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GATES PLAN MAY BE BEGINNING OF THE END OF “DON’T ASK, DON’T TELL”
Pentagon Studies Ways to Relax Enforcement as First Step; Impact on Troops Would be Minimal

SANTA BARBARA, CA, July 1, 2009 – In the wake of yesterday’s unexpected Pentagon announcement about gays in the military, experts say the “don’t ask, don’t tell” policy may be on the brink of irreversible change that would speed up its demise. After speaking with President Obama last week, Defense Secretary Robert Gates has asked military lawyers to explore how to modify enforcement of the policy in ways that are “more flexible until the law is changed.” The president Monday reiterated his intention to end discrimination against gay troops, saying he is working with Congress and the military to do so.

Christopher Neff, political director of the Palm Center, said the remarks by Secretary Gates marked the first time the Defense Secretary has made clear that the Pentagon is onboard with the president’s determination to lift the ban. “‘Don’t ask, don’t tell’ is a package—both a law and a policy—that hasn’t been penetrated for fifteen years,” Neff said. “This is a crack in humpty dumpty, and it gets the ball rolling for a political solution since it gives cover to lawmakers who have been waiting for a nod from the Pentagon.”

Neff said that even a small change in how ‘don’t ask, don’t tell’ is enforced could represent a seismic political shift, even if it does not have a substantial operational impact on most gay troops, who would still be subject to discharge. If the military stops applying certain provisions of the policy, as Gates says it is considering, it would send a signal to Congress about the inevitability of change. “That’s why executive action is the key to unlocking the political stalemate,” said Neff. “Even the statements themselves, although they do await follow-up action, have changed the political landscape.”

Last month, the Palm Center published a report which outlined several legal and political rationales for executive branch discretion in regulating, and even halting, discharges provided for by federal statute. One of those rationales is closely linked to the new review announced by Secretary Gates. According to the Palm Center study, “the ‘don’t ask, don’t tell’ policy itself, as codified by Congress, also grants authority to the Department of Defense to determine the procedures under which investigations,



separation proceedings, and other personnel actions under the authority of 10 U.S.C. § 654 will be carried out ... The Secretary of Defense has discretion to determine the specific manner in which ‘don’t ask, don’t tell’ will be implemented.” Prior to the release of the Palm Center’s report, most observers had assumed that only Congress or the federal courts end the firings of gay troops.

Amidst mounting public pressure, White House press secretary Robert Gibbs said this week that he thought “don’t ask, don’t tell” would be repealed by the end of the president’s first term. Nathaniel Frank, senior research fellow at the Palm Center, said this week’s developments were politically significant. “Serious discussions have been launched by the president himself,” said Frank. “Obama has said this is a failed policy that harms national security, so these measures are not just fixes, but may be the beginning of the end.” Frank added that any regulatory changes that fall short of halting all discharges will be “window-dressing,” but he focused on the implications for further political change. “This means the hot potato party may finally be over, as the president understands where the buck stops.”

In the wake of this week’s developments, the Palm Center announced that it is preparing a more extensive legal analysis of administrative options for relaxing the application of certain provisions of “don’t ask, don’t tell.” Neff said that the Defense Department should invite public input as the rules are re-drafted, which would be consistent with past processes when military regulations have been changed. “This review should be no different,” he said.

Organizations and individuals who have endorsed or endorsed consideration of the use of executive action based on the legal theories outlined in the Palm Center’s study include Secretary Gates, 77 members of Congress, the New York Times editorial page, Center for American Progress, Human Rights Campaign, Servicemembers Legal Defense Network, Hendrik Hertzberg of the New Yorker, the political consultant Robert Shrum, and former White House aide Richard Socarides.

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