

Coordinated Repeal: Ending Don't Ask, Don't Tell in an Orderly Way



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When Congress passed the Don't Ask, Don't Tell law in 1993 as part of the National Defense Authorization Act, it codified military personnel policy and took the decision-making authority away from military leadership. Today, although the Commander in Chief and leaders at the Pentagon have expressed a desire to do away with Don't Ask, Don't Tell, the policy may only be changed by an act of Congress. While legislation is pending in both the House and Senate which would repeal the Don't Ask, Don't Ask law, neither of the bills would do so in accordance with the timeline that the military has requested to carry out this change in an orderly and responsible way.

We recommend that Congress pass legislation that would **repeal the Don't Ask, Don't Tell law now but give the military the time it needs to finish its ongoing study of how best to implement repeal before that change goes into effect.** This Coordinated Repeal approach would untie the hands of leaders at the Pentagon by removing the outdated law while ensuring that the transition to a new personnel policy takes place with minimal disruption to our fighting force.

Coordinated Repeal

Although the versions of repeal legislation proposed in the House and Senate include different timelines to implement regulatory changes throughout the military branches,¹ both bills repeal the Don't Ask, Don't Tell law and require the military to cease discharging gay servicemembers the moment they are enacted. However, the Secretary of Defense has expressed concern about stopping the discharges before the Pentagon's working group has finished its study on how to best implement repeal. Secretary Gates has a point.

Under Third Way's Coordinated Repeal plan, Congress would adopt the repeal language shared by both bills, but it would also include an additional provision making clear that the Pentagon has authority to continue to carry out discharges under Don't Ask, Don't Tell until the working group report has been received by the Secretary and the Pentagon has had time (we recommend 180 days) to review and implement the report's recommendations. The working group study is currently due to the Secretary on December 1, 2010.

The existing Senate bill does reference and codify the Pentagon's ongoing working group study, giving the military sufficient time to implement regulation changes and tying the timeline and deadlines for those alterations to the completion of the working group report. However, the current version of that bill—like its House counterpart—would remove the Department's authority to discharge openly gay servicemembers immediately upon passage, despite the concerns the Secretary of Defense has raised about that issue.

The Department of Defense already has begun an appropriate and thoughtful process to implement this substantial legal and policy change. The December 1, 2010, deadline ensures that it will be completed without undue delay. We believe that Congress should allow the military the time it has requested to plan and implement such a significant alteration in personnel policy. The current bills, which would impose a moratorium on discharges during the short period in which the study is being completed and the regulations are being written and implemented, would force the military to incorporate openly gay soldiers before it has fully completed its assessment of how best to do so.

By contrast, a Coordinated Repeal approach would provide military leaders the time they need to plan and execute changes to the regulations and lay out clear standards of behavior for all servicemembers before openly gay troops are integrated into the force.

Other Legislative Options

In addition to the Senate and House bills, there have been other implementation alternatives discussed around Don't Ask, Don't Tell repeal. Each approach, however, falls short of achieving the goal of an orderly repeal of the policy.

Crafting a Transition Policy to Minimize Discharges

Rather than simply allowing enforcement of Don't Ask, Don't Tell to continue unaltered while the working group finishes its study and the Pentagon reviews its recommendations, some have suggested that Congress allow the military to retain power to discharge openly gay servicemembers but also put in place a transition system that minimizes those discharges. For example, language could be included that requires the Secretary of Defense or another Senate-confirmed civilian appointee to approve any discharge during the period after enactment of repeal but before the change has been implemented in military regulations.

But the Pentagon has already made real changes to enforcement of Don't Ask, Don't Tell, including setting a higher standard for credible evidence and bumping the decision to initiate discharge proceedings up the chain of command. Consequently, a transition policy along these lines would have little impact on the number of discharges completed during the time between passage of a repeal bill and issuance of new regulations to implement the change. For this reason, we believe that a cumbersome transition policy is unnecessary.

Repealing Without Instructions

Congress could also pass legislation that repeals the 1993 law without instructing the Pentagon specifically about what the replacement policy should be. This avenue would remove the impediment of the old law and return the decision-making power to the military, allowing leaders at the Pentagon to implement the personnel policy towards gay and lesbian servicemembers that they think best serves our national security interests. While this avenue may seem attractive,

since the President, the Secretary, and the Chairman of the Joint Chiefs of Staff all support a new policy of nondiscrimination, it could create confusion and lead to a less orderly transition. Codification of Don't Ask, Don't Tell in 1993 cemented the authority to change this policy in the hands of Congress. It would be inadvisable for Congress to now kick authority back to the military without offering some guidance about what the new policy should entail.

Ordering a Temporary Moratorium on Discharges

Some policymakers have advocated implementing a temporary "moratorium" on discharges, essentially making the Don't Ask, Don't Tell law unenforceable for a certain period of time, without actually removing it from the books. This proposal is problematic because it would stop discharges upon enactment, forcing the military to integrate openly gay servicemembers immediately, but it would do nothing to change the underlying law or ensure a smooth transition during the change in personnel policy. It would also leave open the possibility that enforcement of Don't Ask, Don't Tell could be revived at a later date, when the moratorium has elapsed. Because of the uncertainty it would create, military leaders have uniformly come out against this avenue of legislation, and we agree.

Conclusion

The Don't Ask, Don't Tell law is a relic of the past, and military and civilian leaders alike have called for it to be relegated to history. The only question that remains is how best to implement this change, which requires action by both military leaders and Congress. The transition should be smooth and orderly, and it must maintain the primacy of our military and our nation's security. The Third Way Coordinated Repeal approach would harmonize efforts in Congress and at the Pentagon, eliminating legislative uncertainty while giving the military the time it needs to implement the necessary changes to its regulations. We believe that Congress should act swiftly to pass such legislation and allow the military to

put the focus back where it belongs—on the mission, not the personal lives of the troops.

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1. The *Military Readiness Enhancement Act* in the House (H.R. 1283), sponsored by Representative Patrick Murphy, would give the Secretary of Defense 90 days after enactment to revise regulations in conformance with the new law, and the Secretary of each military department would have 180 days from enactment to revise the regulations of that branch.

The Senate version of the *Military Readiness Enhancement Act* (S. 3065), sponsored by Senator Joseph Lieberman, incorporates the working group formed by the Pentagon to study this issue. After enactment of the Senate version of the bill, the working group would have 270 days to submit a report to the Secretary of Defense detailing how to best implement the change in personnel policy. The Secretary of Defense would then have 60 days from submission of the working group report to revise regulations according to the recommendations, and the Secretary of each military department would have 120 days from the issuance of the report to revise the regulations of that branch.