

250 Gibbon Avenue
Fort Leavenworth, KS 66027
28 September 2010

Honorable Jeh C. Johnson
Co-Chair Comprehensive Working Group
Department of Defense
Rm 2B546A
Pentagon, Washington DC 20301

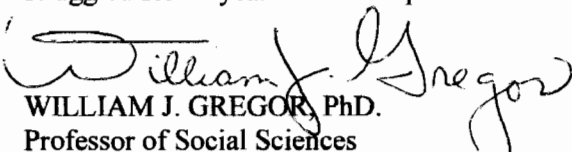
Dear Mr. Johnson:

I am writing to ask you to seriously consider the impact of repealing Sect. 654 10 U.S.C. on the general administration of military justice. In May 1993, I testified before the House Armed Forces Committee in support of the homosexual exclusion. I had been the Professor of Military Science at the University of Michigan and in that role I had responded to numerous faculty and student committees challenging the exclusion policy. My judgment then and now is that the inclusion of self-defined homosexuals in the military will seriously undermine good order and discipline.

Section 654 begins by listing 15 congressional findings. Of those 15 findings only two, 13 and 15, refer directly to homosexuality. Among the remaining 13, six stand out because they define principles that underlie the system of military justice and order; 2, 8, 9, 10, 11 and 14. Congress appended the findings to ensure that the policy enacted in 1993 would withstand constitutional challenge and based the findings on Congress' exclusive constitutional power to make rules for the government and regulation of the land and naval forces. Repealing those findings will mean that military courts will no longer be able to rely on long standing legal precedents. Because those findings are a description of the fundamental principles that have governed military order and discipline since the U.S. civil war, the meaning of good order will be erased. That is why those findings must be carefully reviewed.

The issue before the Congress concerns the discipline of the Armed Forces generally, not the narrow issue of how best to address the sentiments of those given to homosexual behavior. Findings 9 and 10 bind men and women serving in the armed forces to military rules and regulations 24 hours each day and every day of the week from the moment they enter into active service. By repealing Sect. 654 10 U.S.C., the Murphy amendment seeks to separate service members into two persons; one subject to military law when on duty and another subject only to local civilian law. This is a return to the military legal rules of the 1970's and early 1980's, the rules directed by the improvident Supreme Court decision in O'Callahan vs. Parker, 1969. In O'Callahan vs. Parker the Court ruled that the military had no jurisdiction over offenses that were not service connected. That decision proved disastrous to military order. In 1987, the Supreme Court in Solorio vs. U.S. overturned the O'Callahan decision. The Congress confirmed the Supreme Court's decision by incorporating the Supreme Court's Solorio findings in Section 654. Hence, the bill repealing Section 654, 10 U.S.C. will undo over 40 years of judicial precedent and create the conditions that undermined military discipline after Vietnam.

I do not think it proper to enumerate here all the objections that should be raised in opposition to a repeal of Sect. 654. Nevertheless, I would like to note that current rules against homosexual behavior are intended to govern the behavior of the larger military population that does not describe itself as homosexual. Limiting military jurisdiction seeks to prevent enforcement of the law prohibiting sodomy. The current bill does not repeal the law against sodomy, but by restricting military jurisdiction, it not only creates a presumed safe place for sexual behavior but also severely limits the command's ability to prevent other offenses. If enacted, the military could not discipline the behavior at the 1991 Tailhook convention because it took place in a civilian location and the service members were on leave. The issue is not sexual orientation. The repeal intends to create a totally foreign system of military justice and an entirely different concept of military order. The Murphy amendment is unworkable because the Army struggled for 17 years under the provisions of O'Callahan and those rules proved unworkable.


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GEN (Ret.) Carter F. Ham
Co-Chair Comprehensive Working Group
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Rm 2B546A
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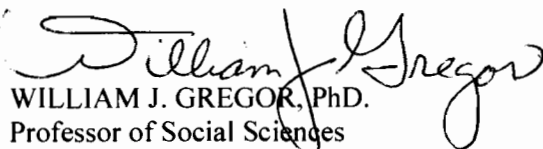
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