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Making A Rainbow Military: Parliamentary Skill And The Repeal Of "Don't Ask, Don't Tell"

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When the Department of Defense was born in the late 1940s it arrived inside the cabinet with a significant prohibition: gay and lesbian citizens were not welcome to serve in America's armed forces[1] (Bérubé 1990, 261). The United States then went on to operate an officially "straight" military well into the 21st century. Congress contributed greatly to such longevity. In 1993, after initial opposition from President Bill Clinton, Congress enacted the "Don't Ask, Don't Tell" statute (DADT). It codified the proscription on gay and lesbian service – and thus gave it new life. Congress indeed formalized the idea of a military closet. This 1993 statute recognized that many thousands of gays and lesbians bore arms but it held that their sexual orientation was inherently a threat to an effective military. Non-straight orientation was best kept secret. If a non-straight soldier were outed then the disclosure would lead to discharge.

After 1993 only a statute enacted by both houses of Congress and signed by the president could truly recast the status of non-straight personnel in the U.S. military. The road to a "rainbow" military ran through Congress. That road would be difficult to traverse. Members of Congress would have to instruct the military that the criteria for service were flawed. But recent research has shown that members of Congress respond to pro-gay opinion in their districts only when it is exceptionally high and vocal (Krimmel et al. 2012). The number of House districts and states that fit these criteria is small.

Not only would an unlikely congressional coalition for the repeal of DADT have to form, but repeal would also require a president willing and able to promote DADT repeal. Congress imposed DADT on an unwilling Commander-in-Chief, to be sure, but Congress would never dictate the reverse – that is, the repeal of DADT – to an unwilling president.

Thus lifting the statutory ban on gay and lesbian military service also depended on the Democratic party hitting the Madisonian jackpot – that is, on unified control of the federal government. Of the two parties Democrats

were much more likely to respond to demands for repeal from LGBT advocacy groups. DADT was enacted during the previous instance of unified Democratic control, 1993–1995, and a Southern Democrat, Sen. Sam Nunn (D-GA), led the enactment. But Democrats soon turned against Nunn's handiwork and committed themselves to repeal, even as Republicans became strong supporters of the policy.

Unified control Democratic control returned in 2009. DADT repeal became one of many policy possibilities that were opened up by public reaction to the administration and policies of President George W. Bush and to the rapidly worsening economy in 2008. DADT repeal was not high on the Democratic party's agenda, though, as Democrats regained unified control of Congress and the White House. Democrats turned first toward fiscal stimulus, health care reform, and stronger financial regulation.

Not until the latter half of the 111th Congress – in a process that spilled over into the December 2010 "lame duck" session – did congressional majorities in the House and Senate act. When they did, they authorized a self-repeal process inside the armed forces that finally led to formal cessation of the historic ban on September 20, 2011.

To paraphrase a famous comment by Vice President Joe Biden, was this a big deal? Clearly it was. Given the inertia behind the old policy, and the structural impediments to its reversal, the authorization of DADT repeal marked a milestone in American political evolution. In doing that congressional majorities *bettered* the civic status of gays and lesbians. That was a historic "first" for Congress.

It was also a "first" for gay rights advocates. They and their legislative, partisan, and military allies ended the last remnant of official federal discrimination against gays and lesbians. More broadly, on September 20, 2011, gays and lesbians formally won the "right to fight" *as themselves,* and not as closeted men and women who had to constantly live on the lookout against the discovery and dishonoring of their identity. "Not satisfied with rights alone, the end gays sought was honor, the honor of serving their country's military" (Hirshman 2012, 333).

WHY DADT REPEAL IS NOTEWORTHY FOR CONGRESS SCHOLARS

DADT repeal thus richly merits the attention of Congress scholars. President Harry Truman's famous effort to desegregate the military, and the follow-on determination of his successor, Dwight D. Eisenhower, shape how we think about "right to fight" politics (James 1995; Krebs 2006; Nichols 2007, 42–50). Congressional–military relations, in contrast, are pictured as turning on distributive issues, such as base closing and weapons procurement; good housekeeping, that is, budgetary servicing of an essential governmental function; or, of course,

the conduct of war (Kriner 2010; Rundquist and Carsey 2002; Stevenson 2006). This is a major and "least likely" case of congressional–military collaboration over social values and the civic status of an identity-based minority.

Moreover, in 2010 Congress carved out a role in a markedly more polarized ideological and legislative context relative to 1993. Between 1993, the 103rd Congress, and 2007, the 110th Congress, the distance between party means in left–right issue space in the House grew 33.5 percent (as indexed by DW-NOMINATE.) In the Senate, the same "spatial" distance changed only half as much – 16 percent. But the Senate divergence was associated with quite remarkable changes in how the Senate conducted its business. There was a 74 percent increase in the number of cloture motions filed between these two Congresses (103rd through 107th), a 143 percent increase in votes on cloture, and a 335 percent increase in cloture being invoked.

Majority rule in the Senate – always an elusive phenomenon – seemed to metamorphose into supermajority rule by the 111th Congress. This change – the advent of a sixty-vote requirement for legislation – turned the Senate into a major battleground for DADT repeal.

The House repeal process played out in straightforward majoritarian fashion. In the House, Democrats had increased the majority that they had regained in the 2006 elections, and they enjoyed a 257–178 margin in the 111th Congress. But Democrats enjoyed a sixty-vote majority in the Senate only very briefly, during summer 2009, between the arrival of Al Franken of Minnesota, after the settlement of the disputed senatorial election there, and the incapacitation of two highly effective and influential Democrats, Sen. Edward Kennedy (D-MA) and Sen. Robert Byrd (D-WV) (Burden 2011; Hulse 2009). By the time DADT repeal was on the Senate agenda in 2010, Senate Democrats not only needed to hold their majority but they also needed to attract Republican votes.

Sheer legislative ability in framing DADT repeal so that it garnered bipartisan support thus mattered greatly in the Senate phase of the repeal. So did simple capacity to avoid mistakes and adeptness in quickly recovering from blunders. DADT repeal pivoted, in the end, on how adroitly Senate Majority Leader Harry Reid (D-NV) – and the caucus of which he was the agent – operated in the harsh political environment of the 111th Congress. The pressures to deliver before the 112th Congress grew, in fact, over the course of 2010. By mid-summer, 2010, the shadow of Republican resurgence in the 2010 elections hung ominously over the Democrats (Baker 2010).

The case of DADT repeal offers lessons, then, in how parliamentary skill cemented an unusual congressional policy intervention. Many think of Congress as the "sick man" of the separation of powers (Zelizer 2013). But here members of Congress displayed strength. They proved quite capable of effectively interacting with the military and the presidency about large matters of justice and inclusion. As a result Congress was present at the historic creation of the "rainbow" military.

OVERVIEW OF THE ANALYSIS

To flesh out a dramatic story, this chapter proceeds by first applying John Kingdon's well-known conceptualization of the policy process (Kingdon 1984). Classic theoretical frameworks survive in large part because they perform well in illuminating new cases. Kingdon's elegant scheme nicely captures the fleeting nature of the opportunity for DADT repeal in the 111th Congress. (This is the section entitled "Three Streams Toward the Repeal Window.")

To recall, Kingdon posits that there is a *problem* stream – by which he means the process that leads to public or elite recognition (or both) that there really is a policy problem that needs debate. There is a *political* stream – such as a favorable set of electoral results that empowers politicians to act on such recognition. Finally, there is a *policy* stream – think here of the learning that proponents for a policy change undergo as they float ideas and puzzle through what successful change will require.

When these three streams "couple" – connect temporally – then a "policy window" opens. By emphasizing such low-probability confluence in the politics of problem solving, Kingdon warns us that lots of societal problems can go unresolved for long periods of time. Over time democracies address important problems disjointedly. Indeed, there is no guarantee at all that they will fix problems that, arguably, *ought* to be fixed. No coupling, no policy window. No policy window, no *chance* of problem solving.

Policy windows, moreover, have a "use them or lose them" quality. The opportunity may disappear. As Kingdon writes, "In space shots, the window presents the opportunity for a launch. . .. Similarly, windows open in policy systems. These policy windows, the opportunities for action on given initiatives, present themselves and stay open for only short periods. . .. If the window passes without action, it may not open again for a long time" (Kingdon 1984, 174, 178). The 111th Congress was just that sort of policy window. If DADT repeal did not happen then, DADT might today still be in effect.

As we will also see ("Obama Reconfigures the Policy Window"), the political action on repeal shifted markedly when President Obama weighed in on the issue in early 2010. In particular, Obama and the Pentagon complicated congressional use of the policy window. They did so by explicitly ignoring the congressional and electoral calendar. The Pentagon would report *its* views on repeal on its own timetable, in late 2010. How Congress would work with the new executive timeline was entirely up to Congress.

In "Congressional Response: Formal Delegation to the Pentagon; Hitching a Ride on the NDAA," I trace the facets of repeal politics that followed from what the president and the Pentagon did in the first few months of 2010. First, in spring 2010, congressional Democrats bargained with the White House and the Pentagon with an eye toward assuring DADT repeal no matter what happened to Democratic majorities in Congress after the 2010 elections. In particular, they negotiated terms of repeal that formally *delegated* the process

to the Pentagon. Congress embraced what Obama and the Pentagon had stipulated – but also created Pentagon accountability to Congress. By announcing that Congress accepted the Pentagon process, and getting the Pentagon's express agreement to this announcement, Congress subtly moved what Obama and the Pentagon had proposed closer to a principal–agent relationship.

Second, the actors favoring DADT repeal unveiled a clever strategy for getting such delegation through the Senate gauntlet during the 111th Congress: they placed DADT repeal into the National Defense Authorization Act (NDAA). The NDAA was must-pass legislation, particularly at a time when the United States was engaged in two wars.

Yet here in the discussion ("If Skill Matters, So Does Miscalculation") we also get to the contingency of DADT repeal. Even though – perhaps because – the NDAA was must-pass legislation, congressional Democrats attached more than one controversial measure to it and simultaneously sought to procedurally shield it from GOP amendment. Sen. Reid (presumably acting on behalf of his caucus) refused to bargain with friendly GOP colleagues – such as Sen. Susan Collins (R-ME) – over amendments to the NDAA, even though she was a member of the Senate Armed Services Committee. Democrats placed a bet that they could hitch DADT repeal onto the NDAA on their terms and win.

In thus procedurally shielding the NDAA so that it could be used to repeal DADT, Democrats squandered the possibility of garnering the necessary Republican votes. What looked like legislative skill was overplaying their hand. In an unusual turn of events, NDAA 2011 was successfully filibustered by a bipartisan coalition. A cloture vote on September 21 failed.

In "Action-Forcing Failure," I zero in on the *second* failed cloture vote. This happened on December 9 – and as we will see, it seemed to draw the curtain down on DADT repeal. The policy window of the 111th Congress, to all appearances, slammed shut.

In fact, the failed cloture vote actually speeded up repeal. The second failed cloture vote was a "faux failure." Sen. Reid instead used it to satisfy immigration policy advocates that Senate Democrats had tried to enact the Development, Relief, and Education for Alien Minors (DREAM) Act (an immigration measure that benefited children of undocumented immigrants who were not natural-born citizens). This had also been tucked into the NDAA. The vote's outcome also sharply raised the pressure on those working for DADT repeal to quickly devise a way toward their goal.

And it was suddenly easy to do just that. By December 9, the road forward was in view. By then, the Department of Defense and the Joint Chiefs of Staff vocally asked for repeal before the conclusion of the 111th Congress. (The details are treated in "The Top Brass Gets Drawn In.") Also, Sen. Joe Lieberman and Sen. Susan Collins had identified a sixty-vote coalition in favor of a stand-alone repeal, separated from NDAA 2011. That coalition's emergence revealed a broad willingness in the Senate to work with military leaders.

In the wake of the December 9 failed vote, Lieberman, Collins, and Senate Majority Leader Reid certified to House leaders and repeal advocates in that chamber that the Senate would quickly match a House vote for a stand-alone repeal. "All The Pieces Suddenly Fall Into Place" sketches the deft mechanics of getting a bill to the president to sign – and the bill signing itself.

"Lessons of DADT Repeal" attends to how the case study can reframe how we think about congressional problem-solving and representation in a polarized age. It also underscores the continuing relevance of Kingdon's "policy windows" framework. The key contribution of this chapter both for congressionalists and for policy scholars who are seeking to assess the utility of the policy windows approach is that we need to incorporate parliamentary skill into our analyses. This is not an original point: Volden and Wiseman emphasize this for the House (Volden and Wiseman 2014). What I add here is a focus on its role in the Senate's dynamics, in bargaining with the White House, and in bargaining with the military.

Three Streams Toward the Repeal Window

When President Bill Clinton signed "Don't Ask, Don't Tell" in 1993, it was not obvious that the statute would mutate into a policy problem. Clinton called it a reasonable compromise between what the military wanted, which was the retention of an existing ban on gay and lesbian service, and his own proposal that gays and lesbians serve openly (Frank 2009, 58–136). The very name – devised by the military sociologist Charles Moskos – suggested a workable middle ground (Holley 2008). The idea was to stop inquiry into sexual orientation at the time of enlistment ("Don't Ask") but require that sexual orientation remain private thereafter ("Don't Tell").

But in fact this arrangement was not a Solomonic compromise. The statute clearly described homosexuality as a threat to military order. Also, sexual orientation was and is discernible over the course of frequent interactions in any work environment. As Diane Mazur wrote in a critique of the policy, "People have private lives apart from their professional military lives, but they generally don't have secret lives" (Mazur 2010, 150). Although the policy never kicked out more than a very small fraction of the gays and lesbians in service it did create a difficult – sometimes extremely difficult – work environment for all non-straight service members and officers (Burrelli 2010; Gates 2004; GAO 2005). There were reports of physical and psychological harassment of lesbians and gays. A horrific murder occurred at Fort Campbell, Kentucky. In that incident a gay soldier successfully fought off a straight soldier. The man whom he bested took revenge by clubbing the gay soldier to death while he slept (Frank 2009, 192–96).

Toward the end of his second term President Clinton told CBS News that the policy was not working. Soon after he left office he repudiated it. Its main architects, Gen. Colin Powell and former Sen. Sam Nunn (D-GA), also eventually turned against it (Frank 2009, 276, 289).

Once the United States went to war in Afghanistan and Iraq – and the news that it was throwing out valuable personnel became widely reported – DADT metamorphosed into a perverse policy. DADT became the center of – in Kingdon's language – a "problem stream." Editorial opinion, military opinion, and public opinion shifted against it. A full study of editorial opinion in print newspapers is unavailable. But Aaron Belkin found that editorial attitudes among the roughly 200 newspapers that editorially supported President George W. Bush's reelection in 2004 were far from opposed to repeal. As for the major national newspapers with generally liberal editorial stances, these were openly calling for repeal (Belkin 2008).

Within the military, a 2004 Annenberg National Election Survey found considerable (though not majority) disagreement with the policy among service members. A *Military Times* survey from 2003 similarly found that support for the policy decreased as one's rank in the armed forces decreased (Belkin 2008). (*Military Times* is a Gannett online product that polls regularly and reports results for the previous two years at http://projects.militarytimes.com/polls.)

Moreover, among the officer corps some reaction to the policy was evident. Patrick Murphy, an Iraq War veteran and later a congressional leader of repeal, reported in his 2008 campaign biography abut his experience in teaching public law at West Point: "When I started teaching my segment on Don't Ask, Don't Tell, I'd always take a poll and find that only about one or two cadets opposed it. By the end of my lectures on equality, usually only one or two still supported the policy" (Murphy 2008, 54–5). Such anecdotal evidence dovetails with Aaron Belkin's observations of genuinely critical discussion of DADT within the service academies (Belkin 2012).

In fact, in 2007, at his Senate confirmation hearing, the new chairman of the Joint Chiefs of Staff, Admiral Michael Mullen, openly invited Congress to revisit DADT. At his confirmation hearing he said, "'I really think it is for the American people to come forward, really through this body, to both debate that policy and make changes, if that's appropriate." He went on to say that, "I'd love to have Congress make its own decisions 'with respect to considering repeal'" (OutServe-SLDN 2008).

Among the public at large, gay and lesbian service was no longer controversial. A full treatment of the survey evidence is beyond the scope of this chapter. But the *Washington Post*–ABC News poll is suggestive. In late May, 1993 – when the issue was in the news – the poll asked, "do you think homosexuals who do NOT publicly disclose their sexual orientation should be allowed to serve in the military or not?" Sixty-three percent said yes, and 35 percent said no. When the 1993 respondents were asked "Do you think homosexuals who DO publicly disclose their sexual orientation should be allowed to serve in the military or not?" only 44 percent said yes and 55 percent said no. Fifteen years later, in mid-July 2008, 78 percent of the public favored closeted service – *and 75 percent favored open service*.

One way to read these results is that the public was happy either way, with closeted *or* open service. It is doubtful that the American public was indignant about DADT's unfairness, its administrative costs, and the loss of personnel eager to serve. But the polling evidence around this time does suggest that the public would not oppose repeal of DADT (*Washington Post*–ABC News Poll July 2008).

In addition to the evolution of the "problem stream," there was a "political stream" that affected the politics of DADT repeal. As noted in the sketch of repeal politics with which I began this chapter, the political stars aligned just a few months after this *Washington Post*–ABC News poll. The Democratic Party platform that year had promised a repeal of DADT. At the 2008 nominating convention the delegates adopted a platform plank calling for repeal of DADT:

> We will . . . put national security above divisive politics. More than 12,500 service men and women have been discharged on the basis of sexual orientation since the "Don't Ask, Don't Tell" policy was implemented, at a cost of over $360 million. Many of those forced out had special skills in high demand, such as translators, engineers, and pilots. At a time when the military is having a tough time recruiting and retaining troops, it is wrong to deny our country the service of brave, qualified people. We support the repeal of "Don't Ask Don't Tell" and the implementation of policies to allow qualified men and women to serve openly regardless of sexual orientation (Democratic Party Platforms 2008).

That plank would have been in the Democratic Party platform no matter which candidate, Sen. Hillary Clinton (D-NY) or Sen. Barack Obama (D-IL), won the Democratic presidential nomination. By 2008, the Democratic Party had become the party of gay rights. As David Karol has stressed, political parties attract "intense policy demanders" (Karol 2009). Although there are important pro-GOP gay rights organizations, such as Log Cabin Republicans, most LGBT "policy demanders" long ago moved into the Democratic Party – bringing congressional Democrats along (Karol 2012; Krimmel et al. 2012).

During the race for the nomination Obama sought to please LGBT activists. To them, he was a devout black Christian whose commitment to LGBT policy concerns was unknown (Wolff Interview 2011). Yet over the course of the nomination struggle Obama reassured LGBT activists. Obama issued an "open letter" in February 2008 in which he called, among other promises, for a repeal of DADT.

The results of the 2012 elections further heightened the prospect of change. Sen. Obama defeated Sen. John McCain 52.9 percent to 45.7 percent. In the House, Democrats increased the majority they had regained in the 2006 elections, with a 257–178 margin. The Senate Democratic majority was the largest it had been since 1993–95, during the 103rd Congress – and it was augmented by the support of two Independents who leaned Democratic, Sen. Joseph Lieberman (I-CT) and Sen. Bernard Sanders (I-VT).

Expectations rose yet more before the president's inauguration. On January 9, 2009, Robert Gibbs, the president-elect's Press Secretary, was asked if the president-elect planned to end DADT. Gibbs replied, "You don't hear politicians give a one-word answer much. But it's 'yes'" (Frank 2013, 167).

But what policy vehicle would become the basis for repeal? DADT was a statute. A repeal would also have to be a statute. The "policy stream" inevitably came to be about statutory design.

Here we get to the first materialization of statutory DADT reform. This was the Military Readiness Enhancement Act (MREA, pronounced "Maria" by the players in the policy domain). It emerged only in the House of Representatives, not the Senate. Legislative action in the Senate, even though Democrats in the 111th Congress organized it, only came *after* the president's 2010 State of the Union address calling for repeal of DADT.

Rep. Martin Meehan (D-MA) introduced the first MREA bill in 2005 and it gained 122 cosponsors. Meehan reintroduced it in the 110th Congress, and the number of cosponsors climbed to 149. The House Armed Services Military Personnel Subcommittee held hearings on MREA and the policy in July 2008. Tellingly, the Pentagon sent no one to defend the policy (Frank 2010, 286).

By then, Rep. Meehan had resigned his seat in Congress to lead the University of Massachusetts-Lowell campus. Stepping in, Rep. Ellen Tauscher (D-CA) introduced the bill in the 111th Congress. When Rep. Tauscher resigned *her* seat – to accept a State Department position – the lead sponsor became Rep. Patrick Murphy (D-PA).

As the first Iraq War veteran elected to Congress, Murphy was an ideal lead sponsor of MREA. Murphy punctuated his takeover of leadership on the bill by joining a mid-summer, 2009, rally for repeal that was held in Philadelphia by Servicemembers United, a new gay veterans group (Benen 2009; Nicholson 2010, 89–90). Also, the number of cosponsors grew some more (and eventually reached 192).

The bill that Murphy now shepherded was H.R. 1283, introduced earlier in March, 2009. The bill announced that its purpose was to "to institute in the Armed Forces a policy of nondiscrimination based on sexual orientation." It then read:

> The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may not discriminate on the basis of sexual orientation against any member of the Armed Forces or against any person seeking to become a member of the Armed Forces.
>
> DISCRIMINATION ON BASIS OF SEXUAL ORIENTATION. – For purposes of this section, discrimination on the basis of sexual orientation is –
>
> (1) in the case of a member of the Armed Forces, the taking of any personnel or administrative action (including any action relating to promotion, demotion, evaluation, selection for an award, selection for a duty assignment, transfer, or separation) in whole or in part on the basis of sexual orientation; and

(2) in the case of a person seeking to become a member of the Armed Forces, denial of accession into the Armed Forces in whole or in part on the basis of sexual orientation.

The bill defined "sexual orientation" as "heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived, and includes statements and consensual sexual conduct manifesting heterosexuality, homosexuality, or bisexuality." The bill gave the Secretary of Defense ninety days after enactment of the statute to revise Defense Department regulations and issue new, implementing regulations, and provided that the Secretary "further direct the Secretary of each military department to revise regulations of that military department ... not later than 180 days after the date of the enactment of this Act" (United States Congress 2009: H.R. 1283).

In sum, the bill was a straightforward prohibition on discriminatory treatment. It equated – *and*, as a matter of status within the military, it *equalized* – the sexual orientation of straights, non-straights, and bisexuals. And change would happen quickly. The military, including the Coast Guard, would become orientation-neutral, as it were, within six months.

Obama Reconfigures the Policy Window

Obama kept his own counsel. Repeal activists filled the silence, hoping to draw him into action. The Palm Center, a research and advocacy nonprofit institute in California, issued a report making a persuasive case that the president had the authority to suspend DADT. This idea generated considerable interest and press attention (Frank 2013; see Henning 2009).

Seizing on the publicity around the idea, Rep. Alcee Hastings (D-FL) and seventy-six other members of the House issued a call for the president to use this authority:

> We urge you to exercise the maximum discretion legally possible ... until Congress repeals the law ... [and] that you direct the Armed Services not to initiate any investigation of service personnel to determine their sexual orientation, and that you instruct them to disregard third party accusations that do not allege violations of the Uniform Code of Military Justice.... Under your leadership, Congress must then repeal and replace Don't Ask, Don't Tell with a policy of inclusion and non-discrimination (Hastings et al. 2009).

By September, the Senate Majority Leader, Harry Reid, followed suit, sending letters to the president and to Secretary of Defense Gates asking for their views on repeal: "'Your leadership in this matter is greatly appreciated and needed at this time'" (Frank 2013, 183).

The president's caution was understandable. Obama hardly wanted to make the same mistakes that President Bill Clinton made. In fact, the stakes were higher than that. With the national security situation and military posture of the United States utterly different from 1993, Obama could not afford poor relations with the Pentagon and the services. Clinton's famously strained

relationship with the Pentagon had been brought on, in part, by military resistance to his proposed executive order on military service by gays and lesbians (Desch 1999, 29–33).

But with his first State of the Union Address in January, 2010, the president finally responded. It was a memorably contentious event. A South Carolina Republican congressman loudly called the president a liar. An angry Associate Justice Samuel Alito mouthed disagreement with the President's characterization of the *Citizens United* campaign finance decision. Amid the tension in the chamber came the following: "This year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are. It's the right thing to do" (see Nicholson 2012, 106).

Sitting at home watching the speech, Alex Nicholson, the director of Servicemembers United, the pro-repeal veterans' group, noticed a crucial ambiguity in the statement: the President was not clear on precisely *when* he saw repeal taking place. This was the first glimmer of what soon came into focus: the president and the Pentagon were ignoring the congressional and electoral calendar (Nicholson 2012, 106). They would set in motion a separate process. The subtext was: Congress was on its own. How it would connect to the executive timeline was up to Congress.

On February 2, Secretary of Defense Gates and Chairman of the Joint Chiefs of Staff Adm. Mullen went to Capitol Hill to back up the president at a hearing of the Senate Armed Services Committee. Gates testified first, and he announced his full support for the president's position. "We have received our orders from the Commander in Chief and we are moving out accordingly." But Gates also underscored the need for a deliberate pace: "I am mindful of the fact, as are you, that unlike the last time this issue was considered by the Congress . . . *our military is engaged in two wars that have put troops and their families under considerable stress and strain*" (emphasis added). He immediately added that

> attitudes toward homosexuality may have changed considerably . . . in the military . . . over the intervening years. . .. To ensure that the department is prepared should the law be changed . . . I have appointed a high-level working group . . . that will immediately begin a review of the issues associated with properly implementing a repeal of the "Don't Ask, Don't Tell" policy.

Gates acknowledged that "our approach . . . will take the better part of a year" but "[a]n important part of this process is to engage our men and women in uniform and their families . . . since . . . they will ultimately determine whether or not we can make this transition successfully" (Gates 2010).

Admiral Mullen, in seconding Gates, noted that "[t]he Chiefs and I are in complete support of the approach that Secretary Gates has outlined." He stressed that he personally opposed DADT because it "forces young men and women to lie about who they are in order to defend their fellow citizens" and he believed that the military could adapt to a repeal. But he did not

know for a fact how we would best make such a major policy change in a time of two wars . . . I also recognize the stress our troops and families are under . . . we need to move forward in a manner that does not add to that stress. . .. What our young men and women and their families want – what they deserve – is that we listen to them. . .. What the citizens we defend want to know . . . is that their uniformed leadership will act in a way that absolutely does not place in peril the readiness and effectiveness of their military . . . balance and thoughtfulness is what we need most right now. *It's what the president has promised us* [emphasis added], and it's what we ask of you in this body. Federal News Service 2010, 47–8.

One month later, Secretary Gates issued a March 2 memorandum for the general counsel to Gen. Carter Ham, Commander, U.S. Army, Europe, calling for the establishment of what later became known as the Comprehensive Review Working Group (CRWG.) This "high-level working group" would deliver its report to the secretary on December 1, 2010 (Lee 2013).

Alex Nicholson of Servicemembers United later wrote, "the administration had made a deal with the Pentagon. In exchange for senior defense leaders' support . . . the President would allow the Pentagon to spend all of 2010 doing an extensive and expensive study to help build both cover and consensus" and then the White House would "pursue legislative repeal in 2011" (Nicholson 2012, 127; see Frank 2013, 188–9).

The president's plan made sense from his perspective and from the Pentagon's point of view. But it had an obviously implausible premise: that Democrats would continue to control both houses of Congress with the same majorities that they had in the 111th Congress. The president assumed away the recurrence of a regular pattern in American politics – the significant loss of support for the president's political party during off-year elections.

Congressional Response: Formal Delegation to the Pentagon; Hitching a Ride on the NDAA

Congressional partners in the repeal process faced a problem: how to lock in the certainty of a repeal *despite* the open-ended nature of the executive part of the process – and despite Secretary Gates' demand that Congress not act until the Pentagon's report was ready. Evidently seeking a way around this problem, Sen. Joe Lieberman introduced S. 3065 the day after Gates issued his memorandum establishing the CRWG. His bill, S. 3065, updated MREA by adding language that recognized the existence of a working group and envisioning a generously delayed implementation of the repeal (United States Congress 2010, S. 3065). This idea strongly resembled what Servicemembers United called for in a plan that it dubbed SE/DI: Set End Date/Delayed Implementation (Eleveld 2010). Congress would repeal DADT on the basis of MREA during the 111th Congress – and *later* the Pentagon would implement the repeal in conjunction with the administrative recommendations of the CRWG.

Repeal proponents would thus trust the Pentagon to end DADT but to do so under congressional instruction. In principle, the Pentagon review was open-ended. Whether the armed forces were ready for repeal awaited serious investigation and internal debate. But S. 3065 essentially told the military, "make the debate come out the way that we want it to." As we will see, this message grated on Secretary Gates.

Over in the House, Rep. Patrick Murphy proposed that the language of S. 3065 be incorporated into the NDAA for 2011. But, in response, the Missouri Democrat chairing the House Armed Services Committee (HASC), Rep. Ike Skelton, asked for a statement of the Secretary's preference – and he got it. Skelton was opposed to DADT repeal. He assumed, correctly, that Gates opposed a plan that boxed Gates, Mullen, and the CRWG process into a recommendation of repeal.

Skelton was right. The secretary did *not* want Congress to act – and he wrote a public letter to Skelton saying that. On the basis of Gates' letter, Skelton and HASC reported the NDAA to the floor – *without* Murphy's amendment.

Still, Secretary Gates also unilaterally acted in a way that signaled good faith. In late March, 2010, he effectively halted further operation of "Don't Ask, Don't Tell" by instituting two adjustments to the discharge procedure. First, only a general or admiral could initiate discharge procedures. Second, the evidentiary standard for "telling" was changed. Any third party "outing" of a gay or lesbian service member would subject the person who exposed someone's orientation to testimony under oath and also special scrutiny with regard to motivation. In other words, DADT died administratively (Shanker 2010; U.S. Naval Institute n.d.). Gates thus signaled that he was willing to act as *something* like an agent of repeal proponents but without formal statutory instruction.

Gates got what he wanted. In late May, NDAA was amended on the House floor without the command that S. 3065 contained. By then all the major principals in the process – the White House, the Pentagon's senior leadership, the leaders of the repeal proponents in the House and Senate, and staff from the repeal advocacy groups – had agreed on language that ultimately became the basis for repeal. In effect, they wrote a contract.

The public signals of the deal over new repeal language came in an exchange of letters among Sen. Lieberman, Rep. Murphy, the chair of the Senate Armed Services Committee, Sen. Carl Levin (D-MI), and Peter Orszag, the Director of the Office of Management and Budget, who issued a May 24 letter in response to a letter made public earlier that day (Donnelly and Anderson 2010; O'Keefe 2010).

The three members of Congress wrote to the President,

> We applaud the pledge in your State of the Union Address. . . . We further commend the Secretary and the leaders of the working group. . . . Given the important efforts of

the working group, we have developed a legislative proposal for consideration by the House and Senate that puts a process in place to repeal "Don't Ask, Don't Tell" once the working group has completed its review and you, the Secretary of Defense, and the Chairman of the Joint Chiefs certify that repeal can be achieved consistent with the military's standards of readiness, effectiveness, unit cohesion, and recruiting and retention. We ... request the Administration's official views on our legislative proposal.

In response, Peter Orszag wrote to each of the three that same day:

> While ideally the Department of Defense Comprehensive Review on the Implementation of Repeal of 10 U.S.C. § 654 would be completed before the Congress takes any legislative action, the Administration understands that Congress has chosen to move forward with legislation now and seeks the Administration's views on the proposed amendment ... the Administration is of the view that the proposed amendment meets the concerns raised by the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. The proposed amendment will allow for completion of the Comprehensive Review, enable the Department of Defense to assess the results of the review, and ensure that the implementation of the repeal is consistent with standards of military readiness, effectiveness, unit cohesion, recruiting and retention. The amendment will also *guarantee that the Department of Defense has prepared the necessary policies and regulations needed to successfully implement the repeal* [emphasis added] ... such an approach recognizes the critical need to allow our military and their families the full opportunity to inform and shape the implementation process.... The Administration therefore supports the proposed amendment (O'Keefe 2010).

This new language – that is, "the proposed amendment" – responded to the interbranch political problem posed by the content of S. 3065 (i.e., that Congress explicitly mooted the comprehensive review and any surprises or information that it might contain). Instead, there was new, very opaque language. Critically, this language *dropped* the explicit prohibition of sexual orientation discrimination that was the heart of MREA (and in the end, repeal went forward in 2011 without such a prohibition).

The new language authorized completion of an internal military review of the administrative feasibility of the military's response to abrogation of Section 654 of Title 10 of the United States Code. When complete, the President would submit a memorandum to (in the statute's words) "the congressional defense committees." The Secretary of Defense and the Chairman of the Joint Chiefs of Staff would also sign that memorandum. It would certify "[t]hat the implementation of necessary policies and regulations pursuant to the discretion provided by the amendments ... is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." The amendments to the U.S. Code (which presumably would be written by the military) "would take effect 60 days after the date of the memorandum's transmittal." If there was no transmittal then "section 654 of title 10, United States Code, shall remain in effect" (United States Congress 2010, S. 3454, 203–7).

Congress would not be ordering the Pentagon around. Any member of the House who voted for repeal simply authorized the Pentagon to proceed with its plans. In fact, if the Pentagon changed its mind, then the statute said – on its face – that DADT stood and would *not* be repealed. If there was no transmittal of a certification that the military had prepared itself for non-straight service members being open about their sexual orientation then "*section 654 of title 10, United States Code, shall remain in effect*" (emphasis added).

This change evidently converted House Democrats who were uneasy with MREA's explicit prohibition of sexual orientation discrimination.

> In the House, several Blue Dog Democrats said they were still weighing their unease with the initial proposal against the compromise. Rep. Henry Cuellar (Texas), for example, said he has received a blunt directive from those serving on the Randolph Air Force Base in his district: "Don't repeal, don't repeal, don't repeal." But Cuellar said the go-ahead from Gates and Mullen is compelling him to rethink his position. "If they were not on board, it'd be hard to even consider it," he said (Newmyer and Dennis 2010).

As R. Douglas Arnold has pointed out, congressional delegation is politically very useful. Because members of Congress want to get reelected they often cannot vote sincere policy preferences. They instead carefully manage what their roll-call record will say about them. On the other hand, members of Congress also devise the procedures for making policy. They can therefore often collude to find a procedure that blurs the "traceability" of the *consequences* of yeas or nays.

If congressional leaders devise a policy design that will not *later* make its supporters electorally or politically vulnerable then members of Congress act responsibly. But policy design must blur traceability (Arnold 1990). It is hard to imagine a better way to blur traceability in the repeal of DADT than the self-certification plan that was devised in late spring, 2010.

What about those who preferred the *explicit* prohibition? To them the self-certification design seemed trustworthy. Speaking for this point of view, the chairman of the Senate Armed Services Committee, Sen. Carl Levin (D-MI), said,

> there is *very little risk* [emphasis added] that the "don't ask, don't tell policy" would be re-established under a future administration. "We've already got the Secretary of Defense and the chairman of the Joint Chiefs favoring ending the ban," Levin said. And once it is repealed, the odds of reinstating it are "so remote it's a little bit like whether or not we're going to repeal the Civil Rights Act of 1964" (Newmyer and Dennis 2010).

This last comment by Sen. Levin is fairly suggestive. One might interpret it as revealing the core of the Pentagon promise – and why it was trustworthy. The internal review required a significant investment of bureaucratic resources. It did so, first, by assessing the extent of internal *administrative* change. Second, such administrative change would be implemented across the entire range of military bureaucracies both within and without the United States and all over

the world. That process would require truly extensive education and training. When the process ended, formal certification and transmittal occurred. And by then the policy would be "locked in." Any *subsequent* legislative–executive coalition that was bent on repealing the repeal would have to do something very politically costly, if not impossible: order the military to undo the administrative process that repealed DADT. Reverse engineering the repeal would repudiate a great deal of good faith work. Would Republicans and conservative Democrats really disrupt the military in this way? In other words, the chance of an ex-post veto was small.

Also, it may be the case that repeal proponents understood that they had subtly transformed what Obama and the Pentagon proposed. They turned it into a "report-to-Congress" process locked inside military funding. Repeal proponents in Congress thereby made the Pentagon *their* agent as well as the president's agent. But they did this in a way that made the new principal–agent relationship rather opaque.

In the end, the May 27, 2010, vote in the House to add the repeal language to NDAA 2011 was 229 Democrats and 5 Republicans in favor (234) against 26 Democrats (mostly Southern Democrats) and 168 Republicans (194). The vote on the rule for NDAA 2011 had been 241–178, with only 11 Democrats defecting on that vote. The next day, the vote on final passage of NDAA was 246 (with 26 Democrats defecting) to 169 (with 9 Republicans voting for final passage).

The Senate Armed Services Committee reported NDAA 2011 with identical repeal language that had been added to the markup by Sen. Joe Lieberman. The vote there on May 27 was 16–12, with Sen. Jim Webb (D-VA) voting against the amendment in committee, and Sen. Susan Collins voting for it. The final vote of approval for NDAA 2011 in committee was 18–10 (Donnelly and Anderson 2010).

The congressional actors favoring DADT repeal thus unveiled a clever strategy for getting through the Senate gauntlet. By 2010, the Senate had become the battlefield where Republicans fought President Obama and the Democratic party's highly activist policy agenda. That change had origins in the previous Congress. When Democrats regained control of the Senate in 2007 during the 110th Congress, the number of cloture votes scheduled by the majority jumped sharply. When the next Congress, the 111th, opened for business, the shift to a sixty-vote threshold for legislation was the premise for how the Senate operated. Yet the Democrats really did not have a sixty-vote majority (Burden 2011; Koger 2012).

And they faced Republican opposition. The fact that a majority of House Republicans voted against NDAA 2011 was actually startling. Voting against the NDAA during a time of two wars clearly was *not* bad politics, if the point of the vote was to stop the repeal of DADT.

The 2008 Republican platform on which Sen. John McCain (R-AZ) ran for president supported the retention of DADT: "Military priorities and mission

must determine personnel policies. Esprit and cohesion are necessary for military effectiveness and success on the battlefield. To protect our servicemen and women and ensure that America's Armed Forces remain the best in the world, we affirm the timelessness of those values, the benefits of traditional military culture, *and the incompatibility of homosexuality with military service*" (emphasis added) (Republican Party Platforms 2008).

Also, two major veterans groups that were organized across states and House districts reinforced the GOP position. These were the Veterans of Foreign Wars and the American Legion. The Legion stated in February, 2010, "Now is not the time to engage in a social experiment that can disrupt and potentially have serious impact on the conduct of forces engaged in combat." A spokesman for the Veterans of Foreign Wars also said, "The VFW is fully aware that societal norms regarding homosexuality have changed since the 1993 passage of [the ban], but what is considered acceptable by civilians must not be blindly imposed on a military institution that the great majority of society chooses not to join" (Scarborough 2010).

Repeal opponents, both within and without Congress, considered their case fairly weighty. The United States was engaged in two major and protracted wars, the Iraq war and the Afghanistan war. Because the armed forces were an all-volunteer force, they had been stretched thin. It was bad policy, the thinking went, to significantly change how the military ran its own house. As one GOP member of Congress later anonymously responded to a *National Journal* Congressional Insiders Poll, "The military has its hands full fighting terror. *Doesn't need the distraction of social engineering*" (emphasis added) (Cohen and Bell 2010).

Given the Senate gauntlet and Republican opposition, legislative vehicles that could attract at least a few Republicans became very attractive. The NDAA fit the bill. A NDAA had never failed to pass in the previous forty-eight years. The NDAA was a strong congressional institution, less likely to get mired in partisan conflict and the growing polarization of Congress. And this particular defense authorization contained a 1.4 percent pay raise for troops and increases in housing and subsistence allowances (Donnelly and Oliveri 2010; Shogan 2012).

If Skill Matters, So Does Miscalculation

But then – despite repeal being primed for success – the effort fell apart. Until this point the leading proponents of repeal on Capitol Hill – Sen. Carl Levin, Sen. Joe Lieberman, and Rep. Patrick Murphy – displayed considerable skill. They finessed how the president and the Pentagon had abruptly turned repeal into an open-ended process. In doing that they subtly changed the relationship between the Pentagon and congressional advocates of repeal. They embedded the formal delegation to the Pentagon inside must-pass military funding – all the more urgent because the United States was fighting two wars.

To be sure, the NDAA did not have special "fast-track" protection against filibusters – in the way, for instance, that free trade legislation does. But did it need such protection? Looking around the Senate, Sens. Levin and Lieberman could see relatively moderate Republican Senators who seemed sure to vote for NDAA 2011, including their Armed Services Committee colleague, Sen. Susan Collins (R-ME).

Yet Senate Democrats overloaded the NDAA with nongermane provisions. Also, they procedurally overplayed their hand, causing Sen. Collins to abruptly walk away from the repeal. On September 21, 2010, the Majority Leader presided over a cloture vote for NDAA 2011. By then the NDAA had two additional items tacked onto it, in addition to DADT repeal (which was perfectly germane, since DADT had been initially enacted through NDAA 1994). NDAA 2011 (the Senate version) had immigration legislation in the form of the DREAM Act, a bipartisan bill that provides a way for minors brought by undocumented parents into the United States to become citizens. Also, the bill had a prohibition on secret holds that had been developed by Sen. Ron Wyden (D-OR) and Sen. Claire McCaskill (D-MO), and that seemed to enjoy wide support in the Senate.

Thus NDAA 2011 at this point – that is, September 2010 – had a mix of germane and nongermane, controversial and seemingly uncontroversial provisions. To protect this legislative contrivance, so that it might all work, the Senate majority leader "filled the amendment tree." This is a maneuver in which the majority leader exploits the majority leader's right of first recognition to unilaterally fill in all of the available amendment opportunities that are attached to the measure that is up for a cloture vote. Filling the tree has many tactical uses. One of them is to make the most of an anticipated supermajority in favor of cloture (Rybicki 2010).

But filling the tree was polarizing – and Sen. Reid surely knew that. Why did Reid risk the polarization? One possibility is that he simply had less time to do his leadership job. He faced a very arduous reelection fight in his home state, Nevada. A Tea Party candidate, Sharon Angle, was putting him to a severe test. Reid no longer had the same time and energy to give to quiet bargaining that he had enjoyed earlier in the 111th Congress (Friel 2010). So Reid and his Senate colleagues took the risk that they could get what they wanted from NDAA 2011 without time-consuming bargaining that they really could no longer afford.

But no sooner than Sen. Reid called the cloture vote than he received bad news straight from the floor. Sen. Susan Collins stated that she very strongly supported DADT repeal. She had been the only Republican on the Armed Services Committee to vote for NDAA 2011. But filling the tree deprived her of opportunities for amendment votes that she wanted (and presumably thought that she needed, either to mend fences with her colleagues, or for credit-claiming in her state, or both).

Perhaps, too, Sen. Collins was irritated by a widely publicized pro-repeal rally in her home state of Maine. The national spotlight shone on Collins

thanks to the celebrity singer, Lady Gaga, who appeared in Portland on September 20. Lady Gaga called on Collins and her similarly moderate Republican colleague, Sen. Olympia Snowe (R-ME), to vote for repeal. It seems safe to assume that Collins or Snowe hardly wanted the appearance, among Maine Republican and conservative Democratic voters, of doing Lady Gaga's bidding.

If Collins would not vote for cloture then certainly *other* possible swing votes – Sen. Scott Brown (R-MA) and Sen. Snowe – would not vote for it either. Sen. Levin sought to persuade the moderate Republicans that nothing would be lost by voting for cloture – politically useful changes could be made to the bill later (presumably in conference). But in the end, two Arkansas Democrats, Mark Pryor and Blanche Lincoln, joined Sen. Collins and all of the other Republicans. The cloture vote failed 56–43 (Donnelly 2010, 2232). Sen. Reid was among the 43. (Murkowski was not present.) This tactic – available to Reid as Majority Leader – saved NDAA 2011 for later, presumably the lame-duck session after the elections, since Reid's "no" vote meant that he reserved the right to hold another vote on the motion for cloture. But the prospects of DADT repeal – seemingly bright before the cloture vote – now were much dimmer. Richard Socarides, former President Clinton's adviser for gay rights, called the failed cloture vote "a political train wreck" (Bangor Daily News 2010).

Action-Forcing Failure

Then came the shock of the 2010 off-year elections. They were a historic triumph for Republicans. The *Wall Street Journal* reported that "The drive in Congress to repeal the military's 'don't ask, don't tell' policy appears all but lost for the foreseeable future."

> Asked what the White House priorities are for the coming congressional session, press secretary Robert Gibbs named four issues – tax cuts, a nuclear-arms treaty with Russia, a child nutrition bill and confirmation of Jack Lew as White House budget director. Asked why he wouldn't put gays in the military on the list, Mr. Gibbs said it looked like Republicans would block action (Meckler 2010).

Such an assessment was plausible. But it also underestimated how legislative expertise might function in the lame duck session. Majority Leader Reid could now devote *all* of his time to his Senate leadership role: he had defeated Sharon Angle in the Nevada Senate election. The Senate would also remain in Democratic control in the next Congress. Reid was hardly a lame duck majority leader.

Nonetheless, DADT repeal was competing with a very full agenda: (1) the expiration of lower income tax cuts and the estate tax repeal; (2) the expiration of the continuing resolution funding the federal government; (3) an impending 23 percent cut in Medicare physician reimbursement rates; (4) the expiration of unemployment insurance; (5) the defense authorization itself; (6) Senate

ratification of a nuclear arms reduction treaty with Russia (New START); (7) renewal of an assortment of expired tax breaks, such as the research and development credit; (8) renewable energy standards for the electric grid; (9) wage parity for women; (10) food safety legislation; (11) a child nutrition bill; (12) action on the recommendations of the president's fiscal commission; (13) the DREAM act for children of undocumented immigrants; and (14) campaign finance legislation (*CQ Weekly* – In Focus 2010). That was a lot of competition. Sen. John Kerry (D-MA) was reported as saying, "I think we're going to have to kind of come to grip with the realities of how much time is left and what's real and what can really pass" (Stanton and Hunter 2010).

Given such a truly crowded agenda, what happened next was quite shocking. But it might well be seen as a clever move by Sen. Reid to force action. Several strong signals informed Reid that DADT repeal would happen in the lame duck session *even if* a second cloture vote on NDAA 2011 failed.

To be sure, there is no direct evidence of such tactical sophistication. But there is nonetheless a plausible case that Reid grasped the subtle uses of apparent failure. If he went ahead with the cloture vote he and his colleagues would get political credit for trying one last time to enact the DREAM Act, which was still attached to NDAA 2011. Also, everyone invested in DADT repeal would grasp that the repeal really had to be hived off from the NDAA and enacted as a separate bill – and thus they would pour themselves into that task. Since there were other controversial items in the NDAA (such as funds for abortions at military hospitals), NDAA would also be quickly adjusted in committee, in negotiation between Sen. Carl Levin and Sen. John McCain, the ranking member. The 111th Congress would thus end with a successful NDAA as well.

On December 9, Sen. Reid sought to break the filibuster of NDAA 2011 a second time, and again he procedurally shielded the bill from amendment. Startled by the news that Reid was doing this, Sen. Collins rushed to the chamber and pleaded with Reid to postpone the vote. She pointed to the progress that had been made by both sides on what amendments would in fact be allowed. There was no need to risk failure. Reid, in response, said that it was time to act given how full the overall agenda of the lame duck session was. He had a point. Collins's plan for amending NDAA would have to be adjusted in the House or conferenced.

But the cloture vote failed *again*, 57–40 (although this time Collins voted for cloture despite her open frustration with Reid.) *Stars and Stripes* reported the bad news on December 9: "*gay rights advocates . . . may have to wait years for another chance* [emphasis added] . . . House Republicans, who will take over as the majority party next month, have already voiced their opposition to allowing openly gay troops to serve in the ranks, and Senate Republicans will also see their numbers increase next year" (Shane 2010b).

Gay rights advocates and sympathetic observers were now deeply uncertain about the quest for military reform. Ari Shapiro, NPR White House reporter,

recalled, "everybody I talked to – from activists to Capitol Hill staffers – can describe the moment they knew 'don't ask, don't tell' would never be repealed" (NPR Weekend Edition 2010). The director of Servicemembers United, Alex Nicholson, wrote in his memoir of the DADT repeal struggle, "We were finally at the end of our rope. The following week was the only week left in the year before the week of Christmas, and if it didn't get done that week, it just wasn't going to happen" (Nicholson 2012, 242). Even Sen. Collins was downbeat. "'I'm sad to say I think the chances are very slim for getting it through,' Ms. Collins acknowledged an interview after the vote" (Steinhauer 2010).

But in fact a stand-alone repeal was quickly forming. Anticipating the scheduled release of the Defense Department report on readiness for repeal, Sen. Lieberman and Sen. Collins called for the report's release on November 15 (Brady 2010b). On November 18, Lieberman announced that he had identified a sixty-vote majority for repeal (Brady 2010c). Then, on November 30, the Defense Department issued its much-anticipated report. The report led to an early-December bout of intense engagement by military leaders with the legislative process.

The Top Brass Gets Drawn In

The report that the Pentagon released on November 30, 2010, resulted from an unprecedented internal effort by America's military leaders to assess whether – in the midst of two wars – the U.S. armed forces could transition into what I have called a "rainbow" military. The assessment was clear: all of the evidence gathered by the CRWG showed that the services could adjust to repeal.[2]

The Senate Armed Services Committee convened a public hearing on December 2 to discuss the report and its implications. At it Secretary Gates called for DADT repeal before the end of the year. Admiral Mullen was actually eloquent in his call for the repeal of DADT: "Back in February when I testified ... I said that I believed the men and women of the armed forces could accommodate ... a change, but I did not know it for a fact. Now I do. *So what was my personal opinion is now my professional opinion*" (emphasis added) (Lee 2013, 305). Thus the process that congressional Democrats, the White House, and the Pentagon set in motion in May led by December to a strong pro-repeal signal. Everyone knew that a report would come during the lame duck session – and many suspected that it would break any legislative log jam. As *CQ Weekly*'s reporter, John Donnelly, wrote after the failed September cloture vote:

> there are ... reasons to think the Senate will find a way to pass the measure later this year ... By December, the Pentagon will have completed its review of the effect that a repeal of 'don't ask, don't tell' would have on the military. If the review finds no serious obstacles, it would strengthen Democrats' position (Donnelly 2010, 2232).

When the report actually came it sent a very clear message – that the Pentagon is ready – and that signal in turn was strongly amplified by Secretary Gates and Admiral Mullen.

In the wake of the December 2 hearings key Republicans began to speak in favor of repeal. Just after the Gates-Mullen testimony, it was clear that Sen. Scott Brown would eventually vote for repeal:

> I pledged to keep an open mind about the present policy on Don't Ask Don't Tell. Having reviewed the Pentagon report, having spoken to active and retired military service members, and having discussed the matter privately with Defense Secretary Gates and others, I accept the findings of the report and support repeal based on the Secretary's recommendations that repeal will be implemented only when the battle effectiveness of the forces is assured and proper preparations have been completed (Sargent 2010b).

Sen. Lisa Murkowski (R-AK) also expressed support,

> After reviewing the DOD report and the testimony before the Senate Armed Services Committee by Defense Secretary Gates and Chairman of the Joint Chiefs of Staff Admiral Mullen, I have concluded that it is time to repeal the "Don't Ask, Don't Tell" law . . . under current law gay and lesbian service members may speak about their sexual orientation only at the risk of being discharged from performing the duties they have trained hard to carry out. . .. I agree with Defense Secretary Gates' view that the military can successfully implement a repeal of the "Don't Ask, Don't Tell" law provided that proper preparations are implemented (Sargent 2010a).

Similarly, Sen. Olympia Snowe stated, "After careful analysis of the comprehensive report compiled by the Department of Defense and thorough consideration of the testimony provided by the Secretary of Defense, the Chairman of the Joint Chiefs of Staff and the service chiefs, I support repeal of the 'don't ask, don't tell' law" (Metzler 2010).

When the cloture vote failed seven days after the December 2 SASC hearing, the Secretary of Defense publicly requested repeal before the end of the 111th Congress. Secretary Gates seized on the remote possibility of DADT's *judicial* invalidation to urge that Congress assure that the Pentagon's own process would continue to proceed smoothly.

Here the clock needs to be turned back just a bit to appreciate what Gates was doing. On September 9, a pro-GOP gay rights group, Log Cabin Republicans, succeeded in winning a constitutional ruling against "Don't Ask, Don't Tell" from the federal district court for the central district of California. The judge then enforced the ruling worldwide on October 12 – and for a few days, until October 20, DADT was actually abolished by judicial fiat until the Ninth Circuit Court of Appeals stayed the order in response to an emergency appeal by the federal government (Garamone 2010; Miles and Garamone 2010).

Thus, in December, there was a possibility in the air: the famously liberal Ninth Circuit *might* uphold the district court injunction. This prospect hung over the lame duck session – and had implications for Congress failing to act.

Gates used this contingency to reinforce his earlier testimony to the Senate Armed Services Committee:

> I believe this is a matter of some urgency because, as we have seen this past year, the federal courts are increasingly becoming involved in this issue. Just a few weeks ago, one lower-court ruling forced the Department into an abrupt series of changes. . .. It is only a matter of time before the federal courts are drawn once more into the fray, with the very real possibility that this change would be imposed immediately by judicial fiat – by far the most disruptive and damaging scenario I can imagine, and the one most hazardous to military morale, readiness and battlefield performance. Therefore, it is important that this change come via legislative means – that is, legislation informed by the review just completed. What is needed is a process that . . . carries the imprimatur of the elected representatives of the people of the United States. *Given the present circumstances, those that choose not to act legislatively are rolling the dice that this policy will not be abruptly overturned by the courts* [emphasis added] (Capehart 2010).

All the Pieces Suddenly Fall Into Place

On the heels of the second failed cloture vote of December 9, "Sen. Joseph Lieberman (I-Conn.) and Collins called a news conference and announced they would introduce stand-alone 'Don't Ask, Don't Tell' legislation – a move seen by many as a 'Hail Mary' pass to make repeal happen before the end of the year" (Johnson 2010). But their effort was hardly a "Hail Mary" pass – that is, a long shot lofted high on a wing and a prayer. Sen. Brown, Sen. Murkowski, and Sen. Snowe had already revealed that they supported DADT repeal. Moreover, the Senate Minority Leader, Sen. Mitch McConnell (R-KY), was quietly releasing any Republicans who wanted repeal. He would not whip a stand-alone bill. Finally, a small business bill was available in the House for quick passage. It had been conferenced but not revoted. Therefore, its original language could be stripped out and the DADT repeal language from NDAA 2011 added to the bill in its place. The procedural benefit of this maneuver was that no conference on the DADT repeal language would be necessary as a result. Majorities in both chambers could pour the wine of DADT repeal into the identical small business bottles that were available (Titus 2011–12; Science Business 2010; GovTrack.us).

The House votes took place on Wednesday, December 15 – over Republican protests about the amendment procedure and the wisdom of acting to repeal DADT during two simultaneous wars. Here the GOP could point to testimony that came immediately after the December 2 testimony before the Senate Armed Services Committee. The Secretary of Defense and Admiral Mullen called on December 2 for repeal. But on December 3, the service chiefs, when they went to Capitol Hill, revealed that they worried about frictions among personnel, despite the CRWG report. Also, on December 14, the Marine Corps Commandant spoke out against repeal. This difference in military views provided the GOP with talking points. Nonetheless, the vote on the rule passed

comfortably, 232–180. Later that day, after a second impassioned debate, the vote on final passage was 250–175. The Pentagon promptly issued a statement calling on the Senate to act.

On Saturday, December 18, on the other side of the Capitol, Senate Majority Leader Reid called for a cloture vote on the identically amended small business bill that now carried DADT repeal. That vote passed 63–33. The Republicans voting with Sen. Susan Collins to proceed to a final vote on the stand-alone repeal bill were Sens. Scott Brown (R-MA), Mark Kirk (R-IL), Lisa Murkowski (R-AL), Olympia Snowe (R-ME), and George Voinovich (R-OH). Then, on final passage later in the day, Sen. Richard Burr (R-NC) and Sen. John Ensign (R-NV) joined these Republicans. That vote was 65–31.

Although he did not speak on the floor, Sen. Kirk issued a statement:

> I very carefully read the Joint Chiefs of Staff report [sic] and met at length with Chief of Naval Operations, Admiral Gary Roughead. Following their exhaustive and considered military judgment, I support the Joint Chief's recommendation to implement the repeal of the current policy once the battle effectiveness of the forces is certified and proper preparations are complete . . . the Constitution charges the Congress with setting military policy and the Executive branch with implementing it. The legislation containing the recommendations of the Joint Chiefs of Staff will remove the various orders of conflicting and uncertain court litigation from our military, allowing uniformed leaders to once again effectively manage our national defense. As a 21-year Navy Reserve officer, I believe it is important for military leaders, not federal judges, to run our armed forces (*Illinois Review* 2010).

Sen. John Ensign's vote on final passage had been foreshadowed by a mid-November statement that he would be guided by the CRWG report (Johnson 2010). Burr, also a final passage vote for repeal, released a statement just after Christmas saying that he had concerns over "timing" but that repeal was "the right thing to do" (Burr 2010). Only Voinovich kept quiet altogether; he was retiring from the Senate once the 111th Congress adjourned.

On December 22, President Obama signed the repeal at a jubilant ceremony at the Department of the Interior, with Sen. Susan Collins standing prominently by his side. Obama then gave extended and moving remarks on the bill's significance. The president sketched vignettes of exceptional combat bravery by gay soldiers. Indeed, soldiers with non-straight sexual orientation had fought for America since the Revolution: "There can be little doubt there were gay soldiers who fought for American independence, who consecrated the ground at Gettysburg, who manned the trenches along the Western Front, who stormed the beaches of Iwo Jima. Their names are etched into the walls of our memorials. Their headstones dot the grounds at Arlington" (Parrish 2010).

Lessons of DADT Repeal

Observers of the DADT repeal process have been struck by how much it went down to the wire (Frank 2013, 203; Nicholson 2012, 242). Given that the

prospect of failure seemed so palpable in the aftermath of the December 9 cloture vote, what made the legislation salvageable? Why did the principals in the drama redouble their efforts and throw themselves into a stand-alone bill? They might have given up and concluded, with varying degrees of resignation, regret, or remorse, that they would bide their time until a "policy window" opened again at some point. But they did not. Why?

One subtle lesson of the case is that parliamentary skill induces further displays of such skill – and it can dissolve legislative obstructionism just enough for remarkably difficult reform to happen. Repeal proponents in Congress showed great flexibility in responding to the very strong procedural preferences of the Pentagon and the president. By May, 2010, through bargaining with the White House and the Pentagon, they locked in a process that was certain to deliver a very strong pro-repeal signal from the military.

Parliamentary skill was not smoothly supplied, error-free, as the tale of overloading NDAA 2011 shows. But skill and dexterity were essential to the forging of the congressional partnership with the Pentagon – and that partnership, in turn, was so attractive during the lame duck session that it induced a final, decisive supply of yet more finesse. The timely ramping up of energy and ingenuity made repeal happen before the policy window really finally snapped shut. The imposing alliance that had been forged with the Pentagon also critically weakened the solidity of GOP opposition in the Senate, and brought over Republican senators willing to place policy goals ahead of party cohesion and discipline.

To be sure, many other factors were at work in the repeal of DADT. The story is just as conjunctural as all "Congress makes a law" stories. Also, the lame-duck session of the 111th Congress was unusually productive; members of Congress were in a mood to get things done (Franke-Ruta 2010).

But this case study does underscore that congressional problem-solving and good public policy are perfectly possible in a polarized age *so long as Congress continues to attract political talent*. Congress's attraction for ambitious and talented professional politicians is not likely to decline so long as it provides careers and is not hampered by term limits. Moreover, as Mayhew has shown, the separation of powers underwrites the attractiveness of Congress for adroit and determined politicians (Mayhew 2000, chs. 1 and 6).

As for Kingdon's "policy windows" framework, it has an inarticulate predicate which this case study has made explicit. Again, it is the supply of legislative skill at a fairly high baseline level. So long as Congress has enough people in it with such skill, and a subset with very high levels of it, then Kingdon's approach will continue to have analytic value.

Notes

1. Aaron Belkin of The Palm Center (www.palmcenter.org/), Nathaniel Frank (www.unfriendlyfire.org/), and Matt Gagnon (http://pinetreepolitics.bangordailynews.com/

author/mattgagnon/) kindly discussed the politics of DADT repeal with me. Charles Stevenson taught me much about the history of congressional stances toward military personnel policies, as did David Burrelli of the Congressional Research Service. Craig Volden raised a very useful question about one of the critical roll-call votes described here. None of them, however, is responsible for any mistakes in this analysis. One further acknowledgement: in addition to the references listed at the back, the Congressional Record, GovTrack.us, Congress.gov, Thomas.gov and Wikipedia were essential resources. (On Wikipedia as an "open source" data source, see Brown 2011.) So were http://dadtarchive.org/, built by the now defunct Servicemembers United but still under maintenance, the OutServe-Servicemembers Legal Defense Network (SLDN) site, www.sldn.org/pages/about-dadt1, and the Defense Department website, www.defense.gov/home/features/2010/0610_dadt/.

2. This assessment is based on Hillman 2013; Lee 2013.

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