Commentary & Reply

Military Justice is Alive and Well

Ari Ezra Waldman

This commentary is in response to Dr. William J. Gregor's article "The Death of Military Justice" published in the Autumn 2010 issue of Parameters *(vol. 40, no. 3).*

In his article, "The Death of Military Justice,"[1] Dr. William J. Gregor argues that the repeal of 10 U.S.C. § 654, commonly known as "Don't Ask, Don't Tell" (DADT), will result in a lack of military discipline, an increase in challenges to the jurisdiction of the Uniform Code of Military Justice (UCMJ), and the all-around breakdown of military justice as we know it. He makes this faulty argument by asserting two related fatal mistakes. First, he erroneously assumes that when Congress repealed the discriminatory DADT law, it was also rejecting all of the appended findings of fact. That is simply not the case. Congress was only casting aside those that called for discrimination against gay servicemembers. Second, Dr. Gregor incorrectly assumes that Congress had to reject basic principles of military justice in order to let gay and lesbian servicemembers be honest about their sexuality. Not so. Dr. Gregor sees the repeal of DADT as bringing a military justice apocalypse because he sees homosexuality as incompatible with honorable military service, but President Obama and Congress disagree. Congress did not reject the central premises of military law when it repealed DADT; rather, broad Congressional majorities concluded that being gay is no more incompatible with military service than being left- or right-handed and that being honest about who you are comports with American military values of honor, service, and trust. That Dr. Gregor cannot see that is unfortunate; that he blindly shouts alarmist rhetoric is dangerous.

On 22 December 2010, President Obama signed legislation that set in motion the end of DADT, stating that "[n]o longer will tens of thousands of Americans in uniform be asked to live a lie, or look over their shoulder in order to serve the country that they love."[2] While ultimate repeal is contingent upon certification from military leaders, the ease and professionalism with which training is progressing means that certification could come as early as this summer.[3] Large majorities of servicemembers saw repeal as either irrelevant to their ability to serve or long overdue, given how many gays and lesbians have already served. As Clifford Stanley, the Undersecretary of Defense for Personnel and Readiness, told a House Armed Services subcommittee, implementing repeal and allowing gay and lesbian servicemembers to stop hiding is

Ari Ezra Waldman—J.D., Harvard Law School, '05; A.B., Harvard College, magna cum laude, '02—is on the faculty at California Western School of Law in San Diego, California. He teaches Military Criminal Justice and Cyberlaw. In addition to writing on military law, Professor Waldman has published scholarly articles on the First Amendment and modern technology.

about "respect for the men and women of our all-volunteer force to serve this great nation, no matter their race, color, creed, religion or sexual orientation."[4]

And yet that respect—for Congress, military law, and gay and lesbian servicemembers—is absent from Dr. Gregor's false controversy. He has two arguments, both of which misunderstand the causes for and effects of the DADT repeal and are premised on the same faulty and offensive assumption that you cannot be gay and serve your country. In his first argument, Dr. Gregor contends that repeal not only changes the law with respect to gays in the military, but also upends the findings Congress appended to Section 654 in 1993. This means "that military courts will no longer be able to rely on those" findings, particularly the uniqueness of military life, the universal application of military law to servicemembers and lack of a right to join the military, "as guides for the governance of the armed forces."[5] That argument has no merit for four reasons.

First, even accepting the premise, the argument is illogical. Congress appended fifteen findings to Section 654 that tell the story behind DADT. The findings remind us that Congressional power over the armed forces emanates from Art. I, Sec. 8 of the Constitution (Finding 1) and because there is no right to serve in the military (Finding 2), Congress can set qualifications for military service as it sees fit (Finding 3). Because the primary purpose of the military is to fight and win wars (Finding 4), requiring servicemembers to make great sacrifices for the good of the nation (Finding 5), high morale, good order and discipline, and unit cohesion are essential for military readiness (Findings 6 and 7). Military life is also fundamentally different from civilian life (Finding 8), necessitating unique laws and codes of conduct that apply to every servicemember all the time no matter where he or she may be (Findings 9, 10, and 11). The uniqueness of military life often forces servicemembers into close quarters with little or no privacy (Finding 12) and, given that, Congress felt that the longstanding ban on gays in the military (Finding 13) made sense given its belief that the presence of gay men and women would disrupt unit cohesion (Findings 14 and 15).[6]

Dr. Gregor only seems concerned with a few of these fifteen findings—that military life is fundamentally different from civilian life, that military law applies to the servicemember's entire life and that there is no right to serve—but if his argument that repealing DADT upends these principles makes any sense, repeal of Section 654 would have to mean the death of all fifteen findings, not just a random five Dr. Gregor considers most important. Seen in that way, Dr. Gregor's argument fails the laugh test. Even after gays and lesbians can serve openly, Congressional power over the military will still come from Art. I, Sec. 8; Congress will still have the power to set, say, minimum age and fitness requirements for service; the purpose of the American military will still be to fight in combat; and all servicemembers will still be required to make sacrifices for the common good.

Second, the legislative process simply does not work the way Dr. Gregor would have us believe. There are nearly 1,000 statutes in which Congress explicitly laid out its "findings and purposes" and included them in the United

States Code,[7] and there are thousands of other findings and purposes behind legislation peppering the legislative histories of our public laws. If Dr. Gregor's theory of legislation was correct, then every time one of these statutes was amended or repealed, the original findings and purposes could no longer apply.

Yet, to change or repeal a law does not necessarily mean rejecting all the animating factors behind that law, just those that are antiquated, wrong, or no longer apply. And, that is what Congress did when it repealed DADT. By allowing gays and lesbians to be as honest about themselves as their straight comrades, Congress has stated that Finding 13—"The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service"—and Finding 15—"The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability"—no longer reflect good policy. Congress has not rejected its own ability to set valid barriers to military service; rather, it has said that being gay is simply not one of them. Nor has Congress dismissed the salient role of honor, unit cohesion, and good order and discipline in maintaining an effective fighting force; rather, it has said that being gay is simply irrelevant to a servicemember's ability to uphold those values. And, Congress has not created a right to serve in the military; rather, it has said that being gay is no reason to disqualify an otherwise qualified applicant.

Third, formal or informal Congressional findings are not as important to the validity and applicability of laws as Dr. Gregor suggests. In *United States v. Lopez,* for example, the Supreme Court struck down the Gun-Free School Zone Act of 1990 as outside Congress's power under the Commerce Clause. The Fifth Circuit had declared the law unconstitutional based, in part, on Congress's failure to justify its actions with specific findings. The appellate court concluded that "[w]here Congress has made findings, formal or informal . . . , the courts must defer 'if there is any rational basis for' the finding. Practically speaking, such findings almost always end the matter."[8] The Supreme Court rejected this view, striking down the law despite caring little about the lack of specific findings and stating that "Congress normally is not required to make formal findings. . . . But to the extent that congressional findings would enable us to evaluate [Congress's] legislative judgment . . . , they are lacking here."[9] If, as the *Lopez* Court's ambivalence suggests, the presence or absence of Congressional findings will not determine the validity of the law at issue, it seems incomprehensible for Dr. Gregor to argue that the alleged rejection of particular findings in Section 654 could undermine the applicability of unrelated laws and principles.

And fourth, the findings on which Dr. Gregor focuses are general and universally applicable outside the DADT context. All of those findings are alive and well in countless other areas of military law and will remain undisturbed long after this controversy becomes a footnote of history. The uniqueness of military life, for example, has always been a bedrock principle of military law.

For example, in his seminal book, *Justice Under Fire*, Professor Joseph W. Bishop defended the need for a separate military justice system with an historical view of any military's exceptionalism: militaries have always needed a criminal justice system that was "swift" and "certain" to maintain the discipline that civilian leaders needed in their militaries; the presence and responsibilities of a commander, who has no civilian counterpart, mandates that he or she be given special powers over criminal justice; there have always been crimes, like AWOL, desertion, missing movements, that are essential to military readiness but have no cousin in civilian life; and, servicemembers have ample opportunity to commit crimes abroad where national courts cannot reach.[10]

The Supreme Court's similar assessment in *Parker v. Levy* that the military is "a specialized society separate from civilian society"[11] has been cited no less than fifty-five times since 1974 in varied cases on divergent subjects[12] and the principle has been applied more than 280 times at every level of the federal courts.[13] At a minimum, this shows how pervasive and relevant the principle is in military law. What's more, the unique nature of military service and military society is the rationale behind granting extreme deference to Congress and the military when it comes to military policy.[14] As the Fifth Circuit noted in *Mindes v. Seaman*, judicial fear about interfering with the military has created an unwillingness to second-guess judgments requiring military expertise and a reluctance to substitute court orders for discretionary military decisions because of "the proper concern that such review might stultify the military in the performance of its vital mission."[15] This deference based on specialized knowledge, experience, and mission is not going anywhere in a post-DADT world.

The uniqueness of military society is also the reason we distinguish between servicemember and civilian rights in a host of areas, such as free speech and the free exercise of religion. In *United States v. Wilson*,[16] for example, the then-Army Court of Military Review held that a military policeman on flag-raising detail had no First Amendment right to blow his nose on the American flag. Even though such expressive conduct may have been permissible in civilian society, "the needs of the armed forces may warrant regulation of conduct that would not be justified in the civilian community."[17] And, in *United States v. Burry*,[18] the Coast Guard court denied the right of a cook to refrain from working on the Sabbath in accordance with his religious beliefs because "[t]o the extent that a military man's freedom of conduct in practicing his religion is curtailed by the demand that he obey proper orders, that curtailment is a permissible result" of rules necessary for a disciplined and effective fighting force.[19] It is hard to imagine how allowing gay and lesbian servicemembers to be honest about who they are could have allowed Private Wilson to desecrate the flag or allowed Burry to let his crewmates starve. Yet, that is precisely Dr. Gregor's argument when he states that military courts will no longer be able to rely on the principle that the military is a specialized society with unique rules that may restrict personal freedom.

Similarly, the principle that there is no right to serve has long been part of federal law. In *Nieszner v. Mark*, for example, the Eighth Circuit affirmed the dismissal of an age discrimination claim of an Air Force technical sergeant in part because the servicemember had no right to his position.[20] The same principle underscored the decision in *Thomsen v. Department of the Treasury*, where the Federal Circuit dismissed a Secret Service agent's Uniformed Services Employment and Reemployment Rights Act claim that the Treasury Department denied him the right to serve in the Army Reserves because there is no right to serve in the armed forces.[21] Contrary to Dr. Gregor's implication, gays and lesbians are not asking for a special right to serve. They, like African-Americans, Jews, and people with green eyes and red hair, are asking not to be disqualified from doing so simply because of a characteristic over which they have no control and is irrelevant to their ability to fight and serve their country with honor.

When it comes to the 24/7 application of the UCMJ to servicemembers, Dr. Gregor's argument is, at best, incomprehensible, and worst, based on faulty assumptions. He makes a bald assertion that allowing gays to serve openly means that Congress overturned *Solorio v. United States*.[22] In that case, the Supreme Court held that military status is sufficient to subject a servicemember to military jurisdiction[23] and overturned the rule of *O'Callahan v. Parker*,[24] which subjected a servicemember to the UCMJ only if the offense was service connected or occurred where there was no federal or state civilian court.[25] Even assuming that *Solorio* is the optimal rule for jurisdiction, the argument makes little sense. Dr. Gregor states that since "the findings in Solorio are found in Section 654, the Congress, by rescinding it, affirmatively removes military status as the sole basis for jurisdiction." As discussed above, that statement represents a basic and fundamental misunderstanding of how the law works. Solorio rested on an "unbroken line of decisions from 1866 to 1960" holding that "the proper exercise of court-martial jurisdiction over an offense" rested "on one factor: the military status of the accused."[26] Any suggestion that repealing DADT upsets that long legal tradition is incomprehensible.

That is, unless you assume that being gay is criminal in the military. Only if you maintain that being gay and being honest about it is incompatible with honorable military service can you conclude that open service means a return to the duality of O'Callahan. O'Callahan separated civilian behavior from military behavior, or behavior not subject to the UCMJ and behavior captured by the UCMJ's punitive articles. Since Dr. Gregor believes that being gay is incompatible with military law, allowing gays to serve openly must mean that Congress is carving out a nonmilitary persona for gay servicemembers. Not so. Congress is not creating an exception to the *Solorio* rule of UCMJ jurisdiction; rather, Congress is saying that in a world governed by *Solorio*, being gay is not criminal and neither grounds for dismissal nor even relevant to the military.

What's more, Congress's trend has been to expand the reach of military justice, not shrink it, suggesting that the jurisdiction of the UCMJ is in no danger with the repeal of DADT. Article 2(a)(10), UCMJ,[27] for example, was

recently amended by § 552 of the National Defense Authorization Act for Fiscal Year 2007 to expand UCMJ jurisdiction to times "of declared war or a contingency operation, [over] persons serving with or accompanying an armed force in the field."[28] And, Congress passed the Military Extraterritorial Jurisdiction Act to reach persons overseas who are "employed by or accompanying the armed forces" that commit crimes that would otherwise be a felony if committed in the special maritime and territorial jurisdiction of the United States.[29] If anything, then, military scholars should be worried about too much military justice jurisdiction rather than Dr. Gregor's groundless claims of an erosion of jurisdiction.

In fact, the only way in which Dr. Gregor's argument makes sense is if you assume that being gay makes you incapable of serving your country honorably. This is also essential to his second argument: that repeal of DADT requires a rejection of basic principles of military justice. You have to assume that gay servicemembers cannot control themselves around their fellow soldiers, that they care more about themselves than serving their country, and that open service is nothing more than an invitation to gay sex in the barracks. Of course, such assumptions are the stuff of insidious stereotypes, worse than the hair-brained chatter of irresponsible frivolity and out of place in intelligent discourse.

Dr. Gregor ignores this reality and argues that "[t]hose who have championed the lifting of the ban on homosexuals have argued that none of these dimensions"—military uniqueness, universal jurisdiction of military law, and Congress's power to exclude persons from military service—"is required to establish an effective military organization." That is neither what advocates of repeal nor overwhelming Congressional majorities have argued. Rather, Congress and the President made clear that being gay is compatible with these values and does no damage to these "dimensions" of military justice. In fact, it is the forced denial of the basic humanity of gay and lesbian servicemembers that is incompatible with basic principles of military justice.

The Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" ("Pentagon Report" or "Report") makes this clear. The purpose of the report was to determine the impact of repealing DADT on "military readiness, military effectiveness and unit cohesion,"[30] thus proving that military discipline and unit cohesion remain the military's fundamental goals. The need for good order and discipline is reaffirmed on 149 of the Report's 266 pages and the Report ultimately concludes that allowing gays to serve openly will have no negative effect on this or any other military value.[31] Indeed, the Report notes that allowing gays to serve openly would have no effect on military readiness as long as good order and discipline is maintained. Dr. Gregor sees that as a contradiction in terms; to him, allowing gays to be honest about who they are disrupts order and erodes discipline. Unfortunately for Dr. Gregor, Congress, the President, and vast majorities of the military and civilian populations disagree.

The only time servicemembers voiced concerns about unit cohesion, order, and discipline was when they fell back on stereotypes of effeminate men, unwanted sexual advances, and inappropriate displays of affection.[32] But, continued discrimination that is, at best, pointless and, at worst, deleterious to the military's mission cannot be based on the prejudices of the ill informed. As a result, the Report found no need for special new standards of conduct to guard against behavior that could be an affront to unit cohesion and good order and discipline because the Pentagon realized that being gay is no more synonymous with inappropriate sexual behavior than being straight is.[33]

Most servicemembers agree. Of those surveyed who believe they have served alongside a gay and lesbian servicemember, 92 percent found that the unit's ability to work together was "very good," "good," or irrelevant to a servicemember's sexual orientation.[34] And 70 percent of all respondents felt that having an openly gay servicemember in their immediate unit would have either a positive or no effect on the unit's ability "to work together to get the job done."[35] Independent studies have shown similar results, concluding that knowing a gay and lesbian unit member has no bearing on unit cohesion[36] and that being honest about one's sexual orientation correlates positively with unit cohesion.[37]

All this proves that the central values underlying military justice—the need for unit cohesion, the importance of good order and discipline, the primacy of military readiness and Congress's power to make rules of governing the military—will be left untouched by the repeal of DADT. In fact, the only principle rejected by repealing DADT is that being gay is incompatible with honorable military service. And, the only expected change to the UCMJ is the overdue repeal of Article 125. Article 125 criminalizes sodomy in the military, but after the Supreme Court declared anti-sodomy laws unconstitutional in *Lawrence v. Texas*[38] and the Court of Appeals for the Armed Forces limited the reach of Article 125 to acts of sodomy with various aggravating factors in *United States v. Marcum*,[39] criminalizing private, consensual sodomy is out of place in military law. Any sexual conduct that is not private or not consensual would fall under the new Article 120 or under Articles 133 and 134.[40]

Dr. Gregor resists this, writing in a paragraph about sexual conduct that "[t]here is no doubt that following the rescission of Section 654 many servicemembers will claim their individual rights are protected from military rules."[41] If he is talking about the liberty interest in intimate association that has nothing to do with a servicemember's ability to perform his duties, then Dr. Gregor and I agree. Engaging in private, consensual sodomy is no more an *a priori* affront to military discipline than engaging in private, consensual vaginal intercourse.

But it is clear that this principle—the inherent irrelevance of one's sexual orientation to military service—is not part of Dr. Gregor's worldview. In his testimony before the House Armed Services Committee in May 1993, Dr. Gregor wanted to keep the ban on gays in the military and allow recruiters to ask about a recruit's sexual orientation. His testimony was based on the same ill-informed and erroneous stereotypes of gay men that the Pentagon

Report roundly rejected. He stated that allowing gay servicemembers to hide their identity would make commanders "unable to . . . prevent conditions that are likely to lead to disorder" and that "incidents can be expected" when gay servicemembers "make open proposition and openly exhibit[] their desires and interests."[42] He said that allowing gays to serve anonymously would make "maintaining the integrity of the blood supply . . . more difficult" and worried about "soldier[s] appear[ing] for treatment of a sexually transmitted disease."[43] These statements are nothing more than antiseptic euphemisms for groundless fears of rampant sexual encounters and fears of HIV, two insidious stereotypes of gay men. He flatly stated that sodomy is "indecent," compared being honest about your sexuality with drug abuse,[44] cited anonymous studies about the "troubled" young gay population,[45] and called homosexuality a "psychosexual condition[]" that "limits [gays'] ability to adapt to military life."[46]

It should come as no surprise, then, that Dr. Gregor turns alarmist upon the impending repeal of DADT. He paints a scary portrait of a universe in which *Solorio* does not exist and where *Parker v. Levy* was decided differently. Yet the fact remains that *Solorio* and Article 2, UCMJ, still exist, Dr. Levy got what he deserved, and the end of a discriminatory ban on honesty will improve unit cohesion, good order and discipline, and military readiness. Despite the rancor associated with the repeal of DADT, allowing gays and lesbians to be honest about who they are will have little to no effect on the American military. The Pentagon Report recognizes that most gay and lesbian servicemembers would still keep their private lives private, much like anyone in the workplace,[47] and most agree that a small percentage of gay servicemembers will actually come out after the end of DADT. To suggest that this will destroy military justice is truly an empty vessel making the greatest sound.

Notes

1. William J. Gregor, "The Death of Military Justice," *Parameters* 40, no. 3 (Autumn 2010): 6.
2. Associated Press, "Obama Signs Repeal of Don't Ask, Don't Tell," *MSNBC.com*, December 22, 2010, http://www.msnbc.msn.com/id/40777922/ns/politics-white_house/t/obama-signs-repeal-dont-ask-dont-tell/.
3. Chris Johnson, "'Don't Ask' Repeal Could Be Certified Mid-Summer," *Washington Blade*, April 2, 2011, http://www.washingtonblade.com/2011/04/02/dont-ask-repeal-could-be-certified-mid-summer.
4. Associated Press, "Defense Department: Don't Ask, Don't Tell Repeal Training Done by Summer's End," *Fox News.com*, April 1, 2011, http://www.foxnews.com/politics/2011/04/01/defense-department-dont-ask-dont-tell-repeal-training-summers-end/#ixzz1LmMFlzXe .
5. Gregor, 7.
6. 10 U.S.C. § 654(a) (2011).
7. Results of a Westlaw search in the unannotated "United States Code" directory for the terms "finding! +4 purpose!".
8. United States v. Lopez, 2 F.3d 1342, 1363-64 (5th Cir. 1993).
9. United States v. Lopez, 514 U.S. 549, 562-63 (1995).
10. Joseph W. Bishop, *Justice Under Fire: A Study of Military Law* (New York: Charterhouse, 1974), 21-25.
11. 417 U.S. 733, 743 (1974).

12. Results of a Westlaw Keycite search of the relevant language.

13. See, e.g., Weiss v. United States, 510 U.S. 163, 174 (1994); Chappell v. Wallace, 462 U.S. 296, 301 (1983); See also Westlaw search in "AllFeds" database "MILITARY /5 SPECIAL! +5 COMMUNITY SOCIETY."

14. See, e.g., Loving v. United States, 517 U.S. 748, 778 (1996) (courts grant extreme deference to Congress when assessing the rationality of military policy given the unique nature of the military mission and the executive and legislative power over that mission).

15. 453 F.2d 197, 199 (5th Cir. 1971).

16. 33 M.J. 797 (A.C.M.R. 1991).

17. Ibid., 799.

18. 36 C.M.R. 829 (C.G.B.R. 1966).

19. Ibid., 831.

20. 684 F.2d 562, 564 (8th Cir. 1982).

21. 169 F.3d 1378, 1381 (Fed. Cir. 1999).

22. 483 U.S. 435 (1987).

23. Ibid., 435.

24. 395 U.S. 258 (1969).

25. Ibid., 272-73.

26. *Solorio v. United States*, 483 U.S., 439.

27. 10 U.S.C. §802(a)(10) (2009).

28. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2217 (2006).

29. 18 U.S.C. § 3261.

30. United States Department of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell,"* November 30, 2010, 1.

31. Ibid., 3.

32. Ibid., 5, 102, 122.

33. Ibid, 133-34.

34. Ibid., 4.

35. Ibid., 3.

36. Bonnie Moradi and Laura Miller, "Attitudes of Iraq and Afghanistan War Veterans Toward Gay and Lesbian Service Members," *Armed Forces & Society* XX(X) (October 29,2009): 1-23. http://www.palmcenter.org/files/active/0/randstudy(3).pdf (shows that knowing a gay or lesbian unit member has no bearing on the unit's cohesion, concluding that "the data indicated no associations between knowing a lesbian or gay unit member and ratings of perceived unit cohesion or readiness").

37. Bonnie Moradi, "Sexual Orientation Disclosure, Concealment, Harassment and Military Cohesion: Perceptions of LGBT Military Veterans," *Military Psychology* 21, no. 4 (October 2009): 513-533 (finding that sexual orientation disclosure is positively related to unit cohesion, while concealment and harassment are related negatively, meaning they appear to reduce cohesion).

38. 539 U.S. 558 (2003).

39. 60 M.J. 198 (C.A.A.F. 2004).

40. United States Department of Defense, *Report of the Comprehensive Review*, 139.

41. Gregor, 9.

42. H.A.S.C. No. 103-18, *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the Committee on Armed Services House of Representatives,* 103rd Cong, 1st Sess (May 4-5, 1993) (statement of Dr. William J. Gregor, U.S. Army (Retired)), 263.

43. Ibid.

44. Ibid., 263-64.

45. Ibid., 296.

46. Ibid., 306.

47. United States Department of Defense, *Report of the Comprehensive Review*, (need pg number).

The Author Replies

William J. Gregor

In "The Death of Military Justice," I set out to review the basic principles that define military order and to bring to the attention of military commanders and the public the importance of maintaining that order. The review of major military law cases during the period 1969 to 1987 and comparisons to incidents in the military since enactment of Section 654 are illustrations of the willingness of military and civilian courts, members of Congress, and commanders to either ignore or set aside those principles. The findings listed in Section 654 provided the clearest expression of those principles and confirmed that a majority of Congress in 1993 supported them. In light of current disorders within the military, I lament that Congress did not hold hearings to review and reaffirm those findings. However, I made a significant error when I asserted that removal of those findings removed those principles from law. My statement, "Repealing those findings will mean that military courts will no longer be able to rely on those legal precedents . . ." is simply not correct. Courts will be able to reference those precedents and the removal of the findings from statute cannot be construed as a decision by Congress to set those principles aside. I regret that error because it has enabled critics of my position to dismiss my argument entirely. My argument is not founded on that observation. I also take no comfort in Mr. Ari Ezra Waldman's statement that the courts are committed to maintaining the principles manifest in those findings, as I will soon explain. Although I regret my error, I would like to observe that the error was far less egregious and will have far less effect than the error made by Justice William O. Douglas and four learned colleagues in 1969 and it will take me less than 18 years to correct.

Mr. Waldman's commentary mixes technical legal comment with personal policy preferences and a variety of conjectures about my motives and worldview. I think it fair, however, to infer from his interpretation of what Congress meant by the repeal of Section 654 and his enthusiasm for applying *Lawrence vs. Texas* to the military that he is more concerned with the rights of servicemembers, homosexual or otherwise, than he is with the maintenance of order. General Martin Dempsey, the new Army Chief of Staff and soon to be Chairman of the Joint Chiefs of Staff, sent a message to the Army stating that restoring discipline would be one of his top priorities. The announcement of General Dempsey's appointment in *Army Times* made note of some prominent command woes related to a climate ripe for misconduct, some involving sexual offenses[1]. Mr. Waldman is correct that neither the repeal of Section 654 nor the presence of homosexuals within the military is the cause of the disorder. However, as the cases I cited illustrate, some courts are inclined to subordinate the need for military order to the rights of the servicemembers, some members of Congress certainly are so inclined, and some commanders are likely to

ignore their duty rather than run afoul of either Congress or the courts. Permit me to illustrate this point.

Mr. Waldman argues that Finding 13 was set aside by the repeal. Finding 13 noted the long-standing legal prohibition against homosexual conduct and that prohibition was never limited to persons identified as homosexuals. As with the other findings, the repeal did not set aside the law upon which that finding was based. Mr. Waldman may argue that the Supreme Court's decision in *Lawrence v. Texas* leads to that result but there are lawyers who will argue that *Lawrence v. Texas* ought not extend to the military and others who will argue that the exceptions in *United States v. Marcum* are too narrow. The 112th Congress seems unwilling to change UCMJ. Thus, Article 125 Sodomy and other rules dealing with sexual behavior enforceable under Articles 133 and 134 may yet be enforced and when enforced, certainly will be challenged. In the current context, would Major General Tony Cucolo try to control promiscuity in his command as he did in 2009? How many Staff Judge Advocates would tell him he had no authority to do so? Would the commander permit a climate ripe for misconduct to continue despite the impact on his command? The current disorder in the military is occasioned by commanders ignoring sexual conduct, consensual and not. The military's laxity toward sexual misconduct may result from a variety of factors such as a decline in public morals, or a mistaken belief that that conduct is a private matter. Regardless, the question is how to restore order and restoring order is a command responsibility. Unfortunately, the military commander is excluded from the discussion. Admiral Mullen cowed or disciplined commanders who might express views different from his own over how or whether to repeal Section 654. The Justice Department did not aggressively defend military authority in cases challenging discharges for homosexual conduct, especially cases in the 9th Circuit Court of Appeals. The instruction Army officers receive to prepare for the repeal of Section 654 is PowerPoint deep and merely states that commanders may discipline sexual conduct to maintain good order, leaving them to determine both the standards and the extent of their authority. Consequently, from this one example, it is reasonable to infer that the repeal will breed both litigation and indiscipline.

One final point, reexamine the Solorio case. In that case, the commander ignored legal advice and charged Solorio with sexual offenses committed in Alaska. The military trial judge dismissed those charges but the trial judge's order was reversed on appeal. Had that commander not persisted in his duty, we might still be dealing with the O'Callahan rules. As the Hasan case in my article illustrates, acting to maintain order was hard, even when supported by law, because the political climate was chary of religious rights. Preserving order is harder when a preference for good order leads to ridicule.

Note

1. Lance M. Bacon, "Challenges await new chief of staff Dempsey," *Army Times*, http://www.armytimes.com/news/2011/04/army-new-chiefs-challenges-martin-dempsey-042411w/.