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HOW WE WON

Progressive Lessons from
the Repeal of
'DON'T ASK, DON'T TELL'

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CHAPTER SEVEN: EXECUTIVE ORDER

The first two years of the Obama administration were an emotional yo-yo for those of us working on DADT repeal. It was clear that coupling high-quality research with an innovative public education campaign to get that research in the hands of decision makers and the public was paying off. The research findings were now frequently referenced and relied upon by courts, Congress, the military and the new administration.

But despite that, the political environment was unstable and difficult to read. During this period, a federal court suspended DADT, allowing gay men and lesbians to serve openly for the first time in the nation's history. A week later, another federal court suspended the suspension, putting DADT back into effect. Soon after, the courts suspended their suspension of the suspension. Ultimately, the courts put DADT back in place yet again, but told the military it couldn't fire any more gays or lesbians. And if the courts were hard to follow, the other branches of government were even worse.

In Congress, after the chairman of the Joint Chiefs of Staff [testified](#) that discrimination compromised the military's integrity, the service chiefs retorted that repeal would risk the loss of life and limb. A Senate committee voted for repeal, and then the Senate voted against it, then against it again, and then for it. Meanwhile, rumors about the White House involved contradictory messages on an almost daily basis. One day there was buzz that the administration had decided to prioritize DADT repeal, and the next day there was talk that it would back-burner the issue. Each bit of good news made it seem as if DADT were on its way out the door, while each piece of bad news made us believe the policy would last for another decade. It was like riding an angry tiger with no seatbelt. Or a yo-yo.

When Barack Obama became president, the gay community was tremendously optimistic that repeal of DADT was in sight. We were all the more heartened when the Human Rights Campaign (HRC) suggested it knew the White House's list of legislative priorities: The first few months would see the passage of hate crimes legislation, followed by an employment nondiscrimination bill, followed by repeal of DADT, all within Obama's first year in office.

But I was skeptical. Despite Obama's campaign promise to push for repeal of the ban as soon as he took office, disturbing signs emerged immediately after the inauguration. In the first few

weeks, a White House spokesperson [told](#) a Boston newspaper that the administration would begin to study DADT in 2010. Not repeal, but study. Members of the president's national security staff even started to [use](#) conditional language, speaking about repeal in terms of "if" rather than "when." Despite these deviations from the president's campaign pledges, the senior political team at the White House remained silent.

Of course, a sense of crisis characterized the national mood when Obama took office. The economy was on the brink of collapse. The military was bogged down in two wars. Bush had made such a mess of so many different policies and had left executive agencies and organizations in such disrepair that the new administration had to prioritize carefully. I didn't blame Obama for trying to put DADT repeal on the back burner. But my job wasn't to empathize with the president.

After a decade-plus of conducting and disseminating academic research, my days of amassing data against DADT were nearly done. As I had believed it would from the beginning, the research had consistently confirmed the 1993 RAND study. The case had been made. Now that body of research had to be translated into results.

As it became clear that the White House had no intention of moving quickly on repeal, my staff and I felt a growing sense of urgency. We knew that if something wasn't done soon, Obama might lose his only chance to get rid of the law. A new administration has just one year to pursue its agenda without worrying about the next midterm election. Once 2010 rolled around, we believed the White House would be less willing to stake out politically challenging positions and less willing to force moderates in Congress to take difficult votes. Action, we thought, would have to come immediately, or it would never come at all.

The repeal bill, entitled the Military Readiness Enhancement Act (MREA for short, pronounced "Maria"), was first introduced in the House of Representatives in 2005 and had been hopelessly stalled ever since. During that initial year of lobbying, almost all liberal Democrats signed onto the bill, giving it 121 co-sponsors at a time when Republicans outnumbered Democrats in the House by a margin of 225 to 207. The 2007 version of the bill had 149 co-sponsors. By early 2009, the bill still had only 164 co-sponsors, even though Democrats now outnumbered Republicans by 235 to 198. As the Democratic margin shifted from minus-18 to plus-37, MREA picked up 43 additional co-sponsors. While that was an improvement, it was

not a majority. Even more ominously, MREA had only one Republican co-sponsor and about three dozen moderate and conservative Democratic co-sponsors. Indeed, MREA didn't even have the votes to get out of the House Armed Services Committee, where Democrats outnumbered Republicans by a margin of 36 to 25.

The situation was worse in the Senate, where there was no companion bill because not a single Republican was willing to step forward as a co-sponsor. And LGBT rights groups were informed there would be no action in the Senate in 2009. The bill was stuck, and the White House didn't want to waste precious political capital to try to force it through Congress.

Amazingly, leaders of the gay community didn't seem worried, and one pro-repeal group issued a statement [saying](#) that the president should take his time with DADT repeal and that there was no need to move during the administration's first year. Some key community leaders seemed certain that Obama would help us of his own accord, without our forcing his hand. Their tactic for promoting repeal was to be the president's friend, to give him political cover, to avoid pressing him too hard so as not to offend him.

Chris Neff and I were baffled by this. It seemed the president was, in fact, asking us to push him. On several occasions, he said it was his job to be the president and our job to put pressure on him. During a 2009 [speech](#) to more than 3,000 people at the annual HRC gala in Washington, D.C., he urged, "Now, I've said this before, I'll repeat it again: It's not for me to tell you to be patient, any more than it was for others to counsel patience to African Americans petitioning for equal rights half a century ago. ... It's so important that you continue to speak out, that you continue to set an example, that you continue to pressure leaders -- including me -- and to make the case all across America."

Pressure was clearly needed. But as Urvashi Vaid, a longtime civil rights leader, once observed, the LGBT community has traditionally lacked the grassroots capacity of its adversaries. This weakens us considerably. In early 2009, when major LGBT rights groups organized a [march](#) on the White House, only a few hundred protesters turned out to walk from a nearby Metro stop to 1600 Pennsylvania Ave. Although it generated a bit of press, the march failed to put significant pressure on the administration. Even though two-thirds of the public favored allowing gay men and lesbians to serve openly, the number of people who cared

deeply about the issue was low. We didn't have the capacity to generate hundreds of thousands of phone calls or letters to the White House or Congress, and politicians knew that. Without legions of galvanized supporters behind us, how could we turn up the heat?

I wondered if there was a way to hold Obama personally responsible for acting on DADT repeal, something that would lay the burden squarely on his shoulders. Calling for an executive order, perhaps. It had never before occurred to me to take this route. During the Bush years, everyone knew there was no chance the president would sign such an executive order. And because it had never been debated, no one saw it coming.

For help, I turned to professor Diane Mazur, the Palm Center's legal co-director. Mazur is a top scholar who combines academic chops with real world experience and who served as an Air Force officer before going to law school and becoming a law professor. For years, she volunteered her legal expertise to the Palm Center.

Within days, Mazur got back to me with good news. In 1983, Congress had passed a [statute](#) colloquially known as the "stop-loss" law. (Formally, it's 10 U.S.C. § 12305, Authority of the President to Suspend Certain Laws Relating to Promotion, Retirement, and Separation.) Under this law, the president has the right to modify or suspend any statute relating to military separations during times of national emergency. Congress defines national emergencies as those periods when reserve forces are involuntarily mobilized on active duty. According to that definition, the United States was in a state of national emergency in 2009.

Mazur explained that the stop-loss statute is a "trumping" law that gives the president, in his capacity as commander in chief of the armed forces, maximum flexibility over military personnel during national security crises. Typically, presidents have used stop-loss orders to compel troops who were about to leave the military to stay in uniform awhile longer. During the first Gulf War, President George H.W. Bush issued a stop-loss order that required troops who were about to leave the military to continue to serve beyond their expected separation dates. But the law is not limited to retirements. The stop-loss statute gives the president broad authority to modify or suspend laws relating to military separations. In short, there was no legal reason why Obama couldn't use the law to stop enforcement of DADT with an

executive order. He could suspend the gay ban with a stroke of the pen. He didn't have to wait for Congress.

In March 2009, I went to Washington to talk to the board of the Servicemembers Legal Defense Network about the executive order proposal. The board included high-level donors, many of whom had supported both SLDN and the Palm Center, as well as gay and lesbian veterans, many of whom had been discharged under DADT. At least half of the roughly 30 people sitting around the table were good friends of mine. Many others were heroes who had suffered terribly as a result of DADT and who had been fighting for years. Nevertheless, they were in deep denial about the political situation.

I spent the first half of my presentation speaking from the heart, praising SLDN for 15 years of hard work and dedication to the repeal movement. And then I dropped the bomb. I said that the repeal bill was dead. I argued that the community should stop cozying up to Obama and take up his challenge to pressure him. Finally, I urged the community to present the president with politically realistic options rather than insisting that he advocate for full repeal via legislation.

The board and staff completely and passionately rejected my proposal in an emotional display that I've never otherwise encountered at a professional meeting. Various attendees burst into tears, called me obnoxious, accused me of using the troops as pawns, pretended to throw a shoe at my head and, that night, sent me an email calling me a liar who needed psychiatric help.

This was hard to hear from friends. But our diagnoses of the political situation were almost completely opposite. The SLDN staff and board seemed to believe that as soon as the Democrats controlled Congress and the White House, DADT repeal legislation would be easy to pass. They thought the White House was our friend. They thought attacking Obama would alienate him and sour him on the notion of helping us. They thought that proposing the executive order idea would lower the bar and give moderates an easy excuse not to support legislative repeal.

But at the time, I believed repeal legislation was stalled and they just couldn't see it.

Part of what the SLDN staff and board didn't grasp was that the executive order idea was just a first step toward a higher goal, a means to an end. No one at the Palm Center actually preferred an executive order over legislative repeal. An executive order would only last as long as the current state of national emergency, which would not continue forever. The order would

suspend the discharge of gay and lesbian troops, but would leave the horrible DADT law on the books. And it would be too easy for a future hostile administration to reverse the order, even if the national emergency persisted. Everyone at Palm understood this.

Nonetheless, there was a compelling logic for pursuing the executive order. Politically, the theory was that if the public came to believe that Obama had the unilateral authority to suspend the ban, they would blame him personally for failing to take action, no longer accepting excuses based on a lack of support in Congress. And this heat would force him either to sign an order or to push Congress to pass repeal legislation. If the president thought that we should pressure him, well, here it was.

Operationally, we were convinced that, as wonderful as it would be to end DADT in one fell swoop via legislative repeal, it was much more feasible to end it in stages. If Obama signed the executive order, gay and lesbian troops would be serving openly in the military, which would destroy the last shred of credibility behind the bogus unit cohesion argument. And that, in turn, would make it easier for Congress to repeal the ban at a future point. Our sound bite would be that the executive order was like "toothpaste that can't be stuffed back into the tube."

At the meeting, one of SLDN's board members urged me to wait six months before explaining the executive order idea to the public. But when I returned to California, Chris and I decided to release a [report](#) that outlined the legal research showing why the president had authority to sign an order suspending DADT. This was May 2009, three and a half months after Obama had taken office. Our accompanying press release was headlined, "[New Study: Obama Can Halt Gay Discharges With Executive Order.](#)" The next day, and without any coordination with the Palm Center, Rep. Rush Holt (D-N.J.) [called](#) on Obama to sign an executive order. But other than that, the results were disappointing. I sent an email to the co-authors of the report, apologizing that, despite their hard work, I had failed to garner the expected media attention.

Then something happened that I'd never experienced before. In the past, media coverage of Palm Center studies would always die down unless we took steps to continue to amplify the research findings (an effort that sometimes failed), but the executive order story rekindled on its own. On the strength of its own merits, the story became a firestorm.

During the next few weeks, the media's long-running "Isn't it terrible to fire gay Arabic linguists" angle on DADT shifted to a

more demanding question: "Why isn't Obama doing anything?" On June 8, an angry Rachel Maddow of MSNBC [raged](#):

"Well, since he [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."

"The Daily Show" ran a highly provocative [segment](#) featuring footage of Obama's campaign promises, juxtaposed with an explanation of the executive order option. Even CNN's Anderson Cooper [demanded](#) to know why the president would not sign an executive order.

Roughly a dozen times, White House press secretary Robert Gibbs was grilled as to why the administration would not sign an executive order. At first, he challenged our legal analysis of the president's authority. Palm responded with a press release explaining, in detail, exactly how the president had such authority. As questioning escalated during the daily press briefings, Gibbs cycled through a number of other reasons why the president would not sign an executive order. And as journalists became increasingly impatient, their tone approached outright mockery.

When Gibbs explained that the president would not sign an executive order because he wanted a more "durable" solution, one journalist noted that Harry Truman had racially integrated the military with an executive order in 1948. She then [asked](#) Gibbs whether the U.S. policy of racial integration in the military is "durable." One blogger who covered the exchange posted her observations at this revealingly titled URL: <http://www.pamshouseblend.com/diary/11094/gibbs-humiliated-again-when-questioned-about-dadt-at-todays-presser>.

More and more people started to call for the two-step strategy -- executive order, then legislative repeal. The influential Center for American Progress, led by John Podesta, [called](#) for an executive order, and other leading Democrats such as political consultant Bob Shrum [added](#) their voices to the chorus. Senate Majority Leader Harry Reid [called](#) for an executive order before retracting his statement the next day, and 77 members of Congress

sent the White House a [letter](#) demanding an immediate executive order.

At the height of the flurry, the administration invited Chris and me to the West Wing, where somewhat heated conversation ensued. The pressure was getting through, which was exactly what we'd hoped and what, perhaps ironically, the president had asked for. Obama had no way out aside from signing the order, which he wouldn't do, or finding some way to pressure Congress into passing repeal legislation.

Discussion of the executive order fired up the president's liberal base. When they heard the story of Dan Choi, an Arabic-language speaker and Iraq combat veteran fired by the Army for being gay, they were angered. Of course, Choi's story would have generated outrage and tough media coverage on its own. But when couched in the notion that Obama could have prevented his discharge, it became a major embarrassment for the White House. A May 7, 2009, Huffington Post [piece](#) about Choi that didn't mention the executive order elicited only nine readers' comments. The same day, a Huffington Post [column](#) about the president's ability to retain Choi via executive order received more than 1,800 comments. This is not to say that the readership of The Huffington Post is the only or the most important way to assess public interest. But its readers' fervor illustrate the potency of the argument.

The political uproar gave the White House a reason to clarify and reiterate its commitment to legislative repeal, which was the whole point. And just like that, the unthinkable happened. Secretary of Defense Robert Gates [announced](#) that, although there would be no executive order, the administration would take executive action. Without providing details, Gates said he would consider rewriting Pentagon regulations so as to relax the implementation of DADT. While the changes under consideration were so small as to mean almost nothing for gay and lesbian troops on the ground, they nonetheless constituted a symbolic earthquake.

"Once 'don't ask, don't tell' changes at all," Chris observed, "it is no longer 'don't ask, don't tell.'"

He meant that, given the public support for repeal, any change to DADT would be irreversible. The beginning of the end. More importantly, even the slightest change to the policy would send a signal to the dozens of members of Congress who wanted to do what they could to sink the policy.

As Chris said, "More solutions are better than fewer solutions, because the proliferation of proposals will create its own momentum for additional legislative and executive action."

As if to illustrate his point, Sen. Kirsten Gillibrand (D-N.Y.) immediately [announced](#) that the Senate would hold hearings on the ban in the fall of 2009. Her original proposal was for an 18-month moratorium on discharging gay and lesbian service members, but unable to find the 60 votes necessary to pass such an amendment, Gillibrand announced hearings instead. While Senate hearings were just one more small step on the road to repeal, gay groups had earlier been told not to expect any action in the Senate in 2009. The heat was having an impact.

Throughout the first two years of his term, questions about Obama's unwillingness to sign an executive order followed the president everywhere he went. In October 2010, mere days before the midterm elections, the country was plagued by stubborn crises -- the nearly 10 percent unemployment rate, continued wars overseas and a general sense of frustration with where things were headed. Yet during a town hall meeting, a woman took the microphone to [ask](#) the president why, given his stroke-of-the-pen authority to suspend DADT, he wouldn't simply put the policy out of its misery. A clearly exasperated Obama said that he lacked the authority to do so.

A friend who works closely with the Obama White House disputes my interpretation of events. He claims that the executive order proposal had little, if any, impact on the president's commitment to legislative repeal. According to him, the White House would have pressed for repeal regardless of our research. The fact that the administration did not push for dismantling of the policy until there was intense coverage of our executive order study was mere coincidence. As with any historical analysis, the only way to know for sure would be to rerun history without discussion of the executive order and observe what happened. Since this is impossible, scholars must do the best they can with the available evidence.

My belief is that DADT became an "enthusiasm gap" issue in 2010, a kind of litmus test for whether the administration could deliver on some of its promises to its liberal base, in large part because of the executive order proposal. Unlike all the other areas in which the administration did not deliver, such as climate change and labor and immigration reform, the national conversation about the possibility of an executive order prevented the White House from ducking behind its inability to garner votes

from 60 senators. The public simply could not understand why the president would not use his unilateral authority to address the problem.

On top of that, the public outcry was fueled by high-profile stories about [Victor Fehrenbach](#), [Katie Miller](#), and other gay and lesbian service members who were punished despite their success in uniform. This outcry both reflected and sustained some of the provocative direct-action protests by [Dan Choi](#) and his colleagues in a group known as [Get Equal](#). I cannot overstate the importance of these initiatives in keeping DADT repeal on the front burner.