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# The Puzzling Persistence of "Don't Ask, Don't Tell"

Elizabeth D. King

*University of Pennsylvania*, [eliking@sas.upenn.edu](mailto:eliking@sas.upenn.edu)

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**THE PUZZLING PERSISTENCE OF “DON’T ASK, DON’T TELL”**

Elizabeth King  
Advisor: Rogers Smith

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## INTRODUCTION

In 1993 President Clinton signed into Public Law 103-160 the statute enacting Sec.654. *Policy concerning homosexuality in the armed forces.*<sup>1</sup> Known as “Don’t Ask, Don’t Tell,” it became the first federal law to prohibit gays and lesbians from serving in the United States military officially. Still in place today, ‘Don’t Ask, Don’t Tell’ not only prevents service members from engaging in homosexual or bisexual acts while in the armed services, but also from disclosing their sexual orientation. Unlike the Pentagon’s previous policy, however, “Don’t Ask, Don’t Tell” acknowledges that sexual orientation is not a bar to military service, and also proscribes military leaders from investigating an individual’s sexuality without substantiated proof. Viewed as a “compromise” to Clinton’s original campaign pledge to lift the ban on homosexuals, the bill underwent six months of prolonged hearings and deliberation until Congress finally enacted legislation. During its interim period, “Don’t Ask, Don’t Tell” generated a great deal of controversy and fervor among not only the military and political elite, but also the general public. Concerns arose regarding the effects that an “open” policy would have on unit cohesion and individual privacy in the military. People feared it would increase military violence and decrease morale. Homophobic sentiments colored much of the rhetoric. Finally, on November 30, 1993, Clinton signed “Don’t Ask, Don’t Tell” into law. It is the only law

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<sup>1</sup> The full text of “Don’t Ask, Don’t Tell” (Sec. 654. Policy concerning homosexuality in the armed forces) is provided in the addendum.

in the United States that permits the firing of an American simply for coming out as gay, lesbian, or bisexual.

The legislation has had a profound impact on the United States military. Since its inception, over 12,600 service members have been discharged from all branches of the military—including 800 military personnel with “mission critical skills” such as pilots, combat engineers, and linguists.<sup>2</sup> The enormous financial cost of “Don’t Ask, Don’t Tell” is staggering: the General Accounting Office (GAO) estimated from 1994-2003 the Department of Defense spent 190 million to implement the policy. A later study conducted by the Palm Center (a think tank at the University of California, Santa Barbara) reevaluated the number at \$363.8 million. Under both studies, this amounts to approximately \$20,000 per discharged service member.<sup>3</sup> Moreover, “Don’t Ask, Don’t Tell” is inherently discriminatory and hypocritical. It forces individuals to live a life of deception and anxiety in order to “honor and defend” a country which then refuses to acknowledge their rights. On July 23, 2008, the House’s Military Personnel Subcommittee held the first congressional hearing since the policy’s implementation to consider whether, fifteen years later, “Don’t Ask, Don’t Tell” still has relevance or necessity. The witness testimony and discussion focused on issues of military readiness, morale, and unit cohesion. The majority sentiment among the present congressmen revealed strong dissatisfaction over the current policy.<sup>4</sup>

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<sup>2</sup> Korb, Lawrence J. "The Costs of Don't Ask, Don't Tell." Center for American Progress.  
<<http://www.americanprogress.org/>>

<sup>3</sup> *ibid.*

<sup>4</sup> U.S. House Armed Services Committee. *Don't Ask, Don't Tell Hearing before the Subcommittee of Military Personnel for the House Armed Services Committee*. 110. Congress, July 23, 2008.

The negative response towards “Don’t Ask, Don’t Tell” comes as little surprise when considering the policy’s general reception among most Americans. Over the past several years, five independent polling organizations (from CNN to Fox to Pew) have administered eight national surveys asking the public whether or not gay people who are open about their sexual orientation should be allowed to service in the military. In every poll, a majority (between 58-79%) support open service for gays and lesbians.<sup>5</sup> In the summer of 2008, a study conducted by ABC/Washington Post found 75% of Americans in favor of open service. This support was widespread with 64% of Republicans also in favor, and even 57% of evangelical Protestants as well.<sup>6</sup> Based on the data, it appears clear that “Don’t Ask, Don’t Tell” no longer aligns with public opinion. In addition, while the military has historically resisted overturning the ban, former high-ranking officials have recently called for a reexamination of the policy. Finally, “Don’t Ask, Don’t Tell” attracts little favorable media attention; most journalists and OP-Ed contributors overtly criticize the policy as discriminatory, outmoded, and a national embarrassment.

From an international perspective, the legislation seems outdated and regressive when compared to the military policies of other Westernized nations. More than twenty of the twenty-six countries that participate militarily in NATO allow homosexuals to serve openly in the armed services. Canada, Australia and Great Britain (three nations culturally similar to the United States) all permit gays and lesbians to serve.<sup>7</sup>

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<sup>5</sup> Belkin, Aaron. "'Don't Ask, Don't Tell': Does the Gay Ban Undermine the Military's Reputation?" *Armed Forces & Society* 34 (2008): 276-291. In EBSCO[database online], 278.

<sup>6</sup> Korb, Lawrence J. "The Costs of Don't Ask, Don't Tell."

<sup>7</sup> Embser-Herbert, Melissa Sheridan. *The U.S. Military's Don't Ask, Don't Tell" policy : a reference handbook*. Westport, Conn: Praeger Security International, 1997, 60.

Furthermore, American forces successfully fought alongside British troops in Iraq and Afghanistan -- even though Great Britain had previously ended their military ban in 2000. Finally, the gay rights movement has made considerable progress in America since the policy's enactment. One views this progression not from favorable court decisions, but also from the legal recognition of same-sex marriage in Massachusetts and Connecticut.

When taking all of this into consideration, an interesting puzzle emerges. What explains the persistence of "Don't Ask, Don't Tell" in light of the above factors? Why does the United States continue to preserve a discriminatory, expensive, outdated policy that is inconsistent with popular opinion and the military guidelines of other similar nations? Although the July hearing signals a new willingness among legislators to address the issue, it also raises the question as to why even a hearing took so long to occur.

To answer these questions, one must consider the possible "forces" currently locking in "Don't Ask, Don't Tell." This thesis analyzes four major sources of resistance sustaining the ban. In doing so, the examination reveals that the significance of these forces on "Don't Ask, Don't Tell" has varied over the course of the policy's duration, resulting from not only from their independent strengths as sources of opposition, but also from their relative importance compared to other forces shaping the issue.

Chapter one studies the role of the Republican Party's hostility towards gay rights and its rise to preeminent power in Washington after the policy's implementation. During this period of Republican dominance in Congress (1994-2006), the GOP majority, influenced by their Christian Right constituency, ensured an intense resistance to any action promoting gay rights. Even when the Party's reign ended and Congress could



proceed more proactively on these initiatives, the presence of a socially conservative executive and knowledge of his Presidential veto provided a continued barrier to a successful legislative repeal.

Chapter two studies the Pentagon's commitment to "Don't Ask, Don't Tell" as a result of the policy's acquired bureaucratic inertia. It then examines the extent to which the Department influenced policymakers on the issue. Overall, while bureaucratic inertia provides a compelling argument for the Pentagon's allegiance to "Don't Ask, Don't Tell," this feature of the military does not persuasively explain the policy's inertia as law. In consideration of more forceful factors at play, at the most the Pentagon served as a subsidiary force in sustaining the policy.

Chapter three considers the impact of the military's opposition using two frameworks. First, an account of the military leadership's active resistance reveals the special importance of this opposition in the original debates. Throughout the policy's subsequent duration, the aversion of the military brass also clearly stood in the way of change, but given the military's subordination to civilian authorities, it never served as the chief explanation for the ban's persistence. But second, the military's "passive" resistance contributed to failures to bring about policy changes via the judiciary. The courts' historical deference to military judgment frustrated numerous attempts challenging "Don't Ask, Don't Tell." Because the congressional climate was not propitious to change, the judiciary seemed the most promising avenue for the policy's opponents; but this deference prevented the policy's judicial invalidation. Once the Democrats assumed power, the emphasis laid on the courts to exact change on the military's policy decreased.

Chapter four traces the commitment and involvement of the United States in the war on terror. Ironically, even as the conflict in Iraq highlighted inherent flaws of “Don’t Ask, Don’t Tell,” in later years, it provided one of the most compelling forces against the ban’s reversal. The war took priority over other matters relating to the military, and also clogged the agenda of the House Subcommittee on Military Personnel, the locale of the 1993 debate on gays in the military. Moreover, fears that the lifting the ban would impose a “social experiment” with unforeseen consequences on the troops provided continuing justification for sustaining the legislation, even as previous arguments held less potency.

Finally, Chapter five considers the future of “Don’t Ask, Don’t Tell” under the Obama administration. Obama pledged to revoke the military’s policy, and most factors would suggest this outcome. At the same time, new forces of potential resistance have emerged. The impact of current economic crisis on the President and Congress is arguably working against the initiation of change.

From this examination, the thesis concludes that while multiple factors contributed to the persistence of the policy, these forces exerted shifting levels of influence over time. The leading arguments in sustaining the policy differed at distinct periods in the legislation’s history. Indeed, because initially public support for gay and lesbian service in the military was at best highly divided, the real puzzle behind “Don’t Ask, Don’t Tell” only emerges in the later years of the Bush administration, when the ban persisted although many factors had come to favor its demise. Prior to that period, the forces supporting an end to the end clearly could not compete against the heavier sources of resistance. But even as some of the older sources of opposition such as hostile public

opinion and entrenched conservative political power waned, new barriers have become more prominent, most notably the continuing strains on the military and the urgency of domestic economic problems. Repeal of the policy seems to require a remarkably serendipitous conjunction of favorable factors outweighing any outstanding sources of opposition, and though change is likely to come in the long run, it remains uncertain how soon that conjunction will be achieved.

## CHAPTER ONE

### Politics and Partisanship in Washington: The Power of the Republican Party

While attending a Q&A session at Harvard University's Kennedy School of Government in 1991, Presidential candidate Bill Clinton responded to a question regarding the military's discriminatory policy on homosexuals. He stated, "I think people who are gay...should be given the opportunity to serve their country."<sup>8</sup> Although a southern governor with no previous record on gay policies, Clinton was the first major party Presidential nominee to court the gay and lesbian vote actively. In the beginning, his stance on gays in the military arguably conferred political benefits: gay and lesbian groups raised almost \$4 million dollars for him. According to some reports on the election, one in every seven votes for Clinton was cast by a homosexual person.<sup>9</sup> Although Clinton reiterated his pledge in three separate speeches over the course of his campaign, the controversy escalated following the election.<sup>10</sup> Two days after his victory, the President-elect affirmed his intention to "lift the ban," despite the pleas of his political

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<sup>8</sup> Embser-Herbert, 8

<sup>9</sup> "1993 KEY SENATE VOTE 7: Gays in the Military." *CQ Weekly Online*, December 18, 1993.

<sup>10</sup> *ibid.*

advisors to drop the issue—at least until the end of the transition phrase.<sup>11</sup> Ignoring their advice, the new Executive held fast to his promise to end the military’s discrimination of homosexuals. In hindsight, Clinton’s decision to follow through on this promise would not only prove unsuccessful, it would unleash a political firestorm haunting him for the duration of his two terms in the Oval Office.

Theoretically, Clinton *could* have disregarded the early opposition from congressmen and the military brass to his proposal. Following in the footsteps of Truman, who desegregated the armed services by an Executive Order in 1948, Clinton might have signed an antidiscrimination order “with the stroke of a pen.” Instead, this initial resistance led the President to announce an interim compromise for six months allowing the Pentagon to study the issue and to provide Congress an opportunity to consider the legislation as well. The protracted hearings in both chambers provided a venue for the opposition to raise their concerns and arguments against allowing gays and lesbians in the military. During the six-month period, these diverse opponents, ranging from legislators to military men to religious activists, launched an impressive and successful attack, ultimately resulting in a “revised” ban, which according to Senator Dan Coates (R-IN), a member of the Senate Armed Services Committee, was “98 percent of the old policy.”<sup>12</sup> Furthermore, several of these opposing forces continued to influence policymakers many years after these first congressional hearings, and thus played an important part in the continuance of “don’t ask, don’t tell” as a federal law.

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<sup>11</sup> Korb, Lawrence J. 1996. The President, the Congress, and the Pentagon: Obstacles to Implementing the “Don’t Ask, Don’t Tell Policy.” In *Out of Force*, edited by Gregory M. Herek, Jared B. Jobe, Ralph M. Carney. Chicago: University of Chicago Press, 293.

<sup>12</sup> Korb, Lawrence J, The President, the Congress, and the Pentagon , 295.

To be sure, one cannot understand the persistence of the military's policy on homosexuals without considering the corresponding role of politics and partisanship in Washington. "Don't Ask, Don't Tell" has endured significant changes in the political landscape: two very different Presidential administrations, drastic swings in the congressional balance of power, and substantial shifts in public opinion. Not surprisingly then, examining the ban's history over the years reveals the changing significance of different political forces and phenomena in resisting the ban's repeal. This chapter considers the role of both the President and Congress in sustaining "Don't Ask, Don't Tell." In particular, it seeks to identify which forces most affected these respective political institutions in the overall preservation of the military's exclusionary legislation. In this light, the Republican Party, especially due to the influence of its anti-homosexual, religiously conservative Christian constituency has acted as one of the greatest sources of political resistance to a renewed policy. However, while the "Christian Right" has played an essential role in preventing gays and lesbians from serving openly in the military, this movement stands alongside other political factors keeping the ban in place. The following thus provides a more thorough explanation of how the Republican Party's religious right constituency impacted "Don't Ask, Don't Tell," as well as the other political influences and phenomena contributing to the policy's inertia in Congress, especially as GOP power later eroded.

As examining the political environment and congressional landscape during the Clinton years (January 20, 1993-January 20, 2001) reveals, neither the implementation nor persistence of "Don't Ask, Don't Tell" presents much of a puzzle. Certainly, Clinton

did not foresee the intense hostility that would mount against his gay rights campaign pledge.<sup>13</sup> Once he embarked on this objective however, the plan to revoke the military's gay ban faced widespread opposition -- and not only from the expected conservative Republicans and the military brass. While his initiative to reverse the ban did receive considerable support among his Party's most liberal legislators, some of the more socially conservative and influential Democrats did *not* endorse the proposed change. For example, Senator Sam Nunn (D-GA) (known as "Mr. Defense" in Congress for his knowledge on defensive issues and for his position as chairman of the Senate Armed Services Committee) strongly opposed a policy allowing homosexuals to serve. In fact, Nunn warned Clinton from the beginning that if he tried to lift the prohibition via executive order, Congress would retaliate and enact a law repealing the order in an amendment to the 1994 family leave bill.<sup>14</sup>

The prospect of gays in the Army did not generate enthusiastic support among many Americans either. Most of the individuals who had voted for Clinton and also embraced his liberal vision did not want him to focus on the initiative so early into his presidency.<sup>15</sup> Further, a great deal of Americans fundamentally disagreed with the idea, which affected the response of elected officials. "I want to support the President," explained Ike Skelton (D-Mo), the then-chairman of the House Armed Services Military Forces and Personnel Subcommittee, "but my family background is deeply rooted in traditional religious values, and my constituents have sent a clear signal that they believe

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<sup>13</sup> Herek, Gregory M, Jared B Jobe, and Ralph M Carney. *Out In Force*. Chicago: The University Of Chicago Press, 1996, 7.

<sup>14</sup> Lawrence J. Korb, "The President, Congress, and the Pentagon," 294.

<sup>15</sup> *Ibid.*

the President is off track.”<sup>16</sup> Along these lines, the national opinion polls conducted during January 1993 found the public evenly divided (47/47) on the controversial matter, actually signifying a slight *drop* in support for gays to serve.<sup>17</sup> Most national polls showed modest acceptance for homosexuals in the military starting in the 1970s (in 1977 51% of the public responded in favor of homosexuals serving in the armed forces).<sup>18</sup> Since then, opinion had moved in slow but positive trend -- except during the “Don’t Ask, Don’t Tell debate.” A small yet significant conservative shift took place in 1993 as support for gays and lesbians serving in the military declined 7 points.<sup>19</sup> (Many analysts credit this drop in approval to the increased media attention during the debate.) Throughout the congressional hearings, the opposition used this national division on the issue as one of their arguments, asserting that the President had no right to rescind the military’s ban on gays if it did not reflect the majority opinion in America.<sup>20</sup>

In contrast to the mostly ambivalent support among the general public “in favor” of ending the ban, the sector opposed to Clinton’s proposal exhibited quite an intense response. One of the strongest challenges to an open policy came from military and religious conservatives. Many political conservatives, especially those with a background in the armed services, had a strong ideological association with the military. During the debates, these “military conservatives” used Clinton’s failure to serve and opposition to Vietnam to argue that he lacked the authority to impose a controversial

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<sup>16</sup> “Months of Hope, Anger, Anguish Produce Policy Few Admire.” *CQ Weekly Online* July 24, 1993.

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

<sup>18</sup> Torres-Reyna, Oscar, and Robert Y. Shapiro. "The Polls-Trends: Women and Sexual Orientation in the Military." *Public Opinion Quarterly* 66 (2002), 621.

<sup>19</sup> Yang, Alan S., "The Polls-Trends: Attitudes Toward Homosexuality." *Public Opinion Quarterly* 61 (1997), 481.

<sup>20</sup> Embser-Herbert, 25

social policy on the institution.<sup>21</sup> In addition, most religious and fundamentalist conservatives many of whom identified themselves as members of the Christian Right, strongly resisted gay rights. This movement has had a considerable influence on the Republican Party's approach to gay rights initiatives, especially on the "Don't Ask, Don't Tell" issue. Moreover, as a complete examination of the policy's durations shows, this religious constituency would remain especially committed to the fight against gays and lesbians in the armed services over the years.

Because of their longstanding influence, a brief history of the Christian Right's role in politics and their relationship to the modern Republican Party sheds light over their impact on "Don't Ask, Don't Tell." The Christian Right is a social movement working to mobilize evangelical Protestants and other orthodox Christian denominations into conservative political action. While these religious denominations have held a presence in American politics since the country's founding, this chapter focuses in particular on the influence of the "new" Christian Right, which began in the 1970s as a movement to restore "traditional values" through public policy. Many scholars date the Christian Right's beginning with the creation of the "Moral Majority" by televangelist Jerry Falwell in 1979.

While approximately two thousand years of Christian theology has classified homosexuality as sin, it wasn't until the 1970s social revolution and effects of liberal judicial rulings that motivated evangelical Protestants to mobilize politically against gay

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<sup>21</sup> *ibid*, 11



rights.<sup>22</sup> Since, then the base actively fights against the gay liberation movement, which they view as an affront to traditional family values. According to Richard Land, the executive director of the Christian Life Commission of the Southern Baptist Convention, “there is greater unanimity [on homosexuality] than even on the abortion issue.”<sup>23</sup> Considering the importance of the anti-homosexual agenda for the Christian Right, it follows that their increasing status within the GOP would thus affect the Republican Party’s position on gay rights.

Over the years the Christian Right has exhibited a dynamic and uneven relationship with Republican Party. In his article on the evolving politics of the Christian Right, Matthew Moen divides this movement into different phases, explaining the respective approaches taken by Christian Right leaders to achieve political inclusion. From the first (“Expansionist”) phase in the late 1970s to the election of Reagan, Moen describes the “political ineptitude” of the Christian Right and their corresponding inability to achieve substantive policy initiatives. Scholars credit their failure during the 1980s to a “fragmented” Christian community that appeared out of touch with modern society. They deemed the Christian Right’s desire to infuse “traditional values” into an increasingly secular and educated society a lost cause, and predicted the movement’s inevitable demise from politics almost entirely.<sup>24</sup>

This forecast proved quite mistaken. Following a “transition” phase in the mid-1980s, Christian Right leaders engaged in “organizational reentrenchment” and a redirection of the movement. Instead of stressing “moral uniformity” on all issues,

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<sup>22</sup> Bull, John, and Chris Gallagher. *Perfect Enemies: The Religious Right, the Gay Movement, and the Politics of the 1990s*. New York: Crown Publishers, Inc., 1996, 7.

<sup>23</sup> *ibid*, 68

<sup>24</sup> Wilcox, Mark J., and Clyde Rozell. *God at the Grass Roots, 1996*. Lanham, MD: Rowman & Littlefield Publishers, Inc., 1997, 253.

leaders began a more politically sophisticated approach, emphasizing consolidation and coalition building with the Republican Party.<sup>25</sup> This strategy of “pragmatism” took off under the leadership of Ralph Reed, who became the executive director of the Christian Coalition in 1989. With Reed at the helm, the Christian Right concentrated their power into electoral politics, and supported a wider range of Republican candidate and a broader conservative agenda. The movement achieved demonstrable success in mobilizing Christian voters, and activists worked to shape GOP platforms on all levels of government. The prominent role given to the issue of “traditional family values” at the 1992 Republican national convention further demonstrated the rising political clout of the Christians activists. The 1992 national Republican platform stated the Party’s direct opposition to gay rights initiatives on adoption, marriage, and nondiscrimination legislation.<sup>26</sup> As the religious right poured their energy into this Presidential election, they also worked on the state level to infuse Republican Parties with their initiatives, which reflected their hostility to gay rights. (For example, Christian activists in Colorado provided the momentum to pass a ballot initiative in 1992 abolishing local legislation protecting homosexuals from discrimination.)<sup>27</sup> As the debate over gays in the military became the major national gay rights issue in 1992 and 1993, it also galvanized the Christian Right to action.<sup>28</sup> As Christian activists inundated Congress and the White

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<sup>25</sup> Moen, Matthew C.. *The Transformation of the Christian Right*. Tuscaloosa: University Alabama Press, 1992, 462.

<sup>26</sup> Bull and Gallagher, 79

<sup>27</sup> Gregory M. Herek, “Social Science, Sexual Orientation,” 10

<sup>28</sup> *ibid*, 11

House with letters in opposition, the passionate and forceful resistance of The Movement contributed to the implementation of “Don’t Ask, Don’t Tell.”<sup>29</sup>

Considering the politics and partisan climate of the Clinton years, it is not difficult to explain the early persistence of “Don’t Ask, Don’t Tell” following implementation. First, the 1994 midterm elections resulted in the “Republican Revolution,” a Republican takeover ending the Democrat’s forty-year-long majority in the House. In part, this outcome reflected the sentiment of many Americans that Clinton and the Democrats had focused too heavily on controversial social issues.<sup>30</sup> The election results thus sent a clear signal to Clinton and the defeated Democrats to lay off potentially divisive issues, effectively dissuading them from returning to the matter of gays in the military.

Furthermore, the incoming Speaker of the House Newt Gingrich had received a great deal of credit for the 1994 Republican victory, and he used this leverage to take his position as Speaker to new authoritative heights. According to Eugene J. McCarthy, a former presidential candidate and congressman, “Gingrich seems to think of himself as a kind of Prime Minister, chosen by the House of Representatives, as a U.S. equivalent to the British Parliament...he appears ready to act as a kind of ‘counter government.’”<sup>31</sup> In many ways, Gingrich did serve as a “counter government” though his vehement opposition to minority Democrats and President Clinton. Furthermore, the Christian Right received a great deal of credit of the Republican’s success as 60% of the incoming Republicans receiving strong backing from the movement.<sup>32</sup> These numbers helped to

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<sup>29</sup> Lawrence J Korb, “The President, Congress, and the Pentagon,” 297

<sup>30</sup> Edward Epstein, “Driving an Agenda? Avoid a Breakdown,” *CQ Weekly* June 9, 2008.

<sup>31</sup> David S. Cloud, “Speaker Wants His Platform to Rival the Presidency,” *CQ Weekly* Feb. 4, 1995.

<sup>32</sup> Bull and Gallagher, 229

solidify their influential role in the Party. Once in office, Gingrich considered the sweeping GOP victory a mandate to pass the Contract with America plan. This agenda emphasized economic issues rather than the moral values concerns that motivated religious conservatives. Therefore, to appease this constituency Gingrich and Republican congressmen granted them smaller legislative victories and frequently employed conciliatory (pro-life, anti-gay) rhetoric.<sup>33</sup> For example, demonstrating his tough stance on gay rights in 1995, Gingrich made statements predicting that the Republican Congress would overturn “Don’t Ask, Don’t Tell” and reinstate the previous policy, which permitted more proactive investigation of suspected homosexuals.<sup>34</sup>

Despite the limited congressional action on the Christian Right’s major social issues, the constituency’s leadership accepted their place in the broader Republican coalition and continued to back GOP candidates. The Movement’s significant electoral contribution to the Republican’s ongoing majority in Congress left them hopeful that the future might yield greater success on their more substantial policy goals.<sup>35</sup> Until then, the Christian Right leadership believed that their influence would at least prevent the GOP from passing initiatives contrary to their “traditional values” platform.<sup>36</sup> With the Republican Party mindful of the religious right’s leverage, it follows that Congress never initiated action to repeal the policy during the Clinton years.<sup>37</sup> If Democrats had introduced legislation supporting gay service at this time, Republicans would have

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<sup>33</sup> Hosansky, David. "Christian Right's Electoral Clout Bore Limited Fruit in 104th." *CQ Weekly*, November 2, 1996.

<sup>34</sup> Towell, Pat. "MILITARY PERSONNEL: Gingrich Retreats From Calling For Tougher Policy on Gays.." *CQ Weekly*, April 8, 1995.

<sup>35</sup> Ibid.

<sup>36</sup> Wilcox and Rozell, 256

<sup>37</sup> Towell, Pat. "MILITARY PERSONNEL"

*jumped* upon the occasion to crush it. Such an opportunity provided an easy carrot to appease their religious and antigay voters.

Furthermore, Clinton never resumed the debate on homosexual service for the rest of his presidency. He had received widespread condemnation for his handling of the matter, and it had squandered necessary political capital.<sup>38</sup> The President thus had little incentive to repeat the debacle. Further, the new political climate also forced the retreat of many pro-homosexual activists from Washington.<sup>39</sup> Gay rights advocates recognized the futility of pushing “Don’t Ask, Don’t Tell” with the Republican powerhouse in place.

During his second term, Clinton demonstrated his commitment to gay rights and the homosexual community by several minor Executive orders and the appointments of openly homosexual people to his administration.<sup>40</sup> Even as Clinton issued Executive Order 13140, which toughened sentences for antigay hate crimes in the military, he still avoided the “Don’t Ask, Don’t Tell” topic. Towards the end of his tenure in 1999, Clinton discussed the policy in a CBS interview and said, “What I’d like to do is focus on making the policy we announced back in 1993 work the way it’s intended to, because it’s out of whack now.” While his comments revealed frustration with the status quo policy, he had laid emphasis on the Pentagon’s implementation failures - not on his previous aim to remove the ban on gays and lesbians.

In contrast to the Clinton presidency, the perseverance of “Don’t Ask, Don’t Tell” under the Bush administration, particularly during the President’s second term, presents more of a conundrum. Again, assessing the respective influences on the Executive and

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<sup>38</sup> Bull and Gallagher, 238

<sup>39</sup> Bull and Gallagher, 261

<sup>40</sup> Ibid, 277

Congress during this period sheds light on the importance of certain political forces in maintaining the military's ban. To begin, Bush's support of "Don't Ask, Don't Tell" poses no mystery. In the 2000 presidential election, the Texas Governor presented himself as the perfect candidate for the Christian Right. Although his father and former President George H.W. Bush had received criticism among religious conservatives for taking a "moderate" stance on social issues, the younger Bush's strong anti-gay voting record quickly assuaged religious conservatives.<sup>41</sup> During a debate in 2000, Bush revealed his stance on the military's gay ban, calling himself a "Don't Ask, Don't Tell" man.<sup>42</sup>

In the 2000 election, 75% of Christian evangelicals voted for Bush and they composed 40% of his electoral base.<sup>43</sup> Throughout Bush's first term he and his political strategists worked to secure a continued allegiance of these religious voters.<sup>44</sup> Early in his presidency, Bush learned of the base's intense hostility towards homosexuals and their rights when he appointed several openly gay people to his administration and AIDS council. This immediately produced an angry response among the religious right: the American Family Association issued an urgent press release that Bush administration "was opening its arms to homosexual activists."<sup>45</sup> The Traditional Values Coalition denounced Bush's "pro-homosexual actions" as "outrageous" and "dangerous."<sup>46</sup> This stir among Christian Right activists over minor matters sent a strong message to the Bush team to steer clear of any pro-gay initiatives. Since, the Bush administration worked to

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<sup>41</sup> Gallagher et al., 279

<sup>42</sup> Kaplan, Esther. *With God on Their Side: How Christian Fundamentalists Trampled Science, Policy, and Democracy in George W. Bush's White House*. New York: New Press, 2004.

<sup>43</sup> *ibid*, 75

<sup>44</sup> John Cochran, "Courting the Christian Vote Can Be an Electoral Tightrope," CQ Weekly, Sept. 4, 2004.

<sup>45</sup> Kaplan, 150

<sup>46</sup> Kaplan, 151

reassure the base of its strong anti-homosexual stance. Bush stopped the practice of proclaiming gay pride declarations in June (implemented under Clinton) and eliminated the liaison to the gay and lesbian community. He also appointed antigay lawyers Michael McConnell and Timothy Tymkovich to federal appeals court seats, and asked Congressman Tom Coburn (who openly disagreed with homosexuality as a “lifestyle”) to chair his Presidential AIDS Council.<sup>47</sup>

Garnering 51% of all votes cast, President Bush won re-election in 2004. Many analysis of the election credited his second win to the support of Christian conservatives and the importance of “moral values.” According to exit polls, a plurality of voters named this issue as their number-one concern.<sup>48</sup> Conversely, other reports on the election argued these political analysts had overstated the impact of Christian evangelicals and their social issues, and instead posited the threat of terrorism had secured the election for Bush.<sup>49</sup> Choosing to disregard these latter arguments, Bush and his Republican colleagues claimed a mandate for their conservative agenda, which would again reflect the influence of religious conservatives.<sup>50</sup>

Additionally, the 2004 election left Republicans in Congress celebrating their expanded majority. The impressive GOP victory reaffirmed the importance of the religious right constituency for Republican legislators, thus providing Christian activists with greater leverage to promote their social agenda issues. Again, the Christian Right’s increased political savvy and pragmatism resulted in a willingness to balance their issues

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<sup>47</sup> Bull and Gallagher, 279

<sup>48</sup> David Nather, “Social Conservatives Propel Bush, Republicans to Victory,” *CQ Weekly*, Nov. 6 2004.

<sup>49</sup> “Effect of ‘Moral Values’ Voters Exaggerated, Says Analysts.” *CQ Weekly Online* Nov. 13, 2004

<sup>50</sup> David Nather, “Social Conservatives”

with broader GOP objectives.<sup>51</sup> Further, even if Republican congressmen did not necessarily deliver major legislative victories for this constituency, they certainly would never antagonize the base by supporting gay rights initiatives. Therefore, as long as Bush reigned in the White House and Republican ruled Congress, “Don’t Ask, Don’t Tell” remained firmly locked in place.

While Republican political elites and Christian conservatives opposed revoking the military’s ban on gays and lesbians however, national opinion polls showed the public’s increasing acceptance of gays in the military. By January 2000, surveys reported that 67% percent of Americans believed homosexuals should be allowed to serve. A CNN/USA Today/Gallup Poll conducted on December 31, 2003 found 85% of American women and 73% of American men supportive of gays serving openly.<sup>52</sup> The same poll also found 91% of Americans between 19-29 favoring a policy of open service as well. At this juncture, with public opinion unquestionably at odds with the policy, the puzzle behind “Don’t Ask, Don’t Tell” gradually begins to emerge.

In 2004 the Log Cabin Republicans, a national gay and lesbian grassroots organization, filed a suit in a federal District Court to strike down the military’s ban on homosexuals. In the past, federal courts had dismissed all previous suits challenging the “Don’t Ask, Don’t Tell” policy, but the Supreme Court’s ruling upholding right of privacy protection for same-sex intimacy in *Lawrence v. Texas* (2003)<sup>53</sup> had sparked optimism among gay rights advocacy groups. According to the head of the suit’s legal

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<sup>51</sup> Cochran, John. "George W. Bush: Another Shot at His Legacy.." *CQ Weekly Online*, August 28, 2004.

<sup>52</sup> "Servicemembers Legal Defense Network." Servicemembers Legal Defense Network.  
<<http://www.sldn.org/pages/polling-data> >

<sup>53</sup> 123 S. Ct. 2472 (2003)



defense Dan Woods, ““Previous challenges to the policy failed mainly because *Bowers v. Hardwick* allowed governmental criminalization of homosexual conduct, but recent Supreme Court decisions demand an immediate reconsideration of the policy under the U.S. Constitution...”<sup>54</sup> In addition to this more propitious legal climate, other factors reinforced the notion that an overturn of “Don’t Ask, Don’t Tell” could occur. As Log Cabin Executive Director Patrick Guerriero asserted, “Public opinion, the experience of our allies, and the national security interests of our nation all lead to the inescapable conclusion that gays and lesbians should be allowed to serve openly and honestly in our military.”<sup>55</sup>

In spite of the new dynamics favoring a repeal of the Pentagon’s policy, the idea lacked still support among a majority of legislators.<sup>56</sup> While the Republican’s rejection of any renewed legislation still comes as no surprise, many Democratic policymakers also wished to ignore the issue. With the war in Iraq underway, congressmen preferred to focus on other military matters rather than resume the controversy over homosexuals in the armed forces again.<sup>57</sup> Frank Gaffney, the president of the Center for Security Policy, explained, “There’s a general sense in Congress that ‘Don’t Ask, Don’t Tell’ is a necessary evil. I doubt it will be debated.”<sup>58</sup> Furthermore, even the most liberal Democrats in favor of ending the policy recognized that their Party’s minority status prevented them from successfully achieving the ban’s elimination. As Rep. Barney

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<sup>54</sup> "News Release: Log Cabin Republicans File Suit to Overturn Military's "Don't Ask, Don't Tell Policy"." Log Cabin Republicans <[http://www.logcabin.org/logcabin/press\\_101204.html](http://www.logcabin.org/logcabin/press_101204.html)>

<sup>55</sup> *ibid*

<sup>56</sup> Sorrells, Niels C.. "Congress Likely to Remain Silent On 'Don't Ask, Don't Tell'." *CQ Weekly Online*, January 10, 2004.

<sup>57</sup> *ibid*

<sup>58</sup> *ibid*

Frank (D-MA) said, “At this point, it makes sense to wait until there is a change in partisan leadership.”<sup>59</sup> In this way, the political environment and the attitudes of Democratic legislators helps to explain the failure of the 2005 Military Readiness Enhancement Act (H.R. 1059), the first legislation to repeal “Don’t Ask, Don’t Tell.” On March 3 2005, Representative Martin Meehan (D-MA) had introduced this bill, H.R. 1059, to the House. Congressmen never convened officially on the matter, and it consequently died in subcommittee.

Not long after this, a change in partisan leadership occurred on the Hill. Despite the advantages initially conferred on GOP with their large number of “safe” seats and fundraising powers, by the 2006 elections the Party lacked popularity.<sup>60</sup> Frustrated by an ongoing war, endless debates on border control and social security, and the shameless lack of executive oversight, Americans expressed their discontent with Congress at the voting booth.<sup>61</sup> The 2006 election rendered the Democratic Party not only majority status in the House, but also their greatest gains in the chamber since the seventies. New Speaker of the House Nancy Pelosi (D-CA) proclaimed, “From sea to shining sea, the American people voted for change.”<sup>62</sup> In response to new political climate in Washington, Congressman Meehan attempted again to bring down the Pentagon’s policy by introducing the Military Readiness Enhancement Act (H.R. 1246) in 2007.

Once more, many factors now pointed towards a possible reversal of the ban. First, national opinion favored a change. Public acceptance of gay rights was at an all

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<sup>59</sup> *ibid*

<sup>60</sup> Benenson, Bob. "Playing Defense: GOP Strives for Continuing Majority in '06." *CQ Weekly Online*, April 24, 2006.

<sup>61</sup> Giroux, Gregory L.. "Voter Discontent Fuels Democrats' Day." *CQ Weekly Online*, November 13, 2006.

<sup>62</sup> *ibid*

time high, and 79% of Americans supported gay and lesbians in the military.<sup>63</sup> The Iraq war demanded more troops and the low recruitment numbers had forced the military to lower their standards. Critics also questioned the Pentagon's discharge of essential Arab linguists under the policy, despite the real need for these translators. Furthermore, a shift in thinking had occurred among some prominent military leadership, as former high-ranking officials called for a reevaluation of "Don't Ask, Don't Tell."

While these circumstances provided legitimate optimism for the ban's repeal, other forces effectively countered this outcome. Following in the steps of its predecessor, H.R. 1246 (which had gained 27 more cosponsors than HR 1059) died in subcommittee. The failure for Congress to act on the legislation largely reflects the political climate. Despite the Democratic majority in the House, the Senate was evenly split. Moreover, with the war underway, the Democrats had focused their energies on setting a timetable for the war and preventing the additional troop surge in Iraq.<sup>64</sup> While military issues dominated the congressional agenda, ending "Don't Ask, Don't Tell" did not seem a top priority. Finally, so long as socially conservative Bush remained in office, the threat of his presidential veto loomed over any legislation reversing the Pentagon's current policy.

In July 2008, the House Military Personnel Subcommittee held the first hearing on "Don't Ask, Don't Tell" since the policy's implementation fifteen years prior. With bipartisan support, the consensus among the present congressman clearly favored an elimination of current policy. It seemed that the fate of "Don't Ask, Don't Tell" thus lay in the outcome of the 2008 Presidential election. While some moderate Republican legislators had expressed discontent over "Don't Ask, Don't Tell," the issue still split

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<sup>63</sup> "Servicemembers Legal Defense Network."

<sup>64</sup> Cloud, David S., and Thom Shanker. "Petraeus Warns Against A Quick Pullback in Iraq." *The New York Times*, September 11, 2007.

directly across party lines among the 2008 presidential candidates. All major Democratic candidates favored overturning the policy, whereas all major Republican candidates favored continuing it.<sup>65</sup> As Democratic candidate Senator Hillary Clinton argued, “It is not the best way for us as a nation to precede.” Conversely, Republican hopeful Mitt Romney argued that the policy “seems to be working.” Even Rudy Giuliani, considered usually more moderate on social issues such as gay rights than his some of his Republican colleagues, stated, “This is not the time to put in place a major social change, a social experiment, in the middle of a war.”<sup>66</sup>

Future Democratic president, Barack Obama, took one of the strongest stances against “Don’t Ask, Don’t Tell.” During Obama’s campaign, he often compared the exclusion of homosexuals in military to the institution’s prior segregation of African Americans, and he promised to roll back the legislation if elected.<sup>67</sup> In a statement to the Human Rights Campaign, one of the largest pro-gay rights organizations in the country, Obama avowed, “America is ready to get rid of the ‘Don’t Ask, Don’t Tell’ policy. All that is required is leadership.”<sup>68</sup> On November 4, 2008, the American people voted Obama into the White House and gave the Democrats control of both legislative chambers as well. With one-party control in Washington, the Democrats now have the power and leeway to pursue their initiatives. In this light, “Don’t Ask, Don’t Tell” may not exist for long.

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<sup>65</sup> Shanker, Thom, and Patrick Healy. "A New Push to Roll Back "Don't Ask, Don't Tell"." *The New York Times Online*, November 30, 2007.

<sup>66</sup> Bellantoni, Christina. "2008 reveal stark differences in the parties." *The Washington Times*, June 11, 2007. EBSCO Megafil (accessed March 29, 2008).

<sup>67</sup> *ibid*

<sup>68</sup> Welna, David. "Congress Revisits Military's Policy on Gays." *NPR Online*, February 17, 2009.

In closing, understanding the persistence of “Don’t Ask, Don’t Tell” requires a corresponding examination of the political environment. As revealed by the policy’s history, the political influences most affecting “Don’t Ask, Don’t Tell” have not remained entirely static over the years. To be sure, the Republican Party’s opposition to allowing gays and lesbians to serve in the armed forces has provided a longstanding source of resistance. Within the GOP, the influence of the Christian Right has contributed to the Party’s continued rejection of gays rights initiatives. As a result of the Party’s religious and military conservative constituencies, periods of Republican dominance in Washington secured “Don’t Ask, Don’t Tell.” Moreover, after the Republicans lost their stronghold in Congress, the threat of Bush’s veto helped to preserve the military’s ban. Consequently, Republican resistance has played a necessary and dominant role in thwarting the reversal of “Don’t Ask, Don’t Tell” law.

At present, most if not quite all the elements necessary to ending the military’s ban on gays and lesbians appear in place. The necessary *political* factors to ending the military’s ban, however, do appear aligned. Therefore, if the current Democratic government does not initiate change, it speaks to the power of forces other than Republican resistance in sustaining “Don’t Ask, Don’t Tell.”

## CHAPTER TWO

### Military Bureaucratic Inertia and the Corresponding Allegiance of the Pentagon

According to a Pentagon “insider” on the bureaucratic nature of the Department of Defense:

“...[T]here is a military-industrial-AND congressional complex that exists here... the interplay of these three forces shapes the way decisions are made... [They] are made on the merits, but they’re also made because of bureaucratic imperatives, the very way we’re organized, and the cultural biases we bring to the table... This is “real world” decision making.”<sup>69</sup>

While intended as advice for newcomers to the Pentagon, this description also illustrates the essential role of the Department’s unique *bureaucracy* in implementing and enforcing military policy. Housed in the enormous Pentagon building, the Department of Defense takes primary responsibility for all coordination and control of the government’s agencies and tasks relating to the military and national security. This Department, headed by the Secretary of Defense (subordinate to the President), proposes and implements the majority of policies governing the armed services, subject to congressional authorization. Over the course of its history, the Department has issued various procedures regarding the treatment and dismissal of homosexual personnel in the military. The implementation of “Don’t Ask, Don’t Tell” in 1993 presented the first time that Congress formally codified such a policy into federal law. In examining the different forces sustaining this policy, the military bureaucracy’s resistance to change might also act as an important force keeping the military’s ban in place.

By this argument, “Don’t Ask, Don’t Tell” has accumulated bureaucratic inertia within the Department, which helps explain the Pentagon’s strong commitment to the military’s ban on homosexual service. This chapter identifies some of the reasons for a policy’s bureaucratic inertia within the military, and by extension, how this might apply

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<sup>69</sup> Gerstein, Col. Daniel M., and Maj Gen Perry M. Smith. *Assignment Pentagon: How to Excel in a Bureaucracy, Fourth Edition, Revised*. Chicago: Potomac Books Inc., 2007, xvi.

regarding the Pentagon's response to "Don't Ask, Don't Tell." First, the chapter examines how the Department's unique culture and organizational structure fosters an environment averse to change. Second, it considers how a policy's "institutionalization" contributes to its entrenchment within a bureaucracy. Finally, the chapter examines the influence of outside institutions on the policy's inertia within the military bureaucracy. After thus shedding light on the reasons behind the Department's commitment to the policy, the chapter finally questions the extent to which this has then affected the ban's preservation as Federal law.

In the case of "Don't Ask, Don't Tell," one could argue that bureaucratic inertia in the military resulted in the Pentagon's strong commitment to the military's ban on gays and lesbians - even in spite of external stresses to the ban, such as the public disapproval, high fiscal cost, deficit of service members, etc. In this event, perhaps the Department's resistance to overturning "Don't Ask, Don't Tell" has influenced the actions of policymakers charged with enacting the official legislation on homosexuals in the military. In this way, the Department's allegiance to "Don't Ask, Don't Tell" might serve as a factor in the maintenance of the discriminatory law.

A brief explanation of the relationship between bureaucratic inertia and policy renewal provides a useful framework to later analyze the Pentagon's response to "Don't Ask, Don't Tell." To explain why some bureaucracies undergo organizational change, certain scholars emphasize the balance between interacting forces of inertia and stress.<sup>70</sup> Inertia, a bureaucracy's commitment to the status quo policy, reflects the personal and

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<sup>70</sup> Huff, James O., Ann S. Huff, and Howard Thomas. "Strategic Renewal and the Interaction of Cumulative Inertia." *Strategic Management Journal* 13 (2008), 56.

financial investments as well as institutional mechanisms supporting the current system.

<sup>71</sup> Inevitably, limits and weaknesses exist in every policy. Over time these deficiencies yield stress, or challenges to the status quo. Many factors can increase the level of organizational stress, which reflects the amount of dissatisfaction over a policy. Instigators of stress might include new technologies, leadership, development of opportunities, or individual frustration.<sup>72</sup> If a sizeable amount of stress accumulates over time, however, then the pressure might call attention to the advantages of policy renewal, possibly resulting in the current policy's demise.<sup>73</sup>

In his seminal book *Bureaucracy: What Government Agencies Do and Why they Do it*, James Q. Wilson argues,

“Every organization has a culture, that is, a persistent, patterned way of thinking about the central tasks of and human relationships within an organization... Like human culture generally, it is passed on from one generation to the next. It changes slowly, if at all.”<sup>74</sup>

Certainly, the Department of Defense embodies a unique culture. According to Major General Perry M. Smith: “The Pentagon is a vibrant city, a unique subculture, a way of life. It has its own momentum, language and life-style: almost a Starship enterprise.”<sup>75</sup>

To elaborate, the Pentagon consists of the Department of the Army, the Department of the Navy, and the Department of the Air Force, as well as numerous other agencies such as the National Security Agency (NSA), the Missile Defense Agency, and the Pentagon

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<sup>71</sup> *ibid*, 55

<sup>72</sup> *ibid*, 58

<sup>73</sup> *ibid*, 58

<sup>74</sup> Wilson, James Q.. *Bureaucracy: What Government Agencies Do and Why They Do It (Basic Books Classics)*. New York: Basic Books, 1991.

<sup>75</sup> Gerstein and Perry, 7



Force Protection Agency (PFPA). They also have distinctive cultures, replete with their own diverse agendas and competing priorities.<sup>76</sup> The grand size and scope of the Pentagon has thus garnered it several nicknames among Washington insiders: “the Puzzle Palace,” “Fort Fumble,” or “the five sided wailing wall.”<sup>77</sup> In addition to the creativity of Washingtonians, these monikers further convey the intricacy of the Department’s numerous and often vying bureaucratic structures. As General David Jones, U.S.A.F (Ret.) once noted, “No one can really understand the complex nature of the Pentagon bureaucracy unless he or she served there as an officer.”<sup>78</sup> While a complete understanding of the internal dynamics of the Department might require this perspective, even from the outside one can observe how the “complex nature” of this bureaucracy creates an environment amenable to policy inertia and thus resistant to its renewal.

Prior to the enactment of “Don’t Ask, Don’t Tell,” the Pentagon had implemented all directives pertaining to homosexual service in the armed forces. From the beginning of the military’s history, the Department dealt with and defined homosexuality in a variety of ways. While no formal exclusionary policy towards homosexuals existed in the eighteenth and nineteenth centuries, the Army and Navy prosecuted acts of sodomy (oral and anal sex) between soldiers, at the time a violation punishable by prison sentence. The idea of penalizing an individual for having a homosexual *identity* (as opposed to engaging in homosexual acts) did not arise until the late nineteenth century following the medical and scientific community’s definition of homosexuality as a distinct category of perversion.<sup>79</sup> In 1954, the Department issued regulatory guidelines to

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<sup>76</sup> Wilson, 101

<sup>77</sup> Gerstein and Perry, 8

<sup>78</sup> *ibid*, 70

<sup>79</sup> Lehring, Gary L.. *Officially Gay: The Political Construction of Sexuality by the U.S. Military* (*Queer*

reflect this new classification.<sup>80</sup> Several decades later in 1982, the department issued *Directive 1332.14*, which provided the “official” procedure for the dismissal of homosexual service members. According to the GAO, the Pentagon undertook these revisions in the 1980s for three main reasons: 1) to establish “uniform procedures” concerning homosexuality across the service branches; 2) to clarify the specific actions for which a person could be separated; and 3) to define the extenuating circumstances under which persons found to have engaged in these actions might be retained.<sup>81</sup> As under the previous guidelines, the Directive’s definition of homosexuality equated homosexual desire with homosexual orientation, and qualified both as grounds for dismissal.<sup>82</sup>

During his Presidential campaign, Clinton pledged to repeal the 1982 Directive by Executive order. As President, his proposal drew intense opposition from Department officials and military leadership, causing him to delay the process for six months.<sup>83</sup> Although the Pentagon had modified their policy on gays approximately ten years ago, these revisions only reaffirmed the institution’s longstanding practice of rejecting homosexual service members. Clinton’s proposition, however, would completely dismantle those current guidelines. Throughout the policy’s six-month interim period, the Secretary of Defense commissioned two studies of the policy, one by the RAND Corporation and the other by a board of military leaders. The RAND report found no justification for the military’s ban on homosexuals, and concluded that with sufficient backing from leadership, the armed services could successfully implement a policy

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*Politics, Queer Theories*). Philadelphia: Temple University Press, 2003, 75.

<sup>80</sup> *ibid*, 101

<sup>81</sup> Herek, 7

<sup>82</sup> Lehring, 106

<sup>83</sup> Lawrence J. Korb, “The President, Congress, and the Pentagon,” in *Out of Force*, 294

allowing for gays and lesbians.<sup>84</sup> Pentagon officials and those in opposition largely chose to ignore these findings however, and instead relied more heavily on the report of the military commission, which did *not* endorse an open service policy for homosexuals.<sup>85</sup> Arguably, the Department's bias illustrates its commitment to maintaining ban on gays. At the end of the six month study period, President Clinton and Secretary of Defense Les Aspin announced the "Don't Ask, Don't Tell" policy. Their so-called "honorable compromise" still marked homosexuality as an unacceptable risk to military order and cohesion, and still gave military commanders considerable flexibility in how strictly they wished to enforce the ban on homosexual conduct.<sup>86</sup> Before the Senate and House on the hearings over this policy, Pentagon officials reiterated to congressmen that the "compromise" policy provided little change to their previous guidelines. Testifying in favor of "Don't Ask, Don't Tell," the Pentagon's General Counsel Jamie Gorelick told the Senate Armed Services, "It merely clarifies an existing policy."<sup>87</sup> As demonstrated by the Pentagon's support for this policy, essentially similar to the 1982 Directive, the concept of rejecting homosexuals from service had already accumulated inertia in the Department. It had more or less been the military's practice for over two hundred years. The implementation of "Don't Ask, Don't Tell" only added to the Department's overall commitment. In this way, any action calling for a reversal of the policy later on would likely face intense department resistance.

Large bureaucracies have a propensity to oppose change. In *Bureaucracy*, James Q. Wilson surveys the limitations inherent in bureaucracies, and he concludes that

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<sup>84</sup> Herek, 8

<sup>85</sup> *ibid*, 8

<sup>86</sup> Lawrence J. Korb, "The President, Congress, and the Pentagon," 295

<sup>87</sup> "Months of Hope, Anger, Anguish, Produce Policy Few Admire,," *CQ Weekly Online* (July 24, 1993)

organizations tend to defy innovation by their very nature—“they are supposed to resist it.”<sup>88</sup> Stability and routine, as opposed to drastic transformation, are also common characteristics of governmental agencies.<sup>89</sup> By this analysis, one should *not* expect a drive for monumental policy change to emanate from a big bureaucracy like the military. At most, the majority of bureaucratic innovation will either alter slightly or add something else to an already existing program; rarely will major change emanate from bureaucratic initiative.<sup>90</sup> Consequently, in observing the Department’s relationship towards “Don’t Ask, Don’t Tell,” it follows that the Pentagon would neither oppose nor instigate a repeal of the military’s ban.

First, the Department’s structural complexity and organizational rivalry accounts in part for the inertia of “Don’t Ask, Don’t Tell.” In his book detailing the Pentagon’s bureaucracy, Perry asserts that the “bureaucratic politics model” provides the most useful academic model to explain the mechanisms and machinery driving the department, as it elucidates how the decision-making process necessarily divides across its multiple agencies.<sup>91</sup> The presence of many organizations within the military bureaucracy challenges the coordination and compromise required when implementing and enforcing policies. Further, the Department’s structure innately breeds competition. For example, a five-sided inter-service rivalry exists between the department’s four major services (Army, Marine Corps, Navy and Airforce) and Joint Chiefs of Staff (JCS).<sup>92</sup> As Perry points out, this competition has advantages at times. It prevents the domination of one service over the rest, therefore ensuring democratic rule among the civilian military. At

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<sup>88</sup> Wilson, 221

<sup>89</sup> Wilson, 221

<sup>90</sup> Wilson, 225

<sup>91</sup> Gerstein and Perry, 189

<sup>92</sup> *ibid*, 151-152

the same time, because each branch has its own history, culture, training establishment, and bases -- it also has unique biases and an individual agenda.<sup>93</sup>

Additionally, an *intra-service* rivalry is present within the subdivisions of these branches. For example, the U.S. Army contains departments for infantry, armor, artillery, and aviation. Each possesses a distinctive subculture and loyalty as well.<sup>94</sup> Finally, rivalries also exist between the service staff and the military departments, between the military service staff members, and between the Secretary of Defense and the Joint Chiefs of Staff. It is not difficult to envision how these webs of competition can lead to bureaucratic entanglement.<sup>95</sup> In this way, the inherent difficulty, and sometimes inability, for agencies to cooperate results in their cumulative aversion change from the outset.

Second, once a policy remains the “official” procedure over a number of years, agencies and individuals grow accustomed to operating under the fixed guidelines. Producing a new framework, however, would require transition and acclimatization, in all likelihood inducing a frustrating process. Numerous studies have found that organizational inertia can accumulate over time, especially when bureaucrats develop “routinized” policies and procedures around the status quo. In their study on cumulative inertia and strategic renewal, Huff et al. describe how a policy’s “institutionalization,” or entrenchment in the system can occur:

“[I]t would be time consuming to abandon increasingly complex current activities and discover alternative procedures for meeting internal and external demands. Further frame changing efforts would resubject the organization to the inefficiencies and uncertainties of new innovation, and require contracts among important agents...As current commitment become less easy to change and more risky to change, as administrative

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<sup>93</sup> *ibid*, 152

<sup>94</sup> Gerstein and Perry, 154

<sup>95</sup> *ibid*, 155

mechanisms are put into place and satisfactory results are more predictable, managers are motivated to work with what they have inherited.”<sup>96</sup>

In this way, the process of a policy’s institutionalization contributes to its bureaucratic inertia.<sup>97</sup> In particular, the agencies of the Department have a reputation for developing “settled habits and comfortable routines” towards their current policies.<sup>98</sup> In turn, this leads to institutionalization, which then generates inertia, and finally results in the strong commitment of the military bureaucracy and hence Pentagon. As analyzing the complex bureaucracy of the military through bureaucratic inertia theory reveals, the “huge and lumbering department” neither fosters an environment conducive to internal bureaucratic innovation, nor particularly responsive to orders from the outside either.<sup>99</sup>

Since its implementation fifteen years ago, “Don’t Ask, Don’t Tell” has yet to encounter any serious legislative challenge, and thus the Department has not needed to wage a major battle. Considering the reasons behind the policy’s inertia, however, it seems likely that the Pentagon would have more than enough incentive to resist this change. First, the Department’s individual branches have adapted to the military’s ban and established custom responses and procedures to fulfill the policy’s ends. In this way, “Don’t Ask, Don’t Tell” has become solidly institutionalized in military bureaucracy. New legislation, however, would render these routines obsolete, and force department bureaucrats to adopt new, less familiar procedures. Department agencies would need to develop a course of action to integrate gays and lesbians into their respective branch of

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<sup>96</sup> Huff et al, 57

<sup>97</sup> *ibid*, 56

<sup>98</sup> Wilson, 232

<sup>99</sup> Cahlink, George, John M. Donnelly, and Tim Starks. "The Pentagon Gates Inherits." *CQ Weekly Online*, December 11, 2006.

the armed services, a challenge made more difficult by the military's traditional hostility towards homosexuals. Revoking the policy would present a host of issues for the Department to handle, among them questions of privacy rights, potentially increased violence towards the homosexual service members, influence on recruitment, and impact on troop cohesion. Initially, these inquiries would necessitate lengthy studies and surveys, and later on, perhaps necessitate new programs or even agencies. Overall, such endeavors require a great deal of time and work, and they become even more complicated in light of the vast and tangled department bureaucracy, rife with rivalries and coordination problems. For military bureaucrats, adhering to an already "functional" institutionalized system of exclusion, although imperfect, prevails over the headache of policy change.

One should also bear in mind external influences on a policy's bureaucratic inertia. Describing the dynamics of political-bureaucratic adaptation, Wood and Waterman discuss the multiple ways in which political institutions can impact bureaucratic behavior. They depict bureaucracies as "adaptive entities" responsive to multiple stimuli such as the President, Congress, courts, and wider political arena such as the media.<sup>100</sup> According to their argument, an organization's commitment to a specific policy is affected by the perceived expectations of these outside institutions.<sup>101</sup> For example, the President plays an important role in contributing to bureaucratic inertia, especially through his role in the nomination process. In 2001, President Bush's appointment of Donald Rumsfeld as Secretary of Defense had a significant impact on the Department. As Secretary, Rumsfeld resolved to "transform" the Department and assert

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<sup>100</sup> Wood, B. Dan, and Richard W. Waterman. "The Dynamics of Political-Bureaucratic Adaptation." *American Journal of Political Science* 37 (1993), 500.

<sup>101</sup> Huff et al., 57

greater civilian control over the military.<sup>102</sup> He augmented the authority of the Secretaries in Department's various military branches, and encouraged civilian officials to immerse themselves in the operational issues usually handled by military leaders.<sup>103</sup> Rumsfeld's aggressive oversight established a culture in the Department of Defense steeped in Bush's ideological doctrine as well. To be sure, his presence and promotion of his administration's socially conservative ideology did not foster an environment receptive to reversing "Don't Ask, Don't Tell."

As Secretary, Rumsfeld implemented sweeping changes, but he displayed great reluctance to consider reforms contrary to his personal vision. During the debates over intelligence restructuring in 2004, Rumsfeld sent a clear message to legislators: "if it ain't broke, don't fix it."<sup>104</sup> In light of this direction, if the majority of military bureaucrats believed "Don't ask, Don't Tell" not "broken," then follows that neither they nor Rumsfeld would have encouraged or participated in a repeal to "fix" the policy.

Although Congress plays a fundamental role in creating and maintaining the structural conditions of a bureaucracy, it has not measurably impacted the military's bureaucratic commitment to the ban on homosexual service. Despite the fact that Representatives Martin Meehan (D-MA) and Ellen Tauscher (D-CA) have both generated legislation in the House to revoke it, neither of their respective efforts made it past subcommittee yet.<sup>105</sup> No persuasive evidence exists, however indicating a strong

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<sup>102</sup> Desch, Micheal C.. "Bush and the Generals." *Foreign Affairs*, May. - Jun. 2007.  
<<http://www.foreignaffairs.org/articles/62616/michael-c-desch/bush-and-the-generals> >

<sup>103</sup> Desch, 4

<sup>104</sup> Kady, Martin. "Pentagon Wields an Iron Hand In National Director Debate." *CQ Weekly Online*, October 10, 2004.

<sup>105</sup> On March 3, 2009, Rep. Ellen Tauscher (D-CA) reintroduced the Military Readiness Enhancement Act (H.R. 1283) for a third time. The House committee has referred the bill to the House Committee on Armed Services.



correlation between this lack of congressional action and the Pentagon's bureaucratic commitment to "Don't Ask, Don't Tell."

Further, in light of the war on terrorism and conflict in Iraq, critics have emphasized the detrimental effects of a policy which discharges troops and linguists during a time of low recruitment and communications backlog. In recent years former members of the military brass and Joint Chiefs have also spoken out against the policy, and the majority of public opinion opposes the ban. Still, the Pentagon has steadfastly maintained their commitment to "Don't Ask, Don't Tell," and in effect has not responded to these outside pressures. Consequently, it seems that congressional and environmental stresses have not negatively impacted the policy's inertia within the Department.

On the other hand, pressures to *sustain* the status quo in the Department have likely emanated from the military. According to the most recent annual survey conducted by the *Military Times*, a majority (58%) of active-duty service members oppose a repeal of "Don't Ask, Don't Tell." Additionally, in spite of the policy's numerous negative consequences, many individuals with impressive military credentials claim "Don't Ask, Don't Tell" as the best policy option. During a Republican Presidential debate in November 2008, candidate John McCain, considered a war hero among many Americans for his imprisonment during Vietnam, glowingly endorsed the current policy:

"All the time I talk to our military leaders, beginning with our Joint Chiefs of Staff and our leaders in the field such as Gen. Petraeus...Almost unanimously, they tell me that this present policy is working, that we have the best military in history, that we have the bravest, most professional, best prepared, and that this policy ought to be continued because its working."<sup>106</sup>

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<sup>106</sup> Welna, David "Congress Revisits"

As the primary concerns for most bureaucrats working in the Department relate to issues of national security and the military, they likely attune their attitudes and biases to further these ends. If those individuals leading and actively serving in the armed forces back “Don’t Ask, Don’t Tell,” their position should exert a greater influence on military bureaucrats than the opinion of the public or policymakers. Therefore, the continued support among the armed forces for the ban on homosexuals probably contributed to the policy’s bureaucratic inertia.

In sum, the Pentagon’s strong resistance to changing “Don’t Ask, Don’t Tell” likely derives from the policy’s accumulated inertia. First, the vastly complex organizational structure and culture of the Department do not foster an environment amenable to change, nor does it seem a probable initiator of reform. Furthermore, bureaucrats resist innovation by nature, and the military has a long history of homosexual exclusion. Over the fifteen-year period from the legislation’s implementation, the multiple agencies within the Department have adjusted to the policy’s guidelines. A change in this procedure would require changes for branches -- an unpalatable prospect for bureaucrats already comfortable with the existing procedures.

It seems therefore that bureaucratic inertia within the Department provides a compelling argument for the Pentagon’s opposition to revoking “Don’t Ask, Don’t Tell.” At the end of the day, however, this resistance only impacts the preservation of the policy to the extent that the Pentagon’s position can influence policymakers. Accounting for the policy’s bureaucratic inertia alone cannot explain the persistence of “Don’t Ask, Don’t Tell” as federal legislation. If Congress were to repeal “Don’t Ask, Don’t Tell,” then Pentagon would have no choice but to follow suit. Therefore, if the Pentagon’s

opposition to overturning the policy has demonstrably affected congressmen from acting to overturn the ban, then this evidences the importance of Pentagon's position, and by extension, the role of the military's bureaucratic inertia as an influence.

In the past, the Pentagon's political clout has prevented Congress from successfully implementing changes that the Department strongly opposes. For example, the passage of the 2004 Intelligence Reform and Terrorism Prevention Act (IRTA) displayed this authority, especially when examining the Department's role in resisting efforts to reorder the intelligence community and appoint a director of national intelligence (NID).<sup>107</sup> Historically, the Pentagon has fiercely challenged any reorganization of its intelligence structure, thus leaving congressmen "bumping up against a long history of inertia" in their attempts to rearrange the system.<sup>108</sup> As an article in *Congressional Quarterly* explained, "The Pentagon and the military committees are willing to discuss cooperation, much as a soldier might let a child hold his helmet or look at his rifle. But they allow no one else to pull the trigger."<sup>109</sup> Moreover, according to the chairman of the Senate Intelligence committee at the time, Pat Roberts (R-KA), Pentagon officials had successfully managed to prevent Congress from assuming any authority in their intelligence structure *twenty-four* times over the past fifty years- with IRTA as the twenty-fifth.<sup>110</sup>

These results imply that the Pentagon garners substantial influence and congressional support on Capitol Hill. In addition to their longstanding political allies, the Pentagon also excels in effectively lobbying legislators. In their efforts to reduce the

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<sup>107</sup> Kady, Martin. "Pentagon Wields an Iron Hand"

<sup>108</sup> *ibid*

<sup>109</sup> *ibid*

<sup>110</sup> *ibid*

power of the NID in the 2004 Intelligence bill, Pentagon officials initiated a campaign early on warning policymakers that this director might have negative impacts on security.<sup>111</sup> Referring the lobbyists on this issue, Senator Roberts remarked, “There was a SWAT team going around pressing their views.”<sup>112</sup> Moreover, Roberts expressed the frustrating position for those trying to enact reform in the department, “[A]dvocates of major change are at a huge disadvantage compared with the political sway of the Pentagon.”<sup>113</sup>

In terms of the 2004 IRTA, the Pentagon’s influence resulted in tangible victories for the Department. Wielding political clout and employing effective lobbying strategies, the Pentagon demonstrated its ability to unleash a successful challenge to congressional change. Since the implementation of “Don’t Ask, Don’t Tell,” however, Congress has yet to instigate any major action to repeal the military’s current policy. Although Representative Meehan (D-MA) attempted to overturn the ban twice with his Military Readiness Enhancement Act, both efforts died in subcommittee, and Congress never convened to discuss either bills. While Rep. Ellen Tauscher (D-CA) most recently reintroduced the bill for a third time in the House, at present the legislation still remains in the House Committee on Armed Services. The overall lack of congressional activity on “Don’t Ask, Don’t Tell” perhaps explains why the Department has not needed to launch a serious lobbying campaign on Congress over the issue.

As a result, no compelling evidence exists that Pentagon officials have exercised significant influence on congressional action, or encouraged the persistence of “Don’t Ask, Don’t Tell” among legislators. Conceivably, they *could* have exerted pressure

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<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

<sup>113</sup> Kady, Martin. "Pentagon Wields an Iron Hand"

through classified meetings and correspondence without the public's knowledge. If Pentagon officials engaged in private and behind-the-scenes lobbying on the issue over the years, it could have motivated policymakers to avoid the issue of gays in the military. Without direct evidence of this pressure, however, one cannot use it to confirm the Pentagon's power in protecting "Don't Ask, Don't Tell."

Moreover, although Chairwoman Susan Davis (D-CA) requested the presence of Department officials at 2008 hearing, the Pentagon fused to send witnesses. Instead, they provided only a brief statement, the contents of which Rep. Davis (D-CA) explained in her opening statements:

"I would like to enter into the record a statement from the Department of Defense regarding Don't Ask Don't Tell. The Department will not be testifying today and has been hesitant to address the issue in open session. I regret that the Department will not be here, since I believe that issues are likely to be raised where their experience could prove to be helpful. *However, when pressed to describe how they would respond to a change in the law, senior Department of Defense officials have indicated that they would comply fully with any new legislation, although they do not advocate in favor of changing the policy at this time.* Without objection, I ask that the Department of Defense statement be entered into the hearing record."<sup>114</sup>

The Pentagon's response to the July 2008 hearing displays their opposition towards altering the current policy. Perhaps more importantly, the actions here reflect their passivity towards new legislation. Based this statement, it seems unlikely the Department of Defense will act as a serious force pressuring policymakers to preserve the ban in the future.

In closing, "Don't Ask, Don't Tell" likely acquired bureaucratic inertia in the military. Yet this neither necessitates nor explains the policy's parallel persistence as congressional law. Even if the Pentagon *would* have previously assumed a more

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<sup>114</sup> US House Hearing July 23, 2008

proactive approach challenging repeal, none of the legislative initiatives overturning “Don’t Ask, Don’t Tell” presented a genuine threat to the status quo. Consequently, if one cannot formulate a convincing case for the Pentagon’s influence on the ban, this then applies to the overall significance of the military bureaucracy as a source of resistance as well. In comparison with other more compelling factors preserving the military’s ban on homosexuals, the effect of the Department’s bureaucracy on the Pentagon therefore does not seem a major factor in the policy’s continued persistence.

### Chapter Three

#### The Military: An Active and “Passive” Source of Resistance

As stated in *Directive 1332.14*, the Department of Defense’s 1982 policy on homosexuality: *Homosexuality is incompatible with military service*. These guidelines typified the longstanding notion of homosexuals as fit for military service. In 1993, Congress passed federal legislation (P.L. 103-160) pertaining to homosexuals in the armed forces; this revised policy also reflected the belief that homosexuals did not belong among the military’s ranks. At present, the majority of Americans disagree with this idea, as national opinion polls report that  $\frac{3}{4}$  of respondents support allowing gays and lesbians to serve in the military. When comparing these results with the attitudes of military professionals on the same issue, however, the two do not align. Today, homophobic attitudes continue to pervade the armed forces, and as a result, the majority of active duty service-members and uniformed leaders remain opposed to the presence of gays and lesbians in the military.

In evaluating the overall significance of the forces resisting open service for homosexuals, one must consider the role of the military's opposition. This chapter first explains the military's homophobic culture and its reasons against allowing gays and lesbians to serve. It then examines the extent to which the military leadership's active resistance has influenced policymakers from repealing the ban on homosexuals. Finally, it also assesses the significance of the military's "passive" resistance, or the historical precedence of judicial deference to the military's judgment, on preservation of "Don't Ask, Don't Tell."

In most countries, the military performs the relatively similar functions of homeland defense and internal social control. By contrast, the United States stands as one of the few nations expected to engage frequently in hostile operations on foreign shores. As a result, the nation's armed services must be ready to meet the call of duty at all times.<sup>115</sup> With these expectations, the government and courts often hold the military to a different set of standards than other institutions. This special separation contributes to the institution's distinctive culture. Other characteristics factor into the military's unique mores and core values as well, many of which then contribute to the military's homophobic attitude and exclusionary environment.

For many Americans the military symbolizes an "ideal of manhood." This masculine ideology suffuses the institution's culture, perpetuating a concept that Marine Corps General Robert Barrow called the "manliness of war."<sup>116</sup> Many of the challenges with integrating women into the armed services emanate from this deeply ingrained belief

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<sup>115</sup> Belkin, Aaron, and Geoffrey Bateman. *Don't Ask Don't Tell*. Boulder, CO: Lynne Rienner Publishers, 2003, 124.

<sup>116</sup> Thomas, Patricia J. and Marie D. Thomas. 1996. Integration of Women in the Military: Parallels to the Progress of Homosexuals? In *Out of Force*, edited by Gregory M. Herek, Jared B. Jobe, Ralph M. Carney. Chicago: University of Chicago Press, 70.

system. As with the female presence, the persona of the gay male also threatens traditional masculine ideology. Although one should not entirely equate the treatment of women, gays, and lesbians in the armed services, each represents a gender role contradictory to the military's prevailing "macho man" dogma.<sup>117</sup>

Further, a large proportion of the military's membership has historically originated from the south and other traditionally conservative areas.<sup>118</sup> Some scholars assert that over the years the armed services has become more homogenized, partially due to the largely southern composition, but also from the institution's increasing partisanship and affiliation with the Republican Party.<sup>119</sup> As one enlisted airman explained during the 2008 Presidential election, "I've always felt that the Republican Party was interested in having a stronger military."<sup>120</sup> Arguably, the ideological slant towards the right stems from the Vietnam War era and the corresponding anti-militaristic position taken by the left. This polarization intensified with the comparison of "hawkish" pro-military Republican candidates and Presidents (Ronald Reagan, George H.W. Bush, Robert Dole and George W. Bush) against "dovish" Democratic counterparts (Jimmy Carter, Walter Mondale, Michael Dukakis, and Bill Clinton.)<sup>121</sup> In the 2008 Presidential election, Republican nominee John McCain enjoyed across-the-board support among the military personnel. According to a *Military Times* poll, 69% of all respondents (from officers to active-duty service members to enlisted reservists) backed McCain over Obama.<sup>122</sup> It follows that if a significant percentage of the service membership possess a geographic

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<sup>117</sup> Ibid, 70

<sup>118</sup> Kauth, Michael R. and Dan Landis. 1996. Applying Lessons Learned from Minority Integration in the Military. In *Out of Force*, edited by Gregory M. Herek, Jared B. Jobe, Ralph M. Carney. Chicago: University of Chicago Press, 100.

<sup>119</sup> Belkin and Bateman, 86

<sup>120</sup> McGarry, Brendan. "Backing McCain." *Air Forces Times* 69 (2008): 36

<sup>121</sup> McNerney, Michael. "Military Partisanship." *Journal of Political and Military Sociology* (2006) 284.

<sup>122</sup> Brendan McGarry, "Backing McCain," 38.



background and/or political orientation closely correlated with homophobic attitudes, this bias will influence the overall military culture as well.<sup>123</sup>

As a traditional and conservative institution, the military tends to delay, rather than embrace, many of the social changes occurring in broader society.<sup>124</sup> That said, some scholars and historians argue that the military's response to President Truman's Executive Order in 1948 (ending the racial exclusion) presents a relative success story.<sup>125</sup> Additionally, while attempts to fully integrate women into the armed services proved more difficult than desegregation efforts, the military also made impressive advances in achieving equity for women. With the help of Congress and the courts, few formal barriers to gender equality now exist.<sup>126</sup> (But even with the removal of most restrictions on their service, women continue to face discrimination on the basis of gender and sexual orientation today.) The military's resistance to gays and lesbians also remains deeply rooted, and it has only intensified since World War II.<sup>127</sup> Moreover, in contrast to military's regulations on African Americans and women, the exclusion of homosexuals still persists as federally mandated legislation.

For many years, those in favor of excluding gays and lesbians from the armed services drew on the argument posited by *Directive 1332.14* stating homosexuals were inherently "incompatible" with the military's duties and fundamental mission. By the implementation of "Don't Ask, Don't Tell" in the early 1990s, the assumption that gays and lesbians lacked the physical and mental ability to perform the duties required of

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<sup>123</sup> Belkin and Bateman, 86

<sup>124</sup> Thomas and Thomas, 78

<sup>125</sup> Herek, Gregory M, Jared B Jobe, and Ralph M Carney. *Out In Force*. Chicago: The University Of Chicago Press, 1996.

<sup>126</sup> Thomas and Thomas, 80

<sup>127</sup> Herek, 5

service members no longer applied. As evidenced in a 1992 statement from the Chairman of the Joint Chiefs of Staff General Colin Powell calling homosexuals “proud, brave, loyal Americans,” the Department of Defense and uniformed leadership now acknowledged that gays and lesbians can serve with competence and honor.<sup>128 129</sup> To justify the ban, the military brass thus maintained the necessity of exclusion based on the negative response heterosexuals would have to their homosexual counterparts.<sup>130</sup> As General Powell explained, “It is difficult in a military setting with no *privacy*...to introduce a group of individuals...who favor a homosexual lifestyle-and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive.”<sup>131</sup> During the “Don’t Ask, Don’t Tell” debate, the military’s core case against open service emphasized these concerns consequent of the interaction between heterosexuals and homosexuals.

In the 1993 deliberations the military brass gave several reasons against the inclusion of gays and lesbians in the armed forces. First, they predicted an overall deterioration in unit cohesion, a vital psychological element for a fighting unit.<sup>132</sup> To prove this, military experts relied on numerous surveys reporting that heterosexual service members disliked their gay and lesbian peers.<sup>133</sup> Uniformed leaders explained the presence of gays and lesbians would produce conflict within a troop and negatively impact performance. Since the enactment of “Don’t Ask, Don’t Tell,” the emphasis laid on protecting unit cohesion persists as one of the military’s main arguments against the

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<sup>128</sup> Herek ,197

<sup>129</sup> Kauth and Landis, 94

<sup>130</sup> Hereck, 197

<sup>131</sup> Kauth and Landis, 95

<sup>132</sup> Thomas and Thomas, 75

<sup>133</sup> Belkin and Bateman, 70

policy's reversal. In the July 2008 congressional hearing reexamining "Don't Ask, Don't Tell," Sergeant Major (Ret.) Brian Jones' provided testimony from the vantage point of a military professional. He explained:

"On several occasions, in the close quarters that a team lives, any attraction to same sex teammates, real or perceived, would be known and would be a problem. The presence of openly gay men in these situations would elevate tensions and disrupt unit cohesion and morale."<sup>134</sup>

The military further argued for the "privacy rights" of heterosexual soldiers. During the 1993 deliberations experts claimed that the duties and living conditions of military service created unavoidable situations where soldiers would be exposed both physically and intimately. They contended that service members, already sacrificing their personal rights in speech, appearance, and behavior for the call of duty, deserved at least *some* control over who could see their naked bodies. If homosexuals could view naked heterosexuals, they reasoned, then it violated the latter's right to privacy.<sup>135</sup> As Gen. Powell explained:

"...heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive, put them in close proximity, ask them to share the most private of all their facilities together, the bedroom, the barracks, latrines, showers, I think that's a very difficult problem to give to them military."<sup>136</sup>

Over the year, supporters of "Don't Ask, Don't Tell" continued to maintain that the absence of ban on homosexuals infringed upon soldiers' privacy. Sergeant Major Jones (Ret.) also raised concerns over the consequences of "forced intimacy" in his testimony to Congress as well.<sup>137</sup>

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<sup>134</sup> US House Hearing July 23, 2008

<sup>135</sup> Belkin and Bateman, 52

<sup>136</sup> Belkin and Bateman, 53

<sup>137</sup> US House Hearing July 23, 2008

Since the enactment of the policy, the military has justified “Don’t Ask, Don’t Tell” relying on these core arguments of unit cohesion and privacy. They have also stressed the adverse impacts that integration of homosexuals would incur on the military’s order and discipline, integrity of rank, successful recruitment and retention.<sup>138</sup> Finally, the military has warned that reversing the current policy would result in heightened violence and harassment towards homosexual troops.<sup>139</sup>

The resonance of these concerns for military helps to explain their hostility towards rescinding “Don’t Ask, Don’t Tell.” As indicated by the latest survey of the *Military Times*, 58% of active duty-members continue to oppose the ban and 10% of respondents said they would not reenlist or extend their service if it were revoked. Another 14% claimed that without the ban on homosexuals, they would consider ending their military career once completing their tour of duty.<sup>140</sup> Revealing the institution’s insular and homophobic culture, these statistics further demonstrate the potency and perseverance of the military’s resistance to homosexual service.<sup>141</sup>

Resulting from these beliefs, uniformed leaders and military elites oppose an open policy for homosexuals. By influencing policymakers, their active resistance helps to account for the creation and continuation of “Don’t Ask, Don’t Tell.” To explain the role and impact of this leadership, it is useful to consider the military’s formal organizational structure. The Department of Defense heads the all of the nation’s unified armed

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<sup>138</sup> Thomas and Thomas, 74

<sup>139</sup> Hereck, 4

<sup>140</sup> McGarry, Brendan. "Troops Oppose repeal of 'don't ask'." *Military Times*.  
<<http://www.militarytimes.com/news/>>

<sup>141</sup> The results of a December 2006 Zogby International Poll found 73% of military personnel “comfortable with lesbians and gay.” Advocates for current policy’s removal have emphasized these results, and argue they demonstrate the military’s shifting attitude on the issue. The Zogby poll drew much criticism among those favoring ban over the wording of this question. The survey also contained a question specific to allowing gays and lesbians in the military and founded only 26% of military respondents in agreement.

services. The structure of command (established by the Goldwater-Nichols Act of 1986) operates under civilian control from the Commander-in-Chief to the Secretary of Defense. From here, an extensive ladder of authority runs through the multiple branches, each containing its own arrangement and pecking order. As a rule-driven institution, the military places a premium on efficiency, stability, and strict adherence to the chain of command.<sup>142</sup> Therefore, the leadership plays an important role in the reception and implementation of policy.<sup>143</sup>

The Chairman and the Joint Chiefs of Staff (JCS), although not positioned in the official chain of command, represent the military's most influential non-civilian leaders. Acting as advisors to the civilian government, the JCS assumes primary responsibility for the military's readiness. While appointed by the President (and technically subordinate to him and Secretary of Defense), the Chairman and JCS *do* have special authorization to approach Congress with their criticisms and concerns over various policies affecting national security.<sup>144</sup> Further, while the JCS serve terms of four years (two for the Chairman), they can only be fired for cause, not at the President's discretion.<sup>145</sup> As a highly regarded and prestigious institution, the JCS thus plays an influential role in counseling the legislators charged with enacting military policy.

In the debates over "Don't Ask, Don't Tell," Congress deferred heavily to the advice of these elite military leaders, all of who voiced strong disagreement towards Clinton's proposed repeal.<sup>146</sup> Despite their original dissent, when Clinton unveiled the

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<sup>142</sup> Zellman, Gail L. 1996. Implementing Policy Change in Large Organizations: The Case of Gays in the Military. In *Out of Force*, edited by Gregory M. Herek, Jared B. Jobe, Ralph M. Carney. Chicago: University of Chicago Press, 266.

<sup>143</sup> *Ibid*, 268

<sup>144</sup> Lawrence Korb, "The President, the Congress, the Pentagon," 296

<sup>145</sup> *ibid*, 276

<sup>146</sup> Hereck, 8

“Don’t Ask, Don’t Tell” compromise on July 19, 1993, he specifically *thanked* the JCS for conceding on some slight provisions. Attempting to put a positive spin on the situation, Clinton concluded that because of their willingness to compromise: “...[T]here will be a decent regard to the legitimate privacy and associational rights of all service members.”<sup>147</sup> His expression of gratitude reveals the authority of the JCS in constructing military policy, and also the significance of their influence in creating “Don’t Ask, Don’t Tell.” Moreover, the fact that “Don’t Ask, Don’t Tell” resulted in little effectual change from the previous policy demonstrates the success (and hence power) of this leadership in achieving their objective to bar gays and lesbians from open military service.

Along these lines, many then cited the collapse of Clinton’s promise to the formidable challenge it faced from the JCS and top uniformed officials. Lauren Miller, a social scientist at the RAND research corporation, concluded, “I can absolutely affirm that winning over the military leaders will be an essential part in the success of implementation of the policy...”<sup>148</sup> Clinton never attained this support for his original pledge, however, and only received their endorsement for the “compromise” version. Furthermore, when the Pentagon ordered two investigations during the policy’s interim period (one conducted by the RAND Corporation and the other by a panel of military officials), the President and Secretary of Defense largely deferred to the findings of the military commission.<sup>149</sup> The elevated status of the military’s findings here demonstrates the importance of the institution’s judgment on the issue.

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<sup>147</sup> Burrelli, David F. and Jody Feder. “Homosexuals and the U.S. Military: Current Issues. CRS Report for Congress, July 18, 2008, 2.

<sup>148</sup> Belkin, 170

<sup>149</sup> Herek, 8

Moreover, scholars have maintained that an effective repeal of the military's ban on gays requires strong endorsement from the uniformed leadership.<sup>150</sup> In general, the hierarchical structure of the military necessitates support at the top to implement policies successfully. Without initial backing from the leaders, the policy will lack compliance and efficacy moving down the chain, as lower level leaders will exhibit inconsistency in their enforcement efforts.<sup>151</sup> Certainly, the military's homophobic culture does not present a welcome environment to enforce the proposed policy. Also, considering that most military leaders view homosexual service as detrimental to the forces, it follows that they would not embrace or enforce effectively a reversal of the ban by their own volition.<sup>152</sup> As a result, implementing this social change requires the genuine commitment from those at the top of the uniformed command and especially the JCS.<sup>153</sup>

During the debate in 1993, policymakers recognized the necessity of the military's leadership's support for legislation to work effectively. Although the President officially heads the military's chain of command, the position alone would not render him enough authority to ensure effective implementation of unpopular policies. Clinton therefore needed the allegiance of the leadership not only to influence Congress, but also to guarantee the policy's success later on. Clinton's lack of military experience and his opposition to Vietnam certainly did not help his image among the uniformed command.<sup>154</sup> Without this credibility, Clinton then especially needed the backing of the JCS and Department of Justice (DOJ) to help him commit military officials. The DOJ

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<sup>150</sup> Belkin and Bateman, 90

<sup>151</sup> Zellman, 278

<sup>152</sup> Lauren L. Miller and John Allen Williams, "Do Military Policies on Gender and Sexuality Undermine Combat Effectiveness?" in Peter Feaver and Richard Kohn, eds., *Soldiers and Civilians: The U.S. Military, American Society, and National Security* (Cambridge, Mass.:BCSIA-MIT Press, 2001).

<sup>153</sup> Korb, "The Presidency, the Congress, the Pentagon," 297

<sup>154</sup> Herek, 11

career attorneys (many of them demonstrating respect to precedent) provided little assistance to the president, however.<sup>155</sup> Furthermore, Clinton exerted little authority over JCS, all of who (except General Powell, whose term expired that year) had been appointed by his Republican predecessor. In this way, Clinton's attempt to win over the military brass proved a lost cause. Devoid of support from the DOJ, JCS and top military commanders, the proposal to lift the gay ban raised serious implementation and compliance concerns among policymakers, and provided them legitimate reason not to impose the controversial legislation.

The military leadership continues to exert an influence on policymaking decisions. While President Obama pledged to end the "Don't Ask, Don't Tell" policy during his 2008 campaign, he also promised to work along with the military in this endeavor and noted, "The military must be our active partners in developing this process."<sup>156</sup> Furthermore, the current Chairman of the Joint Chiefs of Staff Michael Mullen has not expressed any outward resistance to rescinding the ban, but has stated only his commitment to comply with whatever official legislation Congress should enact. Explaining his position on "Don't Ask, Don't Tell," the chairman asserted: "[Don't Ask, Don't Tell]" is a law and we should follow it. Should the law change, the military will carry that out too."<sup>157</sup> Unlike past Chairman and members of the JCS, Mullen's comments reveal a new attitude of compliancy. In this way, Mullen's influence could serve as a source of support rather than resistance for the ban's repeal.

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<sup>155</sup> Korb, "The Presidency, the Congress, the Pentagon," 296

<sup>156</sup> Stone, Andrea. "Gay Rights Advocates Forced to Adjust Agenda." *USA Today*, November 21, 2008.

<sup>157</sup> "Mullen has Open Conversation on "Don't Ask, Don't Tell"." *Military.com*  
<<http://www.military.com/news/article/mullen-has-open-conversation-on-dont-ask-dont-tell.html>>



From this, the military's resistance does seem a potent force in preventing policy change, and on some level helps to explain the implementation and continuity of "Don't Ask, Don't Tell." On the other hand, the armed services, while a distinct and important institution, must follow all legislation enacted by Congress. Even if the military resists a policy and impedes its implementation, it cannot independently prevent the passage of federal law. As the history of racial and gender integration into the military proves, the institution's influence over such legislation has limits. Accordingly, scholars often draw comparisons between the military's ban on gays with its previous policies restricting African Americans and women.<sup>158</sup> While imperfect analogies, these groups have each faced periods of discrimination in the armed services. Many of the military's arguments used to justify the respective exclusions closely parallel as well.

In spite of the military's fundamental resistance towards both movements, the policies allowing for the segregation of African Americans and restrictions on women no longer exist as official procedure. Disregarding the strong opposition from the JCS, in 1948 President Harry Truman ordered the desegregation of the armed forces.<sup>159</sup> While this command faced resistance, particularly within the Army, many consider the gradual assimilation a notable achievement.<sup>160</sup> During Truman's presidency, Congress also enacted laws regulating the integration of women, albeit with more restrictions on their service.<sup>161</sup> Over the following decades, although the status of women in the armed forces did improve, their inclusion was slow and uneven. Women fought for the right to serve, however, employing the courts and legislative channels for change. By the 1990s,

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<sup>158</sup> Kauth and Landis, 92

<sup>159</sup> Korb, "The President, the Congress, the Pentagon," 297

<sup>160</sup> Kauth and Landis, 88

<sup>161</sup> Thomas and Thomas, 66

Congress had voided most all of the formal policies constraining women's service.<sup>162</sup> In this way, though the military vehemently resisted the presence of both African Americans and women from the onset, legislation promoting their integration prevailed. (As demonstrated by the many women service members still encountering sexual harassment and abuse however, federal laws only extend so far when implemented in an environment hostile to such changes.)

Overall, the failure to prevent these prior movements illustrates the threshold of the armed services' authority, and thus reveals the power of the legislative branches to enact policies, even when unpopular. Moreover, it demonstrates the institution's resilient nature. When forced, the military will adapt—at least to an extent.<sup>163</sup> By this analysis, if the President and Congress had together decided to revoke “Don't Ask, Don't Tell,” the military's opposition alone could not have prevented the legislation's elimination.

In sum, the military's active resistance, especially from the leadership, has served as a barrier to the open service for gays and lesbians in the armed forces. In the case of “Don't Ask, Don't Tell,” the relative significance of the military's opposition in preventing the policy's repeal has changed over time. During the policy's implementation period, the resistance of the JCS and top military officials had an important role in shaping the final compromise. Yet despite their influence on policymakers in 1993, less persuasive evidence exists that the military's defiance played a definitive role in maintaining the ban since, especially when considering more compelling forces of opposition. Additionally, in recent years several high-ranking

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<sup>162</sup> Thomas and Thomas, 82

<sup>163</sup> Kauth and Landis, 100

former military leaders have expressed a new opinion on “Don’t Ask, Don’t Tell.” General Shalikashvili and General Powell, both former chairman of the JCS, have publicly called for a “review” of the military’s current policy on homosexuals.<sup>164</sup> Other former leaders have followed suit: On the 14<sup>th</sup> anniversary of “Don’t Ask, Don’t Tell,” 28 retired generals and admirals sent a letter encouraging Congress to overturn the ban.<sup>165</sup> Based on these shifting attitudes of the military brass, and the amenable stance of the current JCS Chairman, the role of military’s opposition no longer presents the same barrier to change as it did fifteen year ago.

Until now, this chapter has focused on the military’s active resistance to change, and to what extent this force has contributed to sustaining the current ban. The military also serves a “passive” role in preserving “Don’t Ask, Don’t Tell.” According to this argument, the military has passively influenced the persistence of the policy through the court’s historical deference to its judgment. At an academic conference on the “Don’t Ask, Don’t Tell” held in 2000, Dina Mazur, a Professor of law and retired U.S. Air Force captain explained:

“I believe the most significant factor that prevents any revision or repeal of “Don’t Ask, Don’t Tell” is the extraordinary deference that *courts* afford to decision making. Today the military makes decisions with the assured understanding in almost all instances that its decisions will not be second-guessed by the courts...Today federal courts no longer consider themselves obligated to determine whether military decision-making is in accord with the Constitution, or whether the decisions are even rational under rational-basis review. Instead, they simply determine whether the military believes it is acting rationally. If so, the courts will defer to the military’s belief.”<sup>166</sup>

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<sup>164</sup> West, Owen . "An Out-Face on Gay Troops." *The New York Times*, February 9, 2009.

<sup>165</sup> *ibid*

<sup>166</sup> Belkin and Bateman, 145

For many years the court has demonstrated a long history of deference to the military on issues pertaining to military service, organization, and membership. In part, this stems from the notion that military service is essentially disparate from civilian life.<sup>167</sup> Moreover, because the Constitution grants the judiciary no specific authority over the military, this branch lacks the constitutional authority as the Executive or Congress on the institution. As a result, courts frequently defer to these powers and the military's judgment when deciding cases on constitutional rights and the military environment.<sup>168</sup> In *Korematsu v. United States* (1944),<sup>169</sup> the Supreme Court sanctioned the military's order to intern Japanese-Americans during World War II, and reasoned that the military's concerns over a potential Japanese security threat warranted the infringement of civil rights. Here, the Court stated: "[w]e cannot reject the unfounded judgment of the military authorities, and of Congress."<sup>170</sup>

Since *Korematsu*, the Court avoided substantive review of military disciplinary proceedings, provided they adhered to judicial prerequisites.<sup>171</sup> During the 1960s, however, the activist Warren Court began to question the military's reach on certain matters. This judicial attitude soon reversed under the more conservative Burger Court, which introduced an era of the "modern military deference doctrine."<sup>172</sup> At this time, *Rostker v. Goldberg* (1981)<sup>173</sup> and *Goldman v. Weinburg* (1986)<sup>174</sup> provide two important

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<sup>167</sup> Jacobsen, Peter D. 1996. Sexual Orientation and the Military: Some Legal Considerations. In *Out of Force*, edited by Gregory M. Herek, Jared B. Jobe, Ralph M. Carney. Chicago: University of Chicago Press.

<sup>168</sup> Scotti, Gavin W.. "Queer Eye for the Military Guy: Will Don't Ask, Don't Tell Survive in the Wake of *Lawrence v. Texas*." *St. John's Law Review* 78 (2004), 908.

<sup>169</sup> 323 U.S. 214 (1944).

<sup>170</sup> *Ibid*, 217-218

<sup>171</sup> Burrelli and Feder, 15

<sup>172</sup> *ibid*, 15

<sup>173</sup> 453 U.S. 57 (1981)

<sup>174</sup> 475 U.S. 503 (1986)

contemporary precedents of the court's deference to the military. In *Rostker*, the Court ruled on the constitutionality of Military Selective Service Act, which upheld the exclusion of women from the military's draft. In this decision the Court emphasized the uniqueness of the military as an institution, "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian."<sup>175</sup> Five years later in *Goldman*, an Orthodox Jew challenged the Airforce's regulation against headgear (prohibiting his yarmulke) on the grounds that it violated his First Amendment Right to religious expression. Writing for the majority, Justice Rehnquist stated, "Our review of military regulation...is far more deferential than constitutional review of similar laws or regulations designed for civilian society."<sup>176</sup> As illustrated by these decisions, the judicial branch has historically granted the military a great deal of leeway due to its unique mission and purpose.<sup>177</sup>

After the implementation of "Don't Ask, Don't Tell," the courts have upheld the policy several times. In *Thomasson v. Perry* (1996),<sup>178</sup> the Fourth Circuit Court of Appeals ruled against Lt. Paul G Thomasson, who had been discharged under the policy for declaring his sexuality. The Court's decision reflected the reluctance to challenge the judgment of military authorities, and again emphasized the need for judicial restraint on military decision-making. In *Richenberg v. Perry*,<sup>179</sup> the Court also upheld the military's decision to remove a homosexual Air Force captain, arguing the ban served legitimate military needs.

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<sup>175</sup> 453 U.S. 57 (1981), 64

<sup>176</sup> 475 U.S. 503 (1986), 507

<sup>177</sup> *Burelli and Feder*, 15

<sup>178</sup> 80 F. 3d 915 (4<sup>th</sup> Circ.), *cert. denied*, 519 U.S. 948 (1996).

<sup>179</sup> 97 F. 3d 256 8<sup>th</sup> Circ. 1996), *cert. denied*, 522 U.S. 807 (U.S. 1997)

In addition their deference to the military, the courts have also relied on *Bowers vs. Hardwick* (1986)<sup>180</sup> to uphold the military's policy against homosexuals. In *Bowers*, the Court ruled that there is no basic right for individuals to engage in homosexual acts, and this decision allowed courts to apply a rational basis standard of review in reviewing "Don't Ask, Don't Tell."<sup>181</sup> For example, in *Phillips v. Perry* (1997)<sup>182</sup> the Ninth Circuit Court of Appeals ruled in favor of "Don't Ask, Don't Tell," arguing that because homosexuals were not members of "suspect class," they were not subject to federal equal protection analysis.

In 2003, the Supreme Court's decision in *Lawrence vs. Texas* decision restricted the scope of legislation based on morals, which arguably changed the constitutional context used to examine "Don't Ask, Don't Tell."<sup>183</sup> Some legal commentators have suggested that *Lawrence* calls for closer analysis of this policy's means and ends, and could therefore lead to the invalidation of the military's current ban. Conversely, others believe the ruling will have little future impact on the judicial approach to "Don't Ask, Don't Tell."<sup>184</sup> Thus far, the court cases reviewing this policy since *Lawrence* prove the latter prediction accurate.

In *United States vs. Marcum* (2004)<sup>185</sup>, the U. Court of Appeals for the Armed Services (the highest judicial tribunal in the military) upheld a sodomy conviction against an Air Force linguist specialist. Here, the Court did not base their conviction primarily on homosexual conduct, but on the inappropriateness of sex between a superior and his

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<sup>180</sup> 478 U.S. 186 (1986)

<sup>181</sup> Scotti, , 908

<sup>182</sup> 106 F.3d (9<sup>th</sup> Cir.1997)

<sup>183</sup> 123 S. Ct. 2472 (2003)

<sup>184</sup> Scotti, 916

<sup>185</sup> 60 MJ 198 (C.A.A.F 2004)

subordinate. The Court implied, however, that the *Lawrence* decision could pertain to the military's prohibition on gays.<sup>186</sup> More recently, in *Cook v. Gates* (2008)<sup>187</sup> the Court of Appeals for the First Circuit dismissed the challenge of twelve gay and lesbian veterans discharged under the military's ban. While the Court based their decision on the "governmental interest in preserving military effectiveness," they acknowledged that *Lawrence* "did indeed recognize a protected liberty interest...and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label."<sup>188</sup> While no case has challenged "Don't Ask, Don't Tell" successfully, future courts may hold that the military's interest in maintaining unit cohesion and discipline no longer endure over the rights recognized by *Lawrence*.

Thus far the Supreme Court has dismissed all opportunities to review "Don't Ask, Don't Tell." In 2005 the Supreme Court agreed to rule on the Solomon amendment. This legislation allows Congress to withhold federal money from universities wishing to exclude access to military recruiters because of "Don't Ask, Don't Tell." Although this case did not directly challenge the military ban, gay rights activists hoped it might raise awareness and instigate momentum on the policy's repeal.<sup>189</sup> Much to their disappointment, however, in *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*<sup>190</sup> the Supreme Court rejected the arguments of universities that the presence of recruiters conflicted with their support for gays rights.

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<sup>186</sup> Burrelli and Feder, 19

<sup>187</sup> 528 F. 3d 42 (1<sup>st</sup> Cir. 2008)

<sup>188</sup> Burrelli and Feder, 22

<sup>189</sup> Files, John. "Advocates Supreme Court Ruling Can Renew Attention to Don't Ask, Don't Tell." *The New York Times Online*, March 13, 2006. <http://www.nytimes.com/>(accessed March 29, 2009).

<sup>190</sup> 126 S. Ct. 1297 (U.S. 2006)

The longstanding judicial deference to the military has thus served a crucial role in legally sanctioning the ban on homosexuals, and arguably in preserving “Don’t Ask, Don’t Tell” as well. An examination of the respective congressional politics under the administrations of Clinton and Bush reveals the great improbability that either Congress or the President might have initiated successfully efforts to repeal the policy. In light of the court’s role in advancing gay rights, many scholars believed “Don’t Ask, Don’t Tell” would fall to the judicial branch, and perhaps the Supreme Court would nullify the “Don’t Ask, Don’t Tell” policy.<sup>191</sup> The judiciary’s stringent deference to the military’s judgment throughout the policy’s duration, however, presented a solid and barrier to the policy’s judicial invalidation.

In this way, the military’s passive resistance encouraged the persistence of “Don’t Ask, Don’t Tell” by influencing the court’s approach to the legislation. The significance of this force in the overall preservation of the policy must be weighed alongside other factors. For much of the policy’s duration, the dominance of the Republican Party in Washington led advocates to seek assistance from the court system. Yet the longstanding judicial deference to the military gave little traction to their cause. This demonstrates the power of multiple opposition forces working together to keep “Don’t Ask, Don’t Tell” in place. Activists for lifting the military’s ban have recently refocused their energies from the courts onto Congress. The Democratic majority provides optimism among activists over Congress’ ability to reverse the policy.<sup>192</sup> With this expectation no longer on the

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<sup>191</sup> Thomas and Thomas, 81

<sup>192</sup> Scarborough, Rowan. "Obama to delay 'don't ask, don't tell' repeal." *The Washington Times*, November 21, 2008.



courts, the significance of judicial deference in sustaining “Don’t Ask, Don’t Tell” has correspondingly diminished.

In conclusion, the military has served in different contexts as an obstacle to open service for gays and lesbians in the military. The combination of active and passive sources of resistance has contributed clearly to the policy’s duration and inertia. For example, had the military leadership not presented such a united and formidable defense against Clinton’s initiative, perhaps his pledge to “lift the ban” would have met greater success. Or without the court’s historical deference to military judgment, perhaps one of the many legal challenges to “Don’t Ask, Don’t Tell” would have led to its nullification. In light of these considerations, one must recognize the other influences bolstering “Don’t Ask, Don’t Tell” as well. The military’s opposition, while a demonstrable and vital barrier at times, operated in conjunction with additional forces to sustain the current legislation.

#### CHAPTER FOUR The Ironic Implications of the War on Terror

On the morning of September 11, 2001, nineteen terrorists associated with al Qaeda, an extremist Sunni Islam network, hijacked four US commercial airliners. The terrorists intentionally crashed two planes into the Twin Towers of New York City’s World Trade Center and a third into the Pentagon building, housing the US Department of Defense. The fourth airliner, though intended for the Capitol, crashed into a field in rural Pennsylvania after the passengers and crew revolted. Staggered by these events,

Americans watched nine days later as their new President addressed a joint session of Congress to declare the country in war against global terrorism. Standing before the country's legislators, Bush announced:

“How will we fight and win this war? We will direct every resource at our command...many will be involved in this effort, from FBI agents to intelligence operatives to the reservists we have called to active duty...And tonight, a few miles from the damaged Pentagon, I have a message for our military: Be ready. I've called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud.”<sup>193</sup>

In spite of Bush's request for “every resource,” the policy against gays and lesbians in the armed forces barred them from meeting the President's call of duty. As C. Dixon Osburn, the executive director of the Service-members Legal Defense Network, a pro-homosexual military support group (SLDN) clarified, “At a time when Bush is calling for all Americans to come together to fight this new enemy, we have our government saying, in official language, ‘We want everyone but you gay, lesbian, and bisexual service members. We don't need your help.’”<sup>194</sup>

Resulting from the 9/11 attacks, the Bush administration would commit to a “War on Terrorism,” pulling the nation into a protracted and bloody conflict. Even after the topple of the Taliban and the dust had settled over Baghdad, the country would remain engaged in this ideological struggle for years. In addition to the war's obvious international repercussions, it involved nearly all spheres of the United States: political, legal, civilian, media, and military. With respect to the armed services, not since Vietnam had the American forces experienced such an extensive and costly conflict, in

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<sup>193</sup> “Bush Issues Ultimatum to Taliban, Calls Upon Nation and World To Unite and Destroy Terrorism.” *CQ Weekly Online*.

<sup>194</sup> Kirby, David. “Think Before You Act.” *Advocate*, December 4, 2001. [EBSCO Megafile]

terms of dollars *and* bodies. In fact, five years into the war, many foreign policy and defense experts contended that the Bush administration had depended far too heavily on the nation's military instead of emphasizing more effective diplomacy. James Dobbins, who had been one of Bush's special envoys to Afghanistan, commented in 2006, "It's been primarily a military enterprise...At some point, this or some administration is going to have to establish a better balance."<sup>195</sup> As a result, the stress on the military comprised its overall efficacy and strength.

The lengthy conflict in Iraq took an especially large toll on the military, severely straining the forces' readiness and recruitment. These concerns gave renewed momentum to "Don't Ask, Don't Tell," as Americans began to reconsider the ramifications of a discriminatory policy. With a desperate need for more soldiers, the ban seemed to hurt more than help the armed services. Ironically, even as the Iraq conflict thus underscored some of the policy's detriments, for opponents of homosexual service, the war provided another *excuse* to sustain "Don't Ask, Don't Tell." Despite the calls from the public, politicians, and even former military leaders to repeal the ban, the policy's supporters maintained the current security crisis posed improper timing to inflict a major "social change" on the armed services. They warned that rescinding the law would cause serious harms, and would place an unfair burden on troops.

Over the course of the policy's history, the drive to end the military's ban on homosexuals only occurred in effect during more recent years, when a conjunction of favorable factors had gradually emerged. At such a juncture, one reasonably expects the

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<sup>195</sup> Monaghan, Elaine, and Jonathan Broder. "The War on Terror." *CQ Weekly Online*, September 11, 2006.

resultant demise of “Don’t Ask, Don’t Tell.” In spite of this, the exclusionary policy remains in place, revealing yet another (or plurality of) effective counterweight (s) still at play. Here, one could argue that America’s “war on terror,” particularly the engagement in Iraq, acted as this force of resistance, and thus increased in overall significance as the other contiguous sources of opposition declined. First, the war dominated Congress’ agenda, and the subcommittees which normally review military policy did not have the time, nor desire, to pursue the controversial issue with Iraq underway. Further, policymakers feared the unforeseen consequences of imposing a “social experiment” on active-duty troops. The chapter therefore examines the course of US involvement in the war on terror and Iraq and the corresponding congressional action on “Don’t Ask, Don’t Tell.” This reveals that while the war had endured for several years, it only became a key factor in precluding policy change with the departure of previously dominant forces.

In the aftermath of 9/11, Congress and the American people quickly signed on to the Bush administration’s war on terrorism. In October 2001, the United States and Great Britain embarked on an invasion of Afghanistan (part of the Operation Enduring Freedom (OEF) operation) to end Taliban regime, which had provided a haven for the al Qaeda network. Bush received widespread support for this action, and Congress immediately granted substantial funds to conduct other OEF operations.<sup>196</sup> In light of these operations and subsequent combat missions, President Bush issued a “stop loss,” an order frequently instated during times of conflict that temporarily halts military discharges. This evoked simultaneous rumblings of resistance towards “Don’t Ask, Don’t Tell”. While the Pentagon maintained the “stop loss” would not alter the status quo policy on homosexual

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<sup>196</sup> Cooper, Mary H.. "New Defense Priorities." *CQ Weekly Online*, September 14, 2002.

service, many service members still interpreted the announcement as a signal that “Don’t Ask, Don’t Tell” no longer applied.<sup>197</sup> These mixed messages increased media attention on the policy, which provided momentum for advocates against the ban. As Osburn explained, “There are moments that really bring into focus the absurdity of ‘Don’t Ask, Don’t Tell,’ and this is one.”<sup>198</sup> With the “stop loss” in effect, gay advocacy groups predicted that the war on terror would lead to fewer gay discharges. According to Aaron Belkin, the director of the Center for the Study of Sexual Minorities in the Military at the University of California, Santa Barbara, “[The military] wants bodies. And frankly, they don’t want a straight person to have a get-out-of-jail-free card. Now if a soldier steps forward and says, ‘I’m gay,’ and there is no other evidence, they won’t be removed.”<sup>199</sup>

Following the Afghanistan invasion, conservative political commentator Bill O’Reilly raised the question of “Don’t Ask, Don’t Tell” on his show. Not surprisingly, O’Reilly resolutely backed the policy, claiming, “[f]or the military, it works because they don’t want a big bunch of discussion about sexuality and I don’t blame them.”<sup>200</sup> Even if the military preferred to avoid the issue -- their attitude did not reflect the current national opinion. According to several national polls conducted in 2000, a strong majority (approximately 67%) of Americans believed homosexuals deserved the opportunity to serve openly in the armed forces.<sup>201</sup> At the same time, O’Reilly’s position seemed an acceptable to many individuals not wishing to challenge the judgment of President or the Pentagon during war. Therefore, although the “stop loss” order gave military leaders

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<sup>197</sup> David Kirby, “Think Before You Tell”

<sup>198</sup> *ibid*

<sup>199</sup> *ibid*

<sup>200</sup> “Unresolved Problem: Interview with Andre Taylor and Jeff Cleghorn.” The O’Reilly Factor Fox. Nov 1, 2001.

<sup>201</sup> Oscar Torres-Reyna and Robert Shapiro, 621.

greater discretion in handling gay discharges, “Don’t Ask, Don’t Tell” remained firmly in place, and generally unchallenged, throughout the initial years of conflict.

Even after the Afghanistan operation successfully dismantled the Taliban regime from power, the war on terror had only just begun. In his State of the Union address in 2002, Bush identified Iraq as part of an “axis of evil.” The President gradually began building a rationale for war, which was bolstered by the Britain’s dossier on Iraq in September. The fifty-page report claimed the Iraqi government had unconventional weapons and could potentially develop a nuclear weapon in 1-5 years.<sup>202</sup> From here, the path to war quickened. The following month Congress authorized President Bush to use force against Iraq and Saddam Hussein. Soon after, the UN Security Council passed Resolution 1441 stating that Iraq must disarm or “face serious consequences.” By the spring, Congress had approved the use of force in Iraq and the US military had begun plans for a possible invasion. After the UN weapons inspector reported Iraq’s refusal to cooperate after two months of inspection, Bush indicated that the country would confront Iraq—with or without the support of American allies or the UN’s explicit approval.<sup>203</sup> On March 17, 2003, the President announced that the UN had failed to meet expectations regarding Iraq and gave Saddam Hussein 48 hours to step down from power. When Hussein refused to comply with the administration’s demands, the United States declared an attack on Iraq.<sup>204</sup>

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<sup>202</sup> Hoge, Warren. "Blair Says Iraqis Could Launch Chemical Warheads in Minutes." *The New York Times*, September 25, 2002.< <http://www.nytimes.com/> >

<sup>203</sup> *The New York Times Online*. March 18, 2008. "Iraq Five Years In: Timeline."  
<[http://www.nytimes.com/interactive/2008/03/18/world/middleeast/20080319\\_IRAQWAR](http://www.nytimes.com/interactive/2008/03/18/world/middleeast/20080319_IRAQWAR)

<sup>204</sup> *ibid*

The war's "combat stage" proved swift. On April 9, 2003, Baghdad fell to the United States. By May 1, President Bush confirmed an official end to the "combat stage" of the assault. On an aircraft carrier in San Diego harbor, Bush declared to thousands of soldiers, " [The] major combat operations in Iraq have ended...in the battle of Iraq, the United States and our allies have prevailed."<sup>205</sup> As the subsequent months, and later *years*, would demonstrate however, America's engagement in Iraq would prove more difficult. Not only would sectarian violence and chaos hinder reconstruction efforts, but also the American death toll would skyrocket.

In 2004 the suit filed by the Log Cabin Republican challenging "Don't Ask, Don't Tell" generated more media buzz on the ban. The consensus among most members of Congress, however, favored avoiding the controversial issue with the war underway. According to Frank Gaffney, president of the conservative Center for Security Policy, "There's a general sense in Congress that 'Don't Ask, Don't Tell' is a necessary evil. I doubt it will be debated."<sup>206</sup> Even more liberal congressmen such Barney Frank, (an openly gay Representative from Massachusetts), acknowledged it was not the right to time push the contentious issue.<sup>207</sup>

The war on terror defined Bush's first term as President, and Congress granted a broad mandate to both him and Secretary of Defense Donald Rumsfeld in pursuing this conflict. With 9/11 propelling the President's popularity to new heights, he took control of the Washington agenda. During the early years of war, Bush and his administration executed the war according to their vision, and relegated Congress to the sidelines. It follows therefore why legislators did not actively challenge "Don't Ask, Don't Tell" in

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<sup>205</sup> *ibid*

<sup>206</sup> Sorrells, "Congress Likely to Remain Silent"

<sup>207</sup> *Ibid.*

this period.<sup>208</sup> Although the administration had been granted nearly every tool it had requested to fight the war (from billions of dollars to a new Department of Homeland Security to the extensive law enforcement legislation of the Patriot Act), by the 2004 elections, the country was no closer to evacuating Iraq. As America's frustration and weariness grew, the country criticized congressmen for failing to exercise proper oversight over Bush and his administration.<sup>209</sup>

Furthermore, though the "combat phase" had in effect ended months ago, intensified violence, suicide bombings and overall chaos presented new challenges in Iraq. According to the 2004 Pentagon report, 1,000 US troops had been killed since the war's beginning.<sup>210</sup> This grave state of affairs led the administration to announce a delay in bringing troops home.<sup>211</sup> Even with the threat of terrorism and Iraq war thus dominating the 2004 election, gay rights also proved a "hot button" topic.<sup>212</sup> Here, the spotlight centered on same-sex marriage however, not gays and lesbians in the military. Most concerns over armed services' policy focused on the current military conflict, marginalizing the importance of reviewing "Don't Ask, Don't Tell."

Boosted by the social conservative vote, Bush reclaimed the presidency in 2004. At a news conference on November 4<sup>th</sup> he proclaimed, "When you win, there is feeling that people have spoken and embraced your point of view. And that's what I intend to tell Congress."<sup>213</sup> While the administration thus gave the impression that Bush's reelection signaled public's approval of the war, each day headlines reported the dire and

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<sup>208</sup> Ibid.

<sup>209</sup> Cochran, John. "George W. Bush: Another Shot at His Legacy.." *CQ Weekly Online*, August 28, 2004. <http://library.cqpress.com/cqweekly/weeklyreport108-000001303192> (accessed March 29, 2009).

<sup>210</sup> "Iraq Five Years In: Timeline."

<sup>211</sup> *ibid*

<sup>212</sup> Nather, David. "Social Conservatives Propel Bush, Republicans to Victory." *CQ Weekly Online*, November 6, 2004.

<sup>213</sup> *ibid*



seeming endless situation in Iraq: In early November, 10,000-15,000 troops besieged Falluja. Weeks later, the US expanded their offensive in the “Triangle of Death region.”<sup>214</sup> On December 21, a base exploded in Mosul killing 18 soldiers—the most deadly attack on the Americans soldiers in Iraq to date.<sup>215</sup> By the end’s end, the country recognized the conflict in Iraq would carry over in 2005, and perhaps even years after. Further, the war had taken an undeniable toll on the military. The Pentagon’s October 2005 report tallied the death count at 2,000 troops.<sup>216</sup>

In 2005, the Supreme Court agreed to review its first lawsuit related to “Don’t Ask, Don’t Tell.” *Rumsfeld vs. Forum for Academic and Institutional Rights (FAIR)* thus brought renewed attention to the military’s ban against gays and lesbians. With the strain of overseas deployment on the US armed services, people began to question if the policy did more to hurt, rather than protect, military readiness. On March 3, Congressman Martin Meehan introduced MREA (H.R. 1059) and along with seven congressmen, wrote a joint letter to the Republican Chairman of the House Armed Services Committee calling for a hearing on the bill. They reasoned: “At a time when our military is already stretched dangerously thin, we are concerned that discharging qualified service members solely because of their sexual orientation is counterproductive.”<sup>217</sup> In some ways, the bill’s timing was opportune: the Army had missed its monthly recruiting target in February by 27.5%, the first time it had failed to meet this objective in five years.<sup>218</sup> Despite the glaring need for additional troops, Meehan’s bill gained little congressional

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<sup>214</sup> “Iraq Five Years In Timeline”

<sup>215</sup> “Iraq Five Year In: Timeline”

<sup>216</sup> Ibid.

<sup>217</sup> Graham, Chad. "Fit to Serve." *Advocate* 939 (2005). In EBSCO Megafile

<sup>218</sup> Cahlink, et al. “The Pentagon Gates Inherits”

attention. Ignoring the letter's appeal, the Chairman never called for a hearing either. With more pressing matters on the docket, H.R. 1059 fell to the wayside.

The following years, however, ushered in the most amenable environment for a reversal of "Don't Ask, Don't Tell." Assuming the position of Secretary of Defense in 2006, Robert Gates inherited the Pentagon from Rumsfeld in a state greatly weakened by the war. The overall military readiness had severely eroded. According to the Pentagon reports, 67% of the 42 active brigades were unready to perform missions, largely due to personnel shortages.<sup>219</sup> Further, while the active and recruiting forces had managed to meet recruitment goals in 2006, the previous fiscal year had been the worst year for recruiting in decades. To compensate, the Pentagon had increased enlisted bonuses, lowered recruitment standards, and raised the age limits for soldiers.<sup>220</sup> With the death count numbering 3000 by December, the bipartisan Study Group on Iraq's report in 2006 that "the situation in Iraq is grave and deteriorating" resonated among policymakers.<sup>221</sup> They could not ignore the military's problems much longer.

Amidst these desperate circumstances, advocates for gays in the military revitalized their drive to eliminate the ban. Frustrated with the courts, these groups began pushing the newly Democratic Congress to issue a bill replacing "Don't Ask, Don't Tell." To counter, Republicans argued a reversal did support the troops in Iraq, due to the potential risks it posed for the armed forces. Based on the military's resistance and the reluctance of legislators to challenge the overly strained institution, "in the near

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<sup>219</sup> Ibid

<sup>220</sup> Ibid.

<sup>221</sup> "Iraq Five Years In Timeline"

future, it has zero chance,” predicted Daniel Goure, vice President of the Lexington Institute, a moderate think tank.<sup>222</sup>

Responding to the renewed commotion over “Don’t Ask, Don’t Tell,” former JCS Chairman Gen. John M. Shalikashvili wrote an OP-ED piece in the New York Times in January 2007. Appointed by Clinton in 1993, Shalikashvili had been a strong proponent of the military’s ban. In this letter, however, Shalikashvili expressed a new perspective: “[t]he military has changed...gays and lesbians can be accepted by their peers.”<sup>223</sup> On the one hand, his reversal of opinion provided strong ammunition for those fighting to repeal “Don’t Ask, Don’t Tell.” On the other, Shalikashvili also iterated his belief here that the nation’s continued involvement in Iraq and current state of political affairs posed improper timing to overturn the current procedure:

“But if America is ready for a military policy of nondiscrimination, *the timing* must be carefully considered. As the 110 Congress opens for business, some of its most urgent priorities, like developing an effective strategy in Iraq, share widespread support that spans political affiliations. Addressing such issues could help heal the divisions that cleave our country. *Fighting early in this Congress to lift the ban on openly gay service members is not likely to add to the healing, and it risks alienating people whose support is needed to get this country on the right track.*”<sup>224</sup>

Although the former Chairman acknowledged an “inevitable lifting of the ban,” those in opposition clung instead to his warning to consider the timing and to prioritize the military’s present engagement first. Regarding the eventual abolishment of “Don’t Ask, Don’t Tell,” Shalikashvili concluded, “When that day comes, gay men and lesbians will no longer have to conceal who they are, and the military will no longer need to sacrifice

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<sup>222</sup> Alvarez, Lizette. "Gay Groups Renew Drive Against Don't Ask, Don't Tell." *The New York Times Online*, September 14, 2006. <http://www.nytimes.com/> (accessed March 29, 2009).

<sup>223</sup> Shalikashvili, John M.. "Second Thoughts on Gays in the Military." *The New York Times Online*, January 2, 2007.

<sup>224</sup> Ibid.

those whose service it cannot afford to lose.”<sup>225</sup> Though the former Chairman’s opinion had thus changed regarding the policy’s future, he did not endorse its repeal in the present.

General Shalikashvili comments ignited considerable attention among the public and across national media. In light of this OP-Ed piece, on the CNN newscast *The Situation Room*, Wolf Blitzer discussed the implications of the policy with military’s recruitment problems and ongoing struggle in Iraq. The former Department of Defense Secretary William Cohen emphasized during an interview with Blitzer that reevaluating the military’s ban did not deserve to be a top priority. Cohen stated:

“What I’m saying is I think that Chairman Shalikashvili has put it right, that this is something that is going to change, is going to evolve. It’s time to start thinking about it and starting to discuss it. But do not make this at the top of the agenda until we get the Iraq strategy underway.”<sup>226</sup>

While Cohen displayed tolerance and acknowledged the policy’s repeal in the future, like Shalikashvili, he argued handling Iraq took precedent. He similarly cautioned should the ban become a “political issue” it might “undermine[s] and it divide[s] the country at a time when we need to have some kind of cohesion about where we are over there right now because we’ve got so many fighting and dying.”<sup>227</sup> Cohen further emphasized that this change should derive from military initiative, rather than from politicians: “the military is the one that has questioned whether or not it would be divisive in terms of really undermining good order and discipline.”<sup>228</sup> The statements of these former high-ranking leaders provided traction for future efforts to repeal “Don’t Ask, Don’t Tell,” but

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<sup>225</sup> Ibid.

<sup>226</sup> "President Bush Gets Ready to Announce New Iraq Strategy; Former Joint Chiefs Chairman Wants to Revisit 'Don't Ask, Don't Tell'." *The Situation Room* CNN. Washington DC: CNN, January 2, 2007.

<sup>227</sup> Ibid

<sup>228</sup> Ibid.

their cautions did not lend the same support for present change, thus providing ammunition against lifting the ban.

Ignoring Cohen's advice to "get Iraq straight first," Rep. Meehan reintroduced MREA (H.R. 1246) in February 2007. With a Democratic majority in Congress, past Republican resistance no longer presented a major barrier to legislative action on the "Don't Ask, Don't Tell." As Allison Herwitt, director of the Human Rights Campaign explained, "We are no longer on the defensive... We can now pursue proactive legislation."<sup>229</sup> Still, "Don't Ask, Don't Tell" fell behind a host of other issues. When Meehan introduced MREA in 2005 and 2007, both bills had been referred to the House Subcommittee on Military Personnel. With the war in Iraq still underway, the Subcommittee had more pressing matters to resolve first. (When Chairman Davis finally called for a congressional hearing, she acknowledged the "long overdue review" with the explanation, "this subcommittee has a number of competing issues that need our attention and that have received it."<sup>230</sup>) Furthermore, even as public opinion favored lifting the military's ban, this change lacked support among the military and its leadership, including the current chairman of the JCS, General Peter Pace. Democratic and Republican congressmen already had their hands full, clashing over issues of the troop surge and setting a timetable for the war. Legislators had no desire to add yet another contentious and distracting issue to their agenda, and thus shelved the policy's reevaluation.

In the summer of 2007, General David H. Petraeus and Ambassador Ryan Crocker developed a plan for the future military engagement in Iraq. Pentagon reports

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<sup>229</sup> Zeller, Shawn. "Gay Groups Plan to Go On Legislative Offensive." *CQ Weekly*, March 12, 2007.

<sup>230</sup> US House Hearing on July 23, 2008

had by now revealed a demonstrable decline in violence. It appeared as though the United States had made considerable headway overall. Despite the improving situation, General Petraeus still warned Congress against a major pullback of troops. When the Senate's bill for definitive timeline for Iraq failed, rendering no foreseeable future for the conflict. Ending the war thus continued in weighing down Congress.

After a successful surge in the number troops, violence in Iraq stabilized from November 2007 into early 2008. From there, Department of Defense reports showed the number of attacks in decline. By the spring, the situation seemed in a stalemate. On July 18, 2008, Bush finally agreed to set a timeline for the war and indicated a reduction in troops in Iraq by the month's end.<sup>231</sup> Several days later, the Subcommittee of Military Personnel of the House Armed Services Committee convened to discuss "Don't Ask, Don't Tell."

During this hearing most of the congressmen present voiced dissent with "Don't Ask, Don't Tell." The two witnesses provided testimony in favor of sustaining the current policy: Brian Jones, a retired sergeant major in the U.S. Army Special Operations Forces, and Elaine Donnelley, the president of the Center for Military Readiness. While Donnelley's argued for the negative effects of homosexuals in the forces, in contrast, Jones emphasized the issue of timing and possible repercussions on the active duty forces.<sup>232</sup> Jones stated:

"But today I think ...I'm kind of baffled that we're sitting in here today, with this issue being this hot, when we -- *we need to be finding ways in supporting our troops and figuring out, well, how we're going to win this war, in Iran -- in Afghanistan and Iraq, as soon as possible, and as efficiently as possible.*

So I think that's where we should be concentrating, you know, that to -- and like I was trying to say a little bit earlier is that you really don't know what you're asking the

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<sup>231</sup> "Iraq Five Years In Timeline"

<sup>232</sup> US House Hearing on July 23, 2008

American armed forces to do when you say -- when you put such a huge policy change or a lot of change, interaction as this would be on, you know, the repercussions of that, what are those repercussions going to be?"<sup>233</sup>

To make his case Jones relied on this newer, and now more persuasive, rationale against implementing new legislation.<sup>234</sup> And while several congressmen derided Donnelley's statements as intolerant and outdated, they did not subject Jones' contentions here to similar scrutiny. Despite the expressed discontent over the policy among congressmen, his points still held resonance.

Finally, the election of President Obama signals a conclusion to the prolonged and seemingly indefinite engagement in Iraq. During his campaign, Obama pledged to end the military's long engagement in Iraq and withdraw all troops within 16 months of his presidency. Once in office, however, the realities of the military's situation forced a reassessment of this promise. In a speech on February 27, 2009 before thousands of Marines at North Carolina's Camp Lejeune, Obama declared the withdrawal of all combat forces from Iraq by August 2010, and the remaining troops by December 2011.<sup>235</sup> The President's announcement that "our combat mission in Iraq will end" comes nearly six years after the initial military invasion.

In sum, US involvement in Iraq played an important role in persistence of "Don't Ask, Don't Tell." First, the war dominated much of the congressional agenda, preventing policymakers from seriously acting on the legislative appeals to overturn the ban. Second, arguments positing the unforeseen consequences of lifting the ban on active duty

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<sup>233</sup> Ibid

<sup>234</sup> Ibid.

<sup>235</sup> Baker, Peter. "Iraq Withdrawal Plan Gains GOP Support." *The New York Times Online*, February 27, 2009. <<http://www.nytimes.com>>

troops in Iraq concerned congressmen, and they hesitated to encourage this policy change if interpreted as unsupportive of the men and women in uniform.

To evaluate the significance of these factors on “Don’t Ask, Don’t Tell,” again, one must weigh them alongside the other forces competing in the policy’s persistence. Although Bush declared the war on terror in 2001, the military’s engagement became most forceful as a barrier to policy reversal in the Iraq conflict’s later years. Illustrated by both the lack of inactivity on the MREA bills, and lack of momentum following the 2008 hearing, Iraq issues diverted legislators from reviewing the policy on homosexuals. Moreover, in later years with public opinion much more amenable to gay rights, it became more difficult for opponents to justify the ban without sounding intolerant and narrow-minded. Arguing against the policy’s repeal on the basis of ill timing with Iraq therefore provided a less offensive defense for sustaining the policy. In the absence of a Republican majority, and with the resistance of military leadership less compelling, the war (and Bush’s veto) likely cinched the law’s continuation.

The war’s conclusion will relieve this resistance to the repeal of “Don’t Ask, Don’t Tell.” Therefore, if inertia on the policy persists, then one must identify new factors to account for this puzzle.

## CHAPTER FIVE

### The Obama Administration and the Future of “Don’t Ask, Don’t Tell”

During his presidential campaign Obama promised to repeal the “Don’t Ask, Don’t Tell” policy and to reinstate those previously discharged under the policy. He further proposed that the Pentagon introduce an education program to school the military



on how to treat gays and lesbians.<sup>236</sup> Although Obama did not make lifting the ban a major issue for his campaign, gay rights activists expressed no concerns regarding his commitment to overturning the ban. According to Joe Solmonese, President of the Human Rights Campaign, “We look forward to working with him [Obama] to end this unnecessary discrimination against patriotic gay and lesbian service-members protecting our country at home and abroad.”<sup>237</sup>

This final chapter considers the probability of the policy’s reversal under Obama’s administration. In this way, it is useful to think about the major factors which have helped to keep “Don’t Ask, Don’t Tell” in place for the last fifteen years, and their relative significance under this new administration. The chapter first examines how the current climate in Washington could affect the progression on the policy. It also considers the possible political implications that attempting to reverse the ban could have for the President and Congress, and in turn, what this in turn could mean for the policy’s future. Next, the chapter analyzes the influence that the military leadership and Pentagon officials have on Obama and his decision-making, and by extension, the possible impact on “Don’t Ask, Don’t Tell.” The chapter then considers the role of gay rights advocates in this overall process and the strategic venues they might pursue to further push the repeal of “Don’t Ask, Don’t Tell.” Finally, it recognizes the possibility of new obstacles emerging as forces for the policy’s inertia.

First, politics and partisanship have played a fundamental role in the ban’s persistence as legislation. The 2008 election gave the Democratic Party majorities in both houses—the first time the Democrats have controlled the legislative and executive

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<sup>236</sup> Scarborough, “Obama to delay ‘don’t ask, don’t tell’”

<sup>237</sup> *ibid.*

branches since Clinton's first two years in office in 1993 and 1994.<sup>238</sup> Today, with the Democratic reign in Washington, progress on gay rights appears much more attainable than under the years of a socially conservative administration and Republican majority. In general, most Democrats support an elimination of the military's ban on homosexuals. Moreover, several Republicans have now expressed similar sentiments, as evidenced during the hearing on "Don't Ask, Don't Tell" in 2008. At the same time, the most forceful political resistance to the policy's repeal will come from the GOP. Currently in the minority, Republicans wield far less power, and hence less effective resistance against lifting the ban. In this light, the current climate in Washington favors a rescind of "Don't Ask, Don't Tell."

This new environment renders optimism among gay rights activists pushing to end "Don't Ask, Don't Tell."<sup>239</sup> Perhaps the elevated expectations among these advocates that the one-party government will deliver do not match the political realities at present. Once in power, the Democratic leadership stated they would now pursue a more "centrist course."<sup>240</sup> This attitude reflects an acknowledgement of the lessons learned from previous years during the Party's brief tenure of control from 1993-1994. At the time Democrats arguably pushed their liberal agenda too far (exemplified in Clinton's attempt to lift the gay ban). As a result, the Democrats faced backlash in the 1994 elections, and the Republican Party emerged as a dominant force. Hindsight has led to their current emphasis on centrism and compromise. "I think we have learned the lessons of '93 and

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<sup>238</sup> Nather, David. "Obama's Next Task: Quick Rise to a Steep Challenge." *CQ Weekly Online*, November 10, 2008.

<sup>239</sup> Rowan Scarborough, "Obama to delay 'don't ask, don't tell' repeal,"

<sup>240</sup> *ibid*

'94..." said House Majority Leader Steny H. Hoyer (D-MD). "We don't want to return to the minority, and by the way we will stay in the majority is by doing this that the American people believe are measured, responsible, and effective."<sup>241</sup>

If their actions match this rhetoric, however, it could potentially lead to conflict with the agenda of liberal activists, as pursuing a moderate course avoids the more controversial social issues. As Congressman David Price (D-NC) stated, "Those social issues would not be the ones we'd lead with... You wouldn't expect us to push a maximum agenda initially, but you'd expect momentum on those issues."<sup>242</sup> If "Don't Ask, Don't Tell" falls into this category, then one should not assume immediate action to overturn the ban.

The Obama administration also has incentive to pursue a "centrist course." Handling the present economic crisis and ending the war in Iraq will likely require political allies from *both* sides of the aisle. In this light, some analysts consider "Don't Ask, Don't Tell" politically "risky" for Obama, as it could squander necessary political capital. According to a recent *Politico* article, challenging the military's current policy threatens social conservatives, and could also potentially damage the new President's relationship with the military.<sup>243</sup> As Peter A. Brown, assistant Director of the Quinnipiac University Polling Institute argues, "American voters may feel better about the idea of openly gay soldiers and sailors, but that doesn't mean the process of trying to change the policy doesn't have enormous political risks for Obama." He adds, "It will

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<sup>241</sup> David Nather, "Obama's Next Task: Quick Rise to a Steep Challenge"

<sup>242</sup> Epstein, Edward. "Driving an Agenda? Avoid a Breakdown." *CQ Weekly*, June 9, 2008.

<sup>243</sup> DiMascio, Jen. "Obama faces test on gay military ban." *Politico*, March 2, 2009. <[www.politico.com](http://www.politico.com)>

give conservatives something to rally around.”<sup>244</sup> This reality might motivate Obama to further delay action on the “Don’t Ask, Don’t Tell.”

If the Democratic Party’s proposed centrism worries those advocating for the gay ban’s repeal, recent troubles between congressional Democrats and Republicans over the economic stimulus bill might provide some relief. Although congressmen cleared the \$787 billion economic stimulus plan in February 2009, the legislation garnered only *three* Republican in both chambers—hardly bipartisan compromise.<sup>245</sup> Not only does this demonstrate the unwillingness of both parties to compromise, it also implies that the pledges of the Democratic leadership to “govern from the middle” may have been mostly symbolic. Moreover, if the Democrats *do* decide to proceed on “Don’t Ask, Don’t Tell,” Republican’s opposition may not matter. Even if the two parties do not “play well” together, the Democratic Party’s majority status gives them a great deal of leeway in to pursue their initiatives.

Considering the current environment, the administration’s announcement to delay immediate action on “Don’t Ask, Don’t Tell” makes sense.<sup>246</sup> Although national polls indicate continuing support for Obama’s priorities, neither he nor the Democrats have yet to pursue any controversial social legislation, which the public may not back as readily. Again, the President has significant matters to tackle, and thus recognizes the importance of establishing a good relationship with congressional leaders on both sides of the aisle.<sup>247</sup> It is neither in Obama’s nor in the Democratic Party’s best interest to pursue potentially divisive legislation at this point in time. Regardless of the liberal one-party

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<sup>244</sup> *ibid*

<sup>245</sup> Schwartz, Joseph J., and David Clarke. "Congress Clears Stimulus Package." *CQ Weekly Online*, February 16, 2008.

<sup>246</sup> Rowan Scarborough, “Obama to delay ‘don’t ask, don’t tell’ repeal”

<sup>247</sup> David Nather, “Obama’s Next Task: Quick Rise to a Steep Challenge”

government, it still could take many months, or even *year*, until “Don’t Ask, Don’t Tell” takes precedence on the agenda.

Washington politics aide, Obama has also emphasized the importance of the military’s judgment in the matter. As the President stated to the Human Rights Campaign about “Don’t Ask, Don’t Tell,” “The military must be our active partner in developing those policies and protocols.”<sup>248</sup> Moreover, during his campaign Obama showed deference to the judgment of the military elite when stating he would not require his Joint Chiefs to support lifting the 1993 compromise (a position which Democratic Candidate Al Gore received criticism for, and later retreated on, in the 2000 Presidential election).<sup>249</sup> “I would never make this a litmus for Joint Chiefs of Staff,” Obama said, “My paramount obligation is to get the best possible people... [w]hat I want are members of the Joint Chiefs of Staff who are making decisions based on what strengthens our military and what is going to make us safer, not ideology.”<sup>250</sup>

Chairman Mullen has explained that to advise the President on “Don’t Ask, Don’t Tell,” he will need adequate time to study the issue and canvass opinions. “I think I owe him [Obama] a very thorough review of the potential impact [of repealing Don’t Ask, Don’t Tell],” he stated.<sup>251</sup> If the recent *Military Times* polls are accurate, however, Mullen will *not* find a majority of support among active duty service member for a reversal. In all likelihood, Mullen will thus recommend that the President proceed slowly on the issue, involving the JCS along the way.<sup>252</sup>

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<sup>248</sup> *ibid*

<sup>249</sup> Myers, Steven Lee. "Despite Gore Reversal, Candidates Denounce 'Litmus Test' for Joint Chiefs." *The New York Times Online*, January 10, 2000. <http://www.nytimes.com/> (accessed March 29, 2009).

<sup>250</sup> *ibid*

<sup>251</sup> Ephron, Dan. "Dont Ask Too Fast." *Newsweek* 153 (2009): 46. In EBSCO Megafile[database online]. (accessed March 29, 2009).

<sup>252</sup> *ibid*.

Additionally, the Department of Defense has echoed a similar position to observe all legislation that Congress should enact. Although refusing to send witnesses to testify in the 2008, hearing the Pentagon released an official statement indicating they would “fully comply with any new legislation, although they did not advocate in favor of changing the policy at this time.”<sup>253</sup> In contrast to the chairman’s position, DOD authorities have explicitly stated their preference to maintain the status quo. While the Pentagon’s lack of support might factor somewhat into the timeline of “Don’t Ask, Don’t Tell,” it will not likely serve as *the* decisive factor preventing President Obama or Democrats from acting on the policy.

Further, Obama’s declaration at Camp Lejeune revealed a more gradual pullout of troops than he had originally outlined during his campaign. The announcement has caused some protest among liberal Democrats, especially among the Party’s leadership, who contest Obama’s proposed residual force of “non-combat troops” too high.<sup>254</sup> While Obama’s plan clashed with many Democrats, it reflected the new Commander-in-Chief’s deference to the military brass. As Admiral Michael Mullen explained to journalist John King on the CNN Newscast *State of the Union*:

“I am very comfortable with [Obama’s] the decision and strongly support the decision. And the President listened to all of us who were involved in his this—General Odierno on the ground in Iraq, General Petraeus, who is responsible for the Central Command area, as well as all the joint chiefs, myself and Secretary Gates.”<sup>255</sup>

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<sup>253</sup> US House Hearing July 23, 2008

<sup>254</sup> *USA Today*. March 2, 2009. "Obama declares end to U.S. presence in Iraq--sort of." EBSCO Megafile (accessed March 16, 2009)

<sup>255</sup> "JOHN KING HOSTS CNN'S STATE OF THE UNION." CNN. Washington DC: CNN, March 1, 2009.

In light of Obama's new approach, Mullen's comments illuminate the considerable influence of the military leaders on the President's decision-making. This situation therefore demonstrates the President's willingness to take the advice of the unformed leadership, even at the risk of his own Party's consternation. It also reveals that the President and military commanders believe that the war abroad warrants a slower and more deliberated timetable. If the timing of the war sustains the policy's inertia, then this might delay the repeal of "Don't Ask, Don't Tell" until 2011 (the United States' required deadline to evacuate Iraq, as set by the Status of Forces Agreement.) If Congress lifts the ban soon after, however, this demonstrates the importance of the war as a force preserving "Don't Ask, Don't Tell."

On March 3, 2009, Representative Ellen Tauscher (D-CA) reintroduced the Military Readiness Enhancement Act (H.R. 1283) in the 111,<sup>th</sup> which as of March 17, had 130 cosponsors. The proposed legislation's title states:

"To amend title 10, United States Code, to enhance the readiness of the Armed Forces by replacing the current policy concerning homosexuality in the Armed Forces, referred to as "Don't Ask, Don't Tell," with a policy of nondiscrimination on the basis of sexual orientation."<sup>256</sup>

Supporters of H.R. 1283 hope that legislators will insert the bill in the defense authorization bill for fiscal year 2010, which Congress will vote on in April 2009. To an extent, this strategy has merits: Lawrence Kolb, an analyst at the Center for American Progress (as well as an advisor to the Obama campaign), explains that "If it's [H.R. 1283] part of a larger package, it has a better chance of getting passed."<sup>257</sup>

Responding to Tauscher's legislation and the appeal of gay rights advocates, the

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<sup>256</sup> H.R. 1283, *The Library of Congress*

<sup>257</sup> Rowan Scarborough, "Obama to delay 'don't ask, don't tell' repeal"

Obama administration issued a paper statement via spokesman Tommy Vietor:

“The President supports changing Don’t Ask, Don’t Tell. As part of the long standing pledge, he has also begun consulting closely with Secretary Gates and Chairman Mullen so that this change is done in a sensible way that strengthens our armed services and our national security.”<sup>258</sup>

This Whitehouse release reveals Obama’s deference once more to both the military elite and Pentagon in the matter. The President’s desire to approach any change in a “sensible way” again implies that the executive office will not take hasty action on the matter.

Lastly, Vietor’s mention of “national security” reaffirms the administration’s hesitance to impose a major policy on the armed forces in light of the continued military engagement.

Since assuming office however, the guarded and indecisive statements from his administration reveal the policy’s deep entrenchment, and thus continuing persistence and success of these forces still locking down the exclusionary legislation. As of now, there is no reason to doubt the President’s commitment to gay rights, nor his campaign pledge to overturn “Don’t Ask, Don’t Tell”—it just may take longer than once anticipated.

Statements from some gay rights advocacy organizations have it made more than evident that they will not wait with indefinite patience on reversing ban, nor will they remain content to linger on the sidelines. Without a doubt, the Democratic majorities have bolstered their confidence and expectations, and gay rights lobbyists certainly have gained more access and influence in Washington. At this point, however, the degree to which policymakers will deliver on these issues may not meet expectations of activists. “Homosexual activists are overconfident because they have not yet seen a counterforce

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<sup>258</sup> *ibid*



emergence as in 1993,” explains Robert Knight, director of the Culture and Media Institute at the Media Research center.<sup>259</sup> Hence, even as Executive Director of the Servicemembers Legal Defense Network Aubrey Sarvis concedes “2009 is about foundation building and reaching consensus,” he still projects Obama will sign Tauscher’s bill “certainly no later than 2010.”<sup>260</sup> Yet with the complete withdrawal of troops from Iraq pushed back to 2011, coupled with other pressing matters, like the deteriorating state of the economy, one might categorize Sarvis’ prediction as “overconfident.”

For certain groups, however, taking bold approach is integral to their overall strategy. “It may be in a given round of engagement, that we don’t get what we asked for,” says gay activist Evan Wolfson, “But if we ask for less than we deserve we are guaranteed to get less than we deserve.”<sup>261</sup> These advocates contend their objectives illustrate a pragmatic course, “I think we are realistic in our expectations, which doesn’t mean we need to sit on our hands,” defends longtime gay lobbyist Winnie Stachelberg of the Center for American Progress.<sup>262</sup> Yet other activists, cognizant of the overall political climate, are prepared to endure a lengthy process for an initiative like “Don’t Ask, Don’t Tell.” Human Rights Campaign director Mr. Solmonese grants, “We certainly have learned the lesson that there is a more complicated order of business. As long as there was satisfaction that there was a working plan in place, then there would be universal agreement that he [Obama] was making good on his commitment.”<sup>263</sup>

The present strategy of gay rights advocates seems to pursue an elimination of the

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<sup>259</sup> Rowan Scarborough, “Obama to delay ‘don’t ask, don’t tell’ repeal”

<sup>260</sup> Rowan Scarborough, “Obama to delay ‘don’t ask, don’t tell’ repeal”

<sup>261</sup> Kirschick, James. “When A Nod’s Not Enough.” *Advocate* 1023 (2009)

<sup>262</sup> *ibid*

<sup>263</sup> Johnson, Ashley. “Where Obama Might Say ‘No’: Minorities.” *National Journal*, December 19, 2008.

military's ban somewhat aggressively, perhaps resulting from their disappointment over the gay marriage initiative.<sup>264</sup> The passage of California's Proposition 8 prohibiting same-sex couples from marrying compelled a number of gay rights organizations to alter their strategy and reorder initiatives. Consequently, many groups have adjusted their priorities to ostensibly more attainable goals, namely revoking the "Don't Ask, Don't Tell" law. In light of the public's strong support and recent statements from high-ranking former military leaders, changing the military's exclusionary policy no longer seems an insurmountable task.

Nonetheless, Mr. Knight cautions pro-homosexual activists not to embark on the same mistakes made by their predecessors during Clinton's first years. Remembering the negative reaction over Clinton's proposal to end the ban, Knight warns that some groups (especially social conservatives) could mount an impressive opposition against rescinding the current policy. He argues this resistance has yet to surface as most Americans "are unaware that gay activists have the military in their gun sights." "But as the threat grows stronger," Knight predicts, "we will see groups forming and resistance building. Americans go about their business and are not activists until they have a Pearl Harbor moment. That has yet to happen, but it will."<sup>265</sup>

Finally, in a recent "YouTube" exchange between the incoming White House Press Secretary Robert Gibbs and the general public on January 14, 2009, a man from Michigan asked: "Is the new administration going to get rid of the 'Don't Ask, Don't Tell' policy?" Gibbs replied, "You don't hear a politician give a one-word answer much.

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<sup>264</sup> Andrea Stone, "Gay rights advocates forced to adjust agenda"

<sup>265</sup> Rowan Scarborough, "Obama to delay 'don't ask, don't tell' repeal"

But it's 'Yes.'"<sup>266</sup> When pressed, the Obama transition team did not provide a timetable for the policy's removal, nor did they identify which policymakers would initiate a revocation. Later, Gibbs elaborated upon his answer and admitted,

"There are many challenges facing our nation now and the President-elect is focused first and foremost on jump-starting this economy...So not everything will get done in the beginning but he's committed to following through with ending the policy against being openly gay in the military."<sup>267</sup>

If the fifteen-year entrenchment of "Don't Ask, Don't Tell" signifies anything, it should be evident that rescinding the policy could prove fairly challenging, even amidst the acquiescent public and liberal political climate. As Gibbs implied, the Obama administration currently faces a host of pressing issues. Many of these concerns will probably take priority over "Don't Ask, Don't Tell" and possibly create new barriers to the change. As Aubrey Sarvis, the current executive director of the Servicemembers Legal Defense Network, explained, "What's the reality for the new administration? Economic upheaval. Health care reform. Environmental challenges. Where does 'Don't Ask, Don't Tell' fall in all of this? I would say it is not in the top five priorities of national issues."<sup>268</sup>

In this way, it might behoove gay advocates to take cues from the Sarvis and Obama administration, and accept that change on this initiative could be slower than perhaps anticipated. In 1993, the gay community suffered from their initially high

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<sup>266</sup> Obama to End Military's 'Don't Ask, Don't Tell' Policy" FOXNews.com.  
<<http://www.foxnews.com/story>>

<sup>267</sup> "Obama aide: Ending 'don't ask, don't tell' must wait - CNN.com."  
<<http://www.cnn.com/2009/POLITICS/01/14/obama.gays.military>>

<sup>268</sup> Rowan Scarborough, "Obama to delay 'don't ask, don't tell' repeal"

expectations of Clinton, and they felt betrayed by the “Don’t Ask, Don’t Tell” compromise. In this way, some activists may need to accept the political realities of policymaking in 2009.

In considering most factors, the elimination of “Don’t Ask, Don’t Tell” under the Obama administration seems likely. Most of the necessary elements for the ban’s repeal have aligned, and sources of resistance have correspondingly diminished. First, opposition from the President or Congress no longer satisfies as explanation for the policy’s present inertia. Moreover, while the recommendations of the military leadership, and a graduated withdrawal from Iraq could delay the policy, neither should serve as longstanding forces against a reversal. Even as all signs point toward a repeal, however, new sources of resistance can always emerge to work against lifting the ban. The current economic crisis presents serious challenges for the President and policymakers, not only dominating their agenda, but also deterring action on possibly contentious legislative. As a result, one cannot predict a definitive timetable for the demise of “Don’t Ask, Don’t Tell.” It seems realistic to expect that change on this policy, while inevitable, also may not occur for several years.

## CONCLUSION

In 1991 Presidential nominee Bill Clinton made a pledge to the lift the military’s longstanding ban of homosexuals. Politicians frequently make promises during their campaign that they never realize after election, yet surprisingly, arguably unwisely, Clinton clung to this initiative. His proposal quickly ignited intense opposition from the

military leadership and congressmen from both parties. Over the course of several months, the combination of these joint forces successfully pushed back the President's original promise of open service for gays and lesbians to the "compromise" policy, "Don't Ask, Don't Tell."

Fifteen years later, the military's prohibition on homosexual service remains officially mandated federal legislation. But if the origins of this compromise policy seem comprehensible in terms of the considerable opposition to gay service when it was enacted, today its persistence seems problematic. As we have seen, the policy does not reflect public opinion: three quarters of Americans disagree with the ban. Nor does it reflect the military policies of most Westernized nations; more than twenty of the twenty-six nations participating in NATO allow homosexuals to serve openly in the armed services. Most media attention criticizes the law as outdated and discriminatory, and many politicians (both Democrats *and* Republicans) voice condemnation as well. It has cost the Pentagon hundred of millions of dollars and the service of more than 12,600 soldiers, medical personnel, and translators.

To explain this puzzling persistence, this thesis has argued that there are a number of different sources of opposition to overturning the military's current policy on gays and lesbians, and the importance of the different sources has changed over time. Four distinct barriers to change have been particularly important since the implementation of "Don't Ask, Don't Tell." Chapter one showed the effect of politics and partisanship on the policy under the Clinton and Bush administrations. Initially, public opinion gave no strong support for the rights of gays in the military. And pivotally at the time of the policy's adoption as well as for its subsequent existence, the Republican Party's

resistance has provided an important obstacle to congressional action on the issue. Moreover, even when public opinion began to shift, the GOP's Christian Right constituency served as a key influence in prolonging and intensifying the Party's hostile approach to gays rights issues. During the Republican's dominance, this effectively sheltered "Don't Ask, Don't Tell" from reevaluation and repeal. When the Democrats finally regained control of Congress in 2006, the threat of the Christian conservative President's veto still provided a continued obstacle to reversal. Of all the factors contributing to the preservation of "Don't Ask, Don't Tell," the Republican resistance has served as the longest and most consistent barrier to change on the policy.

It has not, however, been the whole story. Chapter two examined the extent to which the Department of Defense's continued allegiance to "Don't Ask, Don't Tell" has stemmed from the policy's accumulated bureaucratic inertia, and by extension, whether this allegiance influences the approach of policymakers to the ban. We saw that, although several factors account for the policy's inertia in the Pentagon, at no point in the policy's history can also they explain the policy's corresponding inertia as federal legislation. Without this casual link, an argument emphasizing the Pentagon's role to illuminate the continuation of "Don't Ask, Don't Tell" seems unconvincing, especially alongside more relevant factors.

It has not, however, been the whole story. Chapter two examined the extent to which the Pentagon's continued allegiance to "Don't Ask, Don't Tell" has stemmed from the policy's accumulated bureaucratic inertia, and by extension, whether this then influences the approach of policymakers to the ban. Although several factors account for the policy's inertia in the military bureaucracy, at no point in the policy's history can also

they explain the policy's corresponding inertia as federal legislation. Without this casual link, an argument emphasizing the Pentagon's role to illuminate the continuation of "Don't Ask, Don't Tell" seems unconvincing, especially alongside more relevant factors.

The fact that bureaucratic inertia has not been a major obstacle to change does not mean, however, that military opposition has not been important and at some times, preeminently important. Chapter three considered the different contexts in which the military has served as an influence on "Don't Ask, Don't Tell." More specifically, it emphasized the effect of the military leadership's active resistance to an open policy, as well as its "passive" resistance through judicial deference to military judgment. In the 1993 debates, the opposition of the military brass against homosexual service played a crucial role in shaping the current policy. Though the military's aversion to reversing the ban continued with the policy's persistence, it served as an especially potent barrier to change during the original deliberation period. As a result of conservative political and military opposition, during the years of Republican reign, the legal system seemed to provide a more feasible venue to challenge "Don't Ask, Don't Tell" than congressional channels. But in regard to this avenue, too, the military's position was highly important, as the judiciary's historical deference military judgment prevented rulings against the policy. Even so, both history and law suggest that the military can be made to comply with policies that have strong support from civilian elected leaders; so the military's resistance alone provides an incomplete explanation of the puzzling situation.

Chapter four traces the country's involvement in the war on terrorism and conflict in Iraq. In later years, despite the increase in public receptivity to gays in the military and the waning of conservative Republican dominance in Washington, this protracted

military engagement still hindered congressional action on the ban. The war clogged the agenda of the subcommittees charged with evaluating military policies and relegated “Don’t Ask, Don’t Tell” to the sidelines. Even though many of the previous arguments once used in support of the ban were coming to be widely regarded as prejudiced and unconvincing, justifications to keep the policy on the basis of ill-timing with the war, or on its potential burden on troops, continued to resonate. In the absence of Republican resistance, the war on Iraq served as a dominant force against the repeal of “Don’t Ask, Don’t Tell.”

The final chapter looked to the policy’s future under the Obama administration. At this point, previous forces of opposition no longer present significant obstacles to change. Still, this does not guarantee reversal, as new sources of resistance have emerged in their absence—such as the current economic crisis. With this weighing upon the agenda, an elimination of the current military policy may occur much later than might otherwise be anticipated.

The probability that change will not come in the immediate future is supported by the fact that, as the analysis of this essay has shown, the reversal of “Don’t Ask, Don’t Tell” requires a conjunction of favorable factors. It is important that public opinion be supportive, as it was not under the Clinton administration, though it is today. It is important that conservative Republicans, especially those most influenced by the Christian Right, not have majoritarian power in majority in Congress or in the White House. And it is important that there not be expansive and difficult military operations, like the wars in Iraq and Afghanistan, that in recent years have made pushing for these sorts of changes in the military’s structure and policies seem risky and premature.



To be sure, pressures arising from the strains of large-scale military engagements can work in both directions. By the end of 2004, the war in Iraq had taken an enormous toll on the US military. The death count had mounted to 2000 soldiers, and Americans foresaw no end in sight. Problems of low recruitment and the loss of valuable Arabic translators under the military's ban alerted the public and policymakers to some of the tangible detriments of "Don't Ask, Don't Tell." These military difficulties, along with shifts in public opinion and the decline of conservative Republican influence, contributed in 2007 to the calls from former high-ranking military leaders to reevaluate (and some cases, even eliminate) "Don't Ask, Don't Tell." But even as developments in 2007 and 2008 yielded the most conducive climate to policy renewal to date, congressional and executive concerns not to appear to be hampering the military's capabilities to perform the difficult tasks assigned them in Iraq and Afghanistan have continued to prevail as the principal forces sustaining "Don't Ask, Don't Tell." As examination of these major sources reveals, over the course of the policy's fifteen year duration, the relative weights of the factors sustaining "Don't Ask, Don't Tell" have varied at different periods. Lifting the ban will probably only when all the major sources of opposition to changing the policy are at last in decline.

Under the present Obama administration, most of the factors that previously contributed to the policy's persistence have in fact declined dramatically, and other factors have aligned in favor of repeal. But concerns about disrupting the military in difficult times remain, and the administration has also had to consider the desirability of spending political capital to bring about still-controversial changes in this area when it is simultaneously seeking support for an extraordinary range of large-scale economic and

domestic policy initiatives. These new sources working against change underline how many factors need to be aligned to achieve the policy's future reversal. Assessing the future of "Don't Ask, Don't" requires an understanding that one cannot always account for or control these dynamics. Therefore, one must have patience (and a little faith) that change and justice will eventually occur in the matter of "Don't Ask, Don't Tell."

## Addendum

### **10 USC Sec. 654 01/06/97**

TITLE 10 - ARMED FORCES  
Subtitle A - General Military Law  
PART II - PERSONNEL  
CHAPTER 37 - GENERAL SERVICE REQUIREMENTS

#### **Head**

Sec. 654. Policy concerning homosexuality in the armed forces

#### **Statute**

#### **Statute**

(a) Findings. 97 Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that 97

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a

member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy. - A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated 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;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, \_ good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in

accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(c) Entry Standards and Documents. –

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b)

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required Briefings. - The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of Construction. - Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that -

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions. - In this section:

(1) The term “homosexual” means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian”.

(2) The term “bisexual” means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term “homosexual act” means -

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)

## Source

(Added Pub. L. 10397160, div. A, title V, Sec. 571(a) (1), Nov. 30, 1993, 107 )

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