

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS)	
Plaintiff-appellee,)	
)	Nos. 10-56634, 10-56813
v.)	
)	
UNITED STATES, et al.,)	
Defendants-appellants.)	

**SUGGESTION OF MOOTNESS AND MOTION
TO VACATE THE DISTRICT COURT JUDGMENT**

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**SUGGESTION OF MOOTNESS AND MOTION
TO VACATE THE DISTRICT COURT JUDGMENT**

Effective today, 10 U.S.C. § 654 is repealed, and this facial constitutional challenge to that law is now moot.¹ “Where,” as here, “intervening legislation has settled a controversy involving only injunctive or declaratory relief, the controversy has become moot.” *Chem. Producers & Distributors Ass’n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (quoting *Bunker Ltd. P’ship v. United States*, 820 F.2d 308, 311 (9th Cir. 1987)). This Court’s “established practice” when a case becomes moot on appeal is to “dismiss the appeal as moot, vacate the judgment below and remand with a direction to dismiss the complaint.” *Pub. Utilities Comm’n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (internal quotation marks and citation omitted).

The government therefore respectfully requests that the Court apply its established practice here, vacating the district court’s judgment and permanent injunction and remanding this case with instructions for the district court to dismiss the complaint.

¹ See Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(b), 124 Stat. at 3516 (2010); D.E. 123, Gov’t Letter of July 22, 2011 (noting that repeal certification occurred on July 22, 2011).

A. This Case Is Moot.

1. This case is moot because repeal of § 654 has provided Log Cabin with all the relief it sought, and was entitled to seek, in this case.

In this facial constitutional challenge to § 654, Log Cabin sought (ER 346 (amended complaint), ER 198 (final pretrial order)) and obtained (ER 1-3) only forward-looking prospective relief against the statute's operation—a declaration that 10 U.S.C. § 654 is unconstitutional on its face and an injunction barring enforcement of that statute and its implementing regulations. Log Cabin, as an association purporting to sue on behalf of its members (*see* ER 24-31, 335-338), could only seek prospective relief in this suit because it lacked standing to seek individualized relief on behalf of particular individuals. *See* Br. for Appellee 23; *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 515 (1975); *Wash. Legal Foundation v. Legal Foundation of Wash.*, 271 F.3d 835, 849-50 (9th Cir. 2001) (en banc). Log Cabin attempted to show that it had associational standing based on the contention that prospective relief would redress injuries to two individuals it claimed as members: John

Doe, an unnamed individual in the military who assertedly was at risk of being discharged under § 654, and J. Alexander Nicholson, a former member of the Army who was discharged under § 654 in 2002. *See Br.* for Appellee 22-42.

Repeal of § 654 has effectively provided Log Cabin with the prospective relief it sought to redress those asserted injuries. Section 654 is no longer in force, and the Department of Defense has amended or eliminated all regulations implementing that law. *See Mem. of Clifford L. Stanley 1* (Sept. 20, 2011) (attached); http://www.dtic.mil/whs/directives/whats_new.html. Gays and lesbians may now serve openly in the military, and individuals discharged under § 654 may apply to rejoin the military. John Doe is plainly not now threatened with discharge under § 654, and Nicholson, if he wishes, is free to apply to return to the Armed Forces under the same conditions that apply to anyone else. This case is therefore moot under the established rule that “[w]here intervening legislation has settled a controversy involving only injunctive or declaratory relief, the controversy has become moot.” *Chem. Producers & Distributors Ass’n v. Helliker*, 463

F.3d 871, 878 (9th Cir. 2006) (quoting *Bunker Ltd. P'ship v. United States*, 820 F.2d 308, 311 (9th Cir. 1987); see, e.g., *Burke v. Barnes*, 479 U.S. 361, 363-64 (1987); *Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986).

2. Log Cabin has conceded that at the time § 654's repeal became effective, "the injunctive relief awarded by the district court would become moot," D.E. 120-1, Log Cabin Letter Br. of July 21, 2011, at 4. Despite that concession, Log Cabin at oral argument contended that the possibility that § 654 could be reenacted keeps the case alive. This Court has recognized only a narrow exception to the rule that repeal of a statute moots a facial constitutional challenge: it must be "virtually certain that the repealed law will be reenacted," *Helliker*, 463 F.3d at 878 (quoting *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)). Here there is no reasonable likelihood, much less a virtual certainty, that § 654 will be reenacted.

It is purely speculative that both Houses of Congress would pass a bill reinstating § 654 and that the President—who has been a strong advocate for the Repeal Act—would sign it if they did. And it is doubly

speculative that some future hypothetical Congress and President would reenact that policy in some unspecified, hypothetical form. Those possibilities do not come close to the kind of concrete interest necessary to present a continuing case or controversy. *See Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009).

3. Log Cabin has also contended, even though its claim for injunctive relief is moot, that its claim for declaratory relief is not moot because of continuing “collateral consequences” to “American service-members who were discharged under the statute.” DE 120-1, Log Cabin Letter Br. of July 21, 2011, at 7.

Log Cabin cites no case in which repeal of a statute mooted an injunction against the statute, but not a declaration that the statute is invalid, and that distinction is without basis. Log Cabin purports to sue on behalf of its members, but identifies no “collateral consequence” to Nicholson or John Doe—the only two claimed Log Cabin members it has brought before the Court—that repeal has not already redressed. Even with respect to nonmembers, the declaratory relief sought in this lawsuit would not redress any of the collateral consequences Log Cabin

identifies, all of which would require an award of retrospective, individualized relief to particular Service members. *See* Log Cabin Letter Br. 7-8. As explained above, *supra* p. 2, Log Cabin lacks standing to seek such individualized relief. If discharged Service members believe they are entitled to additional relief, they are free to seek such relief individually, as some have already done. *See Almy v. DOD*, No. 3:10-CV-5627 (N.D. Cal.) (suit by three Service members discharged under § 654 seeking reinstatement to their former positions in the military).²

Moreover, many of the “collateral consequences” Log Cabin cites are not attributable to § 654 at all. Log Cabin notes that some Service members discharged under § 654 received other-than-honorable dis-

² It is also doubtful that the “collateral consequences” doctrine would apply even were those consequences redressable by the declaratory relief sought here. That doctrine was developed to permit those convicted of crimes to secure reversal of their convictions if they continue to face concrete legal disabilities from their convictions even after serving their sentences. *See Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998). Reversal of a criminal conviction in those cases may be necessary to afford relief from the legal consequences of the conviction. Here, by contrast, the claimed “collateral consequences” are not truly “consequences” of the now-repealed statute to Log Cabin; they involve consequences to nonparties—Service members discharged under § 654—that may be raised in independent proceedings even after the district court’s judgment and permanent global injunction are vacated.

charges, a status that disqualifies them from certain benefits. Log Cabin Letter Br. 7. But a discharge under § 654 did not automatically, or even frequently, result in an other-than-honorable discharge. On the contrary, the vast majority of those discharged under § 654 received honorable discharges; for example, the only three former Service members discharged under § 654 whom Log Cabin has identified—Nicholson, Michael Almy, and Anthony Loverde—all received honorable discharges. *See* D.E. 125, Log Cabin Rule 28(j) Letter of Aug. 24, 2011, Exs. A, B, C. Under the regulations that were in place governing separations under § 654, a characterization of “other than honorable” was only permitted if certain aggravating factors were present in the case. *See* DOD Inst. 1332.14 Encl. 3 ¶8.c (superseded Sept. 20, 2011); DOD Inst. 1332.30 Encl. 7 ¶2.b.2 (superseded Sept. 20, 2011). Thus, the character of an individual’s discharge under § 654 depended on additional factors particular to an individual’s Service record, not the mere fact of violating § 654, the latter of which could be the sole basis for Log Cabin’s facial challenge.

Log Cabin also points to the possibility that Service members

“may wish to assert claims for reinstatement and back pay,” Log Cabin Letter Br. 8, presumably based on the contention that their discharges were unconstitutional. But the prospect that “a favorable decision in this case might serve as a useful precedent” in a “future lawsuit cannot save *this* case from mootness.” *United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (emphasis in original); see *Spencer*, 523 U.S. at 17 (rejecting the argument that the challenge to a parole revocation was not moot because it might “foreclose [the convicted person] from pursuing a damages action” against the state). In fact, foreclosing the collateral legal effects of a judgment is one of the principal virtues of holding a case moot and vacating the underlying judgment—a course of action that “prevent[s] an unreviewable decision ‘from spawning any legal consequences,’ so that no party is harmed by what [the Supreme Court] has called a ‘preliminary’ adjudication.” *Camreta v. Greene*, 131 S. Ct. 2020, 2034-35 (2011) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950)).

For all of these reasons, the repeal of § 654 ended any live controversy regarding Log Cabin’s facial challenge to that statute and its

request for declaratory and injunctive relief. This case is now moot.

B. The Judgment Should Be Vacated And The Case Remanded With Instructions To Dismiss The Complaint.

This Court's "established practice" when a case becomes moot on appeal is to "dismiss the appeal as moot, vacate the judgment below and remand with a direction to dismiss the complaint." *Pub. Utilities Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (internal quotation marks and citation omitted); see *Camreta*, 131 S. Ct. at 2034-35 ("When a civil suit becomes moot pending appeal" the Court's "established' . . . practice in this situation is to vacate the judgment below" (quoting *Munsingwear*, 340 U.S. at 39)). In particular, when mootness occurs, not through settlement, but by "happenstance" such as the enactment of legislation (see cases cited below), vacatur of the district court's adverse judgment is appropriate because the party challenging the district court's decision is deprived of the opportunity to seek review of that judgment, and "[v]acatur then rightly strips the decision below of its binding effect and clears the path for future relitigation." *Camreta*, 131 S. Ct. at 2035; see *Alvarez v. Smith*, 130 S. Ct. 576, 581-

82 (2009); *U.S. Bancorp v. Bonner Mall Partnership*, 513 U.S. 18, 25 n.3 (1994) (“mootness by happenstance provides sufficient reason to vacate”). By contrast, where mootness occurs by reason of settlement, vacatur is not mandatory, but instead may be done in the Court’s discretion. *See Bonner Mall*, 513 U.S. at 26-29.

Congress’s decision to enact legislation that in turn moots this appeal is a classic example of mootness occurring under circumstances in which vacatur is mandatory. *See Helliker*, 463 F.3d at 879 (noting that vacatur is appropriate where the Executive Branch’s appeal of an adverse decision is mooted by the passage of legislation); *American Bar Ass’n v. FTC*, 636 F.3d 641, 649 (D.C. Cir. 2011) (vacating adverse judgment against the Federal Trade Commission because congressional legislation made the case moot); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1131 (10th Cir. 2010); *Nat’l Black Police Ass’n v. Dist. of Colum.*, 108 F.3d 346, 353 (D.C. Cir. 1997) (vacatur normally appropriate “when legislative action moots a case and the government seeks vacatur”). The district court’s legally flawed, but now unreviewable, judgment and permanent global injunction against

enforcement of § 654 should therefore be vacated and the case remanded with instructions to dismiss the complaint.

In addition to mootness, vacatur is also appropriate as an equitable matter because, in light of the repeal of § 654, there is no basis for an award of the equitable relief of an injunction or declaratory judgment, especially in the military context. Indeed, as the government has argued in this appeal, there was no basis for such relief to begin with, because, quite apart from the merits, Log Cabin failed to establish standing, and the world-wide injunctive and declaratory relief in any event extended far beyond any relief Log Cabin could properly obtain. The enactment of the Repeal Act reinforces the basis for vacatur of the district court's judgment on equitable grounds.

CONCLUSION

For the foregoing reasons, the Court should hold that this case is moot, vacate the district court's judgment awarding declaratory and injunctive relief, and remand this case to the district court with instructions to dismiss the complaint.

Respectfully submitted,

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SEPTEMBER 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on September 20, 2011.

I certify as well that on that date I caused a copy of this document to be served on the following counsel registered to receive electronic service.

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PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
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SEP 20 2011

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Repeal of "Don't Ask, Don't Tell"

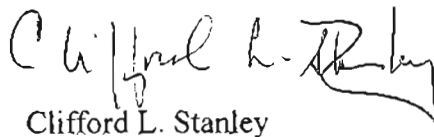
The purpose of this memorandum is to inform you that the law commonly known as "Don't Ask, Don't Tell" (DADT), 10 U.S.C. Sec 654, is repealed and no longer in effect in the Department of Defense.

This repeal today follows the certification to Congress by the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff on July 22, 2011 that the Armed Forces were prepared to implement repeal in a manner consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention.

Effective today, statements about sexual orientation or lawful acts of homosexual conduct will not be considered as a bar to military service or admission to Service academies, ROTC or any other accession program. It remains the policy of the Department of Defense that sexual orientation is a personal and private matter. Applicants for enlistment or appointment may not be asked, or required to reveal, their sexual orientation. Sexual orientation may not be a factor in accession, promotion, separation, or other personnel decision-making.

All Service members are to treat one another with dignity and respect regardless of sexual orientation. Harassment or abuse based on sexual orientation is unacceptable and will be dealt with through command or inspector general channels. The Department of Defense is committed to promoting an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible regardless of sexual orientation. Gay and lesbian Service members, like all Service members, shall be evaluated only on individual merit, fitness, and capability.

Effective today, the Department of Defense and Services will implement their respective pre-approved policy and regulatory revisions effected by repeal. Additional policy guidance can be found in the attached memorandum dated January 28, 2011, "Repeal of Don't Ask, Don't Tell and Future Impact on Policy," and the September 20, 2011, "Repeal Implementation Quick Reference Guide."


Clifford L. Stanley

Attachments:
As stated

DISTRIBUTION:

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JAN 28 2011

PERSONNEL AND
READINESS

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Repeal of Don't Ask Don't Tell and Future Impact on Policy

On December 22nd, 2010, the President signed legislation that will lead to the eventual repeal of 10 U.S.C. § 654 and its implementing regulations (commonly known as "Don't Ask, Don't Tell"). The legislation provides that repeal will take effect 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify to Congress that the Armed Forces are prepared to implement repeal in a manner that is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces. Until such time, there are no changes to 10 U.S.C. § 654 nor any existing Department or Service policies.

The purpose of attachment one is twofold: 1) to provide the Department's Policy Guidance that will take effect on the date of repeal (the exact date is not yet known) and 2) to inform the Military Services about the steps each should take immediately in order to prepare for the effective date of repeal.

Additionally, the second attachment contains those changes to Department Instructions and Directives that will be effective on the date of repeal.

It remains the policy of the Department of Defense that sexual orientation is a personal and private matter, to treat all members with dignity and respect, and to ensure maintenance of good order and discipline. Leaders will be essential to implementing this change in policy fairly and consistently. A clear focus on leadership, professionalism, and respect will enable any change in policy to be executed with minimum disruption to the force.

A handwritten signature in black ink, appearing to read "Clifford L. Stanley".

Clifford L. Stanley

Attachments:

As stated

cc:

Chairman of the Joint Chiefs of Staff

Coast Guard, Commandant (CGI)

General Counsel of the Department of Defense



DADT Repeal Policy Guidance

On the effective date of repeal of Don't Ask, Don't Tell (DADT), which is yet to be determined, this policy guidance will apply to all military personnel serving in the Armed Forces of the United States, including those serving in the Reserve components of the Armed Forces.

In order to prepare to implement the below policy guidance on the effective date of repeal of DADT, each Service is immediately directed to identify its specific instructions and regulations related to all policy areas affected by the future repeal of DADT and prepare draft changes based on the below policy guidance. It is critical to reemphasize that these policy changes will not be effective until the date of repeal.

Separations

Upon repeal, Services may no longer separate Service members under the homosexual conduct policy set forth under 10 U.S.C. § 654 and its implementing regulations. Service members will no longer be subject to administrative separation based solely on legal homosexual acts, a statement by a Service member that he or she is a homosexual or bisexual (or words to that effect), or marriage or attempted marriage to a person known to be of the same biological sex. Members who have an approved separation date after the effective date of repeal based on proceedings commenced solely under 10 U.S.C. § 654 and its implementing regulations will have that separation cancelled and will return to duty.

Additionally, on the date of repeal, Services will cease all pending investigations, separations, discharges, or administrative proceedings commenced solely under 10 U.S.C. § 654, and its implementing regulations. Services may reprocess if facts afford another appropriate reason for separation other than 10 U.S.C. § 654 and its implementing regulations. In those cases already begun in which 10 U.S.C. § 654 and its implementing regulations represent one of multiple reasons for separation, Services will make a case-by-case determination as to whether to proceed with the separation or to start the proceedings over again.

DoD discharge codes JB, RA, RB, RC for discharges under 10 U.S.C. § 654 and its implementing regulations will be discontinued.

Accessions and Recruiting Policy

Upon repeal, statements about sexual orientation or lawful acts of homosexual conduct will not be considered as a bar to military service or admission to Service academies, ROTC or any other accession program. Sexual orientation will continue to be a personal and private matter. Applicants for enlistment or appointment may not be

asked, or be required to reveal, their sexual orientation. All applicants, regardless of any statements in regard to sexual orientation, will be treated with professionalism and respect.

The required briefings given to applicants for enlistment and appointment regarding standards of personal conduct in the armed forces and separations policy will be amended appropriately to reflect the new policy.

Re-Accessions

Upon repeal, former Service members who were discharged solely under 10 U.S.C. § 654 and its implementing regulations may apply to re-enter the Armed Forces. They will be evaluated according to the same criteria and Service requirements applicable to all prior-Service members seeking re-entry into the military at that time. There will be no preferential treatment for Service members separated solely under 10 U.S.C. § 654 and its implementing regulations. They will be processed as any other re-accession applicant under Service policies. Services shall continue to consider a Service member's previous performance and disciplinary record when determining suitability for re-entry.

Services will waive re-entry codes on DD Forms 214 that are based upon separations under 10 U.S.C. § 654 and its implementing regulations. Applicants will then be processed on a case-by-case basis in accordance with Service policies.

In considering applications for re-accessions, the Services will not consider to the detriment of an applicant any separation that was solely for under 10 U.S.C. § 654, and its implementing regulations. For example, former Service members who were separated with an honorable discharge (or an uncharacterized discharge for those occurring during initial training), and who have a separation code in their records reflecting a separation under 10 U.S.C. § 654 and its implementing regulations, shall be considered for re-entry according to the most favorable re-entry classification. The military requirements of the Services will continue to dictate re-accession criteria.

Standards of Conduct

Upon repeal, existing standards of conduct shall continue to apply to all Service members regardless of sexual orientation. Enforcement of service standards of conduct, including those related to public displays of affection, dress and appearance, and fraternization will be sexual orientation neutral. All members are responsible for upholding and maintaining the high standards of the U.S. military at all times and at all places. Services retain the authority provided by law, Department and Service regulations to counsel, discipline, and involuntarily separate those Service members who fail to obey established standards.

Leaders at all levels are entrusted to ensure the impartial administration of these standards and to hold Service members accountable. In cases where conduct is prohibited, leaders shall be expected to take such appropriate corrective or disciplinary action as they determine may be necessary to preserve morale, good order and discipline, unit cohesion, military readiness, and combat effectiveness.

In order to meet the intent of this policy guidance, each Service is directed to immediately review its standards of personal and professional conduct policies and procedures to ensure that they provide adequate guidance in relevant areas, apply uniformly to all personnel, and promote an environment free from personal, social or institutional barriers that prevent Service members from rising to their highest potential. Place special emphasis in such review on the following areas: public displays of affection (PDA), dress and appearance, nepotism, unprofessional relationships, conflicts of interest, and zero tolerance for harassment and hazing. Standards of conduct shall clearly address the responsibility of leaders, supervisors, and subordinate personnel at all levels to foster unit cohesion, good order and discipline, respect for authority, and mission accomplishment.

Additional Guidance

Moral and Religious Concerns/Freedom of Speech

Policies regarding Service members' individual expression and free exercise of religion already exist and are adequate. In today's military, people of different moral and religious values work, live and fight together. This is possible because they treat each one another with dignity and respect. This will not change. There will be no changes regarding Service member exercise of religious beliefs, nor are there any changes to policies concerning the Chaplain Corps of the Military Departments and their duties. The Chaplain Corps' First Amendment freedoms and their duty to care for all will not change. When Chaplains are engaged in the performance of religious services, they may not be required to engage in practices contrary to their religious beliefs. Service members will continue to respect and serve with others who may hold different views and beliefs.

Equal Opportunity

All Service members, regardless of sexual orientation, are entitled to an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible. Harassment or abuse based on sexual orientation is unacceptable and will be dealt with through command or inspector general channels.

Sexual orientation will not be considered along with race, color, religion, sex, and national origin as a class under the Military Equal Opportunity (MEO) program and therefore will not be dealt with through the MEO complaint process.

In order to meet the intent of this policy guidance, DoD, Military Departments, and Service MEO programs will immediately review their current MEO Programs as established in DODD 1350.2 *Department of Defense Military Equal Opportunity (MEO) Program* to ensure consistency with this policy.

Collection and Retention of Sexual Orientation Data

Sexual orientation is a personal and private matter. DoD components, including the Services are not authorized to request, collect, or maintain information about the sexual orientation of Service members except when it is an essential part of an otherwise appropriate investigation or other official action.

Personal Privacy

The creation of separate bathroom facilities or living quarters based on sexual orientation is prohibited, and Commanders may not establish practices that physically segregate Service members according to sexual orientation.

Personal privacy is a concern for many Service members. Members of the Armed Forces accept living and working conditions that are often austere, primitive, and characterized by forced intimacy with little or no privacy. Consistent with current policy, Commanders will continue to maintain the discretion to alter berthing or billeting assignments in accordance with Service policy in the interest of maintaining morale, good order and discipline, and consistent with performance of the mission.

Benefits

There will be no changes at this time to eligibility standards for military benefits, including applicable definitions. Service members and their opposite-sex spouses receive a range of entitlements and benefits depending on eligibility. The Defense of Marriage Act, 1 U.S.C. § 7, and the existing definition of “dependent” in some laws, prohibit extension of many military benefits—such as medical care, travel and housing allowances, and other benefits—to same-sex couples.

All Service members will continue to have various benefits for which they may designate beneficiaries in accordance with the rules governing each program. Some Service members may not have taken full advantage of these designations prior to repeal of DADT. The Services will reemphasize the opportunity to designate beneficiaries for these benefits to all its Service members. Such benefits include the following:

1. Service Member's Group Life Insurance (SGLI) Beneficiary
2. Post Vietnam-Era Veterans Assistance Program (VEAP) Beneficiary
3. G.I. Bill Death Beneficiary
4. Death Gratuity Beneficiary
5. Final Settlement of Accounts Beneficiary
6. Wounded Warrior Act Designated Caregiver
7. Thrift Savings Plan (TSP) Beneficiary
8. Survivor Benefit Plan Beneficiary

Although there will be no changes to benefits eligibility on the date of repeal, the Department will continue to study existing benefits to determine those, if any, that should be revised, based on policy, fiscal, legal, and feasibility considerations, to give the Service member the discretion to designate a person or persons of their choosing as a beneficiary.

Medical Policy

There will be no changes to existing medical policies. The Surgeons General of the Military Departments have determined that repeal of DADT does not affect the military readiness of the force and that changes to medical policies are not necessary.

Duty Assignment

There will be no changes to assignment policies. All Service members will continue to be eligible for world-wide assignment without consideration of sexual orientation. Service members assigned to duty, or otherwise serving in countries in which homosexual conduct is prohibited or restricted, will abide by the guidance provided to them by their local commanders.

Release from Service Commitments

There will be no new policy to allow for release from service commitments for Service members opposed to repeal of 10 U.S.C. § 654 or to serving with gay and lesbian Service members. Service members may request to be voluntarily discharged under the plenary authority of the Military Department Secretary concerned, or other appropriate authority based upon the specific facts of each case. Such discretionary discharge may only be granted when the Military Department Secretary concerned has determined the early separation would be in the best interest of the Service.

Claims for Compensation and Retroactive Full Separation Pay

The Department will not authorize compensation of any type, including retroactive full separation pay, for those previously separated under 10 U.S.C. §654 and its implementing regulations.

ATTACHMENT 2

REVISED AND NEW GUIDANCE BASED UPON REPEAL
OF 10 U.S.C. § 654 (DON'T ASK DON'T TELL)

- References:
- (a) DoDI 1332.14, "Enlisted Administrative Separations," August 28, 2008
 - (b) DoDI 1332.30, "Separation of Regular and Reserve Commissioned Officers," December 11, 2008
 - (c) DoDI 1304.26, "Qualification Standards for Enlistment, Appointment, and Induction," September 20, 2005
 - (d) DoDI 1332.29, "Eligibility of Regular and Reserve Personnel for Separation Pay," June 21, 1991 (incorporating change 1, February 23, 1996)
 - (e) DODD 1332.23, "Service Academy Disenrollment," February 19, 1988
 - (f) DODD 1322.22, "Service Academies," August 24, 1994
 - (g) DoDI 6400.06, "Domestic Abuse Involving DoD Military and Certain Affiliated Personnel," August 21, 2007
 - (h) DOD 6400.1-M-1, "Manual For Child Maltreatment and Domestic Abuse Incident Reporting System," July 15, 2005

1. CHANGES TO REFERENCE (a)

- a. Delete "5. Guidelines for Fact-Finding Inquiries into Homosexual Conduct" from the list of Enclosures on page 3.
- b. Delete "8. Homosexual Conduct.....17" from the Table of Contents on page 4.
- c. Delete the entire "GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT.....38" section from the Table of Contents on page 4.
- d. Delete paragraph 8 (including all subparagraphs contained under paragraph 8) of Enclosure 3 on pages 17-22 .
- e. Delete Enclosure 5 on pages 38-41.
- f. Delete "homosexual conduct or" from paragraph 2.d.(7) of Enclosure 6 on page 45.

- g. Delete “has recommended separation on the basis of homosexual conduct or” from paragraph 3.e.(7)(c)4 of Enclosure 6.
- h. Delete the following terms and their definitions from the GLOSSARY.
 - (1) bisexual.
 - (2) homosexual.
 - (3) homosexual conduct.
 - (4) sexual orientation.

2. CHANGES TO REFERENCE (b)

- a. Delete “8. Guidelines for Fact-Finding Inquiries into Homosexual Conduct” from the list of Enclosures on page 4.
- b. Delete “3. Homosexual Conduct.....9” from the Table of Contents on page 5.
- c. Delete “Homosexual Conduct,” from “Discharge for Misconduct, Moral or Professional Dereliction, Homosexual Conduct, or in the Interest of National Security.....”
From the Table of Contents on page 6.
- d. Delete the entire “GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT.....23” section from the Table of Contents on page 6.
- e. Delete paragraph 3 (including all subparagraphs of paragraph 3) of Enclosure 2.
- f. Delete paragraph 2.b.(5) of Enclosure 3 on page 12.
- g. Delete “In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with Enclosure 2.” from paragraph 3.d.(1) of Enclosure 3 on page 13.
- h. Delete “homosexual conduct,” from paragraph 4.b.(2) of Enclosure 3 on page 14.

- i. Delete “homosexual conduct,” from paragraph 6.b. of Enclosure 3 on page 14.
- j. Delete “HOMOSEXUAL CONDUCT,” from paragraph 2. of Enclosure 7 on page 21.
- k. Delete paragraph 2.b.(2), including all subparagraphs (a-g), of Enclosure 7 on pages 21-22.
- l. Delete Enclosure 8 on pages 23-26.
- m. Delete the following terms and their definitions from the GLOSSARY on pages 27-29.

(1) bisexual

(2) homosexual.

(3) homosexual act.

(4) homosexual conduct.

(5) homosexual marriage or attempted marriage.

(6) propensity to engage in homosexual acts.

(7) sexual orientation.

(8) statement that a member is a homosexual or bisexual, or words to that effect.

3. CHANGES TO REFERENCE (c)

- a. Delete paragraph E2.2.8 and all subparagraphs of paragraph E2.2.8. of Enclosure 2.

4. CHANGES TO REFERENCE (d)

- a. Delete paragraph 3.2.3.1.4.

5. CHANGES TO REFERENCE (e)

- a. Delete paragraph 6.1.2.3.

- b. Delete paragraph 6.3.

6. CHANGES TO REFERENCE (f)

- a. Delete paragraph 3.2. of Enclosure 3.
- b. Revise paragraph 3.3. of Enclosure 3: delete “or E3.2.1. through E3.2.3.”

7. CHANGES TO REFERENCE (g)

- a. Delete the phrase “of the opposite sex” in paragraph E2.13.
- b. Delete both occurrences of the phrase “of the opposite sex” in paragraph E2.14.

8. CHANGES TO REFERENCE (h)

- a. Delete the phrase “of the opposite sex” in paragraph C2.1.15.2.4.
- b. Delete the phrase “of the opposite sex” in paragraph C2.1.15.2.5
- c. Delete the phrase “of the opposite sex” in paragraph AP1.2 of Appendix 1.
- d. Delete the phrase “of the opposite sex” in paragraph AP1.10 of Appendix 1.
- e. Delete both occurrences of the phrase “of the opposite sex” in paragraph AP1.11 of Appendix 1.
- f. Delete the phrase “of the opposite sex” in paragraph AP1. 22 of Appendix 1.
- g. Delete the phrase “of the opposite sex” in paragraph AP1. 39 of Appendix 1.

REPEAL OF “DON’T ASK, DON’T TELL” (DADT): QUICK REFERENCE GUIDE¹

On December 22, 2010, the President signed legislation that led to the repeal of DADT. The legislation provides that repeal would take effect 60 days after the President, Secretary, and Chairman certify to Congress that the Armed Forces are prepared to implement repeal in a manner that is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces. This certification occurred July 22, 2011, and the repeal of DADT occurred on September 20, 2011. Repeal led to some changes in policies, but many of our policies required no change as they are sexual orientation neutral. It remains the policy of DoD not to ask Service members or applicants about their sexual orientation, to treat all members with dignity and respect, and to maintain good order and discipline.

ACCESSIONS AND SEPARATIONS POLICIES

The Services will no longer separate Service members under DADT. Service members who had an approved separation date forecasted after repeal that was based solely on DADT will have that separation cancelled. The Services have ceased all pending investigations, discharges, and administrative proceedings commenced solely under DADT.

Statements about sexual orientation are no longer a bar to military service.

Former Service members discharged under DADT may apply for re-entry, and will be evaluated according to the same standards as all other applicants for re-entry. The Services will continue to use existing policy and procedures to determine the appropriate rank and time-in grade credit awarded. Time-in-service will be awarded.

STANDARDS OF CONDUCT

Existing standards of conduct continue to apply to all Service members regardless of sexual orientation. All Service members are responsible for upholding and maintaining the high standards of the U.S. military at all times and in all places.

MORAL AND RELIGIOUS CONCERNS

There are no changes regarding Service members’ exercise of religious beliefs, nor are there any changes to policies concerning the Chaplain Corps of the Military Departments and their duties. The Chaplain Corps’ First Amendment freedoms and their duty to care for all have not changed. All Service members will continue to serve with others who may hold different views and beliefs, and they will be expected to treat everyone with respect.

PERSONAL PRIVACY

The creation of separate bathroom facilities or living quarters based on sexual orientation is prohibited, and Commanders may not establish practices that physically segregate Service members according to sexual orientation. Consistent with current policy, Commanders will continue to maintain the discretion to alter berthing or billeting assignments in accordance with Service policy in the interest of maintaining morale, good order and discipline, consistent with performance of the mission.

BENEFITS

Eligibility standards for benefits remain the same as they currently are. Service members will continue to have various benefits for which they can designate beneficiaries regardless of sexual orientation, such as: Service members’ Group Life Insurance Beneficiary; Post-Vietnam-Era Veterans Assistance Program Beneficiary; Montgomery G.I. Bill Death Beneficiary; Beneficiary for Death Gratuity; Beneficiary for Final Settlement of Accounts: Deceased Members; Wounded Warrior Designated Caregiver; Thrift Savings Plan Beneficiary; and Survivor Benefit Plan Beneficiary.

The Department will continue to study eligibility standards for existing benefits to determine those, if any, that should be changed.

EQUAL OPPORTUNITY

Sexual orientation will not be considered along with race, color, religion, sex, and national origin as a class under the Military Equal Opportunity (MEO) program and will not be dealt with through the MEO complaint process. All Service members, regardless of sexual orientation, are entitled to an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible. Harassment or abuse based on sexual orientation is unacceptable and will be dealt with through command or inspector general channels.

DUTY ASSIGNMENT

There are no changes to duty assignment policies. All Service members will continue to be eligible for world-wide assignment without consideration of sexual orientation. Service members assigned to duty, or otherwise serving in countries in which homosexual conduct is prohibited or restricted, will abide by the guidance provided to them by their local commanders.

COLLECTION AND RETENTION OF SEXUAL ORIENTATION DATA

Sexual orientation is a personal and private matter. DoD components, including the Services are not authorized to request, collect, or maintain information about the sexual orientation of Service members except when it is an essential part of an otherwise appropriate investigation or other official action.

RELEASE FROM SERVICE COMMITMENTS

There will be no new policy to allow for release from service commitments for Service members who are opposed to repeal of DADT or to serving with gay and lesbian Service members.