

December 7, 2011

The Honorable Carl Levin  
Chairman  
Senate Armed Services Committee

The Honorable Adam Smith  
Ranking Member  
House Armed Services Committee



RE: Conference Report on the National Defense Authorization Act

Dear Chairman Levin and Ranking Member Smith:

As the House and Senate work on the conference report of the National Defense Authorization Act, H.R. 1540 and S. 1867, please find below the recommendations by the Servicemembers Legal Defense Network.

#### **Provisions in the House Bill**

SLDN urges the conferees to drop sections 533-535 of H.R. 1540 as unnecessary or ill-conceived.

Section 533 adds the Joint Chiefs of Staff to the certification process that has already occurred to repeal the Don't Ask, Don't Tell law (10 U.S.C. § 654). As this process has been completed and the law repealed, this section is moot and unneeded. It should not be included in the final conference report.

Section 534 is a restatement of the Defense of Marriage Act (DOMA), as it pertains to the Department of Defense (DoD). It is redundant and unneeded and should not be included.

Section 535 would prohibit military chaplains, other members of the armed services, and civilian employees of DoD from participating in any marriage ceremony that is not opposite-sex. This is an extreme case of congressional micro-management of DoD, would be an expansion of the DOMA, and would restrict chaplains' free exercise of their religion.

In policy memos from the DoD General Counsel Jeh Johnson and Undersecretary for Personnel and Readiness Dr. Stanley, DoD has stated that a military chaplain is allowed to perform any lawful ceremony that is consistent with his or her beliefs and is not required to perform a ceremony that is inconsistent with those beliefs. These guidelines also make plain that access to military facilities is granted on a sexual-orientation-neutral basis. The guidance strikes the right balance between respecting the faith traditions of chaplains and affording all service members the same rights under current law.

While section 3 of DOMA is unfair and discriminatory, it's approach is limited. It does not make same-sex marriages illegal, nor does it restrict what individual Americans may legally do. It simply says:

"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 husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

DOMA only interprets federal laws and regulations, it does not attempt to control the conduct of individuals, even federal employees. As the memos by Dr. Stanley and Mr. Johnson spell out: "private functions are not official activities of the Department of Defense" and "a military chaplain's participation in a private ceremony does not constitute an endorsement of the ceremony by Department of Defense".

Finally, section 535 interferes with the religious activities of military chaplains by prohibiting them from performing (or even assisting in) a same-sex ceremony that is permitted by their faith's tenets.

### Provisions in the Senate Bill

Section 527 of S. 1867 restates what has long been armed forces policy — that military chaplains are not required to perform a marriage ceremony that is contrary to their conscience or moral principles. This policy was reiterated less than three months ago. As such, it is unnecessary, but SLDN does not object to its inclusion in the conference report.

SLDN urges the conferees to adopt the provision of the Senate bill that repeals Article 125 of the Uniform Code of Military Justice (S. 1867, § 551(d)).

Article 125 makes "unnatural carnal copulation" a crime in the U.S. armed services. The statute expressly states that the activity is prohibited whether with a "person of the same or opposite sex". The Manual for Courts-Martial explains that "unnatural carnal copulation" includes oral or anal sex.

The Commission on the 50th Anniversary of the Uniform Code of Military Justice, informally known as the Cox Commission, was established in 2000 to review the UCMJ and suggest changes to it. The Commission was headed by a former chief judge of the Court of Appeals for the Armed Forces and included retired officers and a law professor. After taking testimony and receiving submissions, the Commission concluded that it "concur[s] with the majority of these assessments in recommending that consensual sodomy and adultery be eliminated as separate offenses in the UCMJ and the Manual for Courts-Martial." The Commission went on to note

"the well-known fact that most adulterous or sodomitical acts committed by consenting and often married (to each other) military personnel are not prosecuted at court-martial creates a powerful perception that prosecution of this sexual behavior is treated in an arbitrary, even vindictive, manner. This perception has been at the core of the military sex scandals of the last decade."

The Commission on Military Justice issued a subsequent report in October 2009. It reiterated the conclusion of the Cox Commission:

"Because of [the 2007 changes to the sex crimes provisions of the UCMJ], and in light of the changes in sexual behavior that have occurred since the creation of the UCMJ, there is no need for a separate provision making sodomy a military crime."

The Commission also noted the 2003 Supreme Court decision in *Lawrence v. Texas* which held unconstitutional a state law that criminalized consensual sodomy between consenting adults. Military courts have followed *Lawrence* unless there "are there additional factors relevant solely in the military environment" that bring the case outside the protection of *Lawrence*.

The Secretary of Defense charged a Joint Services Committee on Military Justice to conduct an annual review of the UCMJ and to propose any amendments necessary to ensure that the UCMJ fulfills its purpose as a comprehensive body of military criminal law. This year's recommendations included the repeal of Article 125. The JSC explained,

"Offenses currently falling under Article 125 will be subsumed into other UCMJ provisions. All offenses currently constitutionally punishable under Article 125 will continue to be punishable under the proposals in the complete package for Articles 120, 120b and 134."

There is no reason, therefore, to retain Article 125 and many reasons to repeal it.

Sincerely,



Aubrey Sarvis  
SLDN Executive Director

CC: White House  
Department of Defense