“SOCIAL ENGINEERING” AMID TWO WARS:
How Congress Repealed “Don’t Ask, Don’t Tell” in 2010

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A December, 2011 photo of two female sailors locked in a public kiss offers an iconic image of a profoundly changed relationship between America’s military and American society.* Petty Officer 2nd Class Marissa Gaeta of the United States Navy, dressed in full uniform, embraces her partner in civilian clothing, Petty Officer 3rd Class Clitlalic Snell, on a U.S. Navy pier in Virginia Beach, Virginia. Gaeta has just stepped off her ship, the U.S.S. Oak Hill after an 80-day deployment. Soon the picture of the reunion was seen around the world. [Pilkinson 2011]

This kiss vividly reflects the adjustment of America’s military to a society and politics that had become far more open to gay rights. Gaeta’s commanding officer in fact selected her for his ship’s traditional “first kiss” ashore. But it might never have happened just then.

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The commander’s decision, the kiss, and the photo – they were all made possible by congressional legislation a year earlier. Yet that legislation – the repeal of the 1993 policy regulating and stigmatizing the service of gays and lesbians in the military that was known as “Don’t Ask, Don’t Tell” (DADT) – appeared doomed at a key political moment in December 2010. As 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to - from activists to Capitol Hill staffers - can describe the moment they knew ‘don't ask, don't tell’ would never be repealed…” [NPR Weekend Edition 2010] And yet the drive to repeal “Don’t Ask, Don’t Tell” in the 111th Congress (2009-2011) came back to life, legislation quickly passed in both chambers – and within days President Obama signed the legislation.

What made the drive to repeal DADT so politically resilient? What role did its congressional champions play in giving the drive to repeal a capacity to survive the roadblocks it encountered?

Earlier in 2010, congressional repeal proponents embraced the terms for repeal of DADT that the Pentagon laid out in negotiation among them and the White House. Repeal proponents in Congress withdrew a stipulation, which had existed in their earlier policy proposals, that an expressly stated policy of non-discrimination concerning sexual orientation govern the military. Repeal proponents would instead accept a de facto policy. They also accepted the Pentagon’s claim that administrative re-tooling would take time — and that until such administrative work was complete DADT would remain on the books, if unenforced.

Repeal proponents thus trusted the signals from the Pentagon – i.e. that the military was genuinely open to repeal. This assessment paid off. In the end, the only case that the opponents of repeal had – that the military actually preferred the DADT status quo –
turned out to be hollow. Its hollowness may not have been obvious to these opponents of repeal. They engaged in wishful thinking. Those in favor of ending “Don’t Ask, Don’t Tell” correctly read the signs coming from the Pentagon. Their accurate reading of the military meant that the repeal could be easily and quickly rescued through nimble legislative effort during the lame duck session of the 111th Congress — even though it briefly appeared dead, done in by the obstructionism of opponents in that session. Their argument proved irresistible: the Pentagon wants this.

The case of DADT repeal shows that social liberals in Congress, and the policy advocates with whom they worked closely, did not inherently distrust the military — nor vice versa. They could — and did — come to terms. The civil-military gap that had been much remarked a decade earlier did not exist. The repeal of “Don’t Ask, Don’t Tell” further shows that Congress can correct policy mistakes that it has made earlier. DADT became a symbol of reactionary and capricious treatment of patriotic citizens who just happened to have same-sex orientation. Finally, the successful outcome illustrates the coming-of-age of gay rights national policy networks — and their willingness and ability to work within the national legislative-executive process to make historic gains in civil rights.

**How The Repeal Process Ground To An Apparent Halt**

The immediate backstory of how the repeal of “Don’t Ask, Don’t Tell” ground to an apparent halt in early December, 2010 helps to draw out the surprising character of its quick revival from the dead — and thus the underlying sturdiness of the terms of repeal that had been negotiated earlier in the year. For much of 2010, congressional Democrats worked well with the White House, the Chairman of the Joint Chiefs of Staff,
the Defense Department, and a range of advocacy groups. The groups included the Human Rights Campaign, founded in 1980, Servicemembers United, a new gay veterans group, Servicemembers Legal Defense Network, a legal advocacy group founded in 1993, and the Palm Center, a think tank founded by the political scientist Aaron Belkin that had steadily produced research advocacy since its foundation in 1998.

The Rachel Maddow Show regularly focused on the politics of the process. Several service members engaged in civil disobedience, chaining themselves to the fence of the White House in spring and summer of 2010. One of these included an Iraq combat veteran, an Arabic linguist, Lt. Dan Choi, the son of a Korean-American Baptist minister, who the year before, in March 2009, had defied “Don’t Ask, Don’t Tell” by coming out on air during an appearance on the Rachel Maddow Show – after which he was separated from the Army. [Frank 2013]

The actors in the legislative-executive process had a clever strategy: to tuck rescinding provisions into the National Defense Authorization Act of 2011 (NDAA 2011.) A national defense authorization act (NDAA) had never failed to pass in the previous 49 years. The NDAA was a strong congressional institution, seemingly immune to partisan conflict and the growing polarization of Congress. And this particular defense authorization contained a 1.4% pay raise for troops and increases in housing and subsistence allowances. [Shogan 2011; Donnelly and Oliveri 2010]

But there was also trouble: Senate Republicans filibustered NDAA 2011. Partly this was because the 2008 Republican platform on which Senator 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]

Sen. McCain was later active in the 2010 filibuster. In late September, 2010, he and
his co-partisans argued that a vote to pass NDAA 2011 in September, before the
Pentagon reported on a review of DADT and whether the services could adjust to a
repeal, was inappropriate. There is some evidence, too, that Democrats discounted the
strength of the filibuster simply because a filibuster of NDAA was so unusual – so there
was little working precedent about how such a stand-off got resolved. The confusion
did not clear, and all Republicans held firm. Two Arkansas Democrats, Mark Pryor and
Blanche Lincoln joined Republicans, causing a cloture vote to fail, 56-43. [Donnelly
2010: 2232] Richard Socarides, former President Clinton’s adviser for gay rights,
called the failed cloture vote in September “a political train wreck.” [Bangor Daily
News 2010]

Still, repeal proponents had reason to remain optimistic. Sen. Reid switched his vote
at that time, i.e. to bring the bill to the floor, to a vote *against* bringing it to the floor.
Although Reid did not say when he would next confront the filibuster, his tactic –
available to him as Majority Leader — appeared to save NDAA 2011 for the lame-duck
session after the elections. Congress surely would pass the NDAA then, as Democrats
and Republicans finally came to an agreement over the conditions for cloture.

Then came the shock of the 2010 off-year elections, which were an 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]

Gibbs was right about that. When Senate Majority Leader Reid sought to break the filibuster of NDAA 2011 a second time, Senate Republicans doubled down. A cloture vote failed again, 57–40. Stars and Stripes reported the bad news on December 9th: “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]

Senate Republicans hoisted congressional Democrats on the horns of a dilemma. They could fight a futile struggle during the lame duck session of the 111th Congress as the clock ticked down toward the Christmas holiday and, beyond that, to the New Year. Or they could accept a major policy failure that was certain to anger their base – and leave gay rights advocates demoralized and deeply uncertain about the quest for military reform.

The collapse of the repeal effort indeed seemed a sweet victory not just for Republican opponents of repeal but also for the major veterans groups, the Veterans of Foreign Wars and the American Legion. As 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 had 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 considered their case fairly weighty. The United States was engaged in two major, protracted wars, the Iraq war and the Afghanistan war. Because the armed forces were an all-volunteer force, they had been stretched thin.

The infantry had been subject to stop loss orders, or involuntary extensions of enlistment periods. In the Army the number of personnel affected on a monthly basis between 2004 and 2009 ranged from a high of 15,578 (March 2005) to a low of 8,540 (May 2007.) [Henning 2009] For proponents of DADT repeal, these figures showed just how perverse DADT was. Valuable service members were being shown the door, while others were being kept from the door when it was time to leave.

But for opponents of repeal the stop-loss policy underscored the terrible stress on the military. It was bad policy, the thinking went, to significantly change how the military ran its own house. As one GOP member of Congress 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." [Cohen and Bell 2010]

The “Hail Mary Pass” That Worked

The story of course did not end there. No sooner than hope for repeal seemed barren than it was rekindled by the leading moderate Republican who had long signaled her

Lieberman and Collins found the Republican votes for a filibuster-proof majority that would compensate for defections by conservative Democrats who had joined the filibuster. They thus matched the House passage of a “stand-alone” repeal – that is, separate from the defense authorization.

As Stars and Stripes put it on December 18th,

“In a stunning turnaround, the Senate voted Saturday to move ahead with a ‘don’t ask, don’t tell’ repeal, paving the way for gay troops to serve openly for the first time in the history of the U.S. military. Two earlier attempts to repeal the controversial 17-year-old law that compelled gays to hide their sexuality or risk ouster from the military had failed this year in the Senate. But Saturday's vote moved forward thanks to new support from a handful of Republican senators [emphasis added] who labeled the law outdated and unfair. The move set up a final Congressional vote on the measure late Saturday afternoon, largely a formality after 63 senators supported the repeal earlier in the day.” [Shane 2010a]

Later that Saturday, the Senate enacted, 65-31, the “stand-alone” repeal bill that had been previously passed by the House. On December 22nd, President Obama signed the repeal at a jubilant ceremony at the Department of the Interior – and 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]

The repeal of DADT, in the end, had the dramatic elements that make Congress so fascinating to students of American politics: a roller-coaster process, passionate argument, a profile in courage in the form of Sen. Susan Collins’ critically important willingness to break from her party’s stance, parliamentary maneuver, and soaring presidential rhetoric at the end. A no-nonsense Republican Secretary of Defense, Robert Gates, never wavered in producing a full and persuasive report of the armed forces’ readiness to strip out the internal regulatory machinery that made DADT work. Fittingly, the pro-repeal chairman of the Joint Chiefs of Staff came from the Navy, historically quite hostile to service by gays. Admiral Mullen was plainly sincere, smart, and thoughtful. Those who were invested in the process came to admire him greatly. One of my informants called him “the real hero of the story.”

Finally – and this is what makes DADT repeal a true milestone in American political history – Congress openly changed the civic status of gays and lesbians. It had never done that before. Through working with and in Congress, a coalition of gay rights advocates – Aaron Belkin and the Palm Center’s researchers and legislative tacticians, Rachel Maddow, high-wire protesters such as Lieut. Dan Choi, the Human Rights Campaign, Servicemembers Legal Defense Network, and Servicemembers United – all won big at the national level for the first time in American history. They and their
legislative, partisan, and military allies ended the last remnant of official federal discrimination against gays and lesbians. Gays and lesbians won the “right to fight” as themselves, and not as fearfully 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 Could The Repeal Effort Spring Back To Life So Quickly?

But here we return to the resilience of the repeal process that I flagged earlier. Milestones in American political development often look inevitable or at least highly probable in retrospect. Yet for a time this landmark seemed unattainable.

Even before the cloture vote failed on December 8th, A National Journal Congressional Insiders Poll of 35 Democratic members of Congress (not broken down by chamber) found just half thinking that DADT repeal would happen in the lame duck session, and the other half thinking that it would happen either before or after the 2012 election, evidently either through executive order or in the courts. The 31 GOP MCs who responded to the poll were markedly more doubtful, with only a quarter of them thinking that the lame duck session would enact the repeal, and several believing that repeal would never happen. [Barnes 2010] Senator John Kerry (D-MA) was reported as saying, “I think we’re going to have to kind of come to grips with the realities of how much time is left and what’s real and what can really pass.” [Stanton and Hunter 2010]

Matters seemed even bleaker after cloture failed. As 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]

Why could the repeal effort spring back to life so quickly after it seemed doomed? One possible explanation is simple: Congress was in a mood to get things done. The “lame duck” session of the 111th Congress was unexpectedly quite productive. One of the “wrap-up” stories after the session quoted political scientist Larry Sabato as tweeting, "Like it or not, this lame-duck session is the most productive of the 15 held since WWII…” [Franke-Ruta 2010] Sensing a shift toward getting things done before the new Congress was sworn in, supporters of DADT repeal rode the “mood to legislate.”

Another simple explanation is the pivotal role of Sen. Susan Collins. The informant who called Admiral Mullen “the real hero of the story” certainly has a point: Admiral Mullen’s pro-repeal stance was enormously important. But there is a candidate for the heroine of the story, and it is Susan Collins. Sen. Collins found enough Republicans to break the filibuster. They joined her in effectively handing a major policy victory to congressional Democrats and to President Obama. Theories of “the gridlock zone” and pivotal politics tell us that veto players regulate legislative output. [Brady and Volden 2006; Krehbiel 2010] In this case, veto players in the policy process dropped their partisan vetoes and voted their sincere policy preferences, even though the political credit for the policy result redounded to their partisan rivals.

But besides the mood to legislate and the decisive role of veto-players, we also need to know why the repeal policy was so inherently salvageable. DADT repeal had to have attractive features to justify taking up extremely scarce time. It was competing with the following agenda items: (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% 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.

**Forging a Partnership To Solve the “Policy Window” Problem**

The origins of what made the DADT repeal effort “rescue-able” during the lame duck session lie in the congressional Democrats’ flexible response to a dilemma that emerged in early 2010. Call it the *policy window problem*. The President waited until early 2010 to seriously engage with the cause of repeal. He did this when he called for repeal in his first State of the Union Address. A few weeks later, the Secretary of Defense Gates and Admiral Mullen, chairman of the Joint Chiefs, appeared before Congress and announced an internal review of repeal’s administrative feasibility. They would deliver their report on December 1st — after the 2010 off-year elections.

To re-state the political difficulty in terms that are familiar to many political scientists, the President and the Pentagon consciously chose a process that took the repeal effort beyond the “policy window” opened up in 2009. By policy window, John Kingdon (who fashioned the concept) meant that three “streams” come together.
There is the political stream – such as a favorable set of electoral results that empowers politicians to act. There is the policy stream – think here of the learning that proponents for the policy change had gone through over the preceding years of effort and the research advocacy that they developed. Finally, there is the problem stream, that is, public or elite recognition (or both) that there really is a policy problem that needs fixing.

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 unfixed for long periods of time. Democracies address important problems disjointedly. There is no guarantee that they will fix problems that ought to be fixed. No coupling, no policy window; no policy window, no chance of problem solving.

Policy windows thus have a “use them or lose them” quality. 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.]

These considerations underscore why the President’s plan for repeal seemed curious. At best, under his plan the repeal would happen during a lame duck session of Congress. But who knew what the political aftermath of the 2010 elections would be like? Or how full the session’s agenda would be? How could repeal proponents in Congress prepare a plan in 2010 that would later be resilient – that is, a plan that would have a serious
chance of success in the lame duck session whatever the elections outcome and the demands on legislative energy and time?

That problem – the “policy window problem” -- was talked through and resolved in May, 2010 in a series of meetings involving policy advocates, the White House, Sen. Joe Lieberman, Rep. Patrick Murphy, and the Department of Defense. Although the day-to-day sequence is not known, and reconstructing it is a research task that will require interviews, the fact that there were many such meetings was obvious to close observers. [Nicholson 2012: 165-175; Frank 2013: 191-194]

To fully appreciate the logic of the plan that resulted from these negotiations, and then to trace the favorable political dynamics that the plan facilitated, let us return to the opening of the policy window for DADT repeal in 2009. This provides a particularly effective way to grasp both the policy window problem -- and the plan that finessed it. I sketch, next, the problem stream, the political stream and, last, the policy stream. This re-tells the backstory of repeal explicitly in terms of Kingdon’s useful “three streams” conceptualization.

The Problem Stream, 1993-2009

When President Bill Clinton signed “Don’t Ask, Don’t Tell” in 1993, he 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 heart of the compromise was the cessation of inquiry into sexual orientation at the time of enlistment (“Don’t Ask”), with the presumption that sexual orientation could remain private thereafter if gays and lesbians were discreet (“Don’t Tell”).

But in fact this was not much of a 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 – and sometimes extremely difficult - work environment for all non-straight service members and officers. [Burrelli 2010; Gates: ]

As American society became more open to the gay rights movement, the news about DADT seemed to get worse. It administrative cost was high – almost $400 million according to one study. The absolute number of discharges over the time of the policy (perhaps as high as 14,000 service members) seemed large. [Servicemembers United DADT Digital Archive Project] There were reports of physical and psychological harassment of lesbians and gays. A horrific murder occurred at Fort Campbell, Kentucky: a gay soldier successfully fought off a straight soldier. The man he fended off later took revenge by clubbing the gay soldier to death as he slept. [Frank 2009: 192-196]

Such news symbolized a policy in need of review and change. Indeed, toward the end of his second term President Clinton had 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 Senator Sam Nunn (D-GA), eventually publicly turned against it. [Frank 2010: 276; 289]

Such repudiation found echoes in three kinds of opinion: editorial opinion, military opinion, and public opinion. A full study of editorial opinion in print newspapers is unavailable. But Aaron Belkin, a close observer of the media environment (not least because he consciously sought to shape that environment), found that editorial attitudes among the roughly 200 newspapers that editorially supported President George W. Bush’s re-election 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 which 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 – and undecided officer opinion seemed malleable. Patrick Murphy, an Iraq War veteran, was an impassioned and able player in DADT repeal politics as a Democratic congressman from Pennsylvania’s 8th congressional district. He reported in his 2008 campaign biography on 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: 54-55] Such anecdotal evidence dovetails with Aaron Belkin’s observations of genuinely critical discussion of and ferment over 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, the idea that gays and lesbians should be able to serve openly was widely endorsed – though not, of course, intensely supported, as suggested by the Washington Post-ABC News poll. In late May, 1993 – around the time DADT came into existence -- 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?” 63% said yes, and 35% 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% said yes and 55% said no. Fifteen years later, in mid-July 2008, 78% of the public favored closeted service -- and 75% 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 actually in a boil over DADT’s unfairness or its much-publicized administrative costs and impact on personnel with valuable skills. But all of the polling evidence around this time does suggest that the public would very likely not oppose some sort of repeal of DADT. [Washington
Post-ABC News Poll July 2008] Repeal, if handled properly, would not provoke a backlash.

**The Political Stream, 2008-2009**

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 Don’t Ask, Don’t Tell:

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, Senator Hillary Clinton (D-NY) or Senator 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, Lax and Phillips 2012]

As matters happened during the race for the nomination, Obama had to work very hard to earn the trust of LGBT activists. He had not begun his quest as their preferred candidate. He was a devout black Christian whose commitment to LGBT policy concerns was unknown. Indeed, the worst fears of LGBT activists came to life in fall, 2007 when Obama’s South Carolina campaign sponsored a gospel concert by an “ex-gay” black minister. [Wolff Interview 2011] Yet over the course of the nomination struggle Obama was able to reassure 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. Senator Obama defeated Senator John McCain 52.9% to 45.7%. In the House, Democrats increased the majority they had regained in the 2006 elections, with a 257-178 margin. By summer of 2009, with the arrival of Al Franken of Minnesota, after the settlement of the disputed senatorial election there, Democrats nominally had 58 Senators and two Independents who leaned Democratic, Sen. Joseph Lieberman (D-CT) and Sen. Bernard Sanders (I-VT). To be sure, two senior Democrats were very ill, Senator Edward Kennedy (D-MA) and Senator Robert Byrd (D-WV). Thus the working majority for Democrats was large -- but not, as events soon showed “filibuster-proof.” [Burden 2011; Hulse 2009] Still, the political stream plainly led to an opening for reform.

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]
The Policy Stream, 2005-2009

But what policy vehicle would become the basis for repeal? DADT was a statute. Indeed, it was a policy “boomerang;” a policy or political outcome that differs from the outcome that reformers intended (at the outset of the process that resulted in the boomerang) — and that in key ways is worse than the status quo ante. [Skocpol 1997; Valelly 2007] President Clinton unilaterally sought to abolish an existing regulatory ban, dating to the Reagan Administration (after a review set in motion during the Carter Administration.) In the end he got statutory language – which was part of the National Defense Authorization Act of 1994 – that on its face stigmatized military service by gays and lesbians. For the first time in the history of the military service of gays and lesbians, Congress had expressly intervened to side with a discriminatory policy – and, to an extent, with a homophobic understanding of that policy. [Bailey 2013]

Until the enactment of DADT, the policy to discriminate against gays and lesbians was, in principle, at the discretion of the President. The Carter Administration, for example, had affirmed a Defense Department directive dating to 1949. The Reagan Administration then codified this affirmation in 1982. Clinton’s plan to end the ban would draw on the authority built by such actions — but use it differently. [Korb and Rothman 2013] Understanding that the ban on open military service by gays and lesbians was thus surprisingly fragile, and intent on making the historic policy invulnerable to any future executive order, Gen. Colin Powell, the Chairman of the Joint Chiefs of Staff whom Clinton inherited from the presidency of George H.W. Bush, and Senator Sam Nunn (D-GA), wrote the policy into the United States Code.
All of this meant that a *repeal* of DADT had to go through Congress. Here we get to the main policy idea for DADT reform that initially “coupled” with the political and problem streams in 2009. This was the Military Readiness Enhancement Act (MREA, pronounced “Maria” by the players in the policy domain.) It became part of the policy stream 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 co-sponsors. Meehan reintroduced it in the 110th Congress, and the number of co-sponsors 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 — the first in a national series of rallies. [Benen 2009; Nicholson 2010: 89-90] Also, the number of co-sponsors 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 90 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 would become orientation-neutral, as it were, within 6 months.

**The White House Places Repeal Outside the Policy Window**

But what was the President doing with respect to the policy stream? Was he planning to work with the MREA idea? He did not seem to be doing much at all, despite what his Press Secretary said on January 9th.

Demands for decision action by the President built up throughout spring and summer of 2009 and into early fall. A factor in the calls for action was a Palm Center report making a persuasive case that under the stop-loss policy the President had the authority to suspend DADT. In doing that he would jump-start the congressional process. This idea generated considerable interest and press attention. [Frank 2013]

Seizing on the publicity around the idea, Rep. Alcee Hastings (D-FL) and 76 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 caginess was, however, understandable. Obama hardly wanted to make the same mistakes that President Bill Clinton had made – and that Clinton later publicly acknowledged as mistakes. In fact the stakes were higher than that. With the national security situation and military posture of the United States utterly different than they were in 1993, Obama simply could not afford the kind of poor relations with the Pentagon and the services that affected the early years of the Clinton presidency. These tensions 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]

With his first State of the Union Address in January, 2010, the President finally responded. Tucked into a speech that was marred by a South Carolina Republican congressman calling the President a liar, and by an angry Associate Justice Samuel Alito mouthing disagreement with the President’s characterization of the *Citizens United* campaign finance decision, was 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.”[Quoted in Nicholson 2012: 106.]

But, sitting at home watching the speech, the director of Servicemembers United, Alex Nicholson, 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 foresaw congressional repeal *sometime after the 111th Congress.* [Nicholson 2012: 106]

On February 2nd, 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.” 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: 47-48]

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

As Alex Nicholson of Servicemembers United writes, “…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; also, Frank 2013: 188-189]

The President’s plan was quite understandable from his perspective, and from the Pentagon’s point of view. But it had a very strong, in fact quite 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 that the President’s political party experiences during off-year elections.

**Congressional Democrats Adjust – and Trust**

The trick, then, that had to be resolved by the congressional partners in the repeal process was how to lock in the certainty of a repeal after the policy window closed. Secretary Gates had insisted, however, that Congress not act until the Pentagon’s report was ready. Either that insistence had to be finessed, or it had to be changed but on terms that the Pentagon could accept.

Evidently seeking a way around the policy window 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. 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 trust the Pentagon to end DADT. But, having repealed DADT, Congress would also openly make the working group process a foregone conclusion. 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.”
Over in the House, Rep. Pat Murphy proposed that the language of S. 3065 be incorporated into NDAA 2011. In response, the Missouri Democrat chairing the House Armed Services Committee (HASC), Ike Skelton, asked for a statement of the Secretary’s preference – and he got it. Skelton was opposed to DADT repeal. He wanted to exploit the policy window problem. He assumed, correctly, that Gates opposed the idea that Congress would enact MREA through NDAA – and thereby box Gates, Mullen, and the CRWG process into a recommendation of repeal. Skelton was right. The Secretary did not want Congress to act. On the basis of Gates’ letter, Skelton and HASC reported the National Defense Authorization Act to the floor without Murphy’s amendment.

But 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 the “stand-alone” repeal. In effect, they wrote a contract.

The public signals of the deal over new repeal language came in an exchange of letters between Sen. Lieberman, Rep. Murphy, and 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 problem with S. 3065 – i.e. that Congress explicitly mooted the comprehensive review and any surprises or information that it might contain about the armed services’ actual readiness for repeal. Instead, there was new and very opaque language. Critically, this language dropped the explicit prohibition of sexual orientation discrimination that was the heart of MREA.

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.” [U.S. Congress S. 3454: 203-207]

Congress would not be ordering the Pentagon around. All that any member of the House who voted for repeal did was authorize 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.”

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 for those who had preferred the explicit prohibition, they considered the self-certification design quite 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 quite suggestive. One might interpret it as revealing the core of the Pentagon promise – and why the promise was therefore trustworthy. In the end, the internal review required a significant investment of bureaucratic resources. It assessed the extent of internal administrative change, in the form of revised regulatory machinery. Then, these administrative changes would
actually be implemented across the entire range of military bureaucracies, both within and without the U.S. and all over the world. That process would also require a great of education and training. When that process ended, the certification and transmittal occurred. But by then the policy would be “locked in.” Any subsequent legislative-executive coalition would in effect, be ordering the military to undo the administrative process that de facto repealed DADT and sought to influence practices and attitudes. Reverse engineering the de facto repeal would repudiate a great deal of good faith work. And the earliest that could happen – if it would happen – would be the return of unified Republican control of the national government. Would Republicans really disrupt the military in this way, especially after the process of repeal had run its course? In other words, the possibility of an ex-post veto was quite slim.

Secretary Gates had 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 so that third party “outing” of a gay or lesbian service member could no longer have an effect on a service member’s status or career. [Shanker 2010]

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 27th 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]

Apparent Deadlock, Signs of Underlying Resilience

The first serious political test of the contract between social liberals in Congress and the Pentagon was the September 21st cloture vote on ending the GOP filibuster of NDAA 2011. It went badly – recall that Richard Socarides called it a “political train wreck.” But afterward the CQ Weekly reporter writing up the story of the “train wreck” was struck by how likely repeal might become once the Pentagon working group reported – even though that report would coincide with a lame-duck session. Indeed, the probability of a strong “repeal now” signal from the Pentagon during the lame-duck session may explain why Senate Democrats – after they mishandled the September cloture vote -- postponed another cloture vote on the NDAA filibuster until the lame-duck session.

Senate Democrats’ strategy for the late September cloture vote appears to have been to count on Sen. Collins. She voted for NDAA 2011’s repeal language in committee. [Donnelly 2010: 2232] In voting for cloture Sen. Collins would bring along at least one of the two wavering Arkansas Democrats, Sen. Pryor or Sen. Lincoln. Sensing, or perhaps aware, that this was Reid’s plan, Servicemembers Legal Defense Network (SLDN) sponsored a repeal rally by Lady Gaga in Portland, ME. [Nicholson 2012: 191]
Senate Democrats also discounted the filibuster’s strength. NDAA tops any list of Congress’ must-pass legislation. So Democrats attached immigration legislation to NDAA, i.e. DREAM (Development, Relief, and Education Act for Act for Minors). They also attached a provision limiting the use of undisclosed holds on bills and nominations. In keeping with the plan for NDAA to shuttle controversial measures, Reid used his privilege as Majority Leader to fill out the amendment tree.

Democrats thus ignored Collins’ tacit condition for her vote for repeal, namely, that NDAA be permitted a specific number of specifically defense-related amendments. The Minority Leader had proposed a deal: give us 20 defense-related amendments and then we’ll see what happens. Democrats and Republicans were apparently disagreeing about opportunities for GOP Senators to get things that they needed out of NDAA.

The problem of course, from Reid’s perspective, is that he might get suckered. He would give away 20 amendments – and the amendment process might run away from him if Republicans found enough Democrats to strip out or alter the DADT repeal, DREAM, and the prohibition on holds. The standoff continued; Collins did not vote for cloture, and that may well have tipped the Arkansas Democrats to join the Republican filibuster.

Tellingly, however, the impending Pentagon report suggested hope. As CQ Weekly’s reporter, John Donnelly, wrote:

“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.”
The SASC chair, Sen. Levin, stated that he wanted to bring the bill to the floor again — but could not say how or when. Reid’s spokesperson was also vague: “We expect to reconsider the vote at some point again this year.” [Donnelly 2010: 2232] There is no direct evidence that Democrats assumed that the Pentagon report to break the logjam. But the ensuing inaction on NDAA, as congressional Democrats girded themselves for the off-year elections, suggests that this is probably what they expected.

**The Working Group Works**

Indeed, the “high-level working group,” as Gates initially called it in February, was well underway. The CRWG was co-chaired by the General Counsel of the Department of Defense, Jeh C. Johnson (former General Counsel of the Air Force) and the U.S. Army Commander for Europe, Gen. Carter Ham, a four-star general. The teams under their supervision comprised 68 officials, and their chief of staff was an Air Force two-star general. Four teams operated simultaneously: (1) a Survey Team intended to reliably discover whether the personnel and officers of the Navy, the Coast Guard, the Marine Corps, the Army, and the Air Force could adjust to repeal (2) a Policy Team (3) a Legislative, Regulatory, and Legal Team, and (4) an Education and Training Team.

Separately, the Defense Department asked the RAND Corporation to update the report that it had prepared in 1993 as part of the Defense Department’s assessment at that time of President Clinton’s proposed (but of course never issued) executive order permitting open service by gays and lesbians. This was a report that the Defense Department rejected in 1993 upon receipt, since it was positive about the impact of such an executive order. Asking RAND to update it was an important signal of receptivity to repeal.
The Survey Team conducted 95 “information exchange forums” at 51 military installations around the world, making contact through these forums with about 24,000 service members. General Counsel Johnson and Army Gen. Ham led many of them. About 140 focus groups were also conducted. An online inbox received 72,384 entries. The CRWG commissioned an online survey which the contractor, Westat, sent to 400,000 randomly selected service members over the summer of 2010 (although not to active duty personnel in Iraq and Afghanistan). Of this sample, 115,052 responded for a 28% response rate. A paper survey was subsequently sent to 150,000 military spouses (male and female) with responses numbering 44,266, for a response rate over 30%.

A misconception about the Survey Team work is that it conducted an internal referendum on the issue of repeal. Strictly speaking, this was not so. Secretary Gates insisted that policy in the armed forces was not made on such a basis. No one was asked in the abstract whether s/he approved of a repeal of DADT. Instead, respondents were asked very specific questions framed around impact within a service member’s immediate unit—ability to “get the job done” or how a unit would “work together” – if someone in unit “has said he or she is gay or lesbian.”

Another major question – which fell to the two teams working on policy, law, and regulations was the impact of repeal on receipt of benefits. Under the 1996 Defense of Marriage Act same-sex partners or spouses would have to be treated unequally for the services to remain in compliance with DOMA, and these teams tried to map out how that would work in practice.

A third essential question was the impact on equal opportunity programming. The equal opportunity regulations of the services did not, of course, include an explicit sexual orientation criterion, in addition to the criteria of race, religion, sex, gender, and
national origin. Should they? That would mean that gay and lesbian service members could “pursue complaints of discrimination on the basis of sexual orientation through the…military equal opportunity program…outside the chain of command.” [Lee 2013: 297]

The co-chairs wrote the final report of the CRWG. The report was not a joint work product that required approval of its language from anyone else. To be sure, they convened a weekend session with the team leaders to review a draft. The co-chairs also provided a draft to the service secretaries and service chiefs for review and comment. But they wrote the report in the first person, with “we” being a reference to them, not a corporate “we.” It was their report; this allowed them to offer an assessment and recommendations. This was a crucial (and time-saving) bureaucratic move: they did not have to find or reflect consensus language and could therefore assess and interpret the evidence as they saw it.

Their assessment was clear: on balance, the survey and commentary from service members showed that the services could adjust to repeal. Their recommendation on establishment of sexual orientation as an equal opportunity criterion within the military was also clear: existing procedures were designed to treat everyone fairly; there was no need to add this as a criterion. They made this recommendation on the merits of existing policies – but they also deliberately preempted criticism that repeal required “special treatment” of gay and lesbian service members.

In the end the Pentagon took open and full advantage of the crucial change during the negotiations in April and May, namely, removal of MREA’s crucial stipulation that sexual orientation indeed is an equal opportunity criterion. After 61 years of discriminatory treatment, gay and lesbian service members were obviously entitled to
the equal opportunity program within the military. But the military and Defense Department principals in the review process may have perceived a tension between saying that the services could quickly adjust and simultaneously saying that there were valid equal opportunity issues for gay and lesbian service members. One of the two reforms – repeal or programming – had to give, and it had to be equal opportunity programming.

**The Backloaded Signal and the Lame Duck Session**

Thus the process that congressional Democrats, the White House, and the Pentagon set in motion in May ended with a strong, backloaded signal. Everyone knew that a report would come on December 1st during the lame-duck session. Anticipating the scheduled Pentagon signal and its strength, Sen. Lieberman and Sen. Collins called for the report’s release on November 15th. [Brady 2010a] On November 18th, Lieberman announced that he had identified a 60-vote majority for repeal. [Brady 2010b] Then, on November 30th, the Defense Department issued the CRWG report – with extended public statements from – and press conference – with Gates, Mullen, Johnson, and Ham.

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. On September 9th, 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 District of Columbia. The judge then enforced the ruling worldwide on October 12th – and for a few days, until October 20th, 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]

In principle, the Ninth Circuit might uphold the district court injunction – thus Gates asked Congress to act first:

“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.” [Capehart 2010]

By this point the chair of the Senate Armed Services Committee, Sen. Levin, and Sen. McCain, were talking about whether to strip out the DADT repeal from NDAA – with the idea that DADT repeal would become a “stand-alone” measure. Committee hearings on December 2nd were dramatic; Gates and Mullen appeared to testify on the report. 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.”

[Lee 2013: 305]

Democrats took one more pass at the filibuster of NDAA with repeal in it -- and moved a cloture vote without any concessions on a small number of defense-related amendments that Sen. Collins proposed. Sen. Reid in fact denounced Sen. Collins, claiming that her plan was uncertain and time-consuming. He might have been right, since NDAA would then have to be adjusted in the House or conferenced. But Reid’s attack surprised and angered Sen. Collins, who thought she and Sen. Reid were close to a compromise. [Brady 2010c] This was the darkest moment for repeal, it seemed.

Yet suddenly it all became easy. Nine days later the Senate approved the repeal language in a stand-alone bill. The Republicans voting with Sen. 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-AK), Olympia Snowe (R-ME) and George Voinovich (R-OH). On final passage, Sen. Richard Burr (R-NC) and Sen. John Ensign (R-NV) joined them.

Just after the Gates-Mullen testimony, it was clear that 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 2010a] Murkowski also signaled 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 2010b] Similarly, 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] On the day that he voted for repeal, Sen. Kirk stated, “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] Ensign’s vote on final passage had been foreshadowed by a mid-November statement that he would be guided by the CRWG
report. \cite{Johnson2010} 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.” \cite{Burr2010} Only Voinovich kept quiet; he was retiring from the Senate once the 111th Congress adjourned.

As it happened, a small business bill had been conferenced but not re-voted; it was simply amended to add the repeal language. Majorities in both chambers poured the wine of DADT repeal into the identical small business bottles that were available. \cite{Titus2011-2012; ScienceBusiness2010; GovTrack.us:H.R.2965} There was thus no need for a conference; the President signed the repeal four days later with Senator Collins by his side.

**Conclusion**

Observers of the DADT repeal process have been struck by how much it went down to the wire. \cite{Frank2013:203; Nicholson2012:242} The mood after the failed cloture vote of December 9th was very depressed. “I’m sad to say I think the chances are very slim for getting it through,’ Ms. Collins acknowledged an interview after the vote.” \cite{Steinhauer2010}

But the DADT repeal effort was always far more likely than unlikely. It rested on a partnership between the Pentagon and congressional Democrats – on a joint consensus that it was time to repeal DADT even though the U.S. was engaged in two wars. This collaboration between social liberals and military leaders made the repeal effort *buoyant* – able to rise quickly after it sunk very low on December 9th.

Recall that repeal proponents in Congress had to devise a way to make the most out of the strong likelihood of a pro-repeal report from the Pentagon on December 1st and
also ensure DADT’s repeal during the 111th Congress. This is the problem that repeal proponents and the Pentagon finessed by late May, 2010 – and that they then inserted into the National Defense Authorization Act for 2011. Instead of the MREA idea of Congress ordering an end to discrimination in the military on the basis of sexual orientation, the plan negotiated in late spring, 2010 instead set in motion a “self-repeal” by the military at a specified time after passage of the act, to be certified to Congress, and, critically, without explicit reference to sexual orientation. In effect, there would be no de jure repeal, only a delayed de facto repeal.

Moreover, the negotiated plan had a backloaded signal. To be sure the signal coincided with a lame-duck session – and that session’s agenda was enormous, perhaps unprecedented in its size. But the delivery of the Pentagon’s report on its internal review empowered Sen. Collins and Sen. Lieberman to pivot immediately from the failed cloture vote to quickly solidify a filibuster-proof coalition. The report’s delivery, and the appearances before the Senate Armed Services Committee of military leaders to discuss the report, collectively served as a “focusing event” [Birkland 1999] they re-opened the policy window for a second time.

Sen. Collins was able to shop the idea of a stand-alone repeal in the wake of the very strong signal from the Pentagon and the chairman of Joint Chiefs of Staff. The Republican senators who joined her to vote for repeal cited the report and the stances taken by Secretary of Defense Gates and Admiral Mullen. They – and the more conservative House Democrats who signed on to the repeal in May – were also signing on to a plan that did not order the military to do anything. DADT’s last minute rescue confirms Douglas Arnold’s powerful portrait of a Congress that is inherently more capable of making good public policy than it seems. Because members of Congress want
to get re-elected they often cannot vote sincere policy preferences (which the public choice literature calls “shirking.”) 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 to the roll-call votes. If a coalition leader devises a policy design that will not later make his or her colleagues electorally or politically vulnerable then members of Congress act responsibly. A lot of good public policy can be made without leaving fingerprints. [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. Experimenting with “unit cohesion” during two wars? Not Congress!

Additionally, we can see a new aspect of Congress in civil-military relations. Congress is in this case a player in civil-military politics beyond the constituency service and distributive politics of pensions, base closings and defense procurement – and beyond the NDAA. Influenced by the role of President Harry Truman in ordering the racial desegregation of the armed forces after WWII, and by President Clinton’s failed executive order in 1993, we tend to think of Presidents as decisive shapers of the vital relationship between military service and citizenship. [James 1995; Krebs 2006] President Obama certainly did his part to recast that relationship for gay and lesbian Americans. But so did Congress.

Finally, the case of DADT repeal is the first victory for gay rights activists, groups, and advocates within the national legislative-executive process. This is no small matter. It means that Congress, as an institution, has acquired a new source of institutional resilience.
As David Mayhew has wisely pointed out, one of the major reasons that Congress remains a robust national institution, well into its third century, is that it is an “ambition magnet.” [Mayhew 2000] That is, talented politicians pursue careers – long, effective, accomplished careers during which they take actions in public that are widely noticed – in an institution that is constantly derided by pundits and bemoaned by citizens. A corollary of Mayhew’s subtle point is that Congress is also an advocacy magnet. That nurtures the resilience of an institution that inspires mass, if diffuse, discontent.

In the case of DADT repeal, gay rights activists poured enormous time and energy into keeping members of Congress focused on this legislative priority. [Frank 2013; Neff and Edgell 2013; Nicholson 2012] The difference that such advocacy makes to legislative outcomes in general is remarkably unclear, as political scientists have often noted – and it is fairly doubtful that in this case such advocacy “made the difference” at the margin. [Burstein 2003; Baumgartner, et al 2009] But it is certainly good news for Congress, and for the separation of powers, that gay rights advocacy has found a home within the Madisonian design.

ENDNOTES

1 On moods as forces in enactment productivity, see Mayhew 2005: 142-174.

2 This section based on Hillman 2013; Lee 2013; quotes are referenced by page.
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