



Don't Ask, Don't Tell

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In 1993, former President Bill Clinton attempted to lift the ban on sexual minorities in the military. Commonly known as "Don't Ask, Don't Tell," the policy he proposed, which Congress later revised and codified into law, not only failed to end discrimination against gay men and lesbians in the military but in many ways worsened the situation for gay servicemembers and continued to allow the U.S. military to discharge them solely because of their sexual orientation.

The policy remained in effect from November 1993 until September 20, 2011, when its repeal became effective.

History

Even though Clinton courted glbtq voters during the 1992 presidential campaign in part by promising to lift the gay ban through executive order, once in office he quickly became mired down in a heated political battle over the issue. Members of Congress and the Joint Chiefs of Staff, including Senator Sam Nunn, Chairman of the Senate Armed Services Committee, and General Colin Powell, Chairman of the Joint Chiefs, opposed Clinton's plan. Already criticized for his lack of military experience, the new President faced a difficult choice between fulfilling his campaign promise to gay and lesbian voters and appeasing congressional leaders and his top military advisors.

In January 1993, Clinton announced that he would seek a compromise and attempt to revise the former policy on homosexual service members into a more tolerant one. In July, after much negotiation between the White House, the Department of Defense, and Congress, he presented his proposal, which in turn, Congress heavily revised before codifying "Don't Ask, Don't Tell" into law.

The final version differed markedly from Clinton's original intent. Ironically, it closely resembled the previous policy's restrictions on homosexual status and conduct in the military. Yet, as Janet Halley argued, "Don't Ask, Don't Tell" was much more sinister than it appeared and was "*much, much worse* than its predecessor," for it "discharge[d] people on grounds that tie status to conduct in surprising, devious, ingenious, perverse, and frightening ways."

The previous policy was explicitly anti-gay and banned service outright; it made no pretense of accepting gay men and lesbians in the military. "Don't Ask, Don't Tell" appeared less discriminatory because it did not allow the military to ask recruits about their sexual orientation when they joined, thereby making it possible for closeted gays and lesbians to serve. Yet the moment service members "told," or made statements that remotely suggested they might be gay or lesbian, under "Don't Ask, Don't Tell," the military had grounds to investigate and discharge them for being homosexual or participating in homosexual sex.

According to Halley, the ease with which the policy allowed commanders and investigators to conflate status and conduct was what was so troubling about "Don't Ask, Don't Tell." The law gave the military the



President Bill Clinton (above) intended to increase military tolerance of gay and lesbian servicemembers, but the Don't Ask, Don't Tell policy has not eliminated discrimination.

right to read any gesture that could suggest a propensity to engage in homosexual behavior--such as having gay friends, reading gay publications, or not conforming to gender stereotypes--as indicating the gay or lesbian identity of the service member, an identity that the law presumed is incompatible with military service.

Yet unlike earlier policies that prohibited gay men and lesbians from serving in the military, "Don't Ask, Don't Tell" did not assume that glbtq people could not be good soldiers. Rather, it relied primarily on the unit cohesion rationale to assert that the ban on glbtq service members was necessary for the military to function properly.

The law argued that sexual minorities in the military "would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion." Underlying this argument was the assumption that other military personnel, the majority of whom are heterosexual men, were so uncomfortable with homosexuality that the mere presence of a known homosexual would seriously undermine unit cohesion and jeopardize the overall effectiveness of the U.S. military.

Contrary to the arguments and assumptions inherent in "Don't Ask, Don't Tell," numerous studies by social scientists suggested that the presence of open gays or lesbians in the military would do little to threaten unit cohesion. As Elizabeth Kier stated in her review of unit cohesion and its relation to military effectiveness, "[T]he open integration of gays and lesbians would not disrupt unit cohesion or undermine military performance."

In fact, Kier questioned commonplace assumptions that shared values and beliefs or even liking one's fellow service members lead to increased cohesion. In more extreme situations too much group cohesion can lead to "fragging," or the intentional sabotage of the military by its own members. According to Kier, "Group cohesion can limit organizational performance when it encourages the primary group to pursue goals that are at odds with those of the formal organization."

In spite of the military's insistence that banning gay men and lesbians protects unit cohesion, Kier showed that literature on cohesion, along with the military's own policies and experiences managing it, suggested a much more complex story.

The very question of the impact of open gay men and lesbians in the military was itself something of a red herring. Based on data from the numbers of open gays in police and fire departments, Robert MacCoun suggested that a ban on gay service members did little to affect the number of open gay men or lesbians in the military. He argued, "[A]cknowledged homosexuals would likely be quite rare in the military, even if all restrictions on service by homosexuals were removed."

Since so few gay men and lesbians would come out after the lifting of the ban, it was even more unlikely that lifting the ban would diminish unit cohesion. In other words, in spite of the military's reasoning, "Don't Ask, Don't Tell" did little to preserve unit cohesion.

Although much research had been published that challenged the policy, the U.S. government and the military doggedly continued to support "Don't Ask, Don't Tell" until 2010, and the law devastated many glbtq service members' lives. According to the Service Members Legal Defense Network (SLDN)--a nonprofit organization that provided legal counsel to glbtq service members who were discharged--1250 service members were discharged under "Don't Ask, Don't Tell" in 2001. Between the law's implementation in 1993 and 2003, the U.S. military fired over 7,800 glbtq personnel. As of 2010, more than 14,000 servicemen had been discharged under the policy.

As activists pointed out, not only did "Don't Ask, Don't Tell" harm individual service members, but it also cost the military and U.S. taxpayers dearly. Conservative estimates placed the financial costs of the policy at over \$230 million for the decade between 1994 and 2003. A Government Accountability Office report in

2011 placed the cost of discharging 3,664 servicemembers in the years 2004 through 2009 at approximately \$200 million, bringing the total through 2009 to nearly half a billion dollars. But the cost to military effectiveness and governmental integrity was even more staggering, if difficult to quantify.

As proponents of lifting the ban pointed out, the ban promoted a hostile working environment, wasted crucial resources on unnecessary investigations, and forced many qualified service members to leave the military, depriving the services of many needed talents.

Moreover, by officially condoning discrimination, the military contradicted the democratic values it is supposed to protect and further alienated itself from the civilian sector. In 2002, a poll by the Gallup organization found that 72 percent of the public supported the right of gays and lesbians to serve in uniform. Yet the policy was not repealed until 2011.

A study by Laura Miller and John Allen Williams confirmed the increasing schism between military leadership and civilians. It found that 56 percent of civilians responded affirmatively to a survey asking if they thought gay men and lesbians should be allowed to serve *openly* in armed forces.

As Williams reported to the Center for the Study of Sexual Minorities in the Military, "The military is a reflection of the society it exists to defend, and American society is becoming more tolerant of different lifestyle choices. Sooner or later these changes will filter into the military."

Even sociologist Charles Moskos, the primary author of "Don't Ask, Don't Tell," began to qualify his position. In January 2003, he announced that he would support allowing known gays and lesbians to serve in the military if the U.S. were to reinstitute the draft. "If an open gay said, 'I want to go into the army,' it would be his prerogative," Moskos said. "Of course, there would be problems with that, there would be hassles, but they probably could be overcome."

Moskos claimed that the draft represents a higher virtue in his mind than the right of glbtq people to serve in a volunteer military, and in the context of a draft, he saw the gay ban as an easy way to avoid military service for any soldier who might identify as gay, truthfully or not. But his willingness to consider lifting the ban even in this particular case further cast doubt on the legitimacy of the exclusion of glbtq people from the military.

[Road to Repeal

During his presidential campaign in 2008, then-Senator Barack Obama called for the repeal of Don't Ask, Don't Tell, raising hopes that repeal of the policy would be a top priority of his administration. Following his assumption of office in 2009, however, President Obama indicated that plans to repeal the policy would be delayed so that he could confer with the Joint Chiefs of Staff and his new political appointees at the Pentagon to reach a consensus, and then present legislation to Congress.

During the campaign, Obama intimated that he would end the ban by executive order. After the election, however, he insisted that only Congress could change the policy.

Although military law experts concluded that the President as Commander-in-Chief has the authority to suspend discharges under the policy, and thereby ending it in practice, Obama--to the dismay of glbtq activists--refused to exercise this authority.

In October 2009, on the eve of the National Equality March in Washington, D. C., in a speech before the Human Rights Campaign, President Obama, under pressure from frustrated gay and lesbian activists, again promised that he would repeal Don't Ask, Don't Tell, but yet again failed to offer a detailed plan or timetable.

During the President's State of the Union Address on January 27, 2010, however, he announced that he would work with Congress and the military to "repeal the law that denies gay Americans the right to serve the country they love because of who they are."

In testimony before Congress on February 1, 2010, Secretary of Defense Gates and Admiral Mullen, chair of the Joint Chiefs of Staff, committed to ending the ban, though they said that yet more studies were needed in order to implement the repeal.

Admiral Mullen memorably explained how he came to the conclusion that the DADT policy was inimical to military readiness. "I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens," he said. "For me, personally, it comes down to integrity--theirs as individuals, ours as an institution."

In his testimony, Secretary Gates implied that the military might soon adopt a more humane interim enforcement protocol before the Don't Ask, Don't Tell policy is actually repealed legislatively.

On March 25, 2010, Gates announced some details of the "fairer and more appropriate" enforcement protocol. Henceforth, he explained, third-party complaints about servicemembers must be given under oath and third parties would be scrutinized more thoroughly to prohibit disclosures by those with vindictive or inappropriate motives. He also struck down the practice of allowing confidential conversations with lawyers, clergy, physicians, and therapists to be used in fact-finding inquiries.

In addition, he announced that only generals and naval flag officers would be authorized to initiate fact-finding inquiries.

Later, in October 2010, after significant court rulings cast doubt on the constitutionality of DADT, Gates said that discharges could take place only with the approval of Secretaries of the branches, all of whom are political appointees. These new policies effectively ended involuntary discharges under the policy.

New Activism

The Don't Ask, Don't Tell policy discriminated against gay men and lesbians so starkly and so openly that it became emblematic of the injustices glbtq individuals experience in American society generally, particularly since those who experienced the discrimination directly wanted only to serve their country.

Its repeal became a priority of the glbtq movement even though the number of individuals affected by it was relatively small compared to those who experience discrimination in the private sector or in the area of partnership rights, and even though the number of servicemembers discharged under the policy declined in its later years, falling from more than 1300 discharges in 2001 to 499 in 2009, owing largely to the need of recruits to fight two wars.

DADT also became emblematic of the difficulties of effecting real change in the United States and of the unresponsiveness of American political institutions to popular will. Despite the fact that large majorities of Americans believed that gay men and lesbians should be permitted to serve openly in the military, the DADT policy proved extraordinarily resistant to change.

Because the policy became such a symbol of discrimination on the basis of sexual orientation, its repeal sparked a new activism. Legal organizations, academics, and individual servicemen emerged to lead the movement against the policy.

The Servicemembers Legal Defense Network (SLDN), an organization dedicated to ending discrimination and harassment against military personnel affected by DADT, emerged as a leading voice for change. It offered

free and confidential legal advice to those directly affected by the policy; it lobbied Congress and other political institutions for repeal of the policy; and it challenged the constitutionality of the policy in court.

The Executive Director of SLDN, Aubrey Sarvis, a former U. S. Senate staffer and communications executive, was a leader in pressuring Congress and the Obama administration on the issue and in developing strategies for repeal of DADT.

The work of the Palm Center, a think-tank at the University of California, Santa Barbara (since relocated to UCLA), which concentrates on the study of sexual minorities in the military, was also influential in attacking DADT. Its research thoroughly undermined the assumptions about the deleterious affect of gay men and lesbians on unit cohesion that allegedly justified the policy in the first place. The numerous books and articles--both scholarly and journalistic--of Nathaniel Frank and Aaron Belkin were especially significant.

In addition, a number of individuals who were directly affected by the policy also emerged as effective activists against it.

Perhaps the best known of these is a charismatic infantry officer and Arab linguist who served in Iraq in 2006 and 2007, Lieutenant Dan Choi, who outed himself in March 2009 on *The Rachel Maddow Show*.

Choi, a 2003 West Point graduate, challenged the policy on a number of fronts, from an open letter to President Obama to acts of civil disobedience.

With 38 other West Point alumni, Choi formed an organization, Knights Out, to support the repeal of DADT and "to help their alma mater educate future Army leaders on the need to accept and honor the sacrifices of lesbian, gay, bisexual and transgender troops."

An attractive and eloquent speaker, he energized the movement to repeal DADT through his frequent appearances at gay rights events and pride parades. His media appearances helped give a human face to the discrimination visited on glbtq servicemembers as a result of the Don't Ask, Don't Tell policy.

On March 18, 2010, Choi and Captain Jim Pietrangelo, another outed military officer, escalated the protests against DADT by employing nonviolent direct action civil disobedience. They handcuffed themselves to the front gate of the White House. As the media covered the startling image of two soldiers handcuffed to the White House gate, they waited for the authorities to remove and arrest them.

Other gay and lesbian servicemembers who have been victimized by the DADT policy also become unlikely grassroots activists.

Captain Pietrangelo, for example, fought in Iraq in 1991 as an infantryman and returned as a JAG officer for the second Iraq War. As he was readying for a third combat tour, he was honorably discharged after being outed by a third party.

Pietrangelo sued the government, charging that the policy is unconstitutional. He appealed to the Supreme Court, but in June 2009, at the request of the Obama administration, the Supreme Court rejected the case.

Army sergeant Darren Manzella came to national attention in 2007 when he announced on the CBS newsprogram *60 Minutes* that he was gay. He became the first openly gay service member on active duty to speak to the press from a war zone.

Manzella joined the U.S. Army in April 2002. In March of 2004, he deployed to Iraq, in support of Operation Iraqi Freedom II. Rising to the rank of Sergeant in the medical corps, he provided medical services during more than one hundred 12-hour patrols on the streets of Baghdad. While under fire, Manzella cared for Iraqi National Guardsmen, Iraqi civilians, and his fellow service members. He earned the Combat Medical

Badge, a swift promotion, and several other awards honoring his courage and devotion to duty.

He returned for a second tour of duty in the Middle East in 2006 and was stationed in Kuwait when he appeared on *60 Minutes*.

Manzella had earlier come out to his commander and members of his unit, but the Army had declined to discharge him, illustrating the military's unofficial policy of discharging openly gay servicemembers only after (or if) they returned from dangerous assignments in war zones. Such a practice gave the lie to the argument that DADT was necessary to preserve unit cohesion.

After his appearance on national television, Manzella was speedily discharged. However, he continued his activism against the policy.

Another unlikely activist on this issue was Marine Corporal Evelyn Thomas. She served at Camp Pendleton for four years until another Marine found a letter in her locker about her relationship with a woman. She was then honorably discharged in 1991.

In 2009, Thomas founded a ministry for gays in the military who feared they might be discharged for speaking openly to base chaplains about their sexuality. The Sanctuary Project Veterans was a ministry of Pilgrim United Church of Christ in Carlsbad, California, which provided a safe haven, support, legal advice, and services for soldiers harassed due to the Don't Ask, Don't Tell policy.

Also active in opposing DADT was Captain Tanya Domi, who served 15 years in various capacities, including as a paratrooper, drill instructor, and company commander of 140 MPs.

Because of his frequent appearances on television in opposition to the DADT policy, Michael Almy became emblematic of the injustices of the regulation. An Air Force Major, Almy was named one of the top officers in his career field and led 200 airmen in Iraq. He became the subject of an investigation after his e-mails were illegally read. He was relieved of his duties after he refused to make a statement about his sexuality without the presence of his lawyers. He was discharged in 2006.

An active duty Air Force Lieutenant Robin Chaurasiya faced discharge under DADT because she entered into a civil union with her partner. In speaking out against the policy, she received widespread support from her unit.

Air Force Lieutenant Colonel Victor Fehrenbach was one of the highest ranking servicemembers to fight against the DADT policy. After 18 years of service as a decorated pilot--the recipient of nine Air Medals, including one for heroism--Fehrenbach was investigated on suspicion of homosexuality in 2008.

At first he decided to go along with the discharge, despite being close to a full pension, just because he wanted the ordeal behind him. But then he had a change of heart. "The military was taking everything away from me, but the one thing I realized they couldn't take from me is my sense of right and wrong," he concluded. So he decided not only to fight the discharge but to go public with his case on *The Rachel Maddow Show*. He subsequently became a visible opponent of the policy and filed suit in federal court seeking an injunction to prevent his discharge.

In 1993, Marine Sergeant Justin Elzie, a former "Marine of the Year" for his battalion in Japan, came out on ABC Evening News in order to challenge the ban on gay men and lesbians in the military. He went on to serve four years as an openly gay Marine. During this period he was recommended for promotion, received unit awards, and served on a ship and in the field as a platoon sergeant without any negative effect on unit cohesion.

Although he was not discharged for being gay, Army Specialist Jarrod Chlapowski, a Korean linguist and

cryptologic voice interceptor, chose not to re-enlist because of DADT. Chlapowski was one of the co-founders of Servicemembers United, which was formed in 2005 to lobby against DADT.

Another activist who was not discharged under DADT is Autumn Sandeen, a transgender activist who served for twenty years in the U.S. Navy as a male and who retired in 2000 as a First Class Petty Officer. Sandeen, who frequently blogs on Pamshouseblend.com, suffered harassment as a result of her presentation as an effeminate male, but knew the regulations well enough to fight back when targeted for a DADT investigation. She participated in many protests, including one in which she was arrested with Dan Choi and others for handcuffing themselves to the fence in front of the White House.

Servicemembers United Executive Director Alexander Nicholson was also one of the leaders in the fight to repeal the "Don't Ask, Don't Tell" policy. A former U.S. Army human intelligence collector who speaks multiple foreign languages including Arabic, Nicholson was discharged from the military because of the Don't Ask, Don't Tell policy just six months after the terror attack on the United States on September 11, 2001. In 2005, Nicholson went public about his own experience with DADT and began encouraging other veterans to become active in opposing DADT.

Two other activists who are not themselves current or former servicemembers also deserve mention. One is a self-styled "PTA mom" from Fresno, California who was jolted into glbtq activism as a result of the Proposition 8 campaign in California, the other is a pop music phenomenon.

The "PTA mom" is Robin McGehee, who is a co-founder, with Kip Williams, of the direct action group GetEqual. She was co-director of the 2009 National Equality March on Washington, D. C. She has participated in a number of direct action demonstrations against DADT, including being arrested with Dan Choi for handcuffing herself to the fence in front of the White House. Her November 2010 arrest led to a White House meeting with the Obama administration's liaison to the lgbt community, Brian Bond, in which she expressed the frustration and disappointment felt by the grassroots over the President's apparent lack of engagement on glbtq issues.

Perhaps the most surprising and effective of the new activists is pop music sensation Stephani Germanotti, better known as Lady Gaga. Long known as an ardent supporter of gay rights, frequently appearing at gay events such as HRC dinners and the 2009 National Equality March, Lady Gaga became especially identified with DADT repeal in 2010, when she was escorted to the MTV Music Video Awards show by former soldiers who had been discharged under the law. She has also made YouTube videos urging her fans to lobby for repeal and even interrupted a tour to appear at a rally in Maine to pressure the state's two Republican senators to break a filibuster against repeal.

Steps Toward Repeal

In the spring of 2010, activists became increasingly frustrated at the prospect of having to wait for yet another Pentagon study before the DADT policy was finally dismantled. In addition, many suspected that the President and Secretary Gates were not acting in good faith.

The suspicion was that Gates had agreed to support repeal only after exacting a promise from Obama to delay legislation until after the study scheduled for completion in December 2010. That in effect would mean that repeal would not be considered until 2011, by a Congress that would likely contain far more Republicans than did the 2009-2010 Congress. Many political analysts believed (correctly, as it turned out) that in 2011 there would be fewer supporters of repeal in Congress than there were in 2010.

After several acts of civil disobedience, and even the heckling of President Obama at fundraising events, activists pleaded with the President to keep his promise to repeal DADT in 2010 and to exert control over the Department of Defense and the Department of Justice, which was defending the policy in court.

These calls were met mostly with silence from the White House. In response, many leaders and bloggers urged glbtq voters to withhold support from the Democratic Party if action on repeal were not forthcoming.

It is believed that Speaker of the House of Representatives Nancy Pelosi and Chair of the Senate Armed Services Committee Carl Levin in effect forced the President's hand. Pelosi and Levin urged the President to support their efforts to repeal the policy in 2010. Allegedly, they told him that they were close to having sufficient votes to repeal DADT and were planning to proceed with legislation regardless of his support. If they succeeded without his support, he would get no credit. If they failed, he would be blamed.

In response, the President and Secretary Gates tepidly endorsed a compromise in which Congress would vote to authorize repeal of the ban subject to the December study and to assurances from the President, the Secretary of Defense, and the Chairman of the Joint Chiefs that the repeal would not affect military readiness, unit cohesion, and recruitment and retention.

Even after agreeing to the compromise, however, Secretary Gates and some of the military leaders campaigned against it.

Nevertheless, on May 27, 2010 the Senate Armed Services Committee endorsed the compromise on a 16-12 vote and the House of Representatives voted in favor of the compromise on a vote of 234 to 194.

However, soon after these important votes, Republican senators, led by John McCain of Arizona, vowed to filibuster the repeal of DADT when the Defense Appropriations bill came to the Senate, thus requiring 60 votes to allow the amendment authorizing repeal to be considered.

On September 21, 2010, Senate Majority Leader Reid moved to invoke cloture to kill the Republican filibuster. This motion received 57 votes, three short of the necessary 60 votes. All the Republicans and two Democrats (Senators Pryor and Lincoln of Arkansas) voted to sustain the filibuster, thus dooming the attempt to repeal DADT to failure.

Immediately after the vote, Alexander Nicholson of Servicemembers United issued the following statement: "Today's vote is a failure of leadership on the part of those who have been duly elected to serve this nation and to put the best interests of the country ahead of partisan politics. It is simply inexcusable that this vote failed today."

When it was revealed that President Obama had lobbied not a single senator to vote in favor of breaking the filibuster and that the day after the vote Vice President Biden flew to Arkansas to attend a fundraiser for bluedog Democrat Blanche Lincoln, who had joined the filibuster, many gay activists came to the conclusion that the entire vote was a charade so that Democrats could pretend they were trying to repeal DADT even as they were not.

Senator Majority Reid announced that the Senate might again attempt to repeal DADT during the lame-duck session following the November 2010 elections, but Senator McCain said that he would again filibuster any such attempt.

Court Rulings

Although some individuals had successfully sued to block discharges under the military's anti-gay policies, most notably Sergeant Leonard Matlovich in the 1970s, Sergeant Perry Watkins and Sergeant Miriam Ben-Shalom in the 1980s, and Colonel Margarethe Cammermeyer in the 1990s, courts had been unwilling to declare the Don't Ask, Don't Tell Act unconstitutional. This is partly because of the deference that courts have traditionally paid to military policy and partly because, until recently, courts had not recognized a constitutional right to homosexual sexual expression.

This latter condition changed with the 2003 United States Supreme Court decision in *Lawrence v. Texas*, the decision that reversed *Bowers v. Hardwick* and invalidated sodomy laws. In that decision, Justice Kennedy wrote for the court's majority that "The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons." The Court also found that due process rights are far reaching, encompassing the "autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."

Lawrence v. Texas proved crucial to two decisions that led to the declaration of Don't Ask, Don't Tell as unconstitutional by a federal District Court.

In a 2008 case, *Witt v. Department of the Air Force*, the United States Court of Appeal for the Ninth Circuit determined that the precedents upholding Don't Ask, Don't Tell needed to be reconsidered in light of *Lawrence v. Texas*.

The case involved Major Margaret Witt, a highly-decorated Air Force flight nurse, who was discharged under Don't Ask, Don't Tell. She alleged that the policy violated the due process clause of the Fifth Amendment to the Constitution.

Although Witt's case initially failed at the District Court level, on appeal, the Ninth Circuit, while not ruling on the merits of Major Witt's claims, sent the case back to the District Court, declaring that Don't Ask, Don't Tell must be reconsidered, using a heightened level of scrutiny.

The effect of this ruling was to force the military to justify its allegations that the presence of an openly gay servicemember negatively affects unit cohesion and that the Don't Ask, Don't Tell policy was necessary for purposes of military readiness. It thereby established a test by which the policy's constitutionality could be measured.

While the ruling did not declare the Don't Ask, Don't Tell Act unconstitutional, it made discharging soldiers under the policy potentially much more difficult. The military could not rely upon mere assertions of hypothetical risk, but had to demonstrate the dangers posed by openly gay servicemembers.

The Witt case was retried at the District Court level in Tacoma, Washington in September 2010 by Judge Robert B. Leighton, the very judge who in 2006 had found that Major Witt's constitutional rights had not been violated by her discharge from the Air Force.

During the retrial, Major Witt's former colleagues testified as to her exceptional skills and as to the fact that knowledge of her sexual orientation had no effect on unit cohesion and morale. Indeed, they testified that her firing adversely affected morale and cohesion.

In contrast, lawyers for the Justice Department could only reiterate the tired talking points of 1993 when the act was adopted by Congress.

On September 24, Judge Leighton ruled in favor of Major Witt and ordered her reinstated in the Air Force as soon as practicable. He found that her discharge under DADT violated her due process rights under the Fifth Amendment to the Constitution.

He wrote, "The evidence produced at trial overwhelmingly supports the conclusion that the suspension and discharge of Margaret Witt did not significantly further the important governmental interest in advancing unit morale and cohesion. To the contrary, the actions taken against Major Witt had the opposite effect. . . . Her loss within the squadron resulted in a diminution of the unit's ability to carry out its mission."

Major Witt thus became the first servicemember discharged under DADT to be ordered reinstated. On November 21, the Department of Justice announced that it would appeal the ruling, though later they reversed themselves and Major Witt reached a settlement with the Air Force that allowed her to retire with full benefits.

Just before the Witt case was retried, on September 9, 2010, District Judge Virginia Phillips of Riverside, California released her opinion in another case in which she had applied the *Witt* test. Using that standard in *Log Cabin Republicans v. U.S.A*, Judge Phillips ruled forcefully that the Don't Ask, Don't Tell Act is unconstitutional.

Referring frequently to the Ninth Circuit's 2008 ruling in the Witt case and to *Lawrence v. Texas*, she declared that Don't Ask, Don't Tell violated the due process clause of the Fifth Amendment and the guarantees of freedom of speech and petition of the First Amendment to the Constitution of the United States. She issued an injunction barring enforcement of the policy anywhere in the world.

Judge Phillips' strongly reasoned dissection of the policy brilliantly detailed its deleterious effect on the lives of individuals and on the military itself.

In her ruling, she rehearsed the testimony of military experts, such as Dr. Lawrence Korb, Professor Aaron Belkin, and Professor Robert MacCoun, who explained how the policy is harmful to the military, and of servicemembers--including such outstanding soldiers as Michael Almy, Joseph Rocha, Jenny Kopfstein, John Nicholson, Anthony Loverde, and Steven Vossier--whose privacy was violated and whose expression was unconstitutionally inhibited by the policy.

In many ways, the 85-page decision is a crushing analysis of all that was wrong with the enforcement of the policy. Judge Phillips pointed out, for example, that the military often suspended investigations of troops accused of homosexuality if they were to be deployed abroad, waiting to discharge them only when (or if) they returned. This practice, she observed, is utterly inconsistent with the military's contention that gay and lesbian servicemembers undermine unit cohesion. If they really did that, then the military would surely not want troops accused of homosexuality to serve in battle.

Quite apart from the harrowing accounts of injustice suffered by those who were directly affected by the Don't Ask, Don't Tell policy, perhaps the most damning revelation of the trial was the disconnection between the ostensible aims of the legislation and its effects. As Justice Phillips wrote, "Taken as a whole, the evidence introduced at trial shows that the effect of the Act has been not to advance the Government's interests of military readiness and unit cohesion . . . but to harm that interest."

On October 12, 2010 Judge Phillips issued her final judgment and a worldwide injunction against enforcement of the DADT Act. She ordered the government to suspend and discontinue all pending discharge proceedings and investigations under the policy.

Dan Woods, the attorney who represented the Log Cabin Republicans in the landmark suit, released a statement on October 12 declaring Don't Ask, Don't Tell dead: "This is an extremely significant, historic decision. Once and for all, this failed policy is stopped. Fortunately now we hope all Americans who wish to serve their country can."

However, the declaration of victory was premature. The Obama administration moved quickly to resurrect the policy. On October 14, the Department of Justice indicated that it would appeal the decision and asked Judge Phillips to issue a stay of her injunction against enforcement of the Don't Ask, Don't Tell Act. They indicated that if a stay of the injunction were not granted by October 18, they would seek an emergency stay from the Court of Appeals, alleging that the the military would be thrown into chaos if they could not enforce DADT.

On October 19, Judge Phillips rejected the government's request for a stay, but on October 20, a three-judge panel of the Ninth Circuit Court of Appeals issued a temporary stay pending a hearing on October 25, 2010. On November 1, on a 2-1 vote, the panel issued an indefinite stay pending the duration of the appeal or until legislative action rendered the question moot.

The Obama administration's choice to appeal Judge Phillips' ruling, and especially to request a stay of her injunction, deeply disappointed gay rights supporters.

Perhaps as a sop to the outcry against the decision to appeal the ruling, Secretary of Defense Gates announced that subsequently no discharges could take place without the approval of the Secretaries of the branches. He claimed that the change in protocol was not an attempt to stop the discharges, but it is telling that the first month following this change was the first month since the adoption of DADT that there was not a single discharge under the policy, and subsequently the few known discharges were at the request of the servicemembers.

Although the administration continued to insist that it was in favor of repealing the policy legislatively, its sincerity was called into question by its eagerness to appeal decisions that effectively dismantled the discriminatory law.

Moreover, since the administration was unable to pass legislation repealing DADT during a Congress in which it had very large majorities, it seemed far-fetched to think that they could do so in a Congress in which there would be far fewer Democrats, as was the case in the Congress that was elected on November 2, 2010 and that took office on January 1, 2011.

Lame-Duck Hearings and Legislative Repeal

The question of repeal during the lame-duck session (i.e., the session after the November elections, but before the new Congress convened in January 2011) became urgent because it was widely believed that if DADT were not repealed in it, it could not be repealed during the next two years when Republicans would control the House of Representatives and have a larger minority in the Senate.

On November 30, 2010, 17 years to the day after President Clinton signed the Don't Ask, Don't Tell Act, the long-awaited study that Secretary Gates demanded was released. Costing about \$9 million, the 362-page report concluded that a large majority of troops were comfortable with overturning restrictions on gay men and lesbians in uniform and that they expected it would have little or no effect on their units.

On December 2 and 3, the Senate Armed Services Committee again held hearings on the policy. Secretary Gates and Admiral Mullen again indicated their support for repeal, especially since they feared that the policy would be overturned by the courts abruptly, giving them little time to prepare for the repeal.

Two of the service chiefs were less enthusiastic about repeal, though they all said that were the law changed they would implement the new policy.

Although Senator Joseph Lieberman announced that there were 60 senators in favor of repealing DADT, it was still unclear whether there were sufficient votes in the Senate to defeat a filibuster led by Senator McCain.

On December 9, 2010, an attempt to invoke cloture in order to debate the Defense Authorization bill, which contained the DADT repeal as an amendment, was again defeated, on a 57-40 vote, with Senator Susan Collins the sole Republican voting in favor of cloture and Senator Joe Manchin the sole Democrat voting against cloture.

After the defeat, Senators Lieberman, Mark Udall, and Collins announced that they would introduce a stand-alone bill to repeal DADT. Subsequently, Representatives Patrick Murphy and Steny Hoyer introduced a companion bill in the House.

On December 15, 2010, the House of Representatives passed the bill authorizing repeal of DADT by a vote of 250 to 175.

On December 18, 2010, the Senate finally invoked cloture to cut off debate on the bill and end the filibuster. The vote was 63 to 33, with 57 Democrats (including two independents who caucus with the Democrats) joined by 6 Republicans to invoke cloture.

The final Senate vote on the bill authorizing repeal took place later on December 18. It passed on a vote of 65 to 31, with 57 Democrats and 8 Republicans voting in favor and 31 Republicans voting against repeal. The bill was then sent to the President for his signature.

Soon after the vote to invoke cloture, President Obama issued the following statement: "By ending 'Don't Ask, Don't Tell,' no longer will our nation be denied the service of thousands of patriotic Americans forced to leave the military, despite years of exemplary performance, because they happen to be gay. And no longer will many thousands more be asked to live a lie in order to serve the country they love."

On December 22, 2010, at an elaborate ceremony to which many gay activists and servicemembers who had been discharged under DADT were invited, President Obama signed into law the bill authorizing repeal of Don't Ask, Don't Tell.

The bill did not itself repeal the Don't Ask, Don't Tell Act. Rather, it authorized repeal, contingent on the certification of the President, the Secretary of Defense, and the Chairman of the Joint Chiefs that ending the policy would not negatively affect military readiness. Once that certification was issued, the law authorized the Pentagon to put in place any necessary regulations to ensure an orderly transition. The DADT policy would remain in effect until 60 days after the certification.

Subsequent Developments

Meanwhile, the Log Cabin Republicans lawsuit continued in the Court of Appeals for the Ninth Circuit. Following the passage of the legislation authorizing repeal, the government asked the Court to hold the appeal in abeyance. The Log Cabin Republicans opposed this request, pointing out that as long as servicemembers could be discharged for their sexual orientation, the lawsuit was still relevant. Moreover, they also observed that there was no enforceable timeline for lifting the ban or even any guarantee that the ban would actually be lifted.

On January 28, 2011, the Court of Appeals rejected the government's request to suspend consideration of the lawsuit and set a new schedule for filing briefs. The government's opening brief and excerpts of record were filed on February 25, 2011; Log Cabin Republicans' answering brief and supplemental excerpts of record were filed on March 28, 2011; and the government's reply brief was filed two weeks later.

Significantly, the government in its briefs no longer argued that the Don't Ask, Don't Tell Act is constitutional. They merely pointed to the fact that repeal had been authorized and was underway.

On July 6, 2011, a three-judge panel of the U. S. Ninth Circuit Court of Appeals, including Chief Judge Alex Kozinski, granted a motion to lift the stay of District Judge Virginia Phillips' decision of October 12, 2010 in which she declared Don't Ask, Don't Tell unconstitutional and issued a permanent injunction against "enforcing or applying the 'Don't Ask, Don't Tell' Act." The Court also ordered that oral arguments in the case be held in the week of August 29, 2011.

On July 15, in response to an emergency appeal by the Justice Department, the Ninth Circuit modified the injunction in light of new information supplied by the military to the effect that the repeal process would be ready for certification in a matter of weeks. The new ruling enjoined the government "from investigating, penalizing, or discharging anyone from the military pursuant to the Don't Ask, Don't Tell policy."

The modified injunction in effect ended enforcement of the DADT policy except that it allowed the military to refuse to accept or process applications from openly lesbian, gay, or bisexual people until the repeal process was completed.

On July 22, 2011, the White House announced that President Obama, Secretary of Defense Panetta, and Chair of the Joint Chiefs Admiral Mullen had certified that the repeal of Don't Ask, Don't Tell would not negatively affect military readiness or unit cohesion. Senator Carl Levin, Chair of the Senate Armed Services Committee, announced: "Today's certification for all practical purposes marks the end of a discriminatory policy."

Sixty days later, on September 20, 2011, the Don't Ask, Don't Tell policy was officially repealed.

Even though Don't Ask, Don't Tell was now dead, many questions remained, including whether DADT is or is not unconstitutional.

Whether that question will ever be answered is less likely than it once appeared. On September 29, 2011, a three-judge panel of the Ninth Circuit Court of Appeals dismissed the Log Cabin suit, declaring it moot.

"This suit became moot when the repeal of section 654 took effect on September 20," the panel declared. "If Log Cabin filed suit today seeking a declaration that section 654 is unconstitutional or an injunction against its application (or both), there would be no Article III controversy because there is no section 654. The repeal, in short, gave Log Cabin 'everything' its complaint 'hoped to achieve' There is no longer 'a present, live controversy of the kind that must exist' for us to reach the merits."

More surprisingly, and disappointingly, in a strongly worded conclusion the panel also deemed the October 2010 opinion by District Judge Virginia Phillips declaring DADT unconstitutional without precedential value: "Because Log Cabin has stated its intention to use the district court's judgment collaterally, we will be clear: It may not. Nor may its members or anyone else. We vacate the district court's judgment, injunction, opinions, orders, and factual findings--indeed, all of its past rulings--to clear the path completely for any future litigation. Those now-void legal rulings and factual findings have no precedential, preclusive, or binding effect. The repeal of Don't Ask, Don't Tell provides Log Cabin with all it sought and may have had standing to obtain."

In response to the Court's decision, Dan Wood, lead attorney for Log Cabin Republicans in the case, issued the following statement: "We are, of course, disappointed by today's ruling but we will continue to fight on for the constitutional rights of all people impacted by Don't Ask, Don't Tell. This is an important issue for all Americans and we anticipate seeking re-hearing before the full Ninth Circuit."

In addition, there remained questions of whether servicemembers who were discharged under DADT are entitled to recompense and whether glbtq servicemembers are entitled to protection from discrimination.

A lawsuit filed by the ACLU on behalf of former Air Force Staff Sgt. Richard Collins in the Federal Claims Court sought full severance pay for gay and lesbian servicemembers who were discharged under DADT and received only half the severance pay offered others who involuntarily left the service.

On September 22, 2011, Judge Christine Odell Cook Miller indicated that she would probably rule that *Collins v. U.S.A.* be allowed to proceed to trial, but in effect urged the government to settle the suit rather

than attempt to defend a policy that may be indefensible. In response, the government changed its policy and settled the suit.

The military moved quickly to adopt policies ensuring that glbtq servicemembers were treated equally. One barrier to equal treatment, however, was the Defense of Marriage Act, which prohibited the provision of some benefits to the spouses and partners of gay and lesbian servicemembers. When that barrier fell as a result of the Supreme Court ruling in *Windsor v. U.S.*, which declared Section 3 of the Defense of Marriage Act unconstitutional, the military moved swiftly to recognize the legal same-sex marriages of servicemembers.

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