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## Legislative Updates

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## Legislative Updates

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## LEGISLATIVE UPDATES

*By: Keyla Bade*

### **H.R.5136 “National Defense Authorization Act for Fiscal Year 2011” and “Don’t Ask, Don’t Tell”**

The National Defense Authorization Act is the annual appropriations bill, approving Department of Defense military activities for fiscal year 2011.<sup>2</sup> An amendment to the National Defense Authorization Act, which the House has already approved and included in Section 536 of the National Defense Authorization Act, would repeal of the ban on homosexuals from serving openly in the military.<sup>3</sup> The 1993 law, widely known as “Don’t Ask, Don’t Tell” (DADT), is mandated by federal law and codified in 10 U.S.C. § 654 and prohibits homosexuals from serving in the military stating that it 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.”<sup>4</sup> More than 13,000 people in the military have been forced to leave since the “Don’t Ask, Don’t Tell” policy has been in place, including more than 400 last year.<sup>5</sup>

The language of Section 536 allows Congress to vote to repeal DADT “with actual repeal occurring 60 days after the completion of a study due December 1, 2010.”<sup>6</sup> The study conducted by the Pentagon Working Group examined the effects of fully integrating homosexuals into the armed forces, considering such issues as whether gay and heterosexual troops could be required to share housing and whether the military would be required to extend benefits to same-sex partners.<sup>7</sup> President Obama, Defense Secretary Robert M. Gates, and the Chairman of the Joint Chiefs of Staff Mike Mullen, must then certify that this new policy would not impede military effectiveness or “unit cohesion.”<sup>8</sup> Army Chief of Staff General George Casey, Jr. said that “[r]epealing the law before the completion of the review will be seen by the men and women of the Army as a reversal of our commitment to hear their views before moving forward.”<sup>9</sup> This legislation represents a major step for gay rights advocates who have been trying to repeal this policy since its inception in 1993, arguing that it effectively allows one of the nation’s most powerful agencies to discriminate on the basis of sexual orientation.<sup>10</sup>

Senator John McCain (R-AZ) and other critics of the bill argue that repealing DADT “would ‘be really harmful to the morale and battle effectiveness of our military.’”<sup>11</sup> Supporters believe that the repeal would be a positive change reflective of the U.S.’s shifting sentiments towards gay and lesbian people. “In the land of the free and the home of the brave, it is long past time for Congress to end this un-American policy,” said Representative Tammy Baldwin (D-WI), who is the first female openly

gay congressional representative.<sup>12</sup> President Obama is also pleased with the House’s passage of the repeal saying, “[t]his legislation will help make our armed forces even stronger and more inclusive by allowing gay and lesbian soldiers to serve honestly and with integrity.”<sup>13</sup>

Patrick Murphy (D-PA) first introduced the amendment on April 10, 2010. It was first referred to the House Committee on Armed Services. On May 27, 2010, the House of Representatives approved the amendment. The bill was passed on May 28, 2010 with 229 Democrats and five Republicans in favor. Senate received it on June 28, 2010 and placed it on the Senate Legislative Calendar under General Orders.

On September 21, 2010, the National Defense Authorization Act was stalled on a 56-43 vote, four short of the sixty votes needed to overcome the Republican opposition and begin the debate.<sup>14</sup> On October 12, 2010, a federal district court judge, Judge Virginia Phillips, ordered the military to immediately stop enforcing DADT.<sup>15</sup> The case was brought forth by the Log Cabin Republicans, a 19,000-member partisan gay advocacy group that includes current and former military members. The group argued during a two-week trial in July 2010 that the policy is unconstitutional and should be struck down.<sup>16</sup> The judge ultimately ruled in their favor on the grounds that DADT violated Due Process and the First Amendment rights of gay service members.<sup>17</sup> On October 14, the Department of Justice asked the judge to suspend her ruling while the government prepared a formal appeal.<sup>18</sup> In its appeal, the Department of Justice argued that repeated and sudden changes in DADT would be “enormously disruptive and time-consuming, particularly at a time when this nation is involved in combat operations overseas.”<sup>19</sup> Although the District Court upheld the injunction, effectively repealing DADT, the Ninth Circuit granted a stay requested by the Department of Justice, which re-instated the policy.<sup>20</sup>

The Pentagon announced that it will comply with the Ninth Circuit order to retain the policy, but gay rights advocates have cautioned service members to avoid revealing their sexual orientation in the meantime.<sup>21</sup> On October 21, 2010, Defense Secretary Robert Gates announced that the Pentagon, in order to mitigate any confusion or unjust discharges, is changing the way under which DADT discharges are processed.<sup>22</sup> He issued a directive instructing the secretaries of each branch of the armed services to personally sign off on the dismissal of any gay or lesbian service member under the policy. Further, the Pentagon’s chief legal counsel and its top personnel official have to coordinate all DADT discharges.<sup>23</sup> At the time of print,

time of print, a DADT repeal bill had just passed into law, after vigorous efforts were made to pass the measure.

### **S.729 “Development, Relief, and Education for Alien Minors Act of 2009”**

The Development, Relief, and Education for Alien Minors Act of 2009 (DREAM Act) is legislation that would allow certain undocumented immigrant students the opportunity to apply for permanent residency.<sup>25</sup> The Act would amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 “to repeal the denial of an unlawful alien’s eligibility for higher education benefits based on state residence unless a U.S. national is similarly eligible without regard to such state residence.”<sup>26</sup>

Under the DREAM Act, those eligible are undocumented students between the ages of twelve and thirty-five of “good moral character”, who arrived to the United States before the age of sixteen, have lived in the United States for five consecutive years prior to the Act’s enactment, and who have graduated from a high school in the United States or have earned a GED. These students would then have the opportunity to gain conditional permanent residency.<sup>27</sup> Within six years of approval for conditional permanent residency, the individual must complete at least two years in a program for a bachelor’s degree or higher in the United States or serve in the uniformed services for at least two years and, if discharged, receive an honorable discharge.<sup>28</sup> If the individual does not meet these qualifications within six years, the conditional residency will be revoked and he or she will be once again removable.

Senator Richard Durbin (D-IL) introduced this Act on March 26, 2009 and it currently has forty sponsors. After its introduction in the Senate, the Act was referred to the Committee on the Judiciary. The companion bill in the House of Representatives, the American Dream Act of 2009, was also introduced on March 26, 2009 and was referred to the Subcommittee on Higher Education, Lifelong Learning, and Competitiveness.

Similar forms of this bill have been introduced in Congress before but have not progressed.<sup>29</sup> The DREAM Act has received a lot of media attention though, stirring up documented and undocumented people alike to place pressure on Congress to move this bill forward. On September 14, 2010, the DREAM Act was placed on the agenda to be included as an amendment to the National Defense Authorization Act for 2011. The Senate was scheduled to vote on September 21, 2010 on whether to attach the measure to the Act but a Republican filibuster halted the debate. As of September 22, 2010, Richard Durbin introduced the bill

once again along with Richard Lugar, and it had two sponsors.

The possibility for full immigration reform this year is looking bleak, but the passage of the DREAM Act would be a significant step in that direction. As Majority Leader Reid assured, “We must have immigration reform. When we have enough groups telling me that we can’t do it this year, then we will consider the DREAM Act alone. But we are not at that point now.”<sup>30</sup>

### **The Convention on the Elimination of all Forms of Discrimination against Women**

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is often regarded as an international bill of rights for women. CEDAW defines what constitutes discrimination against women and designs an implementation plan, to be fulfilled by each country in agreement to end it.<sup>31</sup> The convention asserts women’s rights and freedoms to political, economic, and social equality.<sup>32</sup>

The Convention was adopted by the United Nations’ General Assembly in 1976 and has been ratified by 186 countries. The United States is one of only seven countries that have not ratified CEDAW. The others are Iran, Sudan, Somalia, Palau, Nauru, and Tonga.<sup>33</sup> Commentators believe that the U.S. may have put off ratifying CEDAW partly because of national conservative sentiments that oppose or fail to fully support the Convention’s affirmation of women’s right to reproductive choice. For example, the Convention provides for the right to equally shared responsibility for child-rearing by both sexes, the right of child-care including mandated child-care facilities and maternity leave, and the right to reproductive choice and family planning.<sup>34</sup> CEDAW is the only treaty that has made such specific provisions for reproductive rights and family planning. Because CEDAW is an international convention, the Senate must ratify it.

According to CEDAW, discrimination is “. . . any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women . . .”<sup>35</sup> Countries that ratify the Convention are required to implement measures that would eradicate any kind of discrimination against women.<sup>36</sup> These measures must include acknowledging the equality between men and women in the country’s constitution. Further, the country must establish and enforce equal legal protection through legislative measures.<sup>37</sup> Countries that have ratified the Convention are legally bound to put its provisions into practice and must submit national reports at least once every four years concerning measures they have taken to comply with their treaty obligations.<sup>38</sup>

The Obama Administration put CEDAW on the list of priorities for ratification in May 2009.<sup>39</sup> In November



6, 2009, Secretary of State Hillary Clinton said during a speech in Washington, DC, “there is nothing that has been more important to me over the course of my lifetime than advancing the rights of women and girls. And it is now a cornerstone of American foreign policy.”<sup>40</sup> Secretary Clinton has been expected to revive the discussion of women’s issues on Capitol Hill. In March 2010, Secretary Clinton reassured the United Nations Commission on the Status of Women that the administration would “continue to work for the ratification of CEDAW.”<sup>41</sup> However, months have passed since this statement and there has been no substantial action from executive and legislative bodies. Several human rights groups emphasize the importance of CEDAW’s ratification, believing that it would add credence to the equal status of women internationally as well as domestically.<sup>42</sup> The Obama Administration faces continued pressure to urge the Senate to introduce this Convention and schedule hearings in order to seriously contemplate ratification.

### **S.3113 “Refugee Protection Act of 2010”**

The Refugee Protection Act amends the Immigration and Nationality Act (INA) that would strengthen the United States’ commitment to refugees who have fled their countries due to persecution or torture.<sup>43</sup> One of the major provisions of this Act is the elimination of the one-year limit for filing asylum claims currently placed on refugees in the U.S.<sup>44</sup> The Act also authorizes the U.S. Attorney General to appoint counsel for refugees to represent them throughout their proceedings.<sup>45</sup> Previously, many refugees have had to advocate for themselves during their proceedings. Studies have shown that asylum seekers, of whom a third have counsel, are six times more likely to be granted asylum if they have legal representation.<sup>46</sup> The Refugee Protection Act also deals with concerns regarding aliens’ detention periods. The Act directs the Secretary of Homeland Security to establish specific conditions of detention and to give notice of charges to the court and to the individuals within forty-eight hours of the alien’s detention, guaranteeing a system of faster review.<sup>47</sup>

Furthermore, the Act develops the list of social categories upon which asylum claims can be based. As of now, when an individual claims to be seeking asylum based on “membership in a particular social group,” it has generally been difficult for individuals who have fled a country because of gang violence, gender discrimination, or gender orientation. The broader definition of “social groups” in S.3113 can be used to include these individuals.<sup>48</sup> The definitions of “terrorist activity” and “terrorist organization” are also refined and narrowed in order to protect refugees that do not pose a threat to U.S. security from inappropriate exclusion.<sup>49</sup>

This Act emerges from numerous criticisms of the

United States’ lack of commitment to refugees. It comes thirty years after the landmark Refugee Protection Act of 1980 led by the late Senator Edward Kennedy (D-MA). Many people believe that since the passage the 1980 Refugee Protection Act, the United States has fallen short of meeting its obligations. The advocacy organization, Human Rights First, elucidates this point in stating, “. . . [A] barrage of new laws and policies have undermined the institution of asylum in the United States, leading this country to deny asylum or other protection to victims of persecution.”<sup>50</sup>

Judiciary Committee Chairman Patrick Leahy (D-VT) introduced the Refugee Protection Act of 2010 in the Senate on March 15, 2010 with four sponsors. After it was introduced, it was referred to the Committee on Judiciary. Hearings were held and the Act was discussed on May 19, 2010. This Act is the Senate’s solid attempt to address and resolve some of the refugee and asylum systems’ most serious issues and to sincerely consider and recommit to the interests of refugees and asylum seekers.

### **H.R. 3564 “Children’s Act for Responsible Employment of 2009”**

The Children’s Act for Responsible Employment of 2009 (CARE Act) amends the child labor provisions relating to agricultural work in the Fair Labor Standards Act (FLSA).<sup>51</sup> Currently, FLSA law allows for children as young as twelve years old to be hired to work agricultural jobs, such as harvesting fruits and vegetables. The law does not place any limits on the number of hours per week a child can work or on how early an employer can require the child to report to work.<sup>52</sup> Critics argue that this lack of regulations exposes children to risks of exploitation as well as educational compromises, since at present, FLSA does not mandate hourly limits for children’s work on school days.<sup>53</sup> Human rights groups report that the drop-out rate for children who work in agriculture is four times higher than the national rate.<sup>54</sup> The CARE Act revises the age requirement for agricultural employment under FLSA regulations, authorizing it to apply to any child under the age of eighteen unless that child is working for his or her parents or on a family-owned farm.<sup>55</sup> The Act also increases civil and criminal penalties for violating the law in order to ensure employer compliance.<sup>56</sup>

Representative Lucille Roybal-Allard (D-CA) introduced the CARE Act on November 15, 2009, and it currently has ninety-one sponsors. After its introduction, the Act was referred to the Subcommittee on Workforce Protections on November 16, 2009. The Act is supported by over eighty leading organizations including the American Federation for Teachers (AFT), the National Association for the Advancement of Colored People (NAACP), the National Parent Teacher Association (PTA), and Human Rights

Watch. “The United States is a developing country when it comes to child farm workers,” said Zama Coursen-Neff, deputy director of the Children’s Rights Division at Human Rights Watch. “Children who pick America’s food should at least have the same protections as those who serve it.”<sup>57</sup>

Children and human rights advocates were

encouraged recently after the Labor Department announced a large increase in the fines that farmers can face for employing children, to as much as \$11,000 per child<sup>58</sup>. For a deeper rooted and longer lasting change to come about, however, the law has to change and it is unlikely that the CARE Act will get out of committee during this Congress.

## Endnotes

<sup>1</sup> Keyla Bade is a second-year law student at American University Washington College of Law.

<sup>2</sup> H.R. Rep. No. 111-498, at 114 (2010), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_reports&docid=f:hr498.111.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr498.111.pdf).

<sup>3</sup> David M. Herszenhorn & Carl Hulse, *House Votes to Allow ‘Don’t Ask, Don’t Tell’ Repeal*, N.Y. TIMES, May 27, 2010, at 1, *available at* <http://www.nytimes.com/2010/05/28/us/politics/28tell.html>.

<sup>4</sup> 10 U.S.C. § 654(a)(15) (2010).

<sup>5</sup> David Welna, *Don’t Ask, Don’t Tell Policy’s Days Numbered?*, NPR, February 3, 2010, <http://www.npr.org/templates/story/story.php?storyId=123311951>.

<sup>6</sup> U.S. House Vote Spells Demise of “Don’t Ask, Don’t Tell”, HUMAN RIGHTS CAMPAIGN, May 27, 2010, *available at* <http://www.hrc.org/14493.htm>.

<sup>7</sup> Perry Bacon Jr. & Ed O’Keefe, *House Votes to End ‘Don’t Ask, Don’t Tell’ Policy*, WASH. POST, May 28, 2010, at 2, *available at* [http://www.washingtonpost.com/wpdyn/content/article/2010/05/27/AR2010052704540\\_2.html?sid=ST2010052705786](http://www.washingtonpost.com/wpdyn/content/article/2010/05/27/AR2010052704540_2.html?sid=ST2010052705786).

<sup>8</sup> David M. Herszenhorn & Carl Hulse, *House Votes to Allow ‘Don’t Ask, Don’t Tell’ Repeal*, N.Y. TIMES, May 27, 2010, at 1, *available at* <http://www.nytimes.com/2010/05/28/us/politics/28tell.html>.

<sup>9</sup> Bacon & O’Keefe, *supra* note 7, at 2.

<sup>10</sup> *Id.*

<sup>11</sup> Herszenhorn & Hulse, *supra* note 8, at 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Ted Barrett & Dana Bash, *Senate Halts ‘Don’t Ask, Don’t Tell’ Repeal*, *available at* <http://www.cnn.com/2010/POLITICS/09/21/senate.defense.bill/index.html?hpt=T1>.

<sup>15</sup> Julie Watson, *‘Don’t Ask, Don’t Tell’ Enforcement Must*

*be Halted, Federal Judge Rules*, HUFFINGTON POST, Oct. 12, 2010, [http://www.huffingtonpost.com/2010/10/12/dont-ask-dont-tell-judge\\_n\\_759960.html](http://www.huffingtonpost.com/2010/10/12/dont-ask-dont-tell-judge_n_759960.html).

<sup>16</sup> Ed O’Keefe & Sandhya Somashekhar, *Pentagon to Comply with Order to End ‘Don’t Ask, Don’t Tell’*, WASH. POST, October 14, 2010, at 1, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/14/AR2010101407018.html>.

<sup>17</sup> *Id.*

<sup>18</sup> Anne Flaherty & Pete Yost, *DADT Repeal: Obama Vows to End DADT, While Seeking Stay of Repeal Ruling*, HUFFINGTON POST, Oct. 14, 2010, [http://www.huffingtonpost.com/2010/10/14/dadt-repeal-obama-vows-to\\_n\\_763610.html](http://www.huffingtonpost.com/2010/10/14/dadt-repeal-obama-vows-to_n_763610.html)

<sup>19</sup> *Id.*

<sup>20</sup> Posting of Alexandra Manrique to Modern America: A Law & Politics Blog, [http://wclmodernamerican.blogspot.com/2010/10/its-still-secret-but-not-for-long-dadt\\_25.html](http://wclmodernamerican.blogspot.com/2010/10/its-still-secret-but-not-for-long-dadt_25.html) (Oct. 25, 2010 15:05 EST).

<sup>21</sup> Allen G. Breed & Brian Witte, *Court Ruling or No, Gay Troops Know Not to Tell*, ABC NEWS, October 16, 2010, at 1, *available at* <http://abcnews.go.com/US/wireStory?id=11894815>.

<sup>22</sup> Josh Gerstein, *Robert Gates Changes ‘Don’t Ask, Don’t Tell’ Procedures*, POLITICO, Oct. 21, 2010, at 1, *available at* <http://www.politico.com/news/stories/1010/43994.html>.

<sup>23</sup> *Id.*

<sup>24</sup> See Jordan Fabian, Sen. Lieberman: ‘Don’t ask, don’t tell’ repeal will pass if leaders give it time, THE HILL BLOG BRIEFING ROOM, Dec. 1, 2010, <http://thehill.com/blogs/blog-briefing-room/news/131399-sen-lieberman-dadt-could-pass-if-given-enough-time>.

<sup>25</sup> Krissah Thompson, *Immigrant Rights Groups Adjust Focus to Passage of AgJobs, Dream Act*, WASH. POST, July 27, 2010, at 1, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/27/AR2010072704307.html>.

<sup>26</sup> DREAM Act, S. 729, 111th Cong. § 3 (2010).

<sup>27</sup> *Id.* at § 4(a).

<sup>28</sup> *Id.* at § 5(d).

<sup>29</sup> See S. 2205, 110th Cong. (2007)

<sup>30</sup> Thompson, *supra* note 25, at 1.

<sup>31</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>32</sup> *Id.* at art. 1.

<sup>33</sup> US: Ratify Women's Rights Treaty, Human Rights Watch, July 15, 2010, available at <http://www.hrw.org/en/news/2010/07/15/us-ratify-women-s-rights-treaty>.

<sup>34</sup> CEDAW, *supra* note 31, art. 16.

<sup>35</sup> *Id.* at art. 1.

<sup>36</sup> *Id.* at art. 2.

<sup>37</sup> *Id.* at art. 2..

<sup>38</sup> *Id.* at art. 18.

<sup>39</sup> US: Ratify Women's Rights Treaty, *supra* note 33.

<sup>40</sup> Janine Zacharia, *Advancing Women a Top Clinton Goal*, N.Y. TIMES, November 24, 2009, at 1, available at <http://www.nytimes.com/2009/11/25/us/25iht-letter.html>.

<sup>41</sup> US: Ratify Women's Rights Treaty, *supra* note 33.

<sup>42</sup> *Id.*

<sup>43</sup> Refugee Protection Act, S. 3113, 111<sup>th</sup> Cong. (2010).

<sup>44</sup> *Id.* at § 3.

<sup>45</sup> *Id.* at § 6(4).

<sup>46</sup> Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum: Representation: Ideas for Change*, GEO. IMMIGR. L.J. 739 (2002).

<sup>47</sup> Refugee Protection Act, S. 3113 § 10(4).

<sup>48</sup> *Id.* at § 5.

<sup>49</sup> *Id.* at § 4.

<sup>50</sup> *Senators Introduce Bill Strengthening U.S. Commitment to Refugees*, HUMAN RIGHTS FIRST, March 15, 2010, <http://www.humanrightsfirst.org/media/asy/2010/alert/591/index.htm>.

<sup>51</sup> CARE Act, H.R. 3564, 111th Cong. (2009).

<sup>52</sup> See 29 U.S.C. § 212.

<sup>53</sup> U.S. Child Farmworkers' Dangerous Lives, Human Rights Watch, May 5, 2010, available at <http://www.hrw.org/en/news/2010/05/04/us-child-farmworkers-dangerous-lives>.

<sup>54</sup> *Id.*

<sup>55</sup> CARE Act, H.R. 3564, *supra* note 51 at § 2.

<sup>56</sup> *Id.* at § 3 & 4.

<sup>57</sup> U.S. Child Farmworkers' Dangerous Lives, *supra* note 53.

<sup>58</sup> Erik Eckholm, U.S. Cracks Down on Farmers Who Hire Children, N.Y. TIMES, June 18, 2010, at 1, available at [http://www.nytimes.com/2010/06/19/us/19migrant.html?\\_r=2](http://www.nytimes.com/2010/06/19/us/19migrant.html?_r=2).

*For more commentary on the developments of "Don't Ask, Don't Tell" policy within the Defense Authorization Act, see Modern America: Law & Politics Blog, "DADT Panel Update – Webcast, Podcast," "DADT, DOMA, and Fidelity to the Constitution," by David Wexelblat, "It's Still a Secret, But Not For Long: A DADT Play-By-Play," by Alexandra Manrique.*