

# **Repealing Don't Ask, Don't Tell**

**A Historical Perspective from the Joint Chiefs  
of Staff**

**Nathan S. Lowrey**



**Special Historical Study 15**

**Joint History and Research Office  
Office of the Chairman of the Joint Chiefs of Staff  
Washington, DC • 2021**

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## FOREWORD

Ten years ago, President Barack H. Obama signed into law the Don't Ask, Don't Tell Repeal Act of 2010. This reversed a long-standing prohibition against homosexuals serving in uniform, which the military had first established on the eve of its entry into World War I. The following account centers on the final thirty-year period between 1981 and 2011, when Congress and the Defense Department reinforced, then revised, and finally repealed the controversial policy. Based largely on interviews conducted with former members of the Joint Chiefs of Staff (JCS), it pays particular attention to their interaction during 2010, as they deliberated among themselves and advised senior government officials on the policy's complex evolution. Despite significant differences of opinion, the Chiefs agreed to disagree until the way forward became clear—after which they presented a united front while implementing a revolutionary new policy without incident. Their experience provides insight into the complex relationship between personal and professional opinion, and the role of leadership and stewardship at the highest levels. It is ultimately a testament to the strength of the JCS as an institution.

The Department of Defense has reviewed and approved this publication for release. It is an official publication of the Joint History and Research Office, but the views expressed are those of the author and do not necessarily represent those of the JCS or the Department of Defense.

Washington, DC  
March 2021

DAVID B. CRIST, PhD  
Executive Director  
Joint History and Research Office

### **About the Nomenclature**

The terms “homosexual” and “gay” are used interchangeably throughout the monograph, depending on the historical, cultural, clinical, bureaucratic, or other context.

“Gay” includes men and women, such as in references to “gay servicemembers,” while “gay men and lesbians,” uses the adjective “gay” and the noun “lesbian.”

“Gender” encompasses a broad range of socially constructed identity roles, unlike “sex,” which denotes strictly biological differences between male and female.

## Introduction

*Homosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Services in any capacity, and prompt separation of known homosexuals from the Armed Forces is mandatory.*

—Department of Defense, 1949<sup>1</sup>

After World War II and the unification of the Services in 1947, the US military's long-standing proscription against homosexuals in uniform became increasingly difficult to sustain. Chief among the challenges to the prohibition was the establishment of the Uniform Code of Military Justice and the United States Court of Military Appeals, which involved instituting reforms that expanded servicemembers' legal rights. Likewise, the US Supreme Court's 1953 decision that court-martial proceedings were subject to the requirements of constitutional due process and its 1957 ruling that agency administrative decisions were subject to judicial scrutiny also increased legal protections for servicemembers and veterans.<sup>2</sup>

During the 1960s and 1970s, as social changes were sweeping the nation, irregularities in the Services' policies toward homosexuals and how they were administered contributed to a gradual rise in court cases. Early suits often sought to protect the plaintiff's right to procedural due process by highlighting inconsistencies regarding how the military discerned homosexual status or decided which gays or lesbians could remain in uniform. Later, claimants began to challenge the policies' constitutionality on grounds that the government had violated the individual's right to free expression, equal protection, and substantive due process.<sup>3</sup>

Deputy Secretary of Defense W. Graham Claytor Jr. responded to those challenges late in 1980 by proposing policy changes that would consolidate the military's position on homosexuality, but also lessen the stigma experienced by gay and lesbian personnel discharged under those guidelines. Discussion of the proposal revealed strong differences of opinion among the Joint Chiefs of Staff (JCS), prompting General David C. Jones, USAF, Chairman of the JCS, to ask that Secretary of Defense Harold Brown delay approval of the plan until the group could reach consensus.<sup>4</sup> After another unfavorable review of a revised proposal the following month, the Joint Staff recommended that the JCS hold a telephonic vote on the issue, followed by a discussion in the Tank the next day.<sup>5</sup> Before either could occur, however, Deputy Secretary Claytor took preemptive action by endorsing the policy change without waiting for the Chiefs' advice

On 16 January 1981, his last day in office, Claytor issued his revised directive, including a new section that standardized the separation of homosexuals from the military. In an accompanying memorandum to the JCS, he affirmed "the

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most important aspect of our policy is the ability to keep homosexuals out of the service and to separate them promptly in the event they are in fact enlisted or commissioned.”<sup>6</sup> This goal, he explained, required clearly defined and uniformly applicable guidelines that “provide the strongest possible basis for supporting these policies and procedures in court.”<sup>7</sup> Claytor, in the interest of promoting more benevolent discharge proceedings, stressed that “the mere fact of homosexuality does not provide a basis for processing for Misconduct.”<sup>8</sup>

The revised policy’s preamble not only clarified but attempted to justify the Defense Department’s renewed opposition to gays, lesbians, and bisexuals:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.<sup>9</sup>

This indictment replaced previous claims that “homosexuals” were physically or mentally “unsuitable” for military service with a much broader assertion that “homosexuality” itself was “incompatible with military service.” That presumption shifted the underlying rationale for excluding gays, lesbians, and bisexuals from a question of individual fitness and personal conduct to the immutability of a group’s sexual orientation, their propensity to behave accordingly, and the consequences such acts would have upon the military as a whole.<sup>10</sup>

According to Claytor’s directive, the military would promptly separate personnel who revealed a desire to engage in homosexual acts, but with a discharge certificate that now recognized the character of their military service up to that point. Personnel undergoing such separation procedures had the right to request an administrative discharge board, but counseling and rehabilitation were no longer applicable, and the possibility of retention was limited to a narrow range of circumstances in which the individual was required to disavow any desire to participate in homosexual acts. Moreover, the possibility of receiving an other-than-honorable discharge was limited to sodomy cases involving aggravating factors, such as sex involving force, coercion, or intimidation.<sup>11</sup>

Three days following issuance of the modified policy, the JCS submitted their opinions to Secretary of Defense Brown, who was just one day short of leaving office. Although the Chiefs acknowledged a “need to revise the existing directive in order to clarify policy and provide the basis for consistent application,” they nonetheless laid out several major concerns.<sup>12</sup> Among them, they opposed the creation of a new “homosexual” discharge category, as well as elimination of the punitive discharge for personnel who participated in homosexual acts. Fearing that this might signal “a change in attitude regarding the acceptability of homosexuality in the military environment,” they recommended retention of

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misconduct discharges but acquiesced to instituting separate processing procedures for separating homosexuals.<sup>13</sup>

On 26 January 1981, less than a week after Ronald W. Reagan's inauguration, the deputy assistant secretary for manpower responded to the JCS. Writing to the Director of the Joint Staff, the deputy promised that the Defense Department would consider the Chiefs' views on homosexuality during its ongoing initiative to revise the regulation governing Enlisted Administrative Separations.<sup>14</sup> Publication of an update to Directive 1332.14 on 28 January 1982, however, contained only minimal changes to the section on homosexuality.

The military continued to bar the enlistment of gays and lesbians throughout the decade and discharged approximately 17,000 personnel for homosexuality.<sup>15</sup> Although constitutional challenges persisted during the 1980s, federal courts continued to grant special deference to military judgments and consistently upheld its policy towards homosexuality. Under the rational basis standard of review, it accepted the maintenance of good order, morale, and discipline as legitimate government interests, and did not require scientific evidence to establish the policy's legitimacy.<sup>16</sup> As the US Court of Appeals for the District of Columbia concluded in 1984: "The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline."<sup>17</sup> Two years later, the regulation governing the separation of commissioned officers incorporated the same policy on homosexuality as for enlisted personnel.<sup>18</sup> These regulations would remain unchanged until 5 February 1994, when a new Democratic administration implemented the policy known as "Don't Ask, Don't Tell."

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<sup>1</sup> Department of Defense Memo to Secretaries of the Army, Navy, and Air Force, 11 October 1949, cited in Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (New York: Free Press, 1990), 261.

<sup>2</sup> Norman B. Lynch, "The Administrative Discharge: Changes Needed?" *Maine Law Review* 22 (1970): 142-43; Edward F. Sherman, "Civilization of Military Law," *Maine Law Review* 22 (1970): 50-51.

<sup>3</sup> Rhonda R. Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexuals Persons in the United States," *Hastings Law Journal* 30 (March 1979): 837.

<sup>4</sup> Gen Lew Allen Jr., Chief of Staff of the Air Force, Memo (CSAFM 102-80) for the Joint Chiefs of Staff on "Policy for Processing Homosexual Cases in the Armed Forces," (JCS 2478/975: 17 Dec 1980), 2; Enclosure to JCS 2478/975, cited in JCS 2478/974-1, Report by the J-5 to the JCS on Administrative Separation of Homosexuals (JCS 2748/941-1: 14 Jan 1981) 6; Randy Shilts, *Conduct Unbecoming: Lesbians and Gays in the U.S. Military, Vietnam to the Persian Gulf* (New York: St. Martin's Press, 1993), 378.

<sup>5</sup> Note by the Secretaries, "Report by the J-5 to the JCS on Policy for Processing Homosexual Cases in the Armed Forces," (J-5 2478/974/2: 12 Jan 1981); "Report by the J-5 to the JCS on Policy for Processing Homosexual Cases in the Armed Forces," (JCS 2478/974-1: 14 Jan 1981).

<sup>6</sup> W. Graham Claytor Jr., Memo for the Secretaries of the Army, Navy, and Air Force, and Chairman, JCS (Office of the Deputy Secretary of Defense, Washington, DC: 16 Jan 1981).

<sup>7</sup> Ibid

<sup>8</sup> Ibid.

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<sup>9</sup> Department of Defense (DOD) Directive 1332.14, Enlisted Administrative Separations, Enclosure 8, Homosexual Conduct (16 Jan 1981). For the complete text of Enclosure 8, see appendix 3 at the end of this study.

<sup>10</sup> Maj Darrell L. Choat, USMC, “An Analysis of Opinion: The Impact of ‘Don’t Ask, Don’t Tell,’ Its Repeal, and the Proposed Plan to Implement the Repeal,” in J. Ford Huffman and Tammy S. Schultz (eds.), *The End of Don’t Ask Don’t Tell* (Quantico, VA: Marine Corps University Press, 2011) 54.

<sup>11</sup> DOD Directive 1332.14, Enlisted Administrative Separations, Enclosure 8 (28 Jan 1982).

<sup>12</sup> VAdm Thor Hanson, Director of the Joint Staff, Memo for the Secretary of Defense on “Policy for Processing Homosexual Cases in the Armed Forces” (JCS 2478/974-1), 19 Jan 1981; Allen, CSAFM 102-80, 17 Dec 1980.

<sup>13</sup> Ibid.

<sup>14</sup> Maj Gen R. Dean Tice, USA, Deputy Assistant Secretary, Manpower, Reserve Affairs, and Logistics, Memorandum for Director of the Joint Staff on “Policy for Processing Homosexual Cases in the Armed Forces,” 26 Jan 1981.

<sup>15</sup> US Government Accountability Office (GAO)/National Security and International Affairs Division (NSIAD), “Defense Force Management, DoD’s Policy on Homosexuality,” (Washington, DC: GAO/NSIAD 92-98, 12 June 1992), 16.

<sup>16</sup> Ibid., 28.

<sup>17</sup> *Dronenburg v. Zech*, 741 F.2d at 1398 (D.C. Circuit Court of Appeals 1984); Stuart Taylor, “US Court Upholds Navy’s Discharge of a Homosexual, *New York Times*, 18 Aug 1984.

<sup>18</sup> DOD Directive 1332.30, Separation of Regular Commissioned Officers for Cause (12 Feb 1986).

## Photographs



Figure 1. The Joint Chiefs of Staff discuss views on Don't Ask, Don't Tell (DADT) repeal with President Barack H. Obama prior to testimony before the Senate Armed Services Committee, 29 November 2010. Clockwise from left: Admiral Michael G. Mullen, USN; General George W. Casey Jr., USA; Admiral Gary Roughead, USN; Counsel to the Vice President Cynthia C. Hogan; Admiral Robert J. Papp Jr., USCG; National Security Advisor Thomas E. Donilon; White House Counsel Robert F. Bauer; General James E. Cartwright, USMC; General Norton A. Schwartz, USAF; General James F. Amos, USMC; Secretary of Defense Robert M. Gates; and President Obama.



Figure 2. The Joint Chiefs testify before the Senate Armed Services Committee, 3 December 2010. Left to right: General Casey, Admiral Roughead, General Cartwright, General Amos, General Schwartz, and Admiral Papp.

## Photographs



*Figure 3. President Obama signs DADT repeal legislation, 22 December 2010. Left to right: Vice President Joseph R. Biden Jr., Zoe Dunning, Deputy Secretary of Defense William J. Lynn III, Eric F. Alva, President Obama, House Speaker Nancy P. D. Pelosi, Representative Patrick J. Murphy, Representative Susan C. A. Davis, Senate Majority Leader Harry M. Reid, House Majority Leader Steny H. Hoyer, Senator Joseph I. Lieberman, and Senator Susan M. Collins.*



*Figure 4. President Obama signs the certification stating that statutory requirements for DADT repeal have been met on 22 July 2011. Left to right: Brian K. Bond, deputy director of the office of public engagement; Kathleen Harnett, associate counsel to the president; Secretary of Defense Leon E. Panetta; Kathryn Ruemmler, counselor to the president; President Obama; Admiral Mullen; and Vice President Biden.*

# 1 AN HONORABLE COMPROMISE

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In October 1991, Democratic presidential candidate William J. “Bill” Clinton told reporters that he intended to eliminate the prohibition against homosexuals serving in the military.<sup>1</sup> That was expected. Not only had the party’s candidates made similar pledges for more than a decade, but advocacy groups had achieved some success in bringing the issue to the attention of congressional Democrats. Twin resolutions introduced to the House and Senate that fall, and again in the spring of 1992, called for President George H. W. Bush to rescind those portions of the regulation governing enlisted administrative separations that precluded gays, lesbians, and bisexuals from serving in the Armed Forces.<sup>2</sup>

A Government Accountability Office (GAO) report on *DOD’s Policy on Homosexuality* strengthened arguments in favor of legislative reform. It concluded that public tolerance for homosexuality was increasing, that some municipal organizations and allied militaries had successfully integrated homosexuals within their ranks, that the current policy lacked scientific support, and that the cost to replace those separated for homosexuality was significant.<sup>3</sup> Assistant Secretary of Defense Christopher Jehn countered that some of the GAO findings were misleading, others minimized the significance of litigation before the federal courts, and researchers had failed to distinguish between issues of social policy and combat effectiveness.<sup>4</sup> Although the controversial legislation failed to proceed past the committee level, it had nevertheless stimulated debate and signaled that a small minority of legislators (eight senators and seventy-eight representatives) were willing to challenge homosexual discrimination in the military.

North of the border, in October 1992, the Canadian Minister of National Defense announced his intent to end discrimination against homosexuals in the Canadian forces. This controversial and long-delayed decision, reached only as lawyers prepared to defend the exclusionary policy before a federal appeals court in Toronto, Ontario, reflected the Canadian military’s realization that it could not meet the standard required to defend the regulation. Upon withdrawing from the case, the military yielded to the court’s ruling, acknowledged that its policy had violated the Charter of Rights and Freedoms, and consented to the regulation’s immediate repeal.<sup>5</sup>

Although most federal courts continued to sustain the US policy, it nevertheless remained under attack, and potential parallels to the Canadian experience were cause for concern in military circles. In one high-profile case, for example, Navy Petty Officer Keith Meinhold argued that while he may have disclosed his sexuality on national television, he had not admitted to participating in homosexual acts. Thus, he claimed, the Navy’s discharge

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review board had violated his equal protection guarantee by failing to distinguish whether they had separated him for merely being gay or actually engaging in prohibited conduct. The US District Court for Central California agreed in November 1992 and issued a temporary injunction requiring his immediate reinstatement.<sup>6</sup>

### **Debating the Issue and Revising the Policy**

While responding to media inquiries about campaign promises shortly after his November 1992 victory, President-elect Clinton reaffirmed his pledge to end discrimination against homosexuals in the military. His widely reported remarks conveyed the possibility of a unilateral decision from the future commander in chief. This possibility generated resistance from the Chairman of the Joint Chiefs of Staff (CJCS), General Colin L. Powell, USA, and other members of the Joint Chiefs of Staff (JCS), as well as from congressional leaders who threatened to write the ban into law if the president persisted.<sup>7</sup> Since the escalating confrontation thwarted any possibility for the policy's elimination, the new administration negotiated in order to ease tensions and find a mutually acceptable solution. During the ensuing yearlong deliberation, one seemingly obscure question emerged to characterize the debate: in the absence of prohibited conduct, was there a substantial difference between homosexuals who kept their sexual "orientation" private and others who chose to declare their "status" as gay or lesbian?

Secretary of Defense Leslie "Les" Aspin Jr. met with the JCS to discuss military matters on 21 January 1993. In a memorandum to the president later that day, he reported that the two-hour conversation had been "candid and, at times, emotional," but "the elements of a compromise are falling into place."<sup>8</sup> Aspin had outlined three objectives during the meeting: ending "discrimination on the basis of status," implementing "a strict code of conduct . . . to insure that all men and women are free from sexual harassment and any abuse of power," and ensuring that the policy "be defensible in Congress." The Joint Chiefs, who objected to the proposed changes and realized they could align themselves with Senate conservatives to win a vote sustaining the existing policy, nevertheless acknowledged that their role was not to undermine the president and that they were willing to stop asking personnel to declare their sexuality. Noting that the Chiefs welcomed an opportunity to express their concerns to the president in person, Aspin observed that the commander in chief possessed "special leverage."

One thing that will push the military toward compromise is the prospect that this item will be decided by the courts. A judicial decree along the lines of the recent Canadian case would give the military little flexibility. Their incentive for compromise is the

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drafting of a strict code of military discipline that goes to their concerns.<sup>9</sup>

To achieve the administration's objectives, Aspin recommended that the Department of Defense (DOD) take four months to develop the new policy and accompanying code of conduct and also establish an internal review board to examine the proposed changes. Meanwhile, discharge proceedings or legal actions against personnel who had declared their homosexual status could be suspended. In regard to the suspension, he added, acting Attorney General Stuart M. Gerson was willing to intervene if necessary. The president could then implement the changes via executive order, enabling him to claim that he had fulfilled both his commitment to end discrimination based on status and his requirement to maintain morale and discipline within the military. The lynchpin to this tenuous strategy, however, was deferring an immediate Senate vote, which the Democrats understood they could not win. The fact that Samuel A. "Sam" Nunn Jr. (D-GA), chairman of the Senate Armed Services Committee (SASC), intended to initiate hearings in March provided a plausible reason for delay, while George J. Mitchell (D-ME), the Senate majority leader, had also indicated that he was willing to wait until the administration had presented its policy to debate the issue.<sup>10</sup>

When leaked to the press three days later, Secretary Aspin's memorandum energized an already hotly contested dispute.<sup>11</sup> Robert G. Bell, senior director for defense policy and arms control, warned Anthony Lake, assistant to the president for national security affairs, that the Joint Chiefs "were very angry and feel like they are being used as window dressing for a game plan that has already been decided. . . . To make matters worse our friends on the Hill [Capitol Hill] believe that recent press reports have undercut Senator Mitchell's ability to ward off or delay early votes on this issue."<sup>12</sup> Bell advised that while little could be done to reverse the Chiefs' opinion, the "intensity" of their opposition mattered "enormously" and it was "critical" that President Clinton take "the edge off the Chiefs' anger." As he explained,

To do this, the President must convince them that he is genuinely interested in their views, and that while he will not waver on his commitment to change the underlying policy, the process by which the new policy is implemented is still open to constructive advice.<sup>13</sup>

President Clinton welcomed Secretary Aspin and the JCS to the Roosevelt Room of the White House for a prescheduled consultation on Monday, 25 January. This was his first meeting with the JCS as a group, and he was prepared for a confrontation.<sup>14</sup> Vice President Albert A. "Al" Gore Jr., Director of Communications George R. Stephanopoulos, and four national security advisors rounded out his team. After delivering his opening remarks, Clinton relinquished the floor to General Powell, indicating that the conversation should begin with a discussion of the defense budget and force

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structure. The move was intended to enable the attendees to deny that the discussion had solely been about gays in the military.<sup>15</sup>

General Powell, following President Clinton's lead, emphasized that although the current military represented the best peacetime force the nation had known, its operational commitments exceeded those of the Cold War and cuts below a specified baseline would hollow the force and undermine readiness. Clinton acknowledged the Chairman's concerns, then steered the conversation toward the issue of gays in the military, noting that each of the Chiefs would have an opportunity to voice his opinion.<sup>16</sup>

General Powell delivered a "tutorial on the nature of military service" to the new commander in chief. After contrasting civilian and military lifeways, he emphasized the importance of teamwork, noted the need to discriminate against some individuals for the good of the force, and declared that "homosexuality is a problem for us. Sodomy is against the UCMJ [Uniform Code of Military Justice] and contrary to the law in 24 states and the District of Columbia. This law was given to us by Congress. To go in this direction, we're not sure is reflective of the views of society." He then listed the reasons why the military was obliged to discharge homosexuals: to abide by legal requirements, to avoid discord, to mitigate health risks, and, most important, to observe privacy concerns that were widely held throughout the extended military community.<sup>17</sup>

Regarding civil rights implications, General Powell offered that "the comparison with Blacks is off-base. Race involves benign characteristics; sexuality is different." Vice President Gore, who revisited the claim later in the discussion, asked the general for his "underlying theory of homosexuality." Powell replied, "I don't know the answer. I don't make my case on that difference." "For me," Gore responded, "the answer makes a big difference. If we had all the science done, we would find a majority of homosexuals are born with a predisposition. . . . If that person is separated due to status, then the person in a way is discriminated against in a way similar to Blacks. . . . If the view is that homosexuality is a matter of choice, it can lead more easily to view discrimination based on status as justified." President Clinton then declared, "I believe some are born gay, others are not. The job of society is not to discriminate on the basis of moral judgment. I believe my gay friends should be able to serve."<sup>18</sup>

General Powell concluded his presentation by stating, "I make no moral judgment myself, but I think they can best serve in other areas. A possible solution is this: we stop asking; it would not be a condition of entry. There would be no chasing, no witch hunting, as long as their orientation is not apparent. We could then take some time after this first step to decide what is best." Navy Admiral David E. Jeremiah, Vice Chairman of the Joint Chiefs of Staff (VCJCS), later added that the cost of implementing a change in policy would be significant and that the servicemembers deserved to have their voices heard.<sup>19</sup>

The Service Chiefs concurred with the General Powell, although the intensity of their opposition to a more inclusive policy varied. General Merrill

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McPeak, Chief of Staff of the Air Force, was the least outspoken. Although he accepted that an end to discrimination based on an individual's private sexual orientation was imminent, he recommended that the administration postpone making a decision on whether or not to allow declared homosexuals to serve openly, and he opposed any change that would permit homosexual behavior. Both General Gordon R. Sullivan, Chief of Staff of the Army, and Admiral Frank B. Kelso II, Chief of Naval Operations (CNO), opposed any change to the existing policy but advised that if the ban were to be lifted, then gays should not be allowed to serve openly. General Carl E. Mundy, Commandant of the Marine Corps, was the most outspoken. Clarifying his responsibility to represent the views of men and women in uniform, he noted that many Marines (and their families) considered homosexuality immoral and were deeply troubled by the prospect of repealing the ban. Proclamations that one was gay, he asserted, would have the same negative impact as statements that one was a rapist, a Nazi, or a member of the KKK. He concluded, "If we must stop asking the question, okay. If we must stop pursuing, okay. But don't change the policy."<sup>20</sup>

After the Chiefs had spoken, President Clinton shared his views: "What I honestly believe is that there are [gay] people who love their country enough . . . to adhere to very strict standards, but are asking to go the next step and declare." Although the president felt that he should honor his commitment to gay and lesbian personnel, he also recognized his responsibility to avoid undermining morale within the military. He acknowledged that he found the privacy argument to be the most troubling aspect of the proposed status versus behavior distinction because opposition to the presence of homosexuals appeared to stem solely from the opinions of others. By choosing not to ask about an individual's sexual orientation, he thought, they could eliminate the need for homosexuals to mislead and thereby enhance the dignity of their service; barring cases involving declaration, that approach would limit the issue of homosexuality to matters of conduct. In that regard, the president considered disqualifying conduct to extend beyond sexual activity. "I'm not doing this for gay groups," he explained, "I am doing it for people who are gay and want to serve their country. . . . The people I would like to keep wouldn't show up for a Queer Nation parade."<sup>21</sup>

The remainder of the meeting was devoted to developing a practical strategy for adjusting, advancing, and announcing the compromise. President Clinton decided that the military would stop asking individuals about their sexual orientation while it studied the proposed policy change for six months. He also chose to postpone making any distinction between (undeclared) sexual orientation and (declared) sexual status, noted that there could be legal repercussions if the military continued to discharge homosexuals, and expressed a desire that Congress delay any related legislation until after the review was complete. Secretary Aspin, in response, suggested that if the attorney general were to temporarily halt the separation of homosexuals while the review was being conducted, the JCS could retain credibility among their constituents. "It must not look like they've caved," he emphasized.<sup>22</sup>

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President Clinton felt that an immediate press statement was unnecessary. He thought the administration could recognize the Chiefs' arguments and then take time to draft an official policy announcement. Waiting a day or two, said Secretary Aspin, would make it appear as if the president had taken the Joint Chiefs' views under advisement. After Aspin stressed that the JCS were not yet committed to the policy change, the president advised them to acknowledge that while they had agreed to study "how" a more inclusive policy might be implemented, they had not yet agreed to "whether" a more inclusive policy should be implemented. If problems with implementation were as significant as they believed, he explained, it remained conceivable the Chiefs might still persuade him to abandon the plan to lift the ban. When Admiral Kelso expressed his discomfort over being at odds with the commander in chief, President Clinton remarked: "It is no problem. Lots of Presidents got in trouble for not allowing dissent. You'll go to the Hill and will often be asked your views. That's okay; just tell me your views first." General Powell responded, "I guarantee we'll always tell you what we think." The president then implored that the JCS not "let the media drive a wedge between us" and thanked them for visiting.<sup>23</sup>

On 29 January 1993, President Clinton announced that an interim compromise had been reached, which provided additional time for all interested parties to consider the policy change.<sup>24</sup> Five days later, Secretary Aspin directed that while the way forward was being determined the military would stop inquiring if recruits were gay, lesbian, or bisexual. Meanwhile, known homosexuals would be transferred to the Standby Reserve to await their still to be determined fate.<sup>25</sup> This became the first tentative iteration of the Don't Ask, Don't Tell (DADT) policy.

As part of President Clinton's plan, Secretary Aspin had six months to conduct a study, formulate a revised policy, and draft an executive order that would end discrimination in the military based on sexual orientation (as opposed to sexual conduct) alone. This was to be done in consultation with the JCS, military departments, and Congress, and result in a policy that was "consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain."<sup>26</sup> Two months later, shortly after Congress had begun to receive testimony on the subject, Aspin ordered two special studies to help identify and assess available options.

The first of these—the Rand Corporation's *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*\*—was commissioned on 1 April to investigate how to (rather than whether to) implement a policy ending discrimination against homosexuals. Far broader and more comprehensive than any of the preceding reviews, it focused on demonstrating that any threat posed by the presence of homosexuals was at least manageable. The report confirmed the military's staunch opposition to gays in the military and that public opinion remained sharply divided on the issue, but it also

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\*This report was prepared for the Office of the Secretary of Defense by Rand's National Defense Research Institute (NDRI), a federally funded research and development center.

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indicated that qualified support for a more-inclusive personnel policy was growing. It then dispelled AIDS-related health concerns and minimized the risk of antihomosexual violence within the ranks, noting that a number of domestic organizations and foreign militaries had recently incorporated gays and lesbians without consequence, not unlike the military's prior experience with racial integration.<sup>27</sup> The most significant finding, however, was that "unit cohesion" could be subdivided into "social cohesion" and "task cohesion." This distinction made it possible to assert that although common traits and values might enhance a group's social solidarity, that form of unity was not necessarily relevant to the group's commitment or success in achieving collective objectives. "It is not necessary to like people," the report explained, "in order to work with them."<sup>28</sup>

Rand forwarded a draft copy of its research findings by mid-July, followed by a final report in August. It concluded that the only workable option fitting the parameters outlined by President Clinton was to consider gender identity (status) irrelevant (not germane) and apply the existing standards of personal conduct uniformly to both homosexuals and heterosexuals. Since the president had indicated that altering the UCMJ was unacceptable, Rand advised that a more secure legal position could still be achieved by modifying the scope of specifications for Article 125 listed in the *Manual for Courts Martial*. Sodomy prosecutions of either gender, it suggested, could be limited to incidents involving minors or ambiguous consent. If the "not germane" course of action were adopted, Rand recommended that it be implemented immediately with visibly active command support.<sup>29</sup>

The second—by the Military Working Group (MWG), a Pentagon task force comprising five senior officers representing each of the Services plus a support staff of fifty—was commissioned on 5 April. Its report emphasized that the unique nature of the Armed Forces' mission necessitated the sacrifice of some civil liberties to maximize efficiency and argued that the experiences of domestic organizations and foreign militaries were too different to provide useful models for comparison. The MWG also believed that homosexuals presented a legitimate health risk and that knowledge of their presence would challenge core values, lead to internal conflict, divert command attention, undermine recruiting and retention efforts, and disregard conduct proscribed by the UCMJ. Moreover, the report claimed, the known presence of homosexuals in the military would exacerbate an already problematic decline in morale caused by budget reductions and force realignments following the end of the Cold War.<sup>30</sup>

From this perspective, the MWG reaffirmed the prevailing view that "*all homosexuality is incompatible with military service*" and that the presence of gays, lesbians, or bisexuals in any capacity would "have a significantly adverse effect on both unit cohesion and the readiness of the force."<sup>31</sup> The report's authors defended the current policy from accusations of excess. They noted that separations for homosexuality represented only a very small fraction of the total number of discharges, and that although the vast

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majority of these involved prohibited conduct, only a quarter of the sodomy cases prosecuted involved homosexuals.<sup>32</sup> The unstated reality was that most gays continued to serve without being detected.

The MWG forwarded an outline of its recommended policy on homosexuality on 8 June, followed by a summary of its findings on 1 July. Precluded from advocating a return to the previous policy, the study group advised that sexual orientation should be considered a personal and private matter, and that orientation (alone) should not limit one's eligibility to enter or serve in the Armed Forces. To that end, the military would not ask about an individual's sexual orientation, nor would one be required to reveal it, under any circumstance. Although inductees and serving personnel would receive education to "reinforce the principle that all service members can serve without fear of unwarranted intrusion into their personnel lives," it would not entail "sensitivity training" designed to "change any deeply held, religious and ethical beliefs."<sup>33</sup>

At the same time, commanders and law enforcement officials would continue to conduct inquiries and investigations when credible information (e.g., a homosexual act, statement, or marriage) indicated that there might be a legitimate basis for discharge or disciplinary action. Such investigations would be limited to establishing the elements of an offense or basis for discharge, and the use of aggressive tactics (such as stakeouts, roundups, or sting operations) would be restricted to cases involving specific allegations of proscribed conduct. Servicemembers thus found to have engaged in homosexual conduct would be discharged, normally under honorable conditions.

Meanwhile, the SASC held six days of hearings on the subject between 29 March and 11 May. Chairman Sam Nunn set the tone for the proceedings on the first day by emphasizing that "our primary focus and concern must be on the implications of any change in current policy on the effectiveness of our armed forces to carry out their mission to defend the nation."<sup>34</sup> Wide-ranging testimony subsequently addressed such topics as the policy's historical and legal background, the role of unit cohesion on combat effectiveness, the experience of foreign militaries, the concerns of military personnel, implementation issues, civil rights, and morality. The heated exchanges that occurred during the debate were not entirely one sided, but congressional grandstanding, conservative rebuffs, and even witness selection convinced some reform-minded groups that the hearings had been organized to reaffirm the status quo.<sup>35</sup>

The reform movement met equally strong opposition during hearings held by the House Armed Services Committee (HASC) that May, which helped convince the Clinton administration that it lacked the support necessary to withstand congressional resistance, should the president issue an executive order repealing the ban as pledged.<sup>36</sup> Instead, on 19 July, President Clinton announced to an audience at National Defense University that an "honorable compromise" had been reached.<sup>37</sup> Conceding that the new policy was an imperfect solution that failed to achieve all of his intended objectives, he

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reasoned that it remained a significant step in the right direction. The JCS and the Commandant of the Coast Guard concurred that it was at least a practicable outcome to a difficult situation.<sup>38</sup>

Secretary Aspin released a memo later that day, directing the CJCS and Service Secretaries (Secretaries of the Army, Navy, and Air Force) to implement the new “Policy on Homosexual Conduct in the Armed Forces” by 1 October 1993. Until that time, his interim policy would remain in effect.<sup>39</sup> The same day, Attorney General Janet W. Reno advised President Clinton that “because of the extraordinary deference paid by the courts to military service, we are confident that the new policy proposed by the Secretary of Defense will be upheld against constitutional challenge.”<sup>40</sup>

The new policy memorandum, which senior administration officials began to refer to as “Don’t Ask, Don’t Tell, Don’t Pursue,” reflected many of the MWG’s recommendations.<sup>41</sup> As the nickname suggested, the Defense Department version also contained provisions designed to safeguard the status of serving homosexuals. Principal among these was the assertion that “a statement by servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts or has a propensity or intent to do so.”<sup>42</sup> Because the suitability of an individual to serve was to be defined by conduct alone, this internal inconsistency suggested that gays, lesbians, and bisexuals might admit to their sexuality, as long as they remained celibate (or at least discrete). The attached policy guidelines contained the following stipulations:

Sexual orientation, absent credible information that a crime has been committed, will not be the subject of a criminal investigation. An allegation or statement by another that a servicemember is a homosexual, alone, is not grounds for either a criminal investigation or a commander’s inquiry.

Activities such as association with known homosexuals, presence at a gay bar, possessing or reading homosexual publications, or marching in a gay rights rally in civilian clothes will not, in and of themselves, constitute credible information...

Credible information . . . requires a determination based on articulable facts, not just a belief or suspicion.

Commanders, not investigators, determine when sufficient credible information exists to justify a detail of investigative resources to look into allegations.

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Commanders will not take official action against members based on rumor, suspicion, or capricious allegations.

Hostile treatment or violence against a servicemember based on a perception of his or her sexual orientation will not be tolerated.<sup>43</sup>

Between 20 and 23 July, the SASC and HASC each held three hearings to consider the “DoD Policy on Homosexuality in the Armed Forces” and “Assessment of the Plan to Lift the Ban on Homosexuality in the Military.” These hearings were as contentious as the previous ones, with Senator Nunn again setting the tone by declaring that it would be better to address the issue through the normal legislative process.<sup>44</sup> Unlike the earlier proceedings, however, the witness list now included both the Secretary of Defense and members of the JCS. Although Secretary Aspin attempted to defend the administration’s new policy, General Powell hedged. While emphasizing that the JCS fully supported and could successfully implement the policy, Powell also described the uniqueness of the military environment, the need for discriminatory practices in the Armed Forces, and the Chiefs’ opinion that open homosexuality would negatively “affect the cohesion and well-being of the force.” Each Service Chief concurred.

Uncomfortable with inconsistencies that might hinder the administration of DADT, if not the policy as a whole, Congress promulgated its own revision to the proscription against homosexuals serving in the military. The Senate and House passed identical amendments to the Fiscal Year (FY) 1994 National Defense Authorization Act (NDAA) in September. Aware that this would impact the administration’s policy, Aspin chose to delay implementation of DADT until after President Clinton had signed the NDAA (Public Law 103-160) on 30 November.<sup>45</sup> By that time, General John M. Shalikashvili, USA, had succeeded General Powell as CJCS.

The new statute (Title 10 United States Code [U.S.C.] § 654) was shaped by military opinion and reiterated many of the provisions contained in the previous policy governing the administrative separation of homosexual enlisted personnel (DOD Directive 1332.14), revised by Deputy Secretary of Defense William Graham Claytor Jr. in 1981. Congress rejected any constitutional right for homosexuals to serve in the military, acknowledged that it was sometimes necessary to refuse servicemembers certain civil liberties for the good of the force, and then declared that

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 moral, good order, and discipline, and unit cohesion that are the essence of military capability.<sup>46</sup>

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Congress specified three circumstances in which gays and lesbians should “be separated from the armed forces under regulations prescribed by the Secretary of Defense.” These included individuals who “engaged in, attempted to engage in, or solicited another to engage in a homosexual act,” others who made statements that they were “homosexual or bisexual” (unless it could be demonstrated that they didn’t possess a propensity to engage in homosexual acts), and those who attempted to marry a spouse of the same sex.<sup>47</sup>

Congress avoided addressing both the Clinton administration’s proposed distinction between sexual orientation and sexual behavior and its claim that statements alone created a rebuttable presumption regarding the propensity for homosexuals to engage in homosexual acts. The committees conceded that recruits should not be asked about their sexuality during the accession process, but stipulated that the Secretary of Defense could resume that practice should it become necessary in the future.<sup>48</sup> Beyond affirming widespread opposition to homosexual behavior within the ranks, which enhanced the prohibition’s defensibility in court, Congress left the task of defining the mechanisms for enforcing the law up to Secretary Aspin.

On 21 December, Aspin provided guidance for implementing DADT, which was scheduled to take effect on 5 February 1994.<sup>49</sup> He explained that existing regulations had been modified to emphasize that the suitability of homosexuals to serve in the military would now be based on conduct rather than orientation. The directive governing administrative separations, for example, had been modified “to distinguish sexual orientation . . . from homosexual acts and . . . statements that reflect an intent or propensity to engage in homosexual acts.” As such, it noted that while individuals might have an abstract sexual preference for persons of a particular sex, they did not necessarily possess a tangible propensity or intent to engage in sexual acts. Moreover, it observed that presumptions based on admissions of homosexuality were rebuttable, and in those cases servicemembers would be given an opportunity to refute speculations that they were, in fact, likely to engage in homosexual behavior.<sup>50</sup> Secretary Aspin stressed that, in the absence of aggravating factors or a specific request from the commander, “criminal investigative resources will not normally be devoted to the investigation of adult private sexual misconduct where such misconduct is the only offense.” Aspin resigned shortly before the new policy took effect and was replaced by William J. Perry.

### **Implementing and Enforcing the Policy**

Lieutenant Maria Z. Dunning, a US Naval Academy graduate and decorated Gulf War veteran, was the first servicemember to test the flexible boundaries of DADT. Already recommended for discharge after having disclosed that she was a lesbian during a political rally in January 1993, she argued that her statement merely acknowledged her identity, not that she practiced or intended to participate in homosexual acts. In December 1994, a second administrative review board agreed that Dunning had not violated the new

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regulation, and in May 1995, the CNO ordered that she be returned to the Active Reserve.<sup>51</sup> Two months later, however, Defense Department General Counsel Judith A. Miller declared that admitted homosexuals could neither refute government presumptions nor shift the burden of proof to the government by denying the relevance of sexual orientation to sexual behavior.<sup>52</sup> Henceforth, while the theoretical possibility of rebutting the government's presumption effectively safeguarded the policy from constitutional challenge, the near impossibility of actually doing so compelled those who desired to stay in uniform to remain silent.<sup>53</sup>

Unlike the decade following the implementation of Secretary Claytor's 1981 policy revision, when discharges for homosexuality had dropped significantly, the number rose unexpectedly following the implementation of DADT, doubling to more than 1,200 per year by 2000.<sup>54</sup> Most of those separations reflected young, first-term enlistees who had apparently elected to disclose their sexual orientation and subsequently accepted honorable, general, or uncharacterized discharges. At the same time, the number of discharges for homosexual acts or marriages declined by 20 percent.<sup>55</sup>

Critics of the new policy claimed that it was ambiguous, poorly understood, haphazardly observed, and erratically enforced for reasons ranging from willful ignorance of the regulations to increasing animosity toward gays and lesbians.<sup>56</sup> Lack of familiarity with existing standards, as the MWG noted in 1993, was not a new problem, but it was also true that the traditional stigma associated with homosexuality had been replaced by a more accepting and inclusive attitude in many parts of society by the mid-1990s.<sup>57</sup>

In August 1996, as complaints of procedural irregularities accumulated, Deputy Secretary of Defense John P. White notified the Service Secretaries and senior military leaders that inspector generals were "the appropriate persons with jurisdiction to investigate alleged violations of the guidelines" for "fact-finding inquiries into homosexual conduct."<sup>58</sup> Then, in March 1997, Under Secretary of Defense (Personnel and Readiness) Edwin Dorn reiterated existing policy guidance after he learned that some servicemembers had been threatened with physical harm or been reported as homosexuals because they had reported acts of sexual misconduct, rebuffed sexual advances, or were suspected of being gay, lesbian, or bisexual. He emphasized that "service members should be able to report crimes free from fear of harm, reprisal, or inappropriate or inadequate government response" and also clarified that while suspected threats should be promptly investigated, mere allegations of homosexuality did not constitute credible information justifying an investigation into a servicemember's sexual orientation or activities.<sup>59</sup> Finally, in April 1997, Secretary of Defense William S. Cohen, responded to concerns raised by members of Congress and the Servicemembers Legal Defense Network (SLDN) and ordered a review of the Defense Department's administrative policies on homosexual conduct.<sup>60</sup>

Released in April 1998, the resulting report was defensive in tone. Reiterating Secretary Cohen's zero-tolerance stance toward harassment and

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threats of violence, it tentatively claimed that the policy had, “for the most part, been properly applied and enforced,” but also acknowledged that achieving a balance between the prohibition against homosexual conduct and the privacy rights of military personnel had “posed a challenge to the Services.”<sup>61</sup> It also stated that the vast majority of investigations had been properly initiated and that allegations of irregularity reflected cases in which uninformed servicemembers had failed to anticipate possible sources of indirect disclosure. Moreover, the document defended the government’s right to investigate the veracity of “coming out” claims suspected of being made to avoid service obligations, particularly those involving the potential recoupment of educational assistance, bonuses, and special pay. The report maintained that the criminal prosecution of homosexuals was usually limited to cases involving aggravating circumstances and that the infrequent use of pretrial agreements in those instances was intended to facilitate the investigation of additional UCMJ offenses (e.g., fraternization and homosexual conduct). The report’s authors were unaware of any cases in which a chaplain had “inappropriately” violated a servicemember’s confidentiality regarding “homosexual conduct,” and while no physician-patient privilege then existed in the military, they discovered only one instance in which a doctor had disclosed a patient’s homosexuality without the patient’s consent.<sup>62</sup>

According to the report, not only were inductees advised on the Defense Department’s policy on homosexual conduct during the accession process, but substantial efforts were also made to provide additional training on the policy via courses for judge advocate officers, commanders, and officers attending Service war colleges. Nevertheless, “some commanders, attorneys and investigators reported that they had not received training on the homosexual conduct policy.”<sup>63</sup> Similarly, while the DOD remained concerned that some servicemembers might “not report anti-gay threats or harassment for fear of being targeted with and investigation . . . there were instances where the effective dissemination of Under Secretary Dorn’s directive could not be documented.”<sup>64</sup>

The report provided five recommendations: that commanders consult with legal officials at higher headquarters before initiating investigations into alleged homosexual conduct; that pretrial agreements be utilized only when the conduct at issue warrants criminal prosecution; that prior authorization be obtained from the appropriate Service Secretary before initiating a “substantial investigation” into a “coming out” case; that Under Secretary Dorn’s memorandum be reissued, with additional emphasis placed on the fact that those guilty of harassment would be held accountable; and that the Services’ inspectors general adopt “the training of all those charged with implementing the homosexual conduct policy” as a specific item of interest.<sup>65</sup>

Shortly thereafter, Dorn’s successor—Rudolph F. “Rudy” de Leon— notified the Service Chiefs and Service Secretaries that Secretary Cohen had approved the recommendations and would issue implementing guidance.<sup>66</sup> The guidance, however, did not appear until sixteen months later and only

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after antigay harassment in the military had received national attention following the murder of Private First Class Barry Winchell, USA, at Fort Campbell, Kentucky, on 5 July 1999. While Cohen reiterated his opposition to harassment and his determination to “implement” the five year-old “homosexual conduct policy with fairness to all concerned,” Under Secretary de Leon released two memos that clarified and reinforced the Defense Department’s existing policies.<sup>67</sup>

The issue of gays in the military regained political traction later that December as the upcoming year’s presidential campaign approached. Furthermore, consecutive defeats within the European Court of Human Rights caused the United Kingdom to end the ban on homosexuality within its armed forces. Hillary Rodham Clinton, then a candidate for the US Senate, told supporters that DADT had been a failure and that she would work to overturn the policy if elected. She recognized that Congress would not pass such legislation, however, and recommended that the Pentagon strive to reduce the number of gays being discharged.<sup>68</sup> President Clinton echoed his wife’s sentiment during a radio interview five days later, complaining that the policy neither functioned as he had described it, nor as senior military leaders at the time had pledged to implement it. He advocated administrating the policy as originally intended.<sup>69</sup> The following day, Vice President Gore declared that the policy should be abandoned and pledged to “eliminate this unacceptable form of discrimination” if elected president.<sup>70</sup>

The vice president further elevated the level of controversy surrounding DADT during a primary debate a month later by affirming that he would consider a nominee’s willingness to repeal the policy as a litmus test when selecting members of the JCS.<sup>71</sup> Presidential candidate George W. Bush, then governor of Texas, avoided using the awkward “litmus test” metaphor during a Republican primary debate the following evening, but he stated that he would not appoint anyone to the JCS who advocated allowing gays to serve openly in the military.<sup>72</sup> When General Henry H. Shelton, USA, was asked for his opinion during a subsequent interview, the CJCS remarked “that any Commander-in-Chief would want to choose his principle military advisor based on his operational experience, his judgment, his integrity.” On the topic of DADT, the Chairman commented that “it’s not just a policy . . . it’s a law . . . that I think strikes the proper balance between the requirement for good law, order and discipline in the military, and individual rights.” He acknowledged that although the policy was not broken, neither had it been implemented correctly.<sup>73</sup>

Meanwhile, on 13 December 1999, Secretary Cohen gave the Defense Department’s inspector general ninety days to assess the application of the homosexual conduct policy at representative military installations, paying particular attention to the local command climate and the propensity for harassment of servicemembers based on perceived or alleged homosexuality.<sup>74</sup> Cohen also proposed that the policy be amended to “Don’t Ask, Don’t Tell, Don’t Harass.” Under Secretary de Leon gave the Service Chiefs one month to present proposals for revitalizing training on the

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homosexual conduct policy and to prepare a statement that informed subordinate commanders that harassment would not be tolerated and that individuals engaged in such activities would be held accountable.<sup>75</sup> Cohen approved the Service Chiefs' submissions on 1 February 2000 and directed that the Services complete the systematic training of all military personnel by the end of the year.<sup>76</sup>

During its assessment, the DOD's Office of the Inspector General visited more than thirty-eight randomly selected military installations and naval vessels around the globe, collecting more than 71,500 surveys from servicemembers. The findings, released on 16 March as the *Report on Military Environment with Respect to the Homosexual Conduct Policy*, were troubling. As for command climate, 37 percent of the respondents said they had witnessed or experienced behavior that they considered harassment based on perceived homosexuality, while 80 percent had heard some variant of antihomosexual speech used during the preceding year, most of it between junior enlisted males. Moreover, 10 percent believed that the harassment was condoned, and 85 percent believed that derogatory comments were tolerated, to some degree. As for training, 97 percent of the respondents believed they possessed some understanding of the homosexual conduct policy, but 57 percent denied receiving any formal training. Only half considered the existing policy at least moderately effective at preventing or reducing harassment.<sup>77</sup>

A week later, Secretary Cohen established a working group\* to review the inspector general's report and formulate a strategy to address the problems that it had identified.<sup>78</sup> By July, the working group produced a thirteen-point *Anti-Harassment Action Plan* that concentrated upon the adoption of a single, Defense Department-wide policy that admonished all forms of harassment and emphasized that "treatment of all individuals with dignity and respect is essential to good order and discipline." The action plan also recommended enhanced training, improved reporting, tougher enforcement, and the measurement of progress toward the program's goals of educating the force, curtailing inappropriate behavior, and increasing command involvement in the creation of a more cohesive working environment. After Cohen had approved the plan, Under Secretary of Defense (Personnel and Readiness) Bernard D. Rostker relied upon the Service Secretaries and Service Chiefs to implement the plan within their own organizations.

Enhanced education and revised regulations gradually reduced the number command-directed pursuits and criminal investigations by the late 1990s, although critics complained that the comprehensive antiharassment action plan had not been fully implemented by either the Defense Department or the Services and that antigay harassment had continued into the twenty-first century.<sup>79</sup> In 2004, while responding to congressional requests that

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\*Chaired by Carol A. DiBattiste, the under secretary of the Air Force, the group included senior military and civilian officials from each of the Services.

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Secretary of Defense Donald H. Rumsfeld fully implement the antiharassment action plan, Under Secretary of Defense (Personnel and Readiness) David S. C. Chu replied:

The Department has determined the over-arching directive recommended by the Plan is not necessary. The Service's policies and programs are sufficient to address this important issue. It is the Department's view that all service members should be treated with dignity and respect. This is a value held by all four Services and a cornerstone of our leadership and human resources strategies that is reflected in the core values and institutional training throughout the Department.<sup>80</sup>

### **Summary**

January 1993 was an uncertain time for General Colin Powell and the Joint Chiefs. They remained faithful to the belief that the presence of homosexuals would undermine military efficiency, but it was becoming increasingly possible the exclusionary policy might be abolished through executive order or declared unconstitutional in federal court. Although Congress could intervene if the proscription appeared to be in serious jeopardy, siding with lawmakers on this issue could undermine the Chiefs' nascent relationship with President Bill Clinton and Secretary of Defense Les Aspin. Before long, the Chiefs chose to accept the new administration's offer to compromise. The military agreed to stop inquiring about a servicemember's sexual orientation, while the administration accepted that personnel who had committed homosexual acts would continue to be discharged.

After further study and congressional debate, the Defense Department released a draft of its new policy on homosexual conduct. Informally known as "Don't Ask, Don't Tell, Don't Pursue," it narrowed the range of circumstances during which individuals suspected of engaging in homosexual behavior could be investigated, and it stipulated that the admission of homosexual orientation did not necessarily evidence a propensity to engage in homosexual behavior. Concerned that the policy's ambiguity could provide a loophole for gay and lesbian servicemembers to serve openly in uniform, Congress responded by enacting legislation (10 U.S.C. § 654) prohibiting homosexuality in the military. Because it delegated the responsibility for developing, implementing, and administering a policy to enforce the ban to Secretary Aspin, the Defense Department's version of the policy remained essentially intact when implemented in February 1994.

The number of discharges for homosexuality rose unexpectedly following the policy's implementation, and harassment of those alleged to be homosexual remained a pervasive problem. Confusion over two competing visions of how the policy should be administered, lack of command attention,

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and inadequate training explain in part the increase in discharges. Yet, most of the discharges involved first-term personnel who chose to disclose their sexual orientation at a time when the stigma against being openly gay had diminished significantly throughout society, which provided a means for some to evade their commitment to military service. Problems with the policy's enforcement were eventually recognized, particularly through two Defense Department reviews conducted in 1998 and 2000. Corrective actions reduced the occurrence of procedural irregularities and helped to diminish hostility within the workplace, but did not eliminate the challenges.

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<sup>1</sup> Curtis Wilkie, "Harvard Tosses Warm-up Queries to Clinton on the Eve of New Hampshire Debate," *Boston Globe*, 31 Oct 1991.

<sup>2</sup> House, Expressing the sense of the House of Representatives that the President should rescind Department of Defense Directive 1332.14, section H.1, which bans gay, lesbian, and bisexual Americans from serving in the Armed Forces of the United States (Homosexual Discrimination in Military), 102d Cong., 1st sess., 1991, H.R. Res. 271; Senate, Homosexual Discrimination in Military, 102d Cong., 1st sess., 1991, S. Res. 236; House, Homosexual Discrimination in Military, 102d Cong., 1992, H.R. 5208; Senate, Homosexual Discrimination in Military, 102d Cong., 1992, S. 3084.

<sup>3</sup> Government Accountability Office (GAO), *Defense Force Management: DOD's Policy on Homosexuality*, GAO/NSIAD-92-98 (Washington, DC: GAO, 1992), 3.

<sup>4</sup> Christopher Jehn, assistant secretary of defense, letter to Frank C. Conahan, assistant comptroller general, National Security and International Affairs Division, US General Accounting Office, 17 Apr 1992.

<sup>5</sup> Aaron Belkin and Jason McNichol, "Homosexual Personnel Policy in the Canadian Forces," *International Journal*, Winter 2000-2001, 76-77.

<sup>6</sup> "Judge Orders Gay Sailor Temporarily Reinstated," *New York Times*, 8 Nov 1992.

<sup>7</sup> John Cushman, "Top Military Officers Object to Lifting the Ban," *New York Times*, 14 Nov 1992; Tom Morganthau, "Gays in the Military," *Newsweek*, 1 Feb 1993; Cragg Hines, "Two Key Senators Object to Letting Gays in Military," *Houston Chronicle*, 16 Nov 1992.

<sup>8</sup> Leslie Aspin, Secretary of Defense, memorandum to President William J. Clinton, subj: Meeting with the JCS, 23 Jan 1993, NSC, RMS 9300047, Clinton Presidential Papers, Clinton Library, Little Rock, AR.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Nathaniel Frank, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America* (New York: St. Martin's Press, 2009), 81.

<sup>12</sup> Robert Bell, senior director for defense policy and arms control, memorandum for Anthony Lake, assistant to the president for national security affairs, subj: President's Meeting with the JCS, 24 Jan 1993, NSC, RMS 9300047, Clinton Presidential Papers.

<sup>13</sup> *Ibid.*

<sup>14</sup> Frank, *Unfriendly Fire*, 83.

<sup>15</sup> White House, memorandum of conversation, subj: Meeting with the JCS, 25 Jan 1993, NSC, RMS 9300366, Clinton Presidential Papers.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

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<sup>24</sup> William J. Clinton, "President's News Conference, January 29, 1993," *Public Papers of the Presidents of the United States: William J. Clinton, 1993*, book 1: 20 Jan–31 July 1993 (Washington, DC: National Archives and Records Administration, 1994), 20.

<sup>25</sup> Eric Schmitt, "The Gay Troop Issue: How Rules Will Be Altered on Homosexuals in Military," *New York Times*, 29 Jan 1993; Secretary of Defense Leslie Aspin, memorandum to CJCS and service secretaries, subj: Policy on Homosexual Conduct in the Armed Forces, 19 Jul 1993.

<sup>26</sup> William J. Clinton, "Memorandum on Ending Discrimination in the Armed Forces," 29 Jan 1993.

<sup>27</sup> National Defense Research Institute (NDRI), *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* (Santa Monica, CA: Rand Corporation, 1993) xviii–xxii.

<sup>28</sup> *Ibid.*, 28–31.

<sup>29</sup> *Ibid.*, 32–40.

<sup>30</sup> Department of Defense (DOD), "Summary Report of the Military Working Group," (Washington, DC: Office of the Secretary of Defense [OSD], 1 Jul 1993) 3–8.

<sup>31</sup> *Ibid.*, 7, 12.

<sup>32</sup> *Ibid.*, 10–11.

<sup>33</sup> *Ibid.*, 13–15.

<sup>34</sup> Senate Committee on Armed Services, *Policy Concerning Homosexuality*, 1993, 3–4.

<sup>35</sup> Frank, *Unfriendly Fire*, 104.

<sup>36</sup> *Ibid.*, 105–8.

<sup>37</sup> William J. Clinton, "Remarks Announcing the New Policy on Homosexuals in the Military," 19 Jul 1993, [www.presidency.ucsb.edu/ws/index.php?pid=46867](http://www.presidency.ucsb.edu/ws/index.php?pid=46867).

<sup>38</sup> "Remarks by the Joint Chiefs of Staff and Coast Guard Commandant Following Statement by President Clinton Announcing Policy on Gays in the Military Introduced by Secretary of Defense Les Aspin," news conference on 19 Jul 1993, Federal News Service transcript.

<sup>39</sup> Aspin memo, 19 Jul 1993.

<sup>40</sup> Janet Reno, attorney general, memorandum to William J. Clinton, subj: Defensibility of the New Policy on Homosexual Conduct in the Armed Forces, 19 Jul 1993, <http://dont.stanford.edu/regulations/RenoMemo.html>.

<sup>41</sup> White House Office of the Press Secretary, "Background Briefing by Senior Administration Officials," 16 Jul 1993, <http://clinton6.nara.gov/1993/07/1993-07-16-background-briefing-on-gays-in-the-military.html>.

<sup>42</sup> Aspin memo, 19 Jul 1993, 2.

<sup>43</sup> *Ibid.*, 3–5.

<sup>44</sup> Senate Committee on Armed Services, "Policy Concerning Homosexuality in the Armed Forces," 20 Jul 1993, 697.

<sup>45</sup> Edwin Dorn, assistant secretary of defense, memorandum to assistant service secretaries and director of the joint staff, subj: Policy on Homosexual Conduct in the Armed Forces, 30 Sep 1993.

<sup>46</sup> 10 U.S.C., Section 654, (a)-(b), Policy Concerning Homosexuality in the Armed Forces (30 Nov 1993).

<sup>47</sup> 10 U.S.C., Section 654, (b)(1)-(3), Policy Concerning Homosexuality in the Armed Forces (30 Nov 1993).

<sup>48</sup> Pub. L. 103-160, Section 571(d) (30 Nov 1993).

<sup>49</sup> Leslie Aspin, Secretary of Defense, memorandum to military secretaries, CJCS, USDs, ASDs, and others, subj: Implementation of DOD Policy on Homosexual Conduct in the Armed Forces, 21 Dec 1993.

<sup>50</sup> DOD Directive 1332.14, Enlisted Administrative Separations (21 Dec 1993, incorporating Change 1, 4 March 1994), Enclosure E3.A1.1.8 (Homosexual Conduct).

<sup>51</sup> Frank, *Unfriendly Fire*, 174–75; David F. Burrelli and Jody Feder, *Homosexuals and the U.S. Military: Current Issues* (Washington, DC: Congressional Research Service [CRS], 22 Jul 2009) 4–5.

<sup>52</sup> Judith Miller, general counsel of the Department of Defense, memorandum to general counsels of the military departments, the judge advocate general of the Army, judge advocate

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general of the Navy, judge advocate general of the Air Force, and the staff judge advocate to the Commandant of the Marine Corps, subj: "Policy on Homosexual Conduct in the Armed Forces," 18 Aug 1995.

<sup>53</sup> Frank, *Unfriendly Fire*, 176.

<sup>54</sup> GAO, *Military Personnel: Financial Costs and Loss of Critical Skills Due to DOD's Homosexual Conduct Policy Cannot Be Completely Estimated*, GAO-05-299 (Washington, DC: GAO, Feb 2005), 8.

<sup>55</sup> DOD, *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military* (Washington, DC: Office of the Undersecretary of Defense for Personnel and Readiness, April 1998) 2-3.

<sup>56</sup> NDRI, *Sexual Orientation*, 56; Frank, *Unfriendly Fire*, 168.

<sup>57</sup> DOD, MWG Summary Report, 8, 15.

<sup>58</sup> John P. White, deputy secretary of defense, memorandum to secretaries of the military departments, CJCS, and inspector general of the Department of Defense, subj: "Complaints Regarding Alleged Violations of Guidelines for Fact-Finding Inquiries into Homosexual Conduct," 16 August 1996.

<sup>59</sup> Edwin Dorn, under secretary of defense for personnel and readiness, memorandum to secretaries of the military departments, CJCS, and inspector general of the Department of Defense, subj: "Guidelines for Investigating Threats against Service Members Based on Alleged Homosexuality," 24 Mar 1997.

<sup>60</sup> DOD, *Application and Enforcement*, 1.

<sup>61</sup> *Ibid.*, 2.

<sup>62</sup> *Ibid.*, 6-13.

<sup>63</sup> *Ibid.*, 13.

<sup>64</sup> *Ibid.*, 8.

<sup>65</sup> *Ibid.*, 14.

<sup>66</sup> Rudy de Leon, under secretary of defense for personnel and readiness, memorandum to secretaries of the military departments and Chief of Staff of the Army, CNO, Commandant of the Marine Corps, and Chief of Staff of the Air Force, subj: Review of the Effectiveness of the Application and Enforcement of the Department of Defense Policy on Homosexual Conduct in the Military, 7 Apr 1998.

<sup>67</sup> Rudy de Leon, under secretary of defense for personnel and readiness, memorandum to secretaries of the military departments, CJCS, and inspector general of the Department of Defense, subj: "Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality, 12 August 1999; and memorandum to secretaries of the military departments, subj: "Implementation of Recommendations Concerning Homosexual Conduct Policy," 12 August 1999.

<sup>68</sup> Adam Nagourney, "Hillary Clinton Faults Policy of Don't Ask," *New York Times*, 9 Dec 1999.

<sup>69</sup> Robert Pear, "President Admits Don't Ask Policy Has Been Failure," *New York Times*, 12 Dec 1999.

<sup>70</sup> Ceci Connolly and Bradley Graham, "In Switch, Gore Vows to End 'Don't Ask, Don't Tell'—V.P. Says Gays Should be Allowed to Freely Serve IN Military," *Seattle Times*, 14 Dec 1999.

<sup>71</sup> Steven Lee Myers, "Officers Riled by Policy on Gays Proposed in Gore-Bradley Debate," *New York Times*, 7 Jan 2000.

<sup>72</sup> Steve Carell and Toni Collette, "Excerpts from the Debate among G.O.P. Candidates," *New York Times*, 7 Jan 2000.

<sup>73</sup> Gen Henry H. Shelton, CJCS, transcript of interview with Defense Writer's Group, 15 Feb 2000.

<sup>74</sup> William S. Cohen, Secretary of Defense, memorandum to the DOD Inspector General, subj: "Implementation of the Policy on Homosexual Conduct in the Military," 13 Dec 1999.

<sup>75</sup> Linda D. Kozaryn and Jim Garamone, "Cohen Adds 'Don't Harass' to Homosexual Policy, Says It Can Work," American Forces Press Service, 29 Dec 1999; Eric Resnick, "Pentagon Issues 'Don't Ask' Instructions, Again," *Gay People's Chronicle*, 31 Dec 1999.

<sup>76</sup> Office of the Inspector General, Department of Defense (DOD IG), *Military Environment with Respect to the Homosexual Conduct Policy*, report no. D-2000-01 (Washington, DC: Office of

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the Inspector General, Department of Defense, 16 Mar 2000) 18; Elizabeth Becker, “Pentagon Orders Training to Prevent Harassment of Gays,” *New York Times*, 2 Feb 2000.

<sup>77</sup> DOD IG, *Military Environment*, i–ii, 18.

<sup>78</sup> Office of the Assistant Secretary of Defense Public Affairs (OASD-PA), “Secretary Cohen Calls for Action Plan to Reduce Harassment,” news release, 24 Mar 2000.

<sup>79</sup> Servicemembers Legal Defense Network (SLDN), *Conduct Unbecoming: The Tenth Annual Report on ‘Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass’* (2004), 6, 19–22.

<sup>80</sup> Letter from 22 Members of Congress to Donald Rumsfeld, Secretary of Defense, 23 July 2003; David F. Burelli and Charles Dale, “Homosexuals and U.S. Military Policy: Current Issues,” (Washington, DC: CRS, 27 May 2005) 22–23; David Chu, under secretary of defense (personnel and readiness), letter to the Honorable James Langevin, 24 June 2004.

## 2 TESTING THE HYPOTHESIS

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George W. Bush became the forty-third president of the United States on 20 January 2001. Although his predecessor had been a vocal advocate for gay and lesbian rights, conservative politics and traditional values moderated Bush's position on the issue. On one hand, he denounced moral judgments, pledged to hire personnel without regard for their sexual preference, and supported the states' right to recognize domestic unions between same-sex couples.<sup>1</sup> On the other hand, he also opposed gay marriage and the adoption of children by gay couples.<sup>2</sup>

As commander in chief, President Bush was reluctant to appoint a secretary of defense or member of the JCS who favored abolishing DADT.<sup>3</sup> Regardless of whether their intent was to include or exclude homosexuals from the military, Bush preferred to avoid a contentious debate framed as a civil rights issue.<sup>4</sup> He also believed that sexual preference should remain a personal and private matter, and he considered the current prohibition against homosexual conduct in the military an effective policy.

The Bush administration usually deferred questions about the controversial policy to the Defense Department, which in turn passed them to Congress.<sup>5</sup> The DOD's official position, which denied any prohibition against homosexual orientation, stated that in dismissing servicemembers who had engaged in homosexual conduct it merely fulfilled its obligation to enforce 10 U.S.C. § 654. Any change in the law would therefore have to emanate from the president and Congress.<sup>6</sup> While testifying before the SASC during his Secretary of Defense confirmation hearing in December 2006, for example, Robert M. Gates replied to Senator Edward M. Kennedy (D-MA) that "the Department will, of course, continue to follow congressional direction on homosexual conduct."<sup>7</sup>

### **The Global War on Terrorism**

Al-Qaeda attacked the United States on 11 September 2001. Incensed by the wanton destruction, President Bush announced a broad antiterrorism initiative that included launching large-scale military campaigns against the Taliban regime in Afghanistan during October 2001 (Operation Enduring Freedom) and against the Baathist regime in Iraq during March 2003 (Operation Iraqi Freedom). Although each opposition government toppled quickly, coalition forces still faced the monumental task of battling two insurgencies while rebuilding the infrastructures of both nations.

As America began to mobilize for war, Bush authorized Secretary of Defense Donald Rumsfeld to delegate the temporary suspension of

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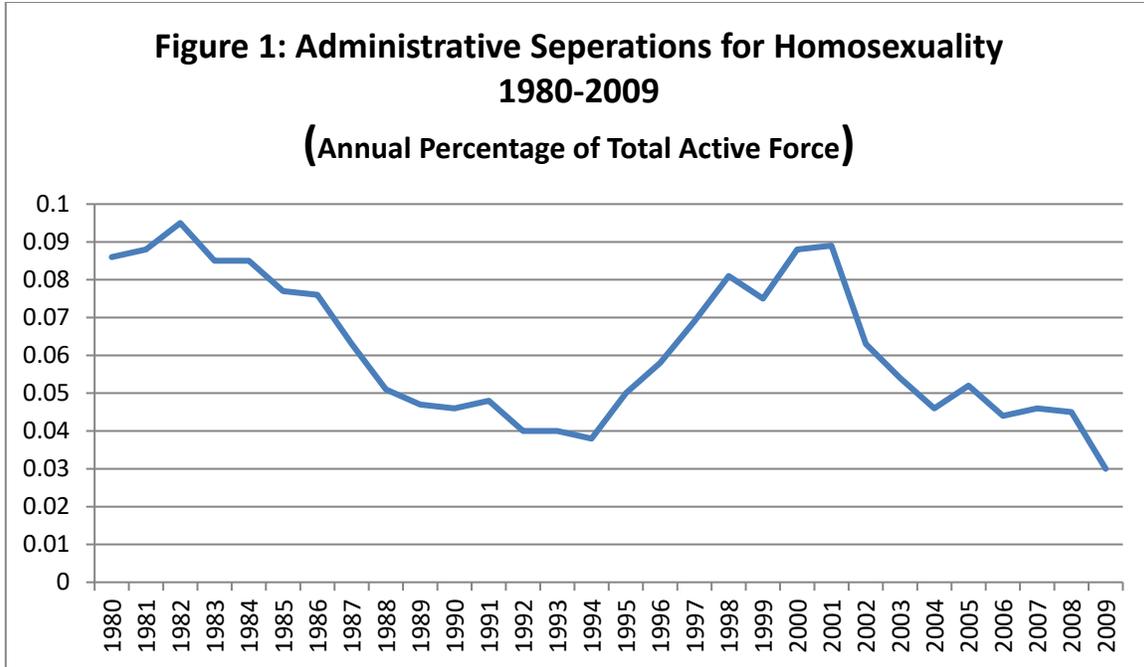
administrative discharges to the Services.<sup>8</sup> This practice, commonly known as a stop-loss policy, was sometimes viewed as a backdoor draft by opponents. Unlike the stop-loss policies enacted during the Gulf War and the Kosovo campaign, the Global War on Terrorism policy lacked a provision to temporarily exempt individuals who were being discharged for homosexual conduct.<sup>9</sup>

When the intensity and duration of overseas deployments increased, particularly after the invasion of Iraq in 2003, recruitment and retention rates began to decline. The Army responded by expanding the scope of its stop-loss policy beyond specialists possessing critical skills to include soldiers employed in more routine occupational fields, members of the Individual Ready Reserve, and personnel scheduled for inter-unit transfers.<sup>10</sup> At the same time, enlistment standards were reduced to expand the shrinking pool of potential volunteers. Strategies included raising the age and weight limits, lowering educational requirements, and approving an increasing number of moral waivers for a wider variety of criminal offenses.<sup>11</sup>

As the wars progressed, the number of gays and lesbians discharged from the military declined, eventually reaching a thirty-year low by 2009 (figure 1).<sup>12</sup> Gay rights advocates were not necessarily surprised; they had previously cited this recurring wartime pattern to counter claims that homosexuals were incompatible with military service. Rand Corporation later offered several complementary explanations for the trend.<sup>13</sup> One reason was the growing acceptance of gays and lesbians, which mirrored sociocultural changes that were evolving across America.<sup>14</sup> Another suggested that deployed commanders either lacked the resources necessary to enforce the exclusionary policy or were reluctant to give up otherwise qualified personnel.<sup>15</sup> A third explanation was that the number of voluntary disclosures (statements) had declined. Although the Rand report did not to speculate why this might have occurred, conceivably some homosexuals chose to keep their sexual orientation hidden in order to fight terrorism.

Regardless of the decline in homosexual discharges, the military continued to enforce DADT. During the next decade, Operations Enduring Freedom and Iraqi Freedom became crucibles for testing whether or not the presence of homosexuals undermined unit cohesion and military effectiveness. This trial by fire reflected a broadening effort to overturn the policy that was waged by gay servicemembers and veterans, promoted by civil rights organizations, publicized by multimedia outlets, championed by liberal legislators, and debated in federal courts and upon presidential campaign platforms. As the resistance movement gained momentum, it focused increasingly upon repealing 10 U.S.C. § 654, rather than merely attempting to shape how military authorities administered DADT. Progress occurred in successive waves, mediated by contemporary events that either attracted or diverted attention from the issue.

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Data compiled from various sources by David F. Burrelli, *Don't Ask, Don't Tell: The Law and Military Policy on Same-Sex Behavior*, Congressional Research Service (CRS) Report R40782 (Washington, DC: CRS 2010), 13.

At its core, the revitalized opposition to DADT derived its credibility from the growing number of gay and lesbian war veterans, some of whom chose to openly challenge the policy while in uniform. According to Rand Corporation, 2.2 percent of males and 10.7 percent of females who served in the military between 1994 and 2008 were homosexual.<sup>16</sup> Altogether, they accounted for approximately 0.34 percent of the total active duty force in 2008. A separate Rand survey conducted among gay, lesbian, and bisexual personnel in 2010 discovered that 3.0 percent of the respondents had fully disclosed their sexuality, while another 27.0 percent had selectively disclosed their sexuality to some members of their unit.<sup>17</sup> This suggests that by the end of the decade approximately 15,000 homosexuals, out of an active force of 1,390,000 servicemembers, were somewhat open about their sexual orientation. From an alternative perspective, 36.0 percent of the respondents to a 2010 DOD survey indicated that they were serving with a servicemember whom they believed to be homosexual.<sup>18</sup>

### Initial Opposition

When the Defense Department established DADT in 1994, it acknowledged that homosexuals served in the military and contributed to its mission. As the wars in Afghanistan and Iraq escalated nearly ten years later, the realization that gays and lesbians serving in harm's way could still be summarily dismissed for merely disclosing their sexual orientation provided moral grounds for some to question the virtue of such a discriminatory

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policy. A representative editorial in the *Washington Post* during 2002 observed that “the desire to defeat al Qaeda has been preempted by an apparently more important priority: continuing the irrational discrimination against gay men and lesbians who would serve this country.”<sup>19</sup> In its January 2003 report, the Human Rights Watch remarked that “the United States may wage war against those who disavow human rights, but it remains adamant against recognizing the fundamental rights of the homosexuals who volunteer to fight, and die, for their country.”<sup>20</sup>

Others questioned the policy’s sustainability on legal grounds. In August 2003, retired Rear Admiral John D. Hutson, formerly the judge advocate general for the US Navy, published a harsh critique of DADT in the *National Law Journal*. This occurred following the US Supreme Court’s decision in *Lawrence v. Texas*, which overturned a controversial 1986 ruling in *Bowers v. Hardwick* that had been the cornerstone of the military’s legal arguments for seventeen years. The *Lawrence* court recognized the right of adults to engage in private, consensual intimacy and rejected moral disapproval as a rational justification for prohibiting such behavior. This decision altered the constitutional framework for litigating DADT by requiring a heightened level of judicial scrutiny.<sup>21</sup>

Noting the nation’s increasing openness to gays and lesbians, Admiral Hutson questioned the necessity of continuing the existing ban on homosexual behavior, which was “virtually unworkable in the military—legally, administratively, and socially.”<sup>22</sup> Continuing to sanction such discrimination, he warned, might encourage elements within society to eschew the military as an overly conservative and backward-thinking institution. His legal concerns were partially confirmed the next year when the US Court of Appeals for the Armed Forces indicated that the Supreme Court’s prohibition against laws barring sexual intimacy could, under certain circumstances, apply to the military.<sup>23</sup> Likewise, the US Army Court of Criminal Appeals cited the *Lawrence* ruling in its decision to overturn the conviction of a soldier who had engaged in consensual sodomy.<sup>24</sup> Although that case involved heterosexual conduct, the inference was that the new standard could affect future efforts to prosecute homosexual conduct violations under Article 125 of the UCMJ.<sup>25</sup>

Other critiques emerged from within the retired community. Former NATO commander General Wesley K. Clark, one of nine Democratic presidential candidates who unanimously opposed DADT in the fall and winter of 2003, acknowledged that the troubled policy did not work. Instead, he advocated a gender-neutral policy similar to the one Great Britain employed at the time, which would deter misconduct (i.e., fraternization) without regard to sexual orientation.<sup>26</sup> Clark proposed an in-house review, which would provide senior military leaders with an opportunity to craft a more inclusive policy for congressional approval.<sup>27</sup>

Then, on 9 December 2003, three retired flag officers (two brigadier generals and one rear admiral) informed the *New York Times* that they were

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gay. Timed to coincide with the tenth anniversary of DADT, the public disclosures were intended to draw attention to the policy's overall ineffectiveness. During a press conference the men explained how DADT contradicted such core values as truth, honor, dignity, and respect. They described the difficulties they had encountered while serving in silence and claimed that the Defense Department had failed to sufficiently address the continuing problem of harassment.<sup>28</sup> The officers joined thirteen other retired military and DOD officials who condemned the policy in an open letter released through SLDN. The statement's signatories, who included Rear Admiral Hutson and former Assistant Secretary of Defense Lawrence J. Korb, charged that "no credible evidence exists to support the continued ban. Indeed, all studies, including those commissioned by the Pentagon, have come to that conclusion."<sup>29</sup> In a letter sent to SLDN, former President Clinton similarly urged the United States to follow the examples set by Canada, Great Britain, and Israel by lifting the ban.

By the end of 2004, many of the nation's leading newspapers had criticized the prohibition against homosexuals.<sup>30</sup> Besides the usual objections, some noted the incongruity between stop-loss, a policy that compelled service personnel to remain on active duty, and DADT, which forced others to depart prematurely.<sup>31</sup> Two lawsuits filed against the government that December epitomized the peculiarity of the situation, with multiple claimants alternatively arguing for their right to either stay in uniform or to leave the service.<sup>32</sup>

Confounding the issue, a number of those separated for homosexuality possessed mission-critical skills, such as linguistic training, that were in short supply.<sup>33</sup> At the behest of Representative Martin T. Meehan (D-MA) and twenty-one of his colleagues, the GAO questioned the financial costs and labor losses associated with enforcing the DADT policy between 1994 and 2003.<sup>34</sup> Although GAO's figures were incomplete, approximately 8 percent of the 9,488 gays and lesbians who had been discharged during the preceding decade held critical occupations (as defined by the military) that were eligible for selective reenlistment bonuses. Moreover, the GAO estimated that the military had spent at least \$190 million\* to recruit and train replacements for the gays and lesbians who had been discharged for their sexuality.<sup>35</sup>

The long-term implications of these costs, GAO suggested, were partially mediated by the fact that more than half of the homosexuals employed in critical occupations were discharged during their first enlistment, when proficiency and experience levels remained low. In response to the report, Under Secretary of Defense (Personnel and Readiness) David Chu emphasized that the number of homosexual discharges represented only 0.37 percent of all "unprogrammed separations" and that "the Department of

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\*A Michael D. Palm Center commission to evaluate the report broadened the scope of relevant expenses to claim that the actual cost was nearer \$364 million. See "Financial Analysis of 'Don't Ask, Don't Tell': How Much Does the Gay Ban Cost?" (Palm Center, University of California-Santa Barbara, February 2006).

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Defense seeks to implement the Federal statute concerning homosexual conduct in the military in a fair manner, treating every servicemember with dignity and respect.”<sup>36</sup>

As awareness mounted over the varied effects of DADT, Representative Meehan introduced the Military Readiness Enhancement Act of 2005 (House Resolution [H.R.] 1059). The proposed legislation prohibited the Departments of Defense and Homeland Security from discriminating on the basis of homosexual orientation and provided for the reaccession of servicemembers who had been previously dismissed for homosexuality. It died after being referred to the House Subcommittee on Military Personnel.<sup>37</sup> That outcome mirrored the fate of similar legislation initiated in 1992 but nevertheless revealed that the cosponsors willing to challenge the policy had risen to 122 during the ensuing thirteen-year period.<sup>38</sup> Deputy Assistant Secretary of Defense (Public Affairs) Lawrence Di Rita told the press that although DADT might be frequently challenged, the issue had been thoroughly debated and reflected the most effective solution to a difficult problem. Moreover, he stated, the policy had little impact on end strength and was not under review.<sup>39</sup>

Opposition to a related issue gained national attention in May 2005, when the Supreme Court announced that it would consider a constitutional challenge to the 1994 Solomon Amendment, which threatened to withhold Defense Department funding from educational entities that denied on-campus access to military recruiters or prohibited Reserve Officers’ Training Corps (ROTC) programs. The legislation responded to resistance encountered on college campuses at the time, which, among other things, reflected the academic community’s condemnation of the military’s stance on homosexuality. Subsequent revisions gradually expanded the scope to target parent institutions and withhold funds (except for student financial aid) from seven other federal agencies besides the Defense Department. To forestall such consequences, which could involve the loss of millions of dollars in grants and contracts, Congress required that the military be allowed access “that is at least equal in quality and scope” to that provided to any other employer.<sup>40</sup>

Although many institutions chose to observe the Solomon Amendment’s requirements, some institutions felt compelled to uphold established nondiscrimination policies by limiting access to employers who excluded applicants based on such factors as age, race, religion, national origin, color, disability, or sexual orientation. In *Rumsfeld v. Forum for Academic and Institutional Reform*, the US Court of Appeals for the Third Circuit ruled that Solomon violated the plaintiffs’ free-speech prerogative by requiring them to “propagate, accommodate and subsidize the military’s expressive message” against homosexuality, despite the institutions’ commitment to nondiscrimination.<sup>41</sup> In *Burt v. Rumsfeld*, the federal district court in Connecticut declared Solomon unconstitutional on similar grounds, stating that it not only impeded the faculty’s efforts to propagate their own beliefs, it compelled them to facilitate the dissemination of the Defense

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Department's message.<sup>42</sup> In March 2006, however, the Supreme Court unanimously decided that Solomon did not violate the First Amendment. Chief Justice John G. Roberts Jr. observed that the amendment regulated conduct, not speech, and that a school's freedom to denounce the military's policy toward homosexuals remained intact. The court also agreed that providing campus access to recruiters was neither an act of expression nor of association.<sup>43</sup> Advocacy groups could only hope that the noteworthy case would focus attention upon their cause.<sup>44</sup>

Opposition to the military's policy toward homosexuals continued during 2006, with a growing number of gay, lesbian, and bisexual personnel serving openly in the Armed Forces and experiencing greater tolerance from their peers.<sup>45</sup> C. Dixon Osburn, executive director of SLDN, noted that "coming-out is one of the most powerful actions any LGBT [lesbian, gay, bisexual, transgender] person can take," and that an increasing number of those who do so "are finding that their straight colleagues care about competence, not sexual orientation."<sup>46</sup> This trend received national exposure through a prime-time broadcast of CBS's *60 Minutes* in December, during which Sergeant Daren Manzella, a combat veteran of Iraq then serving in Kuwait, described the overwhelming support he had received from fellow soldiers and superiors since revealing that he was gay.<sup>47</sup> To facilitate the coming-out process, SLDN published an online survival guide and offered free, confidential legal counseling to those who considered disclosing their sexuality.

The issue of gays in the military, however, was overshadowed by the continuing deterioration of conditions in Afghanistan and Iraq. As the wars dragged on and casualties mounted during 2006, the Bush administration, the Joint Staff, and a congressionally chartered study group separately assessed the situation and considered alternative strategies. President Bush announced his concept for a temporary troop surge and strategic realignment of forces in Iraq, as well as a plan to increase the size of the Army and Marine Corps, on 10 January 2007.<sup>48</sup>

### **Renewed Resistance**

On 2 January 2007, retired Army General John Shalikashvili published an influential op-ed piece in the *New York Times*. As Chairman of the Joint Chiefs during the Clinton administration, he had supported DADT, believing that open homosexuality would lower moral, harm recruiting, and undermine unit cohesion. Recent conversations with serving gay soldiers and Marines, including several who were combat veterans of Iraq, had convinced him that the current force was not only capable of accepting homosexuality, the lifting of the controversial policy was also inevitable. At the same time, however, he cautioned that a bitter congressional debate would not help heal political divisions within the country and that discussion of the issue should involve a measured approach that carefully considered the timing of any subsequent changes.<sup>49</sup>

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The same evening, speaking as a commentator for CNN, former Secretary of Defense William Cohen concurred that the time had arrived to reconsider the discriminatory policy. “What we’re hearing from within the military,” he explained, “is what we’re hearing from within society. That we’re becoming a much more open, tolerant society for diverse opinions and orientation.”<sup>50</sup> Echoing the need for caution, he suggested that the initiative for change should come from the military, rather than Congress, to avoid further political division while the nation’s leaders struggled to define a new strategy for Iraq.

Later that month, Senator Ronald L. Wyden (D-OR) wrote to Robert Gates, the new secretary of defense. Referring to General Shalikashvili’s editorial, Secretary Cohen’s comments, and recent poll results,<sup>\*</sup> Wyden emphasized the need to “welcome the service of any American who is willing and able to do the job” and then asked Gates to identify “what, if any, negative effect the repeal of DADT might have on the United States military.”<sup>51</sup> Responding on Gates’s behalf in a letter to Wyden, Under Secretary Chu first highlighted Shalikashvili’s apprehension toward a shift in policy at that time. He then offered the following observations:

A national debate on changing Title 10, United States Code, Section 654, with the accompanying divisiveness and turbulence across our country, will compound the burden of the war. The urgency to launch this debate is diminished by fact that annual discharges for violations of the Department’s Homosexual Conduct Policy are less than .3% of all discharges in the armed forces. In this light, I question the wisdom of advocating a change. The Department will, of course, follow Congressional direction on homosexual conduct.<sup>52</sup>

Undeterred by such concerns, if not buoyed by the Bush administration’s loss of popular support, gay rights advocacy groups planned a legislative offensive targeting hate crimes and workplace discrimination.<sup>53</sup> Representative Martin Meehan and 149 cosponsors reintroduced the Military Readiness Enhancement Act of 2007 (H.R. 1246) in late February. Although it would again die in committee, as similar proposals had in the past, it renewed the media’s interest in the issue.

In these evolving circumstances, Marine General Peter Pace, the sixteenth CJCS, shared his personal objections to repeal of the DADT policy during a 12 March interview with members of the *Chicago Tribune*’s editorial board.<sup>54</sup> He equated homosexuality and adultery and said they were immoral

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<sup>\*</sup>A 2006 poll conducted by Zogby International indicated that a majority of military personnel who had served in Afghanistan or Iraq were comfortable serving alongside gay or lesbian comrades.

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and contrary to his upbringing and personal values. Some acts, he continued, should not be condoned:

So from that standpoint, saying that gays should serve openly in the military to me says that we, by policy, would be condoning what I believe is immoral activity. And therefore, as an individual, I would not want that to be my policy. Just like I would not want it to be our policy that if we were to find out that so and so was sleeping with someone else's wife that we would just look the other way. Which do not. We prosecute that kind of immoral behavior between members of the armed forces.<sup>55</sup>

By departing from the Joint Chiefs' long-standing assertion that the ban derived from its concern for cohesion and readiness, these remarks brought the controversial policy closer in conflict with the Supreme Court's 2003 *Lawrence* decision that morality was not a sufficient rationale for prohibiting certain forms of personal conduct.

General Pace's candid remarks were widely reported by the media and became the target of sharp criticism from advocacy groups, lawmakers, and administration officials. At SLDN, for example, Dixon Osburn called them "outrageous, insensitive and disrespectful to the 65,000 lesbian and gay troops now serving in our armed forces."<sup>56</sup> Senator James H. "Jim" Webb Jr. (D-VA), a decorated Marine veteran and former Secretary of the Navy, likewise regarded them as "unnecessarily divisive and also inappropriate considering his [Pace's] position at the highest ranks of our military," while Senator John W. Warner (R-VA), a Navy and Marine veteran, former Secretary of the Navy, and then-ranking minority member of the SASC, emphasized that "I respectfully, but strongly, disagree with the Chairman's view that homosexuality is immoral."<sup>57</sup> Secretary Gates clarified the Defense Department's position by stating that policy, not personal opinion, was what mattered. The law governed DADT, he continued, and the Office of the Secretary of Defense (OSD) would "execute that policy as effectively as we can."<sup>58</sup> White House aides intimated that President Bush also considered the remarks inappropriate.<sup>59</sup>

General Pace expressed regret over his choice of words the following day, but he did not apologize for his controversial remarks.<sup>60</sup> In an official press release he explained that "in expressing my support for the current policy, I also offered some personal opinions about moral conduct. I should have focused more on my support of the policy and less on my personal moral views."<sup>61</sup>

Shortly thereafter, Representative Meehan and fifty other sponsors of the Military Readiness Enhancement Act protested to the Chairman. While conveying their outrage that he would demean the service of gay and lesbian personnel, they stressed that he had no right to place his personal religious beliefs above the law and that it was his professional responsibility to ensure

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that all servicemembers were treated with dignity and respect. General Pace's remarks, they claimed, might demoralize gay troops and trigger a rise in antigay harassment or violence within the ranks.<sup>62</sup> Pace, however, denied saying that gay men and women were immoral and claimed that he was "comfortable with the policy because it does not make a judgment about the morality of individual acts." He reiterated that he should have focused more on his support for DADT, rather than condemn immoral acts conducted by either "homosexuals or heterosexuals."<sup>63</sup>

As the controversy continued into April, reporters queried President Bush for his views regarding the morality of homosexuality. He refused to comment but said that he thought DADT was a good policy.<sup>64</sup> In May, the OSD Public Affairs Office issued an expanded policy statement that blamed the ban on Congress. It noted that, while it was obligated by law to separate personnel who engaged in homosexual conduct,

those separated members have the opportunity to continue to serve their nation and national interests by putting their abilities to use by way of civilian employment with other Federal agencies, the Department of Defense, or in the private sector, such as with a government contractor.<sup>65</sup>

This inadvertent admission that gays and lesbians could work in any sector of society but the Armed Forces, including those involved in national defense, highlighted the growing gulf between civil and military perspectives on homosexuality and raised questions about the policy's continued relevance.

In early June, Secretary Gates recommended that General Pace not continue as CJCS. Although the Secretary had initially intended to recommend the general for a second term, after consulting with senior senators from both parties, he realized that the reconfirmation process would involve contentious hearings in the Democratic-controlled Senate. Gates concluded that neither the military nor the nation would be "well-served by a divisive ordeal."<sup>66</sup> While Pace's opinion regarding homosexuality may have contributed in part to Gates's decision, the American public had expressed its dissatisfaction over the conduct of the wars during the 2006 congressional elections, resulting in a landslide victory for the Democrats and Secretary Rumsfeld's resignation shortly thereafter.<sup>67</sup>

Days before his retirement, General Pace testified before Congress as it considered supplemental appropriations for the wars in Afghanistan and Iraq. Asked by Senator Thomas R. Harkin (D-IA) if he had anything to add to the "hurtful" and "demoralizing" remarks made in March, Pace welcomed the opportunity to clarify the media's representation of his previous comments.<sup>68</sup> He supported DADT and, amidst heckling from antiwar protesters in the gallery, encouraged respect for "those who want to serve their nation." He did not believe, however, that the "law of the land" should be used to "condone activity that in my upbringing is counter to God's law."<sup>69</sup>

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Accepting that not all shared his beliefs, General Pace explained that his position as Chairman required that he “obey the law of the land and to object if something is either illegal or immoral.”<sup>70</sup> He would therefore support any change to DADT as long as it did not condone what he personally considered to be inappropriate activity. When Senator Harkin asserted that the nation had no laws against homosexuality, Pace replied that the UCMJ made such conduct illegal. Harkin remarked, “Well, then maybe we should change that?”<sup>71</sup> Aubrey Sarvis, the new executive director for SLDN, welcomed General Pace’s comments and indicated that he looked forward to continuing the public dialogue, which only advanced his organization’s goals.<sup>72</sup>

In late November, as the anniversary of the passage of 10 U.S.C. § 654 approached, twenty-eight retired admirals and generals released the now-customary statement urging Congress to repeal the law. Referencing General Shalikashvili’s observation that doing so would not harm the military and that allied nations had done so without calamity, the officers argued that “our service members are professionals who are able to work together effectively despite differences in race, gender, religion, and sexuality. Such collaboration reflects the strength and best traditions of our democracy.”<sup>73</sup> The announcement was timed to coincide with a protest rally on the National Mall, during which gay rights advocates planted thousands of small American flags in honor of those gays and lesbian who had been discharged as a result of the policy. Advocacy groups in attendance included the Human Rights Campaign, Servicemembers United, Log Cabin Republicans, Liberty Education, and SLDN.<sup>74</sup>

Meanwhile, the upsurge in interest over the future of DADT coincided with the first year of the 2008 presidential campaign. While widespread concern over the global recession and the growing unpopularity of two wars dominated political discussions, human rights issues (e.g., abortion, health care, and gay rights) also generated spirited debate. Gay marriage remained a divisive issue, but allowing homosexuals to serve openly in the military had become far less controversial. Democrats unanimously agreed it was time to lift the ban, while Republicans argued that the policy worked and should not be changed, particularly during wartime.<sup>75</sup>

### **Summary**

Many problems associated with enforcement of DADT had been addressed by the time President George W. Bush took office in 2001. His administration therefore considered it an effective policy that did not need to be changed, much less eliminated. The Global War on Terrorism nevertheless provided an opportunity to field test claims that homosexuality was incompatible with military service. The separation of known homosexuals continued during the wars in Afghanistan and Iraq, although the number of discharges declined noticeably at the same time that the number of openly gay and lesbian personnel appeared to increase. This anomaly led many, including some prominent retired military officials like former Chairman John Shalikashvili,

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to conclude that the force had grown to accept the presence of homosexuals and now valued their contribution as individuals, an opinion shared by a growing number of Americans.

The military's controversial decision to enact stop-loss policies and lower enlistment standards to meet wartime manpower requirements, but continue to discharge otherwise qualified homosexuals, received considerable media attention. The policy seemed unfair and it was expensive to recruit and train replacements. This contradiction strengthened the arguments of advocacy groups pursuing equal treatment for gays in the military and facilitated the introduction of the Military Readiness Enhancement Acts of 2005 and 2007, which called for repeal of 10 U.S.C. § 654 and DADT. Neither bill emerged from committee consideration, but the rising number of representatives willing to sponsor the legislation was significant.

The US Supreme Court also established new legal precedents in *Lawrence v. Texas*, which challenged the traditional deference toward military interests by requiring that a heightened level of scrutiny be applied when considering due process claims involving homosexual conduct. Meanwhile, the nation's disillusion with the wars and the painful recession contributed to rising support for the Democratic Party, which ensured that the issue of gays in the military became a topic for discussion during the 2008 presidential campaign. While the future of the prohibition against homosexual conduct in the military appeared increasingly doubtful, the Joint Chiefs and Defense Department avoided open discussion of the issue by affirming that although they did not advocate change, they would abide by whatever Congress decided.

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### 3 NEW AGENDAS

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Admiral Michael G. Mullen became the seventeenth Chairman of the Joint Chiefs on 1 October 2007. Throughout his early career as a Vietnam-era surface warfare officer, Mullen's seniors had routinely noted his evenhanded approach to equal opportunity. Then, in the early 1990s, he had commanded the *USS Yorktown* (CG 48) during its inaugural embarkation of women.<sup>1</sup> As the CNO from 2005 to 2007, he had highlighted the strategic significance of diversity in his annual guidance to the fleet. He emphasized that its leaders "must actively foster environments where people are valued, respected, and provided the opportunity to reach their full personal and professional potential."<sup>2</sup>

Although Admiral Mullen was not an advocate for repeal in 2007, his perspective on DADT was more in line with the pragmatic stance taken by the Defense Department than that of his predecessor. During his June confirmation hearing, for example, he told members of the Senate Armed Services Committee that

the current policy and law . . . was greatly debated at the time that it was actually put in place. I'm supportive of that policy. I really think that it is for the American people to come forward, through this body, to both debate that policy and make changes, if that's appropriate. That's how I see it. The current policy is one I support, have supported, and until it changes . . . that's where I am.<sup>3</sup>

#### **Presidential Campaigns**

The race for the White House was well underway when the primary election season began in January 2008. Political rhetoric added volatility to an uncertain future, and preparations for the transition to a new presidential administration drew upon the Chairman's time. Beyond a desire to orient the new commander in chief, Admiral Mullen sought to limit vulnerabilities that the nation's enemies might exploit during the transfer of power.<sup>4</sup> The Chairman's Action Group (CAG) prepared an informational paper along those lines in March that presented observations gleaned from its review of previous transitions. Contrasting opportunities gained through extensive preparation prior to the Clinton administration's arrival in January 1993 against others lost to routine before the Bush administration's arrival in 2001, the CAG emphasized how to approach the uncertain future:

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CJCS has the opportunity to prepare for the incoming Administration's challenges by defining and rehearsing in advance a strategic vision and rationale that takes into account both Parties' worldviews and the predilections of the candidates and their key Advisors.<sup>5</sup>

The paper outlined four phases in a seventeen-month long transition period. Preelection preparation was the longest, lasting from December 2007 through October 2008, to be followed by postelection, postnomination, and postinauguration phases. The key to success, the paper advised, was to establish clear objectives and prepare to achieve them by actively engaging the incoming team, building rapport, and purposefully fulfilling the role of principal military advisor. Yet, it also cautioned that despite rigorous preparation, missteps could derail the Chairman's best-laid plans. The authors cited earlier controversies over the Tailhook scandal and gays in the military as historical examples of such unforeseen events that had substantial repercussions.<sup>6</sup>

One ongoing task during the preparatory phase involved monitoring current issues and collecting open-source data that revealed the candidates' positions on defense policy. The Chairman's staff used this information to anticipate questions that the new administration might ask, develop briefings, and rehearse responses.<sup>7</sup> Although the military's perspective on national security matters informed the identification of issues for discussion, Admiral Mullen insisted that his staff avoid giving any impression that it was attempting to shape a presidential agenda.<sup>8</sup> Their goal was to be ready to present the pros and cons of courses of action for a given issue.

As the 2008 presidential campaign progressed, two front-runners emerged. Senator John S. McCain (R-AZ), a retired naval officer and decorated Vietnam veteran, became the Republicans' presumptive candidate in March. Freshman Senator Barack H. Obama (D-IL), a Harvard Law School graduate and former community organizer, became the Democrats' presumptive candidate in June. Although the candidates presented a study in contrasts and their positions on civil rights issues tended to reflect traditional party perspectives, neither appeared to be particularly interested in elevating the debate over gay rights to a prominent position during the campaign.

In 1993, Senator McCain had supported the congressional ban on homosexual conduct in the military. Then, in 1996, he voted for the Defense of Marriage Act (DOMA), a measure that withheld federal benefits from same-sex couples, and against the Employment Non-Discrimination Act, a measure that would have promoted gender equality in the workplace.<sup>9</sup> More recently, McCain had opposed gay marriage and the adoption of children by gay couples while supporting same-sex unions and arguing that individual states should be free to define their own policies governing marriage and adoption.<sup>10</sup>

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During an interview with ABC in the fall of 2006, Senator McCain claimed to support gay rights, explaining that he backed DADT, which enabled gays to serve in the military. Around the same time, during an interview with MSNBC, he said that he was amenable to lifting the ban on homosexual conduct as soon as military officials assured him that the time was right for change.<sup>11</sup> The conciliatory tone was absent in an April 2007 letter to the SLDN. After noting that the 1993 law “unambiguously maintains that open homosexuality within the military presents an intolerable risk to moral, cohesion, and discipline,” he offered his personal opinion.

I believe polarization of personnel and breakdown of unit effectiveness is too high a price to pay for well-intentioned but misguided efforts to elevate the interests of a minority of homosexual service members above those of their units.<sup>12</sup>

McCain defended his position during a November 2007 presidential debate. “All the time I talk to our military leaders,” he said, “beginning with our Joint Chiefs of Staff and the leaders in the field. . . . Almost unanimously they tell me that . . . this policy ought to be continued because it’s working.”<sup>13</sup>

Senator Obama, who had established a reputation for supporting human rights during single terms in the Illinois and the US Senates, released an open letter outlining his commitment to the LGBT community in February 2008.<sup>14</sup> Like Senator McCain, he preferred civil unions to same-sex marriages and believed that states should determine their own policies in regard to issues of matrimony. Unlike his opponent, he pledged to repeal DADT and DOMA, to support the workplace non-discrimination act and the Matthew Shepard National Law Enforcement Hate Crimes Prevention Act,\* and to confront the ongoing HIV/AIDS epidemic.<sup>15</sup>

Senator Obama believed that the Armed Forces were beginning to accept that DADT was a “counterproductive strategy” and moved to assuage their concerns. In April he vowed not to use repeal of the policy as a “litmus test” for screening future members of the JCS.<sup>16</sup> Then, during a July interview with *Military Times*, he said that repeal “is not something that I’m looking to shove down the military’s throats. I want to make sure that we’re doing it in a thoughtful and principled way.” Acknowledging the difficulty involved in pursuing legislative change, he added that “we have to distinguish whether there are functional barriers to doing this and are people prepared for the political heat.”<sup>17</sup>

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\*Prior to President Obama’s inauguration, House Speaker Nancy P. D. Pelosi (D-CA) would inform gay rights advocates that he intended to address hate-crimes, employment discrimination, and then DADT, ideally within one congressional session (Marc Ambinder, “Outing the Debate: An Inside Account of the Struggle to End ‘Don’t Ask, Don’t Tell,’” *National Journal.com*, 9 Dec 2010).

### **Escalating Opposition**

The controversy over DADT extended well beyond the campaign trail as opposition to the policy continued to grow during 2008. Although gay and lesbian veterans had contested the military's prohibition against homosexuality for several decades, federal courts tended to defer to military opinion. This long-standing practice recognized the responsibility of the executive and legislative branches, rather than the judiciary, to establish rules to govern the nation's Armed Forces.<sup>18</sup> Federal courts had also been reticent to declare homosexuals a suspect class whose equal rights required special protection or to acknowledge their right to privacy. These precedents not only limited judicial oversight to cases involving procedural due process, they also minimized defense requirements to demonstrate that DADT was rationally related\* to a legitimate government interest.<sup>19</sup> Because Congress had determined that open homosexuality undermined unit cohesion and military readiness, it followed logically that it was related to government interest. That was about to change.

Major Margaret Witt, a nurse in the Air Force Reserve, shared an off-base residence with her lesbian partner, but neither had publicly disclosed her sexual orientation nor engaged in sexual activity while on government property. When the Air Force began separation proceedings against Witt in 2006, she filed suit, arguing that her constitutional rights had been violated. Although the Western District Court of Washington initially dismissed the case, in May 2008 the Ninth Circuit Court subsequently directed that it reconsider the possibility that her right to due process had been violated.<sup>20</sup> The circuit court's decision was largely based upon its interpretation of *Lawrence v. Texas*, a recent US Supreme Court decision that applied a heightened level of scrutiny, given "the extent of the liberty at stake," to the freedom to engage in private consensual intimacy.<sup>21</sup> Based on the *Lawrence* case, the circuit court decided that the military must go beyond demonstrating that the intrusive policy advanced an important government interest; it must also demonstrate that the intrusion significantly furthered the government's objective in a way that could not be achieved through less-intrusive means. The district court's review had been specifically limited to determining whether or not DADT was justified in Major Witt's case. This limited the implication of its findings outside the immediate jurisdiction or to a broader representation of gay servicemembers.\*\*

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\*Rational basis review, as opposed to intermediate or strict scrutiny, is the lowest level of judicial analysis applied by the courts. It affords minimal protection to the individual.

\*\*In *Cook v. Gates*, the First Circuit Court of Appeals chose to uphold a lower court's decision to dismiss a case brought by twelve gay and lesbian veterans. Although it agreed that *Lawrence* mandated a heightened level of scrutiny, the court believed that the precedent applied to a more limited range of liberty interests, excluding homosexual conduct among military personnel, and that the government's interest in preserving military effectiveness outweighed individual "as-applied" challenges to the policy (Feder, "Don't Ask, Don't Tell": A Legal Analysis, CRS Report R40795 (2010)11-12).

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Another challenge came in July 2008, when the Palm Center released its *Report of the General/Flag Officers' Study Group*. It had commissioned this impartial, bipartisan review months earlier to inform discussion of the Military Readiness Enhancement Act. The study group—comprising four retired officers representing each of the Services\*—focused on determining if 10 U.S.C. § 654 and DADT continued “to serve the best interests of the armed forces.” Whether or not the presence of homosexuals in units constituted an “unacceptable risk” to military effectiveness was of particular interest. Each member possessed impressive credentials, but all had retired prior to or shortly after the policy’s implementation in 1994.<sup>22</sup>

The study group remained convinced that DADT had been the correct policy at the time it was created, although their analysis convinced them that it was no longer relevant and in some ways detrimental to military effectiveness. Echoing other DADT critics, they argued that the obsolete law failed to acknowledge a more tolerant attitude toward homosexuality in the current military than had existed fifteen years earlier. Unit leaders, they said, had to choose between ignoring DADT and discharging qualified personnel, which exacerbated the existing manpower crisis, while gays and lesbians had to either lie about their sexual orientation or jeopardize their careers, which affected job performance.<sup>23</sup>

Noting that Canada and Great Britain had lifted their bans against homosexuality without catastrophe, the study group concluded that the “evidence shows that allowing gays and lesbians to serve openly is unlikely to pose any significant risk to moral, good order, discipline, or cohesion.”<sup>24</sup> They recommended that Congress repeal 10 U.S.C. § 654 and that the military adopt gender-neutral standards for regulating personal conduct. These included maintaining regulations that precluded misconduct prejudicial to good order, discipline, and unit cohesion, such as “prohibitions against any inappropriate public bodily contact for the purpose of satisfying sexual desires.”<sup>25</sup> Their passing inference to Article 125 of the UCMJ represented a conduct-based approach much like that initially pursued by the Clinton administration.

The study received mixed reviews. General Shalikashvili, who endorsed the report, called it “one of the most comprehensive evaluations of the issue of gays in the military since the Rand study fifteen years ago.”<sup>26</sup> He suggested that Congress and the Joint Chiefs seriously consider it. Dixon Osborne, former executive director of SLDN, worried that returning authority to govern homosexuality to the Pentagon could “significantly undermine efforts to achieve full equality under the law” that were already being pursued through the Military Readiness Enhancement Act.<sup>27</sup>

The same month, the Military Personnel Subcommittee of the HASC held its first hearing in fifteen years to review the military’s policy on homosexual conduct. While the 1993 hearings had largely opposed allowing

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\*Members of the study group included B Gen Hugh Aitken, USMC; Lt Gen Minter Alexander, USAF; Lt Gen Robert Gard, USA; and V Adm Jack Shanahan, USN.

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gays and lesbians to serve openly, this round of discussions was much more responsive to adopting a more inclusive policy. Chairwoman Susan A. Davis (D-CA) called for a careful review of a policy that excluded otherwise capable individuals from military service at a time when the military was recruiting more personnel.<sup>28</sup> Neither the Defense Department nor the Services opted to discuss the issue in open session. Davis acknowledged that the military did not advocate change at that time, then speculated that its strategy was to stake out a middle ground in the debate, provide little support to either side, and lay the issue squarely at the feet of Congress. In her words,

DOD policy is that the Department complies with the law. . . . When pressed to describe how they would respond to a change in the law, senior DOD officials have indicated that they would comply with the new law.<sup>29</sup>

Five witnesses testified before the committee: three who opposed and two who supported 10 U.S.C. § 654. Major General Vance Coleman, USA, a retired African American officer who had served during the desegregation of the military, stated that it was the “bewildering and counterintuitive” requirement to discharge qualified and capable personnel that truly threatened unit cohesion and readiness, not the presence of homosexuals. He identified performance as the principal discriminator during combat situations and leadership—the ability to adapt—as the key to successful integration.<sup>30</sup> Staff Sergeant Eric F. Alva, a gay Marine who had been seriously wounded during the invasion of Iraq, and Navy Captain Joan E. Darrah, a retired lesbian with thirty years of experience in naval intelligence, concurred. They recounted the difficulty of being required to serve in silence, as well as the support and cooperation they had received from colleagues who either knew of or suspected their sexual orientation. Both highlighted how DADT adversely impacted recruiting and retention, particularly among young adults.<sup>31</sup>

Sergeant Major Brian Jones, a retired Army Ranger and former member of Delta Force, earned the committee’s ire by questioning why they were discussing a minority group’s concerns during wartime, when they needed to focus on the conflicts in Afghanistan and Iraq. Jones claimed that the presence of openly gay men when operating in close quarters would “elevate tensions and disrupt unit cohesion and moral.” Repealing DADT, he continued, “will not help us win this war on terrorism or any conflict that our military is called upon to fight and win in the future.”<sup>32</sup> The legislators were unmoved. Representative Christopher H. Shays (R-CT) explained that “gays have given their lives in service to our country, and you and every one of us has benefitted. That is why we are having this hearing.”<sup>33</sup>

Elaine C. Donnelly’s testimony particularly irritated the committee.<sup>34</sup> As president and founder of the Center for Military Readiness, a conservative policy organization dedicated to preserving military culture, she opposed the liberalizing effect that DADT had upon the enforcement of 10 U.S.C. § 654.

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Donnelly attempted to undermine the arguments for repeal by challenging statistics, disputing media reports, and discounting the opinions of retired military leaders who endorsed repeal. She insisted that lifting the ban against homosexuals would lead to a “sexualized atmosphere” with dire consequences for the military.<sup>35</sup> Unit cohesion, operational effectiveness, and recruitment and retention would decline, she predicted, while health risks and incidents of sexual assault and harassment would escalate. She cautioned that a stigma of intolerance would be assigned to those who opposed homosexuality on pragmatic or religious grounds and advised that “we don’t need to make decisions based on polls . . . and we don’t take orders from courts.”<sup>36</sup> Committee members vigorously disagreed.\*

Several days later, Representatives Tammy S. Baldwin (D-WI), Barnett “Barney” Frank (D-MA), and Lois G. Capps (D-CA) wrote to Admiral Mullen. They hoped that the recent hearings would “lay the groundwork for congressional action to repeal the failed DOD policy” and requested his “engagement in open dialogue to assist our efforts to pass the Military Readiness Enhancement Act.”<sup>37</sup> They also asked the Chairman to provide the General/Flag Officers’ Study Group the opportunity to discuss their conclusions in person. The Chairman replied that the DADT policy had been in place for eighteen years, that it accounted for only 0.3 percent of total annual discharges, and that he did not advocate changing the law.<sup>38</sup>

### **The Chairman’s New Administration Transition Team**

Although Admiral Mullen had not given DADT much attention since 1993, he was quick to take note when Senator Obama first spoke on the issue during the campaign. At this early stage in the discussion he was primarily interested in compiling background information that would help him determine what a change in the law or policy might mean to the force.<sup>39</sup> By May 2008 the CAG was actively watching the issue of gays in the military, and the Joint Staff Directorates had begun to discuss the proscription against open homosexuality as one of five potentially “loaded” transition topics.<sup>40</sup>

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\*Representative Ellen D. Tauscher (D-CA), author of the Military Readiness Enhancement Act, assured Donnelly that they were indeed discussing a civil rights issue, while Carol Shea-Porter (D-NH) expressed embarrassment over the need to do so. Victor F. Snyder (D-AR), a Marine veteran of Vietnam, thought her characterizations of the homosexual community were “dumb” and “bonkers.” Patrick J. Murphy (D-PA), an Army veteran of Iraq, asked that she “justify” her “position that American service men and women are less professional and less mission capable than service members of other foreign militaries” who had abolished similar bans. Joseph A. Sestak (D-PA), a former vice admiral who had commanded a carrier strike group during Operation Enduring Freedom, emphasized the importance of equality in differentiating the American military from other forces around the globe. He reflected that “at those times where our character doesn’t show through, potentially at a time like this, we somehow happen to hold up a national mirror to ourselves and say, that is not who we are. We are better than that.” (House, *Don’t Ask, Don’t Tell Review*, 2008, 18, 21, 23, 30, 34)

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In June, the Chairman's New Administration Transition Team (CNATT) stood up. Working under the direction of Brigadier General Kenneth F. McKenzie, USMC, a dozen field-grade officers drawn from each of the Services managed the growing list of transition topics and prepared for the postelection phase.<sup>41</sup> Around that time, CNATT members cited DADT as an example of "bubbling-up" campaign issues that might influence future defense policy.<sup>42</sup>

When Brigadier General McKenzie briefed CNATT's "transition strategy" to officials attending a Defense Senior Leadership Conference (DSL) in mid-July, he listed DADT as a tertiary Navy recommendation. An accompanying comment suggested that "if Congress should open discussion on changing or repealing 'Don't Ask, Don't Tell,' we must be prepared to determine the implications and impacts caused by a change of law/policy."<sup>43</sup>

Admiral Mullen concurred and asked other senior leaders for their thoughts on the issue. He believed that they needed information on how junior members of the Armed Forces felt about open homosexuality and what impact repeal might have at the troop level.<sup>44</sup> A few years later, McKenzie recalled that while he met with the Chairman on a regular basis and they might have briefly discussed DADT, it remained only one of many issues that CNATT was considering.<sup>45</sup> It would have been a legitimate concern, he added, given the attention the issue was receiving elsewhere.

Shortly after the July DSLC conference, CNATT requested that the Joint Staff's J-1 Directorate review the law and policy on DADT. The intentionally broad request recommended that the study include a literature review, a description of how the law and policy were originally established, annual discharge statistics, current combatant command and Service perspectives, and potential implications that might result from changes to the law or policy.<sup>46</sup> The secretary of the Joint Staff subsequently directed the J-1 to respond by 11 August, noting that collaboration between adjacent military agencies was appropriate and that requirements for coordination between the Joint Staff, OSD, and the White House had to be observed.<sup>47</sup>

One week before the study was due to be completed, however, the Chairman's special assistant for public affairs halted work on the project.<sup>48</sup> No reason was given for the decision, and years later none of the participants recalled the episode.

The JCS discussed their top seven issues\* during Tank sessions held in September, October, and the first week of November. Although DADT was not listed among these key concerns, it was nonetheless recognized as one of nine topics\*\* that could quickly become very important if the right circumstances presented themselves.<sup>49</sup>

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\*These included strategic concerns relating to the Middle East, Russia, and the Pacific, as well as personnel and readiness issues.

\*\*These topics included cybersecurity, nuclear deterrence, interagency coordination, military healthcare, detainment policies, acquisition programs, and global force posture.

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That summer, CNATT monitored the presidential campaigns and developed postprimary projections of the candidates' defense and national security positions. One paper noted that Senator Obama intended to repeal DADT and halt the practice of employing stop-loss measures to maintain adequate force levels. It posed the basic question: "Is it wrong to deny our country the service of brave, qualified people?"<sup>50</sup> As for Senator McCain's position on DADT, another paper noted that he intended to continue the policy.<sup>51</sup> Around the same time Lieutenant General Stanley A. McChrystal, USA, Director of the Joint Staff (DJS), prepared a list of potential Tank topics that asked if the regulation governing gays in the military was correct.<sup>52</sup>

According to the Defense Department, which reaffirmed its position on DADT around that time, the answer was a qualified maybe. Although it recognized that congressional advocates participating in the July subcommittee hearing had framed the prerogative of gay service personnel to serve openly in the military as one final piece of civil rights legislation, it did not advocate change at that time. "Executing a change in law at this time," it reiterated, "would be problematic, given the intense engagement of our leaders and our forces in prosecuting the global war on terror."<sup>53</sup> Nevertheless, the DOD would follow whatever statutory direction Congress chose to provide.

The presidential race remained close, but Senator Obama tended to outpace Senator McCain in most polls, with his lead growing steadily from mid-September onward. Just days prior to the election and Obama's anticipated victory, the Chairman's staff produced a short information paper titled "Gays in the Military: The First Discussion." Above all, it advised the Chairman to avoid giving his final opinion or entering into a "substantive discussion on the merits of homosexuals serving openly in the military."<sup>54</sup> Candidate Obama's recent statement that he did not intend to "proceed unilaterally" in dismantling DADT but preferred to "work through a step-by-step process with the military brass" to build a "consensus," left action officers optimistic about the likelihood of having time to conduct a comprehensive twelve-month study before reaching a definitive conclusion.<sup>55</sup> Such an analysis would not only help to avert the impact of a sudden policy change on recruitment, retention, and readiness, they suggested, it could also provide a "threshold step" toward congressional consideration of repeal legislation.<sup>56</sup>

Senator Obama became president-elect of the United States on 4 November 2008. At that time CNATT became the sole access point to the Joint Staff for transition, leading the Pentagon's effort to coordinate and collaborate with teams from other organizations.<sup>57</sup> A week after the election the new administration announced that Michele A. Flournoy, president of the nonpartisan Center for New American Security, and John P. White, chair of the John F. Kennedy School of Government's Middle East Initiative at Harvard University, would serve as cochairs of its Department of Defense Agency Review Team.<sup>58</sup> Flournoy, who would soon be appointed under secretary of defense for policy, became the principle point of contact for

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Brigadier General McKenzie and his CNATT team. McKenzie later recalled that although he met with her on a daily basis to coordinate the rapid transfer of power, they never discussed the prospect of repealing DADT.<sup>59</sup>

Secretary Robert Gates met with the leaders of Defense Review Team for first time on 20 November. By then, speculation had already suggested that the president-elect might retain the Secretary. During a forty-five-minute meeting at the Pentagon, Gates offered a personal assessment of the impact that recent changes had had upon the Defense Department and what challenges the new administration might expect to encounter.<sup>60</sup> There is no indication that the discussion involved DADT, although it would have been difficult to ignore the fact that only three days earlier more than one-hundred retired generals and admirals had released a statement calling for repeal of the discriminatory policy.<sup>61</sup> A similar statement released a year earlier had contained only twenty-eight signatories.<sup>62</sup>

Encouraged by Secretary Gates, President-elect Obama invited Admiral Mullen to his campaign headquarters in Chicago, Illinois, on 21 November. The Chairman's staff prepared an information paper called "First Meeting with the President-Elect" for the meeting.<sup>63</sup> It compared the meeting to an interview, which provided an opportunity for Mullen to establish a relationship based on trust and confidence. In addition to recommending five strategic priorities that the CJCS should emphasize to the new commander in chief (civil-military relations, global concerns, Central Command [CENTCOM] issues, force fitness, and closing thoughts), the paper also listed several secondary topics that might surface during the discussion. Gays in the military fell into that category. While it was too early for the Chairman to propose a course of action, his staffers reiterated that a study would be required before he could provide a meaningful recommendation. They also speculated on whether Obama's agreement to delay taking any action toward repeal could stand up before Congress and his willingness "to make a preemptive public statement to quell unrest among the press and key constituencies?"<sup>64</sup>

Admiral Mullen's first meeting with Obama lasted forty-five minutes. Their conversation ranged from the personal to the philosophical, convincing the Chairman that his new commander in chief was a "non-ideological pragmatist who was willing to both listen and lead."<sup>65</sup> The president apparently chose not to mention DADT, although the same day the *Washington Post* reported that he intended to delay any movement toward reversing the controversial policy for several months.<sup>66</sup> Anonymous sources close to the administration explained that this would provide time for the president to confer with the JCS and senior DOD officials, reach consensus, and then present repeal legislation to Congress as late as 2010.<sup>67</sup>

Gay rights advocates received the news with mixed feelings. Aaron Belkin, founding director of the Palm Center, warned against allowing those who opposed repeal time enough to mobilize resistance. "Even the most hardcore opponents in the military understand that repeal is inevitable," he argued, "but if you give them the option to weigh in they will kick and scream

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for 50 years.”<sup>68</sup> Aubrey Sarvis, executive director of SLDN, disagreed. He advocated for the patience necessary to lay foundations, build consensus, and enact workable policies.<sup>69</sup> Colin Powell, former CJCS and secretary of state, remained undecided. During an interview with CNN he acknowledged that attitudes had changed during the fifteen years since the law had been enacted and affirmed that it was time for Congress to conduct a full policy review. “I’m not going to make a judgment as to whether it should be overturned or not,” he added, “until I hear from the Chairman of the Joint Chiefs of Staff, the Joint Chiefs of Staff, the commanders who are responsible for our armed forces in a time of war.”<sup>70</sup>

On 1 December, President-elect Obama formally announced that Secretary Gates would remain at the helm of the Defense Department. This was welcome news. Gates had already earned the respect of both parties for his pragmatism and competence. His continued presence would greatly ease the burden of transition at the Pentagon and help to achieve a bipartisan consensus on important national security issues. With the assignment, however, came instructions to end the war in Iraq and win the war in Afghanistan.<sup>71</sup>

Early in January 2009, just weeks before the presidential inauguration, Secretary Gates and Admiral Mullen hosted a DSLC conference in Washington, DC. During his opening remarks the Chairman solicited combatant command and Service views on several important issues, including the possibility of repealing DADT in the future.<sup>72</sup> He confided that although he had not yet discussed DADT with the incoming administration, he anticipated having to provide advice at some point and noted that senior leaders had to determine the impact that repeal would have on the joint force’s readiness.<sup>73</sup> A cryptic reference to “Stay off the net?” likely reflected the Chairman’s desire to avoid stirring up public controversy.<sup>74</sup>

This preliminary discussion of repeal may have become animated, yet most accounts indicate that it lacked any clear outcome. Admiral Mullen later explained that it represented the beginning of a conversation that would continue for more than two years. Everyone had an opinion, he recalled, but at that time they lacked the information necessary to make an informed decision. Many of the military leaders subsequently chose to listen rather than offer pronouncements or opinions.<sup>75</sup>

At the same time, everyone was troubled by the potential impact that such a controversial policy change might have upon an already strained force that was fighting two bloody insurgencies. Almost to a man, Secretary Gates and the Joint Chiefs opposed moving hastily—if at all—toward the repeal or revision of DADT during wartime. General James T. Conway, thirty-fourth Commandant of the Marine Corps, recalled that “we all felt at the time that it wasn’t necessarily the right thing for the military Services.”<sup>76</sup> General George W. Casey Jr., thirty-sixth Chief of Staff of the Army, acknowledged the he “certainly didn’t think we ought to be screwing with it right then.”<sup>77</sup> Belief that the proposed change “was more political than it was about what provides the best fighting force” frustrated the Chiefs.<sup>78</sup> “Everyone was concerned about

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being rolled and becoming a political hobby horse—in other words, being used,” explained General Norton A. Schwartz, nineteenth Chief of Staff of the Air Force.<sup>79</sup> Although Admiral Gary Roughead, twenty-ninth CNO, shared the others’ concern for the force’s welfare, he thought they might study the issue sooner rather than later.<sup>80</sup>

General James E. Cartwright, USMC, Vice Chairman of the JCS, was more optimistic than the other senior leaders. As a field grade officer assigned to Headquarters Marine Corps in the 1990s, he had worked with Commandant Carl Mundy’s staff during the initial debate and understood that DADT had been an expedient half measure that would eventually be superseded by a more inclusive policy. Moreover, he held the contrarian view that wartime was precisely the time to implement controversial policy changes because the deployed force was too busy executing its combat mission to brood over unpopular personnel decisions. That would not be true, he believed, if the change were postponed until after the force had returned to its mundane garrison life.<sup>81</sup>

### **Hope and Despair**

Anticipation ran high when Barack Obama became the forty-fourth president of the United States on 20 January 2009. While campaigning he had promised to enact sweeping reforms on behalf of those pursuing gay rights, and they were more than ready to benefit from changes that some activists had been championing for more than four decades. Although repeal of 10 U.S.C. § 654 and the DADT policy was not necessarily at the top of their list for immediate redress, it remained a high-profile issue that was far less controversial than gay marriage. Moreover, as commander in chief, President Obama had the authority to directly influence the manner in which DOD enforced the prohibition against open homosexuality.

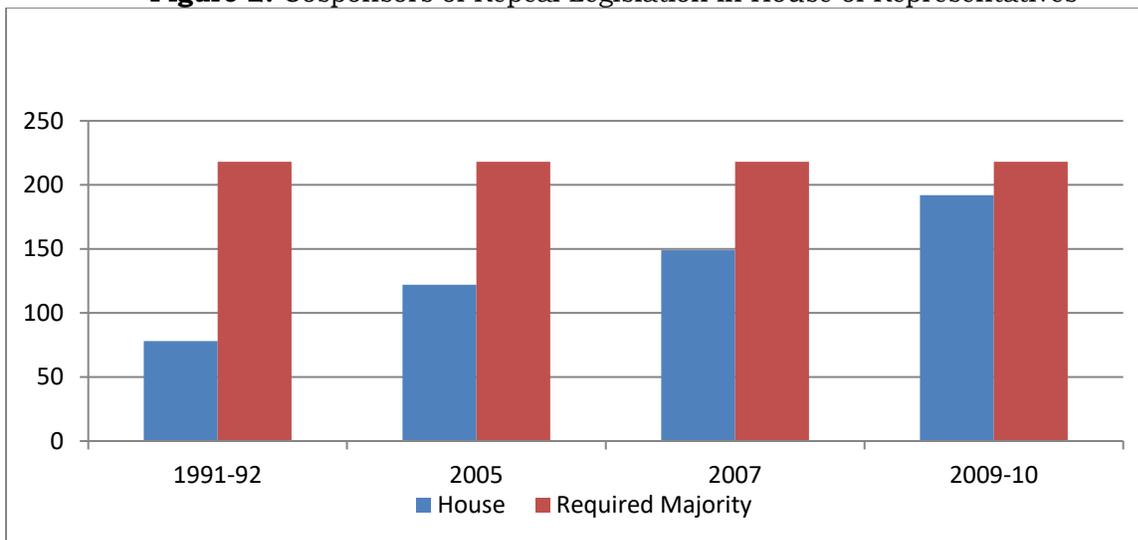
Knights Out, a support group established by thirty-eight gay and lesbian alumni of the US Military Academy at West Point, anticipated repeal. The informal organization sought to advocate for the rights of LGBT soldiers and their families and to assist academy officials in educating Army leaders following what it considered to be the “imminent and inevitable” repeal of DADT.<sup>82</sup> They aligned themselves with USNA Out and Blue Alliance, organizations that gay and lesbian alumni of the Naval and Air Force Academies had formed in 2003 and 2007, respectively. First Lieutenant Daniel Choi—a West Point graduate, Arabic linguist, and Iraq veteran in the New York National Guard—became the Knights Out public spokesman. He loudly proclaimed, “We’re publically announcing our sexuality. . . . It’s about doing the right thing, not about trying to fit into a process that gets you the rank or prevents you from getting a discharge.”<sup>83</sup> Although the military academy distanced itself from the organization, Knights Out members claimed that their message and unofficial presence were generally well received. Its membership doubled within weeks and included heterosexuals who were sympathetic to the plight of LGBT servicemembers.<sup>84</sup>

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Expectations were not limited to the LGBT community. Owen West, a Marine officer who had served two tours in Iraq, wrote an editorial in the *New York Times*. In his experience, fears that open homosexuality would undermine unit cohesion had proven irrelevant upon the modern battlefield. He concluded, “The military is a dictatorship. . . . If ‘don’t ask, don’t tell’ is rescinded, military leaders will ensure smooth compliance, as the chairman of the Joint Chiefs of Staff, Adm. Mike Mullen, has said.”<sup>85</sup> The CAG regarded this prophetic editorial as symptomatic of the escalating debate over repeal.<sup>86</sup>

In early March, Congresswoman Ellen D. Tauscher (D-CA) introduced the Military Readiness Enhancement Act of 2009 (H.R.1283), which would replace the current military policy toward homosexuality with one based on nondiscrimination. As with similar previous initiatives her measure died in Committee. Still, its 192 cosponsors demonstrated, as figure 2 shows, that congressional support for repeal was growing.<sup>87</sup>

**Figure 2.** Cosponsors of Repeal Legislation in House of Representatives



As supporters of gay and lesbian rights gained prominence, so too did resistance from the heterosexual majority. Several retired military leaders initiated the Flag & General Officers for the Military project (FGOM) to solicit support for retaining 10 U.S.C. § 654. The Center for Military Readiness, organized in 1993 to promote traditional military values, assisted in that effort. Borrowing a tactic employed annually by the advocacy groups, FGOM sent an open letter to congressional leaders and President Obama on 30 March.<sup>88</sup> The retired officers warned of catastrophe should open homosexuality be allowed within the ranks:

Our past experience as military leaders leads us to be greatly concerned about the impact of repeal on morale, discipline, unit cohesion, and overall military readiness. We believe that imposing this burden on our men and women in uniform would undermine

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recruiting and retention, impact leadership at all echelons, have adverse effects on the willingness of parents who lend their sons and daughters to military service, and eventually break the All-Volunteer Force.<sup>89</sup>

The weight of experience behind that perspective was both impressive and illustrative. While 104 officers had endorsed a similar document advocating repeal the previous autumn, ten times that number had signed the FGOM letter.<sup>90</sup> Moreover, while the list of pro-repeal signatories had been headed by one full admiral, the list of anti-repeal signatories\* contained forty-seven four-star officers, including two former Chairmen of the JCS, several Service Chiefs, combatant commanders, and theater commanders.<sup>91</sup>

Two weeks later, four of the founding members of FGOM publicized their views in the *Washington Post*. Their editorial explained that despite changing views regarding homosexuality, the military had remained a “specialized society . . . characterized by forced intimacy with little or no privacy.”<sup>92</sup> In those circumstances, they claimed, placing heterosexuals and homosexuals together would disrupt cohesion, divert attention, and dissuade potential recruits from enlisting while simultaneously prompting dedicated personnel to resign. The authors argued against legislation designed to impose “a radical policy that mandates nondiscrimination.”<sup>93</sup> Implementation of such a policy, they warned, would not only require extensive retraining and additional judicial proceedings, but personnel who disagreed with the policy might be denied promotions or punished for their dissent. The officers concluded their piece with the following statement:

The issue is not one of individual desires, or of the norms and mores of civil society. Rather, the question is one of national security and the discipline, moral, readiness and culture of the U.S. armed forces upon which that security depends.<sup>94</sup>

Former Chairman John Shalikashvili responded to the FGOM editorial with one of his own. He discussed the importance of learning, adapting, and sending clear signals to the force, and warned that “for such a large group of retired senior officers to oppose the inevitable could cause the very disruptions they predict.”<sup>95</sup> Like research undertaken when developing new doctrine, he advised, “it will be important for the conversation about gays and lesbians in the military to be informed by data, not speculation or emotion.”<sup>96</sup>

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\*By February 2010 the number of signatories had increased to 1,163 and included endorsements from former Chairmen John W. Vessey and Henry H. Shelton, both retired four-star Army generals.

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### **Summary**

Although economic and national security issues dominated most political discussions during the presidential election year, human rights issues also generated spirited debate and served to differentiate the candidates. Senator John McCain supported 10 U.S.C. § 654 and the DADT policy, while Senator Barack Obama advocated repeal of any prohibition against open homosexuality in the military. Simultaneously, growing pro-repeal sentiment in some segments of Congress, the federal judiciary, and the retired military community continued to challenge the status quo.

Neither Secretary of Defense Robert Gates, Chairman of the JCS Admiral Michael Mullen, nor any of the Service Chiefs advocated revising DADT or repealing 10 U.S.C. § 654 at that time. From their perspective, the policy was working efficiently. Moreover, they considered it unwise to pursue controversial changes to a major personnel policy during wartime. Beyond the impact that open homosexuality might have on operational effectiveness, they were aware that pushing hard for immediate repeal in 1993 had strained civil-military relations and distracted policy makers during President Clinton's first year in office.

While DADT remained a "tertiary issue" for senior military leaders, members of the CAG and the CNATT recognized that it was a volatile concern that might take on great significance in a new Democratic administration.<sup>97</sup> Admiral Mullen agreed and emphasized the need to determine the impact repeal might have at the tactical level.<sup>98</sup> A background review was initiated by the J-1 Directorate but halted by the Chairman's staff before completion.<sup>99</sup>

Repeal turned out to be a nonissue during the brief period preceding President Obama's inauguration. Nevertheless, anticipating that Obama would eventually ask for his advice on DADT, Admiral Mullen solicited opinions from among the nation's most senior military leaders. With the exception of General James Cartwright, Vice Chairman of the JCS, the Chiefs remained convinced that it was unwise to pursue repeal at that time. Meanwhile, the Chairman's personal staff had already foreseen the possibility of conducting a comprehensive study to facilitate JCS discussion and inform a future legislative debate over repeal. The question was not so much how to proceed as it was ironing out the details and deciding when to commit to that course of action.

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<sup>1</sup> Joint History Office, *The Chairmanship of the Joint Chiefs of Staff 1949–2012*, (Washington, DC: Joint History Office, Office of the CJCS, 2012), 238.

<sup>2</sup> CNO Public Affairs, "CNO's 2007 Guidance Focuses on Execution," Story Number NNS070202-03, 2 Feb 2007.

<sup>3</sup> Adm Michael G. Mullen, nominee for Chairman of the Joint Chiefs of Staff, statement in Senate, *Nominations before the Senate Armed Services Committee*, 110th Cong., 1st sess., 31 Jul 2007.

<sup>4</sup> Donna Mills, "Chairman Sets Course for Smooth Transition to Next Administration," American Forces Press Service, 26 June 2008.

<sup>5</sup> Chairman's Action Group (CAG), "Summary of Observations from Recent Transitions," information paper, 25 Mar 2008, 2.

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<sup>6</sup> Ibid., 1, 4, 7.

<sup>7</sup> Ibid., 5; Chairman's New Administration Transition Team (CNATT), "Transition Areas for Expanded Emphasis," information paper, 2008.

<sup>8</sup> Mark Thompson, "Readying Bush's Wars for the New President, *Time*, 13 Nov 2008.

<sup>9</sup> "ElectionCenter2008: LGBT issues: Republicans: John McCain," CNN.com, accessed 31 Oct 2013, <http://cnn.com/ELECTION/2008/issues/issues.samesexmarriage.html>.

<sup>10</sup> "McCain: Same-Sex Marriage Ban Is Un-Republican," CNN.com, 14 Jul 2004, <http://www.cnn.com/2004/ALLPOLITICS/07/14/mccain.marriage/>; Michael Cooper, "Facing Criticism, McCain Clarifies His Statement on Gay Adoption," *New York Times*, 16 Jul 2008.

<sup>11</sup> "Hardball with Chris Mathews: Hardball's' College Tour with John McCain," *NBC News*, 19 Oct 2006.

<sup>12</sup> SLDN, "Press Release: Senator John McCain Defends 'Don't Ask, Don't Tell,' Calls Gay Troops an 'Intolerable Risk,'" 3 May 2007, <http://www.sldn.org/news/archives/senator-john-mccain-defends-dont-ask-dont-tell-calls-gay-troops-an-intolera/>.

<sup>13</sup> T. M. Lindsey, " 'Don't Ask, Don't Tell' Poses Clintonian Catch-22 for GOP Hopefuls," *Iowan Independent*, 10 Dec 2007, <http://iowanindependent.com/1611/Don't-Ask-Don't-Tell-Poses-Clintonian-Catch-22-for-GOP-Hopefuls>; David Welna, "Candidates Split on "Don't Ask, Don't Tell," transcript of broadcast, NPR, 29 Jul 2008,

<http://www.npr.org/templates/transcript/transcript.php?storyId=930413410>.

<sup>14</sup> Senator Barack Obama, "Open Letter to the LGBT Community," Feb 2008, <http://www.gayrightswatch.com/2008/02/barack-obamas-letter-to-gay-lesbian.html>.

<sup>15</sup> Perry Bacon, "Democratic Candidates Address Gay Rights Issues," *Washington Post*, 10 Aug 2007; Kerry Eleveld, "Obama Talks All Things LGBT with *The Advocate*," *Advocate*, 23 Dec 2008, <http://www.advocate.com/print/news/2008/12/23/obama-talks-all-things-lgbt-the-advocate>.

<sup>16</sup> Eleveld, "Obama Talks"; Welna, "Candidates Split."

<sup>17</sup> Rick Maze, "Obama: I Need to Earn Troops' Trust," *Army Times*, 7 Jul 2008; Welna, "Candidates Split."

<sup>18</sup> Feder, "Don't Ask, Don't Tell."

<sup>19</sup> Maj Jeffrey S Davis, "Military Policy toward Homosexuals: Scientific, Historical, and Legal Perspectives," *Military Law Review* 131 (Winter 1991): 84–86, 89–90.

<sup>20</sup> *Witt v. U.S. Department of the Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash., 2006); *Witt v. U.S. Department of the Air Force*, 527 F. Supp. 3d 806 (9th Cir. 2008).

<sup>21</sup> *Lawrence v. Texas*, 539 U.S. 567 (2003).

<sup>22</sup> B Gen Hugh Aitken, Lt Gen Minter Alexander, Lt Gen Robert Gard, and V Adm Jack Shanahan, *Report of the General/Flag Officer's Study Group* (Palm Center, University of California–Santa Barbara, 2008), 1–4.

<sup>23</sup> Ibid., 6–9.

<sup>24</sup> Ibid., 10.

<sup>25</sup> Ibid., 12.

<sup>26</sup> "Amidst Inaction by Politicians, Former Pentagon Brass Call for Repeal of Gay Ban," Palm Center press release, 7 Jul 2008.

<sup>27</sup> "Former Activist Publishes Scathing Critique of Center Report," Palm Center press release, 14 July 2008.

<sup>28</sup> House, *Don't Ask, Don't Tell Review: Hearing before the Military Personnel Subcommittee of the Committee on Armed Services of the United States*, 110th Cong., 2d sess., 23 Jul 2008, 1.

<sup>29</sup> Ibid., 2, 52.

<sup>30</sup> Ibid., 4–5, 17, 22.

<sup>31</sup> Ibid., 6–9.

<sup>32</sup> Ibid., 13.

<sup>33</sup> Ibid., 43, 45.

<sup>34</sup> Ibid., 9–12.

<sup>35</sup> Ibid., 11, 19–20, 89.

<sup>36</sup> Ibid., 11.

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- <sup>37</sup> Tammy Baldwin, Barney Frank, and Lois Capps, members of Congress, letter to Adm Michael G. Mullen, CJCS, 25 Jul 2008.
- <sup>38</sup> Adm Michael G. Mullen, CJCS, letter to Tammy Baldwin, Barney Frank, and Lois Capps, 25 Aug 2008.
- <sup>39</sup> Adm Michael G. Mullen, interview with Nathan S. Lowrey, 6 May 2014.
- <sup>40</sup> CAG, “CAG Tracker,” note sheet, 7 May 2008; “Transition Strategy: J-Director’s Discussion; Other Concerns,” PowerPoint slide, 21 May 2008.
- <sup>41</sup> Maj Gen Kenneth F. McKenzie, USMC, interview with Nathan S. Lowrey, 29 Oct 2013.
- <sup>42</sup> “Transition Areas for Expanded Emphasis,” CNATT Thoughts, Prior to July 2008.
- <sup>43</sup> CNATT, “Transition Strategy: Day One,” PowerPoint presentation, 14 Jul 2008.
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- <sup>45</sup> McKenzie interview.
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- <sup>59</sup> McKenzie interview.
- <sup>60</sup> Donna Miles, “Defense Secretary Meets with Obama Transition Team,” American Forces Press Service, 20 Nov 2008.
- <sup>61</sup> “104 Generals and Admirals: Gay Ban Must End,” news release, Palm Center, 17 Nov 2008.
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- <sup>63</sup> “First Meeting with the President-Elect,” information paper, 2008.
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- <sup>65</sup> Karen DeYoung, “Joint Chiefs Chairman ‘Very Positive’ after Meeting with Obama,” *Washington Post*, 30 Nov 2008.
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- <sup>67</sup> Rowan Scarborough, “Obama to Delay ‘Don’t Ask, Don’t Tell’ Repeal,” *Washington Times*, 21 Nov 2008.
- <sup>68</sup> Amanda Ruggeri, “Obama Opposes Military Ban, but Repealing It Could Take a Year or Two,” *U.S. News and World Report*, 2 Dec 2008.
- <sup>69</sup> Scarborough, “Obama to Delay.”
- <sup>70</sup> Colin Powell, interview with Fareed Zakaria on “Global Public Square,” CNN.com, 14 Dec 2008.
- <sup>71</sup> “Key Members of the Obama-Biden National Security Team Announced,” Obama administration press release, *Change.gov*, 1 Dec 2008.
- <sup>72</sup> “DSLCL – CJCS Opening Remarks,” outline, 6 Jan 2009.

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- <sup>73</sup> “6–7 Jan 09 Defense Senior Leadership Conference (DSLCL) Summary,” conference notes, January 2009.
- <sup>74</sup> “DSLCL – CJCS Opening Remarks,” 6 Jan 2009.
- <sup>75</sup> Mullen interview.
- <sup>76</sup> Gen James T. Conway, USMC (Ret), 34th Commandant of the Marine Corps, interview with Nathan S. Lowrey, 25 Mar 2014.
- <sup>77</sup> Gen George W. Casey, USA (Ret), 36th Chief of Staff of the Army, interview with Nathan S. Lowrey, 17 Apr 2014.
- <sup>78</sup> Conway 2014 interview.
- <sup>79</sup> Gen Norton A. Schwartz, USAF (Ret), 19th Chief of Staff of the Air Force, interview with Nathan S. Lowrey, 4 Mar 2014.
- <sup>80</sup> Mullen interview; Gen James E. Cartwright, USMC (Ret), 8th VCJCS, interview with Nathan S. Lowrey, 11 Mar 2014; Adm Gary Roughead, USN (Ret), 34th CNO, interview with Nathan S. Lowrey, 12 Feb 2014.
- <sup>81</sup> Cartwright interview.
- <sup>82</sup> Knights Out, “About Us,” <http://knightsout.org/wordpress/about-us/>, accessed 9 Dec 2013; William H. McMichael, “West Point Grads Form Gay Support Group,” *Military Times*, 16 Mar 2009.
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- <sup>96</sup> Shalikashvili, “Gays.”
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## 4 SEA CHANGE

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### Proceed with Caution

Shortly after taking office, President Obama reiterated to Admiral Mullen his personal commitment to repealing DADT.<sup>1</sup> Recalling the Clinton administration's bitter experience in 1993, however, administration and DOD officials were wary of another explosive controversy over gays in the military.<sup>2</sup> The White House informed the Chairman's office that it planned to wait several months to a year before asking senior military leaders to address formally the prospect of changing the policy.<sup>3</sup> When an administration staffer erroneously declared during a Pentagon meeting that DADT was part of the president's agenda and needed to be addressed, the Chiefs promptly tabled the discussion.<sup>4</sup>

There were, of course, other pressing issues, such as the global financial crisis, protracted counterinsurgencies in Afghanistan and Iraq, and health care reform. As for possible changes to DADT, Secretary of Defense Robert Gates made the following remark on *Fox News Sunday* in late February: "That dialogue . . . has really not progressed very far at this point in the administration. I think the president and I feel like we've got a lot on our plates right now. . . . Let's push that one down the road a little bit."<sup>5</sup> Nonetheless, during another Oval Office meeting in March, President Obama reminded Secretary Gates, Chairman Mullen, and National Security Advisor James L. Jones that he was serious about repealing DADT and wanted to address the matter after dealing with some of the other concerns.<sup>6</sup>

Continued media attention prevented ignoring the issue entirely. In March, an official spokeswoman acknowledged that Secretary Gates had a brief conversation with President Obama concerning DADT and was currently discussing the issue with Admiral Mullen. Another spokesman insisted that the Chairman had neither been asked by the administration to examine the issue, nor had he provided guidance to either the Joint Staff or Joint Chiefs.<sup>7</sup>

By early April senior officials had begun to discuss enforcement of the policy in greater detail. One of the first instances occurred in the Roosevelt Room of the White House, where President Obama chaired a meeting to decide if the government should ask the Supreme Court to review the Air Force's case against Major Margaret Witt. The Ninth Circuit court had upheld elements of her appeal a year earlier, and the deadline for government action was fast approaching. The president personally decried anything that furthered the enforcement of DADT, but Attorney General Eric H. Holder and Solicitor General Elena Kagan advised that the government was required to faithfully observe 10 U.S.C. § 654.<sup>8</sup>

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General James Cartwright, the VCJCS, had been the sole military representative at the meeting. Following the uncomfortable exchange between senior administration officials he returned to the Pentagon and reported the incident to Secretary Gates, who was not surprised. The two returned to the White House shortly thereafter and shared their views with President Obama and his vice president, Joseph R. “Joe” Biden.<sup>9</sup> Acting on the advice of Defense General Counsel Jeh C. Johnson, Gates opposed a Supreme Court review at that time. The Air Force’s case was weak, and defeat could lead to a court mandate to reverse policy before the military was prepared to change. Meanwhile, he reassured senior military leaders that this did not represent a change in the existing policy toward homosexuals but was instead a “very technical and narrow legal decision about how to handle a specific case.”<sup>10</sup>

A few days later, on 13 April, Admiral Mullen, Secretary Gates, and President Obama held their first substantial discussion of DADT. Aware of the president’s commitment, Gates accentuated the conservative values customarily held by most military personnel. Pentagon officials, he explained, did not know what impact repeal might have upon the force or how long an orderly implementation might take. The Secretary promised to initiate a task force to study the problem.\* He also advised Obama that the change in policy would need to be achieved legislatively for the military to accept its legitimacy, explaining that an executive order would be disparaged as “the fulfillment of a campaign promise by a liberal president.”<sup>11</sup>

Any discussion of the policy in public remained circuitous. While addressing students and faculty at the Army War College several days after meeting with President Obama, Secretary Gates reiterated that although he and the Chairman had begun a dialogue with the commander in chief, they faced a “complex and difficult problem” and would approach it in a “deliberate and cautious manner.” “If we do go down that road,” he insisted, “we do it right and we do it in a way that mitigates any down sides.”<sup>12</sup> During an interview with *Joint Forces Quarterly*, Admiral Mullen stated that he had neither been asked for nor had he offered any recommendations on the issue.<sup>13</sup>

It was National Security Advisor James Jones, former Commandant of the Marine Corps and Supreme Allied Commander Europe, who expressed the greatest uncertainty. While speaking on ABC’s *This Week* he acknowledged that he did not know if DADT would be repealed. It was a sensitive issue, he explained, that had to be “teed up at the right time” and would involve deliberative, thoughtful discussions that considered all perspectives while seeking “a uniform policy for all members of the military.”<sup>14</sup> Senator John McCain, who appeared on the same program, remained open to “a thorough review of the policy by the Joint Chiefs of Staff,” but personally believed that the existing policy worked well.<sup>15</sup>

When Admiral Mullen appeared on the same program the two weeks later, he said that President Obama had made clear his intent to ask

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\*This did not occur until the following year.

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Congress to change the law at “at some point in time.”<sup>16</sup> He acknowledged his responsibility to provide the president with an objective assessment of the impact of repeal on the force and noted that discussions were underway with his immediate staff and the JCS. The Chairman emphasized that the force was under stress and he would need time for a deliberate, measured study of implementation. Any time line would be set after changing the law, not before. His overriding concern was to avoid placing the military in the middle of “a polarizing debate.”<sup>17</sup>

Events that June conspired to force the Obama administration to engage publicly the larger issue of gay rights. That development had less to do with the Supreme Court’s decision not to consider another ongoing challenge to DADT (*Pietrangelo v. Gates*) than it did with the Department of Justice’s (DOJ’s) tactless defense of DOMA.<sup>18</sup> In the former case, advocacy groups and the administration agreed that it was more advantageous to wait for Major Witt’s suit to reach the highest court before disputing the legitimacy of 10 U.S.C. § 654.<sup>19</sup> Years later, some legal scholars claimed that this decision “set in motion an avalanche of judicial chaos that eventually led to repeal of DADT.”<sup>20</sup>

In its defense of DOMA, the Justice Department portrayed the law as a “cautious policy of federal neutrality,” that served a legitimate government interest by preserving “scarce government resources” (it avoided costs that would have otherwise been associated with the extension of some benefits to same-sex couples).<sup>21</sup> While the assertion contradicted President Obama’s earlier campaign rhetoric, the comparison by government lawyers of same-sex marriage to other unconventional unions (e.g., those involving cousins and teenage spouses in particular) outraged many activists.<sup>22</sup> Amid outcries from advocacy groups, media outlets, and members of the Democratic Party, the interpretation threatened to undermine the trust and confidence that the Obama administration sought from its constituents.<sup>23</sup> In order to pacify angry supporters, White House Chief of Staff Rahm I. Emanuel urged Secretary Gates to prepare for the imminent repeal of DADT, but the Secretary declined to act prematurely.<sup>24</sup>

President Obama appeared contrite while speaking from the Oval Office on the evening of 17 June. During a four-minute ceremony he extended a few benefits to the same-sex partners of some federal employees, pledged to support the struggling Domestic Partners Benefits and Obligations Act, and acknowledged the need to repeal DOMA. Surrounded by gay rights advocates, he promised: “I’m committed to these efforts, and I pledge to work tirelessly on behalf of these issues in the months and years ahead.”<sup>25</sup>

Although President Obama chose not to mention DADT at that time, the issue did not escape the attention of seventy-seven legislators who formally requested his support five days later. In a group letter drafted by Congressman Alcee L. Hastings (D-FL), they urged him to “exercise the maximum discretion legally possible in administering Don’t Ask, Don’t Tell until Congress repeals the law.”<sup>26</sup> From their perspective, that included directing the Armed Forces to cease “any investigation of service personnel to

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determine their sexual orientation” and to “disregard third party accusations that do not allege violations of the Uniform Code of Military Justice.”<sup>27</sup> Such a concession (similar to one employed by the Clinton administration) would have allowed openly gay and lesbian servicemembers to remain in uniform while the issue was being resolved. The president did not respond to Congressman Hastings’s letter.

The following week Congressmen Jared S. Polis (D-CO) and Patrick J. Murphy (D-PA) urged the chairman of the HASC, Isaac N. “Ike” Skelton (D-MO), to take action on the Military Readiness Enhancement Act. Skelton instead promised to hold hearings on the implication of repeal. Several days later, SLDN organized a 265-person march on the White House to commemorate the fiftieth anniversary of the Stonewall riots in New York City, commonly viewed as the catalyst for the gay rights movement in America. The number of marchers matched the number of servicemembers who had been discharged from the military since President Obama’s inauguration.<sup>28</sup>

Repeal of DADT figured prominently in a speech the president delivered on 29 June at the White House’s first LGBT Pride Month reception. Before the event, Press Secretary Robert L. Gibbs assured reporters that although President Obama might not be personally involved in repeal discussions with Pentagon officials, the administration was nevertheless working toward eliminating the policy.<sup>29</sup> The president’s concluding remarks highlighted his cautious approach:

My administration is already working with the Pentagon and members of the House and Senate on how we’ll go about ending this policy, which will require an act of Congress. Someday, I’m confident, we’ll look back at this transition and ask why it generated such angst, but as Commander-in Chief, in a time of war, I do have a responsibility to see that this change is administered in a practical way and a way that takes over the long term. That’s why I’ve asked the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to develop a plan for how to thoroughly implement repeal.<sup>30</sup>

Secretary Gates told reporters the next day that he had discussed DADT with both the commander in chief and officials attending a DSLC held the previous week. Conversations focused on how DOD could begin to prepare for the anticipated policy change as the administration pressed Congress to repeal the law.<sup>31</sup> A Joint Staff briefing on repeal to senior leaders contrasted potential risks against possible mitigating factors and offered alternative approaches to conducting a study of the issue. Significantly, one of the major risks they highlighted was “losing control of the change.”<sup>32</sup>

Secretary Gates also told reporters that General Counsel Jeh Johnson was considering the legality of administering the existing policy against open homosexuality in a more “humane” fashion.<sup>33</sup> This idea reflected the

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Secretary's desire to protect gay or lesbian personnel who might become caught in the middle of a future change in policy.<sup>34</sup> Basic DOD guidance, as explained by General Norton Schwartz, Chief of Staff of the Air Force, was to "perform legal due diligence, but don't exacerbate tensions needlessly . . . or make implementation more difficult down the road" by acting on questionable evidence.<sup>35</sup> A spokesman for Admiral Mullen informed reporters that the Chairman likewise supported "the idea of a less draconian way of enforcing the policy."<sup>36</sup>

On 5 June, amidst a rising public dialogue over LGBT issues, Admiral Mullen appeared on CNN's *State of the Union with John King*. The Chairman's purpose was to describe ongoing operations in Afghanistan and Iraq, but King interjected two DADT-related video clips near the end of the segment. The first, taken during the Chairman's 2007 confirmation hearing, showed the admiral supporting then-current policy. In the second, filmed during a recent interview with General Colin Powell, the former CJCS and secretary of state advised that the time was right to review the policy and law. King then asked Mullen if he still supported DADT, even though it conflicted with President Obama's pledge to repeal it.<sup>37</sup>

The Chairman reiterated the military's recently modified position: it's the law, we're at war, and we're now considering alternative means for enforcing the current policy as well as ways to possibly implement a new one. He pointed out that an extensive review had not yet been conducted and that repeal should be approached in a "measured way." His greatest obligation, he emphasized, was to ensure that he gave the president his best advice "should this law change—on the impact on our people and their families at these very challenging times."<sup>38</sup>

Admiral Mullen's frank remarks frustrated government officials and advocacy groups alike.\* Some activists demanded a deliberate approach to equality, rather than a measured approach to repeal, and alleged that the Chairman's caution was merely a delaying tactic.<sup>39</sup> Others were offended by the perception that the presence of homosexuals somehow undermined family values. They questioned if the Chairman had ever considered the impact of DADT on gay and lesbian personnel and their families, and wondered if homosexuals were included among "his people."<sup>40</sup>

In these circumstances General Cartwright suggested that DADT could be seen as a flawed policy that compelled gay and lesbian personnel to conceal their sexual orientation and compromise their integrity by pretending to be straight (thus constituting a lie of omission).\*\* The value of this perspective, which turned the original rationale for implementing DADT on its head, was to provide a means for the Chairman to question the policy without

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\*Gen Cartwright recalled that the Chairman had made public comments against repealing DADT around this time and that they had concerned both Secretary Gates and President Obama (Cartwright interview).

\*\*Gen Cartwright recalled that a pro-repeal senator had proposed the integrity perspective to him (Cartwright interview).

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contradicting his prior arguments in support of the law. At this early point in the discussion, however, members of the JCS rejected the Vice Chairman's proposal.<sup>41</sup>

The promise of preliminary changes to DADT satisfied some gay rights advocates, but other congressional opponents of the controversial policy were not appeased. In early July, Senator Kirsten E. Gillibrand (D-NY) solicited support for a proposed amendment to the 2010 NDAA, which would levy an eighteen-month moratorium on the discharge of homosexuals from the military. Representative Hastings later offered a similar amendment to Department of Defense Appropriation Act of 2010 intended to prevent the use of defense funding to pursue homosexual discharges.<sup>42</sup> Those proposed measures could have forced President Obama to choose between realigning defense priorities or advancing two high-profile gay rights initiatives because he had threatened to veto the spending bill if it included additional funding for certain high-cost procurement programs and the Matthew Shepard Hate Crimes Prevention Act had already been attached to the NDAA.<sup>43</sup> When it became clear that Gillibrand could not secure the sixty votes necessary to avoid a filibuster—despite having the backing of Senate Majority Leader Harry M. Reid (D-NV)—she ultimately decided not to introduce her amendment.<sup>44</sup> Hastings likewise withdrew his proposal at the behest of administration officials and congressional colleagues.<sup>45</sup>

Meanwhile, during a social event at Secretary Gates's residence, Senator Carl M. Levin (D-MI), chairman of the SASC, pulled the Secretary and Vice Chairman Cartwright aside to discuss DADT. He told them that he was ready to hold a SASC hearing and asked if the Defense Department was similarly prepared.\* Gates answered, "Yes."<sup>46</sup> Senator Gillibrand shortly thereafter informed the press that Senator Levin intended to hold a hearing on DADT\*\* in the upcoming months.<sup>47</sup>

Admiral Mullen and his staff examined DADT with more interest than August. Although the Chairman was well-informed, having considered the issue intermittently for more than eighteen months, he had yet to reach a definitive opinion on repeal and wanted to be prepared in case the topic arose during his September reconfirmation hearing. At least some members of the staff understood that the military's standard response—that it was complying with a law that it was required to enforce—would not completely satisfy a Democratic House, Senate, and president. Heretofore, advocacy groups had controlled the terms of the debate. Admiral Mullen believed that a

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\*Senator Levin did not discuss his intentions with Adm Mullen, who was surprised by the announcement of a future SASC hearing on DADT. Levin ultimately delayed the hearing, after Secretary Gates explained that the DOD did not possess enough factual information to provide meaningful testimony (Mullen interview: 5).

\*\*Several of the Service Chiefs indicated that while the announcement of a future SASC hearing may have focused attention on DADT at the CJCS and OSD levels, the possibility was too distant to concern them during the summer and fall of 2009 (Casey interview, 6; Conway 2014 interview, 3; Roughead interview, 14; Schwartz interview, 1).

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comprehensive study would provide hard data and give voice to the servicemembers' concerns as he reframed the question in his own mind.<sup>48</sup>

A timely article, "The Efficacy of 'Don't Ask, Don't Tell,'" reinforced Admiral Mullen's growing interest in integrity as an aspect of the debate over gays in the military.<sup>49</sup> Written by a student attending the National War College, the straightforward critique synthesized information previously presented elsewhere into a compelling argument that restructured the customary debate around integrity. If the perspective of a serving field-grade officer was not authoritative in its own right, the account had also won the 2009 Secretary of Defense National Security Essay Competition and appeared in the fall issue of *Joint Forces Quarterly*. The author, Air Force Colonel Om Prakash, observed that "a law was created that forces a compromise in integrity, conflicts with the American creed of 'equality for all,' places commanders in difficult moral dilemmas, and is ultimately more damaging to the unit cohesion its stated purpose is to preserve." Because lifting the ban would more clearly reflect the nation's values and better serve as a model for the world to emulate, he urged the administration to examine how to implement a repeal of the law.<sup>50</sup>

The Chairman, for the most part, maintained the Defense Department's current position on 10 U.S.C. § 654. In response to advance questions prior the confirmation hearing he wrote:

DoD policy must comply with the public law and only the Congress and the President can change the law. . . . In determining whether and how to change the policy we must act in accordance with the law and in a thoughtful and deliberate way, taking into account the health and integrity of the force.<sup>51</sup>

Confident that the Chiefs shared his "desire for a measured, deliberate approach," the admiral explained that any change "would require sound policy revision and leadership" and that he would need time to study the matter before determining how long implementation might take.<sup>52</sup> Senator Mark E. Udall (D-CO) spared Mullen from having to discuss the topic publicly during his confirmation hearing by asking that he provide his personal thoughts in writing sometime prior to the anticipated SASC hearing. The Chairman's staff began to work toward that end shortly thereafter, although their effort was soon eclipsed by a larger initiative.<sup>53</sup>

Congressional pressure had continued to mount that fall. In late September, Senator Reid wrote to Secretary Gates and President Obama, asserting "that the time has come for the military and civilian leadership of the US government to review DADT and evaluate whether the policy is in the best interests of our nation's security." He requested their views, recommendations, and leadership in resolving the matter.<sup>54</sup> In early October, Representative Hastings asked the Defense Secretary to work "with the Obama administration and Congress to establish a timeline, beginning now, within which to repeal the law and implement a policy of inclusion and non-

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discrimination.”<sup>55</sup> In mid-October, Senator Udall requested that the president consider asking Secretary Gates and Admiral Mullen to provide their written perspectives on DADT—to include a plan for implementing repeal—within thirty days.<sup>56</sup> Both Hastings and Udall referenced Colonel Prakash’s review article.

President Obama also stressed the importance of military integrity. When speaking at a Human Rights Campaign (HRC) dinner in Washington on 11 October, the president declared that patriotic Americans serving the nation should not be punished, and he vowed to work with the Pentagon and Congress to end DADT.<sup>57</sup> That possibility seemed much closer a week later\* when Senator Levin announced that the SASC would hold its hearing on DADT the following month.<sup>58</sup> By the end of November, however, the imminence of the long anticipated discussions had proved deceiving. At that time Levin postponed the hearing until December—if not until the following year—so that his committee could investigate the mass shootings at Fort Hood, Texas.<sup>59</sup>

As for the Chairman, a strategic reassessment of the struggling Afghan campaign had required much of his attention during the autumn of 2009.\*\* Admiral Mullen later remarked that it had been “the most difficult three-and-a-half months of [his] professional life.”<sup>60</sup> Senior military leaders and members of the National Security Council argued for a substantial increase in the size, scope, and duration of counterinsurgency operations there, a sharp contrast to the administration’s vision of moderation. Although Mullen sought to enhance the independence and influence of the Chairmanship,\*\* he realized that the military had strained its relationship with the commander in chief during its pursuit of the surge in Afghanistan, and he recognized the danger of alienating the president by being perceived as continually opposing him on major policy issues.<sup>61</sup>

### **A Sea Change**

Admiral Mullen convened his staff late in October in preparation for the SASC hearing, now expected to occur before the end of December. The Chairman’s principal question remained whether to maintain a neutral posture or to develop and defend a particular position before the Senate committee. Captain Samuel M. Neill, USCG (Ret.), now the lead on DADT initiatives

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\*Two other reasons for optimism on the gay rights front occurred in late October when President Obama signed the Matthew Shepard Hate Crimes Act and the Ryan White HIV/AIDS Treatment Extension Act into law. Whether or not this advanced the repeal of DADT in the administration’s queue for future legislative action remains unclear.

\*\*On a scale of one to ten, Adm Mullen later reflected that the difficulty of dealing with DADT was a one or two, whereas realigning the Afghan strategy was a nine or ten (Mullen interview: 5).

\*\*\*Adm Mullen sought to restore independence and a direct line of communication to the president, which had eroded during the previous Chairman’s tenure (Neill interview, June 2012).

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within the CAG, recommended the latter course of action, as he had in August.<sup>62</sup>

Although Admiral Mullen had no specific timeline in mind, it was increasingly clear that congressional interest in DADT was rising and that the JCS needed to focus more of its time and attention to the controversial policy issue. As CJCS, Mullen needed to understand where the other Chiefs stood so that he could best advise Secretary Gates and President Obama on how to proceed.<sup>63</sup> Yet, as General Schwartz later recalled, DADT repeal “was a sticky wicket” that needed “some sort of forcing function to get the conversation going.”<sup>64</sup> During one Tank session, for example, General James T. Conway, Commandant of the Marine Corps, was leery of needlessly engaging provocative social issues. “Don’t crap on a bicycle wheel,” he warned his cohort, because “it comes around and slaps the pavement every so often in a rotation.”<sup>65</sup>

Captain Neill responded to the Chairman’s request for an action plan by presenting a two-stage strategy shortly before Thanksgiving and then fleshed out the proposal immediately following the holiday.<sup>66</sup> He suggested that a preliminary review team first consider relevant issues surrounding DADT. As “a coordinating agent for the Joint Chiefs,” it would “develop the supporting research that identifies possible outcomes, allows the Chiefs to understand the possible impacts of a change or repeal of the law, and supports the Chiefs in addressing the issue with common framework and understanding before Congress and the public.”<sup>67</sup> Next, assuming that “separate of testimony, a larger and more enduring effort will be needed,” the team would also prepare the “terms of reference” or “charter for a follow-on team to explore the full limits of this issue.”<sup>68</sup> The team’s preliminary findings were due to Army Lieutenant General Lloyd J. Austin, the DJS, by 15 January 2010 and to the Joint Chiefs a week later.\*

Admiral Mullen liked the concept of a two-phase strategy, and the DJS asked each Service to provide a senior field grade officer to staff the Intermediate Future Force (IFF) team. Other members were drawn from the Chairman’s public and legislative affairs, legal counsel, and action group.<sup>69</sup> Primarily comprised of military lawyers at the grade of O-6, the team assembled for the first time early in December. Working discretely in a restricted environment to maintain confidentiality, team members examined “existing surveys, polls, studies, papers, and military science” with the objective of identifying “a reasonable range of expected impacts, pro and con, in each area,” the “best language for addressing each area,” any “extreme or unsupported positions,” and “key areas that should be addressed in Phase II work.”<sup>70</sup> Besides examining potential courses of action for the anticipated

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\*Years later, none of the Service Chiefs recalled this development as particularly significant. Records show that they concurred with the need for a team to collate information that had accumulated following the 1993 hearings, but they do not indicate whether that effort included the charter for a follow-on study (CAG, “DADT Timeline and Initial Documents,” ca. 2011).

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congressional hearing(s), the team also considered possible alternatives should SASC and HASC testimony be delayed beyond 2010.

The IFF team collaborated and coordinated to prepare short information papers and revise drafts until everyone agreed that the intonation was objective and factually accurate. The authors omitted personal opinions in an effort to maintain the document's neutrality, although their results tended to be somewhat conciliatory in tone. Then, acting as a trusted agent, each Service representative prepared his or her own letter of transmittal to accompany the eyes-only, hard-copy collection of "consensus papers" sent to their respective Service Chief.<sup>71</sup>

The study group delivered its first of three installments on 11 December. It included five information papers intended to inform the JCS's initial "closed-door, close-hold" discussion of DADT the following week.<sup>72</sup> The topics covered were unit cohesion; discharge statistics, cost, and critical skills; foreign military experiences; polling since 1993; and the necessity of a future study.<sup>73</sup>

While most of the presented material was merely background information, accompanying questions and statements reflected some of the study group's concerns. The paper on unit cohesion, for example, questioned the validity of the 1993 congressional finding that open homosexuality presented an unacceptable risk to the military. Since that belief underpinned 10 U.S.C. § 654 and served as the principal point of contention during the current debate, the staff's willingness to even ask the question revealed a degree of openness that was absent sixteen years earlier.<sup>74</sup>

A related observation noted that the presence of gays and lesbians had not affected the combat effectiveness of America's major allies in Afghanistan (Australia, Canada, United Kingdom, and France) or the US forces with whom they had served.<sup>75</sup> Another paper observed that although the degree of accuracy reflected in public opinion polls might be questionable, they nevertheless indicated that both the civilian and military communities had become increasingly tolerant of homosexuality since 1993.<sup>76</sup> Acknowledging that "there will be turbulence," the authors stressed that unambiguous leadership was essential to the implementation of a more inclusive policy and that the emphasis had to be "on establishing clear rules of appropriate conduct, not teaching tolerance or sensitivity."<sup>77</sup>

Other observations in the papers argued against repeal. The United Kingdom's experience, for instance, suggested that repeal would create at least some degree of turmoil. Furthermore, one paper proposed that the cost of recruiting and training replacements for individuals separated for homosexuality was necessary to safeguard readiness; manpower losses resulting from the enforcement of DADT were negligible; and social cohesion, far from being irrelevant, had enhanced combat motivation in Iraq.<sup>78</sup>

The disparity between the two perspectives contributed to a final paper, which questioned whether or not the issue required further examination. The authors accepted that the study might be interpreted as a clever delaying tactic, but they suggested that it would update aspects of the issue that had

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evolved since 1993 as well as investigate areas overlooked by previous studies sponsored by gay right advocates. They offered three alternatives: an update of the 1993 Rand report, a blue ribbon panel comprised of military members and subject matter experts, and an internal assessment.<sup>79</sup> The paper on polling suggested that any assessment would most likely involve talking with the joint force. A statistically valid survey, it was noted, could inform the debate and contribute to a sense of inclusion, but the results could also polarize factions and create cynicism if they were discounted.<sup>80</sup> The authors concluded: “Whatever we decide now, if the law is repealed we have a large body of work ahead to plan, resource and execute implementation.”<sup>81</sup>

A blizzard on 18–19 December postponed the planned JCS executive session until after the holidays.<sup>82</sup> The Chairman’s staff used the additional time to prepare additional papers as other repeal-oriented events unfolded. On 22 December, Representative James P. Moran (D-VA) and ninety-five of his colleagues sent a letter to Secretary Gates. Seeking to “increase transparency” on the negative effects that the DADT policy was perceived to have upon national defense, they requested that the Secretary provide the number of homosexuals discharged during the previous calendar year by 15 January 2010; thereafter, they requested monthly updates.<sup>83</sup> Perhaps intended as a subtle warning to the Obama administration—since transparent governance and repeal were two of its recurring themes—the letter made clear that Congress would be actively tracking the number of gays and lesbians discharged during President Obama’s tenure.

Two days later, after several weeks of continuous debate, the Senate narrowly passed its version of the Patient Protection and Affordable Care Act (H.R. 3590); the House had passed a corresponding measure in November.<sup>84</sup> Buoyed by this victory, the president began to consider commenting on repeal during his 2010 State of the Union address.<sup>85</sup> The White House did not share that information with the Joint Staff or the Defense Department, who continued to view the yet-to-be-scheduled SASC hearing as the starting point for any public debate over DADT.

The IFF team briefed the JCS for the first and only time on 4 January 2010.<sup>86</sup> Each of the Joint Chiefs agreed that the controversial issued should not be rushed, but opinions on how best to proceed varied widely. Admiral Mullen later described his leadership style and relationship with the JCS during such important policy deliberations in the following way:

Typically, I didn’t bring the Chiefs into a Tank [session] and jam them on anything. We were a good group of friends, a good group of colleagues that I knew well. My style was to get them in the room, hear their views, put those together with my best military advice—which incorporated theirs—and if there was a disagreement with that to so state that to both Gates and the president.<sup>87</sup>

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Each Service Chief affirmed what they considered to be a remarkable degree of collegiality between themselves and the Chairman, even when they occasionally agreed to disagree.

By January 2010, Admiral Mullen and his staff had been considering the demise of DADT for two years. Although he realized that dismantling such a controversial policy during wartime presented significant challenges, he believed that it was time for the military to step forward and contribute to the larger discussion. He intended to move the JCS toward consensus by some later date and so deferred from asking the Service Chiefs for a definitive decision that January. Instead, he asked for their tentative opinions.<sup>88</sup> Mullen favored a study to advance the discussion, but he also accepted repeal as an ethical imperative, even though some of his staff questioned the strength of that argument against a more pragmatic line of reasoning.<sup>89</sup>

According to General Schwartz, the Service Chiefs were disappointed that the Chairman had already decided the outcome of their deliberations and that he appeared to be more interested in avoiding acrimony than achieving consensus among the JCS.<sup>90</sup> General Casey remembered, “At that point there was no consensus that this was the right thing to do *now*, and there was less consensus whether it was the right thing to do at all.”<sup>91</sup> General Conway recalled that a poll conducted at that time would have likely resulted in two votes for and five votes against repeal (he included General Craig R. McKinley, Chief of the National Guard Bureau, among the opposition).<sup>92</sup> As a group the Service Chiefs continued to promote a deliberate approach, tended to oppose the hasty endorsement of a policy whose ramifications remained uncertain, and shared concerns that outside agencies might force the issue, limit options, and risk a wartime implementation of new standards of conduct.<sup>93</sup>

The degree to which Service Chiefs’ views deviated from the Chairman’s perspectives varied. Although they had not articulated their final opinions, their individual concerns made it possible to infer their position.<sup>94</sup> Admiral Roughead, for example, recognized the inevitability of the situation and was more in line with the Chairman’s position on DADT than the other Service Chiefs.<sup>95</sup> He prioritized the need to address controversial social issues accurately and had already begun to examine the policy in greater detail when the CAG launched its preliminary review in December.\* Despite the potential risk associated with wartime repeal, he realized that there would never be a “good time” to eliminate the policy and wanted the military to be properly situated when it emerged from the conflicts in Afghanistan and Iraq.<sup>96</sup> Roughead also questioned the scope and meaning of “cohesion.” He accepted that combat occurred in multiple environments and that Service solidarity included support agencies and military families, not just forward operating ground forces. To better understand the ramifications of repeal, he

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\*As a junior officer, the CNO had been less than satisfied with the Navy’s strategy for addressing troubled race relations within the fleet (Roughead interview).

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advised: “Let’s explore it. . . . Let’s see where the attitudes are. . . . Let’s examine the issues that are at play and start moving down the road.”<sup>97</sup>

Alternatively, General Conway opposed taking any action before Congress had repealed 10 U.S.C. § 654.<sup>98</sup> Having discussed the issue informally while visiting Marines operating around the globe, he became their official spokesman. The Commandant noted his organization’s unique nature and ethos and estimated that between 85 and 95 percent of the Marines considered the prospect of serving with gay and lesbian personnel problematic. They would be far less willing to accommodate open homosexuality within their ranks, he predicted, than some overly optimistic polls might suggest. Beyond the logistical burden of quartering multiple genders in garrison, Conway also believed that the implementation of such a provocative policy during wartime would impair operational effectiveness and perhaps cost lives. He acknowledged that the military might need to reconsider the parameters of legally permissible homosexual conduct—such as behavior off duty and off base—but the time for that discussion was after the wars had ended.<sup>99</sup>

General Conway also doubted the inevitability of repeal. He knew that congressional debate followed by a party-line vote would be required to resolve the issue, whose outcome was still uncertain.\* The Commandant questioned the wisdom of expending time and energy on a study to determine how to implement change should current laws and regulations be eventually repealed. His aim was to avoid consequences that could arise from acting prematurely. Perceptions mattered and to pursue an implementation strategy without voicing Service Chiefs’ concerns might imply that the Joint Chiefs not only endorsed repeal but were actively ushering in that change. An erroneous impression of such magnitude could influence individuals who were undecided or otherwise inclined to oppose change to actually vote for repeal. Certain that the Chiefs would have an opportunity to present their views at an appropriate time in the future, he advised: “Hey listen, let’s not do this. I just don’t think this is wise or that this thing is yet the law of the land.”<sup>100</sup> Generals Schwartz and Casey occupied the middle ground, although the Air Force tended to be more closely aligned with the Navy and the Army tended to be more closely aligned with the Marine Corps.<sup>101</sup> They accepted the eventuality of repeal and that their Services could accommodate a more inclusive policy if given time to prepare. Yet, they were also reluctant to consider repeal during wartime, particularly as the military executed a major force surge into Afghanistan. For them, the major objection to moving forward was timing.<sup>102</sup>

Following the JCS executive session, the IFF team tried unsuccessfully to collate the Chiefs’ varied perspectives into single stance. The Service Chiefs agreed on too few points to develop a unified position on repeal. The near impossibility of a consensus on such a controversial issue caused the

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\*Some lawmakers had advised the Commandant to avoid leaning too far forward so that he didn’t fall on his face if repeal legislation failed to pass (Conway 2014 interview, 5).

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Chairman to direct the CAG to prepare a generic working paper based on the Joint Staff's perspective. Admiral Mullen later recalled, "I had kind of thought my way through" the problem and asked, "Okay, if it's going to happen what's the best way to move forward here?"<sup>103</sup> Captain Neill, who prepared the "straw-man . . . non-consensus . . . thought piece," later explained that they had intended to frame the problem in order to "propose a way forward for the [Service Chiefs] to comment on."<sup>104</sup> Some of the Service staffs, he granted, were "not thrilled" by the recommended course of action.<sup>105</sup>

The IFF team presented the single-page concept paper and four other information papers to the Joint Chiefs on 8 January.<sup>106</sup> It conceded that "now is not the time to change or repeal the law" but observed that public and political sentiment was moving "towards non-discrimination," that the president intended to eliminate the policy, and that "the law will change" in time. The danger of delaying or deferring a decision on this issue was that the JCS could eventually lose its ability to influence actions relating to the repeal of DADT. Believing the joint force would be "better served if we control the degree and shape of the change," the CAG insisted that "we must lead" the way. The correct course was to "undertake a comprehensive examination of the issue, with systematic participation of the force." The 2011 NDAA, the CAG suggested, could provide a means for resourcing a study that could be presented to Congress along with draft legislation by the summer of 2011. Then, following six to twelve months of congressional deliberation, the issue would likely be decided sometime in 2012. When the law changed, as the CAG optimistically predicted, the military needed to be prepared to swiftly implement the new policy.

The second round of papers included brief summaries of the 1993 hearings, contemporary legal challenges, and options for engaging the force. As for legal challenges, federal courts were currently deliberating the precise standard of judicial review required for cases involving the government regulation of liberty interests previously recognized in *Lawrence v. Texas*, and a Ninth Circuit decision in favor of the *Log Cabin Republicans* could increase the likelihood of a subsequent Supreme Court review.<sup>107</sup> Furthermore, to the extent that JCS testimony strengthened or weakened arguments against open homosexuality in the military, it would set precedents future judicial challenges to 10 U.S.C. § 654 and possibly influence the DOJ's future defense of the law.

Options for engaging the force weighed several possible avenues for administering the proposed study.<sup>108</sup> The IFF team advised against a blue ribbon panel chartered by either the Secretary of Defense or Congress. Such an approach might add diversity to the study group's composition, but the issue was primarily a military matter and federal regulations governing special panels might require that certain meetings be conducted in a public forum. They preferred a military initiative led by a general or flag officer but recommended that external organizations be charged with conducting stand-alone surveys and updating the 1993 Rand report, which they felt would

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enhance transparency and impartiality. The remaining task was to develop an action plan and milestones for the initiative.

Two weeks into the New Year, the public controversy over DADT escalated to heights not seen since 1993. General Carl Mundy, Commandant of the Marine Corps during the first Clinton administration, was aware of the impending contest and voiced his support for retaining 10 U.S.C. § 654 in a pointed editorial published by the *Washington Times* on 12 January. Convinced of the law's validity, the retired general gave priority to "minimizing risk to the nation's military capabilities" over concerns for "civil rights, compassion, or individual fairness" and stated he valued the "informed wisdom" of the 103d Congress over the opinion of those who were neither responsible for nor qualified to judge military effectiveness, or could not appreciate the uniqueness of military service.<sup>109</sup> While fighting two wars, he asserted, was not the time to subject the military to "risky, politically driven social engineering orchestrated to satisfy individual and special interest demands, instead of enhancing military effectiveness."<sup>110</sup>

Conversely, SLND launched a national campaign the same day to draw support for addressing DADT legislatively through the 2011 NDAA.<sup>111</sup> In an open letter to the president in the Capitol Hill newspaper *Roll Call*, Aubrey Sarvis, the organization's executive director, asked that Congress and the American people be mobilized to repeal the "embarrassing and archaic law" in the next defense budget rather than the following year or during a second term.<sup>112</sup> There was growing support for repeal among the Democrats in Congress.\* On the same day that SLND launched its most recent campaign, the *Huffington Post* reported that President Obama had told Defense Department officials that repeal legislation should be added to the 2011 NDAA and that congressional members were already being lined up to support it, should the House consider the bill in the spring.<sup>113</sup>

On 13 January, leading LGBT advocates gathered at the HRC headquarters in Washington, DC, for a private strategy session. Sensing that the Obama administration was close to deciding its approach to the simmering controversy during the upcoming year and that 2010 would prove significant in determining the issue's fate, they discussed potential responses to a range of possible outcomes. One source claimed that "strong signals" had been sent to the White House, warning the administration that there would be "repercussions" if repeal was postponed.<sup>114</sup> The same day the *Advocate* reported that Senator Carl Levin was not only moving to schedule the SASC hearing later that month, he also intended to request that Secretary Gates and Admiral Mullen appear as witnesses.<sup>115</sup>

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\*In November, Representative Barney Frank (D-MA) had told reporters that he had discussed the strategy with House Speaker Nancy Pelosi (D-CA), other congressional leaders, and members of the administration (Kerry Elevand, "DADT Likely to be part of Defense Bill," *Advocate*, 11 Nov 2009). Senator Levin likewise acknowledged that repeal legislation could appear in the next defense budget (Sen. Levin, interview by Rick Maza and Roxana Tiron, *Newsmakers*, C-Span, 20 Nov 2009).

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Anne R. Gearan, a national security writer for the Associated Press, added fuel to the controversy the following day when she disclosed the CAG's confidential proposal for a way forward on repeal.\* She reported that although Admiral Mullen and other Pentagon leaders had begun to quietly push for consensus on a repeal initiative, they were unable to secure the Joint Chiefs' full backing on the timing of that effort. Moreover, advisors who opposed repeal had recommended a measured progression that might conceivably delay the implementation of a more inclusive policy until sometime in 2012. When questioned about the proposal, the Chairman's spokesman merely reiterated that while the Joint Chiefs were aware of the president's intent to disestablish the policy, they had not yet decided what to do or when to do it.<sup>116</sup> The Chiefs met to discuss the potentially volatile situation, but fallout from the disclosures ultimately proved negligible.

The IFF team delivered its third and final round of papers to the Joint Chiefs for consideration on 15 January. They attempted to convey—intentionally or otherwise—a sense that while repeal would involve challenges, it would also offer opportunities and was the ethical thing to do. One of the papers, for example, drew heavily from Colonel Om Prakash's article to describe how one could view the current policy as a challenge to individual integrity that undermined institutional core values.<sup>117</sup> The contradiction between complying with a policy against suspected gay and lesbian personnel and the choice to sustain the deception had its own debilitating effect upon the morale, cohesion, and effectiveness of the individual, their friends, and unit commanders—and needed to be resolved.

The remaining papers were more pragmatic. One that summarized key aspects of the Military Readiness Enhancement Act warned that “repeal is immediate” and “there is no ‘transition period.’”<sup>118</sup> Another, which underscored the United Kingdom's largely uneventful transition following the repeal of its own prohibition against homosexuality in 2000, noted that acceptance of new standards of conduct had varied by rank and service, and that the American military's larger size would create additional complications.<sup>119</sup> A third analyzed LGBT issues in the civilian workplace and found that most Fortune 500 companies embraced nondiscrimination and believed that an environment “that underscores fairness, equity, and inclusion is . . . simply smart business.”<sup>120</sup> Unlike in the civilian workplace, the paper emphasized, DOMA defined *marriage* as a “legal union between one man and one woman” and “benefits that attach by marriage . . . are not provided to domestic partners of federal civil servants.”<sup>121</sup> It questioned the effect that DADT had upon the military's relationship with potential recruits, parents, teachers, professors, colleges, and other influential forces within the community.

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\*Gearan assumed incorrectly that the Chairman's legal counsel had crafted the memorandum, possibly because a notice at the bottom of the document cautioned against its release without their approval. The source of the leak was never discovered (Neill interview, June 2012).

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The longest of the five papers listed a range of practical matters to address if repeal occurred. These included developing a communications plan, establishing new standards of conduct, revising directives, modifying policies, educating the force, monitoring the implementation process, and seeking some accommodation from religious institutions and foreign nations who opposed homosexuality. Most of the paper dealt with DOMA and the denial of otherwise “lawfully recognized” dependent benefits to gay and lesbian couples.<sup>122</sup> “If same-sex partners are not afforded benefits,” it admonished, “this could be perceived as creating a class of service members who are denied access to a support system that is deemed essential to the rest of the force.”<sup>123</sup> It concluded that following repeal, “current advocacy groups will turn attention to issues of equal benefits (financial, medical, social) . . . particularly those lawfully married in a State permitting gay marriage.”<sup>124</sup>

As a result of the preliminary review, by 15 January the IFF team “had made a compelling case for a formal examination of the law and the impacts of any change or repeal.”<sup>125</sup> Their strongest recommendation was to engage the force, since the Joint Chiefs lacked insight into the attitudes of servicemembers and their families regarding the presence of openly gay and lesbian personnel in uniform.<sup>126</sup> Captain Neill recalled that although internal preparations for the upcoming Senate hearing had served as the initial impetus for reviewing DADT, “by mid-January . . . it was heating up and there was dialogue back and forth with staff.”<sup>127</sup>

Another modified position paper, titled “*Concept for Moving Forward*,” assumed that President Obama would use his upcoming State of the Union address to implore Congress to repeal 10 U.S.C. § 654 and then direct the Defense Department to begin preparations to rescind DADT.<sup>128</sup> The IFF team recommended a two-pronged approach. On one hand, Secretary Gates should task the under secretary of defense for personnel and readiness to assign an appropriate Federally Funded Research and Development Center to update Rand’s 1993 study. Simultaneously, he should task the Chairman to form a MWG to assess the impact of repeal upon the force and develop an implementation plan. The DJS would charter the working group and general officers representing the Joint Staff and the Services would provide full-time leadership. As it engaged servicemembers and their families, the working group would identify ways to mitigate risk, recommend repeal legislation, and develop the all-important implementation plan.

The paper also recommended initial assignments. The DJS should coordinate conceptual issues with OSD, such as timing, scope, course, and leadership for the working group. Meanwhile, the IFF would draft a charter for the initiative and identify individuals to staff the study group while it prepared the Joint Chiefs for testimony and identified individuals whom the Chairman should speak with before to any hearing. As the J-1 identified necessary physical resources, the public affairs officer would coordinate with White House staffers to propose language for the State of the Union address. The paper’s authors accepted that “initial discussion between OSD/DJS is

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essential,” but they advised that such contact “needs to be carefully managed” because “OSD will leak any preparations,” and that might “appear to be ‘boxing’ POTUS [president of the United States], which we do not want.”<sup>129</sup>

Milestones for the proposed initiative remained tentative. One generic timetable indicated that “LC/GC/WH Counsel” would discuss language for the upcoming State of the Union address from 20–25 January, seeking to achieve consensus and insure clarity of the president’s intent.<sup>130</sup> A later scenario specified that the DJS would approve the proposed “action timeline” on 22 January, followed by the Chairman the next day.<sup>131</sup> Then, on 25 January, the Chairman’s public affairs officer would continue to collaborate on State of the Union language with White House officials, while his executive assistant delivered a draft of the “desired [Secretary of Defense] to CJCS tasking memo” to Robert S. Rangel, special assistant to the Secretary of Defense.<sup>132</sup> A day following the address, Secretary Gates would return the memo to Admiral Mullen for execution.

Suspense dates for the initiative remained uncertain, but all fell due during the last third of the 2010 calendar year. One timeline suggested that the study group’s report be finished by 1 September, while the concept paper advised that the internal study and Rand update be completed by 1 October.<sup>133</sup> Another schedule envisioned the study group submitting its report on 14 November to the Chairman, who in turn would forward it to Secretary Gates on 1 December.<sup>134</sup> These suspense dates differed significantly from the original ones proposed in the CAG’s first concept paper, which had suggested a completed study sometime during the summer of 2011.

While the Service Chiefs may have been at odds with senior White House and Pentagon officials, they had influential allies on Capitol Hill. Howard P. McKeon (R-CA), ranking member of the HASC, wrote to Secretary Gates and Admiral Mullen on 20 January that “the debate . . . has begun in earnest.”<sup>135</sup> Unmoved by pro-repeal arguments but concerned about their effect on the nation’s ongoing wars, he advised:

No action to change the law should be taken by the Administration or by this Congress until we have a full and complete understanding of the reasons why the current law threatens or undermines readiness in any significant way, whether a change in law will improve readiness in measurable ways, and what the implications for and effects on military readiness, cohesion, morale, good order and discipline are entailed with a change in law.<sup>136</sup>

Rather than simply update the 1993 Rand study—which he considered to be seriously flawed—Representative McKeon asserted that “such information must come from the detailed, objective assessment of the current law” and “must capture the views, perspectives and judgments of those who would be most affected by a change in law: military personnel of all ranks

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and their families and potential members of the all-volunteer force.”<sup>137</sup> He also recommended that the study be conducted by the military services rather than assigned to an independent commission. The rationale behind this pragmatic perspective was readiness: did the law impair or did repeal enhance operational effectiveness?

McKeon’s concern over the objective design of any future analysis was likely influenced by an earlier critique of the initial Rand study that he attached to his letter. In this critique, William A. Woodruff, a professor of law at Campbell University in 1993, had observed:

It is apparent from the outset that the study was not concerned with whether the homosexual exclusion policy should be changed, rather, its focus and purpose was to develop recommendations on how a changed policy should be implemented.<sup>138</sup>

The Rand report “approached the problem as an academic exercise to develop background material and information that would support its recommended policy,” Woodruff continued, and it “ignored significant data that leads one to question the underlying assumption that the old policy will be eliminated.”<sup>139</sup> Such skepticism, neither new nor novel in 2010, would likewise come to characterize the apprehensions of many who opposed the elimination of DADT.

On the same day that Representative McKeon sent his letter to Secretary Gates and Chairman Mullen, Captain Neill and the IFF team began to draft the terms of reference for a military study group to conduct a post-testimony assessment. It drew on General Carter F. Ham’s recent guide\* for the inquiry into the November shootings at Fort Hood, Texas.<sup>140</sup> During the next week Neill perceived a heightened volume of dialogue concerning DADT. “It was clear that the Chairman was having discussions,” he remembered, “and that they were being candid about what they planned to do at the State of the Union.”<sup>141</sup> By this time it was also known that the SASC intended to hold its long-anticipated DADT hearing on 11 February 2010.<sup>142</sup>

News that President Obama would speak on DADT during his State of the Union address became public on 25 January—just two days before the speech—when Senator Levin informed reporters that senior Pentagon officials had asked him to postpone the impending SASC hearing because they did not want to discuss or defend a policy that the White House might abandon.<sup>143</sup> Reaction to the announcement varied among senior leaders. In his memoir, Secretary Gates called President Obama’s “preemptive strike” a “serious breach of trust.”<sup>144</sup> The president had neither consulted with the Service Chiefs before making his decision nor provided the Secretary and Chairman with an opportunity to do so themselves. All they could do was warn the Chiefs of the impending declaration.

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\*Despite the coincidence, Capt Neill did not think that this influenced Secretary Gates’s decision to appoint Gen Ham as cochair of the Comprehensive Review Working Group.

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Admiral Mullen later recalled that he was somewhat surprised by the administration's announcement, although he was not as shocked as Secretary Gates. "This wasn't the first time President Obama mentioned this," the Chairman remarked.<sup>145</sup> General Cartwright,\* the Vice Chairman, said in a later interview that he had always known that the president intended to repeal DADT and that he was not surprised that the topic was included in the speech.<sup>146</sup> Likewise, Admiral Roughead was well aware of the president's agenda and found it unremarkable that he should have included repeal in his address. "The State of the Union," he explained, "is where you put your chips down."<sup>147</sup> At the same time, the CNO acknowledged that he had not known what the president actually intended to say.

The three remaining Service Chiefs had a different perspective, which was closer to Secretary Gates's. General Schwartz was not surprised by the inclusion of repeal in the president's address, but he was nonetheless "disappointed." "Further politicization of the matter . . . put the Chiefs in a difficult place," he explained, making "it more difficult to execute this smooth transition."<sup>148</sup> Moreover, he thought that there had been an "understanding that we would get to meet with the president."<sup>149</sup> General Casey concurred that he was not surprised by the fact that the president intended to speak on DADT but said, "I personally expected that we would get called in and asked for our military advice and whether to do this. That didn't happen. We were given the State of the Union speech a couple of days before, and we saw what he was going to say."<sup>150</sup> General Conway, the most outspoken opponent of moving forward prematurely, later recounted:

Were we surprised? Absolutely! Quite frankly, that's not the way it's supposed to work. Had the president given us the courtesy of a discussion prior to the State of the Union address . . . I think that would have been in consonance with . . . this whole concept of "best military advice." It would have reflected, to me, a little more concern about the health and welfare of the force, as opposed to this being just blatantly political in its design. . . . We made that point clear to Secretary Gates. I will say there was pretty much uniformity on the part of the Service Chiefs, and arguably even in the Tank, about violation of process.<sup>151</sup>

Prior to President Obama's address, the CAG completed and Secretary Gates agreed upon the draft charter for a proposed study examining the potential impact of repeal upon the military.<sup>152</sup> Only an execute order was required to make the concept plan a reality.

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\*Gen Cartwright later recalled that Adm Mullen had seen a copy of the text pertaining to the repeal of DADT before President Obama's State of the Union address (Cartwright interview, 8).

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### **Summary**

Following President Obama's inauguration in January 2010, administration officials and senior military leaders were reluctant to pursue an end to DADT. No one wanted to open a divisive debate at a time when other pressing matters needed attention. Nevertheless, events that spring called for more immediate consideration of repeal. The administration privately contemplated what legal actions were minimally necessary to fulfill its obligation to uphold 10 U.S.C. § 654, while it publicly emphasized its continued commitment to gay rights. Shortly after the Justice Department's unpopular defense of DOMA upset many constituents, President Obama hosted the White House's first LGBT Pride Month reception and promised to find ways to curb enforcement of the policy while exploring a means to repeal the law. Although the Chairman and Secretary of Defense understood the president's objective, little movement occurred at the Pentagon.

The administration's inertia infuriated certain lawmakers who wanted the law repealed. Their initiatives, while unsuccessful, did help convince Carl Levin, chairman of the SASC, to reconsider the relevance of DADT. Preparation for that hearing persuaded Admiral Mullen and the Joint Chiefs to initiate a discrete staff review of the policy. Thus, in early December, the CAG formed the IFF team. Comprised of senior field-grade officers who reflected each of the Services, the team's members prepared short information papers that summarized key issues surrounding the debate over DADT. Their purpose was to provide a common foundation that would enable the Joint Chiefs to discuss the issue and define a position on repeal.

Consensus proved unattainable. Secretary Gates, Chairman Mullen, and Vice Chairman Cartwright supported repeal, but each of the Service Chiefs questioned the wisdom of implementing such a contentious policy change during wartime. Even among themselves, the Service Chiefs disagreed about the need for a study, much less when to conduct it. With the Chiefs unable to agree on the most basic issues, Admiral Mullen directed the CAG to prepare a generic proposal for the JCS (and OSD) to consider.

The paper's authors accepted the inevitability of repeal and suggested that a study could be chartered in 2010, completed in 2011, and then used to inform a congressional debate that might not be decided until sometime in 2012. Public reactions varied when these details were leaked to the press in mid-January. Although some gay rights advocates were gratified to learn that the Pentagon was actively considering repeal, others wondered if the extended timetable was merely a delaying tactic. Some warned of adverse consequences should the Obama administration fail to end the policy in 2010.

Discussions between the Pentagon and White House intensified during the third week of January, as officials conferred on what language President Obama should use when speaking on DADT during his upcoming State of the Union address. Meanwhile, the CAG prepared a new concept paper that envisioned completion of the study, debate, and repeal in 2010, to be followed

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by implementation sometime during 2011. It also drafted a charter for the proposed study group, which Secretary Gates favorably reviewed in time for the president's address. Meanwhile, some congressional leaders conveyed a pragmatic perspective similar to the Service Chiefs' position on repeal to the Secretary and Chairman.

Reactions were mixed when news that President Obama would speak on DADT became public. Secretary Gates later accused the president of committing a "serious breach of trust," because he had failed to consult with the Secretary or the Joint Chiefs before deciding to pursue repeal during the upcoming year. At least three of the Service Chiefs concurred, lamenting that the president had circumvented a system designed to enable them—through the Chairman—to advise the commander in chief on military matters. Still, Admiral Mullen, General Cartwright, and at least two Service Chiefs later remarked that they were not particularly surprised by the president's decision because repeal had always been part of Obama's political agenda and he had expressed his intent to end the policy many times.

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<sup>1</sup> Mullen interview, 3.

<sup>2</sup> Robert M. Gates, *Duty: Memoirs of a Secretary at War* (New York: Alfred A. Knopf, 2014), 331.

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- <sup>95</sup> Cartwright interview, 6.
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## 5 ACKNOWLEDGING THE INEVITABLE

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### Seizing the Initiative

President Obama delivered his first State of the Union address on the evening of 27 January 2010. It was already common knowledge that he would use the occasion to restate his intent to end DADT. That objective drew varied responses from senior officials. Earlier in the day, for example, Senator Kirsten Gillibrand had released a statement from General John Shalikashvili in which the former CJCS announced that “it is time to repeal ‘don’t ask, don’t tell’ and allow our military leaders to create policy that holds our service members to a single standard of conduct and discipline.”<sup>1</sup> House Minority Leader John A. Boehner (R-OH), on the other hand, told reporters that he questioned the wisdom of tampering with a functioning policy.<sup>2</sup>

The Joint Chiefs were themselves divided on how to resolve the controversial issue. The Service Chiefs, who by-in-large supported the current policy, were not alone in opposing hasty reform, and they had powerful allies on Capitol Hill.<sup>3</sup> Years later, General James Conway recalled the advice he and the other Chiefs had received from Representative Ike Skelton, Chairman of the HASC, as they were entering the House Chamber with other Washington dignitaries to listen to the president’s address. “You’re going to hear something tonight that you don’t like,” the congressman had warned, “but don’t let it concern you, because it’s not going to happen.”<sup>4</sup>

Despite their differences of opinion, the Joint Chiefs knew that the media would be interested in their reaction to repealing the ban and appreciated the need to maintain a dispassionate public front. Before entering the chamber they had discussed how to react when the cameras swung in their direction following the president’s comments on DADT. “The compact was ‘no emotion, sit professionally,’” General Norton Schwartz remembered. “We don’t want to repeat occurrences of others embarrassing themselves.”<sup>5</sup> Because the Chiefs customarily respond to any statement regarding the force, Admiral Mullen recalled, their neutrality on this occasion was somewhat awkward.<sup>6</sup>

The majority of President Obama’s speech dealt with reviving the economy, reforming the healthcare system, reducing the deficit, and keeping the nation safe. Near the end—while underscoring the administration’s commitment to civil rights—he commented briefly on the future of DADT. “This year,” he vowed, “I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because they of who they are. It’s the right thing to do.”<sup>7</sup> Shortly after the address, Senior White House advisor Valerie B. Jarret assured television

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viewers that President Obama would launch the repeal initiative “right away” and outline the specifics of that process “in the days and weeks ahead.”<sup>8</sup>

There was mixed congressional support for the president’s agenda. Speaker of the House Nancy Pelosi termed repeal an “issue of fundamental fairness and supporting the patriotic Americans who serve—and wish to serve—our country in uniform.”<sup>9</sup> Senator John McCain argued that “now is not the time to abandon the policy,” citing fifteen years of successful administration and the inherent of danger of enacting major changes during wartime.<sup>10</sup>

Shortly after his State of the Union address, President Obama directed the Defense Department to initiate preparations for the repeal of 10 U.S.C. § 654. Secretary Gates—who had already agreed that ending the controversial policy was the right thing to do—and other Pentagon officials promptly began to implement their commander in chief’s instructions.<sup>11</sup> General George Casey later conceded that although the Joint Chiefs’ earlier discussions of DADT had not been all that serious, after the president’s speech they realized it was time to “get our act together” and they “kicked into high gear.”<sup>12</sup> The day after the president’s address they met to discuss plans for establishing a study group to assess the implication of allowing open homosexuality within the ranks.<sup>13</sup>

As Secretary Gates and Admiral Mullen considered who might lead the assessment team, the Secretary decided to raise the level of oversight originally envisioned by the CAG.\* In keeping with the precedent set during 1993, they had proposed that a two star officer take charge. Gates, however, believed that the working group would require additional authority to ensure that the study was taken seriously.<sup>14</sup> General Carter Ham,\*\* commander of US Army Forces Europe, was subsequently chosen to provide military leadership, while OSD General Counsel Jeh Johnson was selected to provide civilian oversight.\*\*\* Those decisions remained confidential, for the time being.

Instead of canceling the previously scheduled DADT hearings, the SASC had indicated that it might limit early February testimony to outside experts, which could delay planned testimony from Secretary Gates and Admiral Mullen.<sup>15</sup> A day after President Obama’s address, however, Senator Carl Levin announced that he would reserve a portion of the committee’s upcoming budget hearing to question the leaders about the controversial policy.<sup>16</sup>

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\* The CAG had previously suggested that the Chairman task the Service Chiefs with recommending candidates to lead the working group on 3 February. At the time they made the suggestion, the SASC hearing on DADT was still scheduled for 11 February (action timeline).

\*\*Adm Mullen was probably unaware that Gen Ham’s charter for an inquiry into the shootings at Fort Hood had served as a model for the charter of a military working group to study DADT (Neill interview).

\*\*\*Gail H. McGinn temporarily performed the duties of under secretary of defense (personnel and readiness) for the Obama administration, but the position was not officially filled until Clifford Stanley took office in February 2010.

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This was a new, but not necessarily unexpected development. A week before the State of the Union address, the CAG had anticipated that the Chairman might meet with Senator Levin a day after the president's speech to "discuss Posture and DADT hearings," and noted that Levin could easily expand the scope of the budget hearing to include DADT testimony.<sup>17</sup> Years later, Admiral Mullen did not remember such a meeting having taking place, but he acknowledged that it had probably done so.<sup>18</sup>

Meanwhile, Pentagon press secretary Geoffrey S. "Geoff" Morell alerted media representatives that the Defense Department leaders were preparing an implementation plan that Secretary Gates would discuss the following week.<sup>19</sup> Another Pentagon official added that the Secretary also intended to talk about plans to administer the current ban on open homosexuality in a more humane fashion (this was a six-month old initiative that had previously received little attention). Rumors that Gates would make a "major announcement" at Tuesday's SASC hearing soon spread quickly throughout the civil rights network.<sup>20</sup>

The situation evolved rapidly on 29 January.\* Air Force Colonel James H. Baker, director of the CAG, and Captain Samuel Neill, leader of the IFF team, began to transfer all of their DADT materials to Robert S. Rangel, special assistant to the Secretary of Defense.<sup>21</sup> The CAG concurrently issued a reference notebook that it had assembled for Admiral Mullen to the other Joint Chiefs.<sup>22</sup> It contained a list of committee member's perspectives on the issue, policy highlights and fact cards, suggested answers to potential questions, and key lines that could be spoken during testimony.<sup>23</sup> The Chairman's statement had yet to be written.<sup>24</sup>

Although convinced of the need for a comprehensive assessment, Admiral Mullen was less sure of the content and context within which to convey that message to Congress. At the end of January, he considered that question with two of his most trusted assistants, Captains Samuel Neill and John F. Kirby.<sup>25</sup> Kirby, who served as the Chairman's public affairs officer, asked Mullen if he wanted to "step into the ball" or give the standard professional response.<sup>26</sup> This raised three related issues. First, should the Chairman maintain his professional distance or offer his personal opinion on DADT? Second, if the Chairman chose to offer his personal opinion, should he include it in his opening statement or wait until he was asked for it? Third, what constituted a personal—as opposed to professional—opinion?

Admiral Mullen had wrestled with similar questions since his days as a junior officer, and he continued to seek answers as the nation's senior military leader.<sup>27</sup> As Chairman, he believed it imperative that he assume responsibility for the problem so that the military could retain control of the process for making and implementing policy solutions. Personally, he had come to value institutional integrity above operational readiness. Rather than

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\*The president and senior military leaders met in the Tank for two hours on 29 January 2010, ostensibly to discuss operations in Afghanistan (Julian E. Barns, "Obama Meets Joint Chiefs at Pentagon," *Los Angeles Times*, 29 Jan 2010).

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wait for someone on the committee to ask for his personal opinion—a possibility that he had accepted with near certainty—Mullen concluded that it would be more advantageous to seize the initiative and strike first:

I chose to say it up front when I had the mike, if you will, rather than try to figure out how to get that out in the midst of heated questions from one side or the other, when the whole tone and environment in the hearing room could have been much different.<sup>28</sup>

By volunteering his personal opinion he intended to demonstrate his commitment to reform and assure lawmakers that they could rely upon him to conduct a thorough and impartial assessment of the situation, and (if necessary) manage the implementation of the new policy.<sup>29</sup> Captain Neill later described it as an attempt “to best position the institution of the Chairman of the Joint Chiefs of Staff to own the space.”<sup>30</sup>

Admiral Mullen intentionally kept the Service Chiefs in the dark to avoid the possibility of a leak. This restricted final deliberations to private discussions between the Chairman and his public affairs officer. Captain Kirby prepared a draft statement for the Chairman’s review in just 20 minutes over breakfast. He said it was the easiest speech he had ever written because the two had spent so much time considering all sides of the issue that he instinctively grasped Mullen’s perspective. The Chairman changed only one word, switching “homosexual” to “gay and lesbian,” because he felt the latter terms were more representative of those personnel affected by DADT.<sup>31</sup>

Concerned that leaks would preempt his testimony, Admiral Mullen kept his forthcoming statement close hold. He neither informed the Joint Chiefs of his intentions when he met with them the day before his congressional appearance, nor did he discuss them during separate meetings with SASC and HASC leaders. He did, however, share specifics with Secretary Gates and President Obama.<sup>32</sup> The commander in chief learned of Mullen’s intention following an afternoon meeting in the Oval Office, where the Secretary and Chairman explained their plan to complete both a comprehensive assessment and implementation plan by the beginning of December.<sup>33</sup>

Years later, Mullen emphasized that at that time President Obama “wasn’t driving me at all.”<sup>34</sup> Kirby likewise stressed that the Chairman’s opinion was based on a rational analysis of what was best for the force, rather than political expediency.<sup>35</sup> General Schwartz concurred, but from another perspective. He observed that the Chairman had “acted from both principal and his sense of political reality, which included extensive exposure in the White House and consultations on the Hill. He could tell where things were headed and he decided to lead the way.”<sup>36</sup> At the same time, Schwartz added, the Service Chiefs were trying to remain loyal to a different set of responsibilities and obligations.

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### **Season of Testimony**

Secretary Gates and Admiral Mullen appeared before the SASC on 2 February 2010. After a three-hour morning hearing to address FY 2011 budget issues, Senator Levin launched directly into a one-hour afternoon hearing to discuss DADT. He declared that unconvincing arguments used to justify DADT in the past were even less persuasive in 2010 and that the discriminatory policy must go.<sup>37</sup> Senator McCain, however, argued against changing an imperfect but effective policy during wartime and emphasized the wisdom of awaiting an internal report—based on readiness rather than politics—in which the Joint Chiefs presented their best military advice.<sup>38</sup>

Gates's prepared statement differed significantly from the Defense Department's traditional commentary on DADT.\* He declared that “the question before us is not whether the military prepares to make this change but how we best prepare for it. We have received our orders from the Commander in Chief and we are moving out accordingly.”<sup>39</sup> The Secretary then announced the appointment of a high-level working group to review issues associated with the proper implementation of a policy that allowed gays and lesbians to serve openly within the ranks. The members would produce their findings and recommendations in the form of an implementation plan by the end of this calendar year.<sup>40</sup> In the meantime, Gates had already directed his staff to provide recommendations (within forty-five days) on how to curb administration of the current policy, and he intended to ask the Rand Corporation to update its 1993 study.

The Chairman affirmed the Joint Chiefs' unanimous support for the approach outlined by Secretary Gates but emphasized their concern that any implementation plan be “carefully derived, sufficiently thorough, and thoughtfully executed.”<sup>41</sup> Although the Chiefs remained undecided on the issue, he explained, the comprehensive study would provide the insight necessary to develop their best military advice on the impact of repeal and how to best implement the policy change.<sup>42</sup>

Admiral Mullen then switched gears and astonished many by sharing his personal perspective on the military's prohibition against homosexuality:

Speaking for myself and myself only, it is my personal belief that allowing gays and lesbians to serve openly would be the right thing to do. No matter how I look at this issue, I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens. For me personally, it comes down to integrity, theirs as individuals and ours as an institution.<sup>43</sup>

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\*In his memoir *Duty*, Secretary Gates wrote that he remained “skeptical that Congress would pass repeal.” Gen Conway later recalled that he had thought that the Secretary had personally opposed repealing DADT, particularly during wartime (Conway 2014 interview, 7).

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The Chairman granted that while he believed the military community could accommodate a more inclusive policy, he did not know that for a fact, nor did he know the best way to implement such a change on forces already stressed by wars in Afghanistan and Iraq. They would certainly experience some disruption, he admitted, although the type and extent of any disturbances resulting from the implementation of a new policy remained unclear. That was why a study was necessary. \* Since Congress would ultimately decide the matter, Mullen told the committee that “balance and thoughtfulness is what we need most right now.”<sup>44</sup>

Reaction to the senior leaders’ statements was sharply divided along party lines. The Republican committee members opposed repealing DADT. Senator McCain was “deeply disappointed” by Secretary Gates’s “clearly biased” statement.<sup>45</sup> When he inquired about the Service Chiefs’ opinions, Admiral Mullen deferred to their own anticipated testimony but accepted that they agreed it was important to understand the impact of the policy and how to implement it—should the law change. That further frustrated McCain, who concluded his inquiry by exclaiming,

So, again, you are embarking on saying it’s not whether the military prepares to make the change, but how best we prepare for it, without ever hearing from members of Congress, without hearing from the members of the Joint Chiefs, and of course without taking into consideration all the ramifications of this law. Well, I’m happy to say that we still have a Congress of the United States that would have to pass a law to repeal don’t ask, don’t tell despite your efforts to repeal it in many respect by fiat.<sup>46</sup>

When later reminded of Senator McCain’s 2006 promise to support change once the Joint Chiefs had called for repeal, a spokesman explained that the Chairman’s personal perspective did not necessarily reflect that of the JCS as a whole, and the senator would wait for the study to be completed before receiving their consensus opinion on the issue.<sup>47</sup>

While Senator Susan M. Collins (R-ME) was a long-time supporter of repeal, the other Republican committee members were equally dismayed. Senator Roger F. Wicker (R-MS) observed that “we understand that elections have consequences and these two gentlemen see their charge as moving forward with the directives of their commander.”<sup>48</sup> Senator Jefferson B. “Jeff” Sessions (R-AL) likewise commented that “it’s pretty clear what your view is and that will be clear [to] all your subordinates. . . . If it was a trial we would

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\*In response to post-hearing questions from Senator McCain, Adm Mullen wrote: “Leadership requires preparation, and it is my responsibility to ensure our leaders are ready for any decision Congress should make. I do not expect to try and change someone’s views about homosexuality. I do believe that we can have clear standards of conduct and behavior, and hold people accountable to those standards.” (CHARRTS Number: SASC-02-153, 154).

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perhaps raise the undue command influence defense.”<sup>49</sup> Senator Saxby Chambliss (R-GA) supported the status quo and “looked forward to a spirited debate.”<sup>50</sup>

Senator Levin expressed the Democrats’ enthusiasm by praising the Chairman for his leadership and emphasizing that he had been compelled by law—rather than by the commander in chief—to share his personal opinion with the committee.<sup>51</sup> Despite the Democrats’ shared commitment to repeal, a range of individual perspectives persisted. Senator Joseph I. “Joe” Lieberman (I-CT) asked Secretary Gates to reconsider the forty-five-day delay in easing enforcement of the current law, while Senator Levin inquired if the Secretary would support a legislatively sanctioned moratorium on homosexual discharges during the yearlong assessment period. Senator Mark Udall likewise asked for Gate’s thoughts on a legislative proposal to abolish the law early but delay implementation until after the assessment had been completed. Gates—who responded that he would need time to consider the ramifications of a moratorium and that the assessment was intended to inform congressional debate and provide an implementation plan—made it clear that if repeal legislation were passed, it would be essential for the military to have at least one year to establish the new policy. When Lieberman remarked that they would somehow need to accrue sixty votes to repeal the law through stand-alone legislation, Levin suggested that it would be easier to add repeal legislation to the FY 11 NDAA.<sup>52</sup> Lieberman responded with good humor that his colleague’s plan was “a great way to go,” revealing their confidence that repeal in one form or another would eventually occur.<sup>53</sup>

Secretary Gates and Admiral Mullen appeared before the HASC the next day to discuss the FY 2011 defense budget request. Although time had not been set aside to address DADT specifically, several committee members nevertheless chose to raise the topic when it was their turn to question the witnesses. Reactions in the House, like those in the Senate, predictably varied according to political affiliation.

Representative Howard McKeon, who first complained that neither of the senior leaders had responded to his letter of 20 January, accused the Secretary and Chairman of placing “the cart before the horse.”<sup>54</sup> He believed they should have allowed the Service Chiefs to conduct an in-depth policy review before deciding to support President Obama’s repeal initiative.<sup>55</sup> Subsequently, when Representative Walter B. Jones Jr. (R-NC) insinuated that the Chairman was purposefully evading disclosure of the Service Chiefs’ opposition, Admiral Mullen explained that they would have an opportunity to speak for themselves in the near future.<sup>56</sup>

The Democrats as expected were more supportive of repeal.\* Several members with prior military service questioned the need for such a lengthy

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\*Three weeks later, Representative Hastings and thirty cosponsors introduced H.R.1090 to recognize the SASC hearing and the witnesses’ comments as an important “first step forward” and to endorse the elimination of DADT during the current year. The bill died after being referred to the Military Personnel Subcommittee.

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study. Representative Patrick Murphy, who had deployed to Iraq and was currently sponsoring the latest House version of the Military Readiness Enhancement Act (H.R. 1283), surmised that if Congress should repeal 10 U.S.C. § 654 via an amendment to the pending NDAA legislation, then the Defense Department should be able to complete its study and then implement the new policy when the FY 11 budget took effect on 1 October. After commenting on the size, complexity, and enduring character of the military, Secretary Gates advised that “rushing into it, mandating it by fiat with a very short timeline would be a serious mistake.”<sup>57</sup>

Public reaction to the senior leader’s statements was largely favorable. A *Washington Post* columnist enthusiastically recounted the moment of Mullen’s triumph before the SASC and remarked that the Chairman deserved a medal for his bravery.<sup>58</sup> Leading civil-rights activists praised the hearing as a “historic step forward” and “roadmap for full repeal.”<sup>59</sup> Even Secretary Powell weighed in to endorse the Pentagon’s plan to eliminate DADT.

Back at the Pentagon, however, the Service Chiefs were uniformly angered by Admiral Mullen’s “breach of protocol” on Capitol Hill.<sup>60</sup> They had been aware of the Chairman’s growing dissatisfaction with DADT, but each was still caught off guard when he chose to voluntarily assert his moral opposition to continuing the policy.<sup>61</sup> From their perspective the Chairman’s first duty was to speak for the Joint Chiefs on behalf of the joint force and then to express his personal opinion if he disagreed with the administration or was pressed by civilian leaders.<sup>62</sup> In this case Mullen had done the opposite, articulating his own beliefs without first acknowledging that the Service Chiefs either opposed repeal or remained undecided on the issue.<sup>63</sup> In a way, Admiral Roughead later remarked, the certitude of the Chairman’s statement almost contradicted Secretary Gates’s rationale for conducting a detailed study.<sup>64</sup>

General Casey was troubled that the Chairman had chosen to present the personal view of Mike Mullen, citizen, rather than Admiral Mullen, leader of the nation’s Armed Forces. Following the hearing he telephoned Mullen to say, “Mike, come on, you’re the Chairman of the Joint Chiefs. You recommend a policy and you don’t know what the impact to the military is? Come on, that’s crazy.”<sup>65</sup> He later reiterated, “I just thought that was nuts.”<sup>66</sup>

Admiral Roughead and General Casey may not have been inhibited by the Chairman’s comments, but years later the former CNO did allow that his leadership style differed from Admiral Mullen’s.<sup>67</sup> Roughead, who prided himself in having never offered his personal—versus professional—opinion on DADT, explained that he did not want to influence subordinates who might be asked to comment on the policy’s future. General Conway likewise observed that the Chairman’s opinion carried greater weight than that of the Service Chiefs so that it was more difficult for them to argue contrary positions before the public. Admiral Mullen’s unilateral pronouncement, he observed, did not differ greatly in appearance from a JCS consensus decision. Yet it forced the Service Chiefs to take a more adversarial stance than they would have otherwise sought and resulted in the airing of inherent

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differences that he thought should have remained within the confines of the Tank.<sup>68</sup>

While the Service Chiefs may have understood, perhaps even appreciated, the sentiment behind Admiral Mullen's argument for repeal, Generals Casey, Conway, and Schwartz still disputed his assertion that DADT undermined individual integrity and thus institutional core values.<sup>69</sup> If the administration of DADT was plagued by problems of integrity, they believed, it was because some gay and lesbian personnel had joined the military knowing full well that open homosexuality was forbidden but had nevertheless chosen to reveal their sexuality, thereby causing their separations. That was the law\* and General Conway, for one, resented having the blame for such conduct placed upon the military's shoulders.<sup>70</sup>

By shifting the nature of the argument from practical (readiness) to ideological (integrity), Secretary Gates and Admiral Mullen had "fundamentally changed the terms of reference for the debate," "escalated the cost of opposing the initiative," and made it "increasingly difficult to sustain the existing law."<sup>71</sup> "No one ever took that issue on," the Chairman later recalled, "because it's . . . impossible. Even for McCain, who, integrity is sort of at the heart of his soul and his life, he never took it on. He had to stay on readiness and impact."<sup>72</sup> This outcome was not the result of strategic maneuvering on the part of the Chairman, who later confessed that he hadn't "really appreciated" what was occurring at the time.<sup>73</sup> It was instead the unintended consequence of an informed realist having acted on principle.<sup>74</sup>

Although Congress still needed to vote on the issue, Admiral Roughead and Generals Casey and Schwartz had begun to concede the likelihood of DADT's eventual repeal.<sup>75</sup> General Conway was also aware of the change in attitude toward DADT but still estimated that there was an even chance the existing law would be upheld.<sup>76</sup> In order to halt or delay the initiative, he concluded, those who questioned the wisdom of wartime repeal would have to "put a stake in the ground so those people understand the whole of leadership is not simply ready to acquiesce on this."<sup>77</sup>

The Service Chiefs shared their frustration over Admiral Mullen's testimony with Secretary Gates during a Tank meeting on 19 February. Gates later recalled that the Army and Air Force leaders had been the most outspoken. General Casey, who warned of time and scope limits to culture change, emphasized the importance of consulting the force and communicating that the matter had not yet been decided. General Schwartz reiterated that this was not the time to seek change, while the Marine Commandant expressed his concern for unit readiness.\*\* When asked how they should respond to requests for their personal views while defending their annual budget requests for the upcoming year, Gates advised that they had

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\*Curiously, the fact that repeal would have negated the possibility of manipulating the policy to avoid military service apparently did little to inform arguments either for or against repeal.

\*\*Secretary Gates refers to Gen James F. Amos as the Commandant of the Marine Corps here, but Amos was still serving as Assistant Commandant on 19 February 2010.

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no other option than to be honest. They should continue to voice their concerns, he said, but they could also sidestep a public confrontation with the Secretary and Chairman by postponing their final judgment until after the comprehensive review had been completed.<sup>78</sup>

Four days later, the Army was the first department to testify before the SASC. Neither Secretary of the Army John M. McHugh nor General Casey chose to open by offering their personal or professional opinions on DADT, but Senator Levin soon raised the issue by asking if they would support a moratorium on homosexual discharges until the comprehensive review was complete. McHugh responded that the Army wouldn't object if it were the will of Congress and the president, but when pressed by Senator McCain he admitted that he would personally prefer to refrain from enacting a moratorium because it would complicate ongoing enforcement of the current law.<sup>79</sup> Senators Udall and Levin countered that the commander in chief's decision to pursue repeal—as well as the decisions of Chairman Mullen and Secretary Gates to support that initiative—had already complicated matters.<sup>80</sup>

General Casey also opposed instituting a moratorium. It would disrupt the process that Secretary Gates had begun, he explained, by forcing the Army to implement a new policy at the same time it was studying the dynamics of implementation. When Levin backtracked to ask what he would think if it did not involve implementation, Casey was even more direct: “Chairman, this process is going to be difficult and complicated enough. Anything that complicates it more, I think I would be opposed to.”<sup>81</sup>

Later, Senator Lieberman asked if it were true that the general remained undecided on the issue. Casey conceded that was a fair assessment of his position but acknowledged that he had serious concerns about the impact of repeal on a force that had been fighting two wars for more than eight years. “We just don't know the impacts on the readiness and military effectiveness,” he explained, but when the study was complete he would then be in a position to provide his “informed military judgments to the Secretary of Defense, the President, and Congress.”<sup>82</sup>

The Navy Department appeared before the SASC two days later. Like their Army counterparts, none of its leaders chose to offer their personal or professional opinions. Levin again opened the discussion by asking whether or not the policy should be repealed, and if so, by what process. Secretary of the Navy Raymond E. “Ray” Mabus Jr. was the first to speak. After acknowledging that it was Congress' responsibility to decide the matter, he said that he supported repeal and thought that President Obama had “come up with a very practical and workable way to do that,” by working through Secretary Gates's study group.<sup>83</sup> Admiral Roughead deferred to Congress as well but emphasized the importance of conducting a comprehensive analysis based on reliable information that was relevant to the US Navy.<sup>84</sup> This approach was similar to Admiral Mullen's desire to delineate between fact and fiction before deciding how best to institute change.

General Conway's response was more complicated. From a professional perspective he recognized that the commander in chief had expressed his

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intent and the Secretary of Defense had in turn developed a plan to achieve that goal. Conway's personal opinion, however, was that all concerned parties should approach the question of repeal objectively and pragmatically. That meant asking if allowing homosexuals to serve openly would actually enhance the warfighting capability of the US Marine Corps. "At this point, notwithstanding the results that the study will bring forward," he concluded, "my best military advice to this committee, to the Secretary, to the President, would be to keep the law such as it is."<sup>85</sup>

On 4 March, the Air Force was the last of the military departments to testify before the SASC. Reminiscent of the two earlier hearings, neither Secretary of the Air Force Michael B. Donley nor General Schwartz chose to volunteer their views on DADT. When Senator Levin raised the issue, he asked if the senior leaders concurred with Chairman Mullen's conviction "that allowing homosexuals to serve openly would be the right thing to do." Donley affirmed that he did, and then added that he also supported President Obama's efforts to end DADT and Secretary Gates's initiative to study the implications of repeal.<sup>86</sup>

General Schwartz, like his Service counterparts, acknowledged President Obama's intent and assured the committee that the Air Force would faithfully implement a new policy should Congress choose change the law. In the meantime, he considered it essential that they "investigate the facts and circumstances and potential implications, the possible complications, and potential mitigations" of such a change. He then identified two concerns: first, that it was not the right time to stress an already strained force without due deliberation; and second, that the standards of conduct would continue to apply to all servicemembers.<sup>87</sup>

Senator McCain tried to highlight the philosophical rift between Admiral Mullen and the Service Chiefs so that he could claim that they obviously did not support President Obama's political agenda. He asked General Schwartz whether the study's focus should be on how to repeal DADT or the effects of repeal on the military. The Air Force Chief replied that it was important to understand the dynamics of policy change because complications to such things as benefits, cohabitation, and discipline had not yet been thoroughly investigated. When McCain asked if a moratorium would be foolish, Schwartz replied that any interim change would be unwise.<sup>88</sup>

Senator Lieberman reoriented the discussion by asking if the two leaders believed that military personnel should be discharged solely on the grounds of their sexual orientation. After stating that he personally disagreed with that practice, Secretary Donley observed that in his experience, good order and discipline were based on conduct rather than gender or orientation. General Schwartz, however, reiterated that they did not yet possess the necessary data to answer such a complex question. "I take a pragmatic view of this," he told the senator, "not the philosophical view perhaps that you've explored here."<sup>89</sup> Lieberman then asked if he possessed any personal feelings on the issue, to which the general advised that to act in haste would be premature.

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In the meantime, General Carter Ham had forwarded his initial personnel requirements to the DJS on 11 February. It was a hasty request designed to fill key positions in the headquarters element and four staff sections (survey and assessment, policy development, legislative development, and education and training), as well as a forty-five-day review team. The personnel would be agency designated and drawn evenly from the Services, (including Reserve and National Guard components), Coast Guard, and OSD. One-star team leaders would manage the sections, assisted by O-6 deputies and E-9 senior enlisted advisors. Ham asked that the participants be available for an inaugural team meeting on the morning of 19 February.<sup>90</sup>

It was not until 2 March that Secretary Gates provided Jeh Johnson and General Ham with a written charter “to stand up an intra-Department, inter-Service working group to conduct a comprehensive review of the issues associated with a repeal of” DADT.<sup>91</sup> This group became known as the Comprehensive Review Working Group (CRWG). Gates’s one-page cover letter emphasized that the group was fulfilling a presidential request for a policy assessment and implementation plan. He further stressed the need to conduct the study “in a professional, thorough and dispassionate manner” in order to “shield our men and women in uniform and their families from [the political] aspects of the debate.”<sup>92</sup>

An accompanying two-page “terms of reference” concisely addressed the review’s scope, objectives, methodology, deliverables, and support. While systematically engaging “all levels of the force and their families,” the team of experts would determine the impact of repeal upon readiness, effectiveness, cohesion, recruiting, and retention; recommend appropriate changes to existing policies, regulations, and the UCMJ; and identify necessary leadership, guidance, and training on standards of conduct and new policies, as well as means for monitoring “workforce climate and military effectiveness” following implementation.<sup>93</sup> They would also observe and evaluate current legislation and litigation pertaining to DADT and coordinate an update of the 1993 Rand study. The final report—to include a “plan of action to support the implementation of a repeal of the law”—was due by 1 December 2010.

Two events the following day advanced the repeal campaign. First, Senator Lieberman and thirty cosponsors introduced the Military Enhancement Act of 2010 (Senate [S.] 3065), which was a companion to H.R. 1283. The first bill of its kind to appear before the Senate, it sought to repeal 10 U.S.C. § 654, establish a policy of nondiscrimination based on sexual orientation in the Armed Forces, and withhold funding from universities that continued to deny the presence of ROTC programs on their campuses.<sup>94</sup>

Jeh Johnson and General Ham also appeared before the Military Personnel Subcommittee on 3 March to discuss their strategy for assessing DOD requirements for implementing a more inclusive policy.<sup>95</sup> In addition to the two cochairs, Clifford L. Stanley, under secretary of defense for personnel and readiness, also testified. Although three-fourths of the committee members in attendance were Democrats who favored ending DADT, the atmosphere was less supportive than several months earlier. Chairwoman

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Susan A. Davis, for example, reflected the impatience of many when she began the proceeding by admitting that although she appreciated the intent behind Secretary Gates's initiative, she had already accepted that "a quicker solution is possible and, indeed, necessary."<sup>96</sup>

Republican support was similarly qualified. Representative Addison G. "Joe" Wilson Sr. (R-SC), ranking member of the subcommittee, believed in the need for an independent study to precede any action that would affect the current law. Like Congressman McKeon, however, he suspected both the impartiality of an updated Rand study and the utility of a comprehensive review that focused solely upon implementation. Instead, he advocated asking "why the current law threatens or undermines readiness in any significant way?" and "whether repeal of the current law would improve readiness in measurable ways?"<sup>97</sup>

As for personal views on repealing DADT, General Ham merely repeated the importance of understanding the impact of repeal upon the force, should it occur. Granting the need to remain open-minded and objective, Jeh Johnson and Clifford Stanley, as politically appointed members of the administration, acknowledged their clear understanding of the president's intent to repeal the law and end the policy.<sup>98</sup>

The three witnesses explained in general terms plans to survey both the force and the military families. General Ham also envisioned employing focus groups and using social media to develop a more personal perspective that included the views of serving homosexuals. An executive committee comprised of the undersecretary of defense for personnel and readiness, the Service undersecretaries and vice chiefs, and the chief of the National Guard Bureau would coordinate these efforts. Ham promised to keep the lawmakers informed of their progress.<sup>99</sup>

On 18 March, the SASC held a hearing specifically devoted to DADT. Fewer than half of the committee members chose to attend, however, and only two-thirds of those participated actively.<sup>100</sup> The Service Chiefs were apparently not allowed to testify,<sup>\*</sup> limiting witnesses to military veterans.<sup>101</sup> Two former officers—despite having led otherwise exemplary careers—had been recently separated from the Service because they were homosexuals. Former Lieutenant (junior grade) Jenny L. Kopfstein, USN, had voluntarily disclosed her sexual orientation to her shipmates, while former Major Michael D. Almy, USAF, had been inadvertently exposed when authorized personal e-mails were discovered on a government computer in Iraq. The third witness, retired Marine Corps General John J. Sheehan, had been wounded and decorated for valor in Vietnam, and he later served simultaneously as Supreme Allied Commander Atlantic and commander in chief of US Atlantic Command before retiring from the military in 1997.<sup>102</sup>

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<sup>\*</sup>During a previous HASC hearing, Representative McKeon stated that he was "disappointed" that the Service Chiefs were precluded from testifying before the Military Personnel Subcommittee's hearing on DADT because it limited the members' ability to "understand and explore" the leaders' concerns regarding repeal.

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Lieutenant Kopfstein and Major Almy concurred with Admiral Mullen's belief that DADT ran counter to the military's core value of integrity. Attitudes toward gays and lesbians in the military had changed since 1993, they maintained, and institutional opposition to repeal tended to reflect of the older generation's reluctance to question traditional values. Kopfstein told of being accepted and respected by shipmates on board the cruiser USS *Shiloh* (CG 67), while Major Almy observed that being replaced by a less-experienced junior officer had lessened the squadron's moral, cohesion, and efficiency. They expected that repeal would be uneventful and noted that the UCMJ already contained the necessary provisions to discipline anyone who violated the proscribed standards of conduct.<sup>103</sup>

General Sheehan's testimony would become the last major attempt to articulate how and why the presence of homosexuals undermined combat effectiveness. Anchoring his case to 10 U.S.C. § 654, Sheehan reiterated that the purpose of military society is to mold individuals into a cohesive entity predicated upon self-sacrifice and conformity to institutional customs, values, and traditions. From his perspective, that conflicted with the possibility of granting "special accommodations" to gays and lesbians. Senator Levin pointed out that there would be no need for special accommodations if Congress chose to repeal the law.<sup>104</sup>

Sheehan dismissed advocates of a more inclusive policy as naïve, self-serving, and dangerous because they valued individual rights over common defense. "Our enemies, especially the extremists," he proclaimed, "do not care how enlightened or progressive our culture may be. The only thing that matters is effectiveness on the battlefield."<sup>105</sup> He urged Congress to forgo lifting the prohibition against open homosexuality until it had been conclusively demonstrated that the change would enhance effectiveness and minimize risks on today's battlefield.<sup>106</sup> He could not, however, cite any reputable studies to support his claim that homosexuals threatened military readiness or to show that DADT improved combat effectiveness.<sup>107</sup>

The general suggested that allowing openly gay and lesbian personnel had harmed the NATO allies' readiness. His source was a confidential remark by the former Dutch chief of defense that the presence of homosexuals had contributed to a United Nations protection force's inability to prevent the notorious 1995 Srebrenica massacre.<sup>108</sup> Several days later, though, he retracted that statement and apologized for an inaccurate portrayal of the Dutch general's assessment.<sup>109</sup>

Throughout the month of March, the ten combatant commanders testified before the SASC, but only four were asked for their thoughts on DADT: Air Force Generals Victor E. Renuart and Douglas M. Frasier at Northern and Southern Commands, respectively, Admiral Eric T. Olson at Special Operations Command, and Army General David H. Petraeus at CENTCOM. Petraeus asked for permission to read a prepared statement in response to a question from Senator McCain, but Senator Levin denied the request, citing time constraints. The senior military commanders thus offered

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measured responses that corroborated the need for a comprehensive study to resolve the issue, which seemed to satisfy the committee's waning curiosity.<sup>110</sup>

At a 25 March Pentagon press conference, Secretary Gates announced several revisions to the regulations governing the investigation of suspected homosexuals and their subsequent separation from the military (DOD Directives 1332.14 and 1332.30).<sup>111</sup> He reiterated his mid-February guidance to the Chairman and Service Secretaries to review proposed changes in order to make a "fairer and more appropriate" policy.<sup>112</sup> During the press conference he noted that the revisions would provide "a greater measure of common sense and common decency to a process for handling what are difficult and complex issues for all involved."<sup>113</sup>

Under the new regulations, only a general or flag officer in an individual's chain of command could initiate a fact-finding inquiry or separation proceedings involving homosexual conduct, although they were precluded from considering confidential information shared with lawyers, clergy, counselors, psychotherapists, and medical personnel, or information discovered during the course of a personnel security investigation. Third-party statements were admissible but only from reliable witnesses who testified under oath that they had either observed homosexual acts taking place or heard a servicemember divulge that they were gay, lesbian, or bisexual.<sup>114</sup> Such declarations created a presumption of homosexual activity, but the new regulations also made clear that contrary statements made under oath would be considered grounds for having successfully "rebutted" the presumption.<sup>115</sup> The burden of proof thus shifted to the accuser, and unless "a preponderance of the evidence" was available to substantiate the allegations, the administrative board was required to recommend the servicemember's retention.<sup>116</sup> When discharge was deemed appropriate, the separation authority had to be a general or flag officer equal to or higher than the commander initiating the inquiry or separation proceedings. These revisions brought the current policy more in line with the earlier version championed by the Clinton administration, until Defense General Counsel Judith Miller closed the abstinence loophole in 1995.

During the same press conference reporters asked Secretary Gates and Admiral Mullen to comment on a controversial letter that Lieutenant General Benjamin R. Mixon, commander of US Army Pacific (ARPAC), had sent to the editor of *Stars and Stripes*. Responding to concerned commentaries that had appeared in the newspaper, he sought to reassure members of the extended military community made uneasy by the prospect of policy change. After sharing personal doubts regarding the accuracy of surveys that suggested that most military personnel supported the elimination of DADT, he advised like-minded citizens who opposed the "ill-advised repeal of a policy that has achieved a balance between a citizen's desire to serve and acceptable conduct" to express their views.<sup>117</sup>

Secretary Gates answered that he thought it was inappropriate "for an active duty officer to comment on an issue like this."<sup>118</sup> Admiral Mullen concurred, adding that from his perspective, General Mixon had ignored the

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Army Chief of Staff's specific written directions on dealing with repeal-related matters during the review period. Both believed that Mixon had used the influence of his rank and position to obstruct the commander in chief's initiative to end DADT.\* According to the Chairman, if military personnel disagreed strongly with a particular policy, "the answer is not advocacy; it is in fact to vote with your feet."<sup>119</sup> When asked if he was suggesting that Mixon resign, Mullen replied that that decision would be up to him.\*\*

Whether or not Mixon breached procedure was not clear-cut. The DOD directive governing political activities by members of the Armed Forces states that active duty personnel may share their personal views on public issues with newspaper editors, provided that those opinions do not represent those of the Defense Department.<sup>120</sup> The same directive prohibits the use of official authority or influence to "affect the course or outcome of an election" or "solicit votes for a particular candidate or issue."<sup>121</sup> While General Mixon did not specifically state that the views expressed in the letter were his and his alone, he clearly disagreed with the proposed policy changes. Moreover, while some personnel may have recognized him as the commander of ARPAC, he had not signed the letter in that capacity. Perhaps, as one reader noted, *Stars and Stripes* needed to add a standard disclaimer to its editorial page and stop asking contributors to provide their name, rank, status, and location.<sup>122</sup>

During a press conference the following week, Army Secretary McHugh told reporters that General Casey had counselled Lieutenant General Mixon, and the ARPAC commander now "recognized" that "it is inappropriate for him to . . . try to shape the opinion of the force, rather than reach out and ascertain the opinion of the force."<sup>123</sup> McHugh and the Army Chief of Staff considered the matter closed.<sup>124</sup> The effect of the Chairman's harsh public rebuke of a senior military commander on the force's willingness to express any reluctance to changing the current policy remained to be seen. As the Chairman had explained when criticizing Mixon's actions, a "leader in command, by virtue of just that position alone, he has great influence."<sup>125</sup>

### **Summary**

Following President Obama's 2010 State of the Union address, Secretary Gates prepared to implement presidential guidance for a more inclusive personnel policy. Testifying before the SASC in early February, the Secretary and the Chairman described plans to effect that change. Admiral Mullen, without consulting the Service Chiefs, also offered his personal opinion that gays and lesbians be allowed to serve as a matter of personal and institutional integrity. His remarks upset the other Chiefs, who believed that the Chairman's remarks had advanced the administration's position

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\*Adm Mullen believed that LtGen Mixon had violated procedures by presenting his personal advice in public and attempting to "skew the results" of the comprehensive review (Mullen interview, 6 May 2014).

\*\*Years later, a member of Mullen's CAG reflected that the Chairman might have overreacted to LtGen Mixon's letter to *Stars and Stripes* (Neill interview, 26 Jun 2012).

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without adequately representing their reluctance to confront a controversial policy issue in the midst of fighting two wars. Generals Casey, Conway, and Schwartz disputed Admiral Mullen's assertion that DADT undermined individual integrity and institutional core values and cautioned against advocating a policy change without consideration of its consequences for the Armed Services. They recognized that the Chairman had fundamentally altered the debate and made it extremely difficult to sustain the existing regulations.

Subsequent Service testimony during the February budget hearings tended to support the review initiative and oppose an interim moratorium and early end to DADT. The Service Chiefs gradually accepted that some form of change was inevitable but awaited study results before committing themselves on the issue. Admiral Mullen's harsh criticism of General Mixon's appeal for opponents of change to make their voice heard likewise signaled, fairly or not, that opposing views were unwelcome.

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<sup>1</sup> Gen John Shalikashvili, statement advocating repeal of Don't Ask, Don't Tell, press release, 27 Jan 2010.

<sup>2</sup> Laurie Ure, "Obama to Ask Congress to Repeal 'Don't Ask, Don't Tell,'" Political Ticker, CNN.com, 27 Jan 2010.

<sup>3</sup> Conway 2010 interview, 121.

<sup>4</sup> Conway 2014 interview, 5.

<sup>5</sup> Schwartz interview, 3-4.

<sup>6</sup> Mullen interview, 9.

<sup>7</sup> Barack Obama, "Remarks by the President in the State of the Union Address," White House Office of the Press Secretary, 27 Jan 2010.

<sup>8</sup> Valerie Jarrett, transcript of interview, *Rachel Maddow Show*, MSNBC, 27 Jan 2010.

<sup>9</sup> "Congressional Reactions to Obama's State of the Union," *Washington Post*, 27 Jan 2010.

<sup>10</sup> "Reactions to the State of the Union Address," CNN.com, 28 Jan 2010

<sup>11</sup> Gates, *Duty*, 433, 437; Robert Gates, Secretary of Defense, statement before the SASC, 2 Feb 2010, in *DOD Authorization for Appropriations for Fiscal Year 2011*, 111th Cong., 2nd sess. (2010), 84.

<sup>12</sup> Casey interview, 9.

<sup>13</sup> CAG, "DADT Timeline and Initial Documents," Chronology, ca. 2011.

<sup>14</sup> Neill interviews, Jun 2012 and Oct 2012, 6-7; "Action Timeline," Jan 2010.

<sup>15</sup> "Obama Calls for 'Don't Ask, Don't Tell,'" CNN.com, 27 Jan 2010.

<sup>16</sup> Barbara Starr, "Pentagon Plans on 'Don't Ask, Don't Tell' Ready for Congress," CNN.com, 28 Jan 2010.

<sup>17</sup> "Action Timeline," Jan 2010.

<sup>18</sup> Mullen interview, 10.

<sup>19</sup> Starr, "Pentagon Plans."

<sup>20</sup> Barbara Starr, "Rick's List," transcript of 1500 news broadcast, CNN.com, 28 Jan 2010.; Andy Towle, "Gates Says Major Announcement on DADT set for Tuesday," *TowleRoad*, 29 Jan 2010.

<sup>21</sup> CAG, "DADT Timeline."

<sup>22</sup> Ibid.

<sup>23</sup> CAG, "Posture Hearing Preparation Special Thin Binder," Jan 2010 (ECM).

<sup>24</sup> CAG, "DADT Timeline."

<sup>25</sup> Neill interview, Oct 2012, 6.

<sup>26</sup> Neill interview, Jun 2012.

<sup>27</sup> Casey interview, 1, 8; Kirby interview.

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- <sup>28</sup> Mullen interview, 10.
- <sup>29</sup> Neill interview, Jun 2012.
- <sup>30</sup> Neill interview, Oct 2012, 24.
- <sup>31</sup> Kirby interview.
- <sup>32</sup> Mullen interview, 10; Barbara Starr and Laurie Ure, “Sources: Joint Chiefs Set to Review ‘Don’t Ask, Don’t Tell’ Policy,” CNN.com, 1 Feb 2010.
- <sup>33</sup> Gates, *Duty*, 434; Marc Ambinder, “Outing the Debate: An Inside Account of the Struggle to End ‘Don’t Ask, Don’t Tell,’” *National Journal*, 9 Dec 2010.
- <sup>34</sup> Mullen interview, 11.
- <sup>35</sup> Kirby interview.
- <sup>36</sup> Schwartz interview, 6.
- <sup>37</sup> Senate Armed Services Committee, *DOD Authorization for Appropriations for Fiscal Year 2011*, 111th Cong., 2nd sess. (2010), 74–76.
- <sup>38</sup> *Ibid.*, 76–80.
- <sup>39</sup> Gates, statement before the SASC, 2 Feb 2010, 82.
- <sup>40</sup> *Ibid.*
- <sup>41</sup> Adm Michael G. Mullen, CJCS, statement before the SASC, 2 Feb 2010, in *DOD Appropriations for Fiscal Year 2011*, 86.
- <sup>42</sup> *Ibid.*
- <sup>43</sup> *Ibid.*
- <sup>44</sup> *Ibid.*, 86–87.
- <sup>45</sup> Sen John McCain, SASC hearing on DADT, 2 Feb 2010, in *DOD Appropriations for Fiscal Year 2011*, 89.
- <sup>46</sup> *Ibid.*
- <sup>47</sup> Michael D. Shear, “McCain Appears to Shift on Don’t Ask, Don’t Tell,” *Washington Post*, 3 Feb 2010.
- <sup>48</sup> Sen Roger F. Wicker, SASC hearing on DADT, 2 Feb 2010, in *DOD Appropriations for Fiscal Year 2011*, 93.
- <sup>49</sup> Sen Jeff Sessions, SASC hearing on DADT, 2 Feb 2010, in *DOD Appropriations for Fiscal Year 2011*, 91.
- <sup>50</sup> Sen Saxby Chambliss, SASC hearing on DADT, 2 Feb 2010, in *DOD Appropriations for Fiscal Year 2011*, 97.
- <sup>51</sup> Senate Armed Services Committee, *DOD Appropriations for Fiscal Year 2011*, 102.
- <sup>52</sup> *Ibid.*, 88–89, 99.
- <sup>53</sup> Sen Joseph I. Lieberman, SASC hearing on DADT, 2 Feb 2010, in *DOD Appropriations for Fiscal Year 2011*, 102.
- <sup>54</sup> Rep Howard P. McKeon, HASC hearing on the *FY 2011 National Defense Authorization Budget Request from the Defense Department*, 111th Cong, 2d sess., 3 Feb 2010. Transcript by Federal News Service, 9.
- <sup>55</sup> *Ibid.*, 2.
- <sup>56</sup> House, in *ibid.* 16.
- <sup>57</sup> Sec Robert Gates in *ibid.*, 34.
- <sup>58</sup> Dana Milbank, “Mullen Deserves Medal for Senate Testimony Backing Open Military Service by Gays,” *Washington Post*, 3 Feb 2010.
- <sup>59</sup> Joe Solmonese, “Statement from Human Rights Campaign on Don’t Ask, Don’t Tell U.S. Senate Hearing,” press release, Human Rights Campaign, 2 Feb 2010, [www.hrc.org](http://www.hrc.org); Aubrey Sarvis, “SLDN Applauds Historic Hearing: For First Time, U.S. Military Brass Support Repeal of Don’t Ask, Don’t Tell,” press release, SLDN, 2 Feb 2010.
- <sup>60</sup> Conway 2014 interview, 7–8.
- <sup>61</sup> Mullen interview, 10–11; Roughead interview, 7; Conway 2014 interview, 7; Schwartz interview, 4.
- <sup>62</sup> Casey interview, 1; Conway 2014 interview, 7–8.
- <sup>63</sup> Conway 2010 interview, 121.
- <sup>64</sup> Roughead interview, 8.
- <sup>65</sup> Casey interview, 1, 7.

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- <sup>66</sup> Ibid., 7.
- <sup>67</sup> Ibid., 8; Roughead interview, 8.
- <sup>68</sup> Conway 2014 interview, 7–8.
- <sup>69</sup> Casey interview, 5; Conway 2014 interview, 8; Schwartz interview, 4–5;
- <sup>70</sup> Conway 2010 interview, 121.
- <sup>71</sup> Mullen interview, 10; Schwartz interview, 5; then Conway 2014 interview, 8.
- <sup>72</sup> Mullen interview, 10.
- <sup>73</sup> Schwartz interview, 6; Mullen interview, 10; Kirby interview;
- <sup>74</sup> Schwartz interview, 6; Casey interview 8.
- <sup>75</sup> Casey interview, 8; Cartwright interview, 6; Schwartz interview, 3
- <sup>76</sup> Conway 2014 interview, 4, 8; Conway 2010 interview, 121.
- <sup>77</sup> Conway 2010 interview, 121; Conway 2014 interview, 8.
- <sup>78</sup> Gates, *Duty*, 437.
- <sup>79</sup> Senate, *Department of Defense Authorization for Appropriations for Fiscal Year 2011: Hearings before the Committee on Armed Services United States Senate*, 111, 233, 235.
- <sup>80</sup> Ibid., 260, 264–65.
- <sup>81</sup> Ibid., 233.
- <sup>82</sup> Ibid., 236.
- <sup>83</sup> Ibid., 358.
- <sup>84</sup> Ibid., 358–59.
- <sup>85</sup> Ibid., 359.
- <sup>86</sup> Ibid., 467–68.
- <sup>87</sup> Ibid., 468.
- <sup>88</sup> Ibid., 468–69.
- <sup>89</sup> Ibid., 471–72.
- <sup>90</sup> Gen Carter F. Ham, USA, Co-Director of the CRWG, memorandum to DJS listing initial personnel requirements, 11 Feb 2010.
- <sup>91</sup> Secretary Robert M. Gates, memorandum for DoD General Counsel and Commander, US Army Europe, Subj: the “Comprehensive Review on the Implementation of a Repeal of 10 USC § 654,” 2 Mar 2010.
- <sup>92</sup> Ibid.
- <sup>93</sup> Secretary Robert M. Gates, “Terms of Reference; Comprehensive Review on the Implementation of a Repeal of 10 USC §654,” DOD, 2 Mar 2010.
- <sup>94</sup> Sen Joseph Lieberman, “Senators Introduce Repeal of Don’t Ask, Don’t Tell,” press release, Washington, DC, 3 Mar 2010.
- <sup>95</sup> House, *Review of the DOD Process for Assessing the Requirements to Implement Repeal of Don’t Ask, Don’t Tell: Hearing before the Military Personnel Subcommittee of the Committee on Armed Services House of Representatives*, 111 Cong., 2d sess., 2010. (GPO: Washington, DC).
- <sup>96</sup> Ibid., 1.
- <sup>97</sup> Ibid., 2–3.
- <sup>98</sup> Ibid., 17–18.
- <sup>99</sup> Ibid., 6–9, 22, 25–26, 30.
- <sup>100</sup> Senate, *Testimony Relating to the “Don’t Ask, Don’t Tell” Policy; Hearing before the Committee on Armed Services United States Senate*, 111 Cong., 2d sess., 2010.
- <sup>101</sup> House Armed Services Republicans, “McKeon Opening Statement for Hearing Fiscal Year 2011 Budget Request for the United States Navy and Marine Corps,” press release, 24 Feb 2010, armedservices.house.gov.
- <sup>102</sup> Senate, *Testimony*, 9–10, 13–14; USMC, “General John J. Sheehan-Retired,” official biography, [https://slsp.manpower.usmc.mil/biographies/rptbiography.asp?person\\_id+309](https://slsp.manpower.usmc.mil/biographies/rptbiography.asp?person_id+309), 9 Mar 2015.
- <sup>103</sup> Senate, *Testimony*, 9–10, 17, 20, 24–28, 31–32, 39–40, and 42–43.
- <sup>104</sup> Ibid., 6–7, 19.
- <sup>105</sup> Ibid., 7.
- <sup>106</sup> Ibid., 7–8.
- <sup>107</sup> Ibid., 38.

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<sup>108</sup> Ibid., 17–18, 20.

<sup>109</sup> Gen John J. Sheehan, USMC (Ret), letter to Gen Henk van den Breemen, Royal Dutch Marine Corps (Ret), 29 March 2010.

<sup>110</sup> Senate, *Fiscal Year 2011: Hearings*, 693–94, 767–68.

<sup>111</sup> OSD, “Summary of Changes: Revisions to the ‘Don’t Ask, Don’t Tell’ Regulations,” *Federal News Service*, 25 Mar 2010.

<sup>112</sup> Secretary Robert M. Gates, memorandum to Secretaries of the Military Departments and CJCS, Subj: “Revisions to Regulations Implementing 10 U.S.C. § 654,” 17 Feb 2010.

<sup>113</sup> DOD, “Transcript: DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon,” 25 Mar 2010.

<sup>114</sup> OSD, “Summary of Changes.”

<sup>115</sup> DOD, Directive 1332.14 Enlisted Administrative Separations (25 Mar 2010): Enclosure 3, Reasons for Separation, 2.

<sup>116</sup> Ibid.

<sup>117</sup> Lt Gen Benjamin R. Mixon, USA, “Letter to the Editor: Let Your Views Be Known,” *Stars and Stripes*, 8 Mar 2010.

<sup>118</sup> DOD, “Transcript: Gates and Mullen.”

<sup>119</sup> Ibid.

<sup>120</sup> DOD Directive 1344.10, “Political Activities by Members of the Armed Forces,” 19 Feb 2008, Sect. 4.1.1.6, 2–3.

<sup>121</sup> Ibid., 3.

<sup>122</sup> Cdr Wayne L. Johnson (Ret), “Letter to the Editor: Freedom-of Expression Rights,” *Stars and Stripes*, 3 May 2010.

<sup>123</sup> Sec John McHugh, “No Reprimand for General Pushing Gay Ban,” CBS News, 31 Mar 2010.

<sup>124</sup> Ibid.

<sup>125</sup> Shaun Waterman, “Retired General Warns of ‘Rush’ to End ‘Don’t Ask, Don’t Tell,’” *Washington Times*, 9 May 2011.

## 6 PRESSING THE ISSUE

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### Revising the Game Plan

In the weeks and months following President Obama's 2010 State of the Union address, the fate of his initiative to repeal 10 U.S.C. § 654 became increasingly murky. A growing number of vocal activists demanded an early end to DADT, dismissing the wisdom of awaiting the Defense Department's comprehensive review before bringing the matter to Congress. Two concerns propelled their actions: the outcome of the Pentagon's vaguely defined study remained uncertain, and there was a possibility that the Democrats would lose their congressional majority during the upcoming elections. Without clear White House backing for any of the near-term options that Democratic politicians or advocacy groups had proposed, the administration's own commitment to a prompt ending of DADT became suspect.<sup>1</sup> Even the HRC, because of its staunch support for the president's cautious path toward repeal, found the effectiveness of its collaborative, insider-strategy under question.<sup>2</sup>

Skepticism about the White House's urgency to end DADT was not necessarily misplaced. President Obama understood the difficulties posed by attempting to end the ban during wartime and knew that he lacked the Senate votes necessary to ensure the passage of repeal legislation at that time.<sup>3</sup> Moreover, Secretary Gates had already informed the president and his chief of staff Rahm Emanuel of his deep personal opposition to repealing DADT before the completion of the Defense Department study. According to Gates, because the Obama administration had assured the military that its views would be considered before any decision, servicemembers would perceive any attempt to renege on that promise as a "direct insult" from a commander in chief and Congress who "did not give a damn what they thought." Jeh Johnson, Defense general counsel and study cochair, concurred. President Obama and Emanuel, Gates later recounted, had "promised—unequivocally and on several occasions—to oppose any legislation before completion of the review."<sup>4</sup> Activists clamoring for immediate repeal, however, pressured the administration for action.

In Congress, Representative Barney Frank alleged that the president did not intend to repeal DADT during 2010, while the White House's press secretary, Robert Gibbs, continued to sidestep the issue.<sup>5</sup> During an April campaign rally, activists interrupted President Obama so often that organizers evicted them from the hall.<sup>6</sup> Aubrey Sarvis, the executive director of the SLDN, called on the president to support a repeal amendment to the FY 11 NDAA and simultaneously, and incorrectly, accused the White House of

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pressuring legislators to avoid a vote on DADT.<sup>7</sup> Public protests by Army Lieutenant Dan Choi other uniform-clad demonstrators targeted the administration's alleged complicity in suppressing the repeal issue.<sup>8</sup>

Far from silencing the activists, Secretary Gates believed that White House officials were actively encouraging Senators to introduce repeal legislation in advance of the upcoming DOD review. He told Rahm Emanuel on 21 April that he was "getting tired of the White House preoccupation with responding to pressure from gay advocacy groups on DADT without taking into account the impression on the troops that no one . . . at the White House cared about military views and attitudes."<sup>9</sup> Deputy Chief of Staff Jim Messina, who had become the administration's point man for repeal, was collaborating with Winnie Stachelberg from the Center for American Progress and others to craft a compromise that balking Pentagon officials would be more willing to accept.<sup>10</sup>

By late April senior legislators began to assert their views. Senators Levin and McCain—for opposite reasons—each asked Secretary Gates to confirm whether the comprehensive review was to determine *if* or *how* to implement repeal legislation.<sup>11</sup> McCain also insisted that the Service Chiefs be allowed to validate the working group's survey methodologies and that military personnel and their families must have an opportunity to express their opinions. Representative Ike Skelton likewise asked Gates and Mullen to comment on the advisability of legislative proposals impacting the future of DADT.

Secretary Gates and Admiral Mullen reiterated their opposition to any change in policy prior to the completion of a comprehensive review that considered the attitudes of the forces, families, and military community at large. Failing to do so, Gates stressed, would send a "very damaging message . . . that . . . their views . . . do not matter."<sup>12</sup> He considered the primary question to be how the military could best prepare for repeal, and he believed that study findings would inform decision-makers and facilitate the development of an implementation plan.<sup>13</sup> White House officials disregarded Defense Department concerns and continued to discuss the terms of early-repeal legislation with congressional staffers and outside advocacy groups. This frustrated Secretary Gates, who felt betrayed by the administration's waning support and rejected several amendment options presented to him by Rahm Emanuel in early May.<sup>14</sup>

### **Seven Days in May**

On 21 May, as Congress prepared to act on repeal legislation before recessing at the end of the month, Robert Rangel and Jeh Johnson met with administration officials to discuss an engagement strategy for the upcoming week. When the DOD continued to oppose early repeal, Jim Messina claimed that congressional demands were forcing President Obama's hand and he could neither delay the issue nor oppose repeal legislation publicly. Although the attendees failed to agree on a way forward, Admiral Mullen alerted the

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Service Chiefs to the possibility of a repeal amendment being included in the 2011 NDAA.<sup>15</sup>

The next day, former CJCS John Shalikashvili advocated a “repeal-only” option in his second *Washington Post* editorial.\* It allowed Congress to abolish 10 U.S.C. § 654 without eliminating the Defense Department’s DADT policy or adding a new nondiscrimination statute. Rather than impose change legislatively, Shalikashvili thought Congress should instead empower the military to determine the nature, content, and timing of its own policies, to include ending discrimination against gay and lesbian personnel. He reasoned that an incremental approach to statute and *then* policy change would appeal more to apprehensive legislators who were reluctant to repeal the law; once Congress had acted, he expected DOD leaders to follow suit and choose to end the controversial policy.<sup>16</sup>

While deliberations continued at the White House that Sunday, Admiral Mullen and Secretary Gates met on the latter’s porch, something made easy because the two occupied adjacent homes at a naval facility in downtown Washington, DC. Gates outlined the deteriorating situation: the Democrats feared a loss of congressional seats during the fall elections and did not want to wait for the comprehensive review to be completed; the administration, pressured by advocacy groups, had acquiesced to the new timeline; and Rahm Emanuel wanted the Secretary to accept a compromise that would allow for repeal but delay implementation until after the review was complete. Gates remarked in exasperation that he had had enough of the politics, while Mullen noted with equal frustration that he had been misled.<sup>17</sup>

Around that time, House Majority Leader Steny H. Hoyer (D-MD) telephoned Secretary Gates for a frank discussion of the situation. Although Hoyer’s role in the ongoing negotiations had been minimal up to that point, he thought it important to reconcile differences with the Pentagon before Congress acted unilaterally to repeal DADT. Outlining a tentative agreement, he asked Gates what it would take to secure his support for the pending legislation. With military certification and delayed implementation provisions apparently already on the table, it seems likely that elimination of the House’s proposed nondiscrimination rider—which would have complicated management of the new policy—was a final barrier to reaching an agreement. Pentagon Press Secretary Geoff Morell later commented that the majority leader’s call to the Secretary of Defense was “crucial to shaping the compromise that eventually emerged.”<sup>18</sup>

The deal solidified on the morning of Monday, 24 May, one day before Congress would reconvene. On Capitol Hill, Pentagon officials and staff

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\*Aaron Belkin of the Palm Center reportedly drafted the letter for General John Shalikashvili’s endorsement in an effort to have the nondiscrimination language withdrawn from the legislative compromise then under negotiation (Alexander Nicholson, “Book Excerpt: The Drama Behind Repealing Don’t Ask, Don’t Tell,” *Advocate.com*, 17 September 2010). Belkin later apologized for glorifying the military and contributing to the “militarization of the pursuit of repeal” (Mark Thompson, “Is Sexual Violence Endemic to the U.S. Military?” *Time*, 18 July 2012).

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members from senior Democratic senators and House leaders met\* to discuss the language used in Representative Hoyer's draft legislation.<sup>19</sup> That evening Senators Levin and Lieberman, and Representative Murphy cosigned a letter to the President asking for the administration's official stance on the proposal.<sup>20</sup> In addition to dropping the nondiscrimination language from the amendment—which would have significantly expanded the scope of change—they promised to delay implementation pending the completion of a comprehensive review; the military's institution of preparatory measures; and certification by the president, Secretary of Defense, and JCS Chairman that the new policy would not diminish “the military's standards of readiness, effectiveness, unit cohesion and recruitment and retention.”<sup>21</sup> Another provision reportedly agreed to that night but formally added later in the week addressed Senator Robert C. Byrd's (D-WV) concerns by postponing implementation for another sixty days following certification. That delay eliminated the threat of immediate implementation in December 2010 by preserving an opportunity for the 112th Congress to revisit the issue in January 2011.<sup>22</sup>

Secretary Gates made his final appeal to President Obama in a private meeting. Emphasizing that they had secured the Service Chiefs' cooperation and avoided a contentious debate only by promising to wait for the comprehensive review to be completed before taking action, he cautioned that the consequences of breaking such an agreement were unpredictable. The president was unwilling to modify his original repeal strategy, and Gates yielded. “I could live with the proposed legislative language,” he conceded, “as a minimally acceptable last resort.”<sup>23</sup> Admiral Mullen harbored similar concerns, but the certification provision provided “great leverage” that allowed him to “rest more comfortably.”<sup>24</sup> “If I don't think the force is ready,” he had told the president and Secretary of Defense, “I'm not going to certify, period.”<sup>25</sup>

The White House chose Peter R. Orszag, director of the Office of Management and Budget, to reply to Congressmen Levin, Lieberman, and Murphy, which he did that evening.<sup>26</sup> Coming from an official only peripherally related to the repeal issue, the White House's response reflected the president's reluctance to endorse the early-repeal compromise.<sup>27</sup> After stipulating that it would be preferable to complete the comprehensive review prior to any congressional action to repeal 10 U.S.C. § 654, Orszag granted that “the Administration is of the view that the proposed amendment meets

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\*The meetings included representatives from the offices of Senators Carl Levin and Joe Lieberman, and Representatives Nancy Pelosi and Patrick Murphy (Ryan Grim, “Don't Ask, Don't Tell Fight Encountered Heavy Military Resistance,” *Huffington Post*, 3 Jun 2010). Meanwhile at the White House, Jim Messina informed leading advocacy groups and liberal think tanks of the impending agreement without rebuttal (Kerry Eleveld, “A Deal on DADT?” *Advocate.com*, 24 May 2010; Brian Beutler and Christina Bellantoni, “Behind the Scenes: How the Deal to Repeal DADT Got Done,” *Talking Points Memo DC*, 26 May 2010; Alexander Nicholson, “Book Excerpt: The Drama behind Repealing ‘Don't Ask, Don't Tell,’” *Advocate.com*, 17 Sep 2010).

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the concerns raised by the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. . . . The Administration therefore supports the proposed amendment.” That evening, House Democrats tallied potential votes and anticipated the possibility of passing the repeal measure by the end of the week.<sup>28</sup>

Scheduling conflicts prevented Admiral Mullen from sharing the details of the compromise with the Service Chiefs until the following day, but they were aware from other sources that some arrangement was imminent.<sup>29</sup> General Casey had been hosting a dinner party at Quarters One, the traditional home of the Army Chief of Staff, when he received a telephone call from President Obama. During the brief, cordial conversation, they shared each other’s perspectives and intentions regarding the proposed repeal legislation. Noting that the president had spoken with two of the other Service Chiefs that evening, Casey later recalled that “it was pretty transparent” that Obama was merely making pro forma calls to the military officers so that he could claim to have consulted with them on the matter.<sup>30</sup>

Later that evening, while checking e-mails, General Casey learned the extent of the three-way compromise between the administration, Congress, and the Defense Department.<sup>31</sup> Details of the agreement appeared in an advanced copy of a letter sent by Senator McCain’s office the next day, which requested General Casey’s position on the proposed legislation by Wednesday the twenty-sixth. Inquiries sent by Casey to other Service Chiefs confirmed that they too had received McCain’s correspondence and were already drafting replies.<sup>32</sup>

On Tuesday morning, Geoff Morell told reporters that although Secretary Gates firmly believed that the comprehensive review should precede any legislative action to repeal DADT, “with Congress having indicated that it is not possible the Secretary can accept the language in the proposed amendment.”<sup>33</sup> When responding to Senator McCain’s letter of 25 April the same day, Gates made clear that the assessment would “systematically engage the force, their families, and the broader military community,” inquire into a wide range of readiness related issues, and be reviewed by the Service Chiefs prior to distribution.<sup>34</sup>

General Casey had meanwhile called James Jones, former Commandant of the Marine Corps and then-current national security advisor. The Army Chief explained that he had been unaware of Senator McCain’s request when he discussed the compromise with President Obama the previous evening and warned that his written opinion on the matter might differ from what the commander in chief had understood from their conversation. Casey then called Admiral Mullen to inform the Chairman of McCain’s request and his subsequent discussion with Jones.<sup>35</sup> Not long after

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that, Mullen later remembered, he discovered that each of the Service Chiefs\* had received a copy of the letter.<sup>36</sup>

By Wednesday, 26 May, the Service Chiefs had sent their position statements to Senator McCain and Representative Howard McKeon, the ranking member of the HASC. McCain in turn forwarded the correspondence to Senator Levin, chairman of the SASC. In his cover letter to Levin, McCain argued passionately that legislation not be pursued prematurely—particularly during wartime—for the sake of “fulfilling a campaign promise.”<sup>37</sup>

General Schwartz later recalled that it was clear “where the cards were going to fall.” The Service Chiefs had wanted to avoid being preempted while retaining an opportunity to define the path ahead and work the matter through to a reasonable conclusion.<sup>38</sup> General Conway likewise recalled a “sense of imminent foreboding.” The law was almost certainly going to change, and deference to “the opinion of the rank and file was potentially the only thing that could turn away some of that momentum.”<sup>39</sup>

The Service Chiefs’ individual responses emphasized the consistency between each leader’s earlier congressional testimony and their current positions on the proposed legislation. This transparent critique of the administration’s waffling on the issue reportedly angered President Obama.<sup>40</sup> The Service Chiefs unanimously opposed any attempt to deviate from the established schedule and repeal 10 U.S.C. § 654 before completion of the comprehensive review in December. They also agreed that it was important to keep faith with the servicemembers, to understand the consequences of policy change, and to have the necessary information to provide their “best military advice.”<sup>41</sup>

Later that day, General Shalikashvili sent Senators Levin and Lieberman a rebuttal of the Service Chiefs’ position papers. After pronouncing that “there is nothing in those letters that gives Congress any reason to delay enacting the legislative compromise that was proposed this week,” the former CJCS asserted that it was actually necessary for Congress to repeal the law in order for the Service Chiefs to retain their authority to implement the working group’s forthcoming recommendations.<sup>42</sup> This perspective was consistent with study’s directed outcome, namely to determine how best to implement a more inclusive policy.

Although the recent turn of events had not strained General Casey’s relationships with either the Chairman or the Secretary of Defense, he later acknowledged that some of the other Chiefs felt differently.<sup>43</sup> Admiral Roughead, for example, viewed the legislative compromise as a “breach of a commitment . . . that we would work this thing through . . . that needed to be upheld.”<sup>44</sup> Keeping faith with the servicemembers and their families was important, and he thought any effort to short circuit the review process “would have a shadow over it for a long, long time.”<sup>45</sup>

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\*Later, Mullen recalled that he had discussed the letters by phone with the Air Force Chief of Staff on 25 May 2010, while they were traveling separately to Colorado Springs (Mullen interview, 14).

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General Conway later allowed that lines over this issue had already been drawn between the Chairman and Vice Chairman on one hand, and the Service Chiefs on the other, and that the latter group were “feeling a little bit hide-burned” over the earlier rift in communication between themselves and Admiral Mullen.<sup>46</sup> He explained that the “sixteen-star” letters enabled them “to stake out the position and let Congress know, clearly, that there was sort of the dissension in the military leadership, and that the Service Chiefs thought that the timing was not right, and that their needed to be a better understanding of how the troops felt before we acted.”<sup>47</sup>

According to General Schwartz, the Service Chiefs’ consensual decision to send their statements forward without first conferring with the Chairman was a clear example of “the Chiefs acting as Chiefs.”<sup>48</sup> “This was an effort to reassert the role of the other members of the Joint Chiefs,” he said, “and not have the Chairman sort of subjugate those views to his own.”<sup>49</sup> In return, Schwartz observed, Admiral Mullen had “respected the fact that we decided to apply our leverage, just as he had a couple of months before. Fair enough, nobody’s king; Chairman, but nobody’s king.”<sup>50</sup>

When news of the Service Chiefs’ opposition to the compromise surfaced, Admiral Mullen was delivering the commencement speech at the Air Force Academy in Colorado Springs.\* Not having read their letters, he waited to release a public statement until a town hall meeting at nearby Peterson Air Force Base later that day.<sup>51</sup> Raising the issue at the end of the assembly, the Chairman (and his spokesman) declared that he was “comfortable” with the language in the proposed legislation.<sup>52</sup> The comprehensive review would continue; servicemembers and their families would be engaged; and the effect of repeal upon readiness, unit cohesion, and mission capability would be assessed. The study’s findings would serve as the basis for recommendations of the Chairman, the Service Chiefs, and the Secretary of Defense to the president. Should Congress vote to repeal the law, he told a reporter, the “certification trigger” would guarantee the right of senior leaders to determine whether or not the military “should move ahead with that change.”<sup>53</sup> Since each of the certifying officials had already pledged to support the repeal of DADT, that question was apparently one of timing, rather than outcome. Vice Chairman James Cartwright, who had observed the dispute from behind the scenes, later described the circumspect exchanges between Admiral Mullen and the Service Chiefs as routine theatrics.<sup>54</sup>

Deliberations came to a head late Thursday evening, 27 May. During a “heated and vigorous” closed door session, the SASC agreed by a margin of one vote to add the Lieberman-Levin amendment to its version of the FY 11 NDAA (S. 3454). The House also attached the Murphy amendment (House Amendment 672) to its version of the bill (H.R. 5136) and passed it the following morning.<sup>55</sup> One journalist observed that “the most remarkable part of the whole week was the non-role that homosexuality actually appeared to

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\*Some listeners alleged that his talk on the importance of duty contained veiled references to the escalating controversy over DADT, but he did not mention the law, policy, or legislation.

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play . . . in the debate.”<sup>56</sup> The principal public dispute—at least at this stage of the argument—was about when to vote on repeal.

President Obama commented that “this 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>57</sup> Passage of the spending bill provided a backdrop for Obama to chronicle his administration’s past, present, and future commitments to gender equality. After proclaiming June 2010 as Lesbian, Gay, Bisexual, and Transgender Pride Month, the president called “upon all Americans” to fight “prejudice and discrimination in their own lives and everywhere it exists.”<sup>58</sup>

Secretary Gates’s personnel message to the servicemembers and their families was more pragmatic. “There’s been a lot of political posturing and maneuvering on this issue this week,” his spokesman explained, “and the Secretary wanted to communicate directly to the troops about what this all means to them.”<sup>59</sup> Gates conceded that although “it appears likely that Congress will eventually change the ‘Don’t Ask, Don’t Tell’ law,” that might take up to six months to occur. Even then, he stressed, the new policy would not be implemented until “AFTER—I repeat—AFTER” the review had been completed and he, the CJCS, and the president had certified that acknowledged homosexuality would not harm the military.<sup>60</sup> Pending that outcome, current policies and practices remained in effect. Gates urged servicemembers to participate in the review process because “we need to hear from you and your families, so that we can make these judgments in the most informed and effective manner, so please let us know how to do this right.”<sup>61</sup>

During a recorded interview with National Public Radio, Chairman Mullen reaffirmed his moral opposition to DADT. Although he would have “preferred the legislation await the outcome of the review,” he said that “it’s time that the law and policy change.”<sup>62</sup> He had served with suspected homosexuals in the past and considered them “above-average sailors, above average performers,” who were known throughout the command as individuals who “really contributed to the overall mission and the readiness of the crew and ship.”<sup>63</sup> As for readiness, he wanted to hear the military community’s views about allowing open homosexuality within the ranks, and the proposed legislation allowed for that to occur. Regardless of problems the review might uncover, he remained confident that “given time and understanding of what the issues are” the military would eventually be ready to change “in a way that, in the long run, strengthens the force.”<sup>64</sup>

## **Engaging the Force**

During the spring and summer of 2010, the CRWG conducted what may have been “the most comprehensive and inclusive personnel-related review in the history of the U.S. military.”<sup>65</sup> It retained a privately owned research company, Westat Corporation of Rockville, Maryland, to assist in the collection and analysis of relevant data.<sup>66</sup> Westat in turn coordinated the

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employment of a wide range of qualitative and quantitative research instruments—deployed in what can be viewed as three undefined stages—to obtain views on open homosexuality and its anticipated effect upon military readiness from around 260,000 participants (table 1).<sup>67</sup>

**Table 1.** Collection Strategies Employed by the CRWG

<b>Phase</b>	<b>Instrument</b>	<b>Open</b>	<b>Close</b>	<b>Number</b>	<b>Responses</b>	<b>Assessed</b>
I	Online Inbox	18 Apr	15 Aug		72, 384	1, 505 (2%)
I	Member Information Exchange Forums	22 Apr	21 Aug	81	24,300	
I	Member Small Focus Groups	22 Apr	21 Aug	119	1,428	
I	Family Information Exchange Forums	28 Apr	21 Aug	16		
I	Member Leadership Discussion Groups	24 May	14 Sep	29		
I	Family Small Focus Groups	15 Jun	6 Aug	7		
II	Confidential Communication	7 Jul	15 Aug		2,691	160 (6%)
II	Servicemember Survey	7 Jul	15 Aug	400,000	115,052 (28%)	
II	Family Readiness Discussion Groups	1 Aug	21 Aug	9		
III	Spouse Survey	13 Aug	26 Sep	150,186	44,266 (29%)	
	<b>Estimated Total</b>				<b>260,121</b>	

The first technique employed an anonymous online inbox for active military personnel and their families to leave unscripted written comments. It opened on 18 April and more than 72,000 comments were posted over the next four months. Two deliberate samplings were taken from the submissions. After 30 June, researchers selected an initial sample of 546 responses—two-thirds intentionally drawn from women—to compare and contrast male and female perspectives on DADT. They selected a second sampling of 959 comments after 15 August, and then combined them with the first set to achieve a target number of 1,500 comments for further analysis. These data were used to compare and contrast perspectives by pay-grade and Service affiliation.<sup>68</sup>

Around the same time, the CRWG convened a series of private meetings with servicemembers at military installations around the country, in Europe, and in Japan. At Secretary Gates’s insistence, none were conducted in Afghanistan or Iraq to avoid interfering with ongoing operations. The largest events included eighty-one information exchange forums, which were normally attended by 150 to 300 participants and led by senior CRWG personnel who fielded questions from the audience. As a typical follow-on to

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the forums, the CRWG also held 119 small focus groups that were usually attended by nine to twelve participants of similar pay-grade. Westat moderators facilitated these voluntary sessions and followed a set of scripted questions. The smallest encounters involved twenty-nine leadership discussion groups, which were unscripted conversations with senior leaders at the majority of sites visited by the CRWG teams. Westat note takers documented the exchanges by paraphrasing comments they believed to be relevant to the ongoing research.<sup>69</sup>

The second informal phase of research began on 7 July, with release of the servicemember's survey to 400,000 military personnel, double the CRWG's original number (at Secretary Gates's direction). Junior enlisted personnel were statistically oversampled during the survey because it was believed that they were less likely to respond than other age-grade categories. Admission to the web-based instrument required the use of a Common Access Card (CAC) for identification, and answering its 103 questions took approximately thirty minutes to complete. Before the survey's release, each of the Service Chiefs and the Commandant of the Coast Guard had an opportunity to review and comment upon the questions, which addressed each area mentioned in the terms of reference and other concerns (privacy) identified during the face-to-face encounters. During the six weeks that the survey site was operational, the CRWG received 115,052 responses, or 28% of those solicited.<sup>70</sup>

The day that the survey was released, Westat also opened a confidential Internet chat-line to allow personnel to share personal views on DADT. Unlike the previous online inbox, chat-line participants were not required to possess a CAC to enter the site. Once visitors logged into the website, they were encouraged to participate in a live, text-based dialogue with Westat moderators who followed a semistructured interview script. Westat documented 2,691 conversations, including 296 with individuals who self-identified as being gay, lesbian, or bisexual, during the six weeks that the chat-line was operational. Westat analysts then selected transcripts from 160 "information rich" cases for study; half of those chosen were provided by LGBT respondents, and half came from heterosexuals or others who chose not to identify their gender.<sup>71</sup>

The third and final phase of research began on 13 August, with mailing of the spouse survey to the wives and husbands of 150,186 Active, Reserve, and National Guard personnel. Its forty-three questions required fifteen to twenty minutes to complete. Most of the questions were drawn from the servicemember survey, existing family readiness surveys, or concerns identified during information exchange forums. Approximately 29 percent (44,266) of those solicited responded by the 27 September deadline.<sup>72</sup> Meanwhile, family members continued to participate in family-oriented face-to-face exchanges (sixteen forums, seven focus groups, and nine readiness discussions) at nearby military installations. These events were held throughout the study period but occurred more frequently during July and August.<sup>73</sup>

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Concurrent with the above activities, the CRWG also engaged faculty members from each of the Service academies, Service and DOD historians, concerned individuals and organizations interested in the repeal question, and representatives of foreign militaries who could speak on the incorporation of openly gay and lesbian personnel in their country's armed forces. The CRWG also considered policy modifications; implementation costs; and leadership, education, and training requirements should repeal occur.

The CRWG also cooperated with Rand Corporation, which it had engaged to update the research agency's earlier report on *Sexual Orientation and U.S. Military Personnel Policy*. A large portion of Rand's update effort involved incorporating findings from other studies conducted after the establishment of DADT in 1993. That information was used to refine or supplement discussions detailing the history of DADT, social change and public opinion, sexual orientation and disclosure, unit cohesion and military performance, recruiting and retention, health implications, the experiences of foreign militaries and domestic agencies and organizations, and the implementation of a more inclusive personnel policy.<sup>74</sup> Rand also conducted its own Internet survey and held a series of twenty-two focus groups at ten military installations around the country in support of the comprehensive review. Both of the research protocols involved around 200 qualified participants who represented each of the Services and, to a lesser extent, the Coast Guard.<sup>75</sup>

The confidential survey was launched in mid-July, using a modified peer-to-peer recruitment strategy to solicit participation from actively serving members of the military and then respondent-driven sampling techniques to screen for gay, lesbian, and bisexual personnel.\* It was comprised entirely of closed questions and required approximately ten minutes to complete. The first part asked about the presence of homosexuals in the participant's unit, how they were treated by other members, and what effect repeal might have upon efficiency. In the next section, target respondents were asked additional questions about the effect of DADT upon their lives, the degree to which they had disclosed their sexuality to other unit members, and if that would change following repeal. Collection of basic demographic information enabled their responses to be compared by age, gender, race, and ethnic categories.<sup>76</sup>

The focus groups were held from June through August. In addition to moderators, they usually included ten participants chosen by the command. Although Rand sought a high-degree of diversity in group composition, it also segregated members by sex and four ascending rank categories (junior and senior noncommissioned officers as well as company and field grade officers)

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\*Rand made first contact with the study group's initial participants by working through several well-known gay service organizations. These included American Veterans for Equal Rights, Blue Alliance, Knights Out, OutServe, Service Academy Gay and Lesbian Alumni Network, Servicemembers Legal Defense Network, Service Women's Action Network, Servicemembers United, and US Naval Academy Out (Rand, *Update*, 2010: 257).

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to encourage open communication. After devoting half of the ninety-minute meetings to discussing general diversity issues, moderators turned the conversation toward four broad topics relating to sexual orientation: personal experience with gay or lesbian servicemembers, challenges with the existing DADT policy, challenges anticipated to occur should gays and lesbians be allowed to serve (openly), and advice on how to manage those challenges should the policy be changed. The participant's responses were recorded, transcribed, and catalogued according to theme.<sup>77</sup>

Controversy flared in the middle of September, during a CRWG engagement session held at European Command headquarters in Germany. Lieutenant General Thomas P. Bostic, Army deputy chief of staff for personal matters and coleader of the working group's policy team, had fielded questions from the assembled personnel. Afterward an unsigned editorial in the *Washington Times* reported that he had compared personnel who opposed repeal on religious grounds to racists and bigots. He allegedly told participants that if they could not abide by the forthcoming change in policy, then they needed to leave the military.<sup>78</sup> Bostic strongly denied making such remarks and emphasized that, as a CRWG member, he had made a concerted effort to avoid expressing opinions that might compromise the review's integrity. The Army likewise said that its review of available records had failed to corroborate the newspaper's allegations.<sup>79</sup>

### **Analyzing the Data**

The immensity of working group's mandate, coupled with the narrow time frame during which the comprehensive review was to be accomplished, made it necessary to assemble the draft report as incoming data was collected, collated, and analyzed. As early as 4 July, for example, study cochair Jeh Johnson had begun to compose a tentative executive summary for the forthcoming research report. Although the CRWG had not yet launched the servicemembers' survey, information acquired through group encounters and the online inbox had already revealed that a relatively large segment of the military was at least amenable to the idea of ending DADT.<sup>80</sup>

Such early insights were not unique to the CRWG. As the Joint Chiefs spoke with personnel at military facilities around the globe, they too began to develop an appreciation for Service sentiments on the subject. Admiral Mullen later recalled that the younger personnel had shown little interest in discussing the subject with him and appeared unfazed by the prospect of serving with openly gay or lesbian comrades.<sup>81</sup> Admiral Roughead was cautiously curious about the views of personnel who were involved in ground combat operations, such as the special operations forces and explosive ordnance disposal teams. Their principle concern, he remembered, was the Service's ability to maintain occupational standards and individual competencies, and ensure that sailors could do their jobs.<sup>82</sup>

General Conway, on the other hand, estimated that between 80 to 95 percent of the Marines that he and Sergeant Major Carlton W. Kent had

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questioned during town hall meetings had raised their hands in opposition to repeal. With the exception of fewer hands shown at The Basic School—where the Marine Corps trained its new lieutenants in Quantico, Virginia—it was widely accepted that open homosexuality would adversely affect good order, discipline, and unit cohesion.<sup>83</sup> Yet, when Admiral Mullen had pressed a young Marine on the same issue, the two-time Iraq veteran admitted to having experienced a change of heart after learning that his closest friend (who had incidentally saved his life in combat) had been gay. Individuals should be judged according to their professional competency, he now reasoned, rather than their sexual orientation.<sup>84</sup>

The CRWG had meanwhile outlined a structure and schedule for delivering a draft report to the Joint Chiefs by the beginning of November. During July, authors described the research protocol and prepared a historical overview of sexual orientation laws and military regulations. During August, they intended to present historical lessons of racial and gender integration of the US military and consider pragmatic issues involved should a more inclusive policy be implemented (e.g., training, standards of conduct, privacy, religious and medical concerns, equal opportunity, benefits, and the reaccession of prior servicemembers). The Rand Corporation's initial findings, anticipated to arrive around the beginning of August, would supplement their effort.<sup>85</sup>

The same month, based on the current research, the CRWG planned to present its preliminary results, including qualitative information gleaned from the online inbox, group discussions, confidential communication from gay and lesbian servicemembers, and the experiences of analogous civil organizations and foreign militaries. Quantitative data from the servicemember and spouse surveys, however, would not be available until September and October, respectively. While the analyses were being updated, the CRWG would prepare a basic risk assessment and recommendations on how to mitigate potential disruption in the event of repeal.<sup>86</sup>

Secretary Gates received periodic progress reports throughout the summer and fall of 2010. These tended to be private affairs with few participants. Besides the study's two cochairs and the JCS Chairman and Vice Chairman, other regular attendees included Clifford Stanley, principal under secretary of defense for personnel and readiness, and William J. Lynn, III, deputy under secretary of defense.

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**Table 2.** Question 68a from the CRWG’s Servicemember Survey

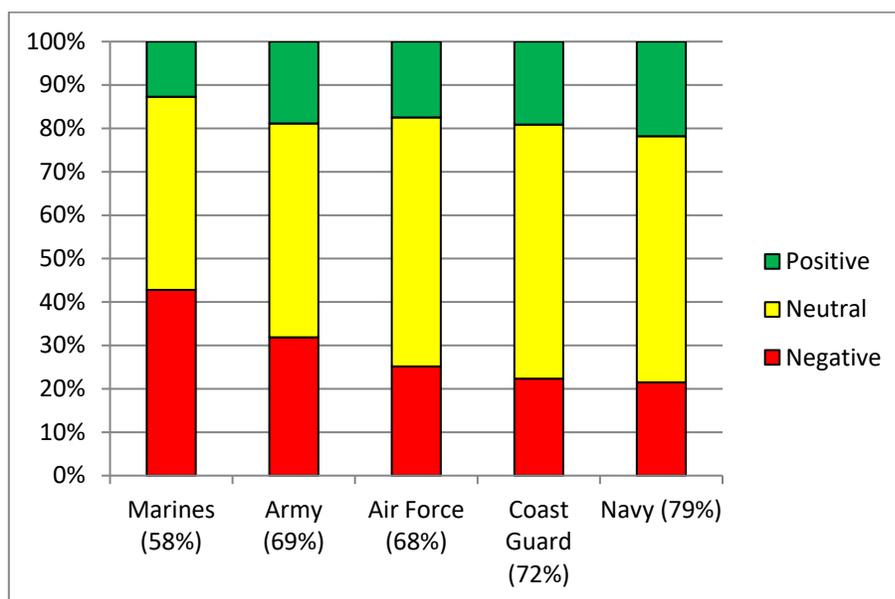
Question 68a. If Don't Ask, Don't Tell is repealed and you are working with a Service member in your immediate unit who has said he or she is gay or lesbian, how, if at all, would it affect... How Service members in your immediate unit work together to get the job done?							
	N	Overall	Army	Marine Corps	Navy	Air Force	Coast Guard
Very positively	6,154	6.6%	7.0%	3.9%	7.7%	6.4%	6.4%
Positively	11,887	11.8%	11.9%	8.8%	14.1%	11.1%	12.7%
Equally as positively as negatively	36,822	32.1%	31.5%	31.1%	33.5%	32.6%	34.3%
Negatively	22,548	18.7%	19.7%	25.8%	14.4%	16.9%	15.9%
Very negatively	11,507	10.9%	12.2%	17.0%	7.1%	8.3%	6.4%
No effect	24,105	19.9%	17.8%	13.4%	23.2%	24.8%	24.2%

Source: CRWG report, 2010: 197.

It was during one of those meetings, on 27 September, that Secretary Gates first learned of the CRWG’s preliminary survey results.<sup>87</sup> Approximately 70 percent of the respondents, including both servicemembers and their spouses, thought that repeal of DADT would have a neutral or positive effect upon unit cohesion. The remaining 30 percent, mostly ground combat units and the Marines, thought that it would lessen unit effectiveness.<sup>88</sup> These statistics, which would become the underlying foundation for the CRWG’s pro-repeal risk assessment, were primarily drawn from Question 68a (see table 2 above) of the servicemember survey. Critics would later complain that one could have as easily interpreted the data to indicate that 82 percent of the respondents believed ending DADT would have a negative or neutral effect, or that 62 percent predicted at least some negative effects, as opposed to 18 percent who expected positive outcomes.<sup>89</sup> These opposing perspectives reflect the two sides of the debate: those advocating repeal thought that it should occur as long as it did not significantly diminish military effectiveness, while those opposing repeal argued that it should not occur unless it enhanced effectiveness.

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**Figure 3.** Question 36 from the CRWG's Servicemember Survey



Responses to survey question 36, “In your career, have you ever worked in a unit with a coworker you believed to be homosexual,” and 68a, “If Don’t Ask, Don’t Tell is repealed and you are working with a Service member in your immediate unit who has said he or she is gay or lesbian, how, if at all, would it effect . . . how Service members in your immediate unit work together to get the job done?”<sup>90</sup> The percentages at the bottom of the chart reflect each Service’s cumulative response to question 36.

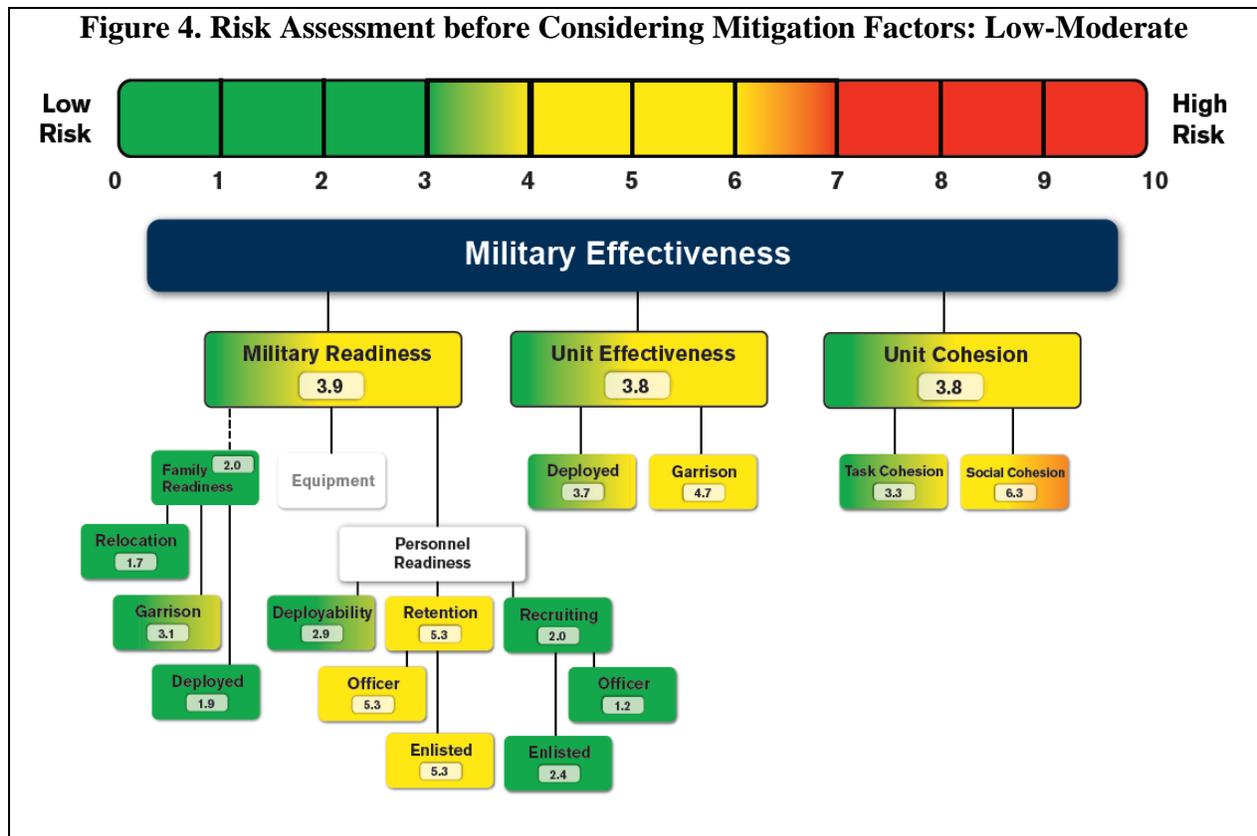
The study’s cochairs also informed Secretary Gates that individuals who had served with homosexuals in the past tended to be less pessimistic about serving with gay and lesbian personnel in the future than those who had not (figure 3), and that respondents deployed to combat zones had predicted that the impact of repeal would actually be less during intense situations than during downtime at sea or in the field. “In the course of the review,” the cochairs observed, “the military community has become more accustomed to the idea of repeal.”<sup>91</sup> These results were far better than the Secretary had expected and “strongly suggested” to him that a more inclusive policy was feasible. Perhaps, he thought optimistically, the report might persuade the Senate to pass the legislation.<sup>92</sup>

The working group conducted its risk assessment the following week.<sup>93</sup> Over a three-day period, a diverse panel of military personnel and career civilians reviewed relevant data and listened to presentations on key topics to determine the threat repeal posed to military effectiveness. A bottom-up decision matrix added a degree of standardization to the process, but the panel’s judgement was ultimately a collective estimate based upon the group’s cumulative experience.<sup>94</sup>

The panel initially decided that repeal posed a low to moderate risk to three major functional areas previously identified in its terms of reference:

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military readiness, unit effectiveness, and unit cohesion (see figure 4 below). An observing Red Team—led by an unnamed general officer and civilian member of the senior executive service—judged that the panel had “presumed greater risk . . . than warranted given the data and information considered.”<sup>95</sup> Revising its assessment to account for the mitigating effect of effective education, strong leadership, and clear policies, the panel reduced the estimated level of risk to low. The study’s cochairs concurred, concluding that the overall risk to military effectiveness was also low. Although “limited and isolated disruption to unit cohesion and retention,” were to be expected, the cochairs were convinced that “a continued and sustained commitment to our core values of leadership, professionalism, and respect for all” would enable the military to “adjust and accommodate this change.”<sup>96</sup>



The CRWG’s overall assessment argued persuasively for repeal by effectively rejecting most concerns expressed by those who opposed change. The group relied on carefully selected anecdotes to convey its perspective. The wife of a formerly enlisted Marine officer, for example, wrote that the repeal of DADT was not only “inevitable,” the “antiquated and nonsensical” debate was “largely motivated by a general misunderstanding and a reactionary fear, similar to the motives of our previous generations who opposed or questioned

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the idea of integrating our armed forces or permitting women to serve in the diverse roles they currently occupy in our branches of the service.”<sup>97</sup> Her sentiments powerfully reinforced the working group’s recommendations.

Reiterating that more than two-thirds of the force foresaw little danger in instituting a more open policy, the study’s authors explained that doubts about repealing DADT were based upon misperceptions about what it would mean for gay or lesbian servicemembers to serve openly. They highlighted the disparity between the ways in which survey respondents perceived actual, versus hypothetical, gay or lesbian coworkers. When describing individuals who they had worked with, for example, respondents emphasized individual skills. When characterizing an abstract open homosexual, however, they resorted to more stereotypical images of effeminate gays and masculine lesbians, and they voiced concerns about notorious displays of affection, unwelcome sexual advances, sexual predation, and the erosion of cohesion, morale, and good order and discipline.<sup>98</sup>

The working group downplayed such perceptions and concerns as exaggerated and inconsistent with the experience of servicemembers who had knowingly served alongside gay and lesbian personnel.<sup>99</sup> They used an often quoted statement from a member of the special operations forces who had participated in an earlier focus group: “We have a gay guy. He’s big, he’s mean, and he kills lots of bad guys. No one cared that he was gay.”<sup>100</sup> Such comments were particularly relevant given the heightened level of apprehension among Army and Marine combat arms units, accordingly attributable to their unfamiliarity with serving gays and lesbians.

Some resistance to change was normal, the CRWG insisted, but lessons learned during the racial and gender integration of the US military, as well as the experiences of comparable domestic organizations and foreign militaries who allow gays and lesbians to serve openly, indicated that the danger posed by repeal was negligible. Even so, it anticipated that most gay and lesbian servicemembers, especially those serving in warfighting units, would continue to exercise discretion when managing their personal lives.<sup>101</sup>

### **Summary**

The Obama administration’s measured approach to ending DADT was almost derailed in the spring of 2010, when gay rights activists questioned the president’s resolve and demanded the elimination of the discriminatory policy before the end of the year. The possibility that Democrats would lose their congressional majority fueled their concern as did the uncertainty about the outcome of the Pentagon’s study. Secretary Gates was disappointed to learn that despite administration assurances to the contrary, some White House officials were collaborating with congressional members to add a repeal amendment to the 2011 NDAA before the CRWG completed its assessment.

When it became apparent that the House and Senate were ready to act unilaterally, President Obama reluctantly agreed to a compromise crafted by Senators Carl Levin and Joseph Lieberman and Representatives Nancy Pelosi

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and Patrick Murphy. Besides dropping a nondiscrimination provision from the amendment, congressional Democrats promised to delay implementation until after the Pentagon had completed its study, preparatory measures had been instituted, and the president, Secretary of Defense, and Chairman of the JCS had each certified that the policy change would not diminish military readiness. Secretary Gates protested that the senior Defense Department leaders had promised to consider the servicemembers' views on DADT before acting but eventually yielded to the president.

Admiral Mullen warned the Service Chiefs of the possibility of an amendment to the NDAA, and President Obama had phoned each Service Chief on the evening he decided to endorse the compromise amendment. Not until Senator John McCain asked for their opinions did the Service Chiefs respond with individual letters that emphasized their consistency on the issue and the importance of keeping faith with the joint force. They opposed any initiative to repeal DADT prior to completion of the CRWG report, which would enable them to understand the consequences of policy change and provide their best military advice.

The Service Chiefs' united opposition had little effect upon the legislation's outcome. Chairman Mullen informed the press that he was comfortable with the repeal amendment; he stressed that the assessment would continue, servicemembers would be engaged throughout the process, and the certification trigger would enable senior leaders to control the implementation of any resulting change in policy. On the evening of 27 May 2010, the SASC and the House each agreed to attach the repeal amendment to their own versions of the NDAA. Although the House passed the spending bill the following morning, a Republican filibuster in September prevented Senate Democrats from bringing up the bill for discussion.

Meanwhile, that spring and summer the CRWG used various research methods to collect and analyze information reflecting the joint force's attitude toward the prospect of allowing gay and lesbian personnel to serve openly within its ranks. Preliminary findings that 70 percent of the surveyed servicemembers and spouses believed that repeal would have a neutral or positive effect upon cohesion were better than Secretary Gates had anticipated, fueling his hopes that the Senate might pass the FY 11 NDAA before the end of the year.<sup>102</sup> While the remaining 30 percent of the respondents—mostly from Army combat units or the Marines—thought that repeal would lessen effectiveness, the working group dismissed their dire predictions as misinformed and exaggerated.

In early October, the CRWG reviewed its collected data and calculated the risk posed by repeal to military readiness, unit effectiveness, and unit cohesion. This involved a complicated four-step process whereby initial estimates were gradually narrowed to generate a representative threat rating for each category.<sup>103</sup> The review panel initially determined that the risk to each was low to moderate, but after considering the impact of recommended mitigating strategies (leadership, training, and policy revision), it reduced the

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risk level to low. Cochairs General Carter Ham and General Counsel Jeh Johnson likewise assessed the overall risk to military effectiveness as low.<sup>104</sup>

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<sup>1</sup> Nathaniel Frank, “Obama’s False ‘Don’t Ask, Don’t Tell Narrative: Is the President Really the Gay Rights Hero He Says He Is?” *New Republic*, 19 Feb 2013.

<sup>2</sup> Ambinder, “Outing the Debate”; John Aravoisis, “Bombshell from Barney Frank: White House Doesn’t Want DADT Repealed This Year,” *Americablog.com*, 15 Mar 2015.

<sup>3</sup> Marc Ambinder, “Gay Activists v. the White House: The Inside Story,” *Atlantic*, 23 Apr 2010.

<sup>4</sup> Gates, *Duty*, 438.

<sup>5</sup> Kerry Eleveld, “View from Washington Universal Stagnation,” *The Advocate.com*, 15 Mar 2010; Eleveld, “Frank Revises Statement Re White House Position on DADT,” *The Advocate.com*, 15 Mar 2010; Eleveld, “White House Still Ducking on DADT,” *The Advocate.com*, 31 Mar 2015; Eleveld, “Is Defense Dept. Blocking DADT Vote?” *The Advocate.com*, 19 Apr 2010.

<sup>6</sup> Chris Johnson, “Don’t Ask Protestors Interrupt Obama Speech,” *Washington Blade*, 19 Apr 2010; Frank, “Obama’s False Narrative.”

<sup>7</sup> Ben Smith, “White House Delaying ‘Don’t Ask’ Repeal,” *Politico*, 19 Apr 2010; Eleveld, “Defense Dept.”

<sup>8</sup> Brian Montopoli, “Dan Choi, Other Gay Rights Protestors Arrested after Chaining Selves to White House Fence,” *CBS News*, 20 Apr 2010; Ambinder, “Gay Activists.”

<sup>9</sup> Gates, *Duty*, 438–39.

<sup>10</sup> Ambinder, “Outing the Debate”; Ryan Grim, “Don’t Ask, Don’t Tell Fight Encountered Heavy Military Resistance,” *Huffington Post*, 3 Jun 2010; John Aravosis, “Center for American Progress Caved on DADT, on Behalf of the Gay Community, Two Months Ago,” *Americablog.com*, 27 May 2010; John Wright, “Groups Try to Block GOP Efforts to Kill or Weaken DADT Legislation,” *DallasVoice.com*, 4 Aug 2010; Alexander Nicholson, “Book Excerpt: The Drama behind Repealing Don’t Ask, Don’t Tell,” *The Advocate.com*, 17 Sep 2010.

<sup>11</sup> Carl Levin, chairman of SASC, letter to Robert M. Gates, Secretary of Defense, 3 May 2010; Senator John McCain, letter to Robert M. Gates, Secretary of Defense, 23 Apr 2010.

<sup>12</sup> Robert M. Gates, Secretary of Defense, and Adm Michael G. Mullen, CJCS, letter to Rep Ike Skelton, chairman of the HASC, 30 Apr 2010.

<sup>13</sup> Robert M. Gates, Secretary of Defense, letter to Carl Levin, SASC chairman, 6 May 2010.

<sup>14</sup> Gates, *Duty*, 439.

<sup>15</sup> *Ibid.*; Rowan Scarborough, “Military Chiefs Split with Mullen on Gays,” *Washington Times*, 1 June 2010.

<sup>16</sup> John M. Shalikashvili, “Congress Should Repeal ‘Don’t Ask, Don’t Tell’ and Let the Pentagon Do the Rest,” letter to the editor, *Washington Post*, 22 May 2010.

<sup>17</sup> Gates, *Duty*, 440.

<sup>18</sup> Grim, “Don’t Ask, Don’t Tell Fight.”

<sup>19</sup> *Ibid.*

<sup>20</sup> Joseph Lieberman, Car Levin, and Patrick Murphy, letter to President Obama, dated 25 May 2010.

<sup>21</sup> *Ibid.*; Senator Joseph Lieberman, “Committee Amendment Proposed by Mr. Lieberman, SEC. [ARM10802]. Department of Defense Policy Concerning Homosexuality in the in the Armed Forces” Senate Office of Legislative Counsel, 24 May 2010, previously available at [www.politico.com/pdf/ppm153\\_lieberman.pdf](http://www.politico.com/pdf/ppm153_lieberman.pdf).

<sup>22</sup> Senator Robert C. Byrd, “Byrd Statement on ‘Don’t Ask—Don’t Tell’ Repeal Compromise Amendment,” 26 May 2010; Grim, “Don’t Ask, Don’t Tell Fight.”

<sup>23</sup> Gates, *Duty*, 440.

<sup>24</sup> Mullen interview, 15.

<sup>25</sup> *Ibid.*

<sup>26</sup> Peter R. Orszag, director of Office of Management and Budget, letter to Senator Lieberman, 24 May 2010.

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- <sup>27</sup> Nicholson, “Book Excerpt.”
- <sup>28</sup> Sheryl Hay Stolberg, “Deal Reached for Ending Law on Gays in Military,” *New York Times*, 24 May 2010.
- <sup>29</sup> Scarborough, “Military Chiefs”; Casey interview 7.
- <sup>30</sup> Casey interview, 2.
- <sup>31</sup> *Ibid.*, 7.
- <sup>32</sup> *Ibid.*, 2, 7; Senator John McCain, letter to Carl Levin, chairman, SASC, 26 May 2010.
- <sup>33</sup> Donna Miles, “Gates Can Accept ‘Don’t Ask, Don’t Tell’ Amendment,” American Forces Press Service, 25 May 2010; Gates, *Duty*, 440.
- <sup>34</sup> Robert M. Gates, Secretary of Defense, letter to John McCain, ranking member of SASC, 25 May 2010.
- <sup>35</sup> Casey interview, 2, 7.
- <sup>36</sup> Mullen interview, 14.
- <sup>37</sup> McCain letter, 26 May 2010.
- <sup>38</sup> Schwartz interview, 5–6.
- <sup>39</sup> Conway 2014 interview, 12.
- <sup>40</sup> Casey interview, 2.
- <sup>41</sup> Gen James T. Conway, Commandant of the USMC, letter to Senator John McCain, ranking member of the SASC, 25 May 2010; Gen Norton A. Schwartz, Air Force Chief of Staff, letter to Senator John McCain, ranking member of the SASC, 26 May 2010; Gen George W. Casey Jr., Army Chief of Staff, letter to Senator John McCain, ranking member of the SASC, 26 May 2010; Adm Gary Roughead, CNO, letter to Senator John McCain, ranking member of the SASC, 26 May 2010.
- <sup>42</sup> Gen John M. D. Shalikashvili (Ret), former CJCS, letter to Senators Levin and Lieberman, 26 May 2010.
- <sup>43</sup> Casey interview, 8.
- <sup>44</sup> Roughead interview, 9.
- <sup>45</sup> *Ibid.*
- <sup>46</sup> Conway 2014 interview, 12.
- <sup>47</sup> *Ibid.*
- <sup>48</sup> Schwartz interview, 6.
- <sup>49</sup> *Ibid.*
- <sup>50</sup> *Ibid.*
- <sup>51</sup> Neil interview, Oct 2012, 10; Donna Miles, “Mullen: Proposed Legislation Retains Prerogative,” American Forces Press Service, 27 May 2010.
- <sup>52</sup> Dana Bash, “Byrd Gives ‘Don’t Ask, Don’t Tell’ Repeal Enough Votes for Committee,” CNN.com, 26 May 2010.
- <sup>53</sup> Miles, “Mullen.”
- <sup>54</sup> Cartwright interview, 9.
- <sup>55</sup> House, *National Defense Authorization Act for Fiscal Year 2011*, 111th Cong., 2d sess., H.R. 5136.
- <sup>56</sup> Chris Geidner, “News Analysis: Four Days That Shook DADT (Updated),” *Metro Weekly*, 2 June 2010.
- <sup>57</sup> Barack Obama, “Statement by the President on Votes to Repeal Don’t Ask, Don’t Tell,” White House Office of the Press Secretary, 29 May 2010.
- <sup>58</sup> Barack Obama, “Presidential Proclamation—Lesbian, Gay, Bisexual, and Transgender Pride Month,” White House Office of the Press Secretary, 28 May 2010.
- <sup>59</sup> Jim Garamone, “Gates Addresses Troops on Don’t Ask, Don’t Tell Repeal,” American Forces Press Service, 28 May 2010.
- <sup>60</sup> Robert M. Gates, “Statement on Don’t Ask, Don’t Tell Legislation,” DOD Press Operations, 28 May 2010.
- <sup>61</sup> *Ibid.*
- <sup>62</sup> Adm Michael G. Mullen, “Mullen Says Gays in Military Shouldn’t Live A Lie,” interview by Michele Norris, *All Things Considered*, NPR, 28 May 2010; David Gura, “Joint Chiefs Chairman Reaffirms Support of ‘Don’t Ask, Don’t Tell’ Repeal,” NPR, 28 May 2010.

## Pressing the Issue

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- <sup>63</sup> Mullen, “Mullen Says.”
- <sup>64</sup> Ibid.
- <sup>65</sup> CRWG, *Report of the Comprehensive Review of the Issues Associated with a Repeal of Don’t Ask, Don’t Tell* (Washington, DC: DOD, 2010), 16.
- <sup>66</sup> Westat, *Support to the DoD Comprehensive Review Working Group Analyzing the Impact of Repealing “Don’t Ask, Don’t Tell,” Volume 1: Findings from the Surveys* (Rockville, MD: Westat, 2010), 15–16.
- <sup>67</sup> Westat, *Volume 1*, 3–4; CRWG, *Comprehensive Review*, 33–39.
- <sup>68</sup> Westat, *Support to the DoD Comprehensive Review Working Group Analyzing the Impact of Repealing “Don’t Ask, Don’t Tell,” Volume 2: Findings from the Qualitative Research Tasks* (Rockville, MD: Westat, 2010), 70–71.
- <sup>69</sup> Westat, *Volume 2*, 3–5; CRWG, *Comprehensive Review*, 33–35.
- <sup>70</sup> CRWG, *Comprehensive Review*, 36–37.
- <sup>71</sup> Ibid., 38–39; Westat, *Volume 2*, 5–7.
- <sup>72</sup> CRWG, *Comprehensive Review*, 38; Westat, *Volume 1*, 17–21.
- <sup>73</sup> CRWG, *Comprehensive Review*, 38–39; Westat, *Volume 2*, 3–4, G-1, and G-2.
- <sup>74</sup> NDRI, *Sexual Orientation: An Update*, viii–xiii.
- <sup>75</sup> Ibid., xxvii, 234–35, 256, 259–60.
- <sup>76</sup> Ibid., 257–60.
- <sup>77</sup> Ibid., 233–37.
- <sup>78</sup> Staff, “Editorial: New Gay Army, Top General Calls Christian Soldiers Bigots,” *Washington Times*, 16 Sept 2010.
- <sup>79</sup> Rowan Scarborough, “General Denies Equating Gays, Blacks in Military,” *Washington Times*, 26 Sep 2010; Rob Fulcher, “Letter to the Editor: Witness to Bostick Comments,” *Washington Times*, 23 Sep 2010.
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- <sup>81</sup> Mullen interview, 12.
- <sup>82</sup> Roughead interview, 5–6, 8–9, and 15–16.
- <sup>83</sup> Conway 2014 interview, 4; Conway 2010 interview, 120; Conway 2008 interview, 61.
- <sup>84</sup> Mullen interview, 12.
- <sup>85</sup> Jeh Johnson, “Report Update,” attachment to “Read Ahead for Secretary Gates: Comprehensive Review Working Group,” 30 Jul 2010.
- <sup>86</sup> Ibid.
- <sup>87</sup> Gates, *Duty*, 44.
- <sup>88</sup> Jeh Johnson and Gen Carter Ham, info memo to Secretary Gates, “Read-ahead for September 27 Update on DADT Working Group,” 23 Sep 2010.
- <sup>89</sup> DOD IG, *Investigation of Improper Disclosure of For Official Use Only Information from the Comprehensive Review Working Group Draft Report*, Report no. 10-117444-345, 8 Apr 2011, 21; CRWG, *Report*, 121; Center for Military Readiness, *Policy Analysis: DoD Inspector General Exposes Improper Activities to Repeal the Law re Gays in the Military (Don’t Ask, Don’t Tell)*, June 2011; Bob Unruh, “Feds Find Fix in on ‘Study’ of Homosexuality in Ranks,” *WND*, 27 Jun 2011, <http://www.wnd.com/2011/06/316273/print/>; Robert Maginnis, “10 Problems with Obama’s ‘Don’t Ask’ Report,” *Human Events*, 7 Dec 2010.
- <sup>90</sup> CRWG, *Report*, 180, 197.
- <sup>91</sup> Johnson and Ham memo.
- <sup>92</sup> Gates, *Duty*, 44.
- <sup>93</sup> Jeh Johnson, “CRWG Lines of Effort,” attachment to “Read Ahead for Secretary Gates: Comprehensive Working Group,” 4 Oct 2010.
- <sup>94</sup> CRWG, *Report*, 9, 97–100.
- <sup>95</sup> Ibid., 100–1, 116.
- <sup>96</sup> Ibid., 119.
- <sup>97</sup> Ibid., 119–20.
- <sup>98</sup> Ibid., 119, 121–22.
- <sup>99</sup> Ibid., 121–22, 125–26.

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<sup>100</sup> Servicemember, CRWG Focus Group, 2010, reported in *CRWG Report*, 126.

<sup>101</sup> *CRWG, Report*, 123–24, 127–29.

<sup>102</sup> Johnson and Ham memo; Gates, *Duty*, 44.

<sup>103</sup> *CRWG, Report*, 97–98, 100–1.

<sup>104</sup> *Ibid.*, 101, 116.

## 7 AUTUMN FOLLIES

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### Senate Filibuster

In twin motions on 16 September 2010, Senate Majority Leader Harry Reid proposed that the chamber vote to consider the FY 11 NDAA without further discussion the following week.<sup>1</sup> If successful in his bid to bring the bill to the floor without delay, he intended to limit the number of amendments discussed during the short time before Congress adjourned for the midterm elections. The Senate would discuss other issues and concerns, he assured his Republican colleagues, when they returned to complete the NDAA (during the lame duck session).

This frustrated Senator John McCain, who accused Democrats of trying to limit debate to a handful of select amendments that furthered their political agenda in the run-up to the election. Whether or not to repeal DADT, he maintained, was better decided after completion of the Pentagon's study.<sup>2</sup> Senator Carl Levin, equally frustrated by McCain's remarks, accused the Republicans of threatening to filibuster a mere move to debate a bill unless the conditions of certain Senators were first met.<sup>3</sup>

It was clear that Senate Democrats needed backing from at least one Republican to achieve the sixty votes required to bypass a filibuster and proceed to discuss the defense authorization bill. They saw Senators Susan Collins and Olympia J. Snowe, two moderates from Maine, as potential allies. Prior to Tuesday's vote, however, Collins said that although she believed that it was time to end DADT, she was compelled to defend her colleagues' right to offer additional amendments on issues associated with the defense bill.<sup>4</sup> Senator Snowe followed suit, and Senator Reid's motion for cloture was defeated.<sup>5</sup>

### Nominating a Commandant

On the same day that the Senate voted to delay its consideration of the FY 11 NDAA, the SASC held a hearing to confirm General James F. Amos as the next Commandant of the Marine Corps, following General Conway's scheduled retirement in October. Six months earlier, when Secretary of the Navy Raymond Mabus had first asked Amos if he would be interested in the position, the general had replied that he was satisfied with his current billet as Assistant Commandant. Moreover, he remained undecided on the question of repeal and had concerns about ending DADT at that time. When Mabus asked how he would respond if the statute changed, Amos affirmed that he would follow the law. For the time being, General James Cartwright, the

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VCJCS, was the only other person who knew that Amos was being considered for the top Marine slot.<sup>6</sup>

In April, Secretary Mabus informed General Amos that he had decided to nominate him to become the next Commandant. Not wanting to take the job under false pretenses, Amos carefully considered his position on DADT over the next month. “My wife and I are Christians, so we prayed through these issues,” he later recalled. “I sought advice from people whose opinion I respect outside the Marine Corps and talked to my family.” Eventually able to “get past” his “own personal beliefs,” Amos decided to oppose repeal and so informed Mabus, suggesting that he should probably nominate another candidate.<sup>7</sup>

While meeting with Secretary Gates in May, General Amos learned that he was still one of three senior officers being considered for the Commandant post.\* Gates asked him three questions, the last pertaining to DADT. Amos reiterated that he did not support repeal and recommended that the Secretary choose a nominee whose views corresponded with those of the administration. Gates responded with good humor that they would likely have to screen all of the general officers in the Marine Corps to find one who supported repeal.<sup>8</sup> That exchange was later repeated when President Obama interviewed Amos\*\* at the White House.<sup>9</sup>

During his confirmation hearing, General Amos informed members of the SASC that he personally opposed any effort to repeal 10 U.S.C. § 654 and end DADT. The law and policy had supported the Marine Corps’ unique requirements in the past, he explained, and he was concerned that effecting a significant change in policy during a period of extended combat operations could disrupt cohesion. He said that he had heard that the survey responses from the individual Marines were predominantly negative, but he did not know that for a fact, nor did he know what the impact of repeal would be on cohesion, recruiting and retention, or combat readiness. Consequently, he supported the CRWG study, convinced that it would provide the information necessary for the next Commandant—whoever that might be— to provide his best military advice on the issue. He assured the SASC that the Marine Corps could be counted upon to respond accordingly, regardless of the outcome.<sup>10</sup>

### **Litigation**

As political maneuvering for a legislative end to DADT continued, court challenges threatened to halt the controversial policy. Secretary Gates had warned of such an eventuality, but because the judiciary was outside the Joint Chiefs’ purview, they were not overly concerned about any court

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\*Gen Amos was unaware that National Security Advisor James Jones, himself a former Commandant of the Marine Corps, had advocated for his advancement to that post (Amos interview, 1 Feb 2011, p. 5).

\*\*Gen Amos later acknowledged that the erroneous belief that President Obama had nominated him to be the Commandant because he supported the repeal of DADT was a source of frustration (Amos interview, 29 July 2014, p. 43).

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decision.<sup>11</sup> Admiral Mullen was confident that the situation would eventually sort itself out, but later allowed that the Defense Department's general counsel had been "whipsawed" as the cases were deliberated back and forth.<sup>12</sup> General Cartwright likewise recalled that after the 2009 meeting in the Roosevelt Room of the White House, it was clear to him that litigation was unviable as a means for ending DADT.<sup>13</sup> General Casey too thought it unlikely that the courts would remove the issue from congressional jurisdiction.<sup>14</sup> Generals Schwartz and Conway nevertheless harbored lingering doubts about how the Ninth Circuit Court of Appeals might rule and whether or not the Obama administration would defend challenges to the law.<sup>15</sup>

A landmark US Supreme Court decision seven years earlier—*Lawrence v. Texas*—had recognized the rights associated with the "autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>16</sup> That ruling changed DADT litigation because it required a higher level of judicial scrutiny. In *Cook v. Gates* in 2008, the First US Circuit Court of Appeals dismissed both facial and as-applied challenges to DADT. On one hand, some forms of sexual conduct—including some instances of servicemembers engaging in homosexual activities—exceeded the earlier decision's narrowly defined range of protected liberty interests. On the other hand, the importance of others that did fall within the scope of consideration was outweighed by the government's established interest in preserving military effectiveness.<sup>17</sup> But the same year, the Ninth US Circuit Court of Appeals reached a different conclusion in *Witt v. U.S. Dept. of the Air Force*.

When the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest . . .<sup>18</sup>

When the Justice Department declined to appeal the decision, in May 2009 the ruling became binding throughout the Ninth Circuit Court's jurisdiction.<sup>19</sup> An appeals court observed the following year that Major Witt's discharge from the Air Force had impeded, rather than facilitated, the government's interest in advancing unit morale and cohesion. Ruling that the government had violated her Constitutional rights the court ordered her reinstatement, and a settlement was eventually reached that allowed Witt to retire with her pension intact.<sup>20</sup>

The Central District Court of California employed a similar standard of scrutiny during *Log Cabin Republicans v. United States* in July 2010.<sup>21</sup> Ruling in favor of the plaintiffs, Judge Virginia A. Phillips decided that the government had failed to demonstrate that the exclusion of gay men and

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women was necessary to maintain military readiness and cohesion. She noted that the number of homosexual discharges had not only declined steadily throughout the current conflicts, but that the military tended to delay such discharges until after scheduled overseas deployments had been completed. Moreover, the Log Cabin Republicans' presentation revealed that DADT undermined readiness because enforcement of the policy impeded efforts to recruit and retain otherwise qualified personnel—including some individuals who possessed critical skills—which in turn contributed to a lowering of qualification standards to meet escalating manpower requirements.<sup>22</sup> On 9 September, Phillips declared that DADT violated the US Constitution's guarantee of due process and free speech.<sup>23</sup>

In mid-October, the Central District Court of California overruled a DOJ objection to limit the scope of its previous judgments against DADT. Instead of allowing the executive and legislative process to continue, Judge Phillips issued a permanent injunction barring further enforcement of DADT nationwide and ordered the military to "immediately suspend and discontinue any investigation, or discharge, or other proceeding" before her judgment.<sup>24</sup> Secretary Gates regarded the abrupt policy reversal as his "worst fear come to pass."<sup>25</sup> It left the administration to defend the constitutionality of a law that President Obama personally opposed and was committed to ending. According to Gates, it precipitated the "worst confrontation" to date between himself and the president.<sup>26</sup>

By phone, President Obama discussed optional responses to the injunction with Secretary Gates. The administration was prepared to seek a stay of the judge's order, but the president wanted to suspend further application of the law until Congress decided the issue. Gates, however, believed any stay would oblige the government to enforce all aspects of the current law. Later that evening, White House counsel Robert F. "Bob" Bauer met with DOD counsel Jeh Johnson and Secretary Gates's special assistant Robert Rangel, but they reached no consensus on how to proceed.<sup>27</sup>

The impasse hardened when President Obama and Secretary Gates spoke again on 19 October. The president considered the law wrong, believed the plaintiffs had a stronger case than the government, and firmly disagreed with the opinion of the Secretary (and the CJCS) that "there is either law or no law—there is no gray area."<sup>28</sup> Privately, Obama explained to Gates that if the Ninth Circuit reversed the lower court's decision, he would need to placate the gay rights advocacy groups by mitigating DADT. A suspension of separations during the repeals process, he said, would meet that requirement.<sup>29</sup> That became irrelevant when the California court denied another request to stay the injunction the same day. The Defense Department announced that openly gay applicants were now eligible to join the Armed Forces, with the caveat that their status was subject to change should if the injunction against enforcing DADT be overruled.<sup>30</sup>

That warning came true the next day, when the Ninth Circuit granted a temporarily stay of Judge Phillips's injunction in order for the parties to fully consider the matter.<sup>31</sup> Clifford Stanley, under secretary of defense for

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personnel and readiness, captured the mood of the moment in a memorandum to the secretaries of the military departments: “This latest twist highlights the legally uncertain period in which we now find ourselves with respect to Don’t Ask, Don’t Tell, and the need to further ensure uniformity and care in the enforcement of this law.”<sup>32</sup>

Secretary Gates and Admiral Mullen met with President Obama in the Oval Office, where the Secretary reiterated that homosexual conduct mandated separation from the military. Obama relented, stating that he would not ask them to do anything that made them uncomfortable.<sup>33</sup> Gates’s 21 October direction addressed both of their needs. He specified that, from that point on, no member of the military would be separated pursuant to 10 U.S.C. § 654 without the personal approval of the respective Service Secretary, in coordination with the both under secretary of defense for personnel and readiness and the Defense Department general counsel.<sup>34</sup> “For all practical purposes,” Secretary Gates later wrote, “it was a suspension of separations, but it upheld the principle that as long as the law was in effect, we would continue to enforce it.”<sup>35</sup>

On 1 November, the Ninth Circuit Court granted the government an indefinite stay, pending appeal of the lower court’s earlier ruling. The court agreed that a disorderly policy transition would “produce immediate harm and precipitous injury,” making an orderly change of such magnitude in the public’s interest.<sup>36</sup> It also noted that “if the administration is successful in persuading Congress to eliminate § 654, this case and controversy will become moot.”<sup>37</sup> The Supreme Court concurred on 11 November.<sup>38</sup>

### **Releasing the Report**

Meanwhile, the CAG planned for release of the working group’s report, which they assumed would be followed by congressional testimony, debate, and some form of legislative action. They envisioned three scenarios: that the FY 11 NDAA would pass with the current DADT amendment attached, that a different NDAA amendment would be passed, or that neither amendment would pass. In the best case, the CAG expected the president to sign the measure into law before Christmas, followed by implementation, certification and then repeal within six to twelve months. In the worst case, the CAG warned that “without legislation, this will be decided in the courts.”<sup>39</sup>

The CAG estimated that leaks of review copies circulated among senior Pentagon officials were inevitable. It advised Admiral Mullen that he and the other Joint Chiefs should meet near the end of October to discuss the report and formulate their best military advice before the working group’s findings became public knowledge.<sup>40</sup> Before that could occur, only days after the CRWG panel had completed its assessment, the *Los Angeles Times* reported that despite resistance to the idea of repeal among combat units, other elements of the armed forces were not particularly worried.<sup>41</sup> During the middle of the month, as three-person teams from each of the Services met with CRWG personnel in Crystal City, Virginia, to review the findings relevant

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to their respective organizations, a friend asked General Ham to confirm a secondhand rumor from a reporter that 70 percent of the survey's respondents thought that repeal would be uneventful.<sup>42</sup> At the end of the month, after the CRWG had briefed Secretary Gates and others on noteworthy results from the servicemember and spouse surveys, the *NBC Nightly News* reported that although some servicemembers strongly opposed repeal, the majority of those surveyed said they would not object to serving alongside openly gay troops.<sup>43</sup> General Ham warned the working group that "this is just the beginning" and advised them "to just not comment."<sup>44</sup> During the same 25 and 26 October in-progress review, the CRWG also described its proposed timeline for implementing repeal to Secretary Gates. Should the NDAA become law in December, the plan was to develop new policies, regulations, and training materials by the end of February 2011; conduct education and training between March and July; and, after completing certification in June, repeal the policy in August.<sup>45</sup>

A substantial midterm election defeat on 2 November added urgency to the Democrats' repeal initiative because they would have to rescind 10 U.S.C. § 654 and end DADT before the Republicans reclaimed control of the House of Representatives in January 2011. Two days after the election, the CRWG couriers hand-delivered four "eyes-only" draft documents\* to the Joint Chiefs, Service Secretaries, and several Defense Department officials.<sup>46</sup> General Ham and Jeh Johnson requested the reviewer's comments by 18 November.<sup>47</sup>

The Service Chiefs—informed by the inquiries, updates, and briefings they received through the period—were already familiar with the report's contents. Several acknowledged the subjective interpretation of data to support favorable conclusions, accepting that it was the nature of statistics.<sup>48</sup> General Schwartz remembered frequent meetings with Chairman Mullen and Secretary Gates, while Mullen recalled discussing certain findings and their implication upon readiness.<sup>49</sup>

Admiral Mullen said later that such discussion provided a means to "flesh out and flush out" where each of the Chiefs stood. He was personally convinced that the impact of repeal would be unexceptional and that the force could handle the change "without a lot of difficulty."<sup>50</sup> Admiral Roughead was likewise comfortable that the Navy's sentiments aligned with the nation's support for equal rights.<sup>51</sup> General Schwartz did not think that repeal would become a major issue for the Air Force either. To him the report conveyed "the fundamental notions that this would not be instantly divisive, that there was at least ambivalence, if not qualified acceptance, of the likely relief from Don't Ask, Don't Tell."<sup>52</sup> General Casey similarly accepted that "these young men and women are much more mature on . . . issues like this than we give them credit for and so it's probably not going to be as risky as I thought."<sup>53</sup>

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\*The collection included both the working group's report and implementation support plan, a summary of Westat's survey findings, and Rand's updated study on sexual orientation and US military personnel policy.

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Still, opinions varied among the Chiefs regarding the level of risk associated with implementing a new policy during wartime. Generals Amos and Casey in particular, but also Admiral Roughead and General Schwartz, confronted the elevated risks implied by the heightened negativity in the responses from personnel assigned to traditionally all-male combat arms.<sup>54</sup> As shown in table 3, the Marine and Army combat units consistently predicted far more negative consequences following repeal than the remainder of the force.<sup>55</sup>

**Table 3.** Combat Arms Perspectives on Repealing DADT

<b>Negative Impact Upon</b>	<b>All Respondents</b>	<b>Marine</b>	<b>Army Combat Arms</b>	<b>Marine Combat Arms</b>
General Readiness	21%	32%	35%	43%
Work Compatibility (Task Cohesion)	30%	43%	48%	58%
Individual Trust (Social Cohesion)	33%	47%	49%	60%
Effectiveness (Deployed)	44%	60%	60%	67%
<b>Unit Context</b>	<b>All Respondents</b>	<b>Marine</b>	<b>Army Combat Arms</b>	<b>Marine Combat Arms</b>
All-male	20%	37%	58%	70%
All-heterosexual	64%	75%	73%	80%

Percentages rounded to up to nearest whole number.

Source: CRWG report, 2010:75-77.

Two days after receiving the draft report, General Amos shared his concerns about combat effectiveness with reporters in San Diego, remarking that repeal would involve risk and that how to determine its influence or measure its magnitude upon unit cohesion and combat effectiveness remained uncertain.<sup>56</sup> Amos said he fully supported the Defense Department's initiative to survey the servicemembers and he intended to provide Chairman Mullen and Secretary Gates with his best military advice.

When the story appeared on 7 November, accounts alleged that General Amos had also asserted that it was an inopportune time to lift the ban on open homosexuality because American forces were still fighting in Afghanistan, which was the position he had taken at his confirmation hearing six weeks earlier when he informed the SASC of his personal opposition to repealing the policy during wartime.<sup>57</sup> Later, at a town hall meeting in Quantico the day before receiving the draft report, he reiterated that individual concerns about having to cohabitate with gay or lesbian personnel might distract straight Marines' attention from their mission.<sup>58</sup> Thus, his

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stance was consistent with the one taken by his predecessor, General James Conway, two months earlier.<sup>59</sup>

The Commandant's position may not have surprised Admiral Mullen, then in Australia with Secretary Gates, but his public commentary did.<sup>60</sup> The Chairman was more annoyed than alarmed by the pronouncement, and he assured reporters the following day that the review was on track—he had met with the Service Chiefs several times; they understood the process and its timing and recognized that their advice should be given privately.<sup>61</sup> Gates affirmed that he would like to see the policy repealed but was unsure of the prospects.<sup>62</sup> A Marine Corps press release accused reporters of taking the Commandant's remarks out of context and urged them to be more conscientious in the future.<sup>63</sup>

Jeh Johnson and Robert Rangel accepted an invitation to the White House on 9 November to address DADT-related issues.<sup>64</sup> That afternoon, before the Joint Chiefs had an opportunity to review the draft report, discuss their concerns among themselves, or submit their comments to the CRWG, rumblings of the long-anticipated leak permeated the Pentagon. A *Washington Post* reporter told General Ham that an interested party, concerned that the process was becoming politicized and—it would later be revealed—worried that anti-repeal groups would mischaracterize the report's findings, had approached another *Post* reporter with an offer to provide details of the working group's assessment. News of the impending story reached Admiral Mullen's office the following afternoon when Captain John Kirby, the Chairman's special assistant for public affairs, learned that the paper had discovered a second source.<sup>65</sup>

The collaborative article soon followed, stating that “a Pentagon study group has concluded that the military can lift the ban on gays serving openly in uniform with only minimal and isolated incidents of risk to the current war efforts.”<sup>66</sup> The report highlighted key statistics, conclusions, and recommendations from the working group's review. It and others also noted Admiral Mullen's recent rebuke of General Amos for drawing attention to the risks posed by repeal.<sup>67</sup>

Secretary Gates “strongly condemned” the unauthorized release of official information and asked the Defense Department's inspector general to identify those persons who were responsible for the leak.<sup>68</sup> After a five-month investigation the inspector general concluded that there was insufficient evidence to determine who had divulged the information, although it was likely leaked “with the intent to shape pro-repeal perception of the draft Report prior to its release to gain momentum in support of a legislative change during the ‘lame duck’ session of Congress.”<sup>69</sup> Much later, General Schwartz stressed that the leak “didn't come from the uniform side, that's for sure.”<sup>70</sup> Instead, he suspected that it had originated—perhaps by design—from within OSD.

On the afternoon of 30 November, approximately one year after the CAG began its initial examination of DADT, the Defense Department held a press conference at the Pentagon. Secretary Gates and Admiral Mullen spoke

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first, followed by Jeh Johnson and General Ham. The Secretary announced that the vast majority of those surveyed did not object to gays and lesbians serving openly in uniform, and repealing DADT “would not be the wrenching, traumatic change that many have feared and predicted.”<sup>71</sup> There may have been a “higher level of discontent, of discomfort and resistance to change” among combat units, he allowed, but those objections did not constitute “an insurmountable barrier to successful repeal.”<sup>72</sup> Such doubts reflected—in part—a tendency to rely upon stereotypes to compensate for one’s lack of familiarity with gays and lesbians, which could be overcome through the strong application of education, training, and leadership. He reassured the audience that pending legislation would not harm military readiness and urged the Senate to pass the bill before the end of the year. With a warning meant for Senator McCain, he concluded that choosing legislative inaction was tantamount to “rolling the dice” that the courts would not abruptly overturn the policy.<sup>73</sup>

Admiral Mullen likewise praised the CRWG for enabling the Chiefs to base their advice on actual data, rather than anecdotal evidence and hearsay. He endorsed their report, findings, and implementation plan, stressing the importance of strong leadership and of “continuing to comport ourselves with honor and hold ourselves accountable across the board to impeccably high standards.”<sup>74</sup> General Ham reiterated that although there would be some “limited and isolated disruption to cohesion and retention” over the short-term, the risk to overall readiness was low and any long-term effects could be mitigated through a “continued and sustained commitment to core values of leadership, professionalism, and respect.”<sup>75</sup> Jeh Johnson repeated the oft-cited survey statistics, as well as the assertion that “much of the concern about ‘openly’ gay service members is driven by misperceptions and stereotypes about what that would mean.”<sup>76</sup> Sound leadership, clear communication, and proactive education would overcome such obstacles, he asserted; there was no expectation for special treatment, nor was there a need for separate bathroom facilities, new or extensively revised standards of conduct, or for anyone to “change their personal religious views or moral beliefs about homosexuality.”<sup>77</sup>

Release of the CRWG report was well-received by pro-repeal advocacy groups. Aubrey Sarvis, executive director for SLDN, commented enthusiastically that “this exhaustive report is overwhelmingly positive and constructive. The Pentagon validated what repeal advocates and social scientists have been saying about open service for over a decade.”<sup>78</sup>

### **Summary**

With efforts to bring the FY 11 NDAA to the Senate floor failing, the only real threat to the Obama administration’s repeal strategy in autumn 2010 was ongoing litigation within the Central District Court of California. While hearing *Log Cabin Republicans v. United States*, Judge Virginia Phillips chose to apply a heightened standard of scrutiny and on 9 September declared that

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DADT impeded, rather than enhanced, military readiness. President Obama was willing to request a stay but wanted to suspend policy enforcement while it was being reviewed. Secretary Gates and Chairman Mullen, however, maintained that in the case of any stay, the law must be upheld.

When the district court denied the Justice Department's final objections to the injunction on 19 October, the Defense Department announced that openly gay and lesbian applicants were at least momentarily eligible to join the Armed Forces. The next day, after the Ninth Circuit Court of Appeals granted a temporary stay of the lower court's order, Secretary Gates directed that no one would be discharged under 10 U.S.C. § 654 without the approval of the concerned military department secretary, in coordination with the under secretary of defense for personnel and readiness and the DOD general counsel. This compromise, he later allowed, amounted to an administrative suspension of the policy that supported the president's aim. The US Supreme Court upheld the circuit court's decision on 11 November, making way for Congress to enact a legislative resolution.

Meanwhile, in early November, the working group circulated draft copies of its report among senior Pentagon officials. The Service Chiefs were not surprised by the report's contents, although that did not mean they agreed with the CRWG's risk assessment. Generals Amos and Casey, in particular, but also General Schwartz, were concerned about the effect of repeal upon warfighters who were already stressed following a decade of conflict.<sup>79</sup> Before the Service Chiefs had an opportunity to submit their comments to the working group, an anonymous source informed the *Washington Post* that two-thirds of force was amenable to repealing DADT and that Pentagon researchers anticipated little disruption following the proposed policy change.<sup>80</sup> The preemptive disclosure undermined potential criticism and helped shape the pro-repeal perception of the report's still-confidential findings in advance of its 30 November 2010 release date.

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<sup>1</sup> Sen Harry Reid, "National Defense Authorization Act for Fiscal Year 2011—Motion to Proceed," *Congressional Record* 156:125-Daily Edition (16 Sep 2010) P. S7158–S159.

<sup>2</sup> Sen John McCain, "National Defense Authorization Act for Fiscal Year 2011—Motion to Proceed," *Congressional Record* 156:125-Daily Edition (16 Sep 2010) P. S7160–S7161.

<sup>3</sup> Sen Carl Levin, "National Defense Authorization Act for Fiscal Year 2011—Motion to Proceed," *Congressional Record* 156:125-Daily Edition (16 Sep 2010) P. S7161.

<sup>4</sup> Sen Susan Collins, "Defense Authorization," *Congressional Record* 156:127-Daily Edition (21 Sep 2010) P. S7234–S7235.

<sup>5</sup> Ted Barrett and Dana Bash, "Senate to Vote on Taking Up 'Don't Ask, Don't Tell' Repeal," CNN, 20 Sep 2010.

<sup>6</sup> Gen James F. Amos, Commandant of the Marine Corps, interview by Dr. Charles P. Neimeyer, Marine Corps History Division, 1 Feb 2011, 3.

<sup>7</sup> *Ibid.*, 4.

<sup>8</sup> *Ibid.*, 5.

<sup>9</sup> Gen James F. Amos, interview by Dr. Charles P. Neimeyer, Marine Corps History Division, 29 July 2014, 43.

<sup>10</sup> Gen James F. Amos, SASC Hearing on the Nomination of Gen Amos to be USMC Commandant, 21 Sep 2010, CQ Congressional Transcripts, 13–15, 17–18, 23–24, and 40.

<sup>11</sup> Roughead interview, 9; Conway 2014 interview, 10; Casey interview, 8.

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- <sup>12</sup> Mullen interview, 15.
- <sup>13</sup> Cartwright interview, 9.
- <sup>14</sup> Casey interview, 9.
- <sup>15</sup> Schwartz interview, 9; Conway 2014 interview, 10.
- <sup>16</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).
- <sup>17</sup> *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008).
- <sup>18</sup> *Witt v. U.S. Dept. of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008)
- <sup>19</sup> Jess Braven and Laura Meckler, “Obama Avoids Test on Gays in Military,” *Wall Street Journal*, 19 May 2009.
- <sup>20</sup> *Witt v. U.S. Dept. of the Air Force*, 739 F. Supp. 2d 1308, 1317 (W.D. Wash. 2010).
- <sup>21</sup> *Witt*, 527 F.3d 806, 819; Order Denying Defendants’ Motion for Summary Judgment at 9, *Log Cabin Republicans v. U.S.*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (Case No. CV 04-08425-VAP).
- <sup>22</sup> *Log Cabin Republicans*, 716 F. Supp. 2d 884.
- <sup>23</sup> *Ibid.*
- <sup>24</sup> Order Granting Permanent Injunction, *Log Cabin Republicans v. U.S.*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 04-8425).
- <sup>25</sup> *Gates, Duty*, 441.
- <sup>26</sup> *Ibid.*
- <sup>27</sup> *Ibid.*
- <sup>28</sup> *Ibid.*, 442–43.
- <sup>29</sup> *Ibid.*, 443.
- <sup>30</sup> Ann Riley, “Federal Judge Denies Obama Administration’s Attempt to Reinstate Don’t Ask, Don’t Tell,” *Jurist*, 19 Oct 2010; Sarah Paulsworth, “DOD Orders Military Recruiters to Accept Openly Gay Applicants in Light of Court Ruling,” *Jurist*, 19 Oct 2010.
- <sup>31</sup> 2010 U.S. App. Lexis 21651.
- <sup>32</sup> Clifford L. Stanley, under secretary of defense for personnel and readiness, memorandum to Secretaries of the Military Departments, Subj: Don’t Ask, Don’t Tell Legal Developments, 21 Oct 2010.
- <sup>33</sup> *Gates, Duty*, 443–44.
- <sup>34</sup> Robert M. Gates, memorandum for Secretaries of the Military Departments, Under Secretary of Defense for Personnel and Readiness, General Counsel of the Department of Defense, “Subject: Title 10 U.S.C. § 654,” 21 Oct 2010.
- <sup>35</sup> *Gates, Duty*, 444.
- <sup>36</sup> Order Granting Stay, 2010 U.S. App. Lexis 22655.
- <sup>37</sup> *Ibid.*
- <sup>38</sup> 2010 Lexis 8807 (Nov 12, 2010).
- <sup>39</sup> CAG, memorandum attachment to Admiral Michael J. Mullen, CJCS, “What’s after December?,” 6 Oct 2010.
- <sup>40</sup> Capt Samuel Neill, CAG member, memorandum to Admiral Michael J. Mullen, CJCS, Subj: “CRWG Report Roll Out Tank” with slides and talking points, 6 Oct 2010.
- <sup>41</sup> David S. Cloud and David Savage, “Legal Scholars Debate Judge’s Ruling on ‘Don’t Ask, Don’t Tell,’” *Los Angeles Times*, 14 Oct 2010.
- <sup>42</sup> DOD IG, *Investigation of Improper Disclosure of For Official Use Only Information from the Comprehensive Review Working Group Draft Report*, report no. 10-117444-345, 8 Apr 2011, 6; Neill memo, 6 Oct 2010.
- <sup>43</sup> DOD, Service Data on Impact of Repealing Don’t Ask, Don’t Tell: Summary of Spouse Survey Quantitative Results, Presented to Secretary of Defense, Document 5333, 25 Oct 2010; DOD, Service Data on Impact of Repealing Don’t Ask, Don’t Tell: Summary of Quantitative Results, Document 5335, 26 Oct 2010; JCS, Proposed DADT Repeal Timeline, Document 5335 (PowerPoint slides), October 2010; Brian Williams, “Don’t Ask, Don’t Tell,” *NBC Nightly News*, 28 Oct 2010.
- <sup>44</sup> DOD IG, *Improper Disclosure*, 7.
- <sup>45</sup> JCS, Proposed DADT Repeal Timeline, Document 5335 (PowerPoint slides), October 2010.
- <sup>46</sup> DOD IG, *Improper Disclosure*, 7–8 and Appendix B, List of Eyes-Only Recipients.

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- <sup>47</sup> Gen Carter F. Ham and Jeh C. Johnson, CRWG co-chairs, memorandum to Secretaries of the Military Departments Chiefs of the Military Services, Subj: "Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. § 654," 4 Nov 2010.
- <sup>48</sup> Mullen interview, 12, 16; Roughead interview, 10; Casey interview, 3; Schwartz interview, 6, 7.
- <sup>49</sup> Schwartz interview, 6; Mullen interview, 12.
- <sup>50</sup> Mullen interview, 16.
- <sup>51</sup> Roughead interview, 11.
- <sup>52</sup> Schwartz interview, 7.
- <sup>53</sup> Casey interview, 3.
- <sup>54</sup> Mullen interview, 16; Casey interview, 2; Gen Norton Schwartz, Chief of Staff of the Air Force, memorandum to Admiral Mullen, CJCS, Subj: "CSAF Personal Assessment of the DoD Comprehensive Review Working Group Study on Repeal on 10 U.S.C. § 654; Kevin Baron, "Amos Offers Vision for U.S. Marine Corps' Future at Town Hall," *Stars and Stripes*, 3 Nov 2010; Tony Perry, "'Don't Ask' Should Stay for Now, New Marine Commandant Says," *Los Angeles Times*, 7 Nov 2010.; "Marine Leader: Keep Policy on Gays in Military," Associated Press, 7 Nov 2010.
- <sup>55</sup> CRWG, *Report*, 74–76.
- <sup>56</sup> Gen James F. Amos, "Quote from the 35th Commandant of the Marine Corps General James F. Amos, 6 November, Bay Front Hilton, San Diego, California," On the Record, Headquarters Marine Corps (HQMC) PA Division, 12 Nov 2010.
- <sup>57</sup> Perry, "'Don't Ask'"; "Marine Leader," Associated Press.
- <sup>58</sup> Baron, "Amos."
- <sup>59</sup> Kevin Baron, "Top U.S. Marine Suggests Segregating Gay Marines from 'Very Religious Ones,'" *Stars and Stripes*, 24 August 2010; Frank James, "Marine Macho Makes Corps Resist Uncloseted Gays: Commandant," NPR, 24 Aug 2010.
- <sup>60</sup> Mullen interview, 16; "Mullen: 'Don't Ask, Don't Tell' Report On Track," American Forces Press Service, 8 Nov 2010.
- <sup>61</sup> Amos, "Quote."
- <sup>62</sup> Ed O'Keefe, "Are Hopes Dimming on Repeal of Don't Ask, Don't Tell?" *Federal Eye*, *Washington Post*, 8 Nov 2010.
- <sup>63</sup> Amos, "Quote."
- <sup>64</sup> DOD IG, *Improper Disclosure*, 13, 18, 21.
- <sup>65</sup> *Ibid.*, 14–15; Ed O'Keefe and Greg Jaffe, "Sources: Pentagon Group Finds There Is Minimal Risk to Lifting Gay Ban during War," *Washington Post*, 11 Nov 2010.
- <sup>66</sup> O'Keefe and Jaffe, "Sources"; Ed O'Keefe and Greg Jaffe, "Report: Pentagon Little Risk to Lifting Gay Ban," *Washington Post*, 11 Nov 2010.
- <sup>67</sup> Elisabeth Bumiller, "Little Harm Found if Gay Ban Is Lifted," *New York Times*, 11 Nov 2010.
- <sup>68</sup> Robert M. Gates, Secretary of Defense, memorandum for Inspector General of the Department of Defense, Subj: Request for Investigation, 17 Nov 2010; "Gates Orders Probe into 'Don't Ask' Review Leak," American Forces Press Service, 12 Nov 2010.
- <sup>69</sup> DOD IG, *Improper Disclosure*, 20.
- <sup>70</sup> Schwartz interview, 78.
- <sup>71</sup> DOD, Transcript of "DOD News Briefing with Secretary Gates and Adm. Mike Mullen from the Pentagon," OASD-PA, 30 Nov 2010, 2
- <sup>72</sup> *Ibid.*
- <sup>73</sup> *Ibid.*, 2–3; Gates, *Duty*, 446.
- <sup>74</sup> DOD, Transcript of "Gate and Mullen," 3–4.
- <sup>75</sup> DOD, Transcript of "DOD News Briefing with General Counsel Johnson and Gen. Ham from the Pentagon," OASD-PA, 30 Nov 2010, 2.
- <sup>76</sup> *Ibid.*, 2–3.
- <sup>77</sup> *Ibid.*, 3.
- <sup>78</sup> Aubrey Sarvis, quoted in, "Breaking: SLDN Statement on Comprehensive Review Working Group (CRWG) Report," SLDN, 30 Nov 2010.

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<sup>79</sup> Mullen interview, 16; Casey interview, 2; Schwartz memo; Baron, “Amos”; Perry, “Don’t Ask”; “Marine Leader,” Associated Press.

<sup>79</sup> CRWG, *Report*, 74–76.

<sup>80</sup> O’Keefe and Jaffe, “Sources”; and O’Keefe and Jaffe, “Report.”

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## 8 REPEAL

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### Best Military Advice

On the afternoon of Monday, 29 November 2010—just three days before the SASC hearing to address the working group’s report—Secretary Gates and the Joint Chiefs gathered in the Oval Office to discuss the study’s findings and accompanying implementation plan with President Obama.<sup>1</sup> Aside from the president’s phone discussion with the Chiefs six months earlier, this was the first time the commander in chief had invited the JCS as a group to present their views on DADT in person. In fact, the Chiefs had insisted on a face-to-face meeting and attached great importance to it. Secretary Gates, however, made no mention of this in his memoir.<sup>2</sup>

The JCS customarily met with the president in the Situation Room of the White House. General Casey regarded the move to the Oval Office as a White House attempt to bully the senior military leaders’ position on repeal. “Put your big boy pants on,” he told his colleagues, “because this is the intimidation mode.”<sup>3</sup> Certain of the Service Chiefs were already feeling the pressure; one had phoned the Army Chief of Staff the previous evening to warn him that he had decided to change his position on repeal.

The president opened the meeting by requesting the Chiefs’ respective opinions. Each of them had ninety seconds to present his best military advice to Obama.<sup>4</sup> Secretary Gates conceded that the Service Chiefs were “less sanguine . . . than the Working Group about the level of risk of repeal with regard to combat readiness,” mainly because it would place additional stress upon a force that was already stretched thin by a decade of war.<sup>5</sup>

Admiral Robert J. Papp Jr., the commandant of the Coast Guard at the time, recalled a less collegial meeting. Describing the experience to Coast Guard Academy midshipman three years later, he asserted that President Obama had looked all five of the Service Chiefs in the eye and declared, “This is what I want you to do.”<sup>6</sup> Without further detail, Papp remarked that if they had disagreed with the president’s demands, “We all had the opportunity to resign our commissions and go do other things.”<sup>7</sup> Neither Admiral Mullen nor General Casey remembered so confrontational an encounter.<sup>8</sup> Casey was satisfied that the Joint Chiefs had been able to brief the president before their congressional testimony, even if only to preserve precedent.

### Congressional Testimony

The predictable SASC hearing began on Thursday morning, 2 December. The working group’s findings, the witnesses’ opinions, the parties’ agendas, and the committee members’ positions were for the most part already known.

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Even the sequence of testimony was reminiscent of the Pentagon press conference held just two days earlier: Secretary Gates led, followed by Admiral Mullen, General Ham, and finally General Counsel Johnson. The only substantive question was how firmly the participants would defend their positions.

Senator Levin highlighted portions of the CRWG's study that supported policy change, stressing that "real world experience is a powerful antidote to the stereotypes that are a major source of the discomfort that some feel about ending DADT."<sup>9</sup> Senator McCain, frustrated by the scant time for review, was less confident than his colleague and believed that repeal was premature. He urged the committee needed to focus on the military's effectiveness, rather than the "broader social issues being debated in our society at large."<sup>10</sup>

Secretary Gates's well-crafted statement emphasized the working group's findings. Acknowledging that repeal might cause short-term disruptions within some combat specialties, he argued that the overall risk to readiness was low and any complications could be resolved through training, education, and the forceful application of principled leadership. Lastly, should the Senate not pass the pending legislation by the end of the year, the Secretary warned, then judicial fiat could inflict sudden, disorderly change upon the military.<sup>11</sup>

Admiral Mullen similarly defended repeal, convinced it would not prove an unacceptable risk to military readiness. He now "knew for a fact" that given sufficient time, whatever risk they posed would be "greatly mitigated" by the implementation plan and "effective, inspirational leadership."<sup>12</sup> Recalling his own experiences in Vietnam, the admiral asserted that the "special warrior bond" between combat personnel was based less on "common values" than the "common threat of the enemy, hardship, and peril."<sup>13</sup>

The Chairman was confident that should repeal occur, the policy change would be led in a manner consistent with each servicemember's oath. "I would not recommend repeal of this law," he said, "if I did not believe in my soul that it was the right thing to do for our military, for our nation, and for our collective honor."<sup>14</sup> General Ham's brief remarks echoed the theme of adaptability, while Jeh Johnson reiterated the danger of letting the courts decide the issue.<sup>15</sup>

Like previous hearings on DADT, the nature and tone of questioning divided sharply along party lines. The Democratic majority embraced the report, while the Republican minority questioned its research protocols and doubted the wisdom of eliminating an effective policy, especially during wartime. The committee wanted more information on the Service Chiefs' role in repeal. Secretary Gates stated that his meetings with the Chiefs had focused on two issues: the possibility that the courts could take the issue out of their hands before the force was ready to change and the overall context of change. "As I look ahead," he said, "I don't see the world getting to be a safer, easier place to live in where our troops are necessarily under less stress."<sup>16</sup> Admiral Mullen assured members that he had considered the sometimes divergent views of the Service Chiefs. Rather than exert his influence, he

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relied on “debate, discussion, and making sure everybody understood where everybody was” on this issue.<sup>17</sup> Although respective members of the JCS held different views on repeal, they all agreed on the soundness of the implementation plan and their readiness to lead that effort should the law change. General Ham and Jeh Johnson had also taken the Service Chiefs’ concerns into account and revised their final assessment accordingly.<sup>18</sup>

Secretary Gates reassured the senators that he would not certify the forces’ readiness to change until he “was satisfied, with the advice of the Service Chiefs, that we had in fact mitigated, if not eliminated, to the extent possible, risks to combat readiness, to unit cohesion and effectiveness.”<sup>19</sup> He did, however, oppose adding the Service Chiefs to the formal certification process because it might necessitate including the combatant commanders, which would result in more than a dozen senior leaders deciding the issue.<sup>20</sup>

The Republicans were particularly troubled by the working group’s failure to ask the force for its opinion on whether or not DADT should be repealed. An exasperated Senator McCain told Admiral Mullen that he was “almost incredulous to see that, on an issue of this magnitude, we wouldn’t at least solicit the views of the military about whether it should be changed or not.”<sup>21</sup> He said that it went against everything about leadership he had learned, that every great leader he had known conferred with their subordinates. According to Admiral Mullen, the report had “implied” where the force stood on this issue. He had not asked that specific question because “I fundamentally think it’s an incredibly bad precedent to ask them to essentially vote on a policy.”<sup>22</sup>

Secretary Gates concurred, regarding a referendum as “very dangerous.” He elaborated: “I can’t think of a single precedent in American History of doing a referendum of the American Armed Forces on a policy issue. Are you going to ask them if they want 15-month tours? Are you going to ask them if they want to be part of the surge in Iraq? That’s not the way our civilian-led military has ever worked in our entire history. The question needs to be decided by Congress or in the courts.”<sup>23</sup> When asked why the working group had chosen to sidestep the fact that most of the men and women contacted through face-to-face or online exchanges had opposed repeal, Gates replied that although responses from individuals who had volunteered to participate in the qualitative portions of the study were important, they were statistically insignificant and less reliable in determining overall attitudes than those acquired through the anonymous survey.<sup>24</sup>

Perhaps the most controversial issue was why those survey respondents assigned to combat units were more pessimistic about the ramifications of repeal than those in noncombat units. Secretary Gates and Admiral Mullen, at different times, offered similar explanations: Army and Marine combat units were typically comprised of young men who—in addition to being focused on combat—were in the midst of discovering themselves,

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who possessed narrow worldviews, and who had never served with women.\* Senator McCain disagreed. If combat troops were mature enough to fight and die, then he considered them mature enough to decide who they wanted to serve with and to estimate the impact upon their effectiveness.<sup>25</sup>

The SASC reconvened the following morning, this time to hear testimony from the Vice Chairman, Service Chiefs, and commandant of the Coast Guard. The order of seating traditionally reflected each Service Chief's seniority as determined by their tenure as a member of the JCS. In this case, however, chairs for Generals Amos and Schwartz had been switched so that Generals Amos and Cartwright were seated next to each other at the center of the table.\*\* This departure from protocol was intended to emphasize the divergent views held by the two senior Marine Corps officers.<sup>26</sup> General Casey said later that "they set Amos up right from the get go."<sup>27</sup>

The Vice Chairman preempted the other Chiefs' views with his own statement, General Schwartz later recalled.<sup>28</sup> Concerned that a court-imposed change would limit the military's ability to effect an orderly implementation of a new policy, General Cartwright testified that the risk posed by repeal to military effectiveness was manageable even during wartime. In "times of conflict the focus is on the war effort," he explained, while "periods of reduced activity can create conditions wherein the challenges associated with making a change of any kind seem enormous."<sup>29</sup>

General Casey's testimony noted that the force had been stretched thin by a decade of war and that a substantial minority, many employed in combat arms, believed that open homosexuality would diminish unit effectiveness, cohesion, and morale. Consequently, the working group had underestimated the degree of difficulty involved in repeal, which he believed presented moderate risks to the Service's short-term military effectiveness and its long-term recruiting and retention efforts. With proper implementation, however, he did not foresee the repeal preventing the force from accomplishing its "worldwide missions, including combat operations."<sup>30</sup>

Admiral Roughead referred to the more than three-fourths of the Navy's respondents who believed the impact of repeal upon the force would be neutral or positive. By focusing on the minority who thought otherwise, he continued, leaders could effectively mitigate sailors' concerns (mostly about privacy) "thorough engaged leadership, effective communications, training and education, and clear and concise standards of conduct."<sup>31</sup> The CNO anticipated the risk to readiness, effectiveness, and cohesion would be low, with the exception of special operations units. He therefore recommended repeal.<sup>32</sup>

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\*The implication that the presence of women had somehow broadened typically all-male attitudes toward human sexuality differed from the CRWG's assertion that combat troops were merely less familiar with gays and lesbians than their colleagues serving in gender-integrated support units.

\*\*The seniority of the four Service Chiefs was determined by their tenure dates on the JCS: Gen Casey, April 2007; Adm Roughead, Sep 2007; Gen Schwartz, Aug 2008; and Gen Amos, Oct 2010.

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General Amos, as expected, was far more apprehensive than the other Chiefs. He criticized the CRWG's failure to specify the risks associated with repealing DADT while combat operations continued in Afghanistan for a ninth consecutive year. Managing such a change would divert leaders' attention from preparing troops for combat and disrupt cohesion at the small unit level, he argued. Nevertheless, the Commandant acknowledged that if Congress decided to repeal DADT, it could be done, and he vowed that the Marine Corps would faithfully follow the law.<sup>33</sup> He later recounted: "It was never a matter of 'would it be easy or would it be hard?' I took the position I took based on what the Marines told me. I'm the Commandant; I was representing those Marines that are out there . . . I'm their advocate."<sup>34</sup>

General Schwartz was reluctant to lift the ban on open homosexuality at that time, even though two-thirds of the Air Force's survey respondents saw little problem with allowing gay and lesbian personnel to serve openly. Like his Army and Marine colleagues, he too thought that the working group had underestimated the short-term risk to military effectiveness, given the continuing combat operations in Afghanistan. Although repeal presented modest risk to Air Force readiness, effectiveness, cohesion, retention, and recruiting, Schwartz found it difficult "as a member of the Joint Chiefs of Staff to recommend placing any additional discretionary demands on our leadership cadres in Afghanistan at this particularly demanding time."<sup>35</sup> If legislators decided to repeal the law, the general recommended that training and education begin immediately but that full implementation and certification be deferred until 2012. By that time, he apparently reasoned, the withdrawal of American forces from Afghanistan and Iraq would be well underway.

Admiral Papp, like his Navy counterpart, considered it unacceptable that coastguardsman should be forced to compromise the core value of integrity to serve in uniform. The Coast Guard's distinctive dual role as both a military and law enforcement agency required that it routinely work "with Federal, State, and local forces where gay and lesbian Americans serve openly with distinction and heroism."<sup>36</sup> Implementation would be challenging, yet he was "absolutely confident" that the Coast Guard could implement any congressionally directed change.<sup>37</sup>

Senator Levin questioned General Cartwright about the divergent opinion between the two Marine officers. The Vice Chairman stressed that he viewed the issue from a joint, rather than Service-oriented, perspective, and that he valued the personal experiences of those who had actually served with gay and lesbian personnel. Several of the Chiefs acknowledged discussing repeal with foreign military counterparts who had experienced minimal disruption when ending similar policies in their own countries. General Amos was not one of them, and although he had no doubt about the ease of transition reported by other militaries around the world, he insisted that repeal should not occur while the Marine Corps was at war.<sup>38</sup> When that was no longer the case, he later clarified for the committee, "I'd be comfortable implementing repeal."<sup>39</sup>

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The lack of consensus among the Joint Chiefs troubled Senator McCain. Generals Casey and Schwartz personally favored eventual repeal, just not at that time. General Amos expressed similar reservations but admitted that his organization might be amenable to a compromise that delayed implementation among Army and Marine units that were currently engaged in combat.<sup>40</sup> General Schwartz quickly advised against an implementation plan that involved different timelines for different communities of the Armed Forces.<sup>41</sup> Admiral Roughead agreed that parsing out implementation by Service “would cause confusion and inconsistencies that would not be helpful to the joint force.”<sup>42</sup> General Cartwright, however, stated that the matter had not yet been settled and that the option of coordinating implementation by Service, combatant command, unit, or combat arm remained plausible.<sup>43</sup> One issue the Service Chiefs did agree upon was that their views were being heard by Secretary Gates and therefore it was unnecessary to add them the certification process.<sup>44</sup>

### **Legislative Action**

Wrangling over party agendas complicated the lame-duck legislative session (set to conclude on 5 January 2011). Senate Democrats were anxious to proceed on several important initiatives—including the repeal of 10 U.S.C. § 654 via passage of the FY 11 NDAA—but Senate Republicans refused to cooperate until after they had addressed GOP concerns over “funding the government and preventing a job-killing tax hike.”<sup>45</sup> As a result, Democrats were unable to overcome a Republican filibuster on 9 December and bring the defense authorization bill up for discussion.<sup>46</sup> Secretary Gates, although disappointed by the failed procedural vote, reminded reporters that Congress had a week to act before adjourning for the holiday recess.<sup>47</sup>

Hopeful that a stand-alone bill might be more successful, legislators brought forth several measures reflecting the same repeal language contained in the FY 11 NDAA amendment. On the afternoon of the filibuster, Senator Joe Lieberman introduced, and a day later reintroduced, the Don’t Ask, Don’t Tell Repeal Act of 2010 (S. 4022/S. 4023).<sup>48</sup> Then, on 14 December, Representative Patrick Murphy presented an identical copy of the Senate amendment (H.R. 6520).<sup>49</sup> Although each of these initiatives would ultimately stall before being acted upon, Representative Chellie Pingree (D-ME) introduced a fourth measure (H.R. 1764) the next morning. Unlike the others, it cleverly proposed that the House concur with an unrelated Senate amendment to the Small Business Act with Respect to the Small Business Innovation Research Program and the Small Business Technology Transfer Program (H.R. 2695), via a subsequent amendment that replaced the bill’s original language with that of the DADT repeal act.<sup>50</sup> Because H.R. 2695 had already reached the conference stage it was considered “privileged” legislation and did not require a cloture vote on a motion to proceed to begin discussion, thereby saving time and circumventing the possibility of another Republican

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filibuster. After an hour-long debate, the House passed H.R. 2695 that afternoon, acquiring sixteen additional yea votes in the process.<sup>51</sup>

The following evening, after the House had passed the Senate's version of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (H.R. 4853), Majority Leader Reid filed to end debate on the DADT repeal act. In the process he "filled the tree" with extraneous amendments, effectively blocking the Republican's ability to further modify (or delay) the repeal legislation.<sup>52</sup> When the Senate assembled on 18 December, discussion of DADT revolved around the usual arguments for and against repeal, with one major exception. Secretary Gates, responding to an inquiry from Senator Jim Webb, had affirmed that the proposed legislation would indeed allow for the new policy to be implemented sequentially by Service, combat arm, or unit.<sup>53</sup> This swayed the decorated Marine veteran and former Secretary of the Navy, who informed colleagues that with the understanding that the Service Chiefs and combatant commanders, in consultation with the Chairman Mullen and Secretary Gates, could specify which combat units could cope with repeal, he intended to support the bill.<sup>54</sup>

Senator McCain, resisting until to the end, cautioned that the policy change would entail great cost and additional sacrifice: "There will be gold stars put up in windows in the rural town and communities all over America that do not partake in the elite schools that bar military recruiters from campus, that do not partake in the salons of Georgetown and the other liberal bastions around the country."<sup>55</sup> Quoting General Amos, who had recently dramatized his strong opposition to repeal, the senator stressed that any policy that diverted the Marines' attention from combat could result in costly mistakes that entailed casualties.<sup>56</sup> Senator Lieberman, whose perspective was more philosophical, quoted Admiral Mullen: we "are an institution that values integrity, and then asks other people to join us, work with us, die with us, and lie about who they are the whole time they are in the military."<sup>57</sup>

Later that afternoon, the Senate voted overwhelmingly (65–31)\* to accept the House's amendment to H.R. 2695.<sup>58</sup> President Obama hailed the action as a historic step toward ending a policy that undermined national security and violated the ideals that service personnel risk their lives to defend.<sup>59</sup> Secretary Gates and Admiral Mullen also welcomed the decision. Gates promised that once the legislation was signed into law he would "immediately proceed with the planning necessary to carry out this change carefully and methodologically, but purposefully."<sup>60</sup> Mullen stressed that implementation would be well-led and that the military's combat readiness and high standards would be maintained.<sup>61</sup> The next day, General Amos

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\*Republicans voting in favor of both measures included Lisa A. Murkowski (AK), Mark S. Kirk (IL), Scott P. Brown (MA), George V. Voinovich (OH), Susan Collins (ME), and Olympia Snowe (ME). Senators John E. Ensign (NV) and Richard M. Burr (NC) voted only to accept the amendment to H.R. 2965.

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likewise emphasized that “fidelity is the essence of the Marine Corps” and it would “step out smartly to faithfully implement this new policy.”<sup>62</sup>

The Chiefs had mixed expectations before the vote. Admiral Mullen, who was in Afghanistan and Iraq during the hearings, considered it unlikely that the repeal measure would survive. Yet, all of a sudden, he later recalled, Senators Collins, Brown, and others came forward and “boom”—it passed.<sup>63</sup> Admiral Roughead had anticipated “very strident friction” from those legislators who opposed repeal but thought that the national attitude supported change and it was going to happen.<sup>64</sup> General Casey remembered that “it was a done deal; you knew where it was going.”<sup>65</sup>

On the morning of 22 December 2010, President Obama approved Public Law 111-321, the culmination of a process that began during his first week in office, when he informed Secretary Gates and Admiral Mullen that he opposed DADT and intended to end the policy.<sup>66</sup> The signing occurred during a thirty-minute-long ceremony held in a crowded auditorium at the Department of Interior.\* Standing before a prominently displayed Marine Corps flag—what Secretary Gates has since called “a not-so-subtle spike of the football”—the president cheerfully acknowledged that he was overwhelmed by the audience’s euphoria.<sup>67</sup>

In his speech, President Obama recalled that during his first meeting with the Secretary of Defense and Joint Chiefs, he had asked for their cooperation in ending DADT. Now, two years later, he commended the military leadership for its role in repealing the policy. Although he praised the contributions of Secretary Gates, Deputy Secretary Lynn, Chairman Mullen, and Vice Chairman Cartwright in particular, Obama did not mention the Service Chiefs’ involvement. The president declared in conclusion:

We are a nation that welcomes the service of every patriot. We are a nation that believes all men and women are created equal. These are the ideals that generations have fought for. These are the ideals that we uphold today, and now it is my honor to sign this bill into law.<sup>68</sup>

Secretary Gates reminded the secretaries of the military departments that despite the signing of the bill, “there are no new changes to any existing Department or Service policies.” The Defense Department would not inquire about one’s sexual orientation, but it would continue to maintain good order and discipline. Any servicemember who altered their personal conduct during the period of implementation, he warned, could still face adverse consequences.<sup>69</sup>

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\*Vice President Joe Biden; Deputy Secretary of Defense William Lynn; Admiral Mullen; veterans Eric Alva and Zoe Dunning; Senators Reid, Collins, and Lieberman; and Representatives Davis, Hoyer, Murphy, and Pelosi appeared onstage with President Obama.

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### **Summary**

Events moved quickly following President Obama's 29 November 2010 meeting with Secretary Gates and the JCS. The atmosphere in the Oval Office was neither hostile nor collegial. Each Chief said his piece to the president, with several expressing concern over the implementation of a controversial new policy during wartime. Two days later, Secretary Gates and Admiral Mullen enthusiastically defended the CRWG's study before the SASC, as well as its conclusion that repeal of DADT would entail little risk to the military's overall effectiveness. They brushed aside criticism expressed by the combat forces.

The Vice Chairman and the Service Chiefs appeared before the SASC the next day. Their views toward risk varied according to the percentage of personnel in their respective Service who opposed repeal, which tended to correspond to the number of ground forces employed in combat arms occupational fields. General Cartwright, Admiral Roughead, and Admiral Papp of the Coast Guard were ready to repeal DADT. General Schwartz advised delaying until 2012, by which time most forces would presumably have been withdrawn from Afghanistan and Iraq. Generals Casey and Amos wanted to wait for the cessation of hostilities before implementing a new policy. The Vice Chairman, however, argued that if it were not this conflict it would be another and that current operations would provide a focus that would reduce implementation-related turmoil.

On other issues, the Joint Chiefs' positions were more closely aligned. Each of the Service Chiefs, for example, had affirmed that they could and would lead successful implementation efforts if Congress decided to repeal 10 U.S.C. § 654. Even General Amos, by far the most outspoken opponent of repeal, acknowledged that he would be comfortable implementing the new policy during peacetime. The Service Chiefs also agreed that it would be a mistake to implement a new policy sequentially—by Service, unit, or occupation—and that it was unnecessary to include them in the formal certification process. This essentially nullified any practical argument against repeal; the Joint Chiefs had reached the same independent conclusion—that a new policy could be successfully implemented with no greater than a modest risk to overall effectiveness.

In mid-December, unable to bring the FY 11 NDAA to the Senate floor for debate, Democrats resorted to several stand-alone bills in attempt to find a way forward. Although identical measures introduced by Senator Lieberman (S. 4022/S. 4023) and Representative Murphy (H.R. 6520) were unsuccessful, Representative Pingree's resolution to substitute the DADT repeal act for language contained in the Small Business Act with Respect to the Small Business Innovation Research Program and the Small Business Technology Transfer Program (H.R. 2695) provided a means to circumvent a Republican filibuster. Because it had already reached the conference stage, the bill was considered privileged legislation and could be sent directly to the Senate for immediate consideration. On 18 December, with eight Republicans

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crossing party lines, the Senate voted overwhelmingly (65–31) in favor of repeal. Four days later, President Obama then signed the bill into law (P.L. 111-321).

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<sup>1</sup> Chris Johnson, “Obama Meets with Joint Chiefs on ‘Don’t Ask,’” *Washington Blade*, 29 Nov 2010.

<sup>2</sup> Casey interview, post remarks.

<sup>3</sup> *Ibid.*, 4.

<sup>4</sup> *Ibid.*

<sup>5</sup> DOD, transcript of “Gates and Mullen.”

<sup>6</sup> Ellie Hall, “Obama Told Military Leaders: Accept Gays in Military or Step Down, Admiral Says,” *BuzzFeed*, 31 Mar 2014, [www.buzzfeed.com/ellievhall/Obama-told-military-leaders-accept-gays-in-military-or-step-down#.pvBqRX2D5](http://www.buzzfeed.com/ellievhall/Obama-told-military-leaders-accept-gays-in-military-or-step-down#.pvBqRX2D5).

<sup>7</sup> *Ibid.*

<sup>8</sup> Mullen interview, 17.

<sup>9</sup> Senate, *The Report of the Department of Defense Working Group that Conducted a Comprehensive Review of the Issues associated with a Repeal of Section 654 of Title 10, U.S.C., “Policy Concerning Homosexuality in the Armed Forces,” Hearings before the Committee on Armed Services United States Senate, 111th Cong., 2nd sess., 2–3 December 2010* (Washington, DC: GPO, 2011) 3, hereafter *SASC Hearing*.

<sup>10</sup> *Ibid.*, 5–6.

<sup>11</sup> *Ibid.*, 6–8.

<sup>12</sup> *Ibid.*, 9.

<sup>13</sup> *Ibid.*, 10.

<sup>14</sup> *Ibid.*, 12.

<sup>15</sup> *Ibid.*, 13.

<sup>16</sup> *Ibid.*, 31.

<sup>17</sup> *Ibid.*, 15.

<sup>18</sup> *Ibid.*, 16, 45.

<sup>19</sup> *Ibid.*, 23.

<sup>20</sup> *Ibid.*, 31.

<sup>21</sup> *Ibid.*, 56–57.

<sup>22</sup> *Ibid.*, 57.

<sup>23</sup> *Ibid.*, 38.

<sup>24</sup> *Ibid.*, 35.

<sup>25</sup> *Ibid.*, 18, 52.

<sup>26</sup> Casey interview, 4; Schwartz interview, 8.

<sup>27</sup> Casey interview, 4.

<sup>28</sup> Schwartz interview, 8.

<sup>29</sup> *SASC Hearing*, 83.

<sup>30</sup> *Ibid.*, 86–87.

<sup>31</sup> *Ibid.*, 88.

<sup>32</sup> *Ibid.*, 89.

<sup>33</sup> *Ibid.*, 90–91.

<sup>34</sup> Amos 2011 interview, 8.

<sup>35</sup> *SASC Hearing*, 93.

<sup>36</sup> *Ibid.*, 95.

<sup>37</sup> *Ibid.*, 95.

<sup>38</sup> *Ibid.*, 97–99.

<sup>39</sup> *Ibid.*, 101.

<sup>40</sup> *Ibid.*, 101–2, 104–5.

<sup>41</sup> *Ibid.*, 105.

<sup>42</sup> *Ibid.*, 106.

<sup>43</sup> *Ibid.*, 114.

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- <sup>44</sup> Ibid., 105, 122.
- <sup>45</sup> Jennifer Steinhauer, “Senate Republicans: No Legislation Until after Tax Cut Extension,” *New York Times*, 1 Dec 2010; Cong. Rec., 156:155 (1 Dec 2010), S8310–11.
- <sup>46</sup> Cong. Rec., 156:162 (9 Dec 2010), S8682–83.
- <sup>47</sup> John D. Banusiewicz, “Gates Repeats Call for Senate to Repeal ‘Don’t Ask,’” American Forces Press Service, *DoD News*, 10 Dec 2010.
- <sup>48</sup> Congress, Summary: S.4022 – 111th Congress (2009–2010), [www.congress.gov/bill/111th-congress/senate-bill/4022](http://www.congress.gov/bill/111th-congress/senate-bill/4022); Congress, Summary: S.4023 – 111th Congress (2009–2010), [www.congress.gov/bill/111th-congress/senate-bill/4023](http://www.congress.gov/bill/111th-congress/senate-bill/4023); Ed O’Keefe and Craig Whitlock, “New Bill Introduced to End ‘Don’t Ask, Don’t Tell,’” *Washington Post*, 11 Dec 2010.
- <sup>49</sup> Congress, Summary: H.R. 6520-111th Congress (2009–2010), [www.congress.gov/bill/111th-congress/house-bill/6520](http://www.congress.gov/bill/111th-congress/house-bill/6520).
- <sup>50</sup> Cong. Rec., 156:166 (15 Dec 2010), p. H8383; House Committee on Rules: Providing for Consideration of the Senate Amendment to the Bill (H.R. 2965) to Amend the Small Business Act with Respect to the Small Business Innovation Research Program and the Small Business Technology Transfer Program, and for Other Purposes. 111th Cong., 2nd sess., 2010, House Report 111-681.
- <sup>51</sup> Cong. Rec., 156:166 (15 Dec 2010), pp. H8397–98.
- <sup>52</sup> Library of Congress, “Bill Summary & Status 111th Congress (2009–2010) H.R. 4853: All Information,” Thomas, [thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04853](http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04853); Cong. Rec., 156:167 (16 Dec 2010), S10384–87.
- <sup>53</sup> Cong. Rec., 156:169 (18 Dec 2010), S10653.
- <sup>54</sup> Ibid., S10652–53.
- <sup>55</sup> Ibid., S10661.
- <sup>56</sup> Ibid., S10661, S10666; Kevin Baron, “Marine Commandant Concluded DADT Repeal May Risk Lives,” *Stars and Stripes*, 14 Dec 2010.
- <sup>57</sup> Cong. Rec., 156-169, S10654.
- <sup>58</sup> Ibid., S10666-67, S10684, D1216.
- <sup>59</sup> White House, *Statement by the President on the Don’t Ask, Don’t Tell Repeal Act of 2010*, Office of the Press Secretary, 18 Dec 2010.
- <sup>60</sup> DOD *Statement by Secretary Robert Gates on Senate Vote to Repeal ‘Don’t Ask, Don’t Tell,’* Release 1164-10, 18 Dec 2010.
- <sup>61</sup> DOD, *Statement by Adm. Mike Mullen on Senate Vote to Repeal ‘Don’t Ask, Don’t Tell,’* Release 1163-10, 18 Dec 2010.
- <sup>62</sup> Gen James Amos, statement on the repeal of Title 10, US Code 654, Subj: “Policy Concerning Homosexuality in the United States Armed Forces” (Don’t Ask Don’t Tell), HQMC, 19 Dec 2010.
- <sup>63</sup> Mullen interview, 17.
- <sup>64</sup> Roughead interview, 11–12.
- <sup>65</sup> Casey interview, 4.
- <sup>66</sup> Michael D. Shear, “The Caucus: Last-Ditch Move to Block Repeal of Don’t Ask, Don’t Tell Fails,” *New York Times*, 21 Dec 2010; Kerry Eleveld, “Obama: ‘Prepared to Implement,’” *Advocate*, 22 Dec 2010.
- <sup>67</sup> Gates, *Duty*, 444–45; White House, *Remarks by the President and Vice President at Signing of the Don’t Ask, Don’t Tell Repeal Act of 2010*, Office of the Press Secretary, 22 Dec 2010.
- <sup>68</sup> White House, *Remarks*.
- <sup>69</sup> Robert Gates, Secretary of Defense, memorandum for secretaries of the military departments, Subj: Don’t Ask, Don’t Tell Repeal Legislation, 22 Dec 2010.

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## 9 IMPLEMENTATION AND BEYOND

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### The Support Plan

Responsibility for implementing the inclusive new policy fell to the under secretary of defense for personnel and readiness, Clifford Stanley, a retired Marine Corps major general. During an update meeting on 4 January 2011, he briefed Secretary Gates, Deputy Secretary of Defense Lynn, Admiral Mullen, General Cartwright, and Defense General Counsel Johnson of plans to form a combined OSD, DOD, and Joint Staff team to provide the military departments with “the necessary policy changes, standardized education and training content, and a framework for repeal recommendation criteria and feedback.”<sup>1</sup> That approach had been formulated earlier by the CRWG—in close collaboration with Stanley’s office—as a means for effecting recommendations contained within its *Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell.”* Three days later, Secretary Gates described the basic concept to the press. He told reporters that he wanted to move quickly, but responsibly, and would commence training as soon as possible. Chairman Mullen affirmed that they would not “dawdle,” but he also cautioned against personnel “coming out” before the policy officially changed.<sup>2</sup>

In its *Support Plan for Implementation*, the working group had stressed above all else the important role that Leadership-Professionalism-Respect would play throughout the process. “Without strong leadership,” it warned, “the views of a vocal minority could negatively impact cohesion, readiness, and, ultimately, the effectiveness of a given unit.”<sup>3</sup> Moreover, leaders must be given “clear, equitable, and enforceable standards of conduct and the tools required to enforce standards and maintain good order and discipline in a sexual orientation-neutral way.”<sup>4</sup>

The support plan also outlined a three-part transition, comprising pre-repeal, implementation, and sustainment stages. Stage one, initiated at Secretary Gates’s discretion, was already underway by October 2010 when Pentagon officials began to consider timelines and milestones for the anticipated repeal effort.<sup>5</sup> It entailed planning and preparations that could be conducted prior to the passage of repeal legislation, such as identifying which protocols would have to be revised and developing training materials.<sup>6</sup>

At a minimum, references to homosexuality and homosexual conduct had to be removed from regulations administering the recruitment, induction, and separation of military personnel, and new policies would have to be developed to correct military records, the reaccession of qualified applicants, and the pursuit of veteran’s benefits. Regulations governing accepted

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standards of conduct would also have to be modified to reflect a gender-neutral policy, principally the expansion of Article 120 and elimination of Article 125 from the UCMJ. In most other regards, existing policies already covered or could be easily adapted to address such issues as dress and appearance, public affection, professional relationships, and harassment.<sup>7</sup>

In deference to the large number of personnel who were apprehensive of the new policy's impact upon personal privacy and individual freedoms, the working group made clear that servicemembers were not expected to change their own views and religious beliefs. They would be required to respect and coexist with others who may hold different opinions, however, and their reluctance to serve alongside gays and lesbians would not be considered sufficient grounds for nullifying one's Service commitments.<sup>8</sup> At the same time, the working group advised against adding sexual orientation to the list of conditions "eligible for various diversity programs, tracking initiatives, and the Military Equal Opportunity program complaint resolution process." If a Service member were confronted by inappropriate interpersonal behavior where sexual orientation was a factor, it recommended that he or she use existing mechanisms to file a same-sex harassment or sex stereotyping complaint.<sup>9</sup>

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Virginia S. Penrod, Clifford Stanley's deputy for military personnel policy, chaired the repeal implementation team (RIT).<sup>10</sup> By the time it was formally established on 11 January, draft versions of the policy guidance had already been delivered to the Services for review and comment.<sup>11</sup> Over the next two weeks, work continued on finalizing directives, preparing implementation guidance, and developing educational materials.<sup>12</sup>

During a 28 January press briefing, Under Secretary Stanley and General Cartwright shared Secretary Gates's most recent guidance on repeal. The Defense Secretary had endorsed the RIT's terms of reference, directing that it provide the Services with necessary policy changes and training tool kits by 4 February.<sup>13</sup> He likewise directed that the Office of the Under Secretary for Personnel and Readiness submit its final implementation plan to him by the same deadline.\* Stressing that implementation would require "engaged and informed leadership . . . at every level," Gates explained that "the steps leading to certification and the actual repeal must be accomplished across the entire [Defense] Department at the same time."<sup>14</sup> That did not mean, the Vice Chairman clarified, that the Services had to conduct the training sequentially or in a predetermined manner.<sup>15</sup> The media also received the Defense Department's "DADT Repeal Policy Guidance to the Military

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\*On 11 Feb 2011, Under Secretary Stanley sent the Defense Department's final repeal implementation plan to the Service Secretaries, directing that they submit their first progress report by 1 March (Karen Parrish, "Service Secretaries Receive Don't Ask, Don't Tell Repeal Plan," American Forces Press Service, 11 Feb 2011).

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Departments.”<sup>16</sup> In a related development, General Amos released a video message asserting that he would personally oversee the repeal of DADT within the Marine Corps and made clear that he expected Marine leaders at all levels to enforce respect and dignity.<sup>17</sup>

Service-specific plans enabled the individual chiefs to lead their respective organizations’ implementation efforts. In other words, they could tailor the Defense Department’s generic plan to fit the size and composition of their particular Service, the scope of its global commitments, and the number of units involved in combat operations. Equally important, the Service Chiefs were familiar with the unique character of their organizations and thus were able to include nuanced attitudes toward repeal. For instance, the Marines strongly opposed change, while the Navy and Coast Guard uniformly supported repeal. Army and Air Force personnel, however, were divided on the issue. In their cases, senior members were twice as likely to oppose change as their younger subordinates.<sup>18</sup>

As previously envisioned by the working group, second-stage implementation would occur after the passage of repeal legislation but before the effective date of any subsequent policy change (which was set to occur sixty days after President Obama, Secretary Gates, and Chairman Mullen had certified that the military was ready to switch policies). With first-stage policy revisions and education materials complete, the Services would proceed to execute their individual training programs in three distinct, but sometimes overlapping, levels. Tier I training focused on subject matter experts who would be called upon to implement and administer the new policy, and others employed in key occupations that would require greater understanding of its nuances (recruiters and personnel specialists, chaplains and family counselors, equal opportunity advisors and lawyers, and criminal investigators and law enforcement personnel). Tier II level training focused on senior commissioned, noncommissioned, and civilian leaders who would be responsible for maintaining the standards of conduct, good order and discipline, and military effectiveness. Tier III Level training would inform servicemembers of the new policy and subsequent expectations regarding personal conduct.<sup>19</sup>

### **House Hearings**

Although the 2011 DOD posture hearings made little mention of repeal, the House did hold two hearings during April to review the department’s implementation policy. In each case, the balance of the witnesses’ testimony was spent allaying the fears of Republican legislators who had opposed ending the controversial policy. On 1 April, Under Secretary Stanley and Navy Vice Admiral William E. Gortney, the DJS, testified before the Subcommittee on Military Personnel.<sup>20</sup> Together, they described the three-step process, explained that training was well underway and would likely be completed by midsummer, and advised that no problems had yet been encountered.<sup>21</sup>

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The tensest portion of the exchange occurred when Representative Vicky Hartzler (R-MO) asked of Under Secretary Stanley “how implementation of this new policy is going to improve the standards of military readiness, effectiveness, unit cohesion, recruiting, [and] retention?” He answered awkwardly: “Well, we don’t—there are a lot of unknowns right now, in terms of improving readiness. We do know that, from an integrity standpoint, as already alluded, that we won’t have members having to lie about who they are as they are servicing.”<sup>22</sup> Then, in response to Hartzler’s subsequent assertion that repeal threatened both military readiness and the force’s welfare, Vice Admiral Gortney countered that “it is the service chiefs’, [the] Chairman’s—best judgment that it is not going to impact our ability to fight and win our Nation’s wars. And I happen to believe it, as well.”<sup>23</sup>

A week later, the Service Chiefs appeared before the full HASC.<sup>24</sup> Their opening statements were, for the most part, progress reports that training was proceeding according to plan and they would be able to implement the new policy when directed. General Peter W. Chiarelli, Vice Chief of Staff of the Army, spoke of the “thoughtful dialogue” occurring between leaders and subordinates, and the soldiers’ “generally positive” response to uneventful training.<sup>25</sup> Admiral Roughead likewise reported that the Navy had “begun the process for a prompt and thoughtful transition” and that feedback from the sailors indicated that the training was “comprehensive, well delivered, and effective.”<sup>26</sup> General Amos affirmed that the Marine Corps was “working diligently” to meet the prerequisites for implementing repeal. He was confident that “Marine leaders at all levels will ensure compliance with the spirit and intent of the new law” and that the “Marines will . . . conduct themselves in accordance with the spirit of the new policy.”<sup>27</sup> General Schwartz vowed that “guided by our core values of integrity, service, and excellence, we will implement this policy change with the same professionalism that we demonstrate in all of our daily endeavors.”<sup>28</sup>

Under Senator Howard McKeon’s questioning, General Amos confirmed that he was more comfortable with the prospect of repeal than he had been in the past. “There hasn’t been the recalcitrant pushback,” he explained. “There has not been the anxiety over it from the forces in the field.”<sup>29</sup> As an example, the Commandant recounted a recent exchange with the senior Marine commander in Afghanistan who told him that the men were focused on the enemy, rather than repeal. In reply to a later question, the Commandant reasoned that so many of the Marines in combat arms specialties had opposed repeal because they were worried about combat: “They [were] not sure what to expect. I think it was expectations and anticipation.”<sup>30</sup>

As with the previous week’s subcommittee hearing, representatives questioned the secondary effects of repeal. Representative Martha Roby (R-AL) asked how repeal would enhance military effectiveness, unit cohesion, and recruiting and retention, and General Amos answered, “I can’t tell you at this point that it will improve it. . . . We are in the implementation phase right now . . . so we can’t say one way or another.”<sup>31</sup> General Schwartz, who agreed that it would be premature to pass judgement at that time, stated that

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“conceptually, you can argue that there might well be an improvement at some point because fewer people leave the Service and so on.”<sup>32</sup> Admiral Roughead remarked that “one of the things that will be true once this is implemented is that we won’t have sailors who, because of orientation, are always looking over their shoulder.”<sup>33</sup> General Chiarelli concurred that it was too early to tell but added that he didn’t expect the fallout to be worse than anything resulting from any other personnel change.

Representative Duncan Hunter (R-CA) inquired about the consequence of repeal upon effectiveness, and Admiral Roughead stated his belief “that we will see great young sailors, who perhaps otherwise would not serve, will be able to serve.”<sup>34</sup> General Amos agreed, stating that he thought that it would “increase peace of mind for a portion of our Marine Corps that is gay and lesbian.”<sup>35</sup> General Schwartz likewise envisioned three advantages: “Clearly peace of mind; there is always potential for keeping people who otherwise might have to depart our Air Force; and it . . . potentially increases the recruiting pool.”<sup>36</sup> At the end of the hearing, General Amos allowed that although he could not be certain, he did not anticipate a decline in readiness or combat effectiveness.<sup>37</sup>

The hearing also provided an opportunity for Republican committee members to voice their dissatisfaction with the CRWG study. One member accused the OSD of intentionally delaying its response to a request for raw survey data pertaining to Army and Marine Corps ground combat forces. Perceived flaws revealed by the information convinced him that the study was “no more than a conclusion looking for a survey.”<sup>38</sup> The lack of legitimacy, he said, spoke “to the lack of honesty in this process.”<sup>39</sup> Another thought one reason so few servicemembers responded to the survey was because many questioned its anonymity and were fearful of the consequences of going on record as opposing repeal. Others considered opposition futile. This resulted in a “bogus” study.<sup>40</sup>

Representative Hartzler implored the chiefs to oppose implementation. General Schwartz responded, “You can rest assured that each one of us will give our best military advice to the Chairman of the Joint Chiefs.”<sup>41</sup> When pressed by Representative Hunter for his recourse should implementation be forced upon the Navy before it was ready, Admiral Roughead replied, “I am confident that the recommendation I make with regard to the readiness of the Navy will be a factor in whether or not we go forward as a force or not.”<sup>42</sup> When Hunter asked the other Chiefs if they concurred, General Schwartz stressed that their advice would be “a very significant factor.”<sup>43</sup>

## **Certification**

By law, the DADT Repeal Act of 2010 would not take effect until the president, Secretary of Defense, and Chairman of the JCS had each attested that the Department of Defense had prepared the necessary policies and regulations, and that the implementation of such was “consistent with the standards of military readiness, military effectiveness, unit cohesion, and

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recruiting and retention of the Armed Forces.” The certification process, however, remained undefined. So by mid-January 2011, a rough idea was that the Service Chiefs would periodically report on the status of several measurable criteria (policy revision, force education, and post-repeal assessment), with the Service Secretaries submitting formal recommendations when it was time to proceed with repeal.<sup>44</sup> By mid-March that idea had evolved into a document containing an executive summary of the decision with combatant command feedback, a list of objective and subjective criteria considered, and plans for post-repeal sustainment.<sup>45</sup>

On 26 April, Secretary Gates held his monthly implementation update meeting.<sup>46</sup> Buoyed by the Services’ progress in training the force, he sought confirmation by sending a list of relevant policy issues (previously identified by the CRWG) to Chairman Mullen, Under Secretary Stanley, and the military department secretaries. They were to determine how well those key areas had been addressed during the ongoing review by the following month’s meeting.<sup>47</sup> Responses indicated that leaders were, for the most part, satisfied with modifications to the existing guidance and that they had no major concerns, issues, or problems.<sup>48</sup>

Under Secretary Stanley informed the military’s senior leaders in late June that Secretary Gates wanted their “communiques of preparedness.” The Service Chiefs and combatant commanders were to submit their letters to the DJS, who would forward them to Under Secretary Stanley, while the Service Secretaries were to send theirs to Stanley directly.<sup>49</sup> As the senior leaders were drafting these, several significant changes occurred. On 1 July, Leon E. Panetta replaced Secretary Gates to become the twenty-third Secretary of Defense.<sup>50</sup> Five days later, following the Obama administration’s call for “heightened scrutiny” of laws targeting sexual orientation, the Ninth Circuit Court of Appeals reinstated its earlier injunction against 10 U.S.C. § 654. To avoid controversial litigation, on 8 July Under Secretary Stanley instructed the military to halt enforcement of the DADT policy and resume accepting gay and lesbian applications.<sup>51</sup> A week later, however, the court of appeals granted a Justice Department request by reinstating its original stay to hear further arguments on why DADT should remain in effect until repeal of the law was put into effect.<sup>52</sup>

By 8 July, eighteen communiques of preparedness arrived at the Pentagon (ten received from combatant commanders, five from Service Chiefs, and three from Service Secretaries) carrying much the same message.<sup>53</sup> Each organization pronounced itself “prepared for” the repeal of DADT/10 U.S.C. § 654 sixty days after certification. They confirmed that the organization had been trained, and germane policies and regulations had been revised to reflect the change. In their opinion, implementation of the new policy was consistent with the standards of unit cohesion, recruiting and retention, and military readiness and effectiveness.

Only the communique from CENTCOM revealed a hint of concern. Its commander, General James N. Mattis, USMC, stated that he was as prepared as he could be for the repeal of DADT.<sup>54</sup> Despite continuing combat

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operations, CENTCOM's subordinate leaders would maintain "the highest standards of discipline and military effectiveness subsequent to repeal," and he was ready to exercise "strong leadership" should situations requiring such attention "arise as a result of repeal."<sup>55</sup>

Under Secretary Stanley added his own communique to the others and sent the collection of letters to Secretary Panetta on 12 July.<sup>56</sup> The same day, Jeh Johnson reported to the new Secretary of Defense that revisions to the regulations and policies for post-repeal environment met the requisite standards—with minor exceptions. He questioned whether the training materials and regulations provided sufficient guidance and, while stressing the lack of a single, comprehensive statement about the new status of gay and lesbian servicemembers, advised against assuming that the Armed Forces would understand that sexual orientation was now irrelevant.<sup>57</sup> In a similar memo to the RIT, Johnson suggested that "DOD provide additional guidance to the Services to assist them in transitioning smoothly to a post-repeal environment."<sup>58</sup>

Admiral Mullen forwarded copies of the Service Chiefs' communiqués to Secretary Panetta three days later, including a letter recommending that the certification process proceed.<sup>59</sup> Vice Admiral James W. Crawford, USN, the Chairman's legal counsel, mistook the letter to be Mullen's personal communique. He informed the Chairman that the White House was considering the legal soundness of one document signed by each of the certifying parties versus three independent certification letters and said that a decision was expected shortly.<sup>60</sup>

The CAG was considering options as well. It advised the Admiral Mullen to tender his best military advice because that would establish "an *institutional precedent* for managing what has been one of the more divisive recent military decisions" and serve as "a template for the institution of the Joint Chiefs of Staff that sustains and strengthens its service to the President."<sup>61</sup> They recommended that he base his assessment on the Service Chiefs' written advice, with input from the combatant commanders, and that it too should be submitted in writing. He would simultaneously support the president, exercise his role as Chairman, leave a historical record, and deter future political controversy.

As for certification, the CAG proposed a brief, but very specific, legal document to be signed by the Chairman Mullen, Secretary Panetta, and President Obama. It addressed the working group's recommendations, policy revisions, and accepted military standards. The CAG warned, "*We should be wary of any effort to politically embellish transmittal.* DADT was a big win for the Administration, and they will want to trumpet it. But assertions that repeal will have no impact upon readiness . . . should not be associated with your signature."<sup>62</sup>

Secretary Panetta and Admiral Mullen signed the formal certification without fanfare on 21 July. It stated that the Defense Department had prepared the necessary policies and regulations and that the implementation of repeal was "consistent with the standards of military readiness, military

## **Implementation**

effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.”<sup>63</sup> The document then went to the White House, accompanied by the communiques of preparedness.<sup>64</sup>

President Obama added his endorsement the following afternoon, with the Chairman, Secretary of Defense, and others\* standing by his side.<sup>65</sup> He proclaimed the act the final major step in ending the discriminatory law that undermined military readiness and violated American principles of fairness and equality.<sup>66</sup> Secretary Panetta similarly pledged his support, while Admiral Mullen stressed the need to continue training, monitor performance, and adjust the new policy where and when needed.<sup>67</sup> The president transmitted the document to Congress, attaching copies to personal letters sent to the chairmen and ranking members of both the HASC and SASC.<sup>68</sup>

After sixty uneventful days, President Obama announced the official end of DADT on 20 September 2011 “Today,” he said, “every American can be proud that we have taken another great step toward keeping our military the finest in the world and toward fulfilling our nation’s founding ideals.”<sup>69</sup> Secretary Gates later commented on the significance of that change, writing that “the only military matter . . . about which I ever sensed deep passion on [the president’s] part was ‘Don’t Ask, Don’t Tell.’ For him, changing that law seemed to be the inevitable next step in the civil rights movement.”<sup>70</sup> Secretary Panetta echoed the value of repeal as did Admiral Mullen, who stated that it made for a stronger and more tolerant joint force, more in keeping with American values.<sup>71</sup> With Admiral Mullen’s retirement imminent, the Secretary praised the Chairman’s “very strong leadership in shaping the defense of this country and . . . as a result of that we’re a stronger and more secure nation.”<sup>72</sup>

The same day, Under Secretary Stanley released a one-page memo to the senior DOD and military leaders. Sandwiched between an opening announcement that 10 U.S.C. § 654 was no longer in effect and a concluding directive that they should implement the policy and regulatory revisions was Jeh Johnson’s previously recommended posture statement:

It remains the policy of the Department of Defense that sexual orientation is a personal and private matter. Applicants for enlistment and appointment may not be asked, or required to reveal, their sexual orientation. Sexual orientation may not be a factor in accession, promotion or other personnel decision-making.

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\*Other members of the administration in attendance were Brian Bond, deputy director, Office of Public Engagement; Kathleen Hartnett, associate counsel to the president; Kathryn Ruemmer, counsel to the president; and Joe Biden, vice president (Jim Garamone, “Don’t Ask, Don’t Tell Repeal Certified by President Obama,” American Forces Press Service, 22 Jul 2010).

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All Service members are to treat one another with dignity and respect regardless of sexual orientation. Harassment or abuse based on sexual orientation is unacceptable and will be dealt with through command or inspector general channels. The Department of Defense is committed to promoting an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible regardless of sexual orientation. Gay and lesbian Service members, like all Service members, shall be evaluated only on individual merit, fitness, and capability.<sup>73</sup>

Under Secretary Stanley resigned shortly afterwards, leaving the Defense Department approximately a month following repeal.<sup>74</sup>

### **A Nonissue**

Two months later, General James Amos told reporters that the policy change had been a “non-event.” He made the comments after visiting troops serving on board the USS *Bataan* (LHD 5) and ashore in Afghanistan who had shown little—if any—interest in discussing the subject.<sup>75</sup> The Commandant said he had no regrets about opposing the change during wartime, explaining that he had felt obliged to set aside his personal opinions and represent the majority view held by combat Marines who worried that repeal might diminish their units’ cohesion and battlefield effectiveness. In retrospect, although convinced that he had done what he needed to do at the time, Amos acknowledged that his concern was “misplaced.”<sup>76</sup>

Signs of change appeared at the Pentagon. A mid-June 2012 video by Secretary Panetta thanked LGBT families for their service.<sup>77</sup> Later that month the DOD hosted its first-ever LGBT Pride Month event—a panel discussion of military life under DADT.<sup>78</sup> Perhaps more meaningful, for the first time the Defense Department authorized servicemembers to wear their uniforms while participating in San Diego’s LGBT Pride Festival and Parade.<sup>79</sup> Repeal also facilitated the return of ROTC units to Harvard, Yale, and Columbia campuses that fall.<sup>80</sup>

In accordance with the CRWG’s support plan for implementation, the under secretary of defense for personnel and readiness requested that the combatant commanders, Service Chiefs, and Service Secretaries assess the effect of repeal upon military readiness, effectiveness, unit cohesion, recruiting and retention by the end of November 2012.<sup>81</sup> The combatant commanders reported no impact on any of these categories. Only General Ham, at US Africa Command, observed the need to support all the diverse beliefs and practices present in the force, including those who did not condone homosexual practices.<sup>82</sup> When General Martin E. Dempsey, the

## **Implementation**

eighteenth Chairman of the JCS, responded to Secretary Panetta early in January 2013, he concurred with the combatant commander's assessment that there had been "no impact."<sup>83</sup>

### **Summary**

The DOD implemented repeal of DADT in three stages: initial administrative planning, implementation, and sustainment. Although implementation began with a staggered start, training was underway in each of the Services by the end of February 2011. The House held two hearings in early April to review the Defense Department's implementation plan. Undersecretary Stanley and Vice Admiral William Gortney (the DJS) appeared before the Subcommittee on Military Personnel, while the four Service Chiefs appeared before the full HASC. They all testified that implementation was progressing swiftly and without incident.

Secretary Leon Panetta and Admiral Mullen signed the certification document on 21 July, and President Obama added his signature during a public ceremony the next day. Sixty days later, DADT formally ended on 20 September 2011. In the end, lifting the ban on open homosexuality proved to be, for the most part, a nonissue. Army General Martin Dempsey, eighteenth Chairman of the JCS, reported a year after repeal that the new policy had had no impact upon the combatant commands.

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<sup>1</sup> Clifford Stanley, under secretary of defense for personnel and readiness, "Read Ahead for Secretary Gates: Don't Ask Don't Tell Repeal Certification Update," OSD, 30 Dec 2010; and "Read Ahead for Secretary Gates: Don't Ask Don't Tell Repeal Certification Update," OSD, 18 Jan 2011.

<sup>2</sup> Cheryl Pellerin, "Gates Outlines 'Don't Ask' Repeal Process," American Forces Press Service, 7 Jan 2011.

<sup>3</sup> CRWG, *Support Plan for Implementation*, DOD, 30 Nov 2010, 37.

<sup>4</sup> *Ibid.*, 5.

<sup>5</sup> Capt Samuel M. Neill, CAG member, memorandum to CJCS, CRWG Report Roll-Out Tank, 6 Oct 2010.

<sup>6</sup> CRWG, *Support Plan*, 1-3.

<sup>7</sup> *Ibid.*, 14-15, 22-23, 30-32, 34.

<sup>8</sup> *Ibid.*, 7, 11, 16, 24, 33.

<sup>9</sup> *Ibid.*, 17, 32.

<sup>10</sup> Clifford Stanley, under secretary of defense for personnel and readiness, "Talking Points, Attachment 1 to Read Ahead for Secretary Gates: Don't Ask Don't Tell Repeal Certification Update," OSD, 30 Dec 2010.

<sup>11</sup> Lt Col Randall E. Smith, USAF, "Agenda," attachment to "DADT Repeal Way-Ahead Discussion," J1-DAG, 12 Jan 2011.

<sup>12</sup> Lt Col Randall E. Smith, USAF, "Implementation Guidance Development," attachment to "DADT Repeal Way-Ahead Discussion," J1-DAG, 12 Jan 2011.

<sup>13</sup> Robert Gates, Secretary of Defense, "Terms of Reference for Repeal Implementation Team," attachment to "Memorandum on Implementation of a Repeal of Title 10, United States Code, Section 654," 28 Jan 2011.

<sup>14</sup> Robert Gates, Secretary of Defense, memorandum to Clifford Stanley, under secretary of defense for personnel and readiness, Subj: "Implementation of a Repeal of Title 10, United States Code, Section 654," 28 Jan 2011.

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- <sup>16</sup> Clifford L. Stanley, under secretary of defense for personnel and readiness, memorandum to military secretaries, Subj: “Repeal of Don’t Ask Don’t Tell and Future Impact on Policy,” 28 Jan 2011.
- <sup>17</sup> Derek Turner, “Amos Delivers Message to Corps on DADT,” *Stars and Stripes*, 29 Jan 2011.
- <sup>18</sup> Neil interview notes, 26 Jun 2012; Neil interview, 2 Oct 2012, 16.
- <sup>19</sup> CRWG, *Support Plan*, 3, 47.
- <sup>20</sup> House Armed Services Committee, Subcommittee on Military Personnel Hearing, *Review of Implementation Plans for Repeal of Law and Policies Governing Service by openly Gay and Lesbian Service Members*, 112th Cong., 1st sess., 1 Apr 2011, HASC No. 112-34 (GPO: Washington, DC, 2011).
- <sup>21</sup> *Ibid.*, 3–5.
- <sup>22</sup> *Ibid.*, 15.
- <sup>23</sup> *Ibid.*, 16.
- <sup>24</sup> House Armed Services Committee, *Repeal of Law and Policies Governing Service by Openly Gay and Lesbian Service Members*, 112th Cong., 1st sess., 7 Apr 2011, HASC No. 112-41 (GPO: Washington, DC, 2011).
- <sup>25</sup> *Ibid.*, 5.
- <sup>26</sup> *Ibid.*, 5–6.
- <sup>27</sup> *Ibid.*, 7–8.
- <sup>28</sup> *Ibid.*, 9.
- <sup>29</sup> *Ibid.*
- <sup>30</sup> *Ibid.*, 12.
- <sup>31</sup> *Ibid.*, 23.
- <sup>32</sup> *Ibid.*, 24.
- <sup>33</sup> *Ibid.*
- <sup>34</sup> *Ibid.*, 28.
- <sup>35</sup> *Ibid.*
- <sup>36</sup> *Ibid.*
- <sup>37</sup> *Ibid.*, 34.
- <sup>38</sup> *Ibid.*, 29.
- <sup>39</sup> *Ibid.*
- <sup>40</sup> *Ibid.*, 31.
- <sup>41</sup> *Ibid.*, 21, 26.
- <sup>42</sup> *Ibid.*, 29.
- <sup>43</sup> *Ibid.*
- <sup>44</sup> Lt Col Randall E. Smith, USAF, “Repeal Reporting Criteria for the Uniformed Services,” attachment to “DADT Repeal Way-Ahead Discussion,” 12 Jan 2011.
- <sup>45</sup> Clifford Stanley, under secretary of defense for personnel and readiness, “Talking Points,” attachment to “Read Ahead for Secretary Gates: Don’t Ask Don’t Tell Repeal Implementation Update,” 24 March 2015.
- <sup>46</sup> Clifford Stanley, under secretary of defense for personnel and readiness, “Talking Points,” Attachment to “Read Ahead for Secretary Gates: Don’t Ask Don’t Tell Repeal Implementation Update,” 21 April 2015.
- <sup>47</sup> Robert Gates, Secretary of Defense, memorandum to the CJCS, USD-PR, and Secretaries of the Military Departments, Subj: Implementation of the Repeal of Don’t Ask, Don’t Tell, 27 Apr 2011.
- <sup>48</sup> Clifford Stanley, under secretary of defense for personnel and readiness, “Matrix of Defense Memorandum, April 27, 2011,” attachment to “Read Ahead for Secretary Gates: Don’t Ask Don’t Tell Repeal Implementation Update,” 20 May 2011.
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<sup>51</sup> Clifford L. Stanley, memorandum to secretaries of the military departments, Subj: "Injunction Regarding 'Don't Ask, Don't Tell,'" 8 Jul 2011.

<sup>52</sup> Carol J. Williams, "Ban on Enforcement of 'Don't Ask, Don't Tell' Policy Is Suspended," *Los Angeles Times*, 16 Jul 2011.

<sup>53</sup> John M. McHugh, SecArmy, memo to USD-PR, Subj: Certification Assessment for the Repeal of DADT, 6 Jul 2011; Ray Mabus, SecNav, memo to USD-PR, Subj: Communique of Preparedness for Repeal of DADT, 7 Jul 2011; Michael B. Donley, SecAirForce, memo to USD-PR, Subj: Preparedness for Repeal of 10 USC 654, 7 Jul 2011; Gen Martin E. Dempsey, Army COS, memo to DJS, Subj: Assessment of Preparedness for Implementation of the Repeal of DADT, 6 July 2011; Adm Gary Roughead, CNO, memo to CJCS, Subj: Assessment of the U.S. Navy's Preparedness for Repeal of 10 USD 654, 1 Jul 2011; Gen James F. Amos, Commandant MC, memo to SecNav, Subj: Communique of Preparedness for the Repeal of 10 USC 654, 5 Jul 2011; Gen Norton A. Schwartz, Air Force COS, memo to CJCS, Subj: Preparedness for Repeal of 10 USC 654, 6 Jul 2011; Adm Robert J. Papp, Commandant USCG, memo to CJCS, 6 Jul 2011; Gen Carter F. Ham, USA, CDR AFCOM, memo to DJS, Subj: US AFCOM's Certification for the Repeal of DADT, 7 Jul 2011; Gen James N. Mattis, USMC, CDR CENTCOM, memo to USD-PR, Subj: USCENTCOM Assessment for Repeal of DADT, 8 Jul 2011; Adm James G. Stavridis, USN, CDR EUCOM, memo to DJS, Subj: EUCOM's Certification for the Repeal of DADT, 7 Jul 2011; Adm James A. Winnefeld, USN, CDR NORTHCOM, memo to DJS, Subj: Certification Document for the Repeal of DADT, 5 Jul 2011; Adm Robert F. Willard, USN, CDR PACOM, memo to DJS, Subj: Certification Document for the Repeal of DADT, 7 Jul 2011; Gen Douglas M. Fraser, USAF, CDR SOUTHCOM, memo to DJS, Subj: Communique of Preparedness for DADT Repeal, 5 Jul 2011; Gen Raymond T. Odierno, USA, CRD JFCOM, memo to DJS, Subj: DADT Communique of Preparedness, 7 Jul 2011; Adm Eric T. Olson, USN, CDR SOCOM, memo to DJS, Subj: USSOCOM Certification for the Repeal of DADT, 8 Jul 2011; Gen C. Robert Kehler, USAF, CDR STRATCOM, memo to DJS, Subj: Certification Document for the Repeal of DADT, 8 Jul 2011; Gen Duncan J. McNabb, USAF, CDR TRANSCOM, memo to DJS, Subj: Certification Document for the Repeal of DADT, 7 Jul 2011.

<sup>54</sup> Gen James N. Mattis, USMC, commander of Central Command, memorandum to under secretary of defense for personnel and readiness, Subj: USCENTCOM Assessment for Repeal of DADT, 8 Jul 2011.

<sup>55</sup> Ibid.

<sup>56</sup> Clifford L. Stanley, under secretary of defense for personnel and readiness, memorandum to Leon E. Panetta, Secretary of Defense, Subj: Communiques of Preparedness for the Repeal of DADT, 12 Jul 2011.

<sup>57</sup> Jeh Charles Johnson, DOD general counsel, memorandum to Leon E. Panetta, Secretary of Defense, DADT Repeal Certification, 12 Jul 2011.

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<sup>62</sup> Ibid.

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<sup>64</sup> DOD, Defense Department Special Briefing from the Pentagon, transcript, 22 Jul 2011.

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- <sup>66</sup> Barack Obama, “Statement by the President on Certification of Repeal of Don’t Ask, Don’t Tell,” White House Office of the Press Secretary, 22 Jul 2011.
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- <sup>68</sup> Barack Obama, Letters to John McCain and Carl Levin, chairman and ranking member of the SASC, and to Howard P. McKeon and Adam Smith, chairman and ranking member of the HASC, 22 Jul 2010.
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- <sup>70</sup> Gates, *Duty*, 298.
- <sup>71</sup> DOD, “News Briefing with Secretary Panetta and Adm. Mullen from the Pentagon,” news transcript, 20 Sep 2011.
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- <sup>73</sup> Clifford L. Stanley, under secretary of defense for personnel and readiness, memorandum to Defense civilian and military leaders, Subj: Repeal of “Don’t Ask, Don’t Tell,” 20 Sep 2011.
- <sup>74</sup> DOD, “DOD Announces Departure of Undersecretary Clifford Stanley,” news release, 27 Oct 2011.
- <sup>75</sup> Robert Burns, “Marine Commandant: End of Gay Ban a Non-Event,” *Star Tribune*, 28 Nov 2011; Robert Burns, “HuffPost Gay Voices: Don’t Ask Don’t Tell: Top Marine Says Service Embracing Gay Ban Repeal,” Huffington Post, 28 Nov 2011
- <sup>76</sup> Burns, “Marine Commandant”; Burns, “HuffPost Gay Voices.”
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- <sup>79</sup> Tony Perry, “Gay Military Personnel Can Wear Uniforms in Parade,” *Los Angeles Times*, 20 June 2012.
- <sup>80</sup> Jennifer Levitz, “ROTC Returns to Harvard: Armed Services Training Is Back after Exiting Some Schools over Vietnam War,” *Wall Street Journal*, 11 Sep 2012.
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- <sup>82</sup> Gen Carter F. Ham, commanding general of Africa Command, memorandum for under secretary of defense for personnel and readiness, Subj: Repeal of Don’t Ask/Don’t Tell (DADT), 26 Nov 2012.
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## CONCLUSION

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When President Barack Obama signed the Don't Ask, Don't Tell Repeal Act of 2010 into law, he concluded three decades of debate over the legitimacy of the government's long-standing proscription against homosexuals serving in the US military. While civilian leaders from all three branches of government would ultimately decide the matter—twice revising the controversial policy before eventually ending it—the JCS contributed their best military advice throughout the period. Their tendency to caution against a more inclusive policy that might hinder the military's effectiveness sat well with two Republican administrations satisfied with the status quo, but not with the three Democrat administrations intent on revising or eliminating the restriction. Taking an oppositional or even neutral stance toward such administration initiatives impeded the Joint Chiefs' ability to influence policy, while a more collaborative approach enhanced interaction and provided a measure of control. The practice of employing studies to consider the implication of proposed changes also served to distance the White House, Defense Department, and JCS from controversial policy decisions.

The first of the two revisions occurred in January 1981, during the final days of the Carter administration. Inconsistencies in the Services' policies toward homosexuality and how they were administrated had made it harder for the military to sustain the ban in court. Chairman David Jones and the JCS acknowledged the need to clarify and consolidate the government's position but cautioned against updating administrative procedures by introducing more benevolent discharge proceedings. When they attempted to outwait the transition to a new administration, departing Deputy Secretary of Defense William Claytor issued revised guidelines without their support.<sup>1</sup> The revision stressed that homosexuality was itself incompatible with military service and that the presence of homosexuals, regardless of conduct, would undermine military efficiency.

The second revision began in January 1993, during the first days of the Clinton administration. Chairman Colin Powell and the JCS advised against any change to the policy that might jeopardize military efficiency. Wary that federal courts might declare the exclusion unconstitutional, they consented to a tentative compromise that would overlook gender status but continued to oppose open homosexuality and illicit sexual conduct (referred to as Don't Ask,

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Don't Tell). When Secretary of Defense Les Aspin revealed the new policy on 19 July, it asserted that one could refute the presumption that openly gay servicemembers would necessarily engage in illicit sexual conduct—which implied that homosexuals could serve openly without violating the law if they remained celibate—and narrowed the circumstances under which inquiries into an individual's sexual orientation could be initiated (known as Don't Ask, Don't Tell, Don't Pursue).<sup>2</sup> Congress, concerned that liberal interpretation of the policy might complicate its administration, amended the FY 94 NDAA to mandate the exclusion of “persons who demonstrate a propensity or intent to engage in homosexual acts.” President Bill Clinton signed Title 10 USC § 654, “Policy concerning homosexuality in the armed forces,” into law on 30 November, and Secretary Aspin issued a revision to the directive governing qualification standards on 21 December, which was to take effect on 5 February 1994.<sup>3</sup> Although later criticized as a half measure, the compromise clearly established that homosexuals were fit for military service and that the problem with their presence lay in the potential intolerance of their heterosexual peers.

On 27 January 2010, President Obama announced during his State of the Union address that he intended to repeal the discriminatory law. A week later, Secretary of Defense Robert Gates and Chairman Michael Mullen appeared before the SASC. Gates observed that the decision to repeal the law had been made and then promised a study to assess the risks, ultimately resulting in a blueprint for implementation. Mullen surprised many by choosing to offer his personal, as opposed to professional, opinion during his opening statement. He opined that allowing gay and lesbian personnel to serve openly was an ethical imperative and privately hoped that his candor would convince Congress that the military was capable of coordinating implementation independently. Their comments frustrated the Service Chiefs, who remained divided on the issue, because it placed them at odds with the Secretary and Chairman. Gates encouraged them to voice their concerns but advised that they could avoid a public confrontation by waiting to base their decisions on the study's findings.

That May, as DOD's Comprehensive Review Working Group collected and assessed data on the military's ability to accept open homosexuality, Democrats moved to repeal 10 USC § 654 by amending the FY11 NDAA. Obama reluctantly agreed to a compromise that required certification of the military's preparedness before implementation could take place, with Secretary Gates and Admiral Mullen following suit. The Service Chiefs, however, responded unanimously to Senator John McCain's request for their views, stressing the importance of keeping faith with the force and allowing for the study's completion before deciding the matter. After passing the House, a Senate filibuster halted the amendment's progress indefinitely.

Gates's “worst fears” came to pass that September, when the Central District Court of California ruled that DADT violated the US Constitution's

## **Conclusion**

guarantee of due process and free speech, and subsequently issued an injunction barring further enforcement of the policy. The injunction was short-lived, however, when the Ninth Circuit Court, with the Supreme Court's later concurrence, granted an indefinite stay to avoid the prospect of a disorderly policy transition. Meanwhile, the study group's report was leaked to the public shortly before its planned release at the end of November. It indicated that Army combat units and the Marine Corps tended to believe that repeal would lessen effectiveness, while 70 percent of the remaining servicemembers and spouses thought it would have a neutral or positive effect on cohesion. An independent review panel assessed the risk posed by repeal to be low.

On 1 December, Gates and Mullen defended the report's findings before the SASC, reiterating that repeal presented little risk. The remaining members of the JCS appeared the following day. The Vice Chairman, Chief of Naval Operations, and Commandant of the Coast Guard were ready to proceed with repeal, while the Chief of Staff of the Air Force advised delaying implementation until 2012, by which time, according to plan, the preponderance of forces would have been withdrawn from Afghanistan and Iraq. The Chief of Staff of the Army and Commandant of the Marine Corps recommended waiting until the cessation of hostilities before moving ahead with the new policy. Despite their differences of opinion, the JCS affirmed their readiness to lead the change should Congress choose to repeal the law.

In mid-December, unable to bring the FY11 NDAA to the Senate floor for discussion, Democrats resorted to several stand-alone bills to end 10 USC §654. When those too failed, they substituted the repeal language for that formerly contained in an amendment to the Small Business Act that had already reached the conference stage and was thus immune to a Republican filibuster. The Senate voted overwhelmingly in favor of repeal on 18 December, and the measure became PL 111-321 four days later. Preparations for the change proceeded without incident that winter and spring. In July, Chairman Mullen, Secretary of Defense Leon Panetta, and President Obama certified that the military was read to proceed, and on 20 September 2011 the ban on homosexuality finally ended. A year later, Chairman Martin Dempsey reported that the more inclusive policy had had "no impact [on] military readiness."<sup>4</sup>

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<sup>1</sup> DOD Directive 1332.14, Enlisted Administrative Separations, Enclosure 8, Homosexual Conduct (16 Jan 1981).

<sup>2</sup> Aspin memo, 19 Jul 1993.

<sup>3</sup> DOD Directive 1304.26 Qualification Standards for Enlistment, Appointment and Induction (21 Dec 1993).

<sup>4</sup> Dempsey memo, 4 Jan 2013.

## *Conclusion*

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## Acronyms

ARPAC	US Army Pacific
CAC	Common Access Card
CAG	Chairman's Action Group
CENTCOM	Central Command
CJCS	Chairman of the Joint Chiefs of Staff
CNATT	Chairman's New Administration Transition Team
CNO	Chief of Naval Operations
CRWG	Comprehensive Review Working Group
DADT	Don't Ask, Don't Tell policy
DJS	Director of the Joint Staff
DOD	Department of Defense
DOJ	Department of Justice
DOMA	Defense of Marriage Act
DSLCL	Defense Senior Leadership Conference
FGOM	Flag & General Officers for the Military
FY	Fiscal Year
GAO	Government Accountability Office
H.R.	House Resolution
HASC	House Armed Services Committee
HRC	Human Rights Campaign
IFF	Intermediate Future Force
JCS	Joint Chiefs of Staff
LGBT	lesbian, gay, bisexual, transgender
MWG	Military Working Group
NDAA	National Defense Authorization Act
OSD	Office of the Secretary of Defense
RIT	repeal implementation team
ROTC	Reserve Officers' Training Corps
S.	Senate
SASC	Senate Armed Services Committee
Service Secretaries	Secretaries of the Army, Navy, and Air Force
SLDN	Servicemembers Legal Defense Network
U.S.C.	United States Code
UCMJ	Uniform Code of Military Justice
VCJCS	Vice Chairman of the Joint Chiefs of Staff

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# Appendix 1

## Key Participants

### January 1981

#### **President of the United States**

James E. “Jimmy” Carter Jr.

#### **Secretary of Defense**

Harold Brown  
(21 Jan 1977–20 Jan 1981)

#### **Deputy Secretary of Defense**

William G. Claytor Jr.  
(24 Aug 1979–16 Jan 1981)

#### **Chairman of the Joint Chiefs of Staff**

General David C. Jones, USAF  
(21 Jun 1978–18 Jun 1982)

#### **Chief of Naval Operations**

Admiral Thomas B. Hayward  
(1 Jul 1978–30 Jun 1982)

#### **Chief of Staff the Air Force**

General Lew Allen Jr.  
(1 Jul 1978–30 Jun 1982)

#### **Chief of Staff the Army**

General Edward C. Meyer  
(22 Jun 1979–21 Jun 1983)

#### **Commandant of the Marine Corps**

General Robert H. Barrow  
(1 Jul 1979–30 Jun 1983)

### January 1993–February 1994

#### **President of the United States**

William J. “Bill” Clinton

#### **Secretary of Defense**

Leslie “Les” Aspin Jr.  
(20 Jan 1993–3 Feb 1994)

William J. Perry  
(3 Feb 1994–24 Jan 1997)

#### **Chairman of the Joint Chiefs of Staff**

General Collin L. Powell, USA  
(1 Oct 1989–30 Sep 93)  
General John M. Shalikashvili, USA  
(25 Oct 1993–30 Sep 1997)

#### **Vice Chairman of the Joint Chiefs of Staff**

Admiral David E. Jeremiah, USN  
(1 Mar 1990–28 Feb 1994)  
Admiral William A. Owens, USN  
(1 Mar 1994–29 Feb 1996)

#### **Chief of Naval Operations**

Admiral Frank B. Kelso II  
(20 June 1990–23 Apr 1994)

#### **Chief of Staff of the Air Force**

General Merrill A. McPeak  
(30 Oct 1990–25 Oct 1994)

## **Appendix 1**

**Chief of Staff the Army**  
General Gordon R. Sullivan  
(21 Jun 1991–20 Jun 1995)

**Commandant of the Marine Corps**  
General Carl E. Mundy Jr.  
(1 Jul 1991–30 Jun 1995)

### **December 2009–September 2011**

#### **President of the United States**

Barack H. Obama

#### **Secretary of Defense**

Robert M. Gates  
(18 Dec 2006–30 Jun 2011)

Leon E. Panetta  
(1 Jul 2011–26 Feb 2013)

#### **Deputy Secretary of Defense**

William J. Lynn III  
(12 Feb 2009–5 Oct 2011)

#### **Special Assistant to Secretary of Defense**

Robert S. Rangel  
(2005–2011)

#### **Under Secretary of Defense for Personnel and Readiness**

Clifford L. Stanley  
(9 Feb 2009–27 Oct 2011)

#### **General Counsel Department of Defense**

Jeh C. Johnson  
(10 Feb 2009–31 Dec 2012)

#### **Chairman of the Joint Chiefs of Staff**

Admiral Michael G. Mullen, USN  
(1 Oct 2007–30 Sep 2011)

#### **Vice Chairman of the Joint Chiefs of Staff**

General James E. Cartwright, USMC  
(31 Aug 2007–3 Aug 2011)

#### **Commandant of the Marine Corps**

General James T. Conway  
(13 Nov 2006–22 Oct 2010)

General James F. Amos  
(22 Oct 2010–17 Oct 2014)

#### **Chief of Staff of the Army**

General George W. Casey Jr.  
(10 Apr 2007–10 Apr 2011)

General Martin E. Dempsey  
(11 Apr 2011–7 Sep 2011)

#### **Chief of Staff the Air Force**

General Norton A. Schwartz  
(12 Aug 2008–10 Aug 2012)

#### **Chief of Naval Operations**

Admiral Gary Roughead  
(29 Sep 2007–23 Sep 2011)

#### **Commandant of the Coast Guard**

Admiral Thad W. Allen  
(25 May 2006–25 May 2010)

Admiral Robert J. Papp Jr.  
(25 May 2010–30 May 2014)

## **Appendix 1**

### **Cochairs**

#### **Defense Comprehensive Review Working Group**

Jeh C. Johnson, General Counsel  
General Carter F. Ham, USA

### **Senate Majority Leader**

Harry M. Reid  
(3 Jan 2007–3 Jan 2015)

### **Chairman**

#### **Senate Armed Services Committee**

Carl M. Levin  
(3 Jan 2007–3 Jan 2015)

### **Ranking Member**

#### **Senate Armed Services Committee**

John S. McCain III  
(3 Jan 2007–3 Jan 2013)

### **House Speaker**

Nancy P. D. Pelosi  
(4 Jan 2007–3 Jan 2011)  
John A. Boehner  
(5 Jan 2011–29 Oct 2015)

### **Chairman**

#### **House Armed Services Committee**

Isaac N. “Ike” Skelton  
(4 Jan 2007–3 Jan 2011)  
Howard P. McKeon  
(3 Jan 2011–3 Jan 2015)

### **Ranking Member**

#### **House Armed Services Committee**

Howard P. McKeon  
(9 Jun 2009–3 Jan 2011)  
David A. Smith  
(3 Jan 2011–Present)

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**Appendix 2**  
**Memorandum from Under Secretary of Defense Claytor to CJCS  
Jones and the Military Secretaries**

THE DEPUTY SECRETARY OF DEFENSE  
WASHINGTON, D.C. 20301

JAN 16 1981

MEMORANDUM FOR SECRETARY OF THE ARMY  
SECRETARY OF THE NAVY  
SECRETARY OF THE AIR FORCE  
CHAIRMAN, JOINT CHIEFS OF STAFF

I am promulgating today a change to DoD Directive 1332 .14<sup>1</sup> (Enlisted Administrative Separations), including a completely new Enclosure 8 on Homosexuality.

The revision contains no change in policy. It reaffirms that homosexuality is incompatible with military service. In order to provide workable policies and procedures for all the military departments, however, and to provide the strongest possible basis for supporting these policies and procedures in court, it is important that applicable provisions be both clear and uniform.

Under heretofore existing DoD Directives, discharge of homosexuals was not mandatory. The revision, however, makes discharge mandatory for admitted homosexuals and establishes very limited grounds for retention in the event a member who claims not to be a homosexual solicits, attempts or participates in a homosexual act or acts. In order to justify retention under these circumstances the member must prove affirmatively that the conduct was a departure from his or her usual behavior, that it is unlikely, to reoccur, that it was not accomplished by force or coercion, that the member is not a homosexual or bisexual, and that his retention under the circumstances would not adversely affect discipline, good order or morale. The purpose is to permit retention where it is shown, example, that the act occurred solely as a result of such matters as immaturity, undue influence, intoxication, or a desire to avoid or terminate military service, and other required findings can be made. This means, of course, that the case of multiple acts, the burden of justifying retention will be even more difficult. The net result of the new provisions will be a clarification and strengthening of DoD policy, with safeguards that should enable the department to sustain its position in the courts.

I have personally worked on this problem from time to time during most of the four years I have served in the Department. I firmly believe that the most important aspect of our policy is the ability to keep homosexuals out of the service and to separate them promptly in the event they are in fact enlisted or commissioned. The revised procedures accordingly make it clear: that mere fact of homosexuality does not provide a basis for processing for Misconduct, but that if homosexual acts occur in

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<sup>1</sup> Distributed separately, on file in Joint Secretariat.

## **Appendix 2**

circumstances where, for example, comparable heterosexual acts could have constituted Misconduct under applicable DoD or service regulations, those acts can, as in Misconduct cases, result in less than honorable discharges. In other words, while homosexuality cannot alone be grounds for a less than honorable discharge, the fact that the member is a homosexual or that the' conduct involves homosexuality cannot be used to exempt the member from disciplinary action or administrative proceedings that would otherwise be appropriate. The Directive also gives the individual services some latitude in providing for secretarial review.

Various helpful comments and suggestions about the content of these regulations have been received from the military departments, some of them conflicting. All have been given careful consideration, and as many as possible incorporated in the final regulations being promulgated herewith. I am satisfied that the Department's problems in this area can be more effectively and efficiently handled under these uniform procedures than has been possible heretofore. The military departments should promptly revise their appropriate personnel policies and procedures to conform to this revision.

*[signed W. Graham Claytor, Jr.]*

W. Graham Claytor, Jr.

**Appendix 3**  
**Enclosure 8, Homosexuality, DOD Directive 1332.14,**  
**Enlisted Administrative Separations (16 January 1981)**

1332.14 (Encl 8)  
Jan 16, 81

HOMOSEXUALITY

A. Policy. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the armed forces; to maintain the public acceptability of military service; and to prevent breaches of security.

B. Definitions. As uses in this enclosure:

1. Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.
2. Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.
3. A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

C. Basis. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this enclosure if, but only if, one or more of following approved findings is made:

1. The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:
  - a. Such conduct is a departure from the member's usual and customary behavior;
  - b. Such conduct under all the circumstances is unlikely to recur;
  - c. Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;
  - d. Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale, and

### **Appendix 3**

e. The member does not desire to engage in or intend to engage in homosexual acts.

2. The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

3. The member has married or attempted: to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

#### **D. Characterization**

1. A Discharge Under Other Than Honorable Conditions may be issued in accordance with the guidance on Misconduct found in enclosure 2, section I if there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act:

- a. By using force, coercion, or intimidation;
- b. With a person under 16 years of age;
- c. With a subordinate in circumstances that violate customary military superior-subordinate relationships;
- d. Openly in public view;
- e. For compensation:
- f. Aboard a military vessel or aircraft; or
- g. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

2. In all other cases, the character of discharge of a member separated under this provision shall reflect the character of the member's service in accordance with enclosure 4.

#### **E. Procedures**

1. Separation processing shall be initiated if there is probable cause to believe separation is warranted under section C.

2. Counseling and rehabilitation requirements are not applicable.

3. The procedural requirements of enclosure 6, section E. shall be used as applicable.

4. A member being considered for separation under this provision shall have the right to request; an Administrative Discharge Board (section V. of this Directive), subject to the following provisions:

- a. The Board shall follow the procedures authorized under section V.B.

### **Appendix 3**

of this Directive, except:

(1) If the Board finds that one or more of the circumstances authorizing separation under section C. is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described in that section.

(2) If this Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under section C. has occurred, the Board; shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

b. The Discharge Authority shall be exercised by a general court-martial convening authority or higher authority in any case which a Discharge Under Other Than Honorable Conditions is authorized. In all other cases, the Discharge Authority shall be exercised in a Special Court-Martial convening authority or higher authority. The Discharge Authority shall dispose of the case according to the following provisions:

(1) If the Board recommends retention, the Discharge Authority shall:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary concerned with a recommendation that the Secretary separate the member under the Secretary's Authority (enclosure 2, section B. 14.).

(2) If the Board recommend separation, the Discharge Authority shall:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis that

1 There is insufficient evidence to support the finding; or

2 retention is warranted under the limited circumstances in section C.

(3) If there has been a waiver of Board proceedings, the Discharge Authority shall dispose of the case in accordance with the following provisions:

(a) If the Discharge Authority determines that there is not sufficient evidence to support separation under section C., the Discharge Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Discharge Authority determines that one or more of the circumstances authorizing separation under section C. has occurred, the member shall be separated unless retention is warranted under the limited circumstances described in section C.

5. The burden of proving that retention is warranted under the limited

### **Appendix 3**

circumstances described in section C. rests with the member except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

6. Findings regarding the existence of the limited circumstances warranting a member's retention under section C. are required only if:

a. The member clearly and specifically raises such limited circumstances; or

b. The Board of Discharge Authority relies upon such circumstances to justify the member's retention.

7. Nothing in these procedures:

a. Limits the authority of the Secretary concerned to take appropriate action in the case to ensure that there has been compliance with the provisions of this enclosure;

b. Precludes retention of a member for a limited period of the time in the interests of national security as authorized by the Secretary concerned;

c. Authorizes a member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;

d. Precludes separation in appropriate circumstances for another reason set forth in enclosure 2; or

e. Precludes trial by court-martial in appropriate cases.

**Appendix 4**  
**Memorandum from Secretary of Defense Aspin to CJCS Powell  
and the Military Secretaries**

THE SECRETARY OF DEFENSE  
WASHINGTON, THE DISTRICT OF COLUMBIA  
July 19, 1993

MEMORANDUM FOR THE SECRETARY OF THE ARMY  
SECRETARY OF THE NAVY  
SECRETARY OF THE AIR FORCE  
CHAIRMAN, JOINT CHIEFS OF STAFF

SUBJECT: Policy on Homosexual Conduct in the Armed Forces

On January 29, 1993, the President directed me to review DoD policy on homosexuals in the military. The President further directed that the DoD policy be "practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our armed forces must maintain."

An extensive review was conducted. I have paid careful attention to the hearings that have been held by both the House and Senate Armed Services Committees, conferred with the Joint Chiefs and acting Secretaries of the Military Departments and considered recommendations of a working group of senior officers in the Department of Defense and those of the Rand Corporation.

The Department of Defense has long held that, as a general rule, homosexuality is incompatible with military service because it interferes with the factors critical to combat effectiveness, including unit morale, unit cohesion and individual privacy. Nevertheless, the Department of Defense also recognizes that individuals with a homosexual orientation have served with distinction in the armed services of the United States.

Therefore, it is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct. Homosexual conduct will be grounds for separation from the military services. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.

I direct the following:

Applicants for military service will not be asked or required to reveal their sexual orientation. Applicants will be informed of accession and separation policy.

Servicemembers will be separated for homosexual conduct.

Commanders and investigating agencies will not initiate inquiries or investigations solely to determine a member's sexual orientation. Servicemembers will

## **Appendix 4**

not be asked or required to reveal their sexual orientation. However, commanders will continue to initiate inquiries or investigations, as appropriate, when there is credible information that a basis for discharge or disciplinary action exists. Authority to initiate inquiries and investigations involving homosexual conduct shall be limited to commanders. Commanders will consider, in allocating scarce investigative resources, that sexual orientation is a personal and private matter. They will investigate allegations of violations of the Uniform Code of Military Justice in an even-handed manner without regard to whether the conduct alleged is heterosexual or homosexual or whether it occurs on-base or off-base. Commanders remain responsible for ensuring that investigations are conducted properly and that any abuse of authority is addressed.

The constraints of military service require servicemembers to keep certain aspects of their personal lives private for the benefit of the group. Our personnel policies will be clearly stated and implemented in accordance with due process of law.

Commanders remain responsible for maintaining good order and discipline. Harassment or violence against other servicemembers will not be tolerated.

Homosexual conduct is a homosexual act, a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

A statement by a servicemember that he or she is homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts or has a propensity or intent to do so. The servicemember has the opportunity to present evidence that he does not engage in homosexual acts and does not have a propensity or intent to do so. The evidence will be assessed by the relevant separation authority.

A homosexual act includes any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires or any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts. Sexual orientation is a sexual attraction to individuals of a particular sex.

The interim policy and administrative separation procedures that I established on February 3, 1993, will remain in effect until October 1, 1993. Secretaries of the Military Departments and responsible officials within the Office of the Secretary of Defense shall, by October 1, 1993, take such actions as may be necessary to carry out the purposes of this directive. Secretaries of the Military Departments will ensure that all members of the armed forces are aware of their specific responsibilities in carrying out this new policy. This memorandum creates no substantive or procedural rights. Any changes to existing policies shall be prospective only.

Policy Guidelines are attached.

cc: Secretary of Transportation

*[signed] Les Aspin*

**Appendix 5**  
**Memorandum from CJCS Dempsey to Secretary of Defense**  
**Panetta**

**CHAIRMAN OF THE JOINT CHIEFS OF STAFF**  
**WASHINGTON, D.C. 20318-9999**

INFO MEMO

CM-0011-13  
4 January 2013

FOR: SECRETARY OF DEFENSE

FROM: General Martin E. Dempsey, CJCS [*signed Martin E. Dempsey 18*]

SUBJECT: Assessment of the Implementation of the Repeal of "Don't Ask, Don't Tell."

Following the 1-year anniversary of repeal, the Combatant Commanders have provided their assessments of "Don't Ask, Don't Tell" (DADT) and report no impact to military readiness, effectiveness, or unit cohesion of the Joint Force. I concur with their assessments, which were forwarded as requested under separate cover.

- The Combatant Commands spent the past year engaged in a follow-on review of the repeal of DADT. Elements of that process included monthly reports, surveys, and data on substantiated incidents related to sexual orientation. Based on the views of the Combatant Commanders over the past year, our success clearly is due to the comprehensive pre-repeal training program, the discipline of our Service members, and the continued close monitoring of the repeal and enforcement by our military leaders at all levels.
- We will continue to monitor the trends and perspectives of our Service members regarding the repeal of "Don't Ask, Don't Tell" and any potential impact on the force.
- Please note the attached memorandum from General Carter Ham (TAB A).

COORDINATION: NONE

Attachment: As stated

Prepared By: Rear Admiral Dwight D. Shepherd, U.S. Navy; Director, J-1; 703-693-8717

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