

Supreme Court Strikes Down DOMA; Hagel Promises Benefits ASAP

By Megan McCloskey and Chris Carroll

Gay military couples could soon have access to the same benefits as their heterosexual counterparts with today's Supreme Court decision striking down the Defense of Marriage Act. That law banned federal benefits for same-sex marriages, so despite military members now being able to serve openly, their domestic partners have been ineligible for many of the benefits the military provides families, such as health care, survivor payments and on-post housing. In a 5-4 ruling written by Justice Anthony Kennedy, the court rules that DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. The DOD released a statement from Defense Secretary Chuck Hagel soon after the decision: "The Department of Defense welcomes the Supreme Court's decision today on the Defense of Marriage Act," it read. "The Department will immediately begin the process of implementing the Supreme Court's decision in consultation with the Department of Justice and other executive branch agencies. The Department of Defense intends to make the same benefits available to all military spouses — regardless of sexual orientation — as soon as possible. That is now the law, and it is the right thing to do. "Every person who serves our nation in uniform stepped forward with courage and commitment. All that matters is their patriotism, their willingness to serve their country and their qualifications to do so. Today's ruling helps ensure that all men and women who serve this country can be treated fairly and equally, with the full dignity and respect they so richly deserve." Despite the repeal of "don't ask, don't tell," and former Defense Secretary Leon Panetta's proclamation earlier this year that "discrimination based on sexual orientation no longer has a place in the military," the Pentagon was limited in what benefits it could legally provide same-sex couples because of DOMA. In February, the Pentagon gave partners of gay troops military ID cards, access to base and other benefits that it could legally provide. The high court's ruling that DOMA is unconstitutional frees the Pentagon to follow through on what Panetta laid out shortly before he left office. If DOMA no longer applied, he wrote in a memo, "it will be the policy of the Department to construe the words "spouse" and "marriage" without regard to sexual orientation, and married couples, irrespective of their sexual orientation, and their dependents, will be given full military benefits." The Pentagon will have to decide whether only legal marriages qualify for benefits or whether those in domestic partnerships are eligible as well, Panetta said in his memo. The services have until October to enact the first round of benefits Panetta extended to same-sex couples; it's unclear at this point what the time line might be if the Pentagon moves forward to offer all benefits to same-sex couples. Although health and other benefits are crucial to families, the changes may not happen as quickly as some would like. Supreme Court rulings typically become final after 25 days, and during that time, DOD lawyers and personnel specialists will be rushing to figure out how implement the change. Lisa Windsor, a retired Army colonel who served as a JAG officer for 22 years and who now works for the Tully Rinckey law firm, said she thinks making the additional changes to the benefits will be a fairly smooth process. "The ball is already rolling," Windsor said. "This is just a natural progression of the repeal of 'don't ask, don't tell.'

They've already gone ahead and said you can have an ID, have access on post, it's not a stretch [to extend all the benefits]. But David McKean, director of government affairs and policy for Outserve-SLDN, which advocates for gay and lesbian military troops said a number of practical hurdles will remain once the law is struck down. Among them is the software for a key DOD personnel system, the Defense Enrollment Eligibility Reporting System, that the military says is not configured to allow same-sex spouses to register. "We're going to be looking at a period of weeks at least where this is taking legal effect, and during that time I would expect the Pentagon to do whatever it can to make sure this is ready to go," he said.

Veterans

The outlook is more complex for veterans in same-sex marriages, McKean said. The statute that governs veterans benefits defines a spouse as "a person of the opposite sex who is a wife or husband." With DOMA's definition of marriage invalidated, the law that governs the Department of Veterans Affairs would still be on the books, but would likewise become unconstitutional, McKean said. Determining which same-sex couples get benefits could be more complicated for veterans than for current military members, he said. Unlike the military, which McKean said bases benefits eligibility on whether a legal marriage took place, regardless of where a servicemember currently lives, the VA has a more restrictive code based on the state of residence that could bar some veterans from collecting married benefits. Veterans who traveled to get legally married while living in a state that does not recognize gay marriage, and who received benefits in a state that does not recognize gay marriage, are likely not considered married under VA law, McKean said. All others — including those who live in gay-marriage recognition states when they're married but live in non-recognition states when benefits take effect — are considered married by the VA, he said. "What you'll have is veterans who lived in the right states at the right times in their lives will get benefits, and veterans who lived in the wrong states at the wrong times will not get benefits," he said.