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Implementing the Repeal of “Don’t Ask, Don’t Tell” in the U.S. Armed Forces

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Introduction and summary

It is long past time to repeal the “Don’t Ask, Don’t Tell” law that bans openly gay men and women from serving in the military. As the Center for American Progress noted in a June 2009 report, the policy is discriminatory, has led to the discharge of thousands of qualified men and women, and has deterred untold others who want to defend their country from serving. Additionally, thousands more men and women in uniform voluntarily leave the service every year because of the law. Repealing it is the right thing to do, can be accomplished quickly, and would require few changes in military regulations and practices.

The highest-ranking civilian and military leaders in the Pentagon agree it’s time to end “Don’t Ask, Don’t Tell”: Last month, Secretary of Defense Robert Gates and Chairman of the Joint Chiefs of Staff Admiral Michael Mullen testified before the Senate Armed Services Committee that they fully support the Obama administration’s decision to work with Congress to repeal the law this year. Admiral Mullen went further, stating it was his personal belief that “allowing gays and lesbians to serve openly would be the right thing to do.”¹

This is the type of leadership needed to once and for all put an end to this policy. Now that these leaders have announced that they do not believe that military effectiveness would suffer if openly gay men and lesbians were allowed to serve, proponents of maintaining this outdated, discriminatory, counterproductive, and most likely illegal policy can no longer base their support for “Don’t Ask, Don’t Tell” on the groundless assertion that open homosexuality undermines unit cohesion and military readiness.² Many of our nation’s closest allies have already repealed their bans on open military service by gays and lesbians. And as their successful experiences demonstrate, effective leadership and consistent execution of policies that create equal standards for all service members can and do ensure that readiness and cohesion are not affected by open service policies.

This month, the Defense Department is reportedly set to announce it will relax the enforcement of “Don’t Ask, Don’t Tell”. Specifically, the department will raise the level of an officer who is authorized to conduct or initiate a “Don’t Ask, Don’t Tell” inquiry; raise the bar on what constitutes credible information to initiate an inquiry; and raise the bar on what constitutes a reliable person in making an accusation.³

Meanwhile, Sen. Joseph Lieberman (I-CT) introduced legislation in the Senate on March 3, 2010, to repeal the 17-year-old law that resembles similar legislation already introduced

in the House of Representatives by Iraq war veteran Rep. Patrick Murphy (D-PA), the Military Readiness Enhancement Act. These developments are encouraging.

But this is not enough. The president and his national security team must begin working directly with Congress to enact legislation decisively overturning the 1993 law. Instead of actually supporting the legislation that has been introduced in both Houses of Congress, the Pentagon has appointed a high-level working group to “ensure that the department is ready should the law be changed.”⁴ This group has three main tasks:

- To reach out to members of the armed services to gauge their views on the issue
- To undertake a thorough examination of all changes to the department’s regulations that will be needed if the policy is repealed
- To examine the potential impact of the repeal on military readiness

Secretary Gates also instructed the RAND Corporation to update its 1993 study on the impact of allowing openly gay men and women to serve in the military in testimony before Congress in February. The secretary noted the review could take up to a year to complete. But this is nonsense. The working group’s first two tasks or objectives have already been completed.

Numerous official government studies dating back to the 1950s confirm that reversing the ban on gays and lesbians in the military will not undermine unit effectiveness or cohesion. According to the Palm Center at the University of California-Santa Barbara, “no reputable or peer-reviewed study has ever shown that allowing service by openly gay personnel will compromise military effectiveness.”⁵ In fact, historian Nathaniel Frank, perhaps the foremost authority on the military’s current policy on gay troops and author of the seminal study on the issue, notes that the ban itself is not “based on sound research because no research has ever shown that openly gay service hurts the military.”⁶

The Clinton administration learned the hard way that studying the impact of the change on military readiness “further would cause waste, delay, and a possible backlash” when it was forced to set up the Military Working Group—many of whose members opposed Clinton’s policy—to study the question of open service.⁷ Congressional proponents of maintaining the ban on homosexual service members—which existed prior to Clinton’s 1993 “Don’t Ask, Don’t Tell” compromise—used the opportunity created by the Working Group’s 1993 review to conduct sensationalist hearings questioning the feasibility of allowing gays and lesbians to serve openly.

The 1993 RAND study demonstrated conclusively that any delay would be counterproductive. RAND went further to state that the “new policy regarding homosexuals in the military... be decided upon and implemented as quickly as possible.” RAND based its recommendation on the prediction that any delay would cause undue anxiety within the

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services, allow opponents to work together to undermine the potential policy change, and signal a lack of commitment to the policy. And that's exactly what happened.

Similarly, the views of service members on this issue have already been thoroughly examined. The *Military Times* conducted a poll of the opinions of U.S. service members on the issue earlier this year. The poll demonstrated that opposition to gays serving openly in the military sharply declined among service members in recent years. The poll of 3,000 active duty troops revealed that opposition to gay men and lesbians serving openly in the military fell to about half (51 percent) from nearly two-thirds (65 percent) in 2004. Additionally, a recent poll of recently returned Iraq and Afghanistan veterans found that 73 percent are personally comfortable in the presence of gays and lesbians, including 37 percent who are very comfortable.⁸ This means today's military is much more supportive of allowing gays to serve openly than were service members of the past to other social changes such as integrating African Americans or opening up combat positions to women.

Moreover, anecdotal evidence suggests that the troops themselves have simply moved on. Shortly after Admiral Mullen's dramatic testimony before Congress, he did not receive a single question on the potential change in policy toward gays and lesbians during a trip to visit service members stationed in Jordan. And Air Force Chief Master Sgt. Darryl Robinson, the operations coordinator for the defense attaché office at the U.S. Embassy in Amman, told reporters after the admiral's question-and-answer session that "The U.S. military was always at the forefront of social change... We didn't wait for laws to change."⁹

Most importantly, while consulting our troops must be a component of the process to repeal "Don't Ask, Don't Tell," leaving the decision up to the troops alone would be unprecedented and would undermine the chain of command. What the Department of Defense should do is engage our men and women in uniform in a discussion about the information and resources they believe would be most helpful to them during the implementation of the new policy.

The Pentagon's review should also recognize the overwhelming support of the American people for overturning the ban. Seventy-five percent of Americans in a recent *Washington Post* poll supported openly gay people serving in the U.S. military, up from 62 percent in early 2001 and 44 percent in 1993, when President Clinton tried to overturn the ban.¹⁰ Overturning the policy enjoys broad appeal across partisan lines as well: The same poll found that majorities across party lines favor repeal, "with support among Democrats (82 percent) and independents (77 percent) higher than among Republicans (64 percent)."

The Pentagon's working group should, however, undertake the second objective and begin a review of the rules and regulations that must be updated in order to effectively and seamlessly implement the policy change. But this review must focus on *how* to implement the change rather than *whether or not* to do so.

Those who take the point of view that there must be a long period of transition are simply setting up a straw man to hide their real agenda, which is to maintain the current ban. Given these arguments, it is critical that the repeal of “Don’t Ask, Don’t Tell” not be perceived as a complicated puzzle requiring complex solutions to minor problems. Substantial research finds that transitioning to an inclusive policy would be significantly less difficult than proponents of “Don’t Ask, Don’t Tell” claim.¹¹ Pentagon Press Secretary Geoff Morrell recently overstated the complexity of this transition when he said on March 3, 2010—after Sen. Lieberman introduced his bill to repeal the policy—that “we need to know more than we know about what the potential impact would be.”¹²

But as this study and the experiences of some of our closest allies will demonstrate, once the law is repealed there are a number of fairly limited and manageable administrative, bureaucratic, and legal changes that must be made to the military’s internal regulations dealing with benefits, housing, conduct, and other relevant topics. Most existing regulations are already neutral with respect to sexual orientation and therefore don’t need to be modified. Others will require minor changes in legislation or additional executive guidance.

This report will analyze the eight critical areas where we believe the military must change rules and regulations in order to effectively implement the new policy (see text-box on page 5). For the most part, these are minor changes to existing standards and can be instituted relatively quickly. Before making our specific recommendations for U.S. policy, we will examine the experiences of our allies in Canada, Israel, and the United Kingdom to demonstrate how their militaries successfully integrated openly gay men and women into their armed forces. Analyzing their experiences will make clear that the U.S. military does not need months or years to make this change, and that the transition can be made quickly and easily.

Twenty-five nations allow openly gay men and women to serve in their militaries, including the majority of our NATO allies. But this report relies primarily on the United Kingdom, Canada, and Israel. These countries were chosen for several reasons.

First, their militaries are structured like ours. Their forces deploy globally and are frequently ordered to live in close quarters, such as on submarines. Second, their forces maintain a high level of readiness and engage in combat frequently. Third, the Canadians, Britons, and Israelis share a set of progressive cultural values similar to those of the United States. While the culture of the American military—or any military for that matter—has certain distinct features, the experiences of these militaries, which resemble our own, can provide valuable insight into how the United States should approach the repeal of “Don’t Ask, Don’t Tell.” Finally, these countries dropped the ban on gays serving openly in the military around the same time that the United States decided not to do so.

Ensuring smooth implementation of the repeal of “Don’t Ask, Don’t Tell”

Key recommendations and findings

Training

- Mandate that the Department of Defense make sexual orientation part of existing servicewide nondiscrimination training programs
- Update all training manuals and the Military Equal Opportunity program to include nondiscrimination based on sexual orientation

Legal issues arising from repeal

- After “Don’t Ask, Don’t Tell” is repealed, there will be no federal law prohibiting service members’ same-sex partners from receiving certain benefits afforded to the same-sex partners of civilian DoD employees and employees of other federal agencies, including the State Department. Certain benefits can be provided if the president revises and reissues his June 2009 White House memo on same-sex domestic partners to include the military services. Alternatively, the military can provide these benefits on its own.

Housing and common-use facilities

- Signal clearly that the military will not segregate housing, showering, and other common-use facilities based on sexual orientation
- Moreover, the military should look first to the State Department in order to determine if service members’ same-sex partners, who meet domestic partner criteria established by the State Department in January 2009, can be allowed to reside in on-base housing or receive the augmented basic housing allowance that married military personnel receive.

Benefits

- There is no federal law (beyond “Don’t Ask, Don’t Tell”) that prohibits the president from applying the June 2009 White House memo that establishes a procedure for extending certain benefits to the same-sex partners of federal civil service employees to same-sex partners of service members.
- The White House memo called on the heads of all federal agencies except the Pentagon to “conduct a review of the benefits provided by their respective departments and agencies to determine what authority they have to extend such benefits to same-sex domestic partners of federal employees.” The Department of Defense should be called upon to do the same.

Code of Conduct issues

- Congress should repeal the ban on sodomy in the Uniform Code of Military Justice, which is rarely enforced on heterosexuals, and replace it with a ban on all sexual acts that undermine good order and discipline.
- DoD should implement a broad code of social conduct based on the U.K. model that covers all personal relationships and behavior that undermine good order and discipline.

Discipline and promotion

- A broad code of social conduct should be implemented as discussed in the above section, and the military’s equal opportunity program should be amended to include issues of sexual orientation, as discussed in the training section.
- Beyond these measures, existing regulations are adequate to provide protection for both homosexual and heterosexual service members on issues of discipline and promotion.

Retroactive compensation and reinstatement

- DoD should allow previously discharged service members the opportunity to re-enlist provided that they meet all other age, fitness, moral, and educational standards as all other prior service members must.
- Prior service applicants should follow existing application procedures whenever possible. The services, Congress, and the White House should work together to establish a fair and uniform procedure for considering requests from former officers.
- Congress should permit a one-time temporary exception for service members discharged under “Don’t Ask, Don’t Tell” who wish to re-enlist if the only barrier to their re-enlistment is a restriction on the number of noncommissioned officers or commissioned officers who may be maintained in a particular military rank.

Health concerns

- Existing health regulations are adequate and do not need to be revised, including pre-entry HIV testing and regular testing for active duty service members and troops about to deploy.

Proponents of maintaining the policy argue that the U.S. military must conclude its exhaustive and in many ways redundant review process before Congress begins drafting and enacting legislation for the law's repeal. We disagree. The Pentagon is fully capable of providing a list of administrative and procedural changes to Congress while both houses take up their respective pieces of legislation.

Nor is there a need for an excessively long implementation period. As noted above, Secretary Gates has indicated that even after Congress repeals the law, the Pentagon could take up to a year to implement the new policy. But the experiences of foreign militaries and RAND's 1993 study indicate that immediate implementation not only can be done but is also the most effective way to make the policy change.

The Palm Center also notes that leadership and consistency will be incredibly important to the repeal: "Senior leaders must send clear signals of support for the new policy, and ensure that commanders discipline those who disobey it. In addition, the military must have a single code of conduct that applies irrespective of sexual orientation, and that holds every service member to the same behavioral standards."¹³

The experiences of the United Kingdom, Canada, and Israel make it clear that integrating openly gay men and women into the armed forces need not be the laborious and contentious process some fear. Several administrative and policy changes can ease the transition, and a wide body of literature and practical experience exists to guide this process.

All reputable military, academic, and popular studies and polls show that the American people are ready for this costly, ineffective, and discriminatory policy to end. The military's top uniformed and civilian leadership has signaled that it is in favor of repeal, too. Now is the time for Congress, the White House, and the Pentagon to improve military readiness by permitting gay and lesbian Americans the opportunity to serve their country without forcing them to live a lie.

The Pentagon is fully capable of providing a list of administrative and procedural changes to Congress while both houses take up their respective pieces of legislation.

Integrating openly gay and lesbian service members

Experiences of foreign militaries

United Kingdom

Of the three countries examined in this paper, the United Kingdom has had the most recent experience establishing a policy of allowing open service. Until the European Court of Human Rights forced the United Kingdom to overturn its ban in 2000, gay and lesbian service members and known homosexuals could be prosecuted under military regulations and discharged.

The ban began to erode in the mid-1990s, when the Ministry of Defense, or MoD, initiated a Homosexual Policy Assessment Team in response to a failed court case challenging U.K. policies on military service and homosexuality. The team did not ultimately advocate overturning the existing policy, but the Palm Center notes that “its report made clear that there was no evidence that gays were unsuited to military service and that the assumption that gays were a threat to security and a predatory menace to young troops were unfounded.”¹⁴

The United Kingdom took steps to modify its policy before repealing it entirely. Gay and lesbian service members could still be discharged under the modified policy, but “military leaders told commanders only to investigate suspect homosexuals if an unavoidable problem arose.”¹⁵

All restrictions were dropped after the Ministry of Defense lost a legal challenge to its policies in the European Court of Human Rights. Four former service members were awarded monetary compensation from the ECHR, and the court ruled in September 1999 that “there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights” of which the United Kingdom is a signatory.¹⁶ The United Kingdom announced in December 1999 that it would comply with the court’s decision and would no longer investigate or discharge service members on the basis of their sexual orientation. The new policy became effective in January 2000, a month after the announcement.¹⁷

Thirty months after the United Kingdom changed its policy to permit open service, the Ministry of Defense concluded in a tri-service review of its army, air force, and navy that the change had been accomplished smoothly. The Royal Air Force reported that “the overwhelming view of RAF COs [commanding officers] is that the change in policy was overdue and represented recognition of the diverse culture in which we all live. All COs agreed that there had been no tangible impact on operational effectiveness, team cohesion, or Service life generally.”¹⁸ The implementation sections in the report detail the steps the MoD took to achieve this smooth transition without undermining military readiness.

Timeline: The United Kingdom Overturns Open Service Ban

European Court of Human Rights finds U.K. ban violates convention

Mid-1990s

The U.K. Ministry of Defense Homosexual Policy Assessment Team finds no evidence that gays are unsuited for military service.

1999

The United Kingdom announces that it will comply with the European Court of Human Rights’ decision to allow open service, and it stops investigating and discharging service members on the basis of sexual orientation.

2000

The United Kingdom overturns its ban on open service.

2002

A U.K. Ministry of Defense review finds that the ban has no tangible impact on operational effectiveness, team cohesion, or service life in general.

2004

The U.K. Civil Partnership Act of 2004 passes.

2005

The Civil Partnership Act of 2004 goes into effect giving legal status to same-sex couples.

Integrating openly gay and lesbian service members (continued)

Israel

The Israeli military, the only conscription (drafted) force considered in this report, never operated under a blanket ban on open service. Yet the Israel Defense Forces, or IDF, did maintain some irregularly enforced restrictions on gay and lesbian service members until June 1993. This was similar to the policy that existed in the U.S. military until 1980. A 1983 military order imposed limits on career paths for homosexuals—intelligence positions requiring top secret clearances were officially off limits to gay and lesbian service members—and mandated a psychological evaluation for any known or suspected homosexuals. Members of the IDF were not automatically dismissed based on their sexual orientation under this policy, but such discharges were still legally permitted.¹⁹

A U.S. Government Accountability Office, or GAO, analysis found that pre-1993 restrictions in Israel on the positions open to gay and lesbian service members were “not followed in practice.” During the GAO’s research in Israel in the early 1990s, before the remaining restrictions were removed, staff were told that gays and lesbians were serving in intelligence positions and “were found to be capable of doing their jobs without problems.”²⁰ The dismissal of IDF Colonel Uzi Even under this policy in the 1980s later provided the impetus to repeal all remaining restrictions.

Colonel Even revealed the circumstances of his discharge from the IDF in 1993 testimony to a subcommittee of the Israeli Knesset, the legislative branch of the Israeli government. Even, a former intelligence officer, was dismissed from the IDF and stripped of his security clearance in 1983 after his homosexuality became known.²¹ The Palm Center notes that, “Even conducted highly classified military research for 15 years and was open about his sexual orientation and therefore not at-risk for blackmail when the IDF revoked his security clearance.”²²

The Israeli prime minister convened a military committee to study the issue as a result of Even’s testimony and the subsequent public backlash against the military. The committee subsequently drafted a policy of nondiscrimination based on sexual orientation. A review conducted in 2000, seven years after openly gay men and women were allowed to serve in the IDF, showed no indication that lifting the gay ban compromised military effectiveness.²³ Additional information on the implementation of this policy is contained in the sections that follow.

Timeline: Israel Moves to Open Service

Colonel’s testimony prompts new policy

1983

Israel imposes limits on career paths for gays and lesbians and mandates that they undergo psychological evaluations.

1988

Sodomy is decriminalized in Israel.

February 1993

Former Israeli Defense Forces Colonel Uzi Even testifies before the Israeli Knesset that he was stripped of his security clearance and discharged in 1983 because of his sexual orientation. The testimony prompts a national response and the military chief of staff subsequently forms a committee to review the military’s policy.

June 11, 1993

The IDF officially adopts a policy of nondiscrimination on the basis of sexual orientation.

1997

The Tel Aviv District Court orders the Israeli army to grant Adir Steiner the benefits of his late partner, Colonel Doron Maisel. Following the decision, same-sex partners of federal employees, including the IDF, are extended the same benefits that heterosexual spouses receive.

Integrating openly gay and lesbian service members (continued)

Canada

The Canadian Forces accepted openly gay and lesbian service members beginning in 1992. The move to permit open service resulted from the evolution of Canada's national human rights policies. In 1985 the country implemented a national Charter of Rights and Freedoms, which did not specifically provide for protection on the basis of sexual orientation but did require equal treatment and protection under the law without discrimination based on a number of specified characteristics. These protections built on similar guarantees in Canada's 1977 Human Rights Act.

In the late 1980s and early 1990s, this framework was examined for its relevance to sexual orientation. A GAO study notes that in 1990 the attorney general of Canada acknowledged that sexual orientation was covered by the Charter of Rights and Freedoms, and two years later "the Court of Appeal for Ontario determined that the Canadian Human Rights Act should be interpreted to include sexual orientation as an illegal basis of discrimination."²⁴

Prior to 1988, the Canadian Forces maintained an outright ban on gays and lesbians in the military. Service members found to be homosexual were automatically discharged, just as in the United States. GAO also notes that the regulations governing gays and lesbians in the military "required military personnel to report to their superiors other soldiers whom they suspected or discovered were homosexual."²⁵ These stringent regulations were loosened in 1988 after several years of consideration. Service members were no longer required to report suspected gays and lesbians, and homosexuals were permitted to refuse discharge on the basis of their sexual orientation—though severe discriminatory practices remained for those who continued to serve.

The Canadian Forces' policy was finally revoked in 1992 when five former service members challenged the policy in court, claiming that it violated the Charter of Rights and Freedoms.²⁶ The Canadian Forces settled in court later that same year and replaced the 1988 policy with one of nondiscrimination on the basis of sexual orientation. It did so despite opposition from within the military, including predictions that large numbers of service members would refuse to shower or bunk with homosexuals and would refuse to re-enlist.

Research by the Palm Center at the University of California-Santa Barbara reveals that just the opposite occurred. Palm researchers noted that "after the ban was lifted... follow-up studies found no increase in disciplinary, performance, recruitment, sexual misconduct, or resignation problems."²⁷ Detailed information on Canada's experience repealing its ban without undermining unit cohesion or military readiness is included in the implementation sections of this report.

Timeline: Canada Repeals Ban on Open Service

Service members challenge ban and win

1985

Canada implements a national Charter of Rights and Freedoms that does not specifically provide protection on the basis of sexual orientation.

1988

Prior to 1988, the Canadian Forces maintained an outright ban on openly gay men and women in the military.

1990

The attorney general of Canada acknowledges that sexual orientation is covered by the national Charter of Rights and Freedoms.

1992

Canada repeals its ban on open service.

1992

A Canadian federal human rights tribunal orders all branches of the Canadian government, including the military, to provide the same medical, dental, and other benefits to gay and lesbian couples as heterosexual common-law couples.

2005

Canada legalizes gay marriage.

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