



Center for Military Readiness — Policy Analysis —

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Congress Must Protect Defense of Marriage Act in the Military

When Congress rushed to repeal the 1993 law regarding gays in the military during the lame-duck session last December, scores of issues remained unresolved. In addition to concerns about personal privacy, religious liberty, and mandatory LGBT (lesbian, gay, bisexual, transgender) training, the thorniest issues were and continue to be marriage and family benefits for same-sex couples.

Defense Department officials have refused to provide specific enforcement regulations that the repeal legislation required. On September 12, House Armed Services Committee Chairman **Howard P. "Buck" McKeon** (R-CA) and Personnel Subcommittee Chairman **Joe Wilson** (R-SC) wrote [a stiff letter](#) asking for delay in the implementation until regulations were provided. **President Barack Obama** and the Pentagon ignored their letter—now we know why.

Twenty-four hours after final repeal of the 1993 law usually called "**Don't Ask, Don't Tell**" on September 20, Defense Department officials revealed their true intent regarding same-sex marriage. In [two policy memoranda](#), the Pentagon authorized the use of military facilities for "private ceremonies," and the option for chaplains to conduct those "functions" without official endorsement by the Defense Department.¹

Unlike an April 13 [Navy memo](#) on the same subject that sparked enormous controversy, the two recent memos, signed by DoD General Counsel **Jeh C. Johnson** and Under Secretary of Defense for Personnel and Readiness **Dr. Clifford L. Stanley**, omitted the word "marriage." In effect, the Johnson/Stanley memos are trying to slip through major change by denying that the "ceremonies" referred to in their memos are subject to the **Defense of Marriage Act (DOMA)**.

These are the same officials who promised Congress that the Defense Department would comply with the DOMA, which defines marriage as the bond between one man and one woman. That was before the administration decided to stop defending the DOMA in court in February 2011. In August, the Justice Department went even further, attacking the DOMA and asking a federal court to declare the law unconstitutional.

FOIA Documents Reveal Intent to Circumvent the DOMA

The controversial April 13 memo signed by **Rear Adm. Mark C. Tidwell**, the **Navy Chief of Chaplains**, authorized the training of chaplains to perform same-sex marriages on Navy and Marine Corps bases. When **Rep. Todd Akin** and 62 colleagues signed a letter protesting the Navy's planned violation of the DOMA, the Tidwell memo was temporarily suspended pending further review.

By means of a **Freedom of Information (FOIA)** request, the **Center for Military Readiness** and the **Thomas More Law Center** obtained Pentagon emails that provide insight into what was happening in April and early May, 2011. Jeh Johnson and other officials in charge of implementation were pressing for concurrence with the Navy's original position authorizing same-sex marriage in states where it is legal. The process apparently resulted in the

Johnson/Stanley policy memos released on September 30. ²

The two post-repeal policy memos, which do not mention marriage, present an obvious, unanswered question: *If a "private ceremony" conducted for a same-sex couple by a willing chaplain on a military base is not a marriage, what is it?*

Omission of the word "marriage" does not change the meaning of the Johnson/Stanley memos. By authorizing unofficial ceremonies that *simulate* marriage, the documents invite litigation from couples claiming the endorsement of God and the state, but not the Department of Defense. Justice Department attorneys again will ask the federal court to declare the DOMA unconstitutional, and the Department of Defense will not oppose the Justice Department in court. If the courts redefine marriage in the military, state laws will be targeted next.

Simulated "Marriage" With No Benefits

CMR has learned that a few liberal chaplains have been pressuring the Pentagon to allow "religious freedom" to bestow simple "blessings" on same-sex couples. But if the chaplain's blessings are of no consequence, why would it matter which state the "ceremony" took place in? Either the chaplain-conducted "religious ceremonies" mean something, or they don't. Military chaplains already can bestow blessings on anyone, anywhere. They can bless the troops before a battle or athletes before a football game. And they can bless two people of the same or opposite sexes, whether married or not, asking God to smile and grant them happiness.

Since there was no need to issue a memo affirming existing unofficial practices, the Pentagon seems to be inventing something new: Authorization for willing chaplains to perform *faux* marriages for same-sex couples, without the Defense Department "endorsement" that qualifies the couple for benefits. Ceremonies recognizing such partnerships would violate the purpose and intent of the DOMA and create legal disparities that threaten to redefine marriage itself.

From the perspective of the Catholic Church, a chaplain-conducted "blessing" dressed up as a religious ceremony celebrating the union of a same-sex couple would simulate the sacrament of Marriage. That would be as contrary to canon law as allowing a lay person to say Mass.

Archbishop Timothy Broglio, head of the Military Archdiocese in Washington, D.C. which endorses all Catholic chaplains, criticized the Johnson/Stanley memos: "Undersecretary Stanley cannot say, on the one hand, that chaplains may take part in any private ceremony as long as it is 'not prohibited by applicable state and local law,' and on the other, say nothing of the federal law." ³

The archbishop further noted that Catholic chaplains will not be permitted to participate in such ceremonies, which would be illegal in 29 states that have approved legislation or referenda defining traditional marriage. The Defense Department should have recognized (or not ignored) the legal and social problems that are sure to result when couples claim status and benefits in some states, but are denied them in others.

Simulated "Marriages" Won't Stop With Same-Sex Couples

The Pentagon's constant claim that all policies must be "sexual orientation-neutral" leads to a conclusion acknowledged by the **Comprehensive Review Working Group (CRWG)**, which produced a report on this subject on November 30, 2010. The CRWG said it would not recommend recognition of "committed relationships" because such relationships would, in themselves, create a new inequity with unmarried opposite-sex couples, who would demand the same privileges. ⁴ (CRWG Report, pp. 142-146)

What the 112th Congress Can Do

The only way to protect traditional marriage in the military is to enact as law [two amendments](#) to the **National Defense Authorization** bill sponsored by Missouri Republicans Todd Akin and **Vicky Hartzler**, which affirm congressional intent regarding marriage. Two additional amendments in the **Defense Appropriations** bill, sponsored by Representatives **Virginia Foxx** (R-NC), **Dan Burton** (R-IN), and **Tim Huelskamp** (R-KS), would bar funding or training for same-sex marriages in the military. ⁵

To his credit, House Armed Services Committee Chairman "Buck" McKeon has announced that he will not cooperate with the administration in passing the Defense Authorization bill if House-passed amendments to protect the definition of marriage in the military are not retained in the final legislation. ⁶ Chairman McKeon deserves support now and in the coming months if more action is needed to deal with the administration's chameleon policies.

Congress should not allow administration officials to keep changing the definition and character of marriage in the military, in order to fulfill President Obama's political promises to LGBT activists. Before the administration implements flawed social policies that weaken marriage, divide the chaplain corps, impose incalculable costs, and undermine military culture and morale, members of Congress need to assert their constitutional right to make policy for the armed forces.

1. In his September 21 memo, DoD General Counsel Jeh Johnson ordered that "determinations regarding use of DoD real property and facilities for private functions, including religious and other ceremonies, should be made on a sexual-orientation neutral basis, provided such use is not prohibited by applicable state and local laws." He added, "the act of making DoD property available for private functions, including religious and other activities, does not constitute an endorsement of the activities by DoD."

A second memo signed on September 30 by Clifford L. Stanley, Undersecretary of Defense for Personnel & Readiness, said that "A military chaplain may participate in or officiate any private ceremony, whether on or off a military installation, provided that the ceremony is not prohibited by applicable state and local law. Further, a chaplain is not required to participate in or officiate a private ceremony if doing so would be in variance with the tenets of his or her religion or personal beliefs."

Both memos specifically said they were written in the context of congressional action to repeal Section 654, Title 10, USC, (called "Don't Ask, Don't Tell,") which President Obama finalized on September. 20, 2011.

2. AP, "[US Military Chaplains May Perform Same-Sex Unions,](#)"

3. CNS News: "[No Same-Sex Weddings West Point's Catholic Chapel Says Military Archdiocese](#)"

4. [CRWG Report](#), pp. 142-146. The panel, co-chaired by DoD General Counsel Jeh Johnson, recommended that same-sex "committed relationships" not be added to the definition of "dependent," family member," or other similar terms, for purposes of eligibility for benefits. The report also recommended but that the issue be "revisited" after repeal.

5. "[House Acts to Mitigate the Consequences of LGBT Law in the Military,](#)" available at www.cmrlink.org.

6. *Politico*: "[Buck McKeon: No Defense Bill Without Gay Marriage Ban, Detainee Provisions](#)"



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