



## SELF INFLICTED WOUND

How and Why Gays Give the White House  
a Free Pass on “Don’t Ask, Don’t Tell”

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## **Executive summary**

Throughout the winter and spring of 2009, attempts to repeal “don’t ask, don’t tell” remained stalled. Although candidate Obama had suggested that efforts to repeal the ban would begin when he became President, rhetoric shifted immediately after the inauguration as the White House spoke of the need to delay repeal initiatives, and then began to use conditional language about whether, not when, the administration would focus on repeal. Major gay rights groups who had taken candidate Obama at his word became increasingly frustrated at the lack of action; senior Congressional spokespersons confirmed that consideration of repeal was not imminent; and media coverage of the issue softened.

All of this changed in May, 2009 when a proposal was introduced in the public domain outlining a new, two-part strategy which would begin with an executive order suspending “don’t ask, don’t tell” followed by legislative repeal at a subsequent time. The proposal included a legal analysis showing that the President has stroke-of-the-pen authority to suspend the ban. The tone of media coverage shifted immediately once activists and journalists realized that the President could suspend “don’t ask, don’t tell”, and the White House was put on the defensive.

As momentum for executive action increased, however, a network of gay and gay-friendly activists, journalists and politicians worked to derail the possibility of a suspension of the ban. This policy analysis advances three points about these efforts to derail an executive order and focus exclusively on legislative repeal of “don’t ask, don’t tell.” In particular, it (1) explains the strategic misperceptions of those who seek to focus exclusively on legislative repeal including the flawed notion that the legislative strategy alone can work; (2) describes the consequences of efforts to block consideration of the two-part strategy (executive order first, legislative repeal second); and (3) suggests why a renewed emphasis on a two-part strategy is the most effective way forward.

## Introduction

Notwithstanding the rhetoric of some of our cultural opponents, the gay community has never had much power in Washington. Four decades after the Stonewall riots, heroic activists and organizations have accumulated a track record which includes some impressive victories at the federal level including both policy and rhetoric. Notable gay-affirmative policies include funding for HIV/AIDS, non-discrimination of non-military gay employees of the federal government, and, more recently, the provision of some domestic partner benefits to spouses of gay government workers. And at the level of rhetoric and symbolism, while the situation is far from perfect, the language of mainstream politicians and opinion leaders has shifted dramatically in recent decades and, more often than not, is marked by a sense of decency, respect, and inclusion.

Despite these impressive accomplishments as well as the possibility of a forthcoming victory on hate crimes, the gay community has never managed to turn a bill into a law, and has been unable to block the passage of highly destructive statutes such as the Defense of Marriage Act as well as the military ban on openly gay service members. As Urvashi Vaid, Executive Director of the Arcus Foundation and former Executive Director of the National Gay and Lesbian Task Force, has argued, our power as a community sometimes pales in comparison to other pressure groups such as labor, veterans and environmentalists, whether measured in terms of the vibrancy of our grassroots networks or the size of our leading organizations' budgets.<sup>1</sup> Perhaps it should come as no surprise that the White House failed to appoint many community members to senior positions, or, more broadly, that we have not been able to have much of an impact on the administration's agenda as it became ever more clear over the past months that gay rights may be near the bottom of its priority list. Whether due to choice (we have chosen not to push, so as not to offend the administration) or capacity (we lack the power to push in a meaningful way), the bottom line is that the White House has for the most part had a free pass on our issues.

With one major exception.

Once it became clear that President Obama could suspend the military's gay ban with the stroke of a pen, and that legislative repeal could follow an executive order, activists and journalists became engaged in a more intensified way. They demanded to know why the administration had not delivered on its pledge to allow gay men and lesbians to serve openly. Previously, everyone had believed that only Congress or the federal courts could allow open gay service. With that as the prevailing assumption, it was easy for the President to explain his lack of action in terms of the stalemate in Congress. He could not be sure he had the votes in the Senate to repeal "don't ask, don't tell," so no one blamed him for the lack of action.<sup>2</sup> President Obama's pass-the-buck strategy worked brilliantly, and pressure on the White House seemed to be a non-starter.

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<sup>1</sup> Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation*. (New York: Doubleday, 1995), 221.

<sup>2</sup> Josh Rogin, "No Telling if 'Don't Ask' Policy Will Continue." CQ Weekly Online. July 20, 2009, 1694-1695. <http://library.cqpress.com/cqweekly/weeklyreport111-000003170507> (accessed July 26, 2009).

In May 2009, the Palm Center released a legal analysis which showed that the President does, in fact, have the legal authority – granted to him by Congress – to suspend discharges under “don’t ask, don’t tell.”<sup>3</sup> Immediately after that analysis was published, the tone of media coverage shifted dramatically. The Daily Show ran a highly provocative segment featuring footage of the President’s campaign promises and segments on both Rachel Maddow’s and Anderson Cooper’s shows emphasized the same question: why isn’t the President doing what he said he would do? Roughly half a dozen times, Press Secretary Gibbs was grilled as to why the administration would not sign an executive order, and on more than one occasion, the tone of the questioning approached outright mockery. When Gibbs explained that the President would not sign an executive order because he wanted a more “durable” solution, one journalist responded by noting that Harry Truman had integrated the military on the basis of race with a 1948 executive order and asked Gibbs whether our policy of racial integration in the military is “durable.”<sup>4</sup> More and more people started to call for a two-prong strategy with an executive order as the first step, followed by legislative repeal afterwards.

Many people seemed to agree that the two-part strategy would make political and operational sense. Once gays are allowed to serve openly and legally, it will be impossible to put the toothpaste back into the tube. Operationally, there is no way to force gays back into the closet. And given that 75 percent of the public favors open gay service, it would be unwise politically for some future Republican President to try to reverse the order.<sup>5</sup> Indeed, when former President George Bush tried to reverse one of Bill Clinton’s executive orders mandating equal treatment for non-military gay employees of the federal government, he could not get away with it.

As the two-part strategy continued to generate real heat on the administration, however, the gay community has taken its foot off the gas pedal. The chorus of gay and gay-friendly activists, journalists and politicians calling for an exclusive emphasis on legislative repeal has grown in recent weeks, and as opponents of the two-part strategy made their case with increasing fervor, the media’s criticisms of the administration have softened, and a senior administration spokesperson has again started to use conditional language as to whether “don’t ask, don’t tell will be repealed.”

This policy analysis begins with an explanation of how and why some members of the gay community have worked so hard to stop putting pressure on the White House, and then outlines an opportunity for how to get back on track. In particular, it (1) explains the strategic misperceptions of those who seek to focus exclusively on legislative repeal including the flawed notion that the legislative strategy alone can work; (2) describes the consequences of efforts to block consideration of the two-part strategy (executive order first, legislative repeal second); and (3) suggests why a renewed emphasis on a two-part strategy is the most effective way forward.

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3 UC Santa Barbara Palm Center. A Roadmap of Political, Legal, Regulatory, and Organizational Steps to Equal Treatment. May 11, 2009.

4 Press Briefing by Press Secretary Robert Gibbs. May 21, 2009.

5 Washington Post/ABC News Poll. August 19-22, 2008. N=1,108 adults nationwide. MoE ± 3.

## Reason for this report

As explained below, the national discussion about the two-part strategy was beginning to unlock the stalemate in Washington that had stalled progress on “don’t ask, don’t tell.” Yet as opponents of the two-part strategy gained traction, media interest has waned and pressure on the White House has softened. Journalists, politicians and other opinion-leaders take some of their cues on the gays-in-the-military issue from internal conversations within the gay community. When some members of the community not only stopped pushing but pro-actively sought to block the two-part strategy, Washington listened. Our hope in releasing this report is to shed light on how a redirection of the conversation could regain some of the momentum that has been lost over the past month. These arguments are developed below.

### *Strategic misperceptions*

Those who oppose the two-part strategy, and who prefer an exclusive emphasis on legislative repeal, have mis-diagnosed the political and strategic landscape in several important ways. Most critically, they believe that the legislative repeal of “don’t ask, don’t tell” is forthcoming in the next several years (if the Democrats still control Congress, which proponents of legislative repeal seem to assume). They also assume that legislative repeal will be clean. The community must focus on legislative repeal, they say, because it is the only way to get rid of “don’t ask, don’t tell” all at once. Related to this point, opponents of the two-part strategy believe that discussion of an executive order or any vehicle short of full-scale legislative repeal lowers the bar by taking the pressure off of political leaders. Finally, opponents believe, incorrectly, that Congress is a pressure point that the gay community can move if it tries hard enough to do so. Each misperception is addressed in turn.

### *The legislative process is badly stalled*

The draft legislation to repeal “don’t ask, don’t tell” is called the Military Readiness Enhancement Act (MREA for short, pronounced ‘Maria’). MREA is and has been stalled and there is little that can be done about that in the near term. MREA was first introduced in the House of Representatives four years ago. After a year of lobbying, almost all liberal Democrats had signed onto the bill as co-sponsors. The 2005 version of the bill had 121 co-sponsors at a time when Republicans in the House outnumbered Democrats by a margin of 225-207. The 2007 bill had 149 co-sponsors. Currently, there are 164 co-sponsors of the bill, but Democrats outnumber Republicans by 235-198. As the Democratic margin shifted from minus-18 to plus-37, a difference of 55 seats, MREA picked up 43 additional co-sponsors.

Some have argued that there was no way to convince more co-sponsors to sign the bill as long as George Bush was president. In the six months since President Obama first took office, however, only about a dozen more members have signed onto the bill. Even more ominously, at this point, MREA has only one Republican co-sponsor, and it has only about three dozen moderate and conservative Democratic co-sponsors. Indeed, MREA does not even have the votes to get out of the Armed Services Committee, where Democrats outnumber Republicans by a margin of 36 to 25. And, the situation is even worse in the Senate, where there is no companion bill because not a



single Republican is willing to step forward as a co-sponsor. Prior to the introduction of the two-part strategy in public discourse, gay rights groups were told that no action would be forthcoming in the Senate this year.

The bill is stuck because it is opposed by many Republicans as well as a significant number of conservative Democrats and because, given this fact, the White House would have to spend real political capital to try to move the bill through Congress. To get a sense of just how little interest the administration has in spending that capital, realize that as soon as the President took office, a White House spokesperson told a Boston newspaper that the administration would begin to study “don’t ask, don’t tell” in 2010.<sup>6</sup> Not repeal, but study. Members of the President’s national security staff even started to use conditional language about the issue, speaking about “if”—rather than “when”—repeal were to happen.<sup>7</sup> In response to these clear deviations from the President’s campaign pledges, the senior political team at the White House said nothing.

Those who endorse an exclusive focus on legislative repeal seem to believe that if the gay community works hard enough, we can force conservatives to support MREA. But there is little logic to their position. Consider several obstacles. To begin, 75 percent of the public already supports open gay service, yet conservatives in Congress continue to oppose the bill.<sup>8</sup> There is little additional room for public education or shifts in public opinion that could cause conservatives to change their minds.

In addition, the political calendar is working against legislative repeal. This year, 2009, is the “easy” year when no one is facing re-election. Neither the White House nor Congressional leadership will want to force conservative, Blue Dog Democrats into a tough vote during 2010, an election year, so absent movement this year, it is difficult to imagine that Congress will consider the bill until after midterm elections. As soon as the 2010 midterm elections are over, however, everyone in Washington will start to focus on the next presidential election. Unless he faces a challenge during the primaries, President Obama will have every reason to court the moderate middle throughout the campaign, and less incentive to appeal to his more liberal base during this time. He will be able to explain the failure to repeal “don’t ask, don’t tell” easily during the next campaign by claiming, with strong credibility, that he does not have the votes in the Senate to move the bill. There are also other, easier gifts that the administration can give to the gay community, and the President can talk about the importance of preserving political capital for crucial fights with Congress over the economy, health care, the environment, Iraq withdrawal, education, and labor.

Finally, it may be unwise to assume that Democrats will continue to control both chambers after the midterm elections, or that President Obama will win a second term. Both possibilities may of

<sup>6</sup> Bryan Bender, “Obama Seeks Assessment of Gays in the Military.” *Boston Globe*. February 1, 2009.

<sup>7</sup> Sean Lengell, “Mullen Asses Military’s Gay Ban; Repeal Left up to Congress.” *The Washington Times*. May 25, 2009.

Also see Jim Jones conversation with George Stephanopoulos, as cited in Kerry Eleveld, “Activists Question Lack of Action on DADT.” *Advocate.com*. May 11, 2009.

<sup>8</sup> Washington Post/ABC News Poll. August 19-22, 2008. N=1,108 adults nationwide. MoE ± 3.

course come to fruition. But even if Democrats retain control, there is no reason to assume that the Democrats' hand will remain as strong as it is today. Those who endorse an exclusive emphasis on legislative repeal seem to elide some or all of these obstacles, and to simply assume that the Democrats will be even stronger in the future than they are today.

As discussed below, MREA is a little bit less stuck today than it was three months ago, before the two-part strategy was first raised, and Senator Kirsten Gillibrand (D-NY) has announced that Senate hearings will be held this year. The process of challenging the administration to sign an executive order forced it to clarify its commitment to legislative repeal, and to signal to its own national security staff that conditional language would not be tolerated. Despite these and a number of other promising steps which are discussed below, the bottom line is that the Democrats do not have the votes to get MREA out of committee in the House of Representatives, and they do not have sixty votes in the Senate, and the gay community seems unable to force members of Congress to change their votes. Those who endorse an exclusive focus on legislation have no credible plan to change these fundamental facts.

*The repeal process will not be clean*

The second misperception among those who oppose the two-part plan is the assumption that MREA will be a clean solution, in other words that legislative repeal of "don't ask, don't tell" will solve the problem of gays in the military all at once. The thinking is that once Congress gets rid of the law and replaces it with an affirmative standard of non-discrimination, we will have finished our legal and political work and can then turn to the organizational work of helping the military change its culture and actually treat all service members fairly. Once this assumption is unpacked, however, it becomes clear that it does not make sense.

On the one hand, MREA itself is not a clean solution. Even if the bill were to pass tomorrow, it would do nothing for transgender service members and it would continue to remain silent about the spouses and domestic partners of gay troops. Will the civilian husband of a gay male service member be entitled to on-base housing? Notification in the case of death? Relocation funds? Membership in family support groups? Shopping at on-base discount stores (PX's)? All of these issues will have to be resolved at some point in the future, even if MREA passes in its current form. So it is a myth that legislative repeal via MREA is a clean, full solution, and that anything else is a "half-measure."

On the other hand, and perhaps even more importantly, there is little chance that MREA will pass anytime soon in its current form, that it will survive the legislative process intact. It will, in other words, be watered down. The reason, as noted above, is we probably do not have enough votes in either house of Congress to pass the bill in its current form.

Every other progressive group is learning that it will have to achieve its key goals over time rather than all at once. Environmentalists were disappointed when the House version of cap-and-trade included massive, politically necessary handouts to polluters. Unions just found out that card-



check legislation could not make it out of the relevant Senate committee without a compromise on its most central element, the right to hold secret elections. National security progressives are realizing that it may not be possible to withdraw from Iraq on the timetable that candidate Obama proposed during the campaign, and that even after the U.S. “withdrawal,” American “peace keepers” or “advisers” may remain in significant force. While the book is still out on health care, consideration of a single-payer plan is not even on the table at this point. Gay groups working on the military ban do not seem to be paying attention to the trends in front of them.

The dismantling of “don’t ask, don’t tell” will require a series of inadequate, partial and highly frustrating solutions. Full-scale integration, unfortunately, will not take place even if MREA passes in its current form. Those who advocate for an exclusive emphasis on MREA frame the conversation in terms of a choice between the pure legislative option and the partial executive option. In fact, the question is not whether we will have a pure or a partial solution, but rather what is the best way to force a series of partial solutions whose cumulative impact will, one day, protect national security and constitute full equality.

Related to this, those who oppose the two-part solution believe that any discussion of half-measures lowers the bar and creates a new, easier path of least resistance for politicians to follow. According to this logic, those members of Congress willing to vote for full-scale repeal are less likely to support it if they have the option of calling for a half-measure such as an executive order. If MREA were not stalled, this observation might have merit. But as long as the legislative process remains stalemated, there seems to be little value in ensuring that a minority of Congress remains willing to vote for its passage. Equally important, opponents of executive action ignore the value of suspending discharges to the larger debate over full repeal: once gays are serving openly, officially and legally, lawmakers will have before them the starkest evidence that openly gay service does not undermine the military.

### *Congress is not a pressure point*

Those who endorse an exclusive emphasis on legislative repeal have made increasingly strident calls for grassroots activists to focus on Congress. The Washington Post published a recent editorial saying that gay activists should redirect their anger towards Congress because there is momentum towards legislative repeal, and because “It’s time they got to work to help get it done.”<sup>9</sup> Representative Patrick Murphy (D-PA), in dismissing the two-part strategy and calling on gay activists to pressure Congress, said that, ““You can sit, bitch and moan, or you can bring about the change in policy our country needs.”<sup>10</sup>

Those who call for increased pressure on Congress seem to forget that for the most part, lawmakers who oppose “don’t ask, don’t tell” come from conservative districts where gay groups have little clout. Nancy Pelosi’s and Harry Reid’s hearts are already in the right place. The problem is that conservative Democrats and Republicans stand in the way of repeal, and that these conservatives

<sup>9</sup> The Washington Post, “Marching Orders.” July 20, 2009. Also see The Washington Post, “Do Tell.” June 27, 2009.

<sup>10</sup> Ibid.

are not vulnerable to pressure from our community, which, in general, does not have the money or the votes to trump the conservative base to which these politicians tend to answer.

*Complaining and organizing do not generate pressure*

Although Congress is not a pressure point, the same cannot be said of the White House. Those who favor an exclusive emphasis on legislation seem to appreciate neither the extent to which the President, not Congress, is vulnerable to accusations of hypocrisy, nor the opportunity to generate media coverage which shines a spotlight on the chasm between candidate Obama's pledge to lift the ban when he took office, and President Obama's unwillingness to sign an order even though he has acknowledged that the ban harms national security.

Discussions of hypocrisy become particularly salient when the gay community can combine them with fresh data, studies and stories which underscore the costs of "don't ask, don't tell." For example, new data documenting increased discharges of Arabic linguists would generate important media coverage on their own. Combined with ongoing messaging that President Obama has the ability to suspend "don't ask, don't tell," however, such data become particularly charged. The same could be said of data showing an increase in overall discharges, studies documenting how the ban imposes costs on national security, and stories about the burdens which the policy imposes on the troops.

Lt. Dan Choi is a case in point. Lt. Choi is an Arabic language speaker and Iraq combat veteran whom the Army is in the process of firing due to his acknowledgment of homosexuality. His story would have generated outrage and tough media coverage on its own. But it was the combination of the loss of an Arabic translator with the understanding that President Obama could have prevented the discharge that was particularly incendiary. For example, a May 7 Huffington Post piece about Lt. Choi which did not highlight the President's ability to prevent the discharge received nine comments, and a similar post the next day received about 200 comments. By contrast, a May 7 Huffington Post column about the President's ability to retain Lt. Choi via executive order received more than 1,800 comments. This is not to say that the readership of Huffington Post is the only or most important audience for assessing interest. The case does suggest, however, that the combination of data which illustrate the costs of the gay ban with messaging about the President's ability to suspend it is particularly inspiring of media attention and community engagement.

By contrast, grassroots organizing on its own does not put much pressure on the White House. Urvashi Vaid has observed that the LGBT community lacks the grassroots capacity of its adversaries, and that this problem weakens us considerably.<sup>11</sup> Despite the benefits that would accrue from having a robust grassroots network organized around the gays-in-the-military issue, we do not have one now. Consider a recent march on the White House organized by a major gay rights group. The march featured a couple hundred protestors who walked from a nearby Metro stop to the White House. It was a well-organized event, and it generated a few media stories, but did not generate significant pressure on the White House.

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<sup>11</sup> Vaid, *Virtual Equality*, pp. 219, 340.

While 75 percent of the public favors open gay service, the number of people who care deeply about the issue is quite small. We do not have the capacity to generate hundreds of thousands of phone calls or letters to the White House or Congress, and politicians know that. There is one and only one pressure point available to us: media coverage which underscores the stalling and hypocrisy of the White House.

Every ounce of activism directed towards the exclusive legislative strategy as opposed to the two-part strategy enhances the ability of the White House to invoke its old pass-the-buck defense which was so effective for the first few months of the administration, before the two-part strategy was raised in public. Calling for an exclusive emphasis on legislative repeal is perhaps the greatest gift gay rights groups could give the White House. And it's a slap in the face to service members like Lt. Dan Choi, whose careers are in peril right now.

### **Derailment efforts**

The two-part strategy was working. As soon as the public learned that President Obama could suspend the gay ban with the stroke of a pen, the tone of media coverage shifted immediately from "isn't it terrible to fire gay Arabic linguists" to "why isn't President Obama doing anything." Consider this June 8 Rachel Maddow quote which illustrates the typical tone of media coverage when the agenda focused on the executive order idea: "Well, since [President Obama] has been a 'fierce advocate in chief,' has he repealed the 'don't ask, don't tell' policy? No. Has he pushed Congress to repeal the policy? Not really. Has he hit the pause button on investigating members of the military to ferret out who's gay and who's not? No, he has not. Has he used his stop-loss powers to put a hold on dismissals of people under the policy? No. No, he hasn't. In fact, as commander-in-chief of the Armed Forces, 'president fierce advocate' actively still is firing people from the U.S. military because they're gay."<sup>12</sup>

The day after the two-part strategy was first introduced in public, Congressman Rush Holt (D-NJ) called on President Obama to sign an executive order. Over the next weeks, journalists put the White House badly on the defensive, grilling Press Secretary Gibbs on an issue that was previously ignored in press conferences. As it insisted on its unwillingness to sign an order, the White House nevertheless clarified and reiterated its commitment to legislative repeal, an important signal given its previous silence on the issue. More and more groups joined the chorus for an executive order, including major gay rights groups and the Center for American Progress. Leading Democrats such as Bob Shrum and John Podesta added their voices to the call. Senate Majority Leader Harry Reid (D-NV) called for an executive order (before retracting his statement the next day), and 77 members of Congress signed a "Dear-Colleague" letter calling for executive action.

And then the unthinkable happened. Secretary of Defense Gates announced that although there would be no executive order, the administration would take executive action. Without providing details, Secretary Gates announced that he would consider re-writing Pentagon regulations so as to relax the implementation of "don't ask, don't tell." For more than fifteen years, "don't ask, don't

<sup>12</sup> The Rachel Maddow Show, June 8, 2009. <http://www.msnbc.msn.com/id/31186750>.

tell” had been absolutely inviolable, a rock-solid policy whose only revisions were changes at the expense of gays, not in their favor.

While the forthcoming change likely would mean almost nothing for gay troops on the ground and would likely do almost nothing to improve national security, it may nonetheless constitute a political earthquake. As Christopher Neff, one of the original co-authors of the MREA bill observed, “once ‘don’t ask, don’t tell’ changes at all, it is no longer ‘don’t ask, don’t tell.’” Keeping in mind that the public wants gays to serve openly, Neff’s point is that any change to “don’t ask, don’t tell” probably will be irreversible. And, perhaps more importantly, even the slightest change to the policy will send a signal to the dozens of members of Congress who know that full-scale repeal is unlikely any time soon, but who want to sink this policy by starting to inflict some of the 1,000 lances that may be necessary to kill it. According to Neff, “more solutions are better than fewer solutions, because the proliferation of proposals will create its own momentum for additional legislative and executive action.”

In a textbook example of Neff’s point, Senator Gillibrand proposed an 18-month moratorium on gay discharges within weeks of Secretary Gates’s announcement. While it has not moved forward, the proposal was quickly followed by an announcement by Senator Gillibrand that the Senate will hold hearings on the ban in the fall of 2009.<sup>13</sup> Senate hearings will constitute just one step on the road to repeal, but gay groups had been told that no action would be forthcoming in the Senate this year. In addition, Representative Alcee Hastings (D-FL) notified the rules committee this week of an amendment he would like to offer to the 2010 Defense Authorization bill that would prohibit the use of funds to enforce “don’t ask, don’t tell.” Whether or not the rule survives intact, it was the momentum generated by the two-part strategy that arguably opened up a space for Senator Gillibrand and Representative Hastings to push the issue forward.

Sadly, at the very moment that discussion of the two-part strategy started to disable the political stalemate surrounding “don’t ask, don’t tell”, some gay and gay-friendly activists, journalists and politicians have let up pressure on the White House by resisting executive action, and insisting on an exclusive focus on legislative repeal.

Consider a number of misleading and inaccurate claims that have been circulated. One often-repeated claim is that the administration does not have the legal authority to sign an executive order and that doing so would constitute an end-run around Congress. This claim is incorrect. In 1983, Congress passed 10 U.S.C. § 12305, known as the “stop-loss” law, which allows the President to “suspend any provision of law” related to military separations during national security emergencies.<sup>14</sup>

As well, those who oppose the two-part strategy have repeatedly framed the conversation as if

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<sup>13</sup> Senator Gillibrand’s original proposal was for an 18-month moratorium on gay discharges. Unable to find the sixty votes necessary to pass such an amendment, the Senator announced hearings instead.

<sup>14</sup> Duncan Osborne, “Views Split on Don’t Ask,” Gay City News, July 23, 2009. [http://www.gaycitynews.com/articles/2009/07/23/gay\\_city\\_news/news/doc4a5667c79b8a5082116155.txt](http://www.gaycitynews.com/articles/2009/07/23/gay_city_news/news/doc4a5667c79b8a5082116155.txt)



legislative and executive options are mutually exclusive. According to this perspective, legislative repeal should be pursued instead of executive action. None of the organizations recommending the multi-stage strategy, however, have proposed it as a substitute for eventual repeal. The Center for American Progress, for example, proposes a multi-step plan beginning with an executive order, followed by legislative repeal.<sup>15</sup> Those who insist on an exclusive emphasis on legislative repeal do not have a plan for unlocking the political stalemate described above.

Yet another misleading claim is the argument that the executive order would cause political blowback, and would somehow destabilize the administration. The argument is based on a misreading of the political landscape. It is true that Republicans and conservative Democrats have the ability to block repeal legislation in Congress. They do not, however, have the power to generate significant political resistance or blowback in response to an executive order. Given that 75 percent of the public favors openly gay service, there would be little capacity or incentive for opponents to make noise. Political history shows clearly that Congress almost never reacts negatively when a President of the same party enacts an executive order.<sup>16</sup> This is a very different political context than 1993, when Congressional leadership opposed open gay service, and when public opinion was less favorable.

It would be equally difficult, again given current public opinion, for the military to cause significant blowback in response to an executive order. Military leaders have said quietly that they understand that openly gay service is inevitable. And in terms of their capacity to make trouble, it is the legislative process that would open a can of worms by allowing military leaders to testify at hearings and forge alliances with opponents on the Hill. A swift executive order would eliminate opportunities for them to resist. If those who oppose the two-part strategy are worried about political blowback from Congress or the military, they should explain how they plan to steer MREA legislation through Capitol Hill without incurring resistance.

Some members of the gay community have provided Washington with reasons to continue discriminating, and their actions have had the effect of softening the pressure on the White House and allowing the President to again use his pass-the-buck strategy. As a result, momentum has been lost and the inertia that characterized the period before the introduction of the two-part solution is returning. Four consequences, in particular, deserve mention.

To begin, opponents of the two-part strategy have undermined the national security argument which took a decade to establish in the public's mind. Part of the reason to sign an immediate executive order is that the military continues to fire badly needed talent such as Arabic linguists. John Shalikashvili, the former Chairman of the Joint Chiefs of Staff, has said that the ban undermines national security.<sup>17</sup> President Obama has made this claim as well. In disavowing the need for immediate action, and given that the prospects for quick legislative repeal seem slim, the

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<sup>15</sup> Lawrence J. Korb, Sean Duggan and Laura Conley, Ending "Don't Ask, Don't Tell": Practical Steps to End the Ban on Openly Gay Men and Women in the U.S. Armed Forces. (Washington: Center for American Progress, June 24, 2009).

<sup>16</sup> Adam Warber, Executive Orders and the Modern Presidency. (Boulder: Lynne Rienner, 2005).

<sup>17</sup> John Shalikashvili, "Second Thoughts on Gays in the Military." New York Times. January 2, 2007.

gay community cedes any sense of urgency about the need to protect national security.

In addition, the community's misleading claims have become a talking point for the President of the United States. When asked whether he would sign an executive order last month, President Obama said that doing so would circumvent the will of Congress, and that he is constitutionally obliged to enforce Congressional statute.<sup>18</sup> This argument, which ignored his now-well-established power of "stop-loss," was first articulated and then repeated extensively by members of the gay community itself.<sup>19</sup> The community provided the President with a misleading talking point to explain why he will continue firing service members for being gay, and almost no one held him accountable.

Moreover, media interest has waned. A Lexis-Nexis search of major print and broadcast media and blog posts reveals that in the 106 days between the presidential inauguration and the first mention of the executive order idea on May 7, the media mentioned "don't ask, don't tell," on average, 5.6 times per day. In the 68 days between the introduction and President Obama's July 13 (misleading) remarks about his unwillingness to sign an order, the media mentioned the policy 19.1 times per day. In the ten days after those remarks, the media mentioned the policy only 11.4 times per day. As the gay community took the heat off the White House and failed to hold the President accountable for misleading remarks, media coverage tapered off (and the tone of media coverage softened as well).

Finally, Chairman of the Joint Chiefs of Staff Mike Mullen has again resorted to using conditional language about the gays-in-military issue, saying he would weigh in "should this law change," rather than "when" it is repealed.<sup>20</sup> He is the first member of the administration to use conditional language in months. Again, almost no one in the gay community held him accountable. It is hard to imagine that Mullen would have resorted to his old use of conditional language if the gay community had continued to pressure the administration to sign an executive order.

### **Moving forward**

Despite the efforts of some gay and gay-friendly activists, journalists and politicians to block consideration of the two-part strategy, its internal logic may be sufficiently compelling that it moves forward on its own momentum. Secretary Gates, after all, has said clearly that he will modify the policy. While this would not constitute an executive order suspending the ban, it would constitute executive action which, as argued above, could have important political consequences – signaling the beginning of the end of the ban – even if operational implications are negligible.

In the history of civil rights struggles, there have been times when idealism has made more sense than pragmatism, and other occasions when pragmatic approaches were most effective. The question is not whether pragmatism is always more effective than idealism, or idealism is always

18 CNN. Anderson Cooper 360. July 13, 2009. <http://www.youtube.com/watch?v=f2xzRMLmEoI>.

19 See Eleveld, "Activists Question Lack of Action on DADT." Also see <http://www.queerty.com/cold-shoulder-obama-wont-stop-military-from-kicking-out-gays-20090512/>

20 "'Measured' Change to Policy on Gays in Military Advised." The Associated Press. July 6, 2009.



better than pragmatism, but rather when idealism makes more sense than pragmatism.

In the case at hand, those who have opposed pressuring the White House and who insist instead on an exclusive focus on Congress should explain (1) why they believe MREA will pass soon; (2) why, if and when MREA passes, they believe that it will not be watered-down and hence still require additional political and legal work which could take years; and (3) why, given that a pure solution is unlikely, they continue to frame the conversation as a choice between a pure legislative solution and a partial executive solution. As the Center for American Progress has argued eloquently, executive and legislative action are reinforcing, not mutually exclusive, options in this case. Because there is no single-shot solution that is likely to end the ban, the policy can only be dismantled via the accumulation of a number of smaller steps. Each small change will be irreversible and will create political momentum for more change.

If a unified community held the President accountable for his recent, misleading remarks about why he will not sign an executive order, redirected the national conversation to the two-part strategy and demanded immediate executive leadership as the first step in a multi-stage effort to lift the ban, we would maximize the chances for unlocking the stalemate in Washington and again see momentum toward an outcome that has been elusive for more than fifteen years.