attorney at the Ninth Circuit Court of Appeals. Ms. Golinski and her partner of over 20 years, Amy Cunninghis, registered as domestic partners in San Francisco in 1995, with the State of California in 2003, and they were legally married in California on August 21, 2008.[61] After their marriage, Ms. Golinski tried to enroll her spouse in her Blue Cross and Blue Shield family coverage plan, in which the couple's adopted child was already enrolled. The Administrative Office of the U.S. Courts refused to process Ms. Golinski's application because her spouse was a woman. Ms. Golinski then filed a discrimination complaint under the Court's Employment Dispute Resolution Plan alleging discrimination based on sex or sexual orientation. Chief Judge Alex Kozinski found that the refusal to process the enrollment form was discriminatory and ordered the Administrative Offices to process the form. The Office of Personnel Management, however, directed the Administrative Offices not to process the enrollment form because DOMA defines spouse as someone of the opposite sex. Thus, Ms. Cunninghis could not be enrolled as a spouse. Ms. Golinski sued alleging DOMA unconstitutionally violates her equal protection rights by denying her benefits that would be available if she were in a heterosexual marriage.

Unlike the Court in *Dragovich*, the Court here did not apply the rational basis standard, reasoning that later Supreme Court precedent undermined the reasoning the Ninth Circuit applied in the *High Tech Gays* case when it said that homosexuals were not a suspect of quasi-suspect class. In short, the Court found that society has changed and thus the reasoning in *High Tech Gays* was no longer valid. As a result, the Court analyzed each of the four factors articulated by the Supreme Court in City of *Cleburne*

v. Cleburne Living Center[62] to determine whether a heightened level of scrutiny should be applied. First, the Court found no dispute in the record regarding the first two factors; that lesbians and gay men have suffered a long history of discrimination, and that sexual orientation is irrelevant to one's ability to contribute to society. Next, regarding the third factor, the Court found that sexual orientation is an immutable characteristic because it is so closely tied to one's identity. Finally, the Court found that even with recent political advances of the LGBT community, they still lack "meaningful" political power.

As a result, the Court applied heightened scrutiny in analyzing each of the four reasons Congress identified to justify DOMA. The Court found that neither encouraging responsible procreation and childrearing, nor defending and nurturing the institution of traditional heterosexual marriage, nor defending traditional notions of morality, nor preserving scarce government resources, were substantially related to an important government objective.[63] On February 22, 2012, the U.S. District Court for the Northern District of California held that Section 3 of DOMA was unconstitutional. On February 24, 2012, BLAG filed a notice of appeal and on February 28, 2012, the United States filed its notice of appeal. On December 11, 2012, the 9th Circuit ordered that the case, like *Dragovich*, be held in abeyance pending the Supreme Court's decision in *Windsor*.

5. ***Massachusetts v. HHS; Gill v. OPM***

In *Commonwealth of Massachusetts v. HHS*, Massachusetts sued challenging the constitutionality of DOMA, alleging that DOMA intrudes into an area of authority reserved for states under the 10th Amendment of the U.S. Constitution, and that it violated the Spending Clause. In part, Massachusetts believed that DOMA forced

Massachusetts to discriminate against same-sex spouses in Massachusetts because funds in joint federal-state programs could neither be given to, nor retained by, Massachusetts on behalf of same-sex spouses.

Massachusetts focused on three specific joint federal-state programs alleging that the application of DOMA to the implementation of each program was unconstitutional. First, Massachusetts alleged that the application of DOMA to the State Cemetery Grants Program was unconstitutional. Under this program, Massachusetts received partial funding for the construction of two veterans' cemeteries, and a partial allowance for each veteran buried in either of the cemeteries.[64] Second, Massachusetts' Medicaid Program, known as MassHealth, receives reimbursement for up to half of its expenditures under the Medicaid Program.[65] Third, Medicare taxes are imposed on Massachusetts for health care benefits provided to an employee's same-sex spouse.[66]

The District Court concluded that DOMA was not a valid exercise of federal authority because DOMA impacted family law in Massachusetts, a power not granted to the federal government in the Constitution but instead reserved for the states. Further, the District Court found that DOMA violated Congress' spending power because it places unconstitutional restrictions on the receipt of federal funding.

Plaintiffs in the *Gill* case are seven same-sex couples married in Massachusetts, and three survivors of same-sex spouses, also married in Massachusetts. Plaintiff Nancy Gill sought to have her same-sex spouse, Marcelle Letaurneau, covered as a beneficiary under her Federal Employees Health Benefits (FEHB) Program and Federal Employees Dental and Vision Insurance Program (FEDVIP) and to use her Federal Flexible Spending account for Ms. Letaurneau's medical expenses. Similarly, the

remaining Plaintiffs claimed entitlement to the same federal benefits based on their status as a (same-sex) spouse or a widow of a deceased (same-sex) spouse. In each case, the appropriate federal agency refused enrollment based on the federal definition of spouse in Section 3 of DOMA. In addressing each claim under the Equal Protection Clause, the Court analyzed whether it would apply the "strict scrutiny" standard of review. In the end, however, the Court never determined under which standard DOMA should be reviewed finding instead that DOMA did not pass muster when reviewed under even the lowest standard of review; the rational basis test.

The District Court addressed the reasons articulated by Congress as well as the separate reasons articulated by the Government in defense of this action. In each case, the Court found that the specific reasons, either articulated by Congress, or by the Government, were unrelated to promoting a legitimate government objective. Thus, the Court found that the Government's application of DOMA in the denial of benefits in each of the Plaintiffs' cases violated the Equal Protection Clause.

The government appealed both cases to the First Circuit Court of Appeals which consolidated the cases for review. On May 31, 2012, the First Circuit issued its decision finding DOMA unconstitutional. The Court neither applied rational basis nor heightened scrutiny, instead applying a "more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." Additionally, the court analyzed that DOMA amounted to an intrusion on the traditional state realm of marriage laws. Both BLAG and the government filed petitions for writ of certiorari to obtain Supreme Court review of the case. The petitions, however, remain pending before the Supreme Court without decision.[67]

IV. Application of the Defense of Marriage Act to the Department of the Army

The application of the Defense of Marriage Act to the Department of the Army is no different than the statute's application to other Federal government agencies. Congress intended the statute to apply across the whole of government when it stated that it would be applied "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies..."[68] These words capture virtually all parts of the government which includes the Department of Defense and the various Service Departments. DOMA had little impact when it was passed, however, because at that time, same-sex couples could not lawfully marry anywhere in the world.[69]

After Congress passed DOMA, Honorable Henry Hyde, Chairman of the House Committee on the Judiciary, asked the General Accounting Office (GAO) to study to the impact of DOMA to determine its effects on federal benefits. In January, 1997, GAO issued a report concluding that DOMA impacted at least 1,049 federal statutes relating to entitlements and benefits.[70] A follow-up study in 2004 reported an increased number of 1,138 laws tied to benefits, protections, rights or responsibilities based on marital status.[71] Among the statutes listed, the report identified approximately 96 statutes from Title 10 of the United States Code, Armed Services, directly impacting service members.[72] The follow-up report identified eight additional statutes in Title 10.[73]

After the repeal of Don't Ask Don't Tell (DADT) on September 20, 2011, the Secretary of Defense directed a study of benefits in the military with a view to extending benefits to same-sex partners of now openly serving gay and lesbian service members.

The repeal of DADT, by itself, did nothing to extend benefits to same-sex spouses or partners of homosexual service members.[74] In fact, initial guidance from the Department of Defense was that the repeal of DADT would have no impact on benefits.[75] The study was initially undertaken by the Repeal Implementation Team[76] but was later continued by the Joint Benefits Review Working Group (JBR),[77] which was formed in 2011. The JBR's charter was to conduct a comprehensive review of the possibility of extending eligibility for benefits, when legally permitted, to same-sex domestic partners and their children from a policy, fiscal, legal, and feasibility perspective.

The JBR focused its work on analyzing all military benefits to determine which, if any, could lawfully be extended to same-sex partners of service members. Paramount in the analysis was the fact that DOMA remained the law of the land and the Department of Defense was, therefore, bound by any limitations DOMA might place on the Department's ability to extend benefits to same-sex partners. At the same time, however, there was recognition that family benefits for service members play a key role in the overall success of the military.[78] When the armed services began extending benefits to spouses of service members, they did so because they realized such benefits were key to retaining technically trained and skilled service members, and that they would also improve morale and effectiveness in the organization as a whole.[79] Indeed, by 2010, the budget for military family support programs totaled $7.6 billion across the services,[80] and the fiscal year (FY) 2013 budget requested $8.5 billion.[81]

As part of its analysis, the JBR placed benefits in one of three categories for analysis. The first category was the group of benefits that were "servicemember designated" benefits. An example of this type of benefit is the Servicemen's Group Life

Insurance (SGLI) beneficiary.[82] The SGLI is a benefit that inures to the active duty service member without regard to his or her marital status. The authority to identify a beneficiary under the SGLI is within the exclusive discretion of the service member and is not otherwise regulated or controlled by laws or policy.[83] As a result, a service member may designate his or her same-sex partner without violating DOMA.[84] The JBR determined there were 18 benefits in this group of service member designated benefits.[85]

The second category of benefits was those regulated only by department policy or regulation and not by statute. To extend a benefit in this category to a same-sex partner would require only a change in policy or regulation and would not necessarily be impacted by an application of DOMA. Examples of benefits in this category are privileges most commonly associated with eligibility for a Department of Defense Identification Card.[86] Possession of an identification card, in turn, establishes eligibility for other benefits like commissary and Post Exchange privileges. There are 22 benefits in this category.[87]

In determining these benefits could be extended to same-sex partners by changing department policy, the Secretary of Defense determined that the statutes did not clearly define who was eligible to receive the benefits. In many of the statutes, Congress left the authority to define dependents to the Service Secretaries. The Secretary's analysis, however, does not fully account for DOMA's broad application to federal laws. Nor does it account for terminology, the definitions of which are clearly stated in other areas of Title 10 having general application across the Department of Defense. First, DOMA applies to "any ruling, regulation, or interpretation of the various

administrative bureaus and agencies of the United States,"[88] of which policies and regulations governing the Department of Defense and the Military Services are a part. Second, there are numerous statutes that define "spouse," and still others that define "dependent" as including one's spouse. Of significance is Department of Defense Instruction 1000.13, which outlines that among those eligible for a dependent identification card is a "lawful spouse."[89]

The third category of benefits is those in which eligibility is clearly defined by statute and thus limited by the definitions contained in DOMA. Examples of these benefits are eligibility for medical care, to include dental, and other statutory benefits that include allowances at the "with dependents" rate like basic allowance for housing (BAH). Since eligibility for benefits and allowances in this category are determined by statutory definitions of "dependent," "family member," or "spouse," they cannot be extended to same-sex partners without first changing the underlying statutory definitions. Thus, they cannot be extended without running afoul of DOMA.[90]

On February 11, 2013, the Secretary of Defense issued a memorandum formally extending certain benefits to same-sex partners of service members. In the memorandum, the Secretary of Defense highlighted the effective implementation of the repeal of DADT, attributing its success to military leaders who oversaw its implementation. Apparently viewing the extension of benefits to same-sex partners as the next logical step after the repeal of DADT, the Secretary stated that "[o]ur work must now expand to changing our policies and practices to ensure fairness and equal treatment. . . to the extent allowable under law."[91] The Secretary referred to the 20

current educational, survivor, and travel and transportation benefits that are service member designated benefits.

The focus of the memorandum, however, was the extension of 22 additional benefits to same-sex partners of service members via a change to DoD Policy. Central in this group of benefits is a policy change that would allow a service member to "certify" that they have a "partnership" which, in turn, will make the partner eligible for a dependent identification card, commissary, and post exchange privileges. This group of benefits also extends eligibility to children of a same-sex partner, for whom the service member provides support. Thus a wide range of family-related benefits were extended to same-sex partners and their children.

The Secretary further noted that extending these benefits required substantial policy revisions, training, and some technical upgrades. Nonetheless, the Secretary challenged the services to implement the changes as expeditiously as possible. The Secretary established a target date of August 31, 2013 for the Service Secretaries to fully implement extensions of these benefits to same-sex partners of service members, but in no case can the services delay longer than October 1, 2013 to fully implement the changes associated with these benefits. Significant, however, is the apparent lack of analysis regarding the application of DOMA to "any ruling, regulation, or interpretation of the various administrative bureaus and agencies." In directing the Services to change the policy regarding the extension of this limited number of benefits to same-sex partners once the relationship is certified by the Service Member, the Secretary has apparently determined that such policy changes are not included in Section 3 of DOMA.

Finally, the Secretary addressed the third class of benefits; those limited by statute. Notwithstanding the applicability of DOMA, the Secretary clearly stated that in the event DOMA is no longer applicable to the Department of Defense, the Department's policy would be to "construe the words 'spouse' and 'marriage' without regard to sexual orientation."[92] In his February 11, 2013 memo, the Secretary of Defense referred to health care benefits and housing allowances at the "with dependents" rate, eligibility for which is defined by statute. The range of benefits that rely upon one's status as a spouse, however, is much broader. For example, access to spousal preference for federal employment is defined by statute and would be limited by the definitions of "spouse" contained in DOMA. Similarly, a same-sex spouse would not qualify for statutory training and educational opportunities because of the restrictions of DOMA. The Secretary further stated that in that event "married couples, irrespective of sexual orientation, and their dependents, will be granted full military benefits."[93]

While the repeal of DADT, at first blush, is completely unrelated to the extension of military benefits to same-sex partners, and their family members and dependents, it is clear that it was a driving force in the Department of Defense's study of benefits for same-sex partners of service members. Thus, the Secretary of Defense carried the repeal of DADT to its next logical step; the extension of military benefits to partners and family members of now openly serving homosexual service members. Indeed, the Department of Defense's first review of benefits for same-sex spouses was part of the Comprehensive Review Working Group.

While one could easily view the Department of Defense's decision as getting ahead of Congress and its continuing defense of DOMA, such is not the case. First, the

Department of Defense's study was stimulated, in part, by President Obama's policy initiative to repeal DADT. In fact, the Department's study was done at the direction of the President.[94] Additionally, one class of benefits is service member designated benefits and, thus, wholly outside any restrictions that DOMA may place on them. Finally, the other 22 benefits that were addressed in the Secretary's memorandum were ones over which the Department had control by way of policy changes. As such, they also were not impacted by the application of DOMA.

V. Projected Consequences of a Repeal of DOMA

Repeal of DOMA may come in one of two ways. The first, and probably the least likely, is that Congress would take affirmative legislative action to repeal the statute. As suggested, this course of action is not probable because of the lengths to which Congress has gone to defend the constitutionality of the statute. The BLAG is defending the constitutionality of the statute on behalf of Congress because of President Obama's decision, as implemented by the Department of Justice, not to defend DOMA. Additionally, Congress has already attempted a similar measure on March 16, 2011, when both the Senate and the House of Representatives presented the "Respect for Marriage Act of 2011."[95] In short, the Respect for Marriage Act, if passed by Congress, would have repealed DOMA by changing the definition of marriage to say that a marriage is valid for federal purposes if it is valid in the State in which the marriage is entered.[96] The measures, however, died in committee and have not yet been revived.

The second mechanism by which DOMA can effectively be repealed is a decision by the Supreme Court finding that DOMA violates the equal protection clause of the Constitution and is, thus, unconstitutional. The issue was argued before the

Supreme Court in two separate cases: *Hollingsworth* (Proposition 8) on March 26, 2013, and *Windsor* on March 27, 2013. A decision in both cases is still pending by the Court. Notwithstanding what appears to be an overwhelming volume of public support arguing that DOMA is unconstitutional, it remains to be seen exactly what the Supreme Court will do with the issue. "The Supreme Court justices sounded closely split on gay marriage Tuesday, but Justice Anthony Kennedy suggested the court should strike down California's law on same-sex marriage without ruling broadly on the issue."[97] The New York Times also reported that the Supreme Court appeared ready to strike down DOMA after the *Windsor* oral arguments.[98] Each case, however, presents unique issues to the Supreme Court regarding the constitutionality of a federal statute, Congressional involvement in an area of law typically reserved for states, and what some would say is a fundamental constitutional right to marry regardless of sexual orientation. If the Supreme Court finds that DOMA is unconstitutional, then the statute is effectively repealed. If, on the other hand, the Supreme Court finds that DOMA is constitutional, then the law remains valid.

Some would say that the consequences of a repeal of DOMA are obvious and need not be discussed further. In short, a repeal of DOMA would remove the federal definition of "marriage" and "spouse" thereby removing any federal restriction DOMA placed on homosexual marriage. Opponents of DOMA would say that same-sex couples lawfully married in a state authorizing and recognizing same-sex marriages will now have the full recognition and status that being married brings in the eyes of the law. It should be noted, however, that a repeal of DOMA will not result in creating a federal right for same-sex couples to marry. Instead, the right to marry will be left to the

respective States to determine for themselves who can be married under their laws. Further, they would say that the unconstitutional barriers are now removed and that same sex couples now have equal protection of the law as required by our Constitution. This, of course, hinges on how broadly, or narrowly, the Supreme Court rules on the issue, assuming they do not dispose of the case for lack of standing.[99]

The impact of a repeal of DOMA, whether by legislative action or judicial decision, will have far reaching consequences beyond the particular facts of the current lawsuits having DOMA as a central issue. It will impact over 1138 statutes that rely upon the definition of "marriage" and "spouse" for purposes of determining eligibility and status for benefits under federal law. In the Department of Defense, it will impact approximately 98 statutes. The action already taken by the Secretary of Defense to extend a large number of benefits to family members and dependents of same-sex partners in the military may minimize the impact. Although not an inclusive list, the Department of Defense has focused on 20 member designated benefits, 22 benefits tied to departmental policy, and a much smaller group of benefits that are tied to definitions in federal statutes. The main impact in the Department of Defense will come in that small group of benefits defined by statutes and over which the Secretary had no authority to act. As stated earlier, this will primarily focus on medical and dental benefits and allowances at the "with dependents" rate.

The work that the Department of Defense has already done will go a long way toward alleviating some of the impact of repeal. For example, the policy revisions and technical upgrades needed to fully implement the Secretary's earlier decision to extend certain benefits, eligibility of which was determined by policy, will lay a solid foundation

for the changes required by a repeal of DOMA. Even though there will be some administrative burdens, they will not be too great because the government is already doing all the necessary administrative steps to deal with heterosexual spouses. Thus, beyond the number of additional eligible beneficiaries, the same administrative processes already exist to accommodate the "new" class of spouse and dependent.

Determining the budgetary impact of a repeal of DOMA on the Department of Defense and the Military Services, however, is more challenging. The Department of Defense reports that the costs of implementing the new benefits under the Secretary's February 11, 2013 memo "would be negligible."[100] To accurately determine costs, the number of same-sex marriages by service members must be known. The Department of Defense, however, does not track data regarding sexual orientation and thus, does not track data regarding how many service members are in a same-sex marriage.[101] As a result, the Department of Defense must extrapolate projected populations based on the relation of military population to the population at large. In an update to its 1993 study regarding sexual orientation on military personnel policy, RAND Corporation reported an estimated 51,800 lesbian, gay, and bi-sexual (LGB) service members on active duty, 31,709 LGB service members in the reserves, and 81,400 LGB retirees.[102] From these estimated populations, RAND further estimated there were 5,698 same-sex partnerships in the active forces, 3,488 in the reserves, and 8,954 among retirees.[103]

Another issue with which the Army, indeed all services, may be forced to deal is the scenario when a gay or lesbian service member is lawfully married in one of the states authorizing such marriages, but is stationed at a post, camp or station in a state that neither authorizes nor recognizes same-sex marriage. From a federal perspective a

repeal of DOMA would simply mean that if the service member were lawfully married in a state authorizing same-sex marriages, then the Army (or other service) would recognize that marriage for purposes of determining eligibility to spousal benefits administered by the Army. That may, however, create a conflict with the state in which the installation is located, if that state does not authorize or recognize same-sex marriages. An example of this type of conflict may be a gay spouse's eligibility for in-state tuition as a military spouse.[104] Because that particular state does not recognize same-sex marriages, the military spouse may not be entitled to the reduced in-state tuition.

A third issue with which military authorities may be faced arises in the extension of Servicemember Civil Relief Act (SCRA) protections to spouses of service members. The issue may arise when a same-sex military spouse seeks the protections of the SCRA to terminate a real property or automobile lease when the military member deploys. The protections of the SCRA apply to both the military member and his or her spouse, when the military member deploys pursuant to military orders. If the military family is assigned to a base located in a state that neither authorizes nor recognizes same-sex marriage, then a conflict will arise regarding whether the spouse can invoke the protections of the SCRA, because the same-sex spouse may not be considered a spouse under that state's laws. In such a case, it is possible that an action to enforce the terms of the lease brought in state court would apply state law to determine if the same-sex spouse is a spouse under the laws of the state.

Another issue that may arise is in the area of domestic violence. While there are numerous protections at both the state and federal level to protect victims of domestic

violence, some of them are tied to the relationship between spouses. In the military, many families live in the local community surrounding the military installation to which they are assigned. As a result, their conduct at home and in the community is governed by state law and local ordinances. In such cases, domestic violence laws designed to protect spouses, may not adequately protect a same-sex spouse of a military member, if the family is assigned in a state that neither authorizes nor recognizes same-sex marriages. This is not meant to suggest that the victim would be without protection. Indeed, many jurisdictions have passed laws that broadly define domestic relationships to protect victims who have relationships with, live with, and share children with their abusers, but are not married to them.

VI. Conclusion

Determining the true impact of a repeal of DOMA on the Department of the Army is difficult because of the practical inability to assess how many same-sex spouses are in the Army family. In a wave of seemingly overwhelming public support, and in the opinion of a fair number of legal experts, it seems inevitable that DOMA will be overturned by the Supreme Court in the coming months. The real consequence, however, of such a decision, will be left to the American public in the various states. A finding that DOMA is unconstitutional will only invalidate a federal statute that defines marriage as being between one man and one woman. It will not, however, necessarily create a federal right for same-sex couples to marry. Unless the Supreme Court goes beyond the constitutionality of DOMA and addresses whether there exists a constitutional right for anyone to marry, the decision regarding who can and cannot marry will remain an issue for the states to determine for themselves. While there would

not be a federal definition of marriage, the fact that Soldiers are stationed throughout our Country in states, some of which do not authorize or recognize same-sex marriages, will continue to present challenges to the Department of the Army and its Soldiers.

Obviously, if the Supreme Court overrules DOMA, it will solve many issues surrounding the eligibility of same-sex spouses for military benefits. It will not, however, remove all issues surrounding same-sex spouses. More study is needed to address the potential conflicts that may arise when married homosexual service members are assigned in states that neither authorize nor recognize same-sex marriages. Further, more study is needed to address the inevitable allegations of unmarried heterosexual couples in committed long-term relationships who wish to attain the same "status" and entitlement to benefits granted to same-sex partners under current Department of Defense policy.

Endnotes

[1] *Don't Ask, Don't Tell Repeal Act of 2010*, Pub.L.No. 111-321, 124 Stat. 3515-17 (2010). President Barack Obama signed legislation repealing Don't Ask, Don't Tell (DADT) (10 U.S.C. §654) on December 22, 2010. The Don't Ask, Don't Tell Repeal Act stated that the repeal would take effect 60 days after the President, Secretary of Defense, and Chairman of the Joint Chiefs certified to Congress that the Armed Forces were prepared to implement the repeal. That certification occurred on July 22, 2011 and the repeal of DADT became effective on September 20, 2011.

[2] *Defense of Marriage Act*, Pub.L.No. 104-199 (codified at 1 U.S.C. § 7 (1996)).

[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',* Comprehensive Review Working Group (Washington, DC, November 30, 2010). On March 2, 2010, then Secretary of Defense Robert Gates directed the Department of Defense General Counsel, Honorable Jeh Charles Johnson, and the Commander, U.S. Army Europe, General Carter F. Ham, "to stand up an intra-Department, inter-Service working group to conduct a comprehensive review of the issues associated with a repeal" of DADT, 10 U.S.C. § 654. (U.S. Department of Defense,

Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. § 654, Secretary of Defense Robert Gates (Washington, DC, March 2, 2010). Secretary Gates also defined the working group's terms of reference specifically directing that the review would identify impacts in the following areas:

> 1. Determine any impacts to military readiness, military effectiveness and unit cohesion, recruiting/retention, and family readiness that may result from repeal of the law and recommend any actions that should be taken in light of such impacts.
> 2. Determine leadership guidance and training on standards of conduct and new policies.
> 3. Determine appropriate changes to existing policies and regulations, including but not limited to issues regarding personnel management, leadership and training, facilities, investigations, and benefits.
> 4. Recommend appropriate changes (if any) to the Uniform Code of Military Justice.
> 5. Monitor and evaluate existing legislative proposals to repeal 10 U.S.C. § 654 and proposals that may be introduced in the Congress during the period of the review.
> 6. Assure appropriate ways to monitor the workforce climate and military effectiveness that support successful follow-through on implementation.
> 7.Evaluate the issues raised in ongoing litigation involving 10 U.S.C. § 654.

[4] 142 Cong.Rec. 994 (H 3396)(1996).

[5] The language of Section 1 of DOMA states:

> "This Act may be cited as the Defense of Marriage Act."

[6] The language of Section 2 of DOMA states, in pertinent part:

> "No State, territory or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

[7] The language of Section 3 of DOMA states, in pertinent part:

> "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as a husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

[8] *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

[9] It is interesting to note that the decision in *Baehr v. Lewin* did not carry the day. Hawaii ultimately amended its constitution limiting marriage to opposite sex couples.

[10] House Committee on the Judiciary, *Defense of Marriage Act*, H.R. Rep. No. 104-664 (1996), at 8 (1996).

[11] Ibid. at 2-4.

[12] Ibid. at 7.

[13] Ibid. at 7-8.

[14] Ibid.

[15] Ibid. at 2.

[16] Ibid. at 9. The states were: Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah.

[17] Ibid. at 10.

[18] Ibid. at 12.

[19] Ibid. at 16.

[20] Ibid. at 35-44. In addition to the views expressed in the House Report, a number of Representatives expressed dissenting views. Those expressing dissenting views start by suggesting there is no emergency that requires Congressional action because *Baehr v. Lewin* was still pending in the Hawaii courts at the time of the Congressional Hearings. They further characterized the actions as an "unwarranted response to a non-issue." Further, they stated that the argument that same-sex marriage is a threat to the institution of marriage is illogical and weak. Finally, they summarized that "supporters of the legislation are using the Congressional process as a platform to express their moral objection."

[21] Julia Halloran McLaughlin, "DOMA and the Constitutional Coming Out of Same-Sex Marriage," 24 *Wis. J.L. Gender & Soc'y* 145, 148.

[22]"Obama Administration Record for the LGBT Community," http://www.whitehouse.gov/sites/default/files/docs/lgbt_record_o.pdf, (last visited April 8, 2013). See also, Letter from Attorney General Eric Holder to Honorable John A. Boehner, Speaker of the U.S. House of Representatives (February 23, 2011).

[23] "Open Letter Concerning LGBT Equality in America," https://my.barackobama.com/page/community/post/alexokrent/gGggJS (last visited April 8, 2013).

[24] Letter from Attorney General Eric Holder to Honorable John A. Boehner, Speaker of the U.S. House of Representatives (February 23, 2011). The Attorney General is required by 28 U.S.C § 530D to submit a report to Congress when the Attorney General or any officer of the

Department of Justice establishes either a formal or informal policy to refrain from enforcing a law of the United States based on a determination that the law is unconstitutional.

[25] *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y). The District Court opinion in this case is reported at *Windsor v. United States*, 833 F.Supp. 2d 344 (S.D.N.Y. 2012).

[26] *Pederson v. Office of Personnel Management*, No. 3:10-cv-1750 (D.Conn.). The District Court decision in this case is reported at *Pederson v. Office of Personnel Management*, 2012 U.S. Dist. LEXIS 106713 (D.Conn. 2012).

[27] Roberta A. Kaplan and Julie E. Fink, "The Defense of Marriage Act: The Application of Heightened Scrutiny to Discrimination on the Basis of Sexual Orientation," 2012 *Cardozo L.Rev. DeNovo* 203, 209. Robert A. Kaplan and Julie E. Fink represent Edith Windsor, the Plaintiff, in *Windsor v. United States*.

[28] Letter from Attorney General Eric Holder to Honorable John A. Boehner (February 23, 2011), *citing*, *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 44-42 (1985).

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Ibid. At the time the Attorney General sent this letter to Congress, the Secretary of Defense had already directed the Comprehensive Review Working Group to study and report on any issues associated with the repeal of DADT, and the President had already signed legislation repealing DADT.

[35] Ibid. *citing*, Richard A. Posner, *Sex and Reason 101* (1992).

[36] Ibid. *citing*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)(plurality).

[37] Ibid.

[38]The Bipartisan Legal Advisory Group (BLAG) is a five-member panel on which the Speaker of the House, Minority Leader, Minority Whip, Majority Leader, and Majority Whip sit. BLAG has authority to direct the partisan House General Counsel to take legal action on behalf of the House of Representatives. http://www.speaker.gov/press-release/house-will-ensure-doma-constutionality-determined-by-the-court (March 9, 2011) (last visited April 4, 2013).

[39] *City of Cleburne v Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

[40] Roberta A. Kaplan and Julie E. Fink, "The Defense of Marriage Act," at 209.

[41] *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

[42] *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

[43] *Romer v. Evans*, 517 U.S. 620, 631 (1996).

[44] Ibid.

[45] Ibid.

[46] H.R. Rep. No. 104-66, at 8.

[47] Notwithstanding the fact that Congress articulated four reasons why DOMA was necessary, the Department of Justice, in it defense of DOMA prior to February 3, 2011, had already acknowledged that one of the reasons could not be relied upon to determine whether DOMA was unconstitutional. Specifically, the Department of Justice had acknowledged that responsible procreation was no longer a viable basis to support the constitutionality of DOMA because the statute itself did nothing to promote responsible procreation among heterosexual couples. Letter from Attorney General Eric Holder to Honorable John A. Boehner (February 23, 2011). *See also*, *Dragovich v. Department of Treasury*, 764 F.Supp.2d 1178, 1189 (N.D.Cal. 2011).

[48]*Romer v. Evans*, 517 U.S. at 631 (1996). In *Romer*, the Supreme Court chose not to apply the heightened scrutiny standard instead invalidating the Colorado Constitution using the rational basis standard. The Court, however, left unanswered whether a classification based on sexual orientation created a suspect classification. *See also*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

[49] Ibid.

[50] *Lawrence v. Texas*, 539 U.S. 538 (2003).

[51] H.R. Rep. No. 104-66, at 15-16.

[52] This argument was addressed thoroughly in *Golinski v. OPM*, 824 F.Supp.2d 968 at 991 (N.D. Ca. 2012). Plaintiff, Karen Golinski, and her spouse, Amy Cunninghis, are raising an adopted minor child. Ms. Golinski presented numerous studies and reports to demonstrate that same-sex parents are equally capable parents as heterosexual parents.

[53] 26 U.S.C. § 2056(a), which provides, in pertinent part, "(a) Allowance of marital deduction. For purposes of the tax imposed by section 2001, the value of the taxable estate shall . . . be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse. . ."

[54] *Windsor v. United States*, 833, F.Supp.2d 394 (S.D.N.Y).

[55] *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

[56] *In re: Marriage Cases*, 183 P.3d 384 (Cal. 2008).

[57] Five California residents: Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson.

[58] One lesbian couple, Kristin Perry and Sandra Stier, and one gay male couple, Paul Katami and Jeffrey Zarrillo, filed the lawsuit after being denied marriage licenses in Alameda County, California and Los Angeles County, California, respectively.

[59] Those Plaintiffs in a lawful same-sex married were married in California between May 15, 2008, when the Supreme Court of California determined California's marriage statutes were unconstitutional thereby creating a right for all people to marry regardless of sexual orientation, and November 5, 2008, when Proposition 8 changed the Constitution of California thereby prohibiting same-sex marriage in California.

[60] *See*, *High Tech Gays v. Defense Industries Security Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990).

[61] Karen Golinski and Amy Cunninghis were legally married in California during the almost six month period in 2008 before the passage of Proposition 8, during which time California authorized and recognized same-sex marriage.

[62] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-42 (1985).

[63] The Court alternatively reviewed DOMA using a rational basis standard of review. Unsurprisingly, the Court found that DOMA could not, indeed did not, withstand even this minimal level of scrutiny.

[64] Under the State Cemetery Grants Program, the federal government paid Massachusetts $6,818,011 for the construction of the Agawan Cemetery, $4,780,375 for a later expansion of the Agawan Cemetery, and $7,422,013 for the construction of the Winchendon Cemetery. The federal government also paid Massachusetts $300 toward the costs of burying each veteran in either cemetery. As a result of DOMA, the federal government threatened to recoup the costs paid to Massachusetts under the program because Massachusetts intended to bury same-sex spouses of veterans who were eligible for burial on one of the two cemeteries.

[65] Massachusetts alleged that the federal government's refusal to reimburse medicaid expenditures and costs associated with benefits provided to same-sex spouses imposed additional costs on Massachusetts of $640,661, and a loss of approximately $2,224,018 in federal funding.

[66] Under normal circumstances, the value of such benefits provided to a heterosexual spouse are free and have no tax consequence. For same-sex spouses, however, the value of such benefits are imputed as income to the employee and thereby trigger an addition tax to be paid by the employer (in this case Massachusetts). Massachusetts alleged that it had paid about $122,607.69 in additional Medicare tax because of health care coverage provided to its employees' same-sex spouses. Additionally, Massachusetts alleged it had incurred a cost of approximately $47,000 for the development of a tracking system it was required to create in order to track compliance with DOMA.

[67] It is likely the petitions will remain pending until the Supreme Court issues its decision in *Windsor*.

[68] *Defense of Marriage Act*, 1 U.S.C. § 7 (1996).

[69]Roberta A. Kaplan and Julie E. Fink, "The Defense of Marriage Act," at 209.

[70] U.S. General Accounting Office, *Defense of Marriage Act*, Barry R. Bedrick, GAO/OGC-97-16 (Washington, DC, January 31, 1997).

[71] U.S. General Accounting Office, *Defense of Marriage Act*, Dayna K. Shah, GAO-04-353R (Washington, DC, January 23, 2004).

[72] U.S. General Accounting Office, *Defense of Marriage Act*, Barry R. Bedrick, GAO/OGC-97-16 (Washington, DC, January 31, 1997).

[73] U.S. General Accounting Office, *Defense of Marriage Act*, Dayna K. Shah, GAO-04-353R (Washington, DC, January 23, 2004).

[74] Daniel Pasek, "Love and War: An Argument for Extending Dependent Benefits to Same-Sex Partners of Military Service Members," *Harvard Law and Policy Review* (Summer 2012).

[75] U.S. Department of Defense, "Repeal of Don't Ask Don't Tell and Future Impact on Policy," Clifford L. Stanley, (Washington, DC, January 28, 2011).

[76] U.S. Department of Defense, "Implementation of Repeal of Title 10, United States Code, Section 654," Secretary of Defense Robert M. Gates, (Washington, DC, January 28, 2011).

[77] U.S. Department of Defense, "Benefits Review After Repeal of Title 10, United States Code, Section 654," JoAnn Rooney, (Washington, DC, November 9, 2011).

[78] Daniel Pasek, "Love and War: An Argument for Extending Dependent Benefits to Same-Sex Partners of Military Service Members," *Harvard Law and Policy Review* (Summer 2012).

[79] Daniel Pasek, "Love and War".

[80] Ibid.

[81] *See*, Office of the Under Secretary of Defense (Comptroller)/CFO, "Overview: United States Department of Defense Fiscal Year 2013," fig. 5-3, at 5-6 (2012).

[82] 38 U.S.C. § 1965 *et seq*.

[83] There are, however, minor limitations in cases where a service member is married and chooses, for whatever reason, not to name his or her spouse as the beneficiary. In such cases, regulations require the Service Member to notify his or her spouse of the fact that the Spouse is NOT designated as a beneficiary to receive the SGLI.

[84] The ability to name a beneficiary under the SGLI program without running afoul of DOMA, however, should not be confused with the separate statutory entitlement for a Service Member to obtain SGLI coverage for his or her Spouse and Family Members. Clearly, the DOMA's definition of "spouse" would be used to determine if any Service Member had a

qualifying Spouse for whom SGLI coverage could be obtain. As a result, a Service Member could not obtain SGLI coverage for his or her same-sex spouse.

[85] The following member-designated benefits are in the first category:

- Service Members Group Life Insurance Beneficiary;
- Post Vietnam-Era Veterans Assistance Program Beneficiary;
- All-Volunteer Force Educational Assistance Program – Active Duty Death Benefit;
- Death Gratuity Beneficiary;
- Final Settlement of Accounts Beneficiary;
- Wounded Warrior Designated Caregiver;
- Thrift Savings Plan Beneficiary;
- Survivor Benefit Plan Beneficiary for Retirees;
- Casualty Notification;
- Escorts for Dependents of Deceased or Missing Members – Eligibility to be an Escort;
- Designation of Persons Having Interest in Status of Missing Member;
- Veteran's Group Life Insurance Beneficiary;
- Person Eligible to Receive Effects of Deceased Persons;
- Travel and Transportation Allowance: Attendance at Yellow Ribbon Reintegration Events;
- Travel and Transportation Allowance: Transportation of Designated Individuals Incident to Hospitalization of Members for Treatment of Wounds, Illness, Injury;
- Designation of Persons Authorized to Direct Disposition of Remains of Members of the Armed Forces;
- Presentation of the Flag of the United States;
- Transportation of Survivors of Deceased Member to Attend the Members Burial Ceremony or Memorial Service;
- Hospital Visitation Privileges;
- Membership in Family Readiness Groups.

[86] Department of Defense Instruction 1000.13, "Identification (ID) Cards for Members of the Uniformed Services, their Dependents, and other Eligible Individuals," December 5, 1997; Army Regulation 600-8-14, "Identification (ID) Cards for Members of the Uniformed Services, their Eligible Family Members, and other Eligible Individuals," June 17, 2009.

[87] The following list of benefits in the second category will be extended to same-sex domestic partners upon declaration of a committed relationship:

- Dependent ID cards, which Will be Renewed in Accordance with Existing Policies;
- Commissary Privileges;
- Exchange Privileges;
- Morale, Welfare, and Recreation Programs;
- Surveys of Military Families;
- Quadrennial Quality of Life Review;

- Emergency Leave;
- Emergency Leave of Absence;
- Youth Sponsorship Programs;
- Youth Programs;
- Family Center Programs;
- Sexual Assault Counseling Program;
- Joint Duty Assignments;
- Exemption from Hostile Fire-Areas;
- Transportation to and from Certain Places of Employment and on Military Installations;
- Transportation to and from Primary and Secondary School for Minor Dependents;
- Authority of Service Secretary to Transport Remains of a Dependent;
- Disability and Death Compensation: Dependents of Members Held as Captives;
- Payments to Missing Persons;
- Space-Available Travel on DoD Aircraft;
- Child care;
- Legal Assistance.

[88] 1 U.S.C. § 7.

[89] DoD Inst. 1000.13

[90] A list of benefits in the third category was never published. Benefits in this category are restricted from same-sex spouse because the statutes that define the benefit establish eligibility based on whether the service member is married. In the Secretary of Defense's memo announcing plans to extend certain benefits to same sex partners of service members, he generally referred to BAH at the "with dependents" rate, and eligibility for medical and dental care, both of which status as a spouse or dependent.

[91] U.S. Department of Defense, "Extending Benefits to Same-Sex Domestic Partners of Military Members," Secretary of Defense Leon Panetta (Washington, DC, February 11, 2013).

[92] Ibid.

[93] Ibid.

[94] Ibid.

[95] On March 16, 2011, Senator Diane Feinstein introduced a bill in the Senate titled the "Respect for Marriage Act of 2011." (S. 598, 112th Congress). Representative Jerrold Nadler introduced a similar bill on the same day in the House of Representatives. (H.R. 1116, 112th Congress). Both bills sought to repeal the Defense of Marriage Act and which stated that a person will be considered married for all federal purposes "if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could be entered into in a State."

[96] Ibid.

[97] David G. Savage and Noam N. Levy, "Supreme Court Appears Split on Prop.8, Broad Gay Marriage Ruling," latimes.com, latimes.com/news/politics/la-pn-supreme-court-gay-marriage-ruling-20130326,0,1511924.story (last accessed April 4, 2012).

[98] Adam Lyptak and Peter Baker, "Justices Cast Doubt on Benefits Ban in U.S. Marriage Law," *New York Times*, March 27, 2013.

[99] When the Supreme Court granted the writ of certiorari agreeing to hear the case, it directed that in addition to the issues presented in the case from proceedings below, the parties should also brief whether the Supreme Court has jurisdiction to hear the case and whether or not the parties have standing in the case because of the Obama Administration's unique litigation position, and BLAG's similarly unique role in defending the constitutionality of the statute on behalf of Congress.

[100] Karen Parrish, "Same-sex Couples Can Claim New Benefits by October," Washington, D.C., February 11, 2013, available at http://www.defense.gov/news/newsarticle.aspx?ID=119260

[101] U.S. Department of Defense, "Repeal of Don't Ask Don't Tell and Future Impact on Policy," Clifford L. Stanley (Washington, DC, January 28, 2011).

[102] Bernard D. Rostker, Study Director, *Sexual Orientation and U.S. Military Personnel Policy: An Update of RAND's 1993 Study*, (Arlington, VA; RAND Corporation, 2010).

[103] Bernard Rostker, *An Update of RAND's 1993 Study*.

[104] Public Law 110-315, Sec. 135.