

## Foxx-Burton Amendment re Defense Funds and the DOMA

**“No funds under the act may be used for activities in contravention of Public Law 104-199, the Defense of Marriage Act.”**

**Purpose:** Indications are that some activities within the Department of Defense may be at risk of violating the Defense of Marriage Act (DOMA). Many issues still need to be addressed with regard to the DADT repeal, but all can agree that we have laws in this country that need to be enforced; no funds should be used to violate our laws. The proposed amendment simply expresses the intent of Congress that in all military policies, regulations, programs, and matters involving benefits, funds may not be used for activities in contravention of the Defense of Marriage Act.

### **Background and Overview:**

The Department of Defense keeps insisting that same-sex couples will not be eligible for military housing and other benefits because of the existence of the Defense of Marriage Act (DOMA), which protects the right of individual states to define marriage as the union of a man and a woman. Legislation to repeal the 1993 law regarding homosexual in the military, usually called “Don’t Ask, Don’t Tell,” reflects these assurances. The repeal legislation states that passage would not require *“the furnishing of benefits in violation of section 7 of title 1, United States Code (relating to the definitions of ‘marriage’ and ‘spouse’ and referred to as the ‘Defense of Marriage Act.’)”*

The situation has changed significantly, however, since the 111<sup>th</sup> Congress approved the repeal bill in December 2010. In February 2011 Attorney General Eric Holder announced that the Department of Justice would no longer defend the DOMA in federal court. The House of Representatives has announced its intent to continue legal defense of the statute, but the outcome of litigation challenging the constitutionality of the DOMA is by no means certain.

The proposed amendment would reaffirm Congress’ expectation that funds shall not be used for benefits, such as housing, education, medical services, transportation, etc., for same-sex couples on the same basis as opposite-sex married couples.

1. The Department of the Navy has already demonstrated how pressures to accommodate same-sex couples can quickly lead to incremental policies that are “consistent” but contrary to previous assurances given with regard to the Defense of Marriage Act.

- In an April 13, 2011, memo, “Revision of Chaplain Corps Tier 1 Training,” the Office of the Chief of Navy Chaplains directed that training be revised to accommodate same-sex marriages on military bases that are located in states where same sex-marriage is legal.
- The memo stated, *“This is a change to previous training that stated same-sex marriages are not authorized on federal property.”*
- The Navy memo’s revision, issued even *before* certification and implementation of the repeal legislation, was a logical but unacceptable interpretation of the mandate to make policies *“sexual orientation neutral.”*
- The memo further authorized the participation of a military chaplain in a same-sex, civil marriage, *“if it is conducted in accordance with the laws of a state which permits same-sex marriages or union,”* and if the chaplain is otherwise certified to officiate. The memo’s

claim that “*this is not a change*” calls into question the intent of the Department of Defense with regard to compliance with the existing Defense of Marriage Act.

2. Even before the administration announced that it would discontinue legal defense of the DOMA, the DoD Comprehensive Review Working Group (CRWG) report noted the “*evolving legal landscape*” and suggested bureaucratic redefinitions to circumvent the DOMA. (CRWG Report, p. 143, and IP, p. 41)

- During his December 2010 testimony before the Senate Armed Services Committee, Defense Secretary Robert Gates expressed concern about the cost of extending various family benefits to same-sex couples and their dependents.
- Defense Department accommodation of same-sex marriage and funding for associated benefits would defy strong public opinion, expressed by voters in more than 30 states who supported the definition of marriage as the exclusive union of one man and one woman. (IP, pp. 54-55)

3. Activist lawyers and judges are sure to challenge inconsistencies in marriage status, which involve housing, medical, education, transportation, and other family benefits.

- For example, a same-sex couple married in Massachusetts but denied military family housing is likely to file litigation using the same legal analysis recently adopted by the administration. Absent congressional guidance, it is not likely that the administration would permit a Defense Department defense of policies that reserve marriage benefits for opposite-sex married couples. The resolution of such a dispute would interject the courts into policy matters that Congress should decide.
- The DoD has said that it will continue to enforce the DOMA, but this is a technicality involving such things as income tax filings that are different for couples filing jointly.
- One of the vignettes in the tiered training program suggests that a same-sex couple would be authorized to live on-base in married housing if they have an adopted child. This extension of existing policy regarding single parents would encourage more incremental changes in policy that run contrary to the expectations of Congress.

It is not enough for the Department of Defense to dismiss all concerns about this and many other issues involving marriage status and benefits by pointing to the existence of the DOMA. There is no contingency “Plan B” to deal with this issue if federal courts invalidate that law. Indeed, the administration is inviting that possibility. Possible court orders could suddenly overturn current policies of the Department of Defense, which is not likely to resist or oppose potential court orders or directives that disregard the intent of the Defense of Marriage Act.

Congress should establish policy guidance on this issue that covers numerous contingencies and unexpected situations in the future. Given the potentially enormous cost of extending marriage benefits to same-sex couples and their dependents, Congress can and should enact a policy making it clear that Defense Department funds should not be used in ways that violate federal law: the Defense of Marriage Act.

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